

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement
regarding PURPA solar qualifying facility
power purchase agreements, by Duke Energy
Florida, LLC.

DOCKET NO. 20180169-EQ
ORDER NO. PSC-2019-0035-PCO-EQ
ISSUED: January 14, 2019

ORDER GRANTING ECOPLEXUS, INC.'S MOTION TO INTERVENE

On September 7, 2018, Duke Energy Florida, LLC (“DEF”) filed a Petition for Declaratory Statement. DEF requests the Commission to declare that a negotiated term of two years is an appropriate contract length for a 100 percent levelized or fixed price in a Public Utility Regulatory Policies Act of 1978 (“PURPA”) solar qualifying facility (“QF”) power purchase agreement.

Motion to Intervene

On September 24, 2018, Ecoplexus, Inc. (“Ecoplexus”), a developer and operator of solar-powered QFs, filed a Motion to Intervene in this proceeding. Ecoplexus states that it is entitled to intervene in this docket because its substantial interests will be affected by the Commission’s action on DEF’s Petition. Ecoplexus has been developing several solar QF projects in DEF’s service area since 2016, and states that it has specifically offered and committed to sell DEF solar power, including all capacity, energy, and other attributes thereof, equivalent to the output of solar facilities proposed by DEF in its 2018 Ten-Year Site Plan at costs less than DEF’s proposed cost for such power.

Ecoplexus further states that in July 2018, it specifically offered and committed to sell the output of its solar QF projects to DEF at pricing expressly less than DEF’s avoided costs. According to Ecoplexus, DEF has refused to negotiate with Ecoplexus for any power purchase agreement based on the costs that DEF would avoid by not building its planned solar units. Ecoplexus states that the real issue at hand is whether DEF is obligated by the Commission’s rules and relevant orders, and by PURPA and the PURPA rules, to negotiate with QFs that offer solar power to DEF based on the QFs’ enabling DEF to cost-effectively avoid the cost of constructing DEF-owned solar generating facilities.

On October 1, 2018, DEF filed a Response to the Motion to Intervene. DEF states that it does not dispute that Ecoplexus appears to have stated sufficient facts which, if proven, would meet the Commission’s standard for intervention in this docket. Instead, DEF responds to several statements of fact and law that Ecoplexus included in its Motion, with which DEF disagrees. DEF states that Commission rules, orders, and prior history all require that DEF base its QF avoided cost calculation for PURPA purchases of firm capacity and energy on the in-service date and operation of its next fossil fueled generating unit, not the next planned solar unit. DEF further states that Ecoplexus inappropriately attempts to introduce new arguments and facts that were not presented in the Petition; namely, whether DEF is obligated to provide pricing based on

avoided solar units. DEF disagrees that this issue is necessary for the Commission to decide DEF's question presented in the Petition. DEF also disputes Ecoplexus's characterization that DEF refuses to negotiate with Ecoplexus for any power purchase agreement based on Ecoplexus providing the same amount of solar power that DEF plans to obtain through DEF self-build units, and states that DEF has negotiated with Ecoplexus in good faith based on its full avoided cost.

Standards for Intervention

Rule 28-105.0027(1), F.A.C., sets forth the standards for the filing of a petition for leave to intervene in a declaratory statement proceeding. The rule states that:

[p]ersons other than original parties to a pending proceeding whose substantial interests will be affected by the disposition of the declaratory statement and who desire to become parties may move the presiding officer for leave to intervene. The presiding officer shall allow for intervention of persons meeting the requirements for intervention of this rule.

Subparagraph (2)(c) of Rule 28-105.0027, F.A.C., states that the motion to intervene shall include "[a]llegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the declaratory statement." Intervenors take the case as they find it.

To have standing, the intervenor must meet the two-prong standing test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The intervenor must show that (1) he will suffer injury in fact that is of sufficient immediacy to entitle him 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) (finding that speculation on the possible occurrence of injurious events is too remote).

Analysis

Ecoplexus states that it appears that DEF's intention is to use the requested declaratory statement, if it were issued, to avoid negotiating with Ecoplexus for solar power that Ecoplexus has offered and committed to provide to DEF at pricing below the avoided costs of DEF's planned solar units. The dispute between Ecoplexus and DEF as to whether DEF's avoided cost is based on the in-service date and operation of its next fossil fueled generating unit or on its next planned solar units is irrelevant to the question of whether Ecoplexus has standing to intervene.

Ecoplexus further states that since July 2017, it has attempted to negotiate power purchase agreements with DEF for the purchase of solar power. Therefore, Ecoplexus has shown that its substantial interests are of sufficient immediacy such that it should be permitted to intervene. The Declaratory Statement, if granted, will declare what an appropriate negotiated term is for a 100 percent levelized or fixed price in a PURPA solar QF power purchase agreement.

Ruling

I find that Ecoplexus meets the standing test established in *Agrico*. Its allegations are sufficient to demonstrate that it will suffer injury in fact if the Declaratory Statement is granted and its substantial interests are of sufficient immediacy such that it should be permitted to intervene. Therefore, the Motion to Intervene is granted.

Based on the above representations, it is

ORDERED by Commissioner Gary F. Clark, as Prehearing Officer, that Ecoplexus, Inc.'s Motion to Intervene is hereby granted as set forth in the body of this Order. It is further

ORDERED that Ecoplexus, Inc. takes the case as it finds it. It is further

ORDERED that all parties to this proceeding shall furnish copies of all pleadings and other documents which may hereinafter be filed in this proceeding to:

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ORDER NO. PSC-2019-0035-PCO-EQ
DOCKET NO. 20180169-EQ
PAGE 4

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By ORDER of Commissioner Gary F. Clark, as Prehearing Officer, this 14th day
of January, 2019.



GARY F. CLARK
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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.

RG

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.