

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 20170122-EI
ORDER NO. PSC-2017-0358-PCO-EI
ISSUED: September 20, 2017

ORDER DENYING SIERRA CLUB'S
PETITION TO INTERVENE AND PROTEST
PROPOSED AGENCY ACTION

By 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 Rule 25-22.082, Florida Administrative Code (F.A.C.), pursuant to subsection (18) of that Rule (Petition for Exemption).

On August 14, 2017, Sierra Club filed a Petition to Intervene and Protest the PAA Order (Petition). On August 21, 2017, FPL filed its Response to Sierra Club's Petition (Response). On August 25, 2017, Sierra Club filed its Motion for Leave to File a Reply to FPL's Response and attached its Reply to FPL's Response (Sierra Club Motion for Leave and Reply). On September 1, 2017, FPL filed its Motion for Leave to File a Reply and Proposed Reply (FPL Motion for Leave and Reply).

Rule 25-22.082, F.A.C. (Rule)

The Rule's intent is:

to provide the Commission information to evaluate a public utility's decision regarding the addition of generating capacity pursuant to Section 403.519, F.S. The use of a Request for Proposals (RFP) process is an appropriate means to ensure that a public utility's selection of a proposed generation addition is the most cost-effective alternative available.

Rule 25-22.082(1), F.A.C.

A "participant" in an RFP is defined by the Rule as:

a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a public utility's RFP. A participant may include, but is not limited to, utility and non-utility generators, Exempt Wholesale Generators (EWGs), Qualifying Facilities (QFs), marketers,

and affiliates of public utilities, as well as providers of turnkey offerings, distributed generation, and other utility supply side alternatives.

Id. at (2)(d).

At subsection (18), the Rule provides:

[u]pon a showing by a public utility and a finding by the Commission that a proposal not in compliance with this rule's provisions will likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or otherwise will serve the public welfare, the Commission shall exempt the utility from compliance with the rule or any part of it for which such justification is found.

PAA Order

The exemption at issue in this case was granted by a PAA Order, upon a finding that FPL met the criteria set forth in the Rule at subsection (18) "by reusing the existing Lauderdale plant site and related facilities for a newer, larger, and more efficient unit." However, in granting the exemption, we emphasized that, in a future Section 403.519, Florida Statutes (F.S.), need determination proceeding, this Commission would have an opportunity to review:

- (1) whether FPL's proposal and other options are the most cost-effective alternative, along with the need for adequate electricity at a reasonable cost;
- (2) whether there is a need for the generation based upon electrical system reliability and integrity, and whether renewable energy sources and technologies, as well as conservation measures, are utilized to the extent reasonably available to meet reliability needs; and
- (3) matters related to public welfare and any other matters the Commission determined to be relevant.

We also specified that granting the exemption does not relieve FPL of meeting the substantive requirements in a Section 403.519, F.S., proceeding.

Sierra Club Petition

Sierra Club asserts: (1) that FPL has not met the requirements for an exemption pursuant to Rule 25-22.082, F.A.C.; (2) that FPL's petition and supporting documentation have not provided sufficient information to allow this Commission to evaluate cost-effective alternatives and determine the need for FPL's proposed project pursuant to Section 403.519, F.S.; and (3) that the granting of the exemption does not comport with the requirements for a variance or waiver pursuant to Section 120.542, F.S.

Much of Sierra Club's Petition addresses standing. Sierra Club asserts that it meets the three-prong associational standing test established by *Florida Home Builders Ass'n v. Dept. of Labor and Employment Sec.*, 412 So. 2d 351 (Fla. 1982), which requires that an association must demonstrate that (1) a substantial number of its members are substantially affected; (2) the subject matter of the proceeding is within the association's general scope of interest and activity; and (3) the relief requested is of the type appropriate for the association to receive on behalf of its members.

Next, Sierra Club asserts that it meets the requirements for administrative standing pursuant to *Agrico Chemical Company v. Dep't of Env'tl. Regulation*, 406 So. 2d 478 (Fla. 2nd DCA 1981), *rev denied*, 415 So. 2d 1359 and 415 So. 2d 1361 (Fla. 1982), because it will suffer injury in fact which is of sufficient immediacy to entitle it to a hearing; and the substantial injury is of a type or nature which the proceeding is designed to protect.

Sierra Club asserts that it meets the first prong of the *Agrico* test because exempting FPL from the Bid Rule's RFP requirement would: (1) deny Sierra Club, and its members, the due process protections prescribed by Sections 403.519 and 120.57, F.S.; (2) deprive Sierra Club, and its members, of the assurance that the Commission has sufficient information to evaluate the need for the proposed project, and limit the transparency and accountability that such information provides; (3) expose Sierra Club, and its members, to greater costs and risks because the proposed project has not been the subject of healthy market competition; and (4) undermine Sierra Club's, and its members', interests in promoting a safe and sustainable environment.

Sierra Club asserts that it meets the second prong of the *Agrico* test because its members' injuries are of the type and nature that this proceeding is designed to protect. Sierra Club avers that the Bid Rule and Section 403.519, F.S., define the zone of interest of this proceeding. Sierra Club asserts that these authorities provide its members with the protections and benefits that the PAA Order would deny them, including their due process rights to participate in a full and fair evidentiary hearing, the assurance that this Commission has sufficient information to evaluate cost-effective alternatives to the proposed project, including the resulting accountability and transparency, as well as the potential cost-savings and identification of clean energy alternatives that would come with an RFP. As a result, Sierra Club asserts that both its and its members' injuries fall squarely within the zone of interest of this proceeding.

