

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power & Light Company
for Rate Unification and for Base Rate Increase

Docket No: 20210015-EI
Date: June 28, 2021

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO THE
PETITION TO INTERVENE OF THE SMART THERMOSTAT COALITION**

Florida Power & Light Company ("FPL") hereby submits its response in opposition to the Petition to Intervene ("Petition to Intervene") filed by the Smart Thermostat Coalition ("STC"). In support, FPL states:

1. On June 21, 2021, STC filed a Petition to Intervene as well as the Direct Testimony of Tamara Dzubay. In the Petition to Intervene, STC alleges that it is "an *ad hoc* coalition comprised of industry leaders in smart thermostat technology." Petition to Intervene at 1, ¶ 1. STC does not seek associational standing, but rather seeks standing jointly for its individual corporate participants, ecobee, Inc. and Google LLC. *Id.* at 1, fn. 1.

I. STC is an Unincorporated Association That Must Prove It Has Associational Standing to Intervene in this Proceeding on behalf of its Two Members.

2. As an "*ad hoc* coalition" that purports to represent the interests of two separate entities, STC is required to demonstrate that it has "associational standing" to intervene in this proceeding on behalf of these two entities. The Florida Supreme Court established the following three-prong test for associational standing: (1) that a substantial number of an association's members may be substantially affected by the Commission's decision in a docket; (2) that the subject matter of the proceeding is within the association's general scope of interest and activity; and (3) the relief requested is of a type appropriate for the association to receive on behalf of its members. *See Fla. Home Builders Ass'n v. Dep't of Labor & Employment Sec.*, 412 So. 2d 351,

353-54 (Fla. 1982).¹ If the allegations in the petition fail to meet the *Florida Home Builders* test, then the petitioning association lacks standing to intervene. *See, e.g.* Order No. PSC-15-0295-PCO-EI (“the petition does not allege facts to show that [the petitioner’s] substantial interests will be affected by the outcome of this proceeding or that their environmental interests are those that this proceeding is designed to protect.”). As discussed below, STC’s Petition fails to meet the Florida Home Builders test and should be dismissed.

A. STC’s Petition to Intervene Fails to Demonstrate Associational Standing.

3. STC fails to allege in its Petition or provide any evidence, through the proposed testimony of Ms. Dzubay, to meet its burden under the *Florida Home Builders* test. Having failed to meet the associational standing requirements, STC asserts in its Petition to Intervene that it is not seeking associational standing, “but rather seeks standing jointly for its individual corporate participants.” Petition to Intervene at 1, fn. 1. This, as a matter of law, it cannot do, nor does it try. The Petition to Intervene alleges injuries to “STC” – not its specific corporate participants – as a result of this proceeding and requests that “STC” be granted intervention in this proceeding. STC fails to provide any particularized information about its corporate participants or evidence to support their specific alleged injuries. Accordingly, it is clear that STC is seeking to intervene in this proceeding in a representative capacity on behalf of its members. The footnote in the Petition to Intervene does not cure the fatal deficiency in STC’s filing, which is its failure to allege facts to meet the requirements under *Florida Home Builders*. On this basis alone, the Commission should deny STC’s Petition to Intervene.

¹ *Florida Home Builders* was a rule challenge proceeding but its holding was subsequently extended to section 120.57(1) hearings. *See Farmworker Rights Org., Inc. v. Dep’t of Health & Rehab. Servs.*, 417 So. 2d 753 (Fla. 1st DCA 1982)

B. In Addition, STC’s Petition to Intervene Fails to Establish STC’s Legal Authority to Intervene in this Proceeding in an Individual Capacity.

4. Additionally, based on the allegations in the Petition to Intervene, STC does not appear to be a “person” that can participate in this administrative proceeding in an individual, non-representative capacity. Only a legal person can intervene in a Chapter 120 proceeding. *See* § 28-106.205(a), F.A.C. (“Persons ... may move the presiding officer for leave to intervene”) (emphasis added). An unincorporated association is not a legal person:

“An unincorporated association is an amorphous concept. It could be a club, a group, or any two or more persons who call themselves an association. An unincorporated association is not governed by law as to its creation, the nature or conduct of its ‘business,’ the constitution of its membership, the elections of its officers, or any of the parameters that define and give substance to an incorporated association.”²

