

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for a limited proceeding to
approve third solar base rate adjustment, by
Duke Energy Florida, LLC.

DOCKET NO. 20200153-EI
ORDER NO. PSC-2020-0271-PCO-EI
ISSUED: July 28, 2020

ORDER DENYING INTERVENTION

The Commission approved Duke Energy Florida, LLC's (DEF) 2017 Second Revised and Restated Settlement Agreement (2017 Settlement) by Order No. PSC-2017-0451-AS-EU, issued on November 20, 2017.¹ The 2017 Settlement allows DEF to seek cost recovery for solar generation that meets the terms of Paragraph 15. DEF may construct up to 700 MW of solar generation through 2022 that would be eligible for recovery through the Solar Base Rate Adjustment (SoBRA) mechanism.

On May 29, 2020, DEF filed its petition for a limited proceeding seeking approval for its third SoBRA. In its petition, DEF seeks cost recovery for its Twin Rivers Solar Power Plant and Santa Fe Solar Power Plant (scheduled to go into service in early 2021), and Charlie Creek Solar Power Plant, Duette Solar Power Plant, and Archer Solar Power Plant (scheduled to go into service in the fourth quarter of 2021). An Order Establishing Procedure was issued on July 10, 2020,² and an administrative hearing is scheduled on October 6, 2020.

Petition for Intervention

By motion dated July 2, 2020, Hardee Dydo Solar LLC (Hardee) requested permission to intervene in this proceeding (Petition). Hardee states that it is a developer of utility scale solar projects and that it has plants in development that are located within DEF's service territory. In seeking to intervene in this proceeding, Hardee states that it is willing to supply DEF with solar power at rates ten percent lower than the revenue requirement being sought by DEF. Hardee argues that because it can provide such lower-cost power to DEF, DEF is "imprudently affecting [its own] production and operating costs, the competitiveness of industry in DEF's service territory, the level of sustainable employment in the region and costs to ratepayers estimated at a Net Present Value of \$10 - \$20 million per project."

DEF's Response in Opposition

DEF filed its response in opposition to Hardee's Petition on July 9, 2020 (Response). DEF argues that the allegations made within Hardee's Petition do not satisfy either prong of the standing test set forth in Agrico Chemical Company v. Department of Environmental Regulation,

¹ Order No. PSC-2017-0451-AS-EU, issued November 20, 2017, in Docket No. 20170183-EI, *In re: Application for limited proceeding to approve 2017 second revised and restated settlement agreement, including certain rate adjustments, by Duke Energy Florida, LLC*

² Order No. PSC-2020-0230-PCO-EI, issued July 10, 2020, in Docket No. 20200153-EI, *In re: Petition for a limited proceeding to approve third solar base rate adjustment, by Duke Energy Florida, LLC*.

406 So. 2d 478, 482 (Fla. 2d DCA 1981). DEF argues that Hardee's interest in selling undefined energy to DEF at allegedly lower rates than the rates proposed in DEF's petition is too remote and speculative to confer standing to participate in this proceeding. DEF states that this proceeding was established to consider DEF's petition for its third SoBRA as permitted by, and in accordance with, the factors for review included in the 2017 Settlement. DEF argues that because the protection of Hardee's economic interests is not included in these factors, an impact to those interests does not support intervenor standing in this proceeding. Additionally, DEF argues that even if Hardee was to be permitted to intervene in this proceeding, Hardee's Petition raises two issues expressly questioning the prudence of DEF's SoBRA projects, which DEF believes to be outside of the scope of the Commission's consideration in this docket. DEF therefore argues that Hardee's Petition should be denied. On July 15, 2020, Hardee filed a response to DEF's opposition to Hardee's intervention petition.³

Standards for Intervention

Pursuant to Rule 28-106.205, F.A.C., persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding and who desire to become parties may move for leave to intervene. Motions for leave to intervene must be filed at least twenty (20) days before the final hearing, must comply with Rule 28-106.204(3), F.A.C., and 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. Intervenors take the case as they find it.

