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Subject: Electronic Filing / Dkt 110018 - EI / SWA & FPL's Joint Response in Opposition to Woods' Petition
Attachments: 2.28.11. SWA-FPL Response to Sullivan Petition to Intervene.pdf; 2.28.11. SWA-FPL Response to Sullivan Petition to Intervene.doc

Electronic Filing

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b. Docket No. 110018 - EI

In Re: Joint petition for modification to determination of need for expansion of an existing renewable energy electrical power plant in Palm Beach County by Solid Waste Authority of Palm Beach County and Florida Power & Light Company, and for approval of associated regulatory accounting and purchased power agreement cost recovery.

c. The Document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 9 pages

e. The document attached for electronic filing is Solid Waste Authority of Palm Beach County and Florida Power & Light Company's Joint Response in Opposition to Petition to Intervene of Mr. & Mrs. Frank Woods.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for Modification to) Determination of Need for Expansion of an Existing) Renewable Energy Electrical Power Plant in Palm) Beach County by Solid Waste Authority of Palm) Beach County and Florida Power & Light Company,) And for Approval of Associated Regulatory) Accounting and Purchased Power Agreement) Cost Recovery)	Docket No. 110018-EU Date: February 28, 2011

SOLID WASTE AUTHORITY OF PALM BEACH COUNTY AND FLORIDA POWER & LIGHT COMPANY'S JOINT RESPONSE IN OPPOSITION TO PETITION TO INVERVENE OF MR. & MRS. FRANK WOODS

Solid Waste Authority of Palm Beach County ("SWA") and Florida Power & Light Company ("FPL") (together the "Joint Petitioners") hereby respectfully respond in opposition to the petition to intervene filed by Mr. and Mrs. Frank Woods (the "Woods"), and state as follows:

Background and Summary

1. On February 21, 2011, the Woods filed their Petition to Intervene (the "Petition") seeking to intervene in the above captioned docket. Paragraph 5 of the Petition contains the Woods' statement of substantial interests. In that paragraph, the Woods allege, among other things, that they *". . . have a substantial interest in the above-captioned docket as approval of the proposed modification will increase their electric rates."* This statement indicates a misunderstanding as to the nature and effect of the requested modification. SWA seeks a modification of an existing determination of need (issued by the Commission) as part of a currently pending application for an increase in electric generating capacity under the Florida Electrical Power Plant Siting Act ("PPSA") of an existing site certification. If granted, the certification - of which a determination of need by the Commission is a pre-requisite - will

permit SWA to increase renewable electric energy production at its existing Palm Beach County site. The requested modification will not apply to FPL but only applies to the SWA and its ability to construct additional generating capacity. It will have no impact on FPL electric rates.

2. The Woods go on to discuss multiple subjects including the definition of statutory terms, the identity of FPL's avoided unit, and FPL's Ten-Year Site Plan. In essence, the remainder of Paragraph 5 of the Petition consists of observations, descriptions of perceived concerns about the Commission's ability to do its job, pointing out that advanced capacity payments will be recovered through the energy conservation cost recovery ("ECCR") clause, and speculation about whether the proposed purchase power agreement ("PPA") will comply with the law. Such observations completely ignore the fact that stringent statutory legal constraints, based on avoided cost, prevent purchases of power from solid waste facilities from increasing a utility's costs. Under the regulatory system in place in Florida under Section 377.709, Fla. Stat., as administered by the Commission, an increase in the amount of renewable energy that is sold to a utility at a price less than or equal to the utility's avoided cost, will at best reduce the utility's costs or, at worst, will have no impact at all - but in no case would it cause costs to increase. Because the Woods' observations and allegations (i) fall short of demonstrating that their substantial interests will be affected by the proceeding and (ii) do not support a conclusion that the Woods will suffer immediate harm, they fail to meet the two-prong test for determining whether a party has a "substantial interest" entitling intervention as articulated by the Court in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

3. The intervention request should be denied for two reasons. First, the request for intervention does not allege any facts entitling the Woods to intervene in this proceeding under