Sierra Club requests the following relief: (1) that an order be entered allowing Sierra Club to Intervene as a full party in this Docket; (2) that the Commission conduct a formal Chapter 120, F.S., evidentiary hearing on disputed facts related to the granting of the exemption, and (3) that FPL's petition for exemption be denied and that FPL be directed "to issue an RFP that permits meaningful participation by a variety of supply-side alternatives, including clean, renewable solar."

FPL Response

In its Response, FPL asks that this Docket be held in abeyance and that the Commission consolidate this Docket, for purposes of hearing, with the future need determination Docket. FPL asserts that this approach has been taken by this Commission in prior proceedings. FPL also argues that the exemption at issue is neither a variance¹ nor a waiver² for purposes of Section 120.542, F.S. Rather the exemption is established by the Rule along with the criteria for granting it. FPL does not object to the standing of Sierra Club or to whether Sierra Club is substantially affected by the Commission's decision to grant the exemption.

Review and Decision

Sierra Club has asserted that FPL has not met the requirements for an exemption pursuant to Rule 25-22.082, F.A.C., which is the subject of the PAA Order. However, the concerns raised by Sierra Club in its Petition relate to the adequacy of the record in an anticipated need determination hearing to be undertaken in a separate Docket pursuant to Section 403.519, F.S. At the core of Sierra Club's argument is an assertion that, absent an RFP, this Commission will not be able to evaluate potential alternatives to FPL's proposed project during an evidentiary hearing. This is largely based upon the assumption that an unspecified and hypothetical RFP participant, a potential generation supplier, will respond to an RFP and improve the record in the need determination proceeding. I observe that no potential generation supplier protested the PAA Order granting FPL the exemption from the RFP requirement. I also note that Sierra Club does not assert that it is a potential generation supplier, or that it represents an entity that is such a provider. Moreover, neither potential generation suppliers nor Sierra Club are precluded from petitioning to intervene in the need determination proceeding to develop and test the adequacy of the record there.

Sierra Club is also concerned that, during the need determination proceeding, both Sierra Club and this Commission will not have the benefit of information regarding the need for additional generation which FPL must publish pursuant to Rule 25-22.082, F.A.C., as part of the RFP process. However, to the extent that such information is not evident in the prefiled testimony and exhibits filed by FPL in the need determination proceeding, it can be obtained by both Sierra Club and our staff via discovery. In its PAA Order, this Commission made it abundantly clear that, notwithstanding the granting of the RFP exemption, in an eventual Chapter 120, F.S., administrative proceeding, FPL must meet each substantive requirement of Section 403.519, F.S. Stated differently, FPL has the burden of proof³ and goes to hearing at its own peril absent the benefit of issuing an RFP.

¹ A variance is a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Section 120.52(21). F.S.

² A waiver is a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Section 120.52(22). F.S.

³ See e.g., *Beshore v. Department of Financial Services*, 928 So.2d 411 (Fla. 1st DCA 2006).

While I agree with Sierra Club that FPL's Petition for Exemption and supporting documentation have not provided sufficient information to allow this Commission to evaluate cost-effective alternatives and determine the need for the FPL's proposed project pursuant to Section 403.519, F.S., that evaluation will not be made in this Docket. Rather, it will be made based upon the evidence presented in a need determination hearing, undertaken in accordance with Chapter 120, F.S., in which FPL has the burden of proof.

Having reviewed the Petition, and based upon the foregoing, I find that Sierra Club's interests are not substantially affected by the Commission's decision to grant the exemption in this Docket because Sierra Club will not suffer an injury in fact which is of sufficient immediacy to entitle it to a Section 120.57, F.S., hearing. Thus, Sierra Club fails to meet the first prong of the *Agrico* and *Florida Homebuilders* tests for standing.⁴ Additionally, in its relief requested, Sierra Club asks this Commission to direct FPL to issue an RFP; thereby permitting participation by supply-side alternatives, including renewable solar. However, Sierra Club does not assert that it is such a potential generation supplier or that it represents such a potential participant as defined by Rule 25-22.082(2)(d), F.A.C. As such, I find that the injury is not of a type or nature that this Docket is designed to protect and that Sierra Club fails to meet the second prong of the *Agrico* test for standing.⁵

Therefore, Sierra Club's Petition is denied. In light of this decision, I do not address the remainder of Sierra Club's arguments or the Sierra Club Motion for Leave and Reply as these are moot. Similarly, I do not address the FPL Motion for Leave and Reply. In accordance with Order No. PSC-2017-0287-PAA-EI, this Docket shall be closed upon the issuance of a consummating order.

Therefore, it is

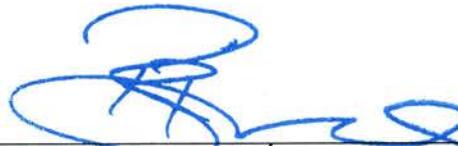
ORDERED by Commissioner Ronald A. Brisé, as Prehearing Officer, that the Sierra Club Petition to Intervene and Protest the PAA Order is denied. It is further,

ORDERED that this Docket shall be closed upon the issuance of an Order Consummating Order No. PSC-2017-0287-PAA-EI.

⁴ See respectively, 406 So. 2d at 482, and 412 So2d at 353.

⁵ See 406 So. 2d at 482.

By ORDER of Commissioner Ronald A. Brisé, as Prehearing Officer, this 20th day of September, 2017.



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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) 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 or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.