

ORIGINAL
FILE 9077

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 16, 1994

**EMERGENCY MOTION TO DISMISS PETITION FOR FORMAL PROCEEDINGS
AND REQUEST FOR COSTS AND ATTORNEYS FEES**

Auburndale Power Partners, Limited Partnership ("APP"), by and through undersigned counsel, pursuant to Rule 25-22.037, Florida Administrative Code, files this Emergency Motion to Dismiss the Petition for Formal Proceedings submitted by Ms. Ann Smith in this docket. In support of its Emergency Motion, APP states:

Request for Emergency Treatment

APP respectfully requests that the Commission decide this matter on an emergency basis due to the long-pending nature of this proceeding, and the fact that the parties anticipate the delivery of power under the approved assignment beginning on January 1, 1995 from APP's Auburndale, Florida Facility. The issues in this proceeding have been before the Commission since April 19, 1994. As stated in the Joint Petition for Expedited Approval of Contract Modifications (the "Joint Petition") filed by APP and Florida Power Corporation ("FPC"), time is of the essence in preserving the viability of the assignment of the LFC No. 47 Corp. ("LFC") Standard Offer Contracts to APP. A delay in the final Commission approval of the assignment could deprive FPC and its ratepayers of the benefits which will flow from the assignment. Thus, APP respectfully requests that the Commission set this Emergency Motion

DOCUMENT NUMBER-DATE

for oral argument immediately and, as soon thereafter as practicable, issue an order dismissing the Petition.

Background

1. On October 24, 1994, the Commission issued a Notice of Proposed Agency Action in this docket, the subject of which is a Proposed Order Approving Contract Modifications, Order No. PSC-94-1306-FOF-EQ (the "Order"). The Order approves, for purposes of cost recovery, the assignment of LFC's Standard Offer Contracts with FPC to APP pursuant to the terms and conditions of the Consent and Agreement, and the administration of those contracts from APP's Auburndale facility.

2. On November 14, 1994, Ann Smith (the "Petitioner") filed a Petition for Formal Proceedings in this docket alleging that the Order is in violation of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), the "small power facilities Public Utility Company Act of 1935," and the Federal Power Act. The Petitioner asserts that she is a resident of Jefferson County and that her substantial interests will be affected by the Order because: (1) there will be an increase in utility rates in Madison and Jefferson Counties; and (2) there will be a loss of local jobs and local economic benefits which flow from the operation of LFC's plants.

Legal Argument

3. The Petitioner has failed to assert a sufficient interest to establish the requisite standing to initiate a formal proceeding under Section 120.57, Florida Statutes. Rule 25-22.029(4), Florida Administrative Code, provides that "[o]ne whose substantial

interests may or will be affected by the Commission's proposed action" may file a petition for a hearing pursuant to Section 120.57, Florida Statutes. Thus, the Petitioner must demonstrate that she has substantial interests that may or will be adversely affected by the Order such that she has standing to initiate a formal administrative proceeding.

4. It is settled in Florida that in order 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 a type or nature which the proceeding is designed to protect. Agrico Chem. Co. v. Department of Env'tl. Regulation, 406 So.2d 478, 482 (Fla. 1st DCA 1981), review denied, 415 So.2d 1361 (Fla. 1982); In re: Application for certificate to provide interexchange telecommunications service by ATLAS COMMUNICATION CONSULTANTS, INC., 94 F.P.S.C. 1:358, 360, Docket No. 9303969-TI, Order No. PSC-94-0114-FOF-TI (January 31, 1994); In re: Petition for closure of standard offer contract subscription limit and for approval for cost recovery of two negotiated power purchase agreements with Wheelabrator North Broward, Inc. and Wheelabrator South Broward, Inc. by FLORIDA POWER & LIGHT COMPANY, 92 F.P.S.C. 6:511, 513, Docket No. 911140-EQ, Order No. PSC-92-0565-FOF-EQ (June 24, 1992). For reasons set forth below, Petitioner fails to meet both prongs of the Agrico test and, therefore, lacks the requisite standing to initiate formal proceedings.

Injury in Fact

5. The Petition fails to meet the first prong of the Agrico test because the Petitioner has not adequately alleged that entry of the Order will subject her to any injury of sufficient immediacy that would entitle her to a formal administrative proceeding. In order to suffer injury in fact, a party must be exposed to any injury or threat of injury that is both real and immediate, not conjectural or hypothetical. Florida Dept. of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978), cert. denied, 359 So.2d 1215 (Fla. 1978). Furthermore, for a ratepayer to suffer injury in fact from a Commission proceeding, there must be a direct nexus between a Commission decision and the ratepayer's payment of increased rates. See In Re: Petition for limited proceeding to implement water conservation plan in Seminole County by SANLANDO UTILITIES CORPORATION., 94 F.P.S.C. 8:256, 260, Docket No. 930256-WS, Order No. PSC-94-0987-FOF-WS (August 15, 1994).

