

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 17, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (J.Crawford) *JSC JB SAB ALT*
Division of Regulatory Analysis (Brown)

RE: Docket No. 090372-EQ – Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida.

AGENDA: 06/29/10 – Regular Agenda – Decision on Motion for Reconsideration – Oral argument not requested; participation is at Commission’s discretion

COMMISSIONERS ASSIGNED: Argenziano, Edgar, Skop

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\090372.RCM.DOC

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Case 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.

The Commission approved the proposed contract at its December 1, 2009, Agenda Conference, and subsequently issued Order No. PSC-09-0852-PAA-EQ on December 30, 2009,

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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.

By Order No. PSC-10-0256-FOF-EQ, issued April 26, 2010, the Commission granted FB Energy's Motion to Dismiss, stating that Funding Group's Petition failed to demonstrate it had standing to pursue a protest and request a hearing under the two-prong test required by Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

On May 11, 2010, Funding Group filed a Motion for Reconsideration of Order No. PSC-10-0256-FOF-EQ, stating that it should have been given leave to amend its protest of Order No. PSC-09-0852-PAA-EQ. On May 18, 2010, FB Energy filed a Response to the Motion for Reconsideration, stating its belief that Order No. PSC-10-0256-FOF-EQ was correct on all points, but that in an abundance of caution, Funding Group should be given leave to amend its protest.

This recommendation addresses Funding Group's Motion for Reconsideration. While none of the parties requested oral argument pursuant to Rule 25-22.022(1), Florida Administrative Code (F.A.C.), staff notes that oral argument may be heard at the Commission's discretion pursuant to Rule 25-22.022(7)(b), F.A.C. The Commission has jurisdiction over this matter pursuant to Sections 366.051, 366.81, and 366.91, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should US Funding Group, LLC's Motion for Reconsideration be granted?

Recommendation: Yes. Funding Group should be given leave to file an amended protest of Order No. PSC-09-0852-PAA-EQ within fifteen days of the date the order on reconsideration issues. If filed, the amended protest should comport with the requirements of Rule 28-106.201, F.A.C., and should conclusively show why Funding Group has standing. (J.Crawford)

Staff Analysis:

Standard of Review

The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., 294 So. 2d at 317.

Funding Group's Motion

In its Motion for Reconsideration, Funding Group cites to Section 120.569(2)(c), F.S., which provides that dismissal of a petition shall, at least once, be without prejudice to the 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. In Order No. PSC-10-0256-FOF-EQ, the Commission stated that:

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.

Funding Group asserts that this statement is legally insufficient to meet the requirements of the statute, and do not support a dismissal without granting an opportunity for leave to amend. See,

e.g., City of Winter Park v. Metropolitan Planning Org. for Orlando Urban Area, 765 So. 2d 797, 798 (Fla. 1st DCA 2000)(on remand, the administrative law judge was required to enter an amended order setting forth with specificity the reasons for the dismissal and was to either provide the cities with an opportunity to amend their petition or state with specificity why any defect in the petition could not be cured by amendment).

Funding Group asserts that by dismissing its protest without granting leave to amend, and without findings of fact to conclusively establish that Funding Group *could not* plead a basis for standing, the Commission failed to consider the requirements of Section 120.569(2)(c), F.S. Rather than filing an appeal for this matter, Funding Group requests that the Commission grant reconsideration, and either (1) grant Funding Group leave to amend its protest, or (2) vacate PAA Order No. PSC-09-0852-PAA-EQ and close the docket.

FB Energy's Response

As a preliminary matter, FB Energy asserts its belief that Order No. PSC-10-0256-FOF-EQ is legally correct as written, and directly addresses the issues raised in Funding Group's Motion for Reconsideration, thus rendering the motion as nothing more than inappropriate and unauthorized reargument. FB Energy believes that Funding Group has already been provided ample opportunity to explain why it has standing to participate in this proceeding, and in fact, fails again in its Motion for Reconsideration to assert facts sufficient to establish standing. However, in an abundance of caution, and in order to avoid further delay of this matter associated with a possible appeal, FB Energy believes that Funding Group should be given an opportunity to amend its protest within seven days.

Analysis and Conclusion

Staff notes that Order No. PSC-10-0256-FOF-EQ does not explicitly state whether Funding Group's protest is dismissed with or without prejudice. However, the language cited above does indicate that it is not anticipated that the defects in Funding Group's standing can be cured. Since the order is not specific on whether the dismissal is with prejudice, and FB Energy requests that Funding Group be allowed to file an amended protest, staff recommends that the Motion for Reconsideration be granted. However, staff recommends that Funding Group be allowed more time to file its amended protest than the seven days recommended by FB Energy. Staff therefore recommends that Funding Group be allowed to file an amended protest of PAA Order No. PSC-09-0852-PAA-EQ no later than fifteen days from the date of issuance of the order on reconsideration. If filed, the amended protest should comport with the requirements of Rule 28-106.201, F.A.C., and should conclusively show why Funding Group has standing under Agrico.

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Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open to permit US Funding Group, LLC to file an amended protest of Order No. PSC-09-0852-PAA-EQ. If US Funding Group, LLC does not timely file an amended protest, the docket should be closed. (J.Crawford)

Staff Analysis: This docket should remain open to permit Funding Group to file an amended protest of Order No. PSC-09-0852-PAA-EQ. If Funding Group does not timely file an amended protest, the docket should be closed.