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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need of Hines Unit 2 Power Plant.	)	Docket No.: 001064-EI
	)	Submitted for Filing: October 3, 2000

FLORIDA POWER CORPORATION'S MOTION TO STRIKE STAFF'S PRELIMINARY ISSUE NUMBER 6 AND THE DIRECT TESTIMONY OF BILLY R. DICKENS

Florida Power Corporation ("FPC" or the "Company"), pursuant to Florida Rule of Civil Procedure 1.140(f) and Rule 28-106.204, F.A.C., respectfully moves the Florida Public Service Commission ("PSC" or the "Commission"), to strike Staff's preliminary issue number 6 and the Direct Testimony of Billy R. Dickens on the grounds that the issue and the testimony supporting that issue are immaterial and impertinent to any issue properly before the Commission in this need determination proceeding.

Staff asks the Commission to take up under preliminary issue number 6 the unknown impact on ratepayers of potential deregulation at some point in time in the future if the costs of the Hines 2 power plant are placed in FPC's rate base over the course of the expected life of the Hines 2 plant. As Staff's sole witness, Mr. Dickens, put it, he will "address issue 6" and explain the "potential risks for Florida ratepayers" resulting from economic uncertainty "due to the advent of electric generation restructuring."

With all due respect to the Commission Staff and Mr. Dickens, this is a matter outside the Commission's jurisdiction in this proceeding and wholly within the realm of the Florida Legislature. Consideration of this alleged "issue" as a matter of "cost recovery" would further violate the well established, fundamental principle that hindsight review of a utility's cost

decisions is improper, even if the Commission had jurisdiction to consider this "issue" and this need determination proceeding was the appropriate forum, which is not the case.

FPC objected to this issue for these reasons when Staff raised it for the first time at the Issues Conference. But Staff refused to withdraw the issue, necessitating this motion.

For all of the foregoing reasons, as more fully explained below, the Commission should grant FPC's motion and strike Staff's preliminary issue number 6 and Staff's testimony on that issue from this proceeding.

SUPPORTING MEMORANDUM

A Need Determination Proceeding is Not the Proper Forum to Address Policy Issues.

Staff's preliminary issue number 6 is not one of the specific statutory criteria that the Commission must consider in this need determination proceeding. It is a "policy" issue. This is made clear by the testimony of Staff's sole witness on issue number 6, Mr. Billy R. Dickens of the Commission's Bureau of Policy Analysis. As noted above, he purports to explain the potential risks for Florida ratepayers -- albeit in this case only FPC's ratepayers are singled out -- from the alleged "advent of electric generation restructuring." (Dickens Testimony, p. 2). The Commission does not need to reach the issue of whether it has jurisdiction to consider this particular "policy" issue -- which it does not --- because the Commission has long recognized that a need determination proceeding is an inappropriate forum to address such "policy" issues. For this reason alone, the Commission should strike Staff's preliminary issue number 6 and the accompanying testimony of Mr. Dickens on this issue.

In the case of FPC's last petition for a determination of need for the Polk County units 1 through 4, now called Hines 1, the Commission was asked to consider (i) whether FPC's self-

build generation option must meet the same cost and performance obligations that FPC imposed on Qualifying Facilities ("QFs") and (ii) whether FPC was obligated as a matter of law to purchase QF capacity in lieu of its self-build option. The Commission deferred ruling on such "policy" questions, explaining that they were "beyond the scope of this proceeding" and "more properly addressed in a generic rulemaking docket or ratemaking proceeding." In re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities, Polk County Units 1-4, by Florida Power Corp., Order No. 25805, Docket No. 910759-EI, February 25, 1992. (emphasis added).

Likewise, the Commission denied Florida Power & Light Company's ("FP&L") rehearing motion in the need determination proceeding for FP&L's Martin units 3 and 4 in part because "the appropriate forum to discuss [the cogeneration issue raised by FP&L] is in the cogeneration rules docket, planning hearing docket, and conservation/cogeneration programs docket." In re: Florida Power and Light Co., Order No. 23080, Docket No. 890974-EI, June 15, 1990. The Commission explained that "[t]hese are the dockets in which it is appropriate for this body to discuss and resolve the often conflicting policy issues surrounding cogeneration." (Id.).

