**Marguerite McLean**

090451-EM

**From:** paulastahmer@aol.com
**Sent:** Monday, May 24, 2010 12:28 PM
**To:** Filings@psc.state.fl.us; Erik Sayler; Martha Brown; Theresa Walsh
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**Subject:** Motion to Reopen Record &Official Recognition of EPA Rule
**Attachments:** 090451-EM Int Motion to ReopenRecord 5-24-10.pdf

a. Persons responsible for this electronic filing:

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b. 090451-EM

In Re: Joint Petition to Determine Need for Gainesville Renewable Energy Center in Alachua County, by Gainesville Regional Utilities and Gainesville Renewable Energy Center, LLC.

c. Documents being filed on behalf of Interveners Deevey and Stahmer

d. There are a total of 11 pages.

e. The documents attached for electronic filing are:
Interveners Motion to Reopen the Record and For Official Recognition of New Greenhouse Gas Emissions Rule Issued by US EPA.(11 pages)

The foregoing is contained in one pdf file.

Thank you for your attention and assistance in this matter.

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5/24/2010

**BEFORE THE**
**FLORIDA PUBLIC SERVICE COMMISSION**

In the Matter of:

**DOCKET NO. 090451-EM**

JOINT PETITION TO DETERMINE NEED FOR GAINESVILLE RENEWABLE ENERGY CENTER IN ALACHUA COUNTY, BY GAINESVILLE REGIONAL UTILITIES AND GAINESVILLE RENEWABLE ENERGY CENTER, LLC.
_____/

**DATE: May 24, 2010**

**INTERVENERS JOINT EMERGENCY MOTION TO REOPEN THE RECORD AND FOR OFFICIAL RECOGNITION OF NEW GREENHOUSE GAS EMISSIONS RULE ISSUED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

Comes now Interveners Deevey and Stahmer ("Interveners"), by and on behalf of themselves, *pro se*, and move the Florida Public Service Commission ("Commission") to reopen the record in the above-captioned case and take official recognition of a new federal rule having a direct impact on the substantive matters to be determined by the Commission, and in support of which state as follows:

1. A final determination of need is pending at the scheduled Agenda Conference of May 27, 2010. Interveners' Motion is made subsequent to the close of the record in this proceeding but prior to the Commission's decision and order.

2. Interveners make this motion because of a newly enacted rule issued by the United States Environmental Protection Agency ("EPA"), announced on or about May 13, 2010, and published on or about May 14, 2010, or shortly thereafter. Thus, it was not possible to bring the new rule to the attention of the Commission before or during the Supplemental Hearing or the official close of the record. The EPA Rule and accompanying explanatory text are five hundred and fifteen (515) pages in length, and Interveners sought to review the entire text prior to filing this motion in order to confirm that the EPA Rule is directly relevant to the substance of these proceedings and that adding it to the record would not simply be cumulative.

3. No doubt, but for the time constraints, Petitioners themselves would have brought this Rule to the attention of the Commission inasmuch as they had a continuing and affirmative obligation to apprise the Commission of all relevant law applicable to and affecting the merits of their need application due to Staff Interrogatory No. 82 (Exh No. 64-67, Bates.pdf 000501-000503.) When informed by Intervener Deevey via Email, on or about May 19, 2010, of the EPA action and its possible implications for GRU, Petitioners replied that the communication "must have been inadvertent", and asked to be removed from the mailing list.

4. The new EPA Rule ("Rule") tailors the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Clean Air Act (CAA or Act). The Final Rule is currently identified as Tailoring Rule 20100413 and can be found at: http://www.epa.gov/nsr/documents/20100413final.pdf. The program for regulating greenhouse gas emissions will start with the largest emitters. Under this Rule, carbon dioxide equivalents

released from the combustion of wood and other biomass fuel to generate electricity will be treated in the same way that emissions from fossil fuel used to generate electricity are treated. Biomass combustion/biogenic emissions are explicitly treated on pages 419 through 423, where one can find EPA responses to comments about whether carbon dioxide emissions from biomass combustion should be treated differently than carbon emissions from the combustion of other fuels. The EPA did not find sufficient basis to exclude emissions of CO2 from biogenic sources in determining permitting applicability provisions at this time, but did not rule out future action.

5. Under the new EPA Rule, GREC will need a permit for its GHG emissions if it begins operation after July, 2013, as the Rule will apply to large stationary sources emitting 100,000 tons per year of Greenhouse Gases after that date. GREC is anticipated to release in excess of 334,000 tons of carbon dioxide per year.

6. The EPA Rule will have a direct impact on the financial viability of Petitioners' proposed GREC project because *nearly all financial projections* produced by Petitioners are based on the assumption that greenhouse gases (e.g. carbon dioxide and carbon dioxide equivalents) produced by the combustion of woody biomass by GREC will be treated as "carbon neutral" by future federal legislation. The federal EPA Rule, which has nationwide applicability, clearly and explicitly states the opposite. While one cannot yet predict the exact manner by which the EPA Rule will be applied, it completely undercuts Petitioners' arguments that GREC will provide many financial benefits because it will be using woody biomass as a fuel source.

