

Shawna Senko

From: Murphy, Katharine <kmurphy@ngn-tally.com>
Sent: Tuesday, May 20, 2014 1:10 PM
To: Filings@psc.state.fl.us
Cc: Curt Kiser; Adam Teitzman; Mary Anne Helton
Subject: Docket 140059-EM; Motion to Strike FECA Comments
Attachments: Motion to Strike FECA Comments.pdf

Full name, address, telephone number, and e-mail address of the person(s) responsible for this filing:

Brian P. Armstrong, Esq.
William C. Garner, Esq.
John R. Jenkins, Esq.
Nabors, Giblin & Nickerson, PA
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070 (telephone)
barmstrong@ngnlaw.com
bgarner@ngnlaw.com
jjenkins@ngnlaw.com

Docket number and title if filed in an existing docket:

140059-EM

Name of the Party on whose behalf this document is filed:

Babcock Ranch Community Independent Special District

Total number of pages in this document:

5

Brief, but complete, description of the attached document:

Attached for filing is the Babcock Ranch Community Independent Special District's Motion to Strike Comments Filed by Florida Electric Cooperatives Association, Inc.

Katie Murphy
Legal Assistant



1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070 Tel.
(850) 224-4073 Fax
kmurphy@ngnlaw.com

The information contained in this email is attorney privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that

any dissemination, distribution or copy of this communication is strictly prohibited. Moreover, any unintentional dissemination of this message does not waive any attorney-client privilege that applies to this communication. If you have received this communication in error, please notify us immediately by telephone collect and delete the original message. Thank you.

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Notice Pursuant to Rule 25-9.044, Florida
Administrative Code of New Electric Service
Provider, Babcock Ranch Community
Independent Special District, and Request for
Partial Waiver

Docket No. 140059-EM

Filed: May 20, 2014

**BABCOCK RANCH COMMUNITY INDEPENDENT SPECIAL DISTRICT'S
MOTION TO STRIKE COMMENTS FILED BY FLORIDA ELECTRIC
COOPERATIVES ASSOCIATION, INC.**

The Babcock Ranch Community Independent Special District ("Babcock District" or "District"), by and through its undersigned counsel, pursuant to Rule 28-106.204(1), Florida Administrative Code, moves to strike comments filed by the Florida Electric Cooperatives Association, Inc. ("FECA"), and in support hereof, says:

1. On April 11, 2014, FECA filed comments addressing the Babcock District's Notice of New Municipal Electric Service Provider and Petition for Waiver of Rule 25-9.044(2), Florida Administrative Code, which was filed March 24, 2014. FECA filed its comments pursuant to Section 120.542, Florida Statutes, and Rule 28-104.003, Florida Administrative Code, within the time permitted under these authorities. The cited Statute and Rule authorize the filing of comments by any "interested person."

2. FECA has no standing in this proceeding as an interested person, and has no standing as a person affected by the Commission's grant of a Rule waiver, because it has not

alleged that it will suffer any immediate harm from the grant of a rule waiver in this case,¹ nor has it alleged that a substantial number of its members will be affected by the Commission's decision in this docket.² In fact, FECA offers no explanation of how its membership might be affected by the grant of a rule waiver in this case. Neither does it explain any set of conditions that exists or might exist with regard to any of its members that could compare to the situation presented by the District in this proceeding. Further, FECA identifies no other heretofore unidentified entity chartered by a Special Act anywhere in Florida that might have the potential of asserting powers affecting one of its members similar to those asserted in this proceeding by the District. Note that the Lee County Electric Cooperative, Inc. ("LCEC"), is not a member of FECA, so associational standing cannot accrue to FECA on the basis that LCEC is an interested party.

3. FECA may only speculate as to how a Commission grant of a rule waiver, or how an undefined and indeterminate Commission interpretation of a special law, could potentially affect it or its members IF the Legislature ever grants powers to another special district within the service territory of one or more of its members that are identical to those granted to the Babcock District. "[A]n injury premised on a potential precedent that might have an effect [on a party] at some unspecified time in the future is too speculative to confer standing." In re: Applications for original certificates to operate water and wastewater utility in Duval and St.

¹ Agrico Chemical Company v. Department of Environmental Protection, 406 So. 2d 478 (Fla. 1st DCA 1981)(holding that before a person may participate in an administrative proceeding, that person must show: 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to Section 120.57, Florida Statutes, hearing; and 2) that his substantial injury is of the type or nature which the proceeding is designed to protect.

² Florida Home Builders v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982); Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982) (together holding that associational standing may be found where: (1) the association demonstrates that a 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.)