The Commission Staff has taken the same position. In the need determination proceeding for FPC's Polk County Units 1 through 4 (Hines 1), Staff rejected Destec's objection to the conclusion that the issue whether FPC should be held to the same cost and performance standards with its self-build option that it imposed on QFs was beyond the scope of the need determination proceeding. Staff was clear that it was inappropriate to consider this "policy" issue in such a proceeding.

> As discussed in the Recommended Order, issues related to the recovery of costs incurred in the construction of power plants are considered in a utility's rate case.

> If Destec is asking that the Commission change its regulatory policy to require utilities to be held to the same cost and performance standards as that of QFs, this would have to be done in rulemaking.

Order No. 25805, Docket No. 910759-EI, February 25, 1992. (emphasis added).

As both the Commission and the Commission Staff have held, a need determination proceeding is an inappropriate forum to consider changes in regulatory policy. Rather, proposed "policy" changes "would have to be done in rulemaking." (Id.). The past positions by the Commission and Commission Staff that such issues should not be considered in a need determination proceeding reflects the directive that agencies must use rulemaking procedures to promulgate important regulatory policy. See, e.g., Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 86 (Fla. 1st DCA 1997) (noting that the 1991 legislature had "expressed, in no uncertain terms, its selection of rulemaking over adjudication as the primary means of policy development"); McCarthy v. Dept. of Ins. and Treasurer, 479 So. 2d 135, 137 (Fla. 2d DCA 1985) (reversing department's order rescinding a certification for failure to comply with prerequisites set forth in department letter because the department "cannot avoid the rulemaking requirements ... by merely adopting non-rule policies").

It is beyond dispute that the "reasonableness" of future cost recovery because of the alleged "advent of electric generation restructuring" raised by Staff's preliminary issue number 6 contemplates changes to existing regulatory policy. Setting aside for the moment the fact that this is a policy matter for the Florida Legislature to consider --- as made evident by the appointment and operation of a Study Commission on this very issue --- the impact of restructuring affects all public utilities, not just FPC, and would involve a host of decisions that must be made strictly on "policy" grounds. FPC's petition for a determination of need for a

single power plant clearly is not the appropriate forum for the resolution of such a "policy" issue --- as the Commission and its Staff have consistently ruled in the past. There is no good reason for the Commission and its Staff to deviate now from their prior holdings. Accordingly, FPC's motion to strike Staff's preliminary issue number 6 and its accompanying testimony should be granted, if for no other reason than that this is not the appropriate venue to consider the issue.

The Commission Does Not Have the Power to Consider Staff's Preliminary Issue Number 6 (and the accompanying supporting testimony of Mr. Billy R. Dickens).

Section 403.519, Florida Statutes, sets forth what the Commission may properly consider in a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. The Commission must take into account (i) the need for electric system reliability and integrity, (ii) the need for adequate electricity at a reasonable cost, (iii) whether the proposed plant is the most cost effective alternative available, (iv) the conservation measures taken by or reasonably available to the applicant which might mitigate the need for the proposed plant, and (v) "other matters within its jurisdiction which it deems relevant." § 403.519, Fla. Stat. Staff's proposed preliminary issue number 6 does not address issues (i), (ii), (iii), or (iv) under Section 403.519 -- these subjects are raised by Staff in its proposed preliminary issues numbers 3, 4, 7, and 8. Proposed issue number 6, therefore, must address "other matters within [the Commission's] jurisdiction" to be properly raised by the Staff and considered by the Commission in this proceeding. It does not.

Section 366.04(1) gives the Commission the power to regulate public utilities with respect to their rates and service. § 366.04(1), Fla. Stat. Neither "rates" nor "service" are defined by the Legislature. The Commission, however, has defined both terms. "Rates" means "the price or charge for utility service." Rule 25-9.002(4), F.A.C. See also City of Tallahassee

v. Mann, 411 So. 2d 162, 163 (Fla. 1981) ("Rates' refers to the dollar amount charged for a particular service or an established amount of consumption."). "Service" is defined as "[t]he supply by the utility of electricity to the customer, including the readiness to serve and availability of electrical energy at the customer's point of delivery at the standard available voltage and frequency whether or not utilized by the customer." Rule 25-6.003(6), F.A.C. The power to regulate "rates" and "service," therefore, contemplates an obligation on the part of public utilities to supply electricity to their customers with the corresponding commitment that they will be paid a reasonable amount for it.

