

Diamond Williams

100437-ET

From: Thompson, Cindy F. [cthompson@carltonfields.com]
Sent: Wednesday, July 27, 2011 8:52 AM
To: Filings@psc.state.fl.us
Cc: Keino Young; Lisa Bennett; jbrew@bbrslaw.com; ataylor@bbrslaw.com; rmiller@pcsposphate.com; paul.lewisjr@pgnmail.com; vkaufman@kagmlaw.com; jmoyle@kagmlaw.com; kstorain@potashcorp.com; Kelly.jr@leg.state.fl.us; Charles Rehwinkel; Saylor.erik@leg.state.fl.us; alex.glenn@pgnmail.com; john.burnett@pgnmail.com; George@cavros-law.com; Bernier, Matthew R.; Huhta, Blaise N.; jwalls@carltonfields.com; Thomas@saprodani-associates.com
Subject: Filing Docket 100437
Attachments: PEF's Motion to Dismiss the Petition to Deny Progress Energy Florida Costs for Repair of Crystal River Unit-3 Nuclear Plant Filed by the Saprodani Associates and Thomas Saporito.pdf

Docket 100437

In Re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.

1. This filing is being made by:

Cindy F. Thompson on behalf of Matthew R. Bernier
 Carlton Fields, P.A.
 215 S. Monroe Street, Suite 500
 Tallahassee, FL 32301
 Telephone: 850-224-1585
 Facsimile: 850-222-0398

2. The document being filed is PEF's Motion to Dismiss the Petition to Deny Progress Energy Florida Costs for Repair of Crystal River Unit-3 Nuclear Plant filed by the Saprodani Associates and Thomas Saporito. This document was filed on July 25, 2011 but the filing today includes a corrected certificate of service.
3. This document contains seven (7) pages.
4. This document is being filed on behalf of Progress Energy Florida.

CARLTON FIELDS
 ATTORNEYS AT LAW

Cindy F. Thompson
 Legal Administrative Assistant to
 Daniel C. Brown
 Martha Harrell Chumbier
 Matthew R. Bernier
 215 S. Monroe Street, Suite 500
 Tallahassee, Florida 32301-1866

direct 850.425.3390
 fax 850.222.0398
cthompson@carltonfields.com
www.carltonfields.com

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Examination of the outage and) Docket No. 100437-EI
Replacement fuel/power costs)
Associated with the CR3 steam)
Generator replacement project,)
By Progress Energy Florida, Inc.) Filed: July 25, 2011

**PEF'S MOTION TO DISMISS THE PETITION TO DENY PROGRESS ENERGY
FLORIDA COSTS FOR REPAIR OF CRYSTAL RIVER UNIT-3 NUCLEAR PLANT
FILED BY THE SAPRODANI ASSOCIATES & THOMAS SAPORITO**

Progress Energy Florida, Inc. ("PEF" or the "Company"), by and through its undersigned counsel and pursuant to Rule 28-106.204, Fla. Admin. Code, files this Motion to Dismiss the Petition to Deny PEF Costs for Repair of Crystal River Unit-3 Nuclear Plant ("Petition") filed by the Saprodani Associates ("SA") and Thomas Saporito ("Saporito" and together with SA, "Petitioners") in this docket on July 18, 2011. The Petition should be dismissed because: it does not satisfy the requirements of Rule 28-106.201(2), Fla. Admin. Code., as required by Rule 25-22.039, Fla. Admin. Code; SA does not have the legal capacity to participate in this docket, has failed to establish standing, and has not appointed Saporito as a qualified representative per Rule 28-106.106, Fla. Admin. Code; and it does not establish Saporito's standing to participate in this proceeding. For these reasons, PEF respectfully requests the Commission to dismiss the Petition.

In support, PEF states:

- (1). The Petition does not satisfy the requirements of Rule 28-106.201(2), Fla. Admin. Code.

Petitions for leave to intervene in Commission dockets must satisfy the pleading requirements of Rule 28-106.201(2), Fla. Admin. Code. See Rule 25-22.039, Fla. Admin. Code. Rule 28-106.201(2), among other things, requires that a petition contain "an explanation of how the petitioner's substantial interests will be affected by the agency determination," a "statement

of when and how the petitioner received notice of the agency decision," a statement of how the facts alleged, together with specific statutes or rules, "require reversal or modification of the agency's proposed action," and a statement of the relief sought, "stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action." *See id.* at (2)(b), (c), (f), & (g).

