

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for exemption under Rule 25-22.082(18), F.A.C., from issuing a request for proposals (RFPs) for modernization of the Lauderdale Plant, by Florida Power & Light Company.

DOCKET NO. 20170122-EI
ORDER NO. PSC-2017-0430-FOF-EI
ISSUED: November 9, 2017

The following Commissioners participated in the disposition of this matter:

JULIE I. BROWN, Chairman
ART GRAHAM
RONALD A. BRISÉ
DONALD J. POLMANN
GARY F. CLARK

ORDER DENYING INNOVATIVE SOLAR SYSTEMS, LLC'S
PETITION TO INTERVENE
AND
MOTION FOR RECONSIDERATION

BY THE COMMISSION:

Background

By Proposed Agency Action Order No. PSC-2017-0287-PAA-EI, issued in this docket on July 24, 2017 (PAA Order), the Florida Public Service Commission (Commission) proposed to grant Florida Power & Light Company's (FPL) Petition for Exemption from the "Bid Rule," which is codified at Rule 25-22.082, Florida Administrative Code (F.A.C.). The exemption was granted pursuant to subsection (18) of that Rule.

On August 14, 2017, Sierra Club filed a Petition to Intervene and Protest the PAA Order (Protest). In accordance with the PAA Order, this was the last day that a protest of the PAA Order was timely. On August 21, 2017, FPL filed its Response to Sierra Club's Protest (Response). On August 25, 2017, Sierra Club filed its Motion for Leave to File a Reply to FPL's Response and attached its Reply. On September 1, 2017, FPL filed its Motion for Leave to File a Reply and Proposed Reply. By Order No. PSC-2017-0358-PCO-EI, issued on September 20, 2017, (Order Denying Sierra Club's Protest) the prehearing officer denied Sierra Club's Protest.

On October 2, 2017, Innovative Solar Systems, LLC (Innovative) filed its Petition to Intervene and Motion for Reconsideration of the Order Denying Sierra Club's Protest (Innovative Petition and Motion). On October 9, 2017, FPL filed its Response in Opposition to the Innovative Petition and Motion. (Response in Opposition). The Innovative Petition and Motion and the FPL Response in Opposition are the subject of this order.

Generally, in its Petition and Motion, Innovative asserts that Sierra Club's Protest was denied because Sierra Club's interests were not substantially affected since Sierra Club is neither a potential generation supplier for FPL's anticipated need, nor a potential Request for Proposals (RFP) participant. Innovative attempts to cure Sierra Club's deficiency by asserting that Innovative is such a supplier and potential RFP participant and will be substantially affected by our decision in this docket. Innovative asks that it be permitted to intervene, that the Order Denying Sierra Club's Protest be vacated, and that we reverse the PAA Order and deny FPL's Petition for Exemption.

In its Response in Opposition, FPL argues that the Innovative Petition and Motion is legally deficient because: Innovative did not file a timely protest to the PAA Order; there is no pending proceeding to provide Innovative a point of entry in light of the Order Denying Sierra Club's Petition; as a nonparty Innovative cannot seek reconsideration of the Order Denying Sierra Club's Petition; Innovative cannot cure Sierra Club's lack of standing by "stepping into its shoes;" and finally, even if Innovative's standing could be established, Innovative has identified no mistake of fact or law in the Order Denying Sierra Club's Protest that would warrant reconsideration of that Order. FPL asks that the Innovative Petition and Motion be denied and that the Commission issue an order consummating the PAA Order which granted FPL the exemption from the bid rule.

Oral Argument was not requested. We have jurisdiction pursuant to Chapter 120, Florida Statutes (F.S.), and Rule 25-22.029, F.A.C.

Review and Decision

1. Petition to Intervene

Rule 25-22.029(1) and (3), F.A.C., establish the point of entry into a proposed agency action proceeding, and provide, in pertinent part, the following:

(1) After agenda conference, the Office of Commission Clerk, shall issue written notice of the proposed agency action (PAA), advising all parties of record that . . . they have 21 days after issuance of the notice in which to file a request for a Section 120.569 or 120.57, F.S., hearing.

* * *

(3) One whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a Section 120.569 or 120.57, F.S., hearing, in the form provided by Rule 28-106.201, F.A.C. Any such petition shall be filed within the time stated in the notice issued

pursuant to subsection (1) of this rule, and shall identify the particular issues in the proposed action that are in dispute.

We provided the following notice language in the PAA Order:

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 14, 2017. (Emphasis original).

Innovative is asking 1) to intervene in this PAA docket, 2) for us to reconsider the procedural order that denied Sierra Club standing to protest the PAA Order (based upon new facts and Innovative replacing Sierra Club for purposes of establishing standing), and 3) for us to reverse the PAA Order (based upon these new facts and Innovative's asserted standing). The effect of granting the Innovative Petition and Motion would be for Innovative to substitute itself for Sierra Club to establish standing that Sierra Club did not have, and then rely upon the timeliness of the Sierra Club's Protest of the PAA Order to reverse the PAA Order which Innovative failed to timely protest.