7. Petitioners have asserted that the "environmental attributes" of GREC will consist of valuable carbon credits and renewable energy credits that can be sold on the open market to third party utilities, or used to mitigate carbon penalties GRU will experience as a result of the

use of fossil fuels in many generators in its fleet. However, inasmuch as the environmental attributes from GREC will include all the CO2 and other pollutants it emits, under the new EPA Rule, the environmental attributes of GREC could *add* significantly to the cost of energy from this plant and *increase* ratepayer's bills. The anticipated carbon credits for using woody biomass and for including a "renewable" fuel source in one's portfolio have potentially evaporated under the EPA Rule. Thus such carbon credits cannot be presumed to be a saleable asset available to GRU, nor can GRU presume an enhanced value due to the sale of GREC power to other utilities on the basis of carbon credits or improving the renewables portfolio of those utilities.

8. The loss of such advantages completely alters the financial prospects for GREC as heretofore contemplated by Petitioners, and the impact of the EPA Rule could mean actual punitive costs to GRU rather than only the loss of appreciable benefits. If the purchase of GREC power no longer comes with special advantages to the buyer, GRU and its ratepayers will be obliged to absorb all or most of the costs of the power produced by GREC, including the costs of carbon emissions, at a time when GRU already has an unusual excess of reserve capacity. Under the terms of the PPA with American Renewables, GRU has very limited discretion to dispatch GREC, and is obliged to pay for all the power the facility *can* generate whether or not GRU needs the power.

As Staff noted in the Revised Staff Recommendations ("RSR"):

> ...staff believes the CPWRR analyses conducted by GRU provides no clear answer to the economic viability of the GREC Project. However, the analyses do indicate that the primary driver of estimated savings comes from the estimated impacts associated with pending environmental regulations affecting CO2. The enactment of pending carbon legislation will have the greatest impact upon the cost effectiveness of the GREC Project. (EXH 24, p.4 of 8) *If the GREC Project is considered carbon neutral*, and is able to reduce the requirement of GRU to purchase carbon credits or allocations, then the facility may provide significant economic benefit.

*See RSR*, top of pdf 29, emphasis added.

> The evidence continues to indicate that the *only* scenario where the GREC Project would become the most cost-effective alternative would be if pending legislation regarding CO2 emissions is enacted.

*See RSR* ,pdf 39, 3rd paragraph, 3rd sentence; emphasis added.

The EPA Rule presents the exact scenario under which Staff assert that GREC will not be the most effective alternative. The Rule makes clear that electric power generated by woody biomass is not carbon neutral.

9. The EPA Rule also undercuts one of the primary objectives that the City of Gainesville sought to achieve with GREC, which is reducing its carbon footprint enough to reach a target compliance with the Kyoto Protocols and the "United States Conference of Mayors' Climate Protection Agreement," as described in Hanrahan's Exhibit PH-3 to supplemental pre-filed testimony. The City's plan was to use GREC's carbon credits to offset carbon dioxide emissions from other generators in its fleet. Under the new Rule, GREC will not produce carbon credits but instead will add in excess of 334,000 tons of emissions every year to the utility's total carbon dioxide emissions.

10. The EPA Rule presents a change in circumstances so significant that issuing a determination on the basis of the record without consideration of the EPA Rule would be contrary to the public interest. *See In re: Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO Transport and associated benchmark;* Docket No. 031033-EI, Order No. PSC -05-0312- FOF-EI, March 21, 2005, at p 8-9; and cases cited therein, including McCaw Communications of Florida, Inc, v. Clark, 679 So. 2d 1177 (Fla. 1996), citing Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966). Petitioners

themselves, especially the City and GRU, have not had the opportunity to evaluate the merits of GREC in light of the Rule and its possible implications.

11. It would be an abuse of discretion for the Commission to proceed without allowing the parties to address the impact of the EPA Rule since doing so could lead to a decision and order containing errors of fact and law, providing substantive grounds for appeal.

12. Alternatively, the Commission could determine that the EPA Rule so transforms the applicable facts and law that all parties would be better served by denial of the pending need application so that Petitioners could submit a new application that takes into consideration the now completely different context in which GREC will be operating and thus afford themselves protection from risks previously not contemplated.

13. Petitioners will not be prejudiced by granting the motion since it would not be in Petitioners' interests to be bound by an agreement arrived at under a radically different regulatory reality. The altered legal landscape poses significant risks to Petitioners where they had before expected protection and substantial benefits. Such changes could also alter the City's or GRU's credit status. As the RSR notes, on page 6:

> Florida Statutes and Commission Rules related to purchased power contracts provide safeguards such that IOU ratepayers would not pay above avoided costs for purchases of renewable capacity and energy. Such is not the case with the current docket because GRU is not rate-regulated by this Commission. Staff notes, therefore, that if the petitioner were an IOU, our recommendation may have been different.

