

**Diamond Williams**

090372-EQ

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**Sent:** Tuesday, May 11, 2010 2:23 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No. 090372-EQ - US Funding Group's Motion for Reconsideration on Order Granting Motion to Dismiss  
**Attachments:** US Funding Motion for Reconsideration.pdf

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b. Docket No. 090372-EQ In re: Order No. PSC-09-0852-PAA-EQ Issued December 30,2009, In re: Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida

c. Filed on behalf of U.S. Funding Group, LLC.

d. Total Pages = 4

e. U.S. Funding Group, LLC's Motion For Reconsideration on Order Granting Motion to Dismiss

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida.      DOCKET NO. 090372-EQ  
ORDER NO. PSC-09-0852-PAA-EQ  
ISSUED: December 30, 2009

**US FUNDING GROUP, LLC'S MOTION FOR RECONSIDERATION  
ON ORDER GRANTING MOTION TO DISMISS**

US FUNDING GROUP, LLC ("Funding Group"), pursuant to Rule 25-22.060, Florida Administrative Code (F.A.C), hereby files this Motion for Reconsideration of the Commission's Order Granting Motion to Dismiss, in which it also ordered that Order No. PSC-09-0852-PAA-EQ shall be considered final and the docket closed. In support of this Motion, Funding Group states as follows:

1. On December 30, 2009, the Commission issued Order PSC-09-0852-PAA-EQ ("PAA Order") approving a power purchase agreement ("PPA") between Progress Energy of Florida, Inc. ("PEF") and Florida Biomass Energy, LLC, ("FB Energy").

2. On January 20, 2010, Funding Group timely filed its Petition Protesting Notice of Proposed Agency Action. On February 10, 2010 FB Energy filed a Motion to Dismiss Funding Group's Petition. Funding Group filed a Response, asserting that its Petition was sufficient, but requesting leave to amend if the Commission found it deficient.

3. On April 26, 2010, the Commission issued its Order on FB Energy's Motion to Dismiss. The Commission not only granted FB Energy's Motion, it did so without leave to amend. The Commission determined that (a) Funding Group had not pled facts sufficient to demonstrate that its "substantial interests" would be affected under the two-prong test set forth in Agrico Chemical Co. v. Dep't of Env't'l Reg., 406 So.2d 478 (Fla. 2d DCA 1981). In

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particular, the Commission found that the injuries Funding Group identified were insufficient and not of a type that the proceeding was intended to protect. With respect to the first prong of the Agrico test, the Commission found that allegations of impacts from the environmental or land use effects of FB Energy's proposed facility were speculative and that "a purely economic interest cannot serve as the basis of standing." With respect to the second prong, the Commission found that Funding Group's zoning and land use concerns were outside the scope of the Commission's authority, and also that "Funding Group is not a customer of PEF , and therefore cannot allege standing on that basis."

4. Section 120.569(c)(2), Fla. Stat. (2009) states 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." The Order on Motion to Dismiss concluded that the Commission did "not believe that the defects identified with respect to Funding Group's petition can be cured by filing an amended petition." The Commission's finding is legally insufficient to meet the requirements of the statute and does not support a dismissal without granting an opportunity for leave to amend. See, e.g., City of Winter Park v. Metropolitan Planning Org. for Orlando Urban Area, 765 So.2d 797, 798 (order required to grant leave to amend to state with specificity why any defect in the petition *cannot* be cured by amendment); W. Frank Wells Nursing Home v. Agency for Health Care Admin., 979 So.2d. 339 (Fla. 1<sup>st</sup> DCA 2008) (improper to dismiss petition without leave to amend, even where no allegations of substantial injury made).

5. Funding Group's Petition contains no information to conclusively establish (a) that Funding Group is not a customer of PEF; (b) that Funding Group cannot allege other substantial interests or more broadly plead its interests; or (c) that Funding Group cannot plead

more broadly the statutes and rules applicable to the decision and how its substantial interests fall within the zone of interest protected by those statutes and rules. Absent such a showing, it was improper for the Commission to dismiss Funding Group's Petition without leave to amend. See, e.g., Brookwood Extended Care Center v. Agency for Health Care Admin, 870 So.2d 834, 841 (Fla. 3d DCA 2003) (requiring agency to permit petitioner an additional opportunity to amend where petition was defective due to petitioner's incorrect interpretation of pleading requirements); National States Insurance Co. v. Office of Insurance Regulation, 988 So.2d 107, 109 (Fla. 1<sup>st</sup> DCA 2008) (agency erred in dismissing amended petition with prejudice for failure to state material facts where it did not conclusively appear that petitioner could not do so).

6. By dismissing Funding Group's Petition without granting leave to amend and without findings of fact to establish conclusively that Funding Group could not plead a basis for standing, the Commission failed to comport with the requirements of §120.569(2)(c), Fla. Stat. Rather than requiring the Florida Supreme Court to address this matter on appeal pursuant to § 366.10, Fla. Stat. (2009), the Commission should reconsider its prior order, grant rehearing, and correct its error.

WHEREFORE, Funding Group hereby requests the Commission:

1. Grant reconsideration, including a rehearing, in this matter; and
2. Either Deny FB Energy's Motion to Dismiss or Grant Funding Group leave to amend its Petition in this matter; and
3. Vacate its Order that Order No. PSC-09-0852-PAA-EQ shall be considered final and the docket shall be closed.

Respectfully submitted,

s/ Robert K. Lincoln

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 11, 2010, I electronically filed the foregoing with the Florida Public Service Commission at [filings@psc.state.fl.us](mailto:filings@psc.state.fl.us) and furnished a true and correct copy of same by electronic delivery and U.S. Mail to the following:

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