

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Environmental Cost Recovery Clause

Docket No. 140007-EI
Filed: June 3, 2014

**DUKE ENERGY FLORIDA'S RESPONSE TO SACE'S
PETITION TO INTERVENE**

Duke Energy Florida, Inc. ("DEF" or the "Company"), pursuant to Rule 28-106.205(1), F.A.C., responds to the Southern Alliance for Clean Energy's ("SACE") May 28, 2014 Petition to Intervene ("Petition").

SACE's Petition should be denied in part because SACE has not, and cannot, demonstrate that it has standing to challenge cost recovery issues in this proceeding. SACE cannot show that its substantial interests will be affected by the Commission's approval of environmental cost recovery factors. Moreover, the Commission's approval of cost recovery factors for environmental compliance programs it has already determined are prudent will not affect interests that SACE as an organization exists to protect. Therefore, SACE cannot prove it has associational standing to participate in the cost recovery portion of this docket.

In support, DEF states:

I. Background

SACE's Petition begins with a recitation of its mission: "to advocate for energy plans, policies and systems that best serve the environmental, public health and economic interest of communities in the Southeast, including Florida. SACE's stated mission is to promote responsible energy choices that create climate change solutions and ensure clean, safe and healthy communities throughout the Southeast." *Petition*, at ¶ 5. SACE also provides a list of

activities it undertakes to further that mission, including supporting federal, state, and local laws, regulations, orders, and other requirements that apply to electric utilities and are designed to protect the environment. *See id.* at ¶ 8. In short, the Petition alleges that SACE is an environmental organization that exists to advocate on environmental policy issues on behalf of its members. SACE's participation in dockets with respect to environmental policy and compliance issues that are within its organizational scope is proper.

However, this is a cost recovery proceeding designed to allow the Commission to evaluate the prudence of costs utilities expend on environmental compliance plans that, in DEF's case, have already been deemed prudent. With respect to environmental compliance plans that have previously been approved by the Commission and are currently being implemented, the sole issue that remains for the Commission to decide is the prudence of the costs incurred in implementing those plans and not the policy or compliance issues that SACE itself states it is chartered to advocate on. Because SACE, as an organization, does not exist to advocate for the economic interests of its members, it is simply not a proper party to participate in those aspects of this docket.

II. SACE does not have Standing to Challenge cost based issues in this Docket.

Intervention in a Commission proceeding is governed by Rule 25-22.039, F.A.C. That Rule provides, in part, that persons "who have a substantial interest in the proceeding" and who desire to participate may petition to intervene. The petition must "include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding." *See id.*

SACE cannot allege that it has a constitutional or statutory right to intervene, nor that any Commission rule gives it the substantive right to participate in these proceedings, therefore, SACE must demonstrate that its substantial interests are subject to determination or will be affected in this proceeding.

To demonstrate that its substantial interests are subject to determination or will be affected, SACE must show that it will suffer an injury in fact of sufficient immediacy to entitle participation as a party, and that the injury is of a type which the proceeding is designed to protect. *See In re: Petition to Determine Need for West County Energy Ctr. Unit 3 Elec. Power Plant*, Order No. PSC-08-0398-PCO-EI (June 17, 2008) (“*West County*”) (citing *Agrico Chem. Co. v. Dep’t of Env’tl. Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981)). Both prongs of the *Agrico* test must be met to establish standing. *Id.*

In the case of an organization that is seeking to represent the rights of its members, SACE must demonstrate that it has “associational standing.” To demonstrate associational standing, SACE must show that a significant number of its members will be substantially affected by the results of the proceeding, that the subject matter of the proceeding is within its general scope of interest and activity, and that the relief requested is of the type appropriate for an association to receive on behalf of its members. *See Fla. Homebuilders Ass’n v. Dep’t of Labor & Employment Sec.*, 412 So. 2d 351, 353-54 (Fla. 1982).¹

This Commission has stated that the test for associational standing requires a demonstration: “(1) that a substantial number of its members have substantial interests which are affected by our proposed action, (2) that the subject matter of the proceeding is within the

¹ *Florida Homebuilders* was a rule challenge proceeding but its holding was subsequently extended to section 120.57(1) hearings. *See Farmworker Rights Org., Inc. v. Dep’t of Health & Rehab. Servs.*, 417 So. 2d 753 (Fla. 1st DCA 1982).

association's general scope of interest and activity, and (3) that the relief requested is of the type appropriate for an association to receive on behalf of its members." *In re: Investor-Owned Elec. Utils.*, Order No. PSC-99-1474-PCO-EI (July 29, 1999); *In re Fla. Power & Light Co.*, Order No. PSC-0374-FOF-EG (March 9, 1988). Under the first prong of this test, the association must meet the *Agrico* test. *Id.*

Regarding cost recovery issues, SACE has not, and cannot, demonstrate that it meets the first two prongs of associational standing test, and therefore cannot establish its standing to participate regarding cost-based issues in this proceeding.

The Commission has previously denied SACE standing to participate in the Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor ("Fuel Clause") docket. *See* Order No. PSC-03-1199-PCO-EI (Oct. 22, 2003). In that Order, the Commission found that SACE did not adequately allege an injury in fact of sufficient immediacy to participate, nor were its alleged injuries to the type of interests that proceeding was designed to protect, as required by *Agrico*. The Commission concluded that "[w]hile SACE raised important environmental concerns, the purpose of this proceeding is to determine the amounts to be recovered by utilities for their fuel and purchased power costs rather than to address environmental concerns."

