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090451-EM

From: Rhonda Dulgar [rdulgar@yvlaw.net]
Sent: Wednesday, May 26, 2010 10:05 AM
To: paulastahmer@aol.com; diandv@bellsouth.net; Raymond "Skip" Manasco; Erik Saylor; Filings@psc.state.fl.us; Martha Brown; Theresa Walsh; Schef Wright
Subject: Electronic Filing - Docket 090451-EM
Attachments: 090451.GRU-GREC.Resp2AmdReq4OfficialRec.5-26-10.pdf

a. Person responsible for this electronic filing:

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b. 090451-EM

In Re: Joint Petition to Determine Need for Gainesville Renewable Energy Center in Alachua County, by Gainesville Regional Utilities and Gainesville Renewable Energy Center, LLC.

c. Document being filed on behalf of Gainesville Regional Utilities and Gainesville Renewable Energy Center, LLC.

d. There are a total of 11 pages.

e. The document attached for electronic filing is Gainesville Regional Utilities and Gainesville Renewable Energy Center, LLC's Response in Opposition to Intervenors' Amended Request for Official Recognition.

(see attached file: 090451.GRU-GREC.Resp2AmdReq4OfficialRec.5-26-10.pdf)

Thank you for your attention and assistance in this matter.

Rhonda Dulgar
 Secretary to Schef Wright
 Phone: 850-222-7206
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5/26/2010

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: JOINT PETITION TO DETERMINE NEED)
FOR GAINESVILLE RENEWABLE ENERGY CENTER) DOCKET NO. 090451-EM
IN ALACHUA COUNTY, BY GAINESVILLE)
REGIONAL UTILITIES AND GAINESVILLE) DATED: May 26, 2010
RENEWABLE ENERGY CENTER, LLC.)
_____)

GAINESVILLE REGIONAL UTILITIES AND
GAINESVILLE RENEWABLE ENERGY CENTER, LLC'S
RESPONSE IN OPPOSITION TO INTERVENORS' AMENDED REQUEST
FOR OFFICIAL RECOGNITION

Gainesville Regional Utilities ("GRU") and Gainesville Renewable Energy Center, LLC ("GREC LLC") (collectively the "Petitioners"), by and through undersigned counsel, hereby file their response in opposition to Dian Deevey's and Paula Stahmer's (collectively, the "Intervenors") "Joint Amended Emergency Motion to Reopen the Record and for Request for Official Recognition of New Greenhouse Gas Emissions Rule Issued by the United States Environmental Protection Agency" (the "Amended Request for Official Recognition" or the "Amended Request"). In summary, the Amended Request for Official Recognition asks that the Commission reopen the record to take official recognition of a Final Rule issued by the United States Environmental Protection Agency and entitled "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" (the "Tailoring Rule"). Alternatively, the Amended Request asks the Commission to allow the parties to "present evidence and testimony regarding the likely impact" of the

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Tailoring Rule on the Gainesville Renewable Energy Center (the "GREC" or the "Project"). Amended Request at 9. For the reasons discussed below, the Commission should deny the Intervenor's Amended Request because:

- (a) the Amended Request for Official Recognition is not timely;
- (b) no basis exists to reopen the record to permit the Intervenor to present evidence concerning the Tailoring Rule because the Intervenor had ample opportunity to present any such evidence at the May 3, 2010 technical hearing in this docket, and opted not to do so;
- (c) importantly, the Tailoring Rule addresses only the potential applicability of greenhouse gas ("GHG") permitting requirements to biomass-fueled power plants that emit more than the rule-defined threshold of GHG emissions under the Prevention of Significant Deterioration ("PSD") and Title V Operating Permit ("Title V") programs; and
- (d) perhaps most importantly, the Tailoring Rule does not impose any actual regulatory requirement or burden on the Project, nor does it affect or determine the Project's "carbon neutrality" or the availability of renewable attributes for the Project.

A. The Amended Request for Official Recognition is Untimely.

1. The Intervenors filed their Joint Emergency Motion to Reopen the Record and for Official Recognition of New Greenhouse Gas Emissions Rule Issued by the United States Environmental Protection Agency (the "Initial Request") on May 24, 2010. On May 25, 2010, the Intervenors filed their Amended Request. The technical evidentiary hearings in this matter were held on December 16, 2009 and May 3, 2010, and thus the Initial Request was filed three weeks after the second (supplemental) scheduled hearing date. The controlling procedural order, No. PSC-09-0671-PCO-EM, requires that any request for official recognition must be filed at least two business days prior to the first scheduled hearing date. Thus, the deadline for filing any such request was April 30, 2010. The Intervenors filed their Initial Request 24 days late and the Initial Request (and the Amended Request) must be denied as untimely.

