

State of Florida



Public Service Commission
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DATE: October 14, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (J. Crawford) *CMK Jan JSC*
Division of Regulatory Analysis (S. Brown) *SB*

RE: Docket No. 090372-EQ – Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida. *WBN RLT*

AGENDA: 10/26/10 – Regular Agenda – Motion to Dismiss – Oral argument not requested; participation is at the Commission’s discretion

COMMISSIONERS ASSIGNED: Edgar and Skop

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RAD\WP\090372.RCM.DOC

Case Background

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.

The Commission 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,

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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, the Commission 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 points, but that in an abundance of caution, Funding Group should be given leave to amend its protest. By Order No. PSC-10-0434-FOF-EQ, issued July 6, 2010, the Commission allowed Funding Group 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. The Commission further directed that, 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.

On July 21, 2010, Funding Group filed an Amended Petition Protesting Order No. PSC-09-0852-PAA-EQ (Amended Petition). On August 10, 2010, FB Energy filed a Motion to Dismiss Funding Group's Amended Petition, contending that Funding Group failed to allege facts that, even if assumed to be true, would establish its standing under Florida law. On September 13, 2010, Funding Group filed a Response to FB Energy's Motion to Dismiss.

On August 9, 2010, FB Energy filed notice of service of its first request for production of documents, first set of interrogatories, and first request for admissions to Funding Group. On the same date, FB Energy also filed an Unopposed Motion to Expedite Discovery. In its motion, FB Energy states its belief that Funding Group lacks standing to request a hearing in this proceeding because it is not a retail customer of PEF, and that the allegations made by Funding Group do not afford a basis for its standing. FB Energy's discovery requests were directed to whether Funding Group is a customer of PEF, and whether it was a customer of PEF at the time Funding Group filed its initial protest of Order No. PSC-09-0852-PAA-EQ. The motion was granted by Order No. PSC-10-0533-PCO-EQ, issued August 19, 2010, and Funding Group's responses to the discovery were served on August 23, 2010.

This matter is now before the Commission for the purpose of resolving FB Energy's Motion to Dismiss Funding Group's Amended Petition. While none of the parties requested oral argument pursuant to Rule 25-22.022(1), Florida Administrative Code (F.A.C.), staff notes that oral argument may be heard at the Commission's discretion pursuant to Rule 25-22.022(7)(b),

Docket No. 090372-EQ
Date: October 14, 2010

F.A.C. The Commission has jurisdiction over this matter pursuant to Sections 366.051, 366.81, and 366.91, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission grant Florida Biomass Energy, LLC's Motion to Dismiss?

Recommendation: Yes. For the reasons discussed below, staff believes that the allegations set forth in Funding Group's Petition fail to conclusively show why it has standing under the two-prong test required by Agrico, as required by Order No. PSC-10-0434-FOF-EQ. Accordingly, FB Energy's Motion to Dismiss should be granted, Funding Group's Amended Petition should be dismissed with prejudice, and Order No. PSC-09-0852-PAA-EQ should be made final and effective. (J. Crawford, S. Brown)

Staff Analysis:

Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963); and Rule 1.130, Florida Rules of Civil Procedure. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Varnes v. Dawkins at 350.

Funding Group's Amended Petition

In its Amended Petition protesting Order No. PSC-09-0852-PAA-EQ, Funding Group contends that it owns property located in Manatee County, in the immediate vicinity of the plant FB Energy proposes to build pursuant to its contract with PEF. Funding Group states that it "also owns residential property in Sumter County," and that this property is served by PEF. Funding Group states that its substantial interests will be affected in that the proposed agency action "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." Funding Group also alleges that its interests will be adversely affected in that the approval of the contract and subsequent construction of the plant creates environmental, operational and emergency risks; the contract is not based on full avoided cost as defined by Section 366.051, F.S.; and the contract does not provide sufficient performance guarantees or assurances that the plant is cost-effective and reliable.

FB Energy's Motion to Dismiss

FB Energy seeks to dismiss Funding Group's Amended Petition on the grounds that Funding Group has failed to allege facts that, even if assumed to be true, would establish its 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).¹ Significantly, Funding Group has not alleged that it is a customer of PEF, nor has it alleged that it was a customer as of the time that it filed its initial petition protesting Order No. PSC-09-0852-PAA-EQ, on January 20, 2010. Although in its amended petition, Funding Group has asserted that it "owns property within Progress's service area," and that the subject property is "served by Progress Energy," these allegations, even if true, are insufficient to establish standing. Since Funding Group is not a customer of PEF at the address alleged in its Amended Petition, and since Funding Group was not a customer of PEF when it filed its initial petition, it cannot have sustained either actual injury at the time of the petition, nor can it demonstrate that its alleged harm is real and immediate. Funding Group's alleged injuries to its property in Manatee County are not only speculative, they are also, as alleged environmental and economic damages to Funding Group's property, outside the Commission's jurisdiction and zone of interests protected by this proceeding.