While incorporated associations can be treated as persons, “[a]n unincorporated association lacks the legal capacity to sue or be sued in its own name.” *Id.* (holding that an unincorporated association was not an affected person); *see also Larkin v. Buranosky*, 973 So.2d 1286, 1287 (Fla. 4th DCA 2008) (“Florida does not have an enabling statute that allows unincorporated associations to be sued in their own names.”); *Walton-Okaloosa-Santa Rosa Medical Soc. v. Spires*, 153 So.2d 325, 326-27 (Fla. 1st DCA 1963) (an unincorporated voluntary association is “not recognized in court by its own name”) (*quoting Florio v. State of Florida*, 119 So.2d 305 (Fla. 2d DCA 1960)). Legal capacity rules apply not only to judicial proceedings, but also to administrative proceedings. *Cape Cave Corp. v. Fla. Dept. of Env’tl. Reg.*, 498 So.2d 1309, 1311 (Fla. 1st DCA 1986). *Ad hoc* organizations like STC, that are not incorporated or otherwise formed under law, lack standing to initiate or intervene in administrative proceedings. *Palm Beach County Env’tl. Coalition*, 2010 WL

² *Palm Beach County Env’tl. Coalition v. Dept. of Community Affairs*, 2010 WL 3638076, *2 (Fla. Div. of Admin. Hearings Sept. 16, 2010).

3638076, *3. STC provides no evidence that it exists as a legal entity and describes itself as an “*ad hoc* coalition.” Accordingly, the Petition to Intervene fails to establish STC’s legal authority to participate in this proceeding in its individual capacity.

C. STC Cannot Establish Standing Based on Alleged Harm to FPL Customers.

5. The Petition to Intervene includes multiple allegations about injuries to “customers” that may result if STC is not granted permission to intervene in this proceeding. For example, STC requests that FPL’s residential tariffs be augmented to “provide significant bill savings for customers.” Petition to Intervene at 3, ¶ 8. STC also alleges that the Commission’s failure to require smart thermostats in conjunction with Time-of-Use price signals may deprive the “Companies’ customers” of certain cost-related benefits. *Id.* at 9, ¶ 28. Additionally, STC alleges that STC and FPL’s customers have an “intertwined interest” in the development of a smart thermostat program. *Id.* at 9, ¶ 29.

6. STC does not represent FPL customers and would not represent their interests if it were permitted to participate in this proceeding. STC’s allegations concerning alleged harm to FPL customers cannot support STC’s standing to intervene. Accordingly, the Commission must legally disregard STC’s allegations regarding injuries to customers when determining whether to grant the Petition to Intervene.

II. In Addition to the Deficiency with the Petition’s Failure to Meet the Associational Standing Requirements, the Petition Also Fails to Demonstrate That STC Has a Substantial Interest in the Outcome of This Proceeding.

7. STC’s Petition to Intervene also fails to demonstrate that STC has a substantial interest in the outcome of this proceeding based on the requirements set forth in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). Under *Agrico*, STC must demonstrate “(1) that [it] will suffer injury in fact of sufficient immediacy to

entitle [it] to a section 120.57 hearing, and (2) that [its] injury is of a type of nature which the proceeding is designed to protect.” 406 So. 2d at 482. To demonstrate an “injury in fact” under *Agrico*, the Petitioner must show that the injury is not remote, speculative, or indirect. *See Int’l Jai-Alai Players Ass’n v. Fla. Pari-Mutuel Comm’n*, 561 So. 2d 1224 (Fla. 3d DCA 1990).

A. STC’s Petition to Intervene Fails to Establish an “Injury in Fact” under the *Agrico* Test.

8. In the Petition to Intervene, STC alleges that it “has a unique and substantial interest that will be affected by the outcome of this proceeding with respect to [FPL’s] implementation of time-of use (“TOU”) tariffs in [its] service territories.” Petition to Intervene at 2, ¶ 5. STC notes that Gulf Power Company’s (“Gulf”) current Energy Select program includes an option for customers to use a price-responsive programmable thermostat to automatically respond to a time-vary rate, while FPL’s tariffs do not contain this option. *Id.* at 6, ¶ 19; 7, ¶ 20. Therefore, STC alleges that FPL’s proposal in this proceeding to migrate customers currently served under Gulf’s tariffs to FPL’s tariffs, thereby discontinuing the tariff establishing Gulf’s Energy Select program, “is a concrete and non-speculative injury to STC’s substantial interests.” *Id.* at 10, ¶ 29. STC argues that the Commission should require FPL to implement a mechanism for utilizing smart thermostats in conjunction with its RTR-1 TOU rate. *Id.* at 9, ¶¶ 28-29.

9. STC’s Petition to Intervene fails to establish the first requirement under *Agrico*, which is to demonstrate an “injury in fact.” *Agrico*, 406 So. 2d at 482. STC’s alleged injury is based on the discontinuance of a Gulf tariff that may adversely impact STC’s economic interests – namely, its ability to sell smart thermostats in FPL’s service territories. This type of alleged injury constitutes an indirect effect on economic competition that does not meet the “immediacy” test under *Agrico*. *See* Order No. PSC-2002-0324-PCO-EI (*citing Fla. Soc. of Ophthalmology v.*

State Bd. of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988); *see also* Order No. PSC-2017-0397-PCO-EI.

