

Matilda Sanders

090372-EQ

From: Amra Rickwa [arickwa@icardmerrill.com]
Sent: Monday, September 13, 2010 12:08 PM
To: Filings@psc.state.fl.us
Subject: fw: bcc: Electronic Filing - Docket 090372-EQ
Attachments: 090732_USF Funding Response FBE MTD Amended Petition_2010 Aug 20.pdf

Per my telephone conversation with Matilda I am forwarding you the email below with the attachment which was originally sent on 8/20/10 for filing, but not showing up in the docket.

Thank you,
Amra

Amra Dillard Rickwa
Florida Registered Paralegal to
Robert K. Lincoln, Esq. & Stacy Dillard-Spahn, Esq.



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-----Original Message-----

Date: Fri, 20 Aug 2010 15:51:59 -0400
From: SDILLARD-SPAHN (Stacy Dillard-Spahn)
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a. **Person responsible for this electronic filing:**

9/13/2010

DOCUMENT NUMBER DATE
07632 SEP 13 09
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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:

10

e. Description of attached document:

U.S. Funding Group, LLC's Response to Florida Biomass Energy, LLC's Motion to Dismiss Amended Petition

(see attached file: 090732_US Funding Response FBE MTD Amend Petition_2010 Aug 20.pdf)

Thank you for your assistance in this matter.



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A Firm Commitment To You.
ICARD MERRILL
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9/13/2010

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

**US FUNDING GROUP, LLC'S RESPONSE TO
FLORIDA BIOMASS ENERGY, LLC'S MOTION TO DISMISS AMENDED PETITION**

US FUNDING GROUP, LLC ("Funding Group"), pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C), hereby files this response in opposition to the Motion to Dismiss Amended Petition filed in this proceeding by FLORIDA BIOMASS ENERGY, LLC ("FB Energy") on August 10, 2010, and in support thereof states as follows:

1. FB Energy's entire argument that Funding Group lacks standing is based on its assertion that Funding Group must allege that it was a customer of Progress Energy on January 2010, in order to satisfy the standing test under Agrico Chemical Company v. DER, et al, 406 So.2d 478 (Fla. 2d DCA 1981). FB Energy's position is misplaced as it ignores that the relevant statutes and rules (1) afford expanded opportunity for entry into these proceedings; (2) give standing to persons who can state an interest in the environmental or need issues on a statewide basis, and (3) create a more liberal standing test with respect to the "immediacy" prong of Agrico. Under a proper interpretation and application of the statutes, rules and precedent, Funding Group has asserted a proper basis for standing, even if it did not or could not assert that it was a customer of Progress Energy on January 20, 2010.

A. **The Zone of Interest Protected in these Proceedings Extends Beyond Customers and Ratepayers**

2. FB Energy asserts that the "interests to be protected" in the instant proceedings are established by Rule.25-17.0832, F.A.C., (the "Contract Rule") and are limited to customers and

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ratepayers. FB Energy not only ignores several critical provisions of the Contract Rule, but also the statutes that the Rule implements.

3. Where a statute is intended to create broad benefits to the public, members of the public may assert those interests to establish standing to participate in administrative proceedings taken pursuant to those statutes. See, e.g., Peace River/Manasota Regional Water Supply Authority et al v. IMC Phosphates et al, 18 So.3d 1079, 1083-84 (Fla. 2d DCA 2009) (Authority's claim of interests in water from Peace River sufficient to support standing where permit was issued pursuant to chapter that dealt with the protection and conservation of water resources of the State); Town of Palm Beach et al v. Dep't of Nat. Res. et al, 577 So.2d 1383, 1388 (Fla. 4th DCA 1991) (where statutes gave department authority to regulate construction on beaches, "the statute and administrative proceedings are designed to protect the entire beach/dune system of the state of Florida" and a petition claiming harm to the dunes in the vicinity of the petitioner's property was sufficient to assert standing under Agrico).

4. The statutes that establish the PSC and its jurisdiction over public and electric utilities are clearly regulated for the public welfare and are to be broadly construed to that end. Section 366.01, Fla. Stat. (2009) states:

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

5. Several provisions of the statutes governing the regulation of electric utilities recognize the PSC's obligation to protect the general public interest in the efficiency and reliability of the entire electric system for the benefit of the entire state. Section 366.04(2), Fla. Stat. (2009) provides the PSC with authority over electric utilities to "require electric power

and reliability within a coordinated grid, for operational as well as emergency purposes.”