FB Energy also cites to Rule 25-17.0832(2) and (3), F.A.C., in its pertinent part:

(2) Negotiated Contracts. Utilities and qualifying facilities are encouraged to negotiate contracts for the purchase of firm capacity and energy to avoid or defer the construction of all planned utility generating units which are not subject to the requirements of Rule 25-22.082, F.A.C. . . . Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract. . . .

¹ A person whose substantial interests are to be determined by agency action and who seeks a hearing before an agency must meet the two-prong standing test set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The petitioner must show that (1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (2) this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote). Further, a purely economic interest cannot serve as the basis for standing. See Agrico, 403 So.2d at 482; International Jai-Alai Players, 561 So. 2d at 1225-26.

(3) Cost Recovery for Negotiated Contracts. In reviewing negotiated firm capacity and energy contracts for the purpose of cost recovery, the Commission shall consider factors relating to the contract that would impact the utility's general body of retail and wholesale customers including:

...

(d) Considering the technical reliability, viability, and financial stability of the qualifying facility, whether the contract contains provisions to protect the purchasing utility's ratepayers in the event the qualifying facility fails to deliver firm capacity and energy in the amount and times specified in the contract.

(Emphasis supplied, Motion to Dismiss at pp. 10-11) FB Energy contends that the rule makes clear that the interests to be protected by the Commission's review of negotiated contracts are the interests of the purchasing utility's ratepayers, i.e., its customers. Funding Group might be a future customer of PEF at the address cited in its Amended Petition, but it is not now a customer at that address, and accordingly, even the allegations that Funding Group owns residential property in Sumter County served by PEF and that Funding Group's Manatee property is in PEF's service area is too speculative to satisfy the injury in fact prong of the Agrico test. In other words, since Funding Group is not a customer, it is legally incapable of suffering an injury in fact as a result of the Commission's approval of the negotiated contract. FB Energy therefore requests that Funding Group's Amended Petition be dismissed with prejudice.

Funding Group's Response

In its Response, Funding Group asserts that the interests to be protected in this proceeding are not limited to customers only, but that the operant rules and statutes are intended to create broad benefits to the public, and that members of the public may assert those interests to establish standing to participate in administrative proceedings. Funding Group contends that, "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." Funding Group also contends that the concerns it raises regarding potential environmental, operational and emergency risks should the plant be constructed are within the zone of interest this proceeding is intended to protect. Finally, Funding Group alleges 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 in Siesta Key, Florida. Funding Group contends that the reliability of the overall state electric grid gives it the appropriate standing to ensure that full avoided cost is paid.

Staff's Analysis

For the reasons discussed below, staff agrees with FB Energy that the allegations set forth in Funding Group's Amended Petition fail to satisfy the two-prong test required by Agrico. Thus, staff recommends that Funding Group's Petition be dismissed, with prejudice, on the

grounds that Funding Group has failed to conclusively demonstrate why Funding Group has standing under Agrico, as required by Order No. PSC-10-0533-PCO-EQ.

Under Agrico, a person whose substantial interests are to be determined by agency action and who seeks a hearing before an agency must show that (1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, F.S., hearing, and (2) this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote). Further, a purely economic interest cannot serve as the basis for standing. See Agrico, 403 So.2d at 482; International Jai-Alai Players, 561 So. 2d at 1225-26.

In its Amended Petition, Funding Group contends that it owns property located in Manatee County, in the immediate vicinity of the plant FB Energy proposes to build pursuant to its contract with PEF. Funding Group states that it "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." However, Funding Group does not clearly or specifically state in its Amended Petition that it is a customer or ratepayer of PEF. It is ambiguous whether the statement is meant to indicate that Funding Group is a customer of PEF, or whether the residential property is merely in PEF's service area. FB Energy states that Funding Group has not alleged that it is a customer or ratepayer of PEF, and has in fact propounded discovery which it believes will demonstrate that Funding Group is not a customer of PEF. Staff notes that the discovery and Funding Group's responses thereto were not a part of the Amended Petition and thus should not be considered in determining the sufficiency of the petition. However, US Funding makes a number of statements in its Response to FB Energy's Motion to Dismiss that clarify that it is not a PEF ratepayer.²

PEF ratepayers have a clear interest in this proceeding in that they will be required to pay, through their rates, the approved costs associated with the negotiated contract. Funding Group contends that even though it is not a PEF customer, the operational and environmental risks posed by the proposed plant would create immediate and adverse impacts to Funding Group's Manatee County property in a storm event. Furthermore, Funding Group asserts that there is a broad public interest protected by the statutes governing Commission decisions, which creates an equally broad "zone of interest" for standing purposes in administrative proceedings under those statutes.

