BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company.	DOCKET NO. 20210015-EI ORDER NO. PSC-2021-0256-PCO-EI ISSUED: July 13, 2021

ORDER DENYING SMART THERMOSTAT COALITION'S PETITION TO INTERVENE

On March 12, 2021, Florida Power & Light Company (FPL) filed a petition, minimum filing requirements, and testimony for a base rate increase effective January 2022. As part of its request, FPL is seeking to consolidate its rates with those of Gulf Power Company (Gulf), recently acquired by FPL's parent company. Pursuant to Order No. PSC-2021-0116-PCO-EI, issued March 24, 2021, the hearing for the FPL rate case is scheduled on August 16 through August 27, 2021.

Petition for Intervention

On June 21, 2021, the Smart Thermostat Coalition (STC) filed a petition to intervene in Docket No. 20210015-EI. STC represents that it is an ad hoc association of two entities, ecobee and Google, LLC, which are asserted to be "industry leaders" in the manufacturing of smart thermostats.[1] STC seeks to intervene and participate in this proceeding as a full party. Neither ecobee nor Google, LLC, has requested individual intervention.

Regarding its request for party status, "STC does not seek associational standing, but rather seeks standing jointly for its individual corporate participants." Petition to Intervene at 1, n. 1. STC claims that "STC, through its smart thermostat manufacturer members, has a unique and substantial interest that will be affected by the outcome of this proceeding with respect to the Companies' implementation of residential time-of-use ("TOU") tariffs in their service territories." Id. at 2.

The only relevant action in this docket regarding time-of-use tariffs cited by STC is a proposal by FPL and Gulf to phase out an existing Gulf TOU tariff and migrate the residential customers currently subject to that tariff to an FPL residential tariff. STC does not allege that its members are Gulf customers who are subject to the existing TOU tariff and object to its deletion because they would lose some benefit(s). Rather, STC argues that the tariff should be retained and the Commission should order FPL and Gulf (collectively "Companies") to implement a new TOU program. Under STC's proposed new program, the Companies would be required to provide smart thermostats as an incentive for ratepayer participation in the time-varying tariff. Prefiled Testimony of Dzubay at 2, lns. 14-15. This program would also require that the

[1] Ecobee is generally described in the Prefiled Testimony of Tamara Dzubay as "a developer of smart thermostats and other smart home products for residential and commercial use." Prefiled Testimony of Dzubay at p.1, lns. 10-11. There is no further information on ecobee and none on Google, LLC, provided in the Petition or Testimony of Dzubay.

Companies enter into load management agreements with the vendors of the thermostats and enabling technologies pursuant to which the vendors would automate customer response, provide the Companies data regarding the "magnitude and location" of these responses, and "receive compensation for the grid value of the response." Id. at lns. 17-21.

STC asserts that the eventual elimination of the Gulf TOU will foreclose this possibility by leaving the Companies' proposed rate structure without "a robust mechanism for customers to leverage flexible demand technologies like smart thermostats, which when paired with TOU rates can provide significant bill savings for customers along with reliability [sic] services that increase efficient use of the distribution grid." Petition at 3. STC claims a "concrete interest" in this proceeding "in order to ensure that the companies make available tariffs through which STC's members can effectively respond to price signals to provide customer and grid benefits through automated shifting of customer heating and cooling load." Id. at 7.

The remainder of the Petition sets forth at length the factual bases for STC's allegation that smart thermostats and enabling technologies have greater positive impacts on billing and the grid if the responses to pricing are automated rather than being dependent on customers taking affirmative action in response to information on energy saving opportunities.

Response in Opposition

On June 28, 2021, FPL filed a Response in Opposition to the Motion. FPL asserts that STC must prove associational standing in order to represent the interests of its members and has failed to do so. FPL also argues that STC has failed to allege any substantial injury in its own right, and is unable to do so as an entity with no separate, legal identity as an association or corporation. FPL also asserts that the interests asserted by STC are actually those of FPL customers, not STC, are speculative, and are not of the type or nature which this proceeding is designed to protect. For all of these reasons, FPL urges that the Petition to Intervene be denied.

Counsel for STC conferred with counsel for all parties prior to filing the Petition. FPL, Commission Staff, the Office of Public Counsel, the Florida Industrial Power Users Group, Walmart, the CLEO Institute, Vote Solar, and the Florida Retail Federation took no position. Counsel for the Larsons and Floridians Against Increased Rates indicated they do not oppose STC's intervention. The remaining parties had not stated a position prior to the Petition being filed. Only FPL filed a Response and the time for the other parties to do so has expired.

Standard for Intervention

Pursuant to Rule 28-106.205, Florida Administrative Code (F.A.C.), persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding and who desire to become parties may move for leave to intervene. Motions for leave to intervene must be filed at least twenty (20) days before the final hearing, must comply with Rule 28-106.204(3), F.A.C., and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to

determination or will be affected through the proceeding. Intervenors take the case as they find it.