2. The Intervenors' characterization of their pleading as an "emergency motion"¹ is equally misplaced, because there is no "emergency" relative to their ability to notify the Commission

¹ In the first instance, the Intervenors concede that the EPA published the final Tailoring Rule on May 14, 2010. Thus, they could have filed at least nine days earlier, but this misses the more significant point, developed below, that there is no "emergency" here because the Intervenors have had literally months to advise the Commission of the existence of the Tailoring Rule docket, and to present testimony regarding its potential impact, but simply failed to do so. Thus, whether considering the nine-day delay from the final Rule's publication, or the seven-month delay from the original publication of the proposed Tailoring Rule, the Intervenors simply sat on their hands.

of the EPA's Tailoring Rule. While the final Tailoring Rule was published on May 14, 2010, this rulemaking docket has been open since at least as early as October 27, 2009, when the Notice of Proposed Rulemaking for the Tailoring Rule was published.² Prevention of Significant Deterioration and Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55292 (Oct. 27, 2009). The EPA then held multiple public hearings and allowed interested parties to provide oral presentations and written comments on the proposed rule. Id.; see also 74 Fed. Reg. 57126 (Nov. 4, 2009) (providing notice of public hearings).

² Intervenors go to great length in their Amended Request to assert that an e-mail from Intervenor Deevey to Petitioners' counsel on or about May 19, 2010 somehow provided notice to Petitioners of adoption of the Tailoring Rule. See Amended Request at 2-3. Intervenor Deevey's e-mail did no such thing. Petitioners have been aware of and actively monitoring EPA's Tailoring Rule docket since at least early November, 2009. Petitioners did not address the Tailoring Rule in this docket because, as discussed in depth below, the Tailoring Rule is not relevant to the issues to be determined within this docket.

With regard to the e-mail exchange referenced in Intervenors' Amended Request, one point needs to be clarified. After receiving what appeared to be an inadvertent e-mail from Intervenor Deevey (that was not addressed to any other parties in this docket), Petitioners' counsel responded as follows: "I think you inadvertently included me as a recipient of this e-mail. If you did, please remove me from the list. Thanks." Intervenor Deevey responded as follows: "I didn't put you on the cc list and can't explain why you got this e-mail. Won't happen again." Thus, it is clear that Intervenors did not inform Petitioners' counsel of the Tailoring Rule intentionally and Intervenors' attempt to characterize the e-mail exchange as an effort to bring the Tailoring Rule to the attention of Petitioners is a gross mischaracterization.

B. The Commission Should Deny the Intervenors' Amended Request to Reopen the Record Because They Waived Their Opportunity to Present Evidence On the Tailoring Rule to the Commission.

3. The Intervenors also seek leave to reopen the record to "present evidence and testimony regarding the likely impact of the [Tailoring Rule] on GREC." Amended Request at 9. No basis exists to reopen the record and the Commission should reject the Intervenors' Amended Request.

4. As stated above, the Tailoring Rule was available and openly debated in multiple public forums. If the Intervenors believed it was relevant to the issues in this proceeding, they could have and should have addressed it in their prefiled testimony (due on March 29, 2010 but which they chose not to file at all), at the May 3, 2010 technical hearing, or in their post-hearing briefs. They did not and they have waived their multiple opportunities to do so. There is simply no valid rationale for reopening the record to allow the Intervenors to present evidence and testimony³ at this late date. In fact, much of the Intervenors' Amended Request simply represents an improper attempt to reargue issues they could have and, if they believed them relevant, as they now assert, should have addressed - but did not address - in their prefiled testimony, cross-examination, or post-hearing briefs.

³ As noted above, the Intervenors did not pre-file any testimony in this proceeding. This was their choice, and they should not be allowed to supplement non-existent testimony now.

5. The Tailoring Rule was available for consideration in this proceeding more than five months before the March 29, 2010 deadline for Intervenors to file their prefiled testimony. Though the Intervenors had ample opportunity to offer testimony concerning the purported relevance⁴ of the Tailoring Rule to this proceeding, to cross-examine the Petitioners' witnesses concerning the Tailoring Rule, or to seek official recognition of the proposed Tailoring Rule, they opted not to take any of these obviously available procedural steps to attempt to make their case or to advise the Commission in any way of the possible relevance of the EPA's pending Tailoring Rule. Accordingly, the Intervenors have waived their opportunity to present evidence on this subject matter, and their motion should be denied.