Funding Group's concerns regarding environmental and operational risks, should the plant be constructed, and should a storm event occur, appear highly speculative. See Ameristeel

² See for example: "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." (Response, ¶ 22, at p. 7).

Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) (threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy to warrant a Section 120.57, Florida Statutes hearing); citing Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) (some degree of loss due to economic competition is not of sufficient immediacy to establish standing). See also International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, at 1225-1226 (Fla. 3d DCA 1990); and Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987) (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process – “The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct.”).

Funding Group’s contention that its interest in the reliability of the overall state electric grid gives it the appropriate standing to ensure that full avoided cost is paid is likewise too broad to confer standing in this proceeding. Under its interpretation, any Florida resident taking service from the state electric grid would have sufficient standing to request a Section 120.57, F.S., hearing in this matter.

Funding Group also cites as a basis for standing Section 366.01, F.S., in that the regulation of public utilities is in the public interest, which should be broadly construed to confer standing in this matter. While the phrase “public interest” is undefined and subject to a broad reading, the phrase should not be read so broadly as to extend the Commission’s authority to grant relief which is beyond the type or nature which this proceeding is designed to protect. Funding Group has not demonstrated that it is a customer of PEF, nor has it shown how, as a non-customer or future customer, its interests are directly and immediately affected in a manner that this proceeding is designed to protect.

For example, other statutory provisions cited in the Amended Petition (such as Section 366.03, the Commission’s approval of the contract creates environmental risks; 366.04, the Commission’s action results in inefficient, insufficient, and inadequate facilities; 366.091, the Commission action does not result in the improvement of the environment) are outside the ambit of this proceeding and are not the interests this proceeding is designed to address.

Finally, staff notes that 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. By Order No. PSC-10-0434-FOF-EQ, the Commission allowed Funding Group 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. The Commission further directed that, 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. As discussed above, staff believes that Funding Group has again failed to demonstrate that it has standing to protest Order No. PSC-09-0852-PAA-EQ. Staff therefore believes that the dismissal of Funding Group’s Amended Petition should now be with prejudice.

Conclusion

Staff believes that Funding Group's asserted substantial interests fail to meet either prong of the standing test set forth in Agrico. As stated above, in order to satisfy the first prong of the test, Funding Group must show that it will suffer an injury in fact which is both real and immediate, not speculative or conjectural, and which is of sufficient immediacy to entitle it to a Section 120.57 hearing. Staff believes that Funding Group's general assertions that its property will be adversely affected, or that it has a broad interest as a member of the public in the approval of the negotiated contract, is far too remote and speculative in nature to satisfy the required showing set forth in Agrico.

In order to satisfy the second prong of the Agrico test, a petitioner must show that the alleged substantial injury is of a type or nature which the proceeding is designed to protect. Even if the alleged injury was found to be real and immediate, Funding Group still fails on the second prong because the majority of the matters raised in its Amended Petition are not the type designed to be addressed in this proceeding.

While staff believes that Funding Group has failed to meet both prongs of the Agrico test, were the Commission to determine that it had failed to meet either prong, such finding would still result in a failure to establish standing in this matter.³

For the reasons discussed above, staff believes that the allegations set forth in Funding Group's Petition fail to conclusively show why it has standing under the two-prong test required by Agrico, as required by Order No. PSC-10-0434-FOF-EQ. Accordingly, staff recommends that FB Energy's Motion to Dismiss should be granted, Funding Group's Amended Petition should be dismissed with prejudice, and Order No. PSC-09-0852-PAA-EQ should be made final and effective.

³ See Order No. PSC-05-0382-FOF-TP, issued April 12, 2005, in Docket No. 050111-TP, In re: Joint petition of MCG Capital Corporation, IDS Telcom Corp. and IDS Telcom LLC for approval for name change and transfer of CLEC Certificate No. 5228 from IDS Telcom LLC to IDS Telcom Corp.; for waiver of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection in connection with the sale of customer-based and other assets from IDS Telcom LLC to IDS Telcom Corp.; and for acknowledgment of registration of IDS Telcom Corp. as intrastate interexchange telecommunications Company effective February 8, 2005.

Docket No. 090372-EQ
Date: October 14, 2010

Issue 2: Should this docket be closed?

Recommendation: If the Commission approves staff's recommendation in Issue 1, Order No. PSC-09-0852-PAA-EQ should be considered final and this docket should be closed. (J.Crawford)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, Order No. PSC-09-0852-PAA-EQ should be considered final and this docket should be closed.