

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Fuel and Purchased Power Cost
Recovery Clause with Generating Performance
Incentive Factor

Docket No: 140001-EI
Filed: November 3, 2014

**FLORIDA POWER & LIGHT COMPANY'S MOTION TO DENY PARTICIPATION OF
PCS PHOSPHATE IN DEFERRED PROCEEDING FOR LACK OF STANDING AND
MOTION TO STRIKE PREHEARING STATEMENT**

Florida Power & Light Company ("FPL" or the "Company"), pursuant to Section 120.57, Florida Statutes ("F.S.") and Rule 28-106.204, Florida Administrative Code, hereby files with the Florida Public Service Commission ("FPSC" or "Commission") this Motion to Deny the Participation of PCS Phosphate in this Deferred Proceeding for Lack of Standing and Motion to Strike PCS Phosphate's Prehearing Statement, and states:

I. Background

1. On June 25, 2014, FPL filed its Petition in this docket seeking a determination by the Commission that it is prudent for FPL to acquire an interest in a natural gas reserve project, that the revenue requirements associated with investing in and operating the gas reserves are eligible for recovery through the Fuel and Purchased Power Cost Recovery Clause ("Fuel Clause"), and that the Commission establish guidelines under which FPL could participate in future gas reserve projects and recover their costs through the Fuel Clause without prior Commission approval, subject to the Commission's established process for reviewing fuel-related transactions in Fuel Clause proceedings. Of course, Commission action on FPL's Petition would only affect the substantial interests of FPL and FPL's customers.

2. On August 22, 2014, in response to a Joint Motion for Approval of Stipulation for Schedule to Decide on Gas Reserve Project Issues and Deferral of St. Lucie Unit 2 Extended Refueling Outage Issue filed by FPL and OPC on August 1, 2014, the Commission established a

separate schedule for the processing of this issue as a “deferred issue” (the “Deferred Proceeding”).¹

3. On October 27, 2014, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (“PCS Phosphate”) filed a Prehearing Statement in this matter, indicating its intent to participate in the Deferred Proceeding, including the final hearing in this matter, stating, “PCS Phosphate does not plan to offer any exhibits at this time, but may introduce exhibits during the course of cross-examination.”

4. In its Prehearing Statement, with regard to its basic position, PCS Phosphate offers only generalized concerns about the precedential nature of the Commission’s decision in the Deferred Proceeding:

“...FPL’s June 25 petition presents issues of first impression that likely will affect the Commission’s consideration of gas reserves for electric utilities going forward. Consequently, all Florida consumers will be affected by the Commission’s resolution of those issues, and, for that reason, PCS Phosphate supports addressing the broader energy policy issues presented through a rule-making process. To the extent that those issues will be resolved in this proceeding, PCS Phosphate generally accepts and adopts the positions taken by the Florida Office of Public Counsel (“OPC”).”

5. As further discussed below, PCS Phosphate has no standing to participate in this Deferred Proceeding. PCS Phosphate fails to show injury in fact of sufficient immediacy or that its injury is of the type or nature which this proceeding is designed to protect. As such, PCS Phosphate has no substantial interest in the Deferred Proceeding and should not be permitted to participate. Furthermore, as PCS Phosphate has no standing to participate in the Deferred Proceeding, its Prehearing Statement should be stricken from the record.

II. Standard for Standing

6. Section 120.52(13), F.S., defines “party” as:

¹ Order No. PSC-14-0439-PCO-EI

“(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

(d) Any county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative, agency, department, or unit to represent the class of interested persons. The authorizing resolution shall apply to a specific proceeding and to appeals and ancillary proceedings thereto, and it shall not be required to state the names of the persons whose interests are to be represented.”

With regard to the Deferred Proceeding, PCS Phosphate is not a specifically named person under subpart (a), authorized by limited rule under subpart (c), or county representative under subpart (d). Nor is PCS Phosphate entitled to participate as a matter of constitutional right, provision of statute, or provision of agency regulation. Therefore, in order to be a party to this Deferred Proceeding, PCS Phosphate must show that its substantial interests will be affected by the proposed agency action in this proceeding. As shown below, PCS Phosphate has failed to meet that test.

