

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: March 25, 2010
TO: Office of Commission Clerk (Cole)
FROM: Office of the General Counsel (Brubaker)
Division of Regulatory Analysis (Brown)
RE: Docket No. 090372-EQ – Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida.
AGENDA: 04/06/10 – Regular Agenda – Motion to Dismiss – Oral argument not requested; participation is at the Commission’s discretion
COMMISSIONERS ASSIGNED: Edgar, Skop, Stevens
PREHEARING OFFICER: Stevens
CRITICAL DATES: None
SPECIAL INSTRUCTIONS: None
FILE NAME AND LOCATION: S:\PSC\GCL\WP\090372.RCM.DOC

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Case Background

On July 16, 2009, Progress Energy Florida, Inc. (PEF or Company) filed a petition requesting approval of a contract for the purchase of firm capacity and energy between PEF and Florida Biomass Energy, LLC (FB Energy). The contract is based on FB Energy constructing, owning, and operating a fluidized bed boiler power production generating Qualifying Facility located in Manatee County, Florida. The facility will use a waste wood and energy crop as its primary fuel to produce approximately 60 megawatts of electricity during a contract term beginning January 1, 2013, through December 31, 2032.

The Commission approved the proposed contract at its December 1, 2009, Agenda Conference and subsequently issued Order No. PSC-09-0852-PAA-EQ on December 30, 2009,

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approving the contract between PEF and FB Energy (PAA Order). On January 20, 2010, US Funding Group, LLC (Funding Group) timely filed its Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract (Petition). On February 9, 2010, FB Energy filed its Motion to Dismiss Funding Group's Petition (Motion to Dismiss). Funding Group filed its Response and Amended Response to FB Energy's Motion to Dismiss on February 17 and February 18, 2010, respectively.

This matter is now before the Commission for the purpose of resolving FB Energy's Motion to Dismiss Funding Group's Petition. The Commission has jurisdiction over this matter pursuant to Sections 366.051, 366.81, and 366.91, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission grant Florida Biomass Energy, LLC's Motion to Dismiss?

Recommendation: Yes. The Commission should grant Florida Biomass Energy, LLC's Motion to Dismiss because Funding Group, LLC lacks standing to pursue its protest and request for a hearing. (Brubaker)

Staff Analysis:

FB Energy's Motion to Dismiss

On January 20, 2010, Funding Group timely filed its Petition Protesting the Commission's PAA Order approving the negotiated purchase power contract entered into by FB Energy and PEF. On February 9, 2010, FB Energy filed its Motion to Dismiss Funding Group's Petition.

FB Energy seeks to dismiss Funding Group's Petition on the grounds that Funding Group's Petition fails to meet the pleading requirements set forth in applicable Florida Statutes and Rules of Administrative Procedure, and because the allegations in the Petition are legally insufficient to establish Funding Group's standing to pursue its protest and request for a hearing in this proceeding. FB Energy states that Funding Group is not a customer of PEF and therefore cannot be substantially affected pursuant to the Commission's statutes applicable to this proceeding. FB Energy also argues that the injuries alleged by the Funding Group in its Petition are not of the type subject to the Commission's regulatory jurisdiction under Chapter 366, F.S., and that Funding Group fails to satisfy the standing test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

Funding Group's Response

On February 17 and February 18, 2010, respectively, Funding Group filed its Response and Amended Response to FB Energy's Motion to Dismiss (Response).¹ Funding Group argues that its Petition in its entirety, specifically paragraphs 4, 7, and 33, identifies its substantial interests that are or will be affected by the Commission's proposed action, and accordingly, is legally sufficient to establish Funding Group's standing to participate in this proceeding. Funding Group also requests that the Commission refer this matter to the Division of Administrative Hearings (DOAH) to conduct a hearing on its Petition, and requests that if the Commission dismisses Funding Group's Petition, that it be without prejudice so that it may file an Amended Petition curing any identified defects.

Staff's Analysis

For the reasons discussed below, staff agrees with FB Energy that the allegations set forth in Funding Group's Petition fail to satisfy the two-prong test required by Agrico. Thus, staff

¹ Funding Group's "Response" and "Amended Response" to FB Energy's Motion to Dismiss are substantially identical, and thus will be treated as the same document and referred to collectively as "Response."

recommends that Funding Group's Petition be dismissed on the grounds that Funding Group lacks standing to pursue its protest and request for a hearing in this proceeding.

Pursuant to Section 120.569, F.S., any person whose substantial interests are to be determined by agency action may institute proceedings by filing a petition or request for hearing with the agency responsible for making the determination. Rule 28-106.201, Florida Administrative Code (F.A.C.), sets forth the items required of petitions that initiate proceedings determining substantial interests.

Two-Prong Test to Establish Standing

A person whose substantial interests are to be determined by agency action and who seeks a hearing before an agency must meet the two-prong standing test set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The petitioner must show that (1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (2) this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote). Further, a purely economic interest cannot serve as the basis for standing. See, Agrico, 403 So.2d at 482; International Jai-Alai Players, 561 So. 2d at 1225-26.