It is clear that even before the issuance of new EPA Rule, PSC Staff had reservations about the financial aspects of GREC. The implications of the Rule can only compound those doubts. Elsewhere Staff stated:

> In the September 2009 Moody's report, the credit rating agency placed a negative outlook on GRU's credit rating. (EXH 2, BSP-000354) In its analysis, Moody's asserted that the negative outlook *was premised on electric rates that are projected to increase to support*

> *additional debt and that are becoming less competitive,* leaving very little headroom to raise rates further. (EXH 2, BSP-000354) The negative outlook also considered the liquidity available to cover the variable rate debt and the future dependency on operating reserves to meet significant capital improvement and other operation and maintenance-related cost increases. (EXH 2, BSP000354) Moody's stated the following five challenges for GRU:
>
> - Six year capital improvement program puts additional pressure *on currently above average rates.*
> - Lack of fuel diversity could place pressure on future rates.
> - *Meeting regulatory requirements* could result in system modifications increasing costs substantially. ;
> - *Less competitive electric rates than other utilities in the region.*
> - Future dependency on rate stabilization fund.
>
> ....Staff believes the proposed GREC Project could *possibly* alleviate the credit rating agencies' expressed concerns about GRU's fuel diversity and potential carbon compliance costs. However, the proposed GREC Project may exacerbate the credit rating agencies concerns regarding non-competitive electric rates and restrained liquidity.

*See RSR,* page 38-39; emphasis added.

Thus, as Staff reported, GRU is already regarded as having high utility rates. Moody's concerns were contained in its September 2009 report, so the "meeting regulatory requirements" concern did not even include costs associated with the imposition of carbon taxes on GREC as are likely under the new Rule. Potentially, the costs of GREC's compliance with the Rule might cause Moody's to have an even more negative outlook. Originally, GREC was seen as a hedge against expected carbon taxes, but the EPA Rule suggests that GREC will be subject to such additional charges, adding more pressure on high utility rates that might cause credit rating agencies to downgrade GRU's bond rating. The City and GRU must be afforded the opportunity to evaluate the possible ramifications of the Rule in this regard rather than being obliged to proceed under contract terms agreed to in circumstances when the then prevailing law was totally different.

Under the terms of the PPA, the City cannot withdraw from the agreement unless the Commission denies the need certification. Obviously, such stringent terms were accepted when the anticipated contingencies were more positive than they are under the new Rule.

14. Official recognition of the EPA Rule will further the goals of fairness, uniformity, and even-handed regulation by the Commission, whereas failure to recognize the Rule will set an untenable precedent for future applicants before the Commission, suggesting a willingness by the Commission to grant petitions that fail to demonstrate compliance with *existing* federal regulations. Such a result would be an anomaly in this case since so much of Petitioners' argument and expectations were predicated on *anticipated* federal legislation that has not been enacted. With the new Rule, law has been enacted that is diametrically opposed to Petitioners' expectations. While it may be reasonable to accept assumptions based on anticipated legislation, it cannot be reasonable to ignore new law that is contrary to those assumptions.

15. The Commission has articulated standards for reconsideration where an Order has already been issued. As stated in *In re: Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO Transport and associated benchmark*:

> "The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering the order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. vs. Bevis."

*See* Docket No. 031033-EI, Order No. PSC -05-0312- FOF-EI, March 21, 2005, at p.2.

In this matter, Interveners are not seeking a reconsideration of an already issued Order, but only that the record be reopened so that the Commission may take cognizance of a new, applicable law germane to the matters under consideration *before* rendering its decision and issuing an order. As such, the standard that Interveners need to meet should be much lower.

Interveners are not rearguing issues that have already been considered, but merely pointing out the implications of the new EPA Rule and the fact that the Rule raises issues that were *never* under consideration, specifically, consequences to Petitioners if CO2 emissions from the combustion of woody biomass are regulated rather than being treated as carbon neutral. None of Petitioners' analyses or evidence, whether proffered on their initiative or provided in response to Staff interrogatories and requests for production, contain any comparative scenarios showing the consequences of GREC being subject to carbon regulation.

The implications of the new EPA Rule are too large to be comprehended by a mere review of the record and unexamined speculation about the impact. The only prudent course of action available to the Commission is to grant official recognition of the Rule and issue an Order that complies with the logical implications of the Rule.

Wherefore, for all the foregoing reasons Interveners move the Commission to:

1. Take official recognition of the new EPA Rule;
2. Deny Petitioners' application for need, or, alternatively,
3. Permit the Parties to present evidence and testimony regarding the likely impact of the Rule on GREC;
4. Issue Findings and an Order conforming to the legal realities of the Rule;
5. Any and all other relief as the Commission may deem warranted.

Respectfully submitted this 24th Day of May, 2010.

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**CERTIFICATE OF SERVICE**

I, Paula H. Stahmer, hereby certify that a true and complete copy of the foregoing has been served on the following via electronic mail and/or United States Mail, on May 24th, 2010:

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