6. In this case, the Petitioner claims that her substantial interests will be affected because she speculates that there will be an increase in utility rates in Madison and Jefferson Counties. Petitioner's efforts to establish standing as a ratepayer fail in three respects. First, Petitioner does not allege that she is a ratepayer of FPC. Second, assuming for sake of argument that Petitioner is an FPC ratepayer, there is nothing in the Order which suggests that the assignment of the Standard Offer Contracts to APP will result in an increase in FPC's rates. In fact, it is undisputed that the pricing provisions in the Standard Offer

Contracts will remain unchanged after the assignment. Third, there is no direct nexus between the Commission's act of approving the Joint Petition and any change in FPC's rates. Indeed, any change in FPC's rates would have to result from a subsequent and separate proceeding.¹ Thus, the Order will not result in any injury in fact to the Petitioner in the form of increased utility rates.²

7. The Petitioner also claims that her substantial interests will be affected by the Order because there will be a loss of local jobs and local economic benefits which flow from the operation of LFC's plants if the assignment takes place and LFC discontinues operation of its Madison and Jefferson County facilities. The Petitioner's assumption that LFC's Madison and Jefferson County facilities will cease operation for all time is speculative and conjectural and thus cannot form the basis of a substantial interest in an administrative proceeding. The Order does not affirmatively state that LFC will definitely discontinue operations at these facilities and does not prevent another entity from operating the facilities. These asserted injuries are not only speculative, they are not the type of injuries which entitle Petitioner to an administrative hearing. The Petition does not

¹ Section 366.06, Florida Statutes (1993).

²See Village Park Mobile Home Ass'n, Inc. v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987), review denied, 513 So.2d 1063 (Fla. 1987) (agency approval of a prospectus did not, or would not, cause mobile home park residents to suffer injury in fact because any harm suffered would result from implementation of the prospectus and not from the agency approval).

state that Petitioner is employed by the LFC facilities. Thus, even if the Order were somehow to result in the loss of jobs, the Petitioner would not suffer any direct injury. Finally, it is settled Commission policy that the loss of local economic benefits is a purely economic injury which is not the type of injury necessary to initiate a formal administrative proceeding.³

Zone of Interests

8. The Petition also fails the second prong of the Agrico test because the Petitioner has not identified substantial interests that this particular proceeding is designed to protect. As stated above, the Petitioner claims that her substantial interests are affected because if the assignment occurs and LFC discontinues operation of its Madison and Jefferson County facilities there will be a loss of local jobs and local economic benefits. A proceeding such as this for approval of contract modifications is not designed to protect the jobs or economic interests of residents of a local community.⁴ Thus, Petitioner's argument that the Order could result in the loss of local jobs and local economic benefits cannot confer upon the Petitioner standing

³ASI, Inc. v. Florida Public Service Commission, 334 So.2d 594 (Fla. 1976); In Re: application for certificate to provide interexchange telecommunications service by ATLAS COMMUNICATIONS CONSULTANTS, INC., 94 F.P.S.C. 1:359, Docket No. 93039C-TI, Order No. PSC-94-0114-FOF-TI (Jan. 31, 1994).

⁴ See In re: Petition of AES Cedar Bay, Inc. and Seminole Kraft Corporation for Determination of Need for the Cedar Bay Cogeneration Project, 89 F.P.S.C. 6:560, Docket No. 881472-EQ, Order No. 21491 (June 30, 1989).

to initiate a formal administrative proceeding under the second prong of the Agrico test.⁵

9. The Petition also fails the second prong of the Agrico test because the Petitioner has not alleged any rules or statutes for which she is entitled to relief in a Commission proceeding for approval of contract modifications. The Petitioner argues that she is entitled to relief because the Order will violate PURPA, the "small power facilities Public Utility Company Act of 1935," and the Federal Power Act. These federal statutes under which Petitioner claims she is entitled to relief are beyond the scope of the matters to be decided by the Commission in a proceeding such as this for approval of contract modifications.

Request for Costs and Attorneys Fees

10. The speculative and conclusory allegations contained in the Petition are insufficient to establish Petitioner's substantial interest in this docket. The Commission should not grant a formal hearing based on the vague, unsubstantiated suggestions that a proposed agency action "may" have an undefined and indeterminate impact upon someone, especially where it appears that the proceeding is being pursued for purposes other than those properly within the jurisdiction of the Commission.

⁵See International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So.2d 1224, 1226 (Fla. 3d DCA 1990) (Jai-Alai players lacked standing to contest an application of fronton owners in proceedings of the Florida Pari-Mutuel Commission establishing opening and closing playing dates because the proceedings were not designed to protect the jobs or economic interests of jai-alai players).

11. Section 120.59(6), Florida Statutes, provides that a prevailing party shall be entitled to recover costs and a reasonable attorneys fee from the nonprevailing adverse party in cases where the nonprevailing party participated in the proceeding for an "improper purpose." Subsection 120.59(6)(e)1. defines "improper purpose" to mean:

participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

(emphasis supplied).

12. Here, it is apparent that Petitioner seeks to attack the Order in an effort to delay the assignment of the LFC Standard Offer Contracts to APP so as to potentially place the assignment in jeopardy. As described above, Petitioner has not adequately alleged any legitimate basis for standing in this case and appears to be participating for the purpose of delaying Commission approval of the Joint Petition. Accordingly, the Commission should find that Petitioner has participated in this case for an improper purpose and is liable for costs and attorneys fees pursuant to Section 120.59(6), Florida Statutes.

WHEREFORE, APP respectfully requests that the Commission:

a. dismiss Ann Smith's Petition for Formal Proceedings for lack of standing;

b. award costs and attorneys fees against Petitioner;

and

c. grant such other relief as the Commission deems appropriate.

Respectfully submitted,



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**Attorneys for Auburndale Power
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Certified Mail to Ann Smith, P.O. Box 1126, Monticello, FL 32344; and by U.S. Mail to: Martha Brown, Staff Counsel, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, FL 32301; J. Bradford Hines, Florida Power Corporation, Office of General Counsel, 3201-34th Street, South, P.O. Box 14042, St. Petersburg, FL 33733; John R. Marks, III, Katz Kutter, Haigler, Alderman, Marks & Bryant, P.A., 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301 this 16th day of November, 1994.



D. Bruce May

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