

**Diamond Williams**

090372-EQ

**From:** Rhonda Dulgar [rdulgar@yvlaw.net]  
**Sent:** Tuesday, May 18, 2010 4:05 PM  
**To:** rjensen@fbenergy.com; rlincoln@icardmerrill.com; John T. Burnett; Paul Lewis, Jr.; Filings@psc.state.fl.us; Jennifer Brubaker; Jean Hartman; Schef Wright  
**Subject:** Electronic Filing - Docket 090372-EQ  
**Attachments:** 090372.FBE.Resp2Mot4Reconsideration.5-18-10.pdf

a. Person responsible for this electronic filing:

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b. 090372-EQ

In Re: Petition for Approval of Negotiated Power Contract with FB Energy, LLC by Progress Energy Florida.

c. Document being filed on behalf of Florida Biomass Energy, LLC.

d. There are a total of 7 pages.

e. The document attached for electronic filing is Florida Biomass Energy, LLC's Response to U.S. Funding Group, LLC's Motion for Reconsideration on Order Granting Motion to Dismiss.

(see attached file: 090732.FBE.Resp2Mot4Reconsideration.5-18-10.pdf )

Thank you for your attention and assistance in this matter.

Rhonda Dulgar  
 Secretary to Schef Wright  
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DOCUMENT NUMBER DATE  
 04218 MAY 18 2010  
 FPSC-COMMISSION CLERK

5/18/2010

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  
FILED: May 18, 2010

FLORIDA BIOMASS ENERGY, LLC'S RESPONSE TO  
U.S. FUNDING GROUP, LLC'S MOTION FOR RECONSIDERATION  
ON ORDER GRANTING MOTION TO DISMISS

Florida Biomass Energy, LLC ("FB Energy"), pursuant to Rule 25-22.060(1)(b), Florida Administrative Code ("F.A.C."), hereby files this response to U.S. Funding Group, LLC's ("Funding Group") Motion for Reconsideration on Order Granting Motion to Dismiss (the "Motion for Reconsideration").

In summary, although FB Energy believes that the Commission's Order Granting Motion to Dismiss ("Order") was correct on all points, in an abundance of caution and to avoid further dilatory tactics by Funding Group (see Paragraph 7 below), FB Energy requests that the Commission grant Funding Group leave to promptly amend its Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract (the "Petition"), and that the Commission expedite its disposition of that amended petition.

Background

1. On July 16, 2009, Progress Energy Florida, Inc. ("PEF") and FB Energy filed their joint petition for approval of

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a negotiated purchase power contract (the "PPA"). The PPA contemplates that FB Energy will construct, own, and operate a biomass-powered electrical power plant in Manatee County, Florida and that PEF will purchase power generated by the plant.

2. On December 30, 2009, the Commission issued Order No. PSC-09-0852-PAA-EQ (the "PAA Order") in which the Commission proposed to approve the PPA.

3. On January 20, 2010, Funding Group filed its Petition with the Commission. On February 9, 2010, FB Energy filed its Motion to Dismiss the Petition. In the Motion to Dismiss, FB Energy argued that Funding Group was not a customer of Progress Energy of Florida and that Funding Group otherwise failed to satisfy the test to establish standing articulated in Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981) ("Agrico").

4. On February 17, 2010, Funding Group filed its Amended Response to FB Energy's Motion to Dismiss (the "Amended Response"). The Amended Response included no new argument as to why Funding Group's Petition should not be dismissed; did not assert that Funding Group was a customer of PEF at the time it filed its Petition; and did not request that the Commission grant oral argument. Instead, the Amended Response perfunctorily referred to three paragraphs in the Petition (one

of which does not exist) as grounds for its conclusory assertion that the Petition was legally sufficient.

5. On April 26, 2010, the Commission issued its Order. As a preliminary matter, FB Energy believes that the Commission's Order is legally correct as written. Moreover, FB Energy notes that the Order directly addresses the issues raised in Funding Group's Motion for Reconsideration, thus rendering the contents of the Motion for Reconsideration as nothing more than inappropriate and unauthorized re-argument. Nevertheless, FB Energy requests that the Commission grant Funding Group's request for leave to amend its Petition.

6. FB Energy believes that Funding Group has already been provided ample opportunity to explain why it has standing to participate in this proceeding. However, in an abundance of caution, and to avoid the delay associated with an appeal on the narrow procedural issue of whether Section 120.569(2)(c), Florida Statutes, requires the Commission to grant Funding Group leave to amend its Petition, FB Energy believes that Funding Group should be given the opportunity to amend its Petition within seven days and essentially "put up or shut up."

7. On information and belief, FB Energy believes that Funding Group is participating in this proceeding primarily as a dilatory tactic. For example, Funding Group's actions relative to FB Energy's Motion to Dismiss appear to be dilatory. Funding

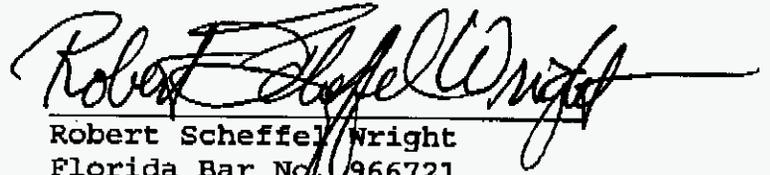
Group obviously had ample opportunity to argue facts that might, if true, be sufficient to establish standing under the Agrico test both in its initial Petition and also in its Response, and in its Amended Response to FB Energy's Motion to Dismiss. However, Funding Group did not allege any such facts in its Petition, and its Response to FB Energy's Motion to Dismiss, Funding Group merely asserted, without specificity or explanation, that its Petition identified Funding Group's substantial interests and further asserted, again without explanation, that its "Petition is legally sufficient to establish Funding Group's standing to participate in these proceedings." Amended Response at 1. In other words, Funding Group chose to stand on its prior pleadings rather than addressing the gravamen of FB Energy's Motion to Dismiss or offering any explanation or additional facts that might satisfy the legal standards of the Agrico standing test, waiting until this late date to seek reconsideration and leave to amend. On its face, Funding Group's pattern of behavior - filing its Petition on the last day of the protest period, and filing its Motion for Reconsideration on the last day of that period, together with its utter failure to address the substance of its deficient assertions regarding standing - objectively appears to be dilatory.

8. FB Energy is prejudiced by delay. Accordingly, FB Energy requests that the Commission expedite its review and disposition of this matter as follows:

- a) that the Prehearing Officer issue a procedural order granting Funding Group seven (7) days from the date of that order to file an amended Petition;
- b) if Funding Group files an amended Petition, FB Energy will file its responsive motion, if any, within three (3) business days; and
- (c) regardless whether FB Energy files a responsive motion, the Commission will expedite its review and disposition of the standing issues raised in Funding Group's amended petition.

WHEREFORE, FB Energy respectfully requests that the Commission grant Funding Group's request to promptly file an amended Petition subject to the conditions set forth herein.

Respectfully submitted this 18th day of May, 2010.

A handwritten signature in black ink, reading "Robert Scheffel Wright". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery and U.S. Mail this 18th day of May, 2010, to the following:

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