Florida law. Although the Commission from time to time has permitted individual customers of a utility to intervene in proceedings involving the utility serving them, in this case the Petition does not allege sufficient facts to show the Woods will suffer injury in fact which is of sufficient immediacy. What the Woods have alleged is that there will be a speculative increase in electric rates by the proposed expanded facility modification. Nowhere in the Joint Petition has it been pled that the proposed modification will increase electric rates. In fact, the underlying petition for need determination and related proposed PPA demonstrate that the Woods and all FPL and SWA customers will benefit from SWA's generation of and FPL's use of renewable energy and lower cost electricity. Therefore, even under the more relaxed approach that the Commission sometimes has applied, the Woods have not alleged sufficient facts upon which intervention may be granted. The Petition's allegations and observations do not demonstrate or represent any immediate injury to the Woods warranting a grant of intervention. Second and similarly, the Woods' questions surrounding the Commission's evaluation of the proposed PPA terms and conditions under Section 377.709(3)(b)1.b, Fla. Stat., do not relate to an immediate injury for which intervention is a remedy.

4. In reality, the Woods are not seeking to protect their own, legitimate interests in this Commission action. Rather, they seek to assume the authority and responsibility of the Commission and its Staff – to stand as a surrogate and conduct or assist the Commission in properly performing its statutory duties.

5. In addition, page 3 of the Petition filed by the Woods, noting *". . . that the Office of Public Counsel (OPC) has not yet sought to intervene in the above-captioned docket to protect the interests of FPL ratepayers in this proceeding."* – indicates to the Commission that the Woods also seek and intend to supplant the OPC as the statutory protector of the interests of

FPL's ratepayers. This proposed undertaking by the Woods flies in the face of the regulatory system installed by the Florida Legislature and represents an attempt by the Woods to wrest from the OPC its responsibility and discretion in determining which cases merit attention. Nothing in the law of standing permits intervention for such a purpose. Inasmuch as the Woods lack standing to intervene on their own behalf, they surely have no standing to intervene on behalf of FPL's other customers. To the contrary, the Legislature has designated OPC as the sole statutory representative of FPL's customers in Commission proceedings. Sec. 350.0611, Fla. Stat.

Argument

6. The applicable standards for intervention are provided in Section 120.52(13), Fla. Stat., and Rule 25-22.039, F.A.C. Rule 25-22.039 states in relevant part:

> 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 petition the presiding officer for leave to intervene. Petitions for leave to intervene must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceedings 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 though the proceeding. Intervenors take the case as they find it.

7. A review of the intervention request shows that it contains (i) no allegations by the Woods of an entitlement to intervene based upon any constitutional or statutory right or Commission rule; and (ii) no facts which demonstrate that the Woods will suffer injury in fact which is of sufficient immediacy. Absent such a showing, intervention should be denied.

8. Florida law provides a two-prong test for determining whether a party has a "substantial interest" entitling the party to intervene in a proceeding. Under this test, the Woods must "...show 1) that they will suffer an injury in fact which is of sufficient immediacy to entitle them to a Section 120.57 hearing, and 2) that this substantial injury is of a type or nature which

the proceeding is designed to protect." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981). The court held that the first part of this test deals with "the degree of injury" and the second part of the test deals with "the nature of the injury." Id. Florida courts have held that the "injury in fact" must be both real and immediate and not speculative or conjectural. *See* International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990); Village Park Mobile Home Assn, Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), review denied 513 So. 2d 1063 (Fla. 1987).

9. The few facts alleged in the Petition are 1) the Woods are residential customers of FPL; 2) the FPL electric bill constitutes a significant portion of their monthly household expenses; and 3) approval of the proposed modification will increase their electric rates. Petition at page 2.[1] The Woods make no attempt to refute or deny the fact that, consistent with the clear intent expressed in the legislative history of Section 377.709, Fla. Stat.,[2] Commission approval of the underlying petition for need determination and proposed PPA would result in benefits (and not harm) to FPL's customers through FPL's use of renewable energy and lower cost electricity and benefits to SWA's customers through cost effective disposal of solid waste and avoiding the need for new landfills.[3] In fact, because the Petition and proposed PPA must be cost effective under Section 377.709, Fla. Stat. -- i.e., the cost of electrical capacity and energy produced by the proposed expanded solid waste facility of Solid Waste Authority of Palm Beach County

[1] The Petition fails to allege even the minimum facts required by Rule 28-106.201, F.A.C. The "Disputed Issues of Material Facts" identified in paragraph 8 of the Petition are actually legal issues, and the Petition does not include any statement of ultimate facts alleged.

