

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for)
Approval of Standard Offer)
Contracts of Florida Power)
Corporation and Auburndale)
Power Partners, Limited)
Partnership)
_____)

Docket No. 940819-EQ

Filed: November 18, 1994

MOTION TO DISMISS PETITION ON PROPOSED AGENCY ACTION

LFC 47 Corporation ("LFC 47"), 3 Radnor Corporate Center, 100 Madsonford Road, Radnor, Pennsylvania 19087, pursuant to Rule 25-22.037, Florida Administrative Code, hereby files this Motion to Dismiss Petition on Proposed Agency Action filed by Evander Bend, Petitioner. In support of its motion, LFC 47 states the following:

BACKGROUND

1. On October 24, 1994, the Florida Public Service Commission ("FPSC" or "Commission") issued Notice of Proposed Agency Action ("PAA"), Order No. PSC-94-1306-FOF-EQ in Docket No. 940819-EQ, approving the Joint Petition for expedited approval of contract modifications ("Joint Petition") of Florida Power Corporation ("FPC") and Auburndale Power Partners Limited, Partnership ("APP"). The PAA Order approved, for cost recovery purposes, the assignment of two LFC 47's Standard Offer Contracts with FPC to APP and the administration of those contracts from APP's Auburndale facility.

2. On November 14, 1994, Petitioner, alleging that he is a ratepayer of FPC, filed the Petition on Proposed Agency Action requesting a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes. Petitioner alleges that his substantial interests "in his

DOCUMENT NUMBER-DATE 98

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capacity as a ratepayer of FPC are affected by the PAA."

3. The Petition then outlines claimed disputed issues of material fact and further alleges what the Petitioner believes are the ultimate facts.

LEGAL ARGUMENT

Florida Public Service Commission Rule 25-22.029(4) provides that:

One whose substantial interest may or will be affected by the Commission's proposed action may file a petition for a Section 120.57 hearing in the form provided by Rule 25-22.036.

FPSC Rule 25-22.036(9)(b) states:

Where a Petition on Proposed Agency Action has been filed, the Commission may:

1. Deny the petition if it does not adequately state a substantial interest in the Commission's determination . . .

4. The case of Agrico Chem. Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 1st DCA 1981), review denied 415 So.2d, 1361, Fla. 1982, addresses the issue of standing in administrative proceedings. A Petitioner claiming a substantial interest must be adversely affected in order to provide standing to initiate a formal proceeding. The Agrico case states that to have standing to initiate a formal administrative proceeding an individual must show (1) that he or she will suffer injury in fact which is of sufficient immediacy to entitle him or her to a formal proceeding and (2) that the injury is of the type or nature which that proceeding is designed to protect.

5. The Petitioner has not alleged any injury in fact, nor has the Petitioner alleged

an injury of such sufficient immediacy that it would entitle him to a formal administrative hearing. The Petitioner states only that he is a ratepayer of FPC. The Petition makes no statement whatsoever as to how the Commission's PAA Order causes injury to the Petitioner. A simple statement that a Petitioner is a ratepayer of a regulated utility does not grant standing entitling the Petitioner to a formal administrative hearing. The Petitioner must show that he or she will be injured or harmed in some fashion or form as a result of the agency's actions. Further, without such an allegation of injury, there is no way to determine if the harm or injury is of such sufficient immediacy to entitle the Petitioner to a formal administrative hearing.

6. As such, the Petitioner has failed to meet the first prong of the test outlined in the Agrico case. Without an allegation of injury, Respondents are left to speculate as to what harm would come to the Petitioner as a result of the Commission's Proposed Agency Action Order approving the Joint Petition.

COSTS AND ATTORNEYS FEES

7. Section 120.59(6), Florida Statutes, addresses the award of attorneys fees and costs from a non-prevailing adverse party. Costs and attorney fees shall be awarded to the prevailing party where the non-prevailing adverse party has been determined to have participated in the proceeding for an "improper purpose". "Improper purpose" is defined in Subsection 120.59(6)(E1) as:

Participation in a proceeding pursuant to Section 120.57(1), primarily to harass or to cause unnecessary delay or for

frivolous purposes or to needlessly increase the cost of licensing or securing the approval of an activity (Emphasis added).

8. Because of the unsubstantiated and purely speculative nature of Petitioners's motion, it would appear that the only reason the petition was filed was to cause unnecessary delay and to unnecessarily and needlessly cause an increase in the cost of licensing or securing the approval of an activity. As previously stated herein, the Petitioner has failed to allege any standing that would entitle him to a formal administrative hearing. His only purported standing is that he is a ratepayer of FPC. Ratepayer status alone does not provide standing. Accordingly, the Commission should find that the Petitioner has participated or filed this petition for formal proceedings for an improper purpose and as such is liable for cost and attorney's fees pursuant to Section 120.59(6), Florida Statutes.

REQUEST FOR EXPEDITED TREATMENT

9. Finally, LFC respectfully request the FPSC to address this matter on an expedited basis. This matter was initiated before the Commission on April 19, 1994 and as stated in the Joint Petition for Expedited Approval of Contract Modifications, time is of the essence in preserving the validity and viability of the transaction. LFC is requesting expedited approval of the assignment, otherwise LFC will be required to complete certain alterations to the existing facilities within an extremely limited time frame which may preclude LFC from meeting its January 1, 1995 commercial in service date under the current Standard Offer Contracts.

WHEREFORE, LFC respectfully requests the Commission (1) to dismiss the Petition on Proposed Agency Action filed by Evander Bend because the Petitioner lacks the requisite standing and (2) to grant such other relief as the Commission deems appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Marks', written over a horizontal line.

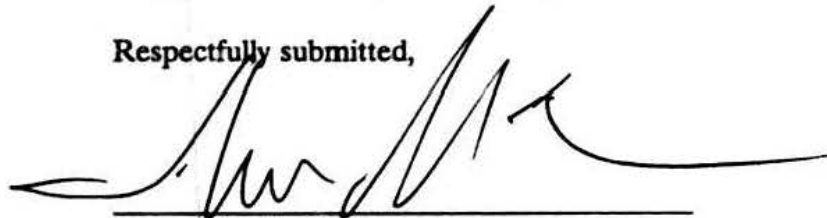
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Attorneys for LFC 47 Corp.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by Hand Delivery to Richard Benton, Esq., 3837-A Killearn Court, Tallahassee, Florida 32308; and by United States Mail to Ann Smith, Post Office Box 1126, Monticello, Florida 32344; Martha Brown, Staff Counsel, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0850; D. Bruce May, Holland & Knight, Post Office Drawer 810, Tallahassee, Florida 32302; Robert F. Riley, Esq., Auburndale Power Partners, Limited Partnership, 12500 Fair Lakes Circle, Suite 420, Fairfax, Virginia 22033; and J. Bradford Hines, Esq., Florida Power Corporation, Office of General Counsel, Post Office Box 14042, St. Petersburg, Florida 33733; this 18th day of November, 1994.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John R. Marks, III", written over a horizontal line. The signature is stylized and cursive.

John R. Marks, III