Johns Counties by Nocatee Utility Corporation and by Intercoastal Utilities, Inc., Order No. PSC-00-1265-PCO-WS (July 11, 2000)(citing, Village Park Mobile Home Association v. Department of Business and Professional Regulation, 506, So. 2d 426, 430 (Fla. 1st DCA 1987)(rev. denied, 513 So. 2d 1063 (Fla. 1987)). Petitions asserting such a speculative interest fail the first prong of the Agrico test, which requires an intervenor to show that he or she will suffer an injury in fact which is of an immediate nature. Id.

4. Absent its standing to request a hearing in this matter, or to intervene as a party, FECA is not an interested person, and is not authorized under Section 120.542, Florida Statutes, or Rule 28-104.003, Florida Administrative Code, to file comments in this proceeding.

5. FECA filed its comments without seeking leave of the presiding officer to do so, notwithstanding its failure to demonstrate its status as an interested person. The comments have therefore been included in the docket file, and might form part of the record upon which the Commission bases a decision. Therefore, in the absence of a determination confirming FECA's standing as an interested person, its comments should be stricken from the record. The Commission has found it appropriate to strike such pleadings when they are filed by a person who has not demonstrated standing as an interested party. See In re: Petition of Tampa Electric Company to increase its rates and charges, Order No. 6156 (May 28, 1974).

5. Alternatively, and to the extent the presiding officer or the Commission decides that FECA is permitted to file comments in this proceeding, such comments should be limited strictly to addressing those portions of the Babcock District's pleadings which address the specific point of the request for a rule waiver. Clearly, the District's initial pleading seeks relief in addition to its request for a rule waiver. All comments addressed to any other matters plead by

the District should be stricken from the record. FECA relied on provisions in law that allow interested persons to comment on a petition for a rule waiver, and if permitted to file comments, should be limited to doing just that.

6. On May 19, 2014, pursuant to Rule 28-106.204(3), Florida Administrative Code, District counsel requested by email whether any party opposes this Motion. FECA, LCEC and Tampa Electric Company each have indicated that they oppose this Motion. Florida Power & Light Company indicates that it takes no position.

Wherefore, for the reasons indicated in this Response, the Babcock District respectfully requests that the Commission (1) find that FECA is not an “interested person” authorized to file comments in this proceeding; (2) strike from the record all comments submitted by FECA; or in the alternative (3) strike from the record all comments submitted by FECA which relate to matters other than, specifically, the request for rule waiver; and (4) grant the District such further relief as may be just and proper.

Respectfully submitted this 20th day of May, 2014.

s/ William C. Garner
WILLIAM C. GARNER
Florida Bar No. 577189
BRIAN P. ARMSTRONG
Fla. Bar No. 888575
JOHN R. JENKINS
Florida Bar No. 435546
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070 Telephone
(850) 224-4073 Facsimile
*Attorneys for Babcock Ranch Community
Independent Special District*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing was furnished by electronic mail to the following this 20th day of May, 2014:

James D. Beasley, Esq.
J. Jeffry Wahlen, Esq.
Ausley Law Firm
P.O. Box 391
Tallahassee, FL 32302
jbeasley@ausley.com
jwahlen@ausley.com

John A. Noland, Esq.
Henderson Law Firm
P.O. Box 280
Ft. Myers, FL 33902
john.noland@henlaw.com

D. Bruce May, Jr., Esq.
Kevin Cox, Esq.
Holland Law Firm
P.O. Drawer 810
Tallahassee, FL 32302-0810
bruce.may@hklaw.com
kevin.cox@hklaw.com

Dennie Hamilton
Frank R. Cain, Jr.
Lee County Electric Cooperative, Inc.
P.O. Box 3455
North Ft. Myers, FL 33918-3455
dennie.hamilton@lcec.net
frank.cain@lcec.net

Paula K. Brown
Regulatory Coordination
Tampa Electric Company
P.O. Box 111
Tampa, FL 33601
regdept@tecoenergy.com

John T. Butler, Esq.
Scott A. Goorland, Esq.
700 Universe Boulevard
Juno Beach, FL 33408-0420
john.butler@fpl.com
scott.goorland@fpl.com

William B. Willingham
Michelle L. Hershel
Florida Electric Cooperatives Assoc., Inc.
2916 Apalachee Parkway
Tallahassee, FL 32301
fecabill@embarqmail.com
mhershel@feca.com

Matthew R. Bernier, Esq.
Duke Energy Florida
106 East College Avenue
Tallahassee, FL 32301
matthew.bernier@duke-energy.com

Martha Carter Brown, Esq.
Jennifer Crawford, Esq.
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
mbrown@psc.state.fl.us
jcrawfor@psc.state.fl.us

s/ William C. Garner
WILLIAM C. GARNER