10. Additionally, the impact, if any, of FPL’s proposal to discontinue Gulf’s tariffs on STC’s competitive or business interests is too remote and speculative to confer standing in this proceeding. Notwithstanding FPL’s proposal to eliminate Gulf’s existing tariffs, STC will still be free to market its products to FPL customers and may or may not experience any material change in its business as a result of FPL’s proposal.

11. Furthermore, the direct testimony of STC’s proposed witness on the substance of its proposal belies STC’s claim that it will suffer a “concrete and non-speculative injury” as a result of FPL’s proposal to discontinue Gulf’s tariffs. As shown below, STC witness Dzubay frequently describes the alleged benefits of STC’s request for a smart thermostat requirement as speculative and conditional, thereby demonstrating the speculative and conditional nature of an injury that might result from a denial of that request:

- “STC believes that there is significant *potential* to expand benefits for ratepayers and the grid by building on the Companies’ prior investment in AMI technology.”³
- “Accordingly, a residential TOU tariff using smart thermostat enabling technology as an enrollment incentive *could* significantly expand the number of customers who are able to tap into energy management benefits available from the Companies’ AMI investments.”⁴
- Similarly, encouraging broad customer shift to TOU rates and smart thermostats that can automatically respond to those rates, along with a mechanism that provides visibility regarding the magnitude and location of load shifts, *could* serve an important role in allowing the Companies to cost-effectively match load to supply as their energy mix shifts over time.”⁵

³ Direct Testimony of M. Dzubay at 10:10-11 (emphasis added).

⁴ *Id.* at 13:13-16 (emphasis added).

⁵ *Id.* at 14:13-17 (emphasis added).

- “STC believes there are multiple *potential* effective program designs currently being considered or implemented in other jurisdictions that the Companies and the Commission can look to as templates for investing in smart thermostats alongside AMI as part of a grid modernization package.”⁶
- “STC believes the Companies *could* realistically target 30% residential customer enrollment in a smart thermostat-enabled TOU tariff.”⁷

B. STC’s Alleged Interests Are Not of a Type of Nature Which This Proceeding is Designed to Protect.

12. STC’s Petition also fails to satisfy the second requirement of the *Agrico* test, which is to demonstrate that the alleged injury is of a type of nature which the proceeding is designed to protect. *Agrico*, 406 So. 2d at 482. It is clear that STC’s motivation to participate in this proceeding is predicated on advancing its economic interests. This attempt to intervene to protect economic and business interests is fatal to STC’s Petition. For example, in the Petition to Intervene, STC indicates:

- “STC has a concrete interest in participating in this proceeding in order to ensure that the Companies make available tariffs through which *STC members can effectively respond to price signals* to provide customer and grid benefits through automated shifting of customer heating and cooling load.”⁸; and
- “If the Commission does not require the Companies to implement a mechanism for utilizing smart thermostats in conjunction with TOU price signals to shift demand, then both the Companies’ customers and *the members of STC* will lack an important avenue to achieve *benefits* from cost-effective load shifting.”⁹

However, the purpose of this proceeding is not to promote STC’s economic interests through tariffs that will incentivize customers to purchase smart thermostats; it is to evaluate FPL’s proposed base rate increase and unification of rates with Gulf.

⁶ *Id.* at 15:13-16 (emphasis added).

⁷ *Id.* at 18:3-4 (emphasis added).

⁸ Petition at 7, ¶ 21 (emphasis added).

⁹ *Id.* at 9, ¶ 28 (emphasis added).

13. Further, STC’s citations to various sections of Chapter 366 of the Florida Statutes in an apparent attempt to convince the Commission that it has the legislative charge to protect the sales of products for any given equipment manufacturer is misplaced as these sections do not contain any directives that require or authorize the Commission to consider the competitive or business interests of a single party when setting rates.¹⁰ Furthermore, this proceeding was not designed to incentivize or facilitate the sale of specific products to customers in connection with the establishment of utility tariffs.

14. The Commission recently rejected similar arguments in a Petition to Intervene filed by ChargePoint in Docket No. 20210016-EI.¹¹ In that proceeding ChargePoint argued that it had standing to intervene in the proceeding because Duke Energy Florida (“DEF”) owned and operated DC fast charging stations that would directly compete with ChargePoint’s customers that own and operate commercial charging stations and could interfere with a competitive marketplace and hinder ChargePoint’s ability to sell its products in DEF’s service territory.¹² The Commission rejected ChargePoint’s arguments and denied its Petition to Intervene on the basis that ChargePoint had failed to meet the requirements for standing under *Agrico*:

ChargePoint has not shown that it is in immediate danger of direct injury as a result of the outcome in this proceeding. Rather, ChargePoint alleges that direct harm will result to the value of its services and customer networks personally, and to the free market generally. ChargePoint’s alleged harm is abstract and speculative, and is not directly affected by the outcome of this proceeding . . . ChargePoint also does not satisfy the second prong of the *Agrico*

¹⁰ In the Petition to Intervene, STC cites to Sections 366.06(1) and 366.041, F.S., neither of which direct or authorize the Commission to consider, in contravention of Florida case law and Commission precedent, potential indirect economic impacts to a party when setting rates.