While this proceeding is concerned with environmental issues, it, like the Fuel Clause docket, is a cost recovery docket. While SACE could theoretically make arguments regarding environmental plan composition and compliance,² it may not "examine alleged prudently incurred costs and examine alleged reasonable projected compliance costs", *see Petition*, at ¶ 10,

² For example, in Docket No. 130301, the Commission approved DEF's Petition to Modify the Scope of an Existing Environmental Program. *See* Order No. PSC-14-0173 (April 16, 2014) (approving DEF's petition) & Order No. PSC-14-0218-CO-EI (May 9, 2014) (consummating Order making Order No. PSC-14-0173-PAA-EI effective and final). SACE did not intervene or seek to participate in that docket.

as those types of inquiries are simply not within its organizational purpose. The Commission has previously limited intervenor's participation to discrete issues for which the intervenor was able to establish standing. *See, e.g., In re Aloha Utils. Inc.*, Order No. PSC-02-1250-SC-SU (Sept. 11, 2002) ("Because we find that the Limited Partner's substantial interests are only affected by our decision concerning back-billing and the effective date of the tariff, intervention shall be limited to those issues."); *In re: Petition of S. Bell Tel. & Tel. Co. to Place into Effect Certain New Rates and Charges Pursuant to Section 364.05, Fla. Stat.*, Order No. 10046 (June 4, 1981) (approving agreement that School Board may intervene in the docket but its intervention shall be limited).

SACE exists to promote clean energy generation and energy efficiency alternatives to generation; it does not exist to advance the interests of its members in the rates they pay for electric service. Its intervention in this docket should therefore be limited to those issues for which it has a substantial interest. That is not to say that SACE's members do not have an advocate regarding cost recovery issues; Public Counsel's role is to advocate on behalf the financial interests of all customers – including SACE's members.

III. SACE has the obligation to Prove, not Just Allege, that it has Standing to Intervene

To the extent the Commission allows SACE to intervene based on its allegations of standing, SACE still retains the burden of proof regarding its allegations. The Commission has held that an order granting intervention is essentially "non-final" because it is based on the intervening party's *allegations*. Objecting parties retain the right to test the factual basis of those allegations and it is the intervening party's burden to factually demonstrate its standing to participate. *See In re: Petition to determine need for an elec. power plant in Martin County by Fla. Power & Light Co.*, Order No. PSC-02-1260-PCO-EI (Sept. 13, 2002) ("parties to

administrative hearings in Florida have an affirmative duty to prove standing – not just allege standing – when another party contests that standing.”)

IV. CONCLUSION

Wherefore, for the reasons expressed herein, DEF respectfully requests the Commission to enter an Order denying SACE’s Petition to Intervene in aspects of this docket that are not within its organizational purpose and for which SACE does not have standing to participate. Moreover, to the extent that SACE is allowed to participate in this proceeding based on its allegations of standing, DEF reserves its right to challenge those allegations going forward.

/s/ Dianne M. Triplett
Dianne M. Triplett
Associate General Counsel
DUKE ENERGY FLORIDA, INC
299 First Avenue North
St. Petersburg, FL 33701
Telephone: (727) 820-4692
Facsimile: (727) 820-5042

Duke Energy Florida, Inc.

CERTIFICATE OF SERVICE

Docket No.: 140007

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the following this 3rd day of June, 2014.

/s/ Dianne M. Triplett
Attorney

<p>Charles Murphy Office of General Counsel Florida Public Service Commission 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 Ltan@psc.state.fl.us</p> <p>James D. Beasley/J. Jeffry Wahlen/Ashley M. Daniels Ausley Law Firm P.O. Box 391 Tallahassee, FL 32302 jbeasley@ausley.com jwahlen@ausley.com adaniels@ausley.com</p> <p>Jeffrey A. Stone/Russell A. Badders/ Steven R. Griffin Beggs & Lane Law Firm P.O. Box 12950 Pensacola, FL 32591 jas@beggslane.com rab@beggslane.com srg@beggslane.com</p> <p>Robert Scheffel Wright/John T. LaVia Gardner Law Firm 1300 Thomaswood Drive Tallahassee, FL 32308 schef@gbwlegal.com jlavia@gbwlegal.com</p> <p>Jon C. Moyle, Jr. Moyle Law Firm 118 North Gadsden Street Tallahassee, FL 32301 jmoyle@moylelaw.com</p> <p>Kenneth Hoffman Florida Power & Light Company 215 S. Monroe Street, Suite 810 Tallahassee, FL 32301-1858 Ken.Hoffman@fpl.com</p>	<p>Florida Power & Light Company John T. Butler (LAW/JB) 700 Universe Blvd. Juno Beach, FL 33408-0420 John.butler@fpl.com</p> <p>Robert L. McGee Gulf Power Company One Energy Place Pensacola, FL 32520-0780 rlmcgee@southernco.com</p> <p>J.R. Kelly/P. Christensen/J. McGlothlin/ Charles J. Rehwinkel Office of Public Counsel c/o The Florida Legislature 111 West Madison Street, #812 Tallahassee, FL 32399 Christensen.patty@leg.state.fl.us Rehwinkel.charles@leg.state.fl.us</p> <p>James W. Brew/F. Alvin Taylor Brickfield, Burchette, Ritts & Stone, P.C. 1025 Thomas Jefferson St., NW Eighth Floor, West Tower Washington, D.C. 20007 jbrew@bbrslaw.com ataylor@bbrslaw.com</p> <p>Ms. Paula K. Brown Tampa Electric Company P.O. Box 111 Tampa, FL 33601 regdept@tecoenergy.com</p>
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