The Petition has not, and cannot, comply with these requirements.¹ To date, there has been no agency determination, agency decision, or proposed agency action that the Petitioners can challenge. In that respect, the Petition is premature.

Moreover, the Petition should be dismissed because it is completely devoid of any explanation of the Petitioners' substantial interests at issue in this proceeding. As discussed below, there is a well-established two-prong inquiry to assess the adequacy of a petitioner's claimed substantial interest in a given proceeding. *See Agrico Chem. Co. v. Dep't of Envtl. Prot.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). However, the threshold to an analysis of a claimed substantial interest is that there must be a claimed substantial interest to analyze. Here, there is no such claim to analyze and therefore the petition must be dismissed. *See* Rule 25-22.039, Fla. Admin Code (requiring petitions to intervene to comply the requirements of Rule 28-106.201(2), including an "explanation of how the petitioner's substantial interests" are at issue.).

Because the Petition fails to satisfy the pleading requirements contained in the Rules, it should be dismissed.

¹ PEF is challenging the legal sufficiency of the Petition and does not address its substance. However, this should not be interpreted as agreement with the allegations of the Petition; the substantive claims will not be addressed until Petitioners can demonstrate standing to participate in this proceeding.

(2). SA is not a proper party to this proceeding.

The Petition must also be dismissed as to SA because the Petition does not allege that SA has the legal capacity to participate in this proceeding. This Commission has previously denied an entity's petition to intervene based, in part, on the entity's failure to allege that "it is a corporation, non-profit corporation, or any other entity with the legal capacity to sue." See *In re: Energy Conservation Cost Recovery Clause*, Order No. PSC-08-0596-PCO-GU, Docket No. 080002-EG (Sept. 16, 2008) (denying the Saporito Energy Consultants' request to intervene). It was noted that section 607.0128, Florida Statutes, "requires that associations register with the state in order to transact business." *Id.* at n.3. Because SA has failed to allege that it is registered with the State,² as to SA, the Petition must be dismissed.

(3). SA has not alleged that it has standing to participate under *Agrico Chemical*.

The Petition does not allege that SA has a substantial interest in the outcome of this proceeding necessary to establish standing to participate under the two-pronged test of *Agrico Chemical*, and, therefore, the Petition must be dismissed.

To show a "substantial interest" in the outcome of an administrative proceeding, a party must show: "1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his 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." *Agrico Chem.*, 406 So. 2d at 482. The Petition is wholly devoid of any allegation that SA will suffer an injury based on the outcome of this proceeding. There is, for example, no allegation that SA is a customer of PEF, or any allegation that the Company's rates and charges have any effect on SA whatsoever.

² Saprohani Associates is not a registered entity according to the Department of State.

Moreover, SA has failed to allege that it has “associational standing” to participate in this proceeding. Associational standing is established if:

- (1) the association demonstrates that substantial number of an association’s members may be substantially affected by the Commission’s decision in a docket; (2) the subject matter of the proceeding is within the association’s general scope of interest and activity; and (3) the relief requested is of a type appropriate for the association to receive on behalf of its members.

Order No. PSC-080596-PCO-GU.³ Again, the Petition has failed to satisfy these requirements; it has failed to identify who SA’s members are, how many of them may be affected by the outcome of this proceeding, or in what way. The Petition also fails to identify SA’s “general scope of interest and activity” or that the scope of this proceeding, and the relief requested, is within that sphere of interest and activity.

In short, the Petition fails to allege any basis to determine that SA has standing, associational or otherwise, to participate in this proceeding.

Finally, the Petition contains no allegations of any facts demonstrating that Saporito has made the necessary filings to be considered a qualified representative within the meaning of Rule 28-106.106, Fla. Admin. Code. For this reason, as well as the other reasons outlined above, the Petition is technically deficient and must be dismissed.

- (4). Saporito has not demonstrated that he has standing to participate under *Agrico Chemical*.