7. In order to participate in the Deferred Proceeding, PCS Phosphate must meet the two-pronged test for standing to intervene set forth in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981). That test provides that in order for one to be considered to have a “substantial interest” in the outcome of a proceeding, a potential party must show, “1) that he will suffer injury in fact of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his injury is of a type or nature which the proceeding is designed to protect.” *Id.* at 482.

8. The first prong of the test concerns the degree of injury. The asserted injury cannot be remote, speculative, abstract or indirect. *Id.*, citing *International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Commission*, 561 So.2d 1224 (Fla. 3rd DCA 1990) and *Village Park Mobile Home Ass'n v. Department of Business Regulation*, 506 So.2d 426 (Fla. 1st DCA 1987).

9. The second prong concerns the nature of the injury. The interests in the proceeding must be within the zone of interest that the proceeding was intended to protect. *See Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n*, 418 So.2d 1046 (Fla. 1st DCA 1982); *Suwannee River Area Council Boy Scouts of America v. Department of Community Affairs*, 384 So.2d 1369 (Fla. 1st DCA 1980); *Boca Raton Mausoleum v. Department of Banking and Finance*, 511 So.2d 1060 (Fla. 1st DCA 1987); *Friends of the Everglades v. Board of Trustees*, 595 So.2d 186 (Fla. 1st DCA 1992).

III. Argument

10. PCS Phosphate clearly fails to meet the *Agrico* test for standing. PCS Phosphate openly acknowledges there is no injury of any immediacy; rather, PCS Phosphate admits that it seeks to participate out of the concern that broader policy might impact Florida consumers.² PCS Phosphate's expressed concerns are highly speculative and remote. A general concern that proceeding, "likely will affect the Commission's consideration of gas reserves for electric utilities going forward," fails to identify any immediate and real harm to PCS Phosphate. PCS Phosphate is required under *Agrico* to show that *this* proceeding would immediately harm *PSC Phosphate*, not some "likely" effect on "Florida consumers". *See Ameristeel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997) (threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy to warrant a Section 120.57, F.S., hearing); citing *Florida*

² To the extent PCS Phosphate is attempting to suggest that it speaks as the voice of "all Florida consumers", it is in no way authorized to do so. That representation is left squarely in the hands of OPC under Florida law. *See*, Section 350.0611, F.S.

Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988)(some degree of loss due to economic competition is not of sufficient immediacy to establish standing). See also *International Jai-Alai Players*, at 1225-1226 (Fla 3d DCA 1990); and *Village Park Mobile Home Association*, at 434 (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process – “The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct.”)

11. The precedential effect of this proceeding is both remote and is not the type or nature of an interest that this proceeding is designed to protect. Potential adverse legal precedent does not constitute the substantial interest PCS Phosphate needs for intervention in a proceeding. *In Re: Application for Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.* Docket No. 992040-WS, Order No. PSC-00-1265-PCO-WS, issued July 11, 2000. (Injury premised on a potential precedent that might have an affect on the parties at some unspecified time in the future is too speculative to confer standing.) See also *In Re: Petition of Monsanto Company for a Declaratory Statement Concerning The Lease Financing of a Cogeneration Facility*, Order No. 16581, Issued September 11, 1986 in Docket No. 860725-EU (County’s request to intervene in a declaratory statement proceeding on lease-financing of a planned cogeneration facility was based on its interest in precedential impacts to its own cogeneration facility and was therefore denied); citing to *State Department of Health and Rehabilitative Services v. Barr*, (agency orders rendered in Section 120.57, F.S., proceedings may “indirectly determine controversies and affect persons yet unborn, but the rule is stare decisis, not res judicata,” and Section 120.57, Florida Statutes, proceedings will afford the person

an opportunity to attack the agency's position by the appropriate means, and Section 120.68, Florida Statutes, will provide judicial review.)