To have standing, the intervenor must meet the two-prong standing test set forth in Agrico. The intervenor must show that (1) he will suffer injury in fact that is of sufficient immediacy to entitle him to a Section 120.57, F.S., hearing, and (2) the substantial injury is of a type or nature that 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. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

Analysis & Ruling

Hardee is not an original party to this proceeding and has not asserted that it is entitled to intervene as a matter of statutory or constitutional right. Thus, Hardee must plead sufficient facts to demonstrate that its substantial interests will be affected through this proceeding in order to be granted intervention. Hardee's substantial interest in this proceeding, as demonstrated in the Petition, is that of a potential supplier of energy to DEF. Given this interest, and upon review of

³ Our rules do not contemplate a response to a response. We consider such pleadings inappropriate, and the arguments raised are not considered herein.

its Petition and the facts alleged therein, Hardee does not satisfy the two-prong test established by Agrico to establish standing to intervene in this proceeding.

The first prong established within Agrico requires that the intervenor show that it will suffer injury-in-fact, which is of sufficient immediacy to entitle it to a Section 120.57, F.S., hearing. Additionally, the injury-in-fact must be both real and immediate and not speculative or conjectural. Hardee has not shown that it may suffer an immediate or direct injury as a result of the outcome in this proceeding. Rather, Hardee simply alleges that because it can provide cheaper power to DEF and that DEF's refusal to purchase such power will purportedly increase DEF's costs, and the overall competitiveness of industries within DEF's service territory and sustainable employment in DEF's region will be impacted "imprudently."

Hardee's allegations of harm are abstract and speculative, and not direct to Hardee. The First District Court of Appeal stated in Village Park Mobile Home Ass'n, that the "petitioner must allege that [it] has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct."⁴ Hardee does not identify any direct injury to itself in its Petition, and instead relies on an abstract and speculative argument regarding negative impacts to "sustainable employment" and economic competition in DEF's service territory. As DEF pointed out in its Response, the Commission has found that an indirect effect on economic competition does not meet the "immediacy" test of Agrico. Order No. PSC-02-0324-PCO-EI, issued March 13, 2002, in Docket No. 001148-EI, In re: Review of the retail rates of Florida Power & Light Company (citing Fla. Soc. of Ophthalmology v. State, Bd. of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988)).

The second prong of the test in Agrico requires that the substantial injury alleged in support of standing be of a type or nature which the proceeding is designed to protect. DEF filed the petition to initiate this proceeding pursuant to Section 366.076(1), F.S., which authorizes the Commission to conduct limited proceedings on any issue within its jurisdiction and to limit the issues under consideration in those proceedings. The limited purpose of this proceeding is to consider DEF's petition for its third SoBRA, as permitted by the 2017 Settlement, and in accordance with the factors for review included in that Agreement.

Hardee does not address the second prong of Agrico in its Petition, nor does it clearly convey what its substantial interest is in this proceeding that the proceeding is designed to protect. However, from a review of the Petition as a whole, it appears that Hardee's alleged substantial interest is that of a potential supplier of solar power to DEF. This proceeding is not designed to protect or consider the commercial interests of an individual potential supplier of energy to an electric utility, or broad notions of industry competitiveness or sustainable employment. As a result, Hardee has not satisfied the second prong of Agrico because the substantial injury alleged is not of a type or nature which this proceeding is designed to protect.

Agencies are directed to carefully review a petition to determine whether it is in substantial compliance with applicable procedural rules. Section 120.57(2)(c), F.S. In this

⁴ Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987)

instance, one of the applicable procedural rules requires that the moving party identify 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 agency rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the proceeding. Rule 28-106.205, F.A.C. For the reasons discussed above, Hardee has not identified in its petition a legally cognizable substantial interest to support its intervention.

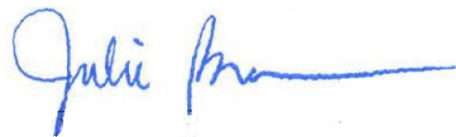
Pursuant to Section 120.57(2)(c), F.S., where a petition fails to substantially comply with applicable procedural rules, an agency must dismiss that petition, with the first dismissal being without prejudice unless it conclusively appears from the face of the petition that the defect cannot be cured.

For the reasons stated above, Hardee has failed to meet the legal standard for intervention; therefore, its Petition to intervene is denied without prejudice.

Based on the above representations, it is

ORDERED by Commissioner Julie I. Brown, as Prehearing Officer, that Hardee Dydo Solar LLC's request for leave to intervene in Docket No. 20200153-EI is hereby denied without prejudice.

By ORDER of Commissioner Julie I. Brown, as Prehearing Officer, this 28th day of July, 2020.



JULIE I. BROWN
Commissioner and Prehearing Officer
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

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

NOTICE OF FURTHER PROCEEDINGS OR 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) 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. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.