Section 366.04(5), Fla. Stat. (2009), provides the PSC with:

jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

6. Section 366.05(1), Fla. Stat. (2009) provides the PSC with the power to:

require repairs, improvements, additions, replacements, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public.

7. Section 366.081, Fla. Stat. (2009) provides in part that:

The Legislatures finds and declares that it is critical to utilize the most efficient and cost-effective demand-side renewable energy systems and conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens.

8. Section 366.051, Fla. Stat. (2009) provides in part that:

Electricity produced by cogeneration and small power production is of benefit to the public when included as part of the total energy supply of the entire electric grid of the state

9. In Legal Envt'l Assistance Fund, Inc. v. Clark et al, 668 So.2d 982 (Fla. 1996), the Florida Supreme Court differentiated the standing to participate in an administrative proceeding before the PSC and the standing to appeal the resulting order. The PSC had allowed the petitioner (LEAF) to intervene, and LEAF was attempting to appeal. In reviewing LEAF's interest in the proceedings, the Court found that § 366.081, Fla. Stat., established a broad public interest protected by the underlying proceeding, stating as follows:

LEAF's stated interest in this case as a public interest advocacy organization is to protect its members' use and enjoyment of Florida's natural resources by seeking to avoid unneeded new power plants and obtaining lower energy costs to customers. This interest parallels the legislative intent of FEECA, which seeks to

utilize the most efficient and cost-effective energy conservation systems to protect the general welfare of Florida and its citizens. *See* § 366.81, Fla.Stat. (1993).

Legal Envtl. Assistance Found., Inc. v. Clark, 668 So.2d 982, 987 (Fla. 1996)

10. The Contract Rule cites §§ 350.127 and 366.05(1), Fla. Stat., as the specific authority for the Contract Rule, and §§ 366.051 and 366.081, Fla. Stat., as the statutes implemented by the Contract Rule. The applicable Contract Rule recognizes and protects interests beyond those of customers and ratepayers. Section 3 of the Contract Rule provides factors that the PSC must consider before approving a negotiated contract. Subsection 3(a) requires the PSC to consider:

Whether additional firm capacity and energy is needed by the purchasing utility *and by Florida utilities from a statewide basis.* (emphasis added).

11. Section 2 of the Contract Rule recognizes and limits the right of PEF and FB Energy to enter a negotiated contract. That section requires the utility to give “consideration to the characteristics and of the capacity and energy to be delivered by the qualifying facility under the contract.” This requires consideration of the nature, location and reliability of the qualifying facility, and by fair implication, the impacts of that facility.

B. The PSC Rules Provide for a Broader Definition of Party Interests than § 120.52(12), Fla. Stat. or Uniform Rule 28-106.11, F.A.C.

12. Under the Administrative Procedure Act, there are several independent definitions of a “party.” Fla. Stat. § 120.52(12). Pursuant to § 120.52(12)(b) a “party” includes “[a]ny other person who, as a matter of constitutional right, provision of statute, or *provision of agency regulation*, is entitled to participate in whole or in part in the proceedings, *or* whose substantial interest will be affected by proposed agency action, and who makes an appearance as a party.” (emphasis added).

13. The Uniform Rules permit persons whose substantial interests are determined in a proceeding to have a point of entry. Rule 28-106.111, F.A.C. The PSC has adopted an exception to the Uniform Rules that govern who may participate in an administrative hearing and how they may do so. Commission Rule 25-22.029, F.A.C., “Point of Entry Into Proposed Agency Action Proceedings” (the “Standing Rule”) is the relevant and definitive “provision of agency regulation” that sets forth the requirements for standing to participate in a proceeding before the Public Service Commission with respect to the PSC’s proposed agency action orders (“PAA Orders”).

14. The Standing Rule states “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 29-106.201, F.A.C.” Rule 25-22.029(3), F.A.C. (emphasis added). The Standing Rule expands the point of entry from a person whose interests “will be determined” under the Uniform Rules, or whose “substantial interests will be affected” under § 120.52(2), Fla. Stat., to include a person’s whose interests **may be** affected by the issuance of a PAA Order.

15. The Second DCA in Agrico, acknowledged that a party may be given standing based on a “provision of agency regulation.” Agrico, 406 So.2d at 481-482. However, the agency in Agrico was the DER, and not the PSC. The Agrico Court found that the statute relevant to the DER proceedings did not confer standing apart from the definition in § 120.52(2), Fla. Stat., and then further explained what it meant to have a “substantial interest in the outcome of the proceedings” under that definition. Id. at 482.

