



William P. Cox
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420
(561) 304-5662
(561) 691-7135 (Facsimile)

October 9, 2017

-VIA ELECTRONIC FILING-

Ms. Carlotta Stauffer, Commission Clerk
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 20170122-EI - Florida Power & Light Company's Petition to Request Exemption under Rule 25-22.082(18), F.A.C, from Issuing a Request for Proposals for the Modernization of the Lauderdale Plant

Dear Ms. Stauffer:

Please find the enclosed for filing a copy of Florida Power & Light Company's ("FPL") response in Opposition to the Petition to Intervene and Motion for Reconsideration filed by Innovative Solar Systems, LLC.

Thank you for your assistance. Please contact me should you or your staff have any questions regarding this filing.

Sincerely,

s/ William P. Cox

William P. Cox
Senior Attorney
Florida Bar No. 0093531

WPC/msw
Enclosures

cc: Takira Thompson, Traci Matthews, Phillip Ellis, Division of Engineering
Charles Murphy, Office of the General Counsel

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's
Petition to Request Exemption under Rule 25-
22.082(18), F.A.C., from Issuing a Request
for Proposals for the Modernization of the
Lauderdale Plant

Docket No: 20170122-EI

Date: October 9, 2017

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO THE
PETITION TO INTERVENE AND MOTION FOR RECONSIDERATION FILED BY
INNOVATIVE SOLAR SYSTEMS, LLC**

Pursuant to Rules 28-106.201, 28-106.204, and 25-22.0376, Florida Administrative Code ("F.A.C."), Florida Power & Light Company ("FPL" or the "Company"), files this Response in opposition to the petition to intervene and motion for reconsideration ("Petition") filed by Innovation Solar Systems, LLC ("ISS") of Order No. PSC-2017-0358-PCO-EI ("Order"). In the Order, the Prehearing Officer denied the petition to intervene and protest of the Sierra Club ("Sierra Club Protest") of Proposed Agency Action Order No. PSC-2017-0287-PAA-EI ("PAA Order"), issued by the Florida Public Service Commission ("FPSC" or the "Commission") on July 24, 2017. The PAA Order approved FPL's request for exemption from a provision in Rule 25-22.082, F.A.C., the "Bid Rule," which otherwise would direct the issuance of a Request for Proposals ("RFP") in connection with FPL's proposed modernization of its existing Lauderdale power plant (to be renamed the Dania Beach Clean Energy Center) (the "Project" or "Dania Beach Project"), prior to FPL filing a petition for determination of need for the Project with the Commission.

The Commission should deny ISS's petition to intervene and motion for reconsideration of the Order because it is legally deficient for the following reasons: (1) ISS failed to file a timely protest of the Commission's PAA Order; (2) there is no pending proceeding to provide a

point of entry for intervention by ISS under Rules 25-22.029 and 25-22.039, F.A.C., in light of the Order denying the Sierra Club protest; (3) because ISS is not a party to this proceeding, it cannot seek reconsideration under Rule 25-22.0376, F.A.C., which limits such motions to a “party”; (4) ISS cannot attempt to “cure” Sierra Club’s lack of standing as determined by the Order by “stepping into its shoes” and then seeking reconsideration of the Order; and (5) even if ISS could establish standing for itself in this proceeding, ISS has identified no mistake of fact or law that would warrant the Commission’s reconsideration of the Order.

Based upon the foregoing, FPL seeks denial of ISS’s petition to intervene and motion for reconsideration and issuance of a consummation order for the PAA Order by the Commission.

I. Background

1. Pursuant to Rule 25-22.082(18), F.A.C., on May 22, 2017, FPL filed a petition with the Commission requesting that FPL be exempted from the RFP requirement in the Bid Rule for FPL’s modernization of the Lauderdale plant. Subsection 18 of the Bid Rule itself provides that the Commission may exempt a utility from any of the requirements of this rule based upon a finding by the Commission that (1) the proposal will likely result in a lower cost supply of electricity to the utility’s general body of ratepayers, *or* (2) will increase the reliable supply of electricity to the utility’s general body of ratepayers, *or* (3) otherwise will serve the public welfare.

2. On July 13, 2017, after considering FPL’s petition, oral comments from the Office of the Public Counsel (“OPC”), and written comments from Sierra Club, the Commission unanimously voted to approve FPL’s petition, finding that FPL’s proposed Project met all three criteria for an exemption under Subsection 18 of the Bid Rule and specifically that FPL should be exempted from the Bid Rule’s RFP requirement. On July 24, 2017, the Commission issued

its PAA Order granting FPL's request and specifically noting in the PAA Order, in direct response to the OPC and Sierra Club comments, that "[g]ranted the exemption does not relieve the Company of any requirements during a future [Power Plant Siting Act] need determination process, including a demonstration that the project is the most cost-effective source of power or whether conservation or renewable generation can mitigate the need for the modernization of the Lauderdale plant." PAA Order at 4.