Moreover, by asking that we reconsider the Order Denying Sierra Club's Protest, Innovative implicitly asks that this Commission determine that Sierra Club had standing to Intervene in this docket; however, Innovative's pleadings are void of any argument on that point and instead conflate the status of Innovative, as if it had made a timely protest, with Sierra Club.

The parties' arguments on intervention are set forth below.

Innovative Petition and Motion

Innovative asserts that it is a nationwide utility-scale solar farm developer with three utility-scale solar farms under development in Florida and would submit these three projects in an RFP issued by FPL. Efforts by Innovative to discuss a direct power purchase agreement (PPA) with FPL have been unsuccessful and FPL has indicated that it has no interest in signing a solar PPA with Innovative. Thus, Innovative asserts that a mandatory RFP is the only avenue by which FPL would be required to consider more cost-effective, clean alternatives for the modernization of FPL's Lauderdale Plant and Innovative will suffer injury if it is prevented from offering these projects to FPL for consideration. Innovative argues that this is the type of injury this docket is designed to prevent.

Innovative argues that by exempting FPL from the bid requirement, this Commission is giving FPL permission to continue to ignore clean, renewable, more cost-effective alternatives

and thwarting the development of renewables in Florida. Innovative takes issue with the basis of the underlying PAA Order as it relates to the effects of modernizing a gas plant by building a larger gas plant. Innovative avers that, if given the opportunity, it can demonstrate that solar is superior to natural gas. Innovative asserts that its interests are substantially affected, and it will suffer an injury in fact as a result of our granting FPL the exemption from the Bid Rule. In sum, Innovative argues that it meets the requirements for standing as set forth in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981) *rehearing denied*, 415 So.2d 1359 (Fla. 1982). As such, Innovative asks that it be permitted to intervene in this docket, that we vacate the Order Denying Sierra Club's Protest, and that we reverse the PAA Order and deny FPL's petition for exemption from the Bid Rule.

FPL Response in Opposition

FPL asserts that we should deny Innovative's Petition to Intervene because it is legally deficient for the following reasons: (1) Innovative failed to file a protest within 21 days of the issuance of our PAA Order granting FPL's petition for an exemption of the Bid Rule as required by Rule 25-22.029, F.A.C., which governs protests of PAA orders. Sierra Club is the only entity that filed a timely protest. Innovative can neither refute that fact nor attempt to latch on to Sierra Club's Protest in order to comply with the protest deadline set by the PAA Order. (2) There is no pending proceeding to provide a point of entry for intervention by Innovative under Rules 25-22.029 and 25-22.039, F.A.C., in light of the Order Denying Sierra Club's Protest. Rule 25-22.039, F.A.C., governing intervention in our proceedings, only allows intervention in a pending proceeding before this Commission. Rule 25-22.029, F.A.C., governs points of entry into a PAA proceeding before the Commission, and provides for a point of entry to a proceeding only if a timely protest is filed by a substantially affected person within 21 days of the issuance of a PAA order. Because Sierra Club did not seek reconsideration of the Order Denying Sierra Club's Protest by the deadline for motions for reconsideration, there was no "pending proceeding" that would have provided Innovative a point of entry for its Petition to Intervene in this proceeding.

Conclusion

While Innovative might otherwise have standing to intervene in a docket and protest a PAA order, or to seek reconsideration of a procedural order if it established standing on its own and timely protested the issuance of a PAA order, we find that, in the instant case, FPL is persuasive in its argument that Innovative is not timely in its attempt to intervene and participate in this docket. The protest of the PAA Order had to be filed by August 14, 2017. Innovative filed its Petition and Motion on October 2, 2017. By the Order Denying Sierra Club's Protest, the prehearing officer determined that Sierra Club lacked standing to intervene and protest the PAA Order that granted FPL the RFP exemption. We find that Innovative cannot properly rely on Sierra Club's timely protest of the PAA Order and then substitute itself for Sierra Club to establish "injuries in fact" for purposes of standing pursuant to *Agrico Chemical Company v. Department of Environmental Regulation*,¹ and thereby revive both

¹ 406 So.2d 478 (Fla. 2d DCA 1981) *rehearing denied*, 415 So.2d 1359 (Fla. 1982).

Sierra Club's standing and the underlying Protest. Thus, Innovative's Petition to Intervene shall be denied.

We do observe that, as with Sierra Club, there is nothing preventing Innovative from petitioning this Commission to intervene in the underlying need determination proceeding that will address the modernization of the Lauderdale Plant. Docket No. 20170225-EI, *Petition for determination of need for Dania Beach Clean Energy Center by Florida Power & Light Company*, has recently been opened to address that subject and all elements of that case must be proven by FPL. Moreover, if Innovative believes that FPL has refused to purchase renewable power from Innovative and that FPL is legally required to do so, Innovative can file a complaint with this Commission based upon that concern.