C. The Intervenors Misrepresent the Relevance of the Tailoring Rule to this Proceeding.

6. The Intervenors' assertion that the Tailoring Rule will have an impact on the financial viability of the Project demonstrates either a fundamental misunderstanding or a clear misrepresentation of the purpose of the Tailoring Rule. Either way, the Commission should reject the Intervenors' assertions and deny their motion.

⁴ As discussed more fully in the next section of this response, the Petitioners strongly believe that the Tailoring Rule is in no way relevant to the issues to be determined in this proceeding.

7. The Tailoring Rule represents EPA's approach to limiting the scope of its potential regulation of GHG emissions under the PSD and Title V programs of the Clean Air Act. The Tailoring Rule establishes thresholds for GHG emissions to determine which facilities will be required to obtain PSD and Title V permits. In the Tailoring Rule, EPA determined that some GHG sources (e.g., small farms and restaurants) are categorically excluded from being required to obtain PSD or Title V permits for the GHG emissions while larger facilities with GHG emissions exceeding specified thresholds will require PSD or Title V permits. With regard to GHGs generated by biomass combustion, the EPA decided not to provide a categorical exclusion at this time; however, the EPA specifically found that this determination does not foreclose EPA from creating an exclusion at a later date. Tailoring Rule at 421.

8. Moreover, the Tailoring Rule does not purport to determine what the ultimate treatment of the Project would be; to the contrary, the EPA plainly states that it has not taken "a final position" on the matter, and in fact states its plans "to seek further comment on how we might address emissions of biogenic carbon dioxide under the PSD and title V programs through further action, such as a separate Advance Notice of Proposed Rulemaking." Id. at 421-22.

9. In summary, the Tailoring Rule is a permitting rule that establishes when facilities will be required to obtain PSD or Title V permits for GHG emissions. The Tailoring Rule does not require the Project, or any other biomass-fueled power plant, to meet any maximum emission limit for carbon dioxide or other GHG emissions. The Rule does not subject the Project to any requirement to obtain any emissions allowances. By the terms of the final Tailoring Rule itself, whether and how biomass-fueled power plants will ultimately be subject to regulatory requirements for their biogenic CO₂ emissions, or whether the Project will be subject to any such requirements, are issues that will be addressed in future EPA proceedings, and are thus entirely speculative at this time. See esp. Tailoring Rule at 421 (recognizing that the Tailoring Rule does not foreclose EPA's ability to provide a generic exclusion for biomass sources, or to provide other exclusions based on other rationales at a later time).

CONCLUSION

10. The Intervenors' attempt to bootstrap the Tailoring Rule into this proceeding is misplaced, both temporally and substantively. The Tailoring Rule does not directly or indirectly determine whether biomass facilities such as the Project are "carbon neutral" for the purposes of a GHG "cap and

trade" program. The Tailoring Rule does not address the future availability of renewable energy credits, carbon allowances, or other renewable attributes to biomass facilities, nor does it require biomass facilities to obtain CO₂ emissions allowances or to comply with any other regulation of greenhouse gases. As discussed in witness Ed Regan's testimony, the determination of these issues will ultimately be made by Congress. See STR 454-58.

11. In summary, Intervenors' Amended Request represents much ado about nothing. The Tailoring Rule simply does not do what the Intervenors claim it does, and absolutely no need exists to address the Tailoring Rule in this proceeding.

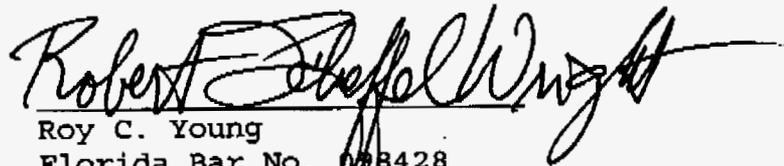
12. Because the Intervenors' Initial Request and Amended Request are both untimely and irrelevant, Petitioners believe that no substantive discussion of the hypothetical impacts of the Tailoring Rule on the Project is necessary or appropriate. Accordingly, Petitioners are not requesting oral argument. However, if there were to be any consideration of having substantive discussion of the possible relationship of the Tailoring Rule to the Commission's decisions on the merits of the requested need determination, the Petitioners believe that they should have the opportunity to address the procedural questions as to why the Intervenors' requests for official

recognition and to reopen the record should be denied.

WHEREFORE, Gainesville Regional Utilities and Gainesville Renewable Energy Center, LLC, respectfully request that the Commission deny all relief requested by the Intervenors in their Amended Request for Official Recognition.

Respectfully submitted this 26th day of May, 2010.

Young van Assenderp, P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by United States Mail and electronic mail on this 26th day of May, 2010.

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