

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: October 26, 2017

TO: Office of Commission Clerk (Stauffer)

FROM: Division of Engineering (Ellis, Thompson) ^{POE} ^{TT}
Office of the General Counsel (Murphy) ^{CS} TM

RE: Docket No. 20170122-EI – Petition for exemption under Rule 25-22.082(18), F.A.C., from issuing a request for proposals (RFPs) for modernization of the Lauderdale Plant, by Florida Power & Light Company.

AGENDA: 11/07/17 – Regular Agenda – Motion for Reconsideration – Oral Argument Not Requested – Participation at the Discretion of the Commission.

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brisé

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

By Proposed Agency Action Order No. PSC-2017-0287-PAA-EI, issued in this Docket on July 24, 2017 (PAA Order), the Florida Public Service Commission (Commission) proposed to grant Florida Power & Light Company's (FPL) Petition for Exemption from the "Bid Rule," which is codified at Rule 25-22.082, Florida Administrative Code (F.A.C.). The exemption was granted pursuant to subsection (18) of that Rule.

On August 14, 2017, Sierra Club filed a Petition to Intervene and Protest the PAA Order (Protest). In accordance with the PAA Order, this was the last day that a protest of the PAA Order was timely. On August 21, 2017, FPL filed its Response to Sierra Club's Protest (Response). On August 25, 2017, Sierra Club filed its Motion for Leave to File a Reply to FPL's Response and attached its Reply. On September 1, 2017, FPL filed its Motion for Leave to File

a Reply and Proposed Reply. By Order No. PSC-2017-0358-PCO-EI, issued on September 20, 2017, (Order Denying Sierra Club's Protest) the prehearing officer denied Sierra Club's Protest.

On October 2, 2017, Innovative Solar Systems, LLC (ISS) filed its Petition to Intervene and Motion for Reconsideration of the Order Denying Sierra Club's Protest (ISS Petition and Motion). On October 9, 2017, FPL filed its Response in Opposition to the ISS Petition and Motion. (Response in Opposition). The ISS Petition and Motion and the FPL Response in Opposition are the subject of this staff recommendation.

Generally, in its Petition and Motion, ISS asserts that Sierra Club's Protest was denied because Sierra Club's interests were not substantially affected since Sierra Club is neither a potential generation supplier for FPL's anticipated need, nor a potential Request for Proposals (RFP) participant. ISS attempts to cure Sierra Club's deficiency by asserting that ISS is such a supplier and potential RFP participant and will be substantially affected by the Commission's decision in this docket. ISS asks that it be permitted to intervene, that the Order Denying Sierra Club's Protest be vacated, and that the Commission reverse the PAA Order and deny FPL's Petition for Exemption.

In its Response in Opposition, FPL argues that the ISS Petition and Motion is legally deficient because: ISS did not file a timely protest to the PAA Order; there is no pending proceeding to provide ISS a point of entry in light of the Order Denying Sierra Club's Petition; as a nonparty ISS cannot seek reconsideration of the Order Denying Sierra Club's Petition; ISS cannot cure Sierra Club's lack of standing by "stepping into its shoes;" and finally, even if ISS's standing could be established, ISS has identified no mistake of fact or law in the Order Denying Sierra Club's Protest that would warrant reconsideration of that Order. FPL asks that the ISS Petition and Motion be denied and that the Commission issue an order consummating the PAA Order which granted FPL the exemption from the bid rule.

Oral Argument was not requested. The Commission has jurisdiction pursuant to Chapter 120, Florida Statutes (F.S.), and Rule 25-22.029, F.A.C.

Discussion of Issues

Issue 1: Should the Commission grant ISS's Petition to Intervene?

Recommendation: No. The Commission should deny ISS's Petition to Intervene. (Murphy)

Staff Analysis: Staff recommends that ISS is not timely in its attempt to intervene and participate in this PAA docket.

Rule 25-22.029(1) and (3), F.A.C., establish the point of entry into a proposed agency action proceeding, and provide, in pertinent part, the following:

(1) After agenda conference, the Office of Commission Clerk, shall issue written notice of the proposed agency action (PAA), advising all parties of record that . . . they have 21 days after issuance of the notice in which to file a request for a Section 120.569 or 120.57, F.S., hearing.

* * *

(3) One whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a Section 120.569 or 120.57, F.S., hearing, in the form provided by Rule 28-106.201, F.A.C. Any such petition shall be filed within the time stated in the notice issued pursuant to subsection (1) of this rule, and shall identify the particular issues in the proposed action that are in dispute.

The Commission provided the following notice language in the PAA Order:

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 14, 2017. (Emphasis original).

