

Ruth Nettles

090372-EQ

From: Rhonda Dulgar [rdulgar@yvlaw.net]
Sent: Tuesday, February 09, 2010 6:04 PM
To: Filings@psc.state.fl.us
Subject: Fwd: Electronic Filing - Docket 090372-EQ
Attachments: 090732.FBE.MTD.2-9-10.pdf

To the PSC Commission Clerk:

Attached for filing is Florida Biomass Energy LLC's Motion to Dismiss the protest of US Funding Group in Docket No. 090372-EQ. As you will see from the time of my earlier e-mail, I served this motion on all parties electronically at 4:37 p.m., but I inadvertently failed to address that e-mail to the Clerk's electronic filings address. Accordingly, I respectfully ask that you accept it for filing at this time.

Thank you very much for your consideration and attention to this matter. If you have any questions, please call me or Schef Wright at 222-7206.

Respectfully,
Rhonda Dulgar

>>> Rhonda Dulgar 2/9/2010 4:37 PM >>>

a. Person responsible for this electronic filing:

Robert Scheffel Wright
Young van Assenderp, P.A.
225 South Adams Street, Suite 200
Tallahassee, FL 32301
(850) 222-7206
swright@yvlaw.net

b. 090372-EQ
In Re: Petition for Approval of Negotiated Power Contract with FB Energy, LLC by Progress Energy Florida.

c. Document being filed on behalf of Florida Biomass Energy, LLC.

d. There are a total of 8 pages.

e. The document attached for electronic filing is Florida Biomass Energy, LLC's Motion to Dismiss.

(see attached file: 090732.FBE.MTD.2-9-10.pdf)

Thank you for your attention and assistance in this matter.

Rhonda Dulgar
Secretary to Schef Wright
Phone: 850-222-7206
FAX: 850-561-6834

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida.

DOCKET NO. 090372-EQ
ORDER NO. PSC-09-0852-PAA-EQ
ISSUED: February 9, 2010

FLORIDA BIOMASS ENERGY, LLC'S MOTION TO DISMISS

FLORIDA BIOMASS ENERGY, LLC ("FB Energy"), pursuant to Rule 28-106.204(2), Florida Administrative Code ("F.A.C."), hereby files this motion to dismiss the Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract (the "Petition") filed in this proceeding by U.S. Funding Group, LLC ("Funding Group") on January 20, 2010.

In summary, the Commission must dismiss Funding Group's Petition because Funding Group has failed to state how its substantial interests will be affected by the proposed agency action, thus Funding Group lacks standing to pursue its protest and request for a hearing. Specifically, Funding Group is not a customer of Progress Energy Florida, and therefore cannot be substantially affected pursuant to the Commission's statutes applicable to this proceeding. Moreover, the injuries alleged by Funding Group, to wit, that "Funding Group's property will be adversely affected environmentally and economically by the close proximity of FB Energy's Plant," Petition at 2, are clearly of a type that is not subject to the Commission's regulatory

DOCUMENT NUMBER DATE

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FPSC-COMMISSION CLERK

jurisdiction under Chapter 366, Florida Statutes. Accordingly, Funding Group fails to satisfy the standing test set forth in Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

Background

1. On July 16, 2009, Progress Energy Florida, Inc. ("PEF") and FB Energy filed their joint petition for approval of a negotiated purchase power contract (the "PPA"). The PPA contemplates that FB Energy will construct, own, and operate a biomass-powered electrical power plant in Manatee County, Florida and that PEF will purchase power generated by the plant.

2. On December 30, 2009, the Commission issued Order No. PSC-09-0852-PAA-EQ (the "PAA Order") in which the Commission proposed to approve the PPA.

3. On January 20, 2010, Funding Group filed its Petition with the Commission and electronically served a copy of the Petition on FB Energy. This motion to dismiss has been filed within 20 days of service of the Petition; accordingly, the motion to dismiss is timely filed. See Rule 28-106.204(2), F.A.C. (stating that a motion to dismiss shall be filed within 20 days of service of a petition).

Standing

4. Funding Group has failed to adequately allege in the Petition how its substantial interests will be affected by the

PAA Order. Accordingly, Funding Group's Petition must be dismissed.

5. Funding Group's sole explanations as to how its substantial interests will be affected by the PAA Order are set forth in Paragraphs 7 and 22 of the Petition. Paragraph 7 states:

Funding Group's residentially zoned property is located within ¼ mile of the proposed Plant. The sole legal access to Funding Group's property is via Armstrong Road. As part of its zoning application, FB Energy is attempting to vacate and close Armstrong Road. Additionally, Funding Group's property will be adversely affected environmentally and economically by the close proximity of FB Energy's Plant.

Paragraph 22 states:

The Funding Group has substantial interests that are adversely affected for the purposes of Section 120.569 and 120.57, Florida Statutes (2009) by the PSC's Proposed Action and incorporates by reference the allegations set forth above.

6. Section 120.54(5)(b)4.c., Florida Statutes, provides that a petition for administrative hearing shall include:

An explanation of how the petitioner's substantial interests are or will be affected by the action or proposed action.

Rule 28-106.201(2)(b), F.A.C., similarly provides that a petition for administrative hearing shall contain:

an explanation of how the petitioner's substantial interests will be affected by the agency determination.

