

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida.

DOCKET NO. 090372-EQ
ORDER NO. PSC-10-0434-FOF-EQ
ISSUED: July 6, 2010

The following Commissioners participated in the disposition of this matter:

NANCY ARGENZIANO, Chairman
LISA POLAK EDGAR
NATHAN A. SKOP

ORDER GRANTING MOTION FOR RECONSIDERATION AND
LEAVE TO FILE AMENDED PROTEST

BY THE COMMISSION:

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.

We 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, 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, we 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

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points, but that in an abundance of caution, Funding Group should be given leave to amend its protest.

This order 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.), we note that oral argument may be heard at our discretion pursuant to Rule 25-22.022(7)(b), F.A.C. We have jurisdiction over this matter pursuant to Sections 366.051, 366.81, and 366.91, Florida Statutes (F.S.).

Decision

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 we 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, we 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, we 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 we 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

We note 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, we determine that the Motion for Reconsideration shall be granted and that Funding Group shall be allowed more time to file its amended protest than the seven days recommended by FB Energy. Therefore, we determine that Funding Group shall 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 shall comport with the requirements of Rule 28-106.201, F.A.C., and shall conclusively show why Funding Group has standing under Agrico.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the US Funding Group, LLC shall 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, and if filed, the amended protest shall

comport with the requirements of Rule 28-106.201, F.A.C., and shall conclusively show why Funding Group has standing. It is further

ORDERED that this docket shall 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 shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of July, 2010.



ANN COLE
Commission Clerk

(S E A L)

JSC

DISSENT BY: COMMISSIONER SKOP

COMMISSIONER SKOP, dissenting with a separate opinion:

In the instant case, granting the Motion for Reconsideration was improper because the petitioner failed to meet the legal standard required for the Commission to grant reconsideration. The standard of review for reconsideration of a Commission order is whether the motion identified a specific point of fact or law that the Commission overlooked or failed to consider in rendering its order.¹ In this regard, the petitioner's motion failed to make an affirmative showing that the Commission erred in rendering its order granting the Motion to Dismiss on the merits for lack of standing. 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."² To this point, an arbitrary feeling characterized as "an abundance of caution" clearly does not meet the legal standard required for the Commission to grant reconsideration, nor does it allow the Commission to

¹ Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962).

² Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

ignore the essential requirements of the law. Such a substantial departure from controlling case law and well established Commission precedent creates a slippery slope to the extent that this Order represents a cloud of uncertainty with respect to the applicable standard of review for reconsideration of future Commission orders.³

The Funding Group Legal Argument is Fundamentally Flawed

The legal argument advanced by the petitioner is without merit and fundamentally flawed. Section 120.569(2)(c), Florida Statutes, requires the Commission to dismiss a petition and grant leave to amend when the required content of the pleading is not in accordance with the uniform rules. The petitioner's gross misinterpretation of Section 120.569(2)(c), Florida Statutes, wrongfully asserts that this statute provides the procedural means, in the wake of an adverse ruling, to subsequently amend a petition conforming to the uniform rules that has been properly decided on the merits. The plain and unambiguous language of this statute does not support this bad faith argument.

Additionally, the legal argument advanced by the petitioner is not supported by controlling case law. The case law cited by the petitioner is not directly on point and can be readily distinguished from the facts of the instant case to the extent that the Commission granted the Motion to Dismiss on the merits for lack of standing, and subsequently rendered an order setting forth with specificity the reasons for dismissal.⁴ Moreover, the petitioner failed to cite more recent case law supporting an interpretation of the statute that is adverse to the interpretation advanced by the petitioner.

Furthermore, lack of diligence by the petitioner does not create a due process right in the wake of an adverse ruling on the merits. Specifically, the petitioner failed to exercise at least three separate procedural options in response to the Motion to Dismiss. First, the petitioner could have requested a deferral of the Motion to Dismiss, but failed to do so. Second, the petitioner could have requested leave to amend prior to the Commission rendering a decision on the merits, but failed to do so. Third, the petitioner could have requested a voluntary withdrawal of its petition, without prejudice (providing an opportunity to file a timely amended petition), but failed to do so. Instead of exercising diligence when confronted with a Motion to Dismiss, the petitioner chose to merely insert a placeholder within its responsive pleading asserting the right to amend in the event of an adverse ruling on the merits. Unfortunately, this asserted right is not supported by statute and is insufficient to overturn an adverse decision properly rendered on the merits.

For these reasons, the Motion for Reconsideration must be properly denied.

³ Florida Supreme Court precedent is controlling case law and *binding upon* the Commission. (emphasis added).

⁴ City of Winter Park v. Metropolitan Planning Org. for Orlando Urban Area, 765 So. 2d 797, 798 (Fla. 1st DCA 2000).

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.