Indeed, under the current regulatory scheme, public utilities submit to regulation with respect to their "rates and service" with the promise that they "shall not be denied a reasonable rate of return upon [their] rate base." See, e.g., § 366.04, Fla. Stat. (the Commission "shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service ...") and § 366.041, Fla. Stat. (listing matters the Commission can consider in setting "just, reasonable, and compensatory rates, charges, etc." provided that the public utility "shall not be denied a reasonable rate of return upon its rate base ..."). Cf. United Telephone Co. of Florida v. Mann, 403 So. 2d. 962, 966 (Fla. 1981) (ruling that "[a] regulated public utility is entitled to an opportunity to earn a fair or reasonable rate of return on its invested capital," noting that this amount "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain credit and to attract capital."). This quid pro quo -- accepting an obligation to serve at a regulated price in return for a reasonable rate of return -- underlies the entire regulatory scheme and represents the fundamental regulatory compact that exists between the Legislature and the public utilities.

In preliminary issue number 6, Staff asks the Commission to reconsider the regulatory compact and renege on its part of the bargain at any point in time in the future when the Commission deems it prudent to do so under the then-existing circumstances. Indeed, apart from, and even in spite of, a determination under Section 403.519 that the Hines 2 power plant is needed to provide FPC's ratepayers adequate electricity with the optimum technology and at a reasonable cost, Staff would have the Commission reconsider at a future time whether FPC should continue to recover its incurred costs in meeting its obligation to provide electrical service to its ratepayers. The Florida Legislature obviously never intended such an outcome as part of the existing regulatory scheme; accordingly, the Commission simply does not have this power.

The Commission's power to determine what the public utility will be paid for its service clearly is not absolute. Rather, the Florida Legislature provided that the rates paid public utilities shall be "just, reasonable, and compensatory" and that "no public utility shall be denied a reasonable rate of return upon its rate base." § 366.041, Fla. Stat. Further, the Florida Legislature set forth the procedures by which a public utility's rates are to be fixed, adjusted, or changed, providing for separate proceedings initiated either by the utility, by complaint, in writing, or by motion of the Commission so that the public utility was given notice of the nature of the dispute over its rates and the right to be heard. E.g., §§ 366.041, .06, .07, Fla. Stat. In such proceedings, what is properly at issue, according to the Florida Legislature, is the rate proposed or demanded "by the public utility." In determining the "justness and reasonableness" of the rate proposed or demanded by the utility, the Commission must take into account the costs actually incurred and the investments actually made, as well as the services actually rendered. Id.

In this way and in this manner, the Florida Legislature has circumscribed the Commission's jurisdiction over the rates proposed or charged by public utilities for its service. The Commission cannot expand its power to regulate each public utility with respect to "its rates and service" beyond what has been explicitly provided by the Florida Legislature. See Towerhouse Condominium, Inc. v. Millman, 475 So. 2d 674, 676 (Fla. 1985) (the Court reasoned that, if the Legislature had intended the condominium association's power to purchase real property to be unlimited, it would not have specified circumstances under which the association would be authorized to make such a purchase; accordingly, the Court held that by granting authority in specific situations, the Legislature intended to limit the authority only to those situations); PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988) (applying the doctrine that the mention of one thing in a statute implies the exclusion of others).

Nowhere is the Commission given the power by the Florida Legislature to propose on its own an issue that goes to "rates" based not on actual costs incurred or investments made and services actually provided but on unknown and unspecified future market forces in a proceeding that has nothing to do with the rates actually being proposed or charged by the public utility. Yet, that is exactly what the Commission Staff purports to do here.