An entity seeking to establish standing based on the substantial interests of its members usually claims associational standing under the standards set forth in Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982), and Farmworker Rights Organization, Inc. v. Department of Health and Rehabilitative Services, 417 So. 2d 753, 754 (Fla. 1st DCA 1982). However, STC expressly waived any claim to associational standing in its Petition and stated that it is "seek[ing] standing jointly for its individual corporate participants." Petition at 1, n.1. STC did not cite Florida Home Builders in its Petition and did not set forth facts to demonstrate that it satisfies the three criteria established in that case. Instead, STC sets forth facts and argument relevant to the two-prong standing test for individual intervenors set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).

Under Agrico, an intervenor must show that (1) they will suffer injury in fact that is of sufficient immediacy to entitle them to a Section 120.57, F.S., hearing, and (2) the substantial injury is of a type or nature that 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).

Analysis and Ruling

STC has not set forth allegations upon which I can conclude that its participants have a substantial interest that is affected by this proceeding.[2] Regarding the first step of this analysis, "a petitioner can satisfy the injury-in-fact standard set forth in Agrico by demonstrating in his petition either: (1) that he had sustained actual injury in fact at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action." Village Park Mobile Home Ass'n, 506 So. 2d at 433. Although STC is the petitioning intervenor, it does not allege that it has an independent interest that is affected by this proceeding; the interests it asserts are only those of its participants, ecobee and Google, LLC. Neither of these participants are alleged to be an existing customer of the Companies. Neither are alleged to reside in the Companies' services areas, do business in the these service areas, or otherwise rely on electric service from the Companies. Nothing in this rate case affects the current operations of those participants.

Regarding an injury being realized as a result of this rate case, STC asserts that phasing out the Gulf TOU tariff eliminates "a robust mechanism for customers to leverage flexible demand technologies like smart thermostats, which when paired with TOU rates can provide

[2] STC's express waiver of associational standing is accepted and that issue is not considered in this order.

significant bill savings for customers along with reliability [sic] services that increase efficient use of the distribution grid." Petition at 3 (emphasis added). STC further claims a "concrete interest" in this proceeding "in order to ensure that the companies make available tariffs through which STC's members can effectively respond to price signals to provide customer and grid benefits through automated shifting of customer heating and cooling load." Id. at 7 (emphasis added). In the underscored phrases above, STC asserts that the benefits of any potential program would be realized by the ratepayers and the grid, not STC's participants. Neither ecobee nor Google, LLC, has a protected interest in positive impacts to the general body of ratepayers or benefits to the grid. The only entity that may intervene and protect these general interests without showing individualized injury-in-fact is the Office of Public Counsel. See Sections 350.061 and 350.0611, F.S.

Moreover, for the alleged potential injury to be realized by STC, several interdependent events would have to occur. First, the Commission would have to deny the Companies' request to phase out the existing Gulf tariff and order the Companies to adopt an expanded TOU tariff for all of its service areas that includes the program proposed by STC. The Companies would then have to implement this new program by offering smart technology incentives to customers and entering into load management agreements with vendors. For there to be an injury-in-fact, it must be presumed that ecobee and Google, LLC, would be among these vendors. Next, customers would have to sign up for the TOU tariff and enhanced technology offering, which would then have to result in ratepayer savings and grid benefits. This chain of events does not demonstrate an immediate danger of injury or an impact to substantial interest, but rather shows that any injury is speculative and, therefore, insufficient for standing under the first prong of Agrico. See International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224 (Fla. 3d DCA 1990) (potential impact on union negotiations alleged to flow from changes to dates of operation sought by jai-alai fronton owners too speculative an injury to support standing for the players).

Assuming the events listed above occurred, the selected vendors would receive compensation for the grid value of the response. See Prefiled Testimony of Dzubay at 2, lns. 17-21. Assuming that ecobee and Google, LLC, were selected as vendors, then, they would stand to profit monetarily. These allegations "are legally insufficient because the alleged economic injury does not fall within the zone of interest intended to be protected by the applicable statutes." Florida Soc. of Ophthalmology v. State Bd. of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988). Therefore, STC also does not satisfy the second portion of the Agrico test.[3] Accordingly, Smart Thermostat Coalition's petition to intervene is denied.

[3] See 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 ("Agrico provides that competitive economic injury may only qualify as an injury if the applicable governing statute is designed to protect . . . such an interest, and this rate case proceeding was not designed to protect ChargePoint's alleged interests.").

Based on the foregoing, it is hereby

ORDERED by Chairman Gary F. Clark, as Prehearing Officer, that the Petition to Intervene filed by Smart Thermostat Coalition is hereby denied.

By ORDER of Chairman Gary F. Clark, as Prehearing Officer, this 13th day of July, 2021.

GARY F. CLARK
Chairman and Prehearing Officer
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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.