Finally, and just as with SA, the Petition completely fails to demonstrate, or even allege, that Saporito personally has standing to participate in this proceeding. The petition fails to allege how any decision in this docket will substantially affect Saporito. In fact, Saporito has not even

³ Citing *Florida Home Builders v. Department of Labor & Employment Security*, 412 So. 2d 351 (Fla. 1982) and *Farmworker Rights Organization v. Department of Health and Rehabilitative Services*, 417 So. 2d 753 (Fla. 1st DCA 1982).

alleged that he is a customer of the Company.⁴ Thus, Saporito has failed to allege that he has a substantial interest in the outcome of this proceeding, or that any interest he has is one that the proceeding was designed to protect; therefore, he has failed to allege the requisites to establish standing. *See Agrico Chem.*

CONCLUSION

The Petition should be dismissed because it fails to satisfy the pleading requirements of Rule 28-106.201(2), Fla. Admin. Code. Additionally, SA does not have the legal capacity to participate in this docket, and even if it did, the Petition does not establish its standing to do so. Furthermore, the Petition does not establish that Saporito is a qualified representative capable of representing SA in this proceeding. Finally, the Petition fails to establish that Saporito has standing to participate in this proceeding.

WHEREFORE, PEF respectfully requests that the Commission dismiss the Petition.

Respectfully submitted this 25th day of July, 2011.



R. Alexander Glenn
General Counsel-PEF
John Burnett
Associate General Counsel
PROGRESS ENERGY SERVICE
COMPANY, LLC
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (727) 820-5587
Facsimile: (727) 820-5519

James Michael Walls
Florida Bar No. 0706242
Blaise N. Huhta
Florida Bar No. 0027942
Matthew R. Bernier
Florida Bar No. 0059886
CARLTON FIELDS, P.A.
Post Office Box 3239
Tampa, FL 33601-3239
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

⁴ Saporito has previously alleged that he is actually a customer of Florida Power & Light. *See* DN 07385, filed in Docket No. 080002-EG (Aug. 18, 2008).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic and U.S. Mail this 25th day of July, 2011 to all parties of record as indicated below.


ATTORNEY

<p>Office of General Counsel Keino Young Lisa Bennett Florida Public Service Commission 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 kyoung@psc.state.fl.us lbennett@psc.state.fl.us</p> <p>Brickfield Law Firm James W. Brew/F. Alvin Taylor Eighth Floor, West Tower 1025 Thomas Jefferson Street, NW Washington, DC 20007 jbrew@bbrslaw.com ataylor@bbrslaw.com</p> <p>White Springs Agricultural Chemicals, Inc. Randy B. Miller Post Office Box 300 White Springs, FL 32096 RMiller@pcsphosphate.com</p> <p>Progress Energy Florida, Inc. Mr. Paul Lewis, Jr. 106 East College Avenue, Suite 800 Tallahassee, FL 32301-7740 paul.lewisjr@pgnmail.com</p>	<p>Florida Industrial Power Users Group Vicki G. Kaufman/Jon C. Moyle, Jr. c/o Keefe Law Firm 118 North Gadsden Street Tallahassee, FL 32301 vkaufman@kagmlaw.com jmoyle@kagmlaw.com</p> <p>PCS Administration (USA), Inc. Karin S. Torain Skokie Boulevard, Suite 400 Northbrook, IL 60062 KSTorain@potashcorp.com</p> <p>Office of Public Counsel J.R. Kelly/Charles Rehwinkel/Erik Sayler c/o The Florida Legislature 111 W. Madison Street, Room 812 Tallahassee, FL 32393-1400 kelly.jr@leg.state.fl.us rehwinkel.charles@leg.state.fl.us sayler.erik@leg.state.fl.us</p> <p>Progress Energy Service Company, LLC R. Alexander Glenn/John T. Burnett P.O. Box 14042 St. Petersburg, FL 33733-4042 alex.glenn@pgnmail.com john.burnett@pgnmail.com</p>
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Southern Alliance for Clean Energy
George Cavros, Esq.
120 E. Oakland Park Blvd, Ste. 105
Fort Lauderdale, FL 33334
Telephone: 954.563.0074
Facsimile: 866.924.2824
Email: george@cavros-law.com

Thomas Saporito
Senior Consultant
Saprodani Associates
Post Office Box 8413
Jupiter, FL 33468
Telephone: 561.972.8363
Email: thomas@saprodani-associates.com