

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-10-0256-FOF-EQ
ISSUED: April 26, 2010

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR
NATHAN A. SKOP
BEN A. "STEVE" STEVENS III

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

Background

On July 16, 2009, Progress Energy Florida, Inc. (PEF or Company) filed a petition requesting approval of a contract for the purchase of firm capacity and energy between PEF and Florida Biomass Energy, LLC (FB Energy). The contract is based on FB Energy constructing, owning, and operating a fluidized bed boiler power production generating Qualifying Facility located in Manatee County, Florida. The facility will use a waste wood and energy crop as its primary fuel to produce approximately 60 megawatts of electricity during a contract term beginning January 1, 2013, through December 31, 2032.

We approved the proposed contract at our December 1, 2009, Agenda Conference, and subsequently issued Order No. PSC-09-0852-PAA-EQ on December 30, 2009, approving the contract between PEF and FB Energy (PAA Order). On January 20, 2010, US Funding Group, LLC (Funding Group) timely filed its Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract (Petition). On February 10, 2010, FB Energy filed its Motion to Dismiss Funding Group's Petition (Motion to Dismiss). Funding Group filed its Response and Amended Response to FB Energy's Motion to Dismiss on February 17 and February 18, 2010, respectively.

This matter is now before us for the purpose of resolving FB Energy's Motion to Dismiss. We have jurisdiction over this matter pursuant to Sections 366.051, 366.81, and 366.91, Florida Statutes (F.S.).

FB Energy's Motion to Dismiss

On January 20, 2010, Funding Group timely filed its Petition Protesting our PAA Order approving the negotiated purchase power contract entered into by FB Energy and PEF. On February 9, 2010, FB Energy filed its Motion to Dismiss Funding Group's Petition.

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FPSC-COMMISSION CLERK

FB Energy seeks to dismiss Funding Group's Petition on the grounds that Funding Group's Petition fails to meet the pleading requirements set forth in applicable Florida Statutes and Rules of Administrative Procedure, and because the allegations in the Petition are legally insufficient to establish Funding Group's standing to pursue its protest and request for a hearing in this proceeding. FB Energy states that Funding Group is not a customer of PEF and therefore cannot be substantially affected pursuant to our statutes applicable to this proceeding. FB Energy also argues that the injuries alleged in Funding Group's Petition are not of the type subject to our regulatory jurisdiction under Chapter 366, F.S., and that Funding Group fails to satisfy the standing test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

Funding Group's Response

On February 17 and February 18, 2010, respectively, Funding Group filed its Response and Amended Response to FB Energy's Motion to Dismiss (Response).¹ Funding Group argues that its Petition in its entirety, specifically paragraphs 4, 7, and 33, identifies its substantial interests that are or will be affected by our proposed action, and accordingly, is legally sufficient to establish Funding Group's standing. Funding Group also requests that we refer this matter to the Division of Administrative Hearings (DOAH) to conduct a hearing on its Petition, and requests that if we dismiss Funding Group's Petition, that it be without prejudice so that it may file an Amended Petition curing any identified defects.

Analysis and Decision

For the reasons discussed below, we agree with FB Energy that the allegations set forth in Funding Group's Petition fail to satisfy the two-prong test required by Agrico. Thus, Funding Group's Petition shall be dismissed on the grounds that it lacks standing to pursue its protest and request for a hearing.

Pursuant to Section 120.569, F.S., any person whose substantial interests are to be determined by agency action may institute proceedings by filing a petition or request for hearing with the agency responsible for making the determination. Rule 28-106.201, Florida Administrative Code (F.A.C.), sets forth the items required of petitions that initiate proceedings determining substantial interests.

Two-Prong Test to Establish Standing

A person whose substantial interests are to be determined by agency action and who seeks a hearing before an agency must meet the two-prong standing test set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The petitioner must show that (1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (2) this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the

¹ Funding Group's "Response" and "Amended Response" to FB Energy's Motion to Dismiss are substantially identical, and thus will be treated as the same document and referred to collectively as "Response."

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). Further, a purely economic interest cannot serve as the basis for standing. See, Agrico, 403 So.2d at 482; International Jai-Alai Players, 561 So. 2d at 1225-26.