3. On August 14, 2017, the deadline for filing a protest of the Commission's PAA Order under Rule 25-22.029, F.A.C., Sierra Club filed its protest of this PAA Order and its petition to intervene in the above referenced docket. No other party or substantially affected person, including ISS, filed a protest of the PAA Order by this date. On August 21, 2017, FPL filed its response opposing Sierra Club's protest and petition to intervene. On August 25, 2017, Sierra Club filed a motion for leave to file a reply to FPL's response, and on September 1, 2017, FPL filed a response to Sierra Club's Motion. On September 22, 2017, the Prehearing Officer issued the Order denying the Sierra Club petition to intervene and protest of the PAA Order. On October 2, 2017, 135 days from when FPL first filed its Request for exemption from the Bid Rule and 49 days after the protest period ended for the PAA Order, ISS filed its petition to intervene and motion for reconsideration of the Order.

II. Legal Argument

A. ISS failed to file a timely protest of the PAA Order

4. ISS, which purports to be a nationwide utility-scale solar farm developer, failed to file a protest within 21 days of the issuance of the Commission's PAA Order granting FPL's petition for an exemption of the Bid Rule for the Dania Beach project, as required by the Commission's rule governing protests of PAA Orders, Rule 25-22.029, F.A.C. The Prehearing

Officer noted in the Order that no potential generation supplier, which would include ISS, protested the PAA Order. Order at 4. Sierra Club is the only entity that filed a timely protest. ISS can neither refute those facts nor attempt to latch on to Sierra Club's protest in order to comply with the protest deadline set by the PAA Order.

5. In contrast to ISS, Sierra Club did file a timely protest of the PAA Order, but the Prehearing Officer found in the Order that Sierra Club lacked standing to intervene and that its protest of the PAA Order should be denied because the concerns its protest raised relate to an anticipated need determination for the Dania Beach project that would be undertaken in a separate docket under Section 403.519, Fla. Stat. Order at 4. The Prehearing Officer in the Order further noted that neither potential generation suppliers (such as ISS) nor Sierra Club are precluded from petitioning to intervene in the ultimate need determination proceeding. *Id.* So it is clear from the Order that ISS has failed to file a protest, and it cannot now file its own protest by resurrecting or adopting Sierra Club's protest by seeking reconsideration of the Order.

B. There is no pending proceeding to provide a point of entry for intervention by ISS under Rules 25-22.029 and 25-22.039, F.A.C., in light of the Order denying the Sierra Club protest

6. Rule 25-22.039, F.A.C., governing intervention by persons in a Commission proceeding, only allows a person, such as a company like ISS, to intervene in a pending proceeding before the Commission. Rule 25-22.029, F.A.C., governing points of entry into a PAA proceeding before the Commission, provides for a point of entry to a proceeding only if a timely protest is filed by a substantially affected person within 21 days of the issuance of the PAA Order. Sierra Club is the only entity that filed such a timely protest and sought to intervene in this proceeding by the protest deadline.

7. On September 22, 2017, the Prehearing Officer denied Sierra Club's petition to intervene and protest in the Order. Sierra Club did not seek reconsideration of the Order by the deadline for motions for reconsideration, October 2, 2017. As a result, there was and is no "pending proceeding" that would have provided or provides ISS a point of entry for its petition to intervene in this proceeding. Accordingly, the Commission should deny the ISS petition to intervene.

C. Because ISS is not a party to this proceeding, it cannot seek reconsideration of the Order under Rule 25-22.0376, F.A.C., which limits such motions to a "party"

8. Rule 25-22.0376, F.A.C., permits a "party" to seek reconsideration of a non-final order to the full Commission, such as the Order issued by the Prehearing Officer in this proceeding. As noted above, ISS did not timely file a petition to intervene and has not been granted "party" status in this proceeding. Accordingly, it cannot lawfully seek a motion for reconsideration of the Order under Rule 25-22.0376, F.A.C., as a non-party to this proceeding.

D. ISS cannot attempt to "cure" Sierra Club's lack of standing as determined by the Order by "stepping into its shoes" and then seeking reconsideration of the Order

9. It is well established that a petitioner seeking to challenge an administrative agency's action must have standing. As the person asserting party status in the only timely filed protest at issue, Sierra Club, not ISS, has the burden of demonstrating the requisite standing for itself to initiate and maintain its protest filed in this proceeding. See, *e.g.*, Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2nd DCA 1981)). Accordingly, one person cannot "cure" another person's lack of standing and, by seeking to do so, avail itself to the legal rights of the other person.

10. But that is precisely what ISS is requesting that the Commission let it do with its petition to intervene and motion for reconsideration of the Order. ISS wants to “step into the shoes” or be a “strawman” of Sierra Club to cure Sierra Club’s standing deficiency in this proceeding through its own petition to intervene and motion for reconsideration. By doing so, ISS is attempting to take up the procedural mantle of the Sierra Club protest, a procedural vehicle which ISS did not file or exercise itself in this proceeding by the 21-day deadline under Commission Rule 25-22.029, F.A.C. In effect, ISS is trying to provide Sierra Club with a third bite at the apple with its motion for reconsideration. The Commission should not allow this twisted and concocted abuse of its process and thinly veiled attempt by ISS to file an untimely protest of the PAA Order.

E. Even if the Commission permits ISS to intervene in this proceeding, ISS has failed to identify a single mistake of fact or law in Order No. PSC-2017-0358-PCO-EI

11. Under Rule 25-22.0376, F.A.C. and well established legal precedent, the standard for reconsideration of the Order is to bring to the Commission’s attention some point of fact or law that was overlooked or failed to be considered when the Prehearing Officer rendered the Order.¹

12. ISS alleges that it has standing to intervene in this proceeding as a potential bidder to an RFP that FPL would have issued if it did not seek an exemption under the Commission’s Bid Rule (Rule 25-22.082, F.A.C.) for the Dania Beach Project. Petition, ¶12. Even if the

¹ See, e.g., In re: Petition for rate increase by Florida Power & Light Company, Docket No. 160021-EI, In re: Petition for approval of 2016-2018 storm hardening plan, by Florida Power & Light Company, Docket No. 160061-EI, In re: 2016 depreciation and dismantlement study by Florida Power & Light Company, Docket No. 160062-EI, In re: Petition for limited proceeding to modify and continue incentive mechanism, by Florida Power & Light Company, Docket No. 160088-EI, Order No. PSC-16-0231-FOF-EI (F.P.S.C., June 10, 2016) (denying motion for reconsideration and citing Diamond Cab Company of Miami v. King, 140 So.2d 889, 891 (Fla. 1962); Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981)).

Commission was to agree that those facts support standing and granted ISS intervention in this proceeding, which it should not, ISS has failed to identify a single fact or law that the Prehearing Officer overlooked in denying the Sierra Club's petition to intervene and protest. Instead, ISS has made unsubstantiated and inaccurate claims about its *own* interests in its filing, including the false claim that FPL refused to negotiate a power purchase agreement with ISS for solar energy. Petition, ¶13. These claims, even if true, point to no fact or law that the Prehearing Officer overlooked in rendering the Order denying intervention and the protest filed by Sierra Club. Accordingly, ISS has failed to establish any lawful ground for reconsideration of the Order.

WHEREFORE, for the foregoing reasons, Florida Power & Light Company respectfully requests that the Commission deny ISS's petition to intervene and motion for reconsideration, and issue a consummating order for PAA Order No. PSC-2017-0287-PAA-EI.

DATED this 9th day of October, 2017.

Respectfully submitted,

William P. Cox
Senior Attorney
Kevin I.C. Donaldson
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
Telephone: (561) 304-5662
Facsimile: (561) 691-7135
Email: will.p.cox@fpl.com
Email: kevin.donaldson@fpl.com

By: s/ William P. Cox
William P. Cox
Florida Bar No. 0093531

CERTIFICATE OF SERVICE
Docket No. 20170122-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished

by electronic mail on this 9th day of October, 2017 to the following:

Charles Murphy, Esq.
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
cmurphy@psc.state.fl.us

Charles Rehwinkel, Esq.
Patricia Christensen, Esq.
J.R. Kelly, Esq.
Office of Public Counsel
The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399
rehwinkel.charles@leg.state.fl.us
christensen.patty@leg.state.fl.us
kelly.jr@leg.state.fl.us

Julie Kaplan, Esq.
Diana Csank, Esq.
Sierra Club
50 F St. NW, 8th Floor
Washington, DC 20001
julie.kaplan@sierraclub.org
diana.csank@sierraclub.org

Candice N. Carr, Esq.
Innovative Solar Systems, LLC
1095 Hendersonville Road
Ashville, NC 28803
Candice.carr@innovativesolarsystemsllc.com

By: s/ William P. Cox
William P. Cox
Florida Bar No. 0093531