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090372-EQ

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Sent: Wednesday, July 21, 2010 4:39 PM
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Subject: Electronic Filing - Docket 090372-EQ
Attachments: 090732_US Funding Amended Petition_2010 July 21.pdf

a. Person responsible for this electronic filing:

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b. Docket number/title:

090372-EQ
 In Re: Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida.

c. Document filed on behalf of:

U.S. Funding Group, LLC

d. Total number of pages in the attached document:

11

e. Description of attached document:

U.S. Funding Group, LLC's Amended Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract.

(see attached file: 090732_US Funding Amended Petition_2010 July 21.pdf)

Thank you for your assistance in this matter.

DOCUMENT NUMBER-DATE

5984 JUL 21 2010

FPSC-COMMISSION CLERK

7/22/2010

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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-09-0852-PAA-EQ
ISSUED: December 30, 2009

**AMENDED PETITION PROTESTING NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING NEGOTIATED PURCHASE POWER CONTRACT**

Petitioner, U.S. Funding Group, LLC ("Funding Group"), pursuant to Sections 120.569 and 120.57, Florida Statutes (2009), and Rules 28-106.201 and 25-22.029, Florida Administrative Code (F.A.C), and the Order of the Commission on July 6, 2010, files this amended petition for an administrative hearing in the above-styled matter and alleges:

The Agency and Agency Action

1. The affected agency is the Public Service Commission ("PSC"), 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850.
2. The agency file is Docket Number 090372-EQ. On December 30, 2009, the PSC issued Order No. PSC-09-0852-PAA-EQ (the "PAA"), granting preliminary approval to a contract between Progress Energy Florida, Inc. ("PEF") and Florida Biomass Energy, LLC ("FB Energy"). The contract is based on FB Energy constructing, owning, and operating an electric power production plant in Manatee County, Florida (the "Plant").

The Petitioner

3. U.S. Funding Group, LLC, is a Florida limited liability company in good standing, with offices at 5379 Ocean Blvd, Sarasota, Florida, 34242, telephone 941-926-1800.
4. Funding Group owns property located in Manatee County, more specifically located east of Bishop Harbor and west of U.S. 41, in the immediate vicinity of the Plant. In addition,

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FPSC-COMMISSION OFFICE

Funding Group also owns residential property in Sumter County, more specifically located at 2150 CR 243-B, Wildwood FL 34785. Funding Group's property in Wildwood is served by Progress Energy.

Petitioner's Representative in this Proceeding

5. U.S. Funding Group, LLC is represented by Robert K. Lincoln and Stacy Dillard-Spahn of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., whose address is 2033 Main Street, Suite 600, Sarasota, Florida 34237; and whose telephone number is (941) 366-8100. Petitioner has contracted to pay their attorney a reasonable attorney's fee for this matter.

Notice of the Agency Decision

6. The Funding Group received notice of the PSC's Proposed Action in this matter on January 10, 2010 by seeing a copy on the PSC web site.

Disputed Issues of Material Fact

7. Both Progress Energy and FB Energy are "public utilities" and "electric utilities" as those terms are defined in s. 366.02, Fla. Stat.

8. Funding Group asserts that the Commission did not properly consider the factors established in Rule 25-17.0832(3), F.A.C., required to approve a negotiated contract.

9. Funding Group asserts that Progress Energy cannot demonstrate need for the electricity to be provided by the proposed Plant. Progress Energy has excess capacity in its 10 Year Site Plan and does not plan to take any of that capacity off-line to offset the power purchased under the Contract.

10. Funding Group asserts that the cost-effectiveness of the Contract has not been properly established. While the Contract is a "negotiated contract," the terms were based on

the 2008 Standard Offer contract rather than by the avoided cost approach required by s. 366.051, Fla. Stat.

11. The contract price is not based on the full avoided cost as required by s. 366.051, Fla. Stat.

12. Furthermore, the proposed Facility and the Contract are not cost effective and reliable as required by Rule 25-17.001(5)(d), F.A.C.

13. Funding Group's residentially zoned property in Manatee County is located within ½ mile of the proposed Plant. The sole access to Funding Group's property is via Armstrong Road.

14. The proposed Plant will negatively affect Funding Group's Manatee County property in a storm event in unique and particular ways that are directly resulting from the Commission's approval of the Contract.

15. The Contract does not provide sufficient performance guarantees to meet the requirements of Rule 25-17.0832(3)(d), F.A.C.

16. The negotiated contract is not prudent for cost recovery purposes, and the proposed purchase of firm capacity and energy from the Plant pursuant to the terms and other conditions of the Contract cannot reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs, or provide energy security, as set forth in Rule 25-17.240, F.A.C.