ISS is asking 1) to intervene in the PAA docket, 2) for the Commission to reconsider the procedural order that denied Sierra Club standing to protest the PAA Order (based upon new facts and ISS replacing Sierra Club for purposes of establishing standing), and 3) for the Commission to reverse the PAA Order (based upon these new facts and ISS's asserted standing). The effect of granting the ISS Petition and Motion would be for ISS to substitute itself for Sierra Club to establish standing that Sierra Club did not have, and then rely upon the timeliness of the Sierra Club's Protest of the PAA Order to reverse the PAA Order which ISS failed to timely protest.

Moreover, by asking that the Commission reconsider the Order Denying Sierra Club's Protest, ISS implicitly asks that the Commission determine that Sierra Club had standing to Intervene in

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this docket; however, ISS's pleadings are void of any argument on that point and instead conflate the status of ISS, as if it had made a timely protest, with Sierra Club.

The parties' arguments on intervention are set forth below.

ISS Petition and Motion

ISS asserts that it is a nationwide utility-scale solar farm developer with three utility-scale solar farms under development in Florida and would submit these three projects in an RFP issued by FPL. Efforts by ISS to discuss a direct power purchase agreement (PPA) with FPL have been unsuccessful and FPL has indicated that it has no interest in signing a solar PPA with ISS. Thus, ISS asserts that a mandatory RFP is the only avenue by which FPL would be required to consider more cost-effective, clean alternatives for the modernization of FPL's Lauderdale Plant and ISS will suffer injury if it is prevented from offering these projects to FPL for consideration. ISS argues that this is the type of injury this docket is designed to prevent.

ISS argues that by exempting FPL from the bid requirement, the Commission is giving FPL permission to continue to ignore clean, renewable, more cost-effective alternatives and thwarting the development of renewables in Florida. ISS takes issue with the basis of the underlying PAA Order as it relates to the effects of modernizing a gas plant by building a larger gas plant. ISS avers that, if given the opportunity, it can demonstrate that solar is superior to natural gas. ISS asserts that its interests are substantially affected, and it will suffer an injury in fact as a result of the Commission granting FPL the exemption from the Bid Rule. In sum, ISS argues that it meets the requirements for standing as set forth in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981) *rehearing denied*, 415 So.2d 1359 (Fla. 1982). As such ISS asks that it be permitted to intervene in this docket, that the Commission vacate the Order Denying Sierra Club's Protest, and that the Commission reverse the PAA Order and deny FPL's petition for exemption from the Bid Rule.

FPL Response in Opposition

FPL asserts that the Commission should deny ISS's petition to intervene because it is legally deficient for the following reasons: (1) ISS 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 as required by Rule 25-22.029, F.A.C., which governs protests of PAA Orders. Sierra Club is the only entity that filed a timely protest. ISS can neither refute that fact nor attempt to latch on to Sierra Club's Protest in order to comply with the protest deadline set by the 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 Sierra Club's Protest. Rule 25-22.039, F.A.C., governing intervention in Commission proceedings, only allows intervention in a pending proceeding before the Commission. Rule 25-22.029, F.A.C., governs points of entry into a PAA proceeding before the Commission, and 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. Because Sierra Club did not seek reconsideration of the Order Denying Sierra Club's Protest by the deadline for motions for reconsideration, there was no "pending proceeding" that would have provided ISS a point of entry for its petition to intervene in this proceeding.

Conclusion

While ISS *might* otherwise have standing to intervene in a docket and protest a PAA Order, or to seek reconsideration of a procedural order if it established standing on its own and timely protested the issuance of a PAA Order, staff recommends that, in the instant case, FPL is persuasive in its argument that ISS is not timely in its attempt to intervene and participate in this docket. The protest of the PAA Order had to be filed by August 14, 2017. ISS filed its Petition and Motion on October 2, 2017. By the Order Denying Sierra Club's Protest, the prehearing officer determined that Sierra Club lacked standing to intervene and protest the PAA Order that granted FPL the RFP exemption. Staff recommends that ISS cannot properly rely on Sierra Club's timely protest of the PAA Order and then substitute itself for Sierra Club to establish "injuries in fact" for purposes of standing pursuant to *Agrico Chemical Company v. Department of Environmental Regulation*,¹ and thereby revive both Sierra Club's standing and the underlying Protest. Thus, staff recommends that ISS's Petition to Intervene should be denied.

Staff does observe that, as with Sierra Club, there is nothing preventing ISS from petitioning the Commission to intervene in the underlying need determination proceeding that will address the modernization of the Lauderdale Plant. Docket No. 20170225-EI, *Petition for determination of need for Dania Beach Clean Energy Center by Florida Power & Light Company*, has recently been opened to address that subject and all elements of that case must be proven by FPL. Moreover, if ISS believes that FPL has refused to purchase renewable power from ISS and that FPL is legally required to do so, ISS can file a complaint with the Commission based upon that concern.