[2] See Senate Staff Analysis and Economic Impact Statement, CS/ SB 573, dated May 4, 1984 (revised June 28, 1984) at pp.1-2 (stating that Florida PSC staff expected that utility ratepayers would benefit in the long run from construction of solid waste facilities that use solid waste as a primary source of fuel for the production of electricity).

[3] Delays in Commission action caused by the Woods' questionable interest in this proceeding will seriously impact those Florida citizens who rely on the SWA to timely and cost-effectively manage and dispose of solid waste in Palm Beach County – citizens located some 150 miles from the Woods residence in Chuluota and some 200 miles from the Woods residence in St. Augustine.

("SWA") and delivered to FPL is no greater than the cost to FPL of producing an equivalent amount of capacity and energy had SWA's facility not been constructed and operated -- there is not only no likelihood of harm or injury to the Woods, but no possibility. The terms on which FPL will buy the power are structured to ensure that FPL is not paying more than its avoided costs, and therefore the purchase of power from SWA's expanded facility would not increase the electric rates for FPL's customers. Accordingly, the Petition fails to satisfy either of the two prongs of the applicable two-part *Agrico Chemical* standing test, and should be denied as the Woods have not presented sufficient facts to have a legal right to intervene in this proceeding.

10. The Woods also are attempting to stand in the shoes of the Commission itself by interpreting certain provisions of the statutory language of Section 377.709(3)(b)1.b., Fla. Stat. *Ameristeel* held that "an Administrative agency's interpretation of a statute it is charged with enforcing is given great deference." Id. at 477. The Woods attempt to usurp the Commission's responsibility to interpret the term "design costs" articulated in this section, as a justification for intervention in this proceeding. Under Woods' interpretation of Section 377.709, Fla. Stat., a solid waste facility would be paid the "lesser of" (i) the total "capital cost" of a utility's next planned generating unit – i.e. engineering, design, equipment, procurement, construction, installation, AFUDC, interconnection, transformation, and all the factors included in the "avoided capacity cost"; and, (ii) the cost to simply "design" the electrical components of the solid waste facility – an absurd comparison and certainly not consistent with the intent of the law. Such a specious interpretation would ignore established principles of statutory construction and is in direct conflict with legislative intent directing ". . . *the Florida Public Service Commission to establish a funding program to encourage the development by local governments of solid waste facilities*. . . ." (emphasis supplied) Importantly, legislative history, which

Petitioners have chosen to ignore, makes clear the intention to "... *allow local governments to obtain financing for the electrical generation portion of their solid waste facilities* with no direct cost to them. *Utility ratepayers will ultimately pay for these facilities.*" (emphasis supplied)[4]

11. Moreover, Section 377.709(3)(b), Fla. Stat., specifically grants the Commission the authority to "approve or disapprove a contract, or it may modify a contract with the concurrence of the parties to the contract." Clearly, the Woods are not parties to the proposed PPA between SWA and FPL, and the Commission has the ultimate jurisdiction regarding approval of said PPA terms. The Woods are attempting to override the Commission's jurisdiction and authority with respect to the interpretation of Section 377.709, Fla. Stat., and approval of the proposed PPA contract terms. The mere fact that the Woods have no substantial interest and injury in fact which is real, immediate, and not speculative leads to the logical conclusion that their request to conduct discovery and cross-examination of witnesses at the formal hearing is an attempt to assert control over the powers and jurisdiction of the Commission and its Staff granted under Chapter 366, Fla. Stat.

WHERFORE, for all of the foregoing reasons, the Joint Petitioners respectfully request that the Commission deny the Petition and refuse to allow the Woods to intervene or otherwise participate in this proceeding. Alternatively, the Commission could allow the Woods to participate, but short of granting intervention as a full party in interest – something akin to the status of *amicus curiae*. In either event, the Commission should make clear at the outset that their participation must be limited strictly to proper issues in this proceeding and that abuse and/or unwarranted delay of the proceeding will not be tolerated. Specifically, any order granting intervention or a lesser form of participation should make clear that the Woods shall

[4] See Senate Staff Analysis and Economic Impact Statement, CS/ SB 573, dated May 4, 1984 (revised June 28, 1984) at pg.2.

comply with applicable statutes, rules, and codes of conduct governing proceedings and participants before the Commission.

Respectfully submitted on this 28th day of February, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 28th day of February, 2011, to the following:

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