16. However, the Agrico Court never set forth or explained in the context of a PSC proceeding, the meaning of the Standing Rule, or any other rule that confers standing “on one

whose substantial interests may be affected.” The Florida Supreme Court’s decision in LEAF establishes that the broad public interest protected by the statutes governing PSC decisions, create an equally broad “zone of interest” for standing purposes in administrative proceedings under those statutes.

17. Because the PSC Rule confers standing to not only those whose substantial interests will be affected, but also to those whose substantial interest may be affected, it contemplates a different level of “immediacy” than the Agrico test requires. That is, a party need only allege that the proposed action has the potential to affect interests that are protected by the relevant statutes and rules.

18. Thus, Funding Group need only establish that it has substantial interests protected by the proceedings that may be affected by these proceedings, including interests that “may” be affected in the future.

C. Funding Group’s Amended Petition is Sufficient to Demonstrate that it Has Substantial Interests Protected by the Applicable Statutes and Rules that May Be Affected by the PAA or Alternatively, Demonstrates that It Can Allege Such Interests

19. Funding Group has alleged that it owns residential property in Sumter County served by Progress Energy based on Progress Energy’s own maps of its service area.

20. FB Energy’s counsel conceded that if Funding Group were a customer, it likely could establish standing. Motion to Dismiss, paragraph 17. However, FB Energy’s position is that if Funding Group were not a customer on January 20, 2010, it cannot claim any injury. In particular, FB Energy asserts that the potential status as a customer is insufficient. Id. FB Energy further asserts that Funding Group’s claims that the contract is not reliable are also “conjectural and speculative” and insufficient to establish a cognizable injury. Id.

21. FB Energy is wrong. The Standing Rule's use of the term "may" indicates that future injuries are cognizable in these proceedings as a basis for standing. None of the judicial or administrative cases cited by FB Energy analyses the impact of the Standing Rule language on the proper application of the Agrico test.

22. Even if Funding Group's Sumter County property is not currently served by Progress Energy, it could be served by Progress Energy during the term of the contract approved by the PAA at issue. Therefore, Funding Group **may** be a customer or ratepayer in the future, even if it was not on January 20, 2010.

23. Furthermore, Funding Group has asserted a number of interests related to its Manatee County property and its proximity to FB Energy's proposed facility, that are within the zone of interest created by the portions of the Contract Rule that FB Energy did not bother to cite, and by the applicable statutes.

24. Funding Group has pled facts that establish a substantial interest in the "characteristics of the capacity and energy to be delivered under the contract" under Section 2 of the Contract Rule. Clearly, the relevant "characteristics of the capacity" involve the proposed FB Energy facility which Funding Group has asserted will have direct and negative impacts on Funding Group's Manatee County property.

25. Funding Group has pled facts that establish a substantial interest in the question of whether the proposed contract, and the FB Energy facility, are "needed by Florida utilities." This interest is created by Section 3(a) of the Contract Rule, and also by the powers of the PSC in § 366.04(2)(c) and 366.04(5), Fla. Stat., to provide conservation and reliability in a coordinated grid and to avoid the uneconomic duplication of generation facilities. Because FB Energy's facility may adversely impact Funding Group's Manatee County property, Funding

Group has an interest protected by the Contract Rule and those statutes. Further, Funding Group has pled facts establishing that its interests in “an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation” as protected by § 366.04(5), Fla. Stat., may be affected by Funding Group’s location of its facilities in the Coastal High Hazard Area.

26. Section 366.051, Fla. Stat., provides that small power production is a benefit to the public when included in the entire electric grid of the state, which would include Funding Group’s Sumter County property, Manatee County property, and its offices at 5379 Ocean Boulevard, Siesta Key, Florida. This statute also requires that purchase contracts such as the one at issue in these proceedings, be based on the purchasing utility’s full avoided cost. The statute, consistent with the previous sections identified, makes it clear that the purchase of energy from small power producers is of statewide interest with respect to the reliability of the overall grid. Funding Group has pled facts sufficient to establish that the contract at issue does not meet these requirements, and that Funding Group’s properties may be affected by the failure of the Order at issue to protect the statewide interest in ensuring that the full avoided cost is paid.

D. Conclusion

27. For the reasons stated above, Funding Group’s Petition is legally sufficient to establish Funding Group’s standing to participate in these proceedings.

WHEREFORE, Funding Group hereby requests the Commission deny FB Energy’s Motion to Dismiss Amended Petition.

Respectfully submitted,

s/ Robert K. Lincoln

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 20, 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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