¹ 406 So.2d 478 (Fla. 2d DCA 1981) *rehearing denied*, 415 So.2d 1359 (Fla. 1982).

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Issue 2: Should the Commission grant ISS's Motion for Reconsideration of the Order Denying Sierra Club's Petition?

Recommendation: No. The Commission should deny ISS's Motion for Reconsideration of the Order Denying Sierra Club's Petition. (Murphy)

Staff Analysis: The legal standard for reconsideration of an order is to bring to the attention of the administrative agency some point of fact or law that it overlooked or failed to consider when it rendered its order. *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). Notwithstanding that ISS impermissibly attempts to use a motion for reconsideration to substitute itself for Sierra Club in order to cure Sierra Club's lack of standing, ISS also fails to meet the standard for reconsideration. Thus, the Commission should deny ISS's Motion for Reconsideration of the Order Denying Sierra Club's Protest.

ISS Petition and Motion

ISS asserts that it is a nationwide utility-scale solar farm developer and would submit projects in response to an RFP in this docket. ISS takes exception to the decision reached by the Commission in the PAA Order issued in this docket. ISS argues that it is substantially affected by the Order Denying Sierra Club's Protest, and that FPL has not been interested in signing a solar PPA with ISS.

FPL Response in Opposition

FPL asserts that ISS cannot attempt to cure Sierra Club's lack of standing, as determined by the Prehearing Officer in the Order Denying Sierra Club's Protest, by "stepping into [Sierra Club's] shoes" and then seeking reconsideration of that Order. FPL avers that ISS is attempting to take up the procedural mantle of the Sierra Club protest, a procedural vehicle which ISS did not file itself within the 21-day deadline required by Rule 25-22.029, F.A.C. FPL contends that, by its Motion for Reconsideration, ISS is trying to provide Sierra Club with a "third bite" at the apple in this docket. FPL asserts that, because ISS failed to timely intervene or protest the PAA Order, ISS is not a party to this proceeding. Thus, ISS cannot seek reconsideration of the Order Denying Sierra Club's Protest pursuant to Rule 25-22.0376, F.A.C., which limits such motions to a "party."

FPL further asserts that, 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. FPL argues that, pursuant to 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

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the Order.² FPL argues that ISS has failed to meet this burden and thus, has failed to establish any lawful ground for reconsideration of the Order Denying Sierra Club's Protest.

Conclusion

While acknowledging that Sierra Club was denied standing for "failure to demonstrate that their interests would be substantially affected," ISS fails to identify any mistake of fact or law, in the Order Denying Sierra Club's Protest, that would have supported Sierra Club's standing. Instead, ISS attempts to cure Sierra Club's lack of standing by alleging new facts which are intended to demonstrate ISS's own standing to protest the Commission's PAA Order which ISS failed to timely protest. Stated differently, ISS attempts to substitute itself for Sierra Club to bolster the allegations in Sierra Club's Protest by making new arguments to cure Sierra Club's deficient pleading and, in turn, seeks reconsideration. A party cannot use reconsideration to make new arguments or seek to bolster a deficient pleading. *See* Order No. PSC-11-0097-FOF-WS, Issued on February 2, 2011, in Docket No 100318-WS, *In re: Petition for order to show cause against Service Management Systems, Inc. in Brevard County for failure to properly operate and manage water and wastewater system*. ("A motion for reconsideration is not the appropriate vehicle for bolstering allegations and making new arguments to cure an earlier, deficient pleading.").

Because ISS has failed to bring to the Commission's attention some point of fact or law that the Prehearing Officer overlooked or failed to consider in the Order Denying Sierra Club's Protest, ISS has failed to meet the standards for reconsideration set forth in *Diamond Cab Company of Miami v. King*, *Stewart Bonded Warehouse, Inc. v. Bevis*, and *Pingree v. Quaintance*. Therefore, staff recommends that the Commission should deny ISS's Motion for Reconsideration of the Order Denying Sierra Club's Protest.

² *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)).

Issue 3: Should this docket be closed?

Recommendation: Yes. The PAA Order at issue in this docket is final upon the issuance of a consummating order. If the Commission agrees with the staff recommendation in either Issue 1 or 2 of this recommendation, this docket should be closed upon the issuance of an order consummating Order No. PSC-2017-0287-PAA-EI. (Murphy)

Staff Analysis: The PAA Order at issue in this docket is final upon the issuance of a consummating order. If the Commission agrees with the staff recommendation in either Issue 1 or 2 of this recommendation, this docket should be closed upon the issuance of an order consummating Order No. PSC-2017-0287-PAA-EI.