17. The Commission did not properly consider the reliability and viability of the Plant, and the performance guarantees in the Contract are insufficient to protect the ratepayers.

18. The proposed Plant is not reliable or viable and the information that was provided to the PSC regarding the status of FB Energy's permitting activities was not accurate with respect to the required land use approvals.

19. The proposed Plant is to be located on property that is largely below 5' elevation and within the Coastal High Hazard Area. The remainder of the site is almost entirely below 10' elevation. Most of the site will be inundated in a Category 1 storm event.

20. The proposed Plant is to be located within the 130 MPH wind-born debris zone.

21. The biomass fuel for the proposed Plant will be woody biomass fuel stock stored in uncovered, open storage piles.

22. FB Energy cannot demonstrate that the proposed Plant will be able to provide continuous and reliable electricity during or after storm events, and the proposed Plant and Contract therefore are not reliable.

23. The current land use regulations applicable to the proposed Plant site do not allow the proposed Plant. The Comprehensive Future Land Use Plan of the site must be amended and the site rezoned for the Plant.

24. On October 13, 2009, PSC Staff issued its 2nd Data Request to PEF, requesting specific information on the status of zoning for the Plant. In its October 27 Response PEF stated (emphasis added):

FB Energy began the land use and zoning approval process in April, 2009. The Comprehensive Land Use Plan approval process for a biomass facility has been completed and approved. FB Energy is currently in the process of the local re-zoning process. The site shall be re-zoned from the current light industrial zone to include a biomass power facility; and, based on initial discussions with County Staff and Commissioners, the project is well accepted and supported by both. While it has taken longer than expected for the full approvals, the local zoning approval should be received by January 2010.

25. In fact, the Comprehensive Land Use requirement had not been approved because on October 20, 2009, a full week before PEF issued its response to the PSC Staff, a challenge was filed to the comprehensive plan amendment. Because of this challenge, there is no Final Order regarding the Comprehensive Plan Amendment, regulations applicable to the site remain unchanged and the Plant is not permitted.

26. The Comprehensive Plan Amendment necessary to construct the proposed Plant has been challenged and will not be effective until a Final Order approving the Plan Amendment, if ever, is entered.

27. The rezoning necessary to construct the proposed Plant has been approved but will not be effective until the Plan Amendment is effective, if ever.

28. The PSC was not informed of the permitting uncertainties identified herein. Due to the Contract's redaction of critical dates and the failure of FB Energy and PEF to inform the PSC of the permitting delays and uncertainties for the Plant, the PSC could not appropriately apply and assess Rules 25-17.0832(3)(d) and 25-17.240, F.A.C., to the petition.

29. Based on the location and operational characteristics of the proposed Plant, it is likely that service disruptions will occur in even lower intensity storm events. This means that the Contract does not and cannot provide assurances of adequate service to the customers of Progress and the larger service area including the state. It also means that the proposed Plant is likely to off-line in times of emergency power demand after a storm event.

30. By locating the proposed Plant in a Coastal High Hazard Area and 130 MPH Windborne Debris Zone in close proximity to Funding Group's Manatee County property, FB Energy will impose physical and environmental risks for the surrounding areas, including

Funding Group's Manatee County property in violation of its duty under s. 366.03 not to unduly prejudice or disadvantage other persons such as Funding Group.

31. By entering the Contract to buy energy from the proposed Plant, and imposing risks on the surrounding area, Progress Energy is in violation of its duty under s. 366.03, Fla. Stat., not to give undue disadvantage to any locality or person, including Funding Group.

32. By approving the Contract, which relies on the proposed Plant in a Coastal High Hazard Area and 130 MPH Windborne Debris Zone, the Commission did not properly implement its jurisdiction under s. 366.04(2)(c), Fla. Stat., to require electric power reliability within a coordinated grid, for conservation as well as emergency powers.

33. By approving the Contract, which relies on the proposed Plant in a Coastal High Hazard Area and 130 MPH Windborne Debris Zone, and in close proximity to significant environmentally sensitive lands, including the Terra Ceia Aquatic Preserve, the Commission violated the requirement of s. 366.91(1), Fla. Stat., that renewable energy facilities result in environmental improvement.

Petitioner's Substantial Interests Will Be Affected by the Agency Determination

34. Funding Group asserts that it has standing to bring this action because its substantial interests that are to be protected by the applicable statutes and rules will be substantially affected in the following ways:

a. Section 366.01, Fla. Stat., states that the purpose of the regulation of public utilities by the Commission is as follows:

The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the

provisions hereof shall be liberally construed for the accomplishment of that purpose.