The Petition fails to meet the pleading requirements set forth in Section 120.54(5)(b)4.c., Florida Statutes, and Rule 28-106.201(2)(b), F.A.C. The allegations in the Petition are legally insufficient to establish Funding Group's standing to participate in this proceeding. Moreover, the Petition does not allege that the Funding Group is a customer of PEF.

7. To establish standing, a petitioner seeking a hearing under Sections 120.569 and 120.57, F.S., must demonstrate:

- 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and
- 2) that his substantial injury is of the type or nature which the proceeding is designed to protect.

Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Both prongs of this two-pronged test must be satisfied for a petitioner to establish standing in a Chapter 120 proceeding. The first prong of the standing test "deals with the degree of injury." Id. To satisfy the first prong, a petitioner must assert that the agency action will result in an injury which is immediate, not remote. The injury cannot be based on speculation or conjecture. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Association v. Florida.

Pari-Mutuel Commission, 561 So. 2d 1224, 1226 (Fla. 3rd DCA 1990) (finding alleged injuries to be "too remote and speculative" to qualify under the first prong of the Agrico test). The second prong of the Agrico test "deals with the nature of the injury." Agrico, 406 So. 2d at 482. The second prong of the Agrico test requires a showing that the injury is of the type and nature which the proceeding is designed to protect. Stated alternatively, a petitioner's injury must fall within the "zone of interest" to be protected by the rules and statutes at issue. Numerous Florida cases addressing the second prong of the Agrico standing test have concluded that a purely economic interest cannot serve as the basis for standing. See, e.g., Agrico, 403 So. 2d at 482; International Jai-Alai Players, 561 So. 2d at 1225-26; see also In Re: Tampa Electric Company dba Peoples Gas System, FPSC Docket No. 011622-EG, Order Granting Motion to Dismiss, 2002 WL 1559716 (dismissing a petition for failing to meet the second prong of the Agrico test).

8. Funding Group's only asserted interests in this matter are that its property "will be adversely affected environmentally and economically by the close proximity of FB Energy's Plant." Petition at 2. Funding Group's alleged interests fail to meet either prong of the Agrico test. With regard to the first prong, Funding Group's conclusory

allegations that it will be affected "environmentally and economically" are purely speculative and thus insufficient to establish standing to participate in this proceeding. With regard to the second prong of the Agrico test, Funding Group does not allege an injury that falls within the zone of interest that this proceeding is designed to protect. Funding Group's alleged "environmental and economic" injuries do not fall within the scope of Chapter 366, Florida Statutes. Moreover, Funding Group is not a customer of PEF. In sum, Funding Group has not and cannot allege facts sufficient to meet the second prong of the Agrico test and its Petition should be dismissed.

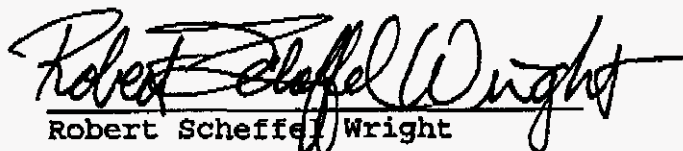
9. In addition, a petition for administrative hearing must comply with the pleading requirements set forth in Section 120.54(5)(b)4., Florida Statutes, and 28-106.201(2), F.A.C. See Brookwood Extended Care Centers of Homestead, LLP v. Agency for Healthcare Administration, 870 So. 2d 834, 838-39, 841 (Fla. 3d DCA 2003) (upholding dismissal of a petition for formal administrative hearing that failed to comply with the statutory and rule pleading requirements, but granting leave to file an amended petition). Funding Group's general and conclusory allegations concerning how their substantial interests will be affected are legally insufficient to meet the pleading requirements of Section 120.54(5)(b)4., Florida Statutes, and

Rule 28-106.201(2), F.A.C., thus, the Funding Group's Petition should be dismissed.

10. On information and belief, FB Energy believes that certain of Funding Group's allegations are untrue, in part or in whole, as well as impertinent and irrelevant, and FB Energy may move to strike such objectionable material. Finally, on information and belief, FB Energy believes that Funding Group's Petition has been filed for the improper purpose of delaying FB Energy's project and unnecessarily increasing FB Energy's costs of developing its project.

WHEREFORE, for the reasons set forth, FB Energy, LLC respectfully moves the Commission to enter its order dismissing U.S. Funding Group's Petition and granting such other relief as the Commission deems appropriate.

Respectfully submitted this 9th day of February, 2010.



Robert Scheffel Wright
Florida Bar No. 966721
John T. LaVia, III
Florida Bar No. 853666
Young van Assenderp, P.A.
225 South Adams Street
Suite 200
Tallahassee, Florida 32301
(850) 222-7206 Telephone
(850) 561-6834 Facsimile

Attorneys for FB Energy, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery and U.S. Mail this 9th day of February, 2010, to the following:

Jean Hartman/Jennifer Brubaker
Florida Public Service Commission
Office of the Public Counsel
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

John Burnett
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, Florida 33733

Paul Lewis, Jr.
Progress Energy Florida, Inc.
106 East College Avenue
Suite 800
Tallahassee, Florida 32301

Stacy L. Dillard-Spahn
Robert K. Lincoln
Icard, Merrill, Cullis, Timm,
Furen & Ginsburg, P.A.
2033 Main Street, Suite 600
Sarasota, Florida 34237

Richard Jensen
FB Energy, LLC
100 Third Avenue West
Bradenton, Florida 34205


Attorney