Funding Group asserts that paragraphs 4, 7 and 33 of its Petition identify its "substantial interests that are or will be affected by the proposed action."² According to Paragraph 4 of its Petition, Funding Group owns property in Manatee County that is located in the immediate vicinity of the proposed plant that is the subject of the Commission's PAA Order. Paragraph 7 of Funding Group's Petition also refers to its residentially-zoned property located in the vicinity of the proposed plant. Funding Group states that the sole access to its property is via a road that FB Energy is attempting to vacate and close as part of FB Energy's zoning application. Funding Group also asserts that its property will be "adversely affected environmentally and economically by the close proximity of FB Energy's Plant." Funding Group's only other assertion regarding its substantial interests is in paragraph 22 of its Petition, which states that "has substantial interests that are adversely affected for the purpose of Section 120.569 and 120.57, Florida Statutes (2009) by the PSC's proposed Action."

Staff believes that Funding Group's asserted substantial interests fail to meet either prong of the standing test set forth in Agrico. As stated above, in order to satisfy the first prong of the test, Funding Group must show that it will suffer an injury in fact which is both real and immediate, not speculative or conjectural, and which is of sufficient immediacy to entitle it to a Section 120.57 hearing. Staff believes that Funding Group's general assertions that its property

² Funding Group's Petition does not include a paragraph 33.

will be adversely affected environmentally by the proximity of the proposed plant is far too speculative in nature to satisfy the required showing set forth in Agrico. Furthermore, a purely economic interest cannot serve as the basis for standing; thus Funding Group's allegation of an economic adverse affect on its property similarly fails.

In order to satisfy the second prong of the Agrico test, a petitioner must show that the alleged substantial injury is of a type or nature which the proceeding is designed to protect. Even if the alleged injury was found to be real and immediate, Funding Group still fails on the second prong as this Commission clearly does not have the authority to address zoning issues related to roads surrounding the proposed plant. Nor is the Commission vested with the authority to address the environmental concerns raised by Funding Group. Finally, as pointed out by FB Energy, Funding Group is not a customer of PEF, and therefore cannot allege standing on that basis.

Failure to Comply with Pleading Requirements

Section 120.569(2)(c), F.S., and Rule 28-106.201, F.A.C., set forth the items that a petition to initiate proceedings determining substantial interests must contain. FB Energy argues that another basis on which to dismiss Funding Group's Petition is that the Petition fails to meet these basic pleading requirements. Specifically, FB Energy argues that the "general and conclusory allegations" regarding Funding Group's substantial interests are legally insufficient. Staff believes that the pleading requirements of Section 120.569, F.S., and Rule 28-106.201, F.A.C., have been met. However, as discussed previously, staff also agrees that Funding Group's alleged substantial interests as stated are insufficient to establish its standing to pursue a hearing in this matter according to the Agrico test.

In its Response, Funding Group requests if the Commission grants FB Energy's Motion to Dismiss, that Funding Group be allowed to timely file an Amended Petition curing any identified defect. Section 120.569(2)(c), F.S., provides that dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, *unless it conclusively appears from the face of the petition that the defect cannot be cured.* (emphasis added). While Funding Group may vigorously object to the building of FB Energy's proposed plant and while it may also have legitimate concerns as to the effect of the proposed plant to its property, for the reasons discussed above, those concerns are not sufficient to satisfy the standing requirements necessary to pursue a hearing in this proceeding. Thus, staff does not believe that the defects identified with respect to Funding Group's Petition can be cured by filing an amended petition.

Finally, staff notes that Funding Group has requested that its Petition be referred to DOAH for the assignment of an Administrative Law Judge to conduct a hearing on its Petition. If the Commission approves staff's recommendation to grant FB Energy's Motion to Dismiss, Funding Group's request will be rendered moot. In any event, Funding Group's Petition is not the type of proceeding that the Commission has typically referred to DOAH.³

³ Historically, the Commission has only referred certain customer disputes to DOAH. See for example, Order No. PSC-05-0806-FOF-EI, issued August 5, 2005, in Docket No. 040208-EI, In re: Consumer complaint against Florida

Conclusion

For the reasons discussed above, staff believes that the allegations set forth in Funding Group's Petition fail to satisfy the two-prong test required by Agrico. Accordingly, staff recommends that Funding Group's Petition should be dismissed because it lacks standing to pursue its protest and request for a hearing.

Issue 2: Should this docket be closed?

Recommendation: If the Commission approves staff's recommendation in Issue 1, Order No. PSC-09-0852-PAA-EQ should be considered final and this docket should be closed. (Brubaker)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, Order No. PSC-09-0852-PAA-EQ should be considered final and this docket should be closed.

Power & Light Company by Leticia Callard; and Order No. PSC-98-1254-FOF-GU, issued September 22, 1998, in Docket No. 970365-GU, In re: Complaint of Mother's Kitchen Ltd. against Florida Public Utilities Company regarding refusal or discontinuance of service.