The Commission has the authority and responsibility to protect the public welfare, including the interests claimed by Funding Group.

b. The Commission's decision subjects Funding Group to undue prejudice and disadvantage in violation of s. 366.03, Fla. Stat., by approving a power Plant in a location and manner that imposes environmental and operational risks that will create immediate and adverse impacts to Funding Group's Manatee County property in a storm event.

c. Because Funding Group owns property within Progress Energy's service area, the Commission's action in approving the Contract affects its interests as protected by s. 366.041, Fla. Stat., that requires Progress Energy to maintain a system that is efficient, sufficient and adequate and that uses alternative energy sources efficiently.

d. Because Funding Group owns property within Progress Energy's service area, the Commission's action in approving the Contract affects its interests as protected by Rule 25-17.001(5)(d), F.A.C., that requires a negotiated contract to be cost effective and reliable.

e. Because Funding Group owns property within Progress Energy's service area, the Commission's action in approving the Contract affects Funding Group's interests protected by s. 366.051, Fla. Stat., in having the rate paid by its provider under a negotiated purchase contract to be based on the full avoided cost.

f. Because Funding Group owns property in the immediate vicinity of the proposed Plant, the Contract approved by the Commission violates the intent of, and Funding Group's interest under, s. 366.91(1), Fla. Stat. and 366.092(1), Fla. Stat., that the expansion of renewable energy generation should result in improved environmental conditions.

Ultimate Facts and/or Mixed Facts and Conclusions of Law

35. The Funding Group has substantial interests that are adversely affected for the purposes of Sections 120.569 and 120.57, Florida Statutes (2009) by the PSC's Proposed Action and incorporates by reference the allegations set forth above.

36. The Contract does not offer sufficient performance guarantees to meet the requirements of Rule 25-17.0832(3)(d), F.A.C.

37. The Contract is not based on full avoided cost as defined by s. 366.051, Fla. Stat.

38. The Contract does not result in a system that is reliable for operational and emergency purposes as required by s. 366.04, Fla. Stat.

39. The Contract does not result in a rate system that meets the requirements of s. 366.041(1), Fla. Stat.

40. The Contract does not meet the intent of s. 366.91(1), Fla. Stat. and s. 366.092(1), Fla. Stat.

41. The negotiated Contract is not prudent for cost recovery purposes. The proposed purchase of firm capacity and energy from the Plant pursuant to the terms and other conditions of the Contract cannot reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs, or provide energy security, as set forth in Rule 25-17.240, F.A.C.

42. The viability of FB Energy's proposed Plant is highly questionable due to numerous permitting issues that were not disclosed to the PSC and which remain unresolved. The PSC could not and did not consider accurate information in assessing the reliability and viability of

the Plant, and therefore failed to properly assess whether the performance guarantees in the contract are sufficient to protect the ratepayers.

Statutes and Rules Warranting Relief

43. The following statutes provide the basis for relief:

- a. Section 366.03, Fla. Stat., because the Commission's action approving the Contract unduly disadvantages Funding Group and its Manatee County property by creating environmental risks.
- b. Section 366.04(2)(c) , Fla. Stat., because the Commission action approves a proposed Plant that will not provide reliable energy for operational and emergency purposes because of the location of the proposed Plant;
- c. Section 366.041(1), Fla. Stat. because the Commission's action results in inefficient, insufficient and inadequate facilities.
- d. Section 366.051, Fla. Stat. because the Commission action approves a contract that is not based on the avoided cost.
- e. Section 366.091(1), Fla. Stat. because the Commission action does not result in the improvement of the environment.
- f. Section 366.092(1), Fla. Stat.. because the Commission action does not result in the improvement of the environment.

44. The following rules provide the basis for granting relief:

- a. Rule 25-17.0832(3), F.A.C. because the Commission action approves a Contract for which there is no need and which does not provide assurances that the Plant is cost-effective and reliable.

- b. Rule 25-17.240, F.A.C because the Commission action approves a proposed Contract based on the proposed Plant which is not cost effective and reliable

Relief Sought

45. Funding Group requests the following relief:

- a. That the Commission enter an Order setting the above-styled proceeding for an evidentiary proceeding, through an administrative hearing; and
- b. That following said hearing, the Commission enter an order denying Florida Progress Energy's petition requesting approval of the negotiated purchase power contract between Progress Energy Florida, Inc. and Florida Biomass Energy, LLC.

Respectfully submitted,

s/ Robert K.Lincoln
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CERTIFICATE OF SERVICE

I CERTIFY that on July 21, 2010, I electronically filed the foregoing with the Florida Public Service Commission at filings@psc.state.fl.us and furnished a true and correct copy of same by electronic and U.S. Mail to the following:

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