The Commission's prior rulings in need determination proceedings when even legitimate cost recovery issues have come up -- those dealing with the costs actually incurred or investments made in the construction of a power plant -- have been consistent with the legislative scheme limiting the manner in which the Commission may consider and fix rates. The Commission has refused to entertain such cost recovery issues in need determination proceedings. In Order No. 25805, the Commission refused to consider whether FPC should be

held to the same cost and performance standards as that of QFs because "issues related to the recovery of costs incurred in construction of power plants are considered in a utility's rate case." Indeed, the Commission concluded that "if FPC's construction, non-fuel operating, and maintenance costs were substantially higher than what was claimed in this docket, the increase in costs will have to be justified in some future rate case to obtain cost-recovery. That is the risk the company assumes by constructing its own units." Order No. 25805, Docket No. 910759-EI, February 25, 1992. (emphasis added).

In the same docket, the Commission accepted as a finding of fact that (i) it would determine if ratepayers bear the burden of cost overruns on utility projects and that (ii) customers receive the benefits of all costs savings from utility generation construction projects but concluded this finding was "not material to the ultimate decision" in the need determination proceeding. Likewise, in Order No. PSC-99-1478-FOF-EI, the Commission addressed Gulf Power's failure to provide backup fuel for its proposed power plant and warned that "any future purchased power costs associated with a natural gas fuel interruption will be reviewed for prudence at subsequent fuel adjustment proceedings." In re: Gulf Power Co., Order No. PSC-99-1478-FOF-EI, Docket No. 990325-EI, August 2, 1999. See also In re: Florida Power and Light Co., Order No. 24165, Docket No. 900796-EI, January 26, 1991. (holding that "by necessity" the Commission must make a determination of need for the additional capacity that will be provided before a determination of prudence is made).

Of course, what Staff proposes to raise here is not even a legitimate cost recovery issue. Instead, Staff wants the Commission to consider as a matter of "policy" the propriety of the whole concept of cost recovery under the existing regulatory scheme because of anticipated but

currently unknown changes in this scheme at some point in the future. On its face, Staff's proposed preliminary issue number 6 raises a "policy" issue that goes to the very heart of the existing legislative scheme providing for the regulation of public utilities that provide the State of Florida with electricity.

Staff's sole witness, Mr. Billy R. Dickens, is in the Commission's Bureau of Policy Analysis. (Dickens Testimony, p. 2). He addresses only Staff's preliminary issue number 6 in order to explain, in his words, "why economic uncertainty, due to the advent of electric generation restructuring, raises potential risks for Florida ratepayers." (Id. at p. 3). His proposal is that the Commission should allow FPC to include the costs of the Hines 2 power plant in its rate base only so long as those costs are below market prices and exclude them when they exceed the market. (Id. at p. 8). In other words, Mr. Dickens would impose on FPC the "lesser of" the regulated cost-based rate recovery and market driven prices.

Mr. Dicken's proposal is antithetical to both the regulatory scheme and market economics. **No market participant would agree to accept market prices below its cost if it had to forego the benefits when the market price exceeded its costs.** Yet, that is exactly what Mr. Dicken's proposes the Commission should impose on FPC under the guise of advancing "market efficiency." (Id. at p. 7). His proposal certainly is not "just, reasonable, and compensatory"; it is confiscatory. And it violates the legislative prohibition that "no public utility shall be denied a reasonable rate of return upon its rate base." § 366.041, Fla. Stat.

The Commission clearly does not have this power and, therefore, should not consider this issue or the testimony of Staff's witness on the issue. See Mathis v. Florida Dep't of Corrections, 726 So. 2d 389, 391 n. 4 (Fla. 1st DCA 1999) (indicating that agencies are

"creatures of statute and only have such powers as statutes confer"); Southern States Utilities v. Florida Public Service Comm'n, 714 So. 2d 1046, 1051 (Fla. 1st DCA 1998) ("the PSC, like other administrative agencies, is a creature of statute [and] the Commission's powers, duties, and authority are those and only those that are conferred expressly or impliedly by statute of the State"). See also Consumers Power Co. v. Michigan Public Service Comm'n, 596 N.W. 2d 126, 1999 WL 462507 (Mich. June 29, 1999) (holding that "PSC exceeded its authority in ordering the electric utilities to transmit electricity produced and sold by other suppliers to customers in the service area of the utility"). FPC's Motion to Strike Staff's Preliminary Issue Number 6 and the Direct Testