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To: Filings@psc.state.fl.us
Subject: Electronic Filing for Docket No. 080002-EI / FPL's Response in Opposition to Petition to Intervene of Saporito Energy Consultants
Attachments: FPL's Response in Opposition to Petition to Intervene of Saporito Energy Consultants.doc

Electronic Filing

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b. Docket No. 080002-EI; In re: Energy Conservation Cost Recovery Clause

c. The documents is being filed on behalf of Florida Power & Light Company.

d. There are a total of 7 pages in the attached document.

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to Petition to Intervene of Saporito Energy Consultants.

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8/15/2008

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Energy Conservation)
Cost Recovery Clause)

Docket No. 080002-EI
Filed: August 15, 2008

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION
TO PETITION TO INTERVENE OF SAVORITO ENERGY CONSULTANTS**

Florida Power & Light Company ("FPL") respectfully responds in opposition to the petition for intervention of Thomas Saporito as an individual, and representing Saporito Energy Consultants ("SEC"), and states as follows.

Background and Summary

On August 8, 2008, Mr. Saporito filed a "Petition for Hearing and Leave to Intervene" as an individual and as a representative of SEC with a purported interest in the Sunshine Energy Program. Mr. Saporito's filing is being treated by the Florida Public Service Commission ("Commission") Staff ("Staff") as a request to intervene in the Energy Conservation Cost Recovery Clause ("ECCR") docket, wherein certain outstanding issues related to FPL's Sunshine Energy Program will be addressed. Accordingly, FPL is filing its response in this ECCR docket.

Mr. Saporito does not allege that he participated in the Sunshine Energy Program, that SEC participated in the Sunshine Energy Program, or that SEC has any "clients" that participated in the Sunshine Energy Program. FPL has also reviewed its records and determined that neither Mr. Saporito nor SEC were ever participants in the Sunshine Energy Program.

The intervention request should be denied for several reasons. First, under Florida law, the request for intervention does not allege any facts entitling Mr. Saporito or SEC to intervene in this proceeding. Second, the intervention request does not even show that SEC is a legal entity with the capacity to maintain or intervene in a legal action. Third, even if SEC was a legal

DOCUMENT NUMBER-DATE

07364 AUG 15 08

FPSC-COMMISSION CLERK

entity under Florida law, Mr. Saporito is not entitled to appear and represent SEC or SEC's clients because he is not an attorney or "qualified representative" as required by Commission rules.

Argument

A. Mr. Saporito Fails to Allege an Adequate Basis for Intervention

The applicable standards for intervention are provided in Section 120.52(12)(b), Florida Statutes, and Rule 25-22.039, Florida Administrative Code. Rule 25-22.039 states in relevant part:

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 petition the presiding officer for leave to intervene. Petitions for leave to intervene must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceedings 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 though the proceeding.

Review of the intervention request shows that it contains (i) no allegation by Mr. Saporito of an entitlement to intervene based upon any constitutional or statutory right or Commission rule; and (ii) no mention of any "substantial interest" of Mr. Saporito entitled to protection in this proceeding. Absent such a showing, intervention should be denied.

Florida law provides a two-prong test for determining whether a party has a "substantial interest" entitling the party to intervene in a proceeding. Under it Mr. Saporito must show that: (1) he will suffer an injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (2) his substantial injury is of a type or nature which the proceeding is designed to protect. *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

Mr. Saporito has failed to allege that he will (or even could possibly) suffer any injury in fact as a result of the resolution of any Sunshine Energy issues that are addressed in the ECCR docket. Mr. Saporito alleges only that SEC's clients' interests could be affected because the Commission "will decide in this docket whether it should order FPL to refund monies" paid by participants of the Sunshine Energy Program. Saporito Petition, p. 2. The specific issues for consideration in the ECCR docket related to the Sunshine Energy Program have yet to be developed. Regardless of what specific issues are identified, however, the alleged interests of SEC clients are the only interests specifically discussed by Mr. Saporito. Any decision related to Sunshine Energy will not personally affect Mr. Saporito, much less produce any injury, because as noted above, he was never a participant in the Sunshine Energy Program. Mr. Saporito has failed to allege that he is at risk of suffering any injury in fact of sufficient immediacy to entitle him to a hearing, or that such injury is of a nature which this proceeding is designed to protect, and accordingly, his request for intervention as an individual should be denied.

B. SEC Lacks Legal Capacity to Intervene and Fails to Allege an Adequate Basis for Intervention

SEC is not a legal entity with the capacity to participate in this proceeding. SEC's request for intervention states that it is a "privately held entity." Saporito Petition, p. 2. Only certain groups of individuals or business entities are recognized by Florida law as legal entities distinct from their members, which are affirmatively granted the capacity to sue and be sued by statute. *See, e.g.*, § 607.0302, Florida Statutes. SEC does not allege it is a corporation, non-profit corporation, or any other entity with the legal capacity to sue under Florida law. Additionally, a review of the records of the Florida Department of State, Division of Corporations, indicates that SEC is not currently registered with the state as such an entity. Accordingly, SEC does not appear to be an entity recognized in Florida with the capacity to

intervene. See *In re Petition to Determine Need for Polk Unit 6 Electrical Power Plant by Tampa Electric Power Company*, Docket No. 070467-EI, Order No. PSC-07-0695-PCI-EI, 2007 WL 2417278 (Fla. P.S.C. 2007) (conditioning intervention of organization upon the filing of proof that it has a valid certificate issued by the Department of State).

Even if SEC had the legal capacity to intervene, it has failed to allege that it will suffer any injury in fact as a result of the resolution of any Sunshine Energy issues that are addressed in the ECCR docket. As discussed above, SEC was never a participant in the Sunshine Energy Program. Accordingly, any decision related to that program could not affect SEC or cause it to suffer any injury.

Perhaps SEC is somehow trying to establish associational standing to intervene on behalf of its clients. If this is so, the intervention request plainly fails to establish such standing. To begin with, there is no allegation that SEC and/or its clients represent any kind of association. Moreover, even if the intervention request contained such allegations, the test for associational standard has not been met. The test for associational standing, which was established in *Florida Home Builders v. Dept. of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982) and *Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services*, 417 So. 2d 753 (Fla. 1st DCA 1982), is based on the standing principles established in *Agrico*. Associational standing may be found where: (1) the association demonstrates that a substantial number of an association's members may be substantially affected by the Commission's decision in a docket; (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 a type appropriate for the association to receive on behalf of its members.

Applying this standard to the intervention request, it is clear that no facts are alleged that would entitle SEC to standing either individually, or on behalf of others, or as part of some association. First, the intervention request is silent as to how many SEC clients, if any, ever participated in Sunshine Energy. Second, there is no description of SEC's general scope of interest and activity. Finally, the petition fails to demonstrate that the relief requested is of a type appropriate for SEC to receive. As a result, SEC has failed to demonstrate associational standing.

In summary, SEC is not a legal entity entitled to appear or intervene in this or any legal proceeding. In addition, the intervention request fails to provide the Commission any factual basis upon which it can find that the two prong standing test in *Agrico*, and the three prong associational standing test established in *Florida Home Builders*, have been satisfied. Accordingly, the request for intervention by SEC should be denied. See *In re Petition to Determine Need for West County Energy Center Unit 3 Electrical Power Plant by Florida Power & Light Company*, Docket No. 080203-EI, Order No. PSC-08-0398-PCO-EI, 2008 WL 2568584 (Fla. P.S.C. 2008) (denying intervention to individual and to unregistered organization that failed to demonstrate standing under *Agrico* or *Home Builders*).

C. Mr. Saporito is Not Entitled to Represent SEC or SEC's Clients

The Commission's rules require that a party be represented by an attorney or a "qualified representative." Rule 28-106.106(1), Fla. Admin. Code. Mr. Saporito is purporting to represent SEC and SEC's clients' interests, but Mr. Saporito is not an attorney, and has not made the required filing of qualifications for consideration to become a "qualified representative." Rule 28-106.106(2)(a), Fla. Admin. Code. Accordingly, Mr. Saporito is not entitled to represent SEC or SEC's clients before the Commission in this proceeding.

Conclusion

WHEREFORE, for all of the foregoing reasons, FPL respectfully requests that the Commission deny the request for intervention filed by Thomas Saporito, as an individual, and representing Saporito Energy Consultants.

Respectfully submitted this 15th day of August, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically and by United States Mail this 15th day of August 2008, to the following:

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