2. Motion for Reconsideration

The legal standard for reconsideration of an order is to bring to the attention of the administrative agency some point of fact or law that it overlooked or failed to consider when it rendered its order. *Diamond Cab Company of Miami v. King*, 140 So.2d 889, 891 (Fla. 1962); *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974); *Pingree v. Quaintance*, 394 So.2d 161 (Fla. 1st DCA 1981). Notwithstanding that Innovative impermissibly attempts to use a Motion for Reconsideration to substitute itself for Sierra Club in order to cure Sierra Club's lack of standing, Innovative also fails to meet the standard for reconsideration. Thus, as set forth below, we shall deny Innovative's Motion for Reconsideration of the Order Denying Sierra Club's Protest.

Innovative Petition and Motion

Innovative asserts that it is a nationwide utility-scale solar farm developer and would submit projects in response to an RFP in this docket. Innovative takes exception to the decision reached by us in the PAA Order issued in this docket. Innovative argues that it is substantially affected by the Order Denying Sierra Club's Protest, and that FPL has not been interested in signing a solar PPA with Innovative.

FPL Response in Opposition

FPL asserts that Innovative cannot attempt to cure Sierra Club's lack of standing, as determined by the Prehearing Officer in the Order Denying Sierra Club's Protest, by "stepping into [Sierra Club's] shoes" and then seeking reconsideration of that Order. FPL avers that Innovative is attempting to take up the procedural mantle of the Sierra Club protest, a procedural vehicle which Innovative did not file itself within the 21-day deadline required by Rule 25-22.029, F.A.C. FPL contends that, by its Motion for Reconsideration, Innovative is trying to provide Sierra Club with a "third bite" at the apple in this docket. FPL asserts that, because Innovative failed to timely intervene or protest the PAA Order, Innovative is not a party to this proceeding. Thus, Innovative cannot seek reconsideration of the Order Denying Sierra Club's Protest pursuant to Rule 25-22.0376, F.A.C., which limits such motions to a "party."

FPL further asserts that, even if we permit Innovative to intervene in this proceeding, Innovative has failed to identify a single mistake of fact or law in Order No. PSC-2017-0358-PCO-EI. FPL argues that, pursuant to Rule 25-22.0376, F.A.C., and well established legal precedent, the standard for reconsideration of an order is to bring to our attention some point of fact or law that was overlooked or failed to be considered when the Prehearing Officer rendered the order. FPL argues that Innovative has failed to meet this burden and thus, has failed to establish any lawful ground for reconsideration of the Order Denying Sierra Club's Protest.

Conclusion

While acknowledging that Sierra Club was denied standing for "failure to demonstrate that its interests would be substantially affected," Innovative fails to identify any mistake of fact or law, in the Order Denying Sierra Club's Protest, that would have supported Sierra Club's standing. Instead, Innovative attempts to cure Sierra Club's lack of standing by alleging new facts which are intended to demonstrate Innovative's own standing to protest our PAA Order which Innovative failed to timely protest. Stated differently, Innovative attempts to substitute itself for Sierra Club to bolster the allegations in Sierra Club's Protest by making new arguments to cure Sierra Club's deficient pleading and, in turn, seeks reconsideration. A party cannot use reconsideration to make new arguments or seek to bolster a deficient pleading. *See* Order No. PSC-11-0097-FOF-WS, Issued on February 2, 2011, in Docket No 100318-WS, *In re: Petition for order to show cause against Service Management Systems, Inc. in Brevard County for failure to properly operate and manage water and wastewater system*. ("A motion for reconsideration is not the appropriate vehicle for bolstering allegations and making new arguments to cure an earlier, deficient pleading.").

Because Innovative has failed to bring to our attention some point of fact or law that the Prehearing Officer overlooked or failed to consider in the Order Denying Sierra Club's Protest, Innovative has failed to meet the standards for reconsideration set forth in *Diamond Cab Company of Miami v. King, Stewart Bonded Warehouse, Inc. v. Bevis*, and *Pingree v. Quaintance*. Therefore, we deny Innovative's Motion for Reconsideration of the Order Denying Sierra Club's Protest.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Innovative Solar Systems, LLC's Petition to Intervene is denied. It is further

ORDERED that Innovative Solar Systems, LLC's Motion for Reconsideration of the Order Denying Sierra Club's Petition is denied. It is further

ORDERED that this docket shall be closed upon the issuance of an order consummating Order No. PSC-2017-0287-PAA-EI.

By ORDER of the Florida Public Service Commission this 9th day of November, 2017.



HONG WANG

Chief Deputy Commission Clerk
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

CWM

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.