Funding Group asserts that paragraphs 4, 7 and 33 of its Petition identify its "substantial interests that are or will be affected by the proposed action."² According to Paragraph 4 of its Petition, Funding Group owns property in Manatee County that is located in the immediate vicinity of the proposed plant that is the subject of our PAA Order. Paragraph 7 of Funding Group's Petition also refers to its residentially-zoned property located in the vicinity of the proposed plant. Funding Group states that the sole access to its property is via a road that FB Energy is attempting to vacate and close as part of FB Energy's zoning application. Funding Group also asserts that its property will be "adversely affected environmentally and economically by the close proximity of FB Energy's Plant." Funding Group's only other assertion regarding its substantial interests is in paragraph 22 of its Petition, which states that it "has substantial interests that are adversely affected for the purpose of Section 120.569 and 120.57, Florida Statutes (2009) by the PSC's proposed Action."

We find that Funding Group's asserted substantial interests fail to meet either prong of the standing test set forth in Agrico. As stated above, in order to satisfy the first prong of the test, Funding Group must show that it will suffer an injury in fact which is both real and immediate, not speculative or conjectural, and which is of sufficient immediacy to entitle it to a Section 120.57 hearing. Funding Group's general assertions that its property will be adversely affected environmentally by the proximity of the proposed plant is far too speculative in nature to satisfy the required showing set forth in Agrico. Furthermore, a purely economic interest cannot serve as the basis for standing; thus Funding Group's allegation of an economic adverse affect on its property similarly fails.

In order to satisfy the second prong of the Agrico test, a petitioner must show that the alleged substantial injury is of a type or nature which the proceeding is designed to protect. Even if the alleged injury was found to be real and immediate, Funding Group still fails on the second prong as this Commission clearly does not have the authority to address zoning issues related to roads surrounding the proposed plant. Nor are we vested with the authority to address the environmental concerns raised by Funding Group. Finally, as pointed out by FB Energy, Funding Group is not a customer of PEF, and therefore cannot allege standing on that basis.

² Funding Group's Petition does not include a paragraph 33.

Failure to Comply with Pleading Requirements

Section 120.569(2)(c), F.S., and Rule 28-106.201, F.A.C., set forth the items that a petition to initiate proceedings determining substantial interests must contain. FB Energy argues that another basis on which to dismiss Funding Group's Petition is that the Petition fails to meet these basic pleading requirements. Specifically, FB Energy argues that the "general and conclusory allegations" regarding Funding Group's substantial interests are legally insufficient. We believe that the pleading requirements of Section 120.569, F.S., and Rule 28-106.201, F.A.C., have been met. However, as discussed previously, we also agree that Funding Group's alleged substantial interests as stated are insufficient to establish its standing to pursue a hearing in this matter according to the Agrico test.

In its Response, Funding Group requests if we grant FB Energy's Motion to Dismiss, that Funding Group be allowed to timely file an Amended Petition curing any identified defect. Section 120.569(2)(c), F.S., provides that dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, *unless it conclusively appears from the face of the petition that the defect cannot be cured* (emphasis added). While Funding Group may vigorously object to the building of FB Energy's proposed plant and while it may also have legitimate concerns as to the effect of the proposed plant to its property, for the reasons discussed above, those concerns are not sufficient to satisfy the standing requirements necessary to pursue a hearing in this proceeding. Thus, we do not believe that the defects identified with respect to Funding Group's Petition can be cured by filing an amended petition.

Finally, we note that Funding Group has requested that its Petition be referred to DOAH for the assignment of an Administrative Law Judge to conduct a hearing on its Petition. With our granting of FB Energy's Motion to Dismiss herein, Funding Group's request is rendered moot. In any event, Funding Group's Petition is not the type of proceeding that we have typically referred to DOAH.³

Conclusion

For the reasons discussed above, we find that the allegations set forth in Funding Group's Petition fail to satisfy the two-prong test required by Agrico. Accordingly, Funding Group's Petition shall be dismissed because it lacks standing to pursue its protest and request for a hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Biomass Energy, LLC's Motion to Dismiss is granted. It is further

³ Historically, we have only referred certain customer disputes to DOAH. See for example, Order No. PSC-05-0806-FOF-EI, issued August 5, 2005, in Docket No. 040208-EI, In re: Consumer complaint against Florida Power & Light Company by Leticia Callard; and Order No. PSC-98-1254-FOF-GU, issued September 22, 1998, in Docket No. 970365-GU, In re: Complaint of Mother's Kitchen Ltd. against Florida Public Utilities Company regarding refusal or discontinuance of service.

ORDERED that US Funding Group, LLC's Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract is hereby dismissed. It is further

ORDERED that Order No. PSC-09-0852-PAA-EQ shall be considered final and the docket shall be closed.

By ORDER of the Florida Public Service Commission this 26th day of April, 2010.



ANN COLE
Commission Clerk

(S E A L)

JSB

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.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, 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.