12. Additionally, and significantly, PCS Phosphate has not alleged that it is, and in fact it is not, a customer of FPL. As it is not a customer, injury to PCS Phosphate is non-existent, and PCS Phosphate should be denied standing. See *In re: Florida Power & Light Company's Petition to Determine Need for West County Energy Center Unit 3 Electric Power Plant*, Order No. PSC-08-0398-PCO-E1, Issued June 17, 2008, in Docket No. 080203 (petitioner was “not a customer of FPL and the petition does not allege any facts to show that he has a substantial interest that will be affected by the outcome of the proceeding or that his interest is one this need determination proceeding is designed to protect.”) See also, *In re: Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes*, Order No. PSC-05-0301-PCO-WU, Issued March, 18, 2005, in Docket No. 050018-WU (former customer of a utility “failed to demonstrate that his substantial interests will be affected.”)

13. PCS Phosphate is a customer of Duke Energy not FPL. Its customer status conveyed standing to participate in the Fuel Clause hearing as to issues involving Duke Energy. As a customer of Duke Energy and not FPL, it has no standing in the Deferred Proceeding, which only affects the substantial interests of FPL and FPL's customers. PCS Phosphate has, appropriately, taken no position on FPL's fuel issues in the general 140001 docket. It also should not be taking a position in FPL's deferred issues. When seen from this perspective, it is clear just how remote and speculative PCS Phosphate's pled interest is. Duke has not proposed recovery of a gas reserves transaction through the Fuel Clause. Duke may never propose such a transaction or Fuel Clause recovery for such a transaction. If Duke does make such a proposal,

then it will have to meet the same burden of proof that FPL has had to meet in this case. At that point PCS Phosphate will have a full and ample opportunity to contest the transaction that would affect its substantial interests as a customer of Duke. Any decision in this case based on the evidence before the Commission in this case would not be controlling on the prospective Duke case which may or may not be filed. So, denial of PSC Phosphate's participation in this case for lack of standing would in no way prejudice PCS Phosphate.

14. To the extent that PCS Phosphate is a party to Docket 140001, that should not confer it standing to participate in the Deferred Proceeding. As discussed above, PSC Phosphate is not a customer of FPL, its issues are highly speculative and remote, and PCS Phosphate is in no way substantially affected by FPL's proposal. The Deferred Proceeding is akin to a "spin-off" of a docket. While it was not formally spun-off, it was procedurally separated from the main 140001 docket. Separate timelines were provided for discovery, pleadings, issue identification, final hearing, and there will be a separate agenda conference. It is uniquely an FPL related matter, and participation should only be permitted for those that would be substantially impacted and otherwise have standing had it been a separately assigned docket. To provide PCS Phosphate an opportunity to engage in the proceeding, participate in discovery, cross examine FPL witnesses, and provide arguments on FPL's proposal would substantially prejudice FPL, and would completely fly in the face of s. 120.52 and the purpose and intent of *Agrico*.

15. Furthermore, because PCS Phosphate does not have standing to participate in the Deferred Proceeding, its Prehearing Statement should be stricken from the record.

16. FPL has conferred with the parties of record to this proceeding. PCS Phosphate and OPC indicate they object to FPL's Motion. The Florida Retail Federation indicates it objects to FPL's Motion and that "[t]he Commission's decisions on these issues are likely to be precedential, and we believe that the Commission should allow PCS to participate." FIPUG indicates it opposes

FPL's motion and supports "the participation of PCS/White Springs in the oil and gas exploration and production portion of this docket."

WHEREFORE, FPL requests that the Commission deny the participation of PCS Phosphate in this Deferred Proceeding for lack of standing and motion to strike PCS Phosphate's Prehearing Statement.

Respectfully submitted this 3rd day of November, 2014.

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service on this 3rd day of November, 2014 to the following:

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