¹¹ Order No. PSC-2021-0126-PCO-EI, issued April 12, 2021, in Docket Nos. 20190110-EI, 20190222-EI, 20210016-EI, *In re: Petition for limited proceeding for recovery of incremental storm restoration costs related to Hurricane Michael and approval of second implementation stipulation, by Duke Energy Florida, LLC; In re: Petition for limited proceeding for recovery of incremental storm restoration costs related to Hurricane Dorian and Tropical Storm Nestor, by Duke Energy Florida, LLC; In re: Petition for limited proceeding to approve 2021 settlement agreement, including general base rate increases, by Duke Energy Florida, LLC.*

¹² *Id.* at 3.

test, because the injury it alleges is not of a type or nature that this proceeding is designed to protect . . . *Agrico* provides that competitive economic injury may only qualify as an injury if the applicable governing statute is designed to protect against such an interest, and this rate case proceeding was not designed to protect ChargePoint's alleged interests.¹³

III. The Commission Should Disregard Any Allegations in the Petition to Intervene That Are Unrelated to STC's Burden of Proof.

15. Both the Petition to Intervene and the testimony of STC's witness describe various programs and rate offerings by other utilities in different states. Petition to Intervene at 7, ¶ 23 – 8, ¶ 26; Direct Testimony of T. Dzubay at 15:12 – 17:13. These programs and offerings by other utilities are irrelevant to STC's request to intervene in this proceeding and should be disregarded because they provide no information related to the sole question before the Commission – whether STC has demonstrated standing to intervene in this proceeding. STC has failed to meet its burden under the tests set forth in *Florida Home Builders* and *Agrico*, and therefore, the Commission should deny the Petition to Intervene and accordingly disregard all substantive proposals that STC has made in its filing.

IV. STC Has the Obligation to Prove, Not Just Allege, That It Has Standing to Intervene.

16. Unlike other organizations and entities that have sought to intervene in this matter, STC has provided no testimony to support its allegations that it has standing to intervene in this proceeding. Accordingly, there is no evidentiary basis on which the Commission could conclude that STC has standing to intervene because there is no evidence to support STC's allegations. As previously noted, the Commission has held that an order granting intervention based on the intervening party's allegations in support of standing is not definitive. In fact, objecting parties retain the right to test the factual basis of the allegations supporting standing, and it is the

¹³ *Id.* at 4.

intervening party's burden to factually demonstrate its standing to intervene. *See In re: Petition to determine need for an electrical power plant in Martin County by Florida Power & Light Company*, Docket Nos. 020262-EI, 020263-EI, Order No. PSC-02-1260-PCO-EI (Sept. 13, 2002) (“parties to administrative hearings in Florida have an affirmative duty to prove standing – not just allege standing – when another party contests that standing.”); *see also In re: Petition for rate increase by Florida Power & Light Company*, Docket No. 20210015-EI; Order No. PSC-2021-0138-PCO-EI at 3 (April 20, 2021) (“Although ECOSWF has made allegations that support associational standing under Florida Home Builders, FPL has objected to the factual allegations supporting ECOSWF’s associational status and is entitled to conduct discovery and to present evidence, testimony, and argument regarding its associational standing. Therefore, ECOSWF’s associational standing shall be an issue in this proceeding and ECOSWF shall have the burden of proof with regard to this issue.”); *In re: Petition for rate increase by Florida Power & Light Company*, Docket No. 20210015-EI; Order No. PSC-2021-0139-PCO-EI at 4 (April 20, 2021) (“There is no clear Commission precedent on Florida Rising’s associational standing. Under these circumstances, FPL is entitled to conduct discovery and present evidence, testimony, and argument regarding Florida Rising’s associational standing. Florida Rising’s associational standing shall be an issue in this proceeding and Florida Rising shall have the burden of proof with regard to this issue.”)

17. In attempting to intervene in this proceeding at this late date, STC takes the case as they find it, specifically the deadline for intervenor testimony set in the order governing procedure in this matter. Since STC chose to only file testimony on their substantive proposals in this matter and did not file any testimony to support their alleged standing, STC definitionally cannot meet its

burden of proof to establish standing in this matter, even if its request for intervention in this docket did not suffer from the multiple infirmities discussed above.

CONCLUSION

WHEREFORE, for the reasons expressed herein, FPL respectfully requests that the Commission deny STC's Petition to Intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE
20210015-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery* and/or electronic mail this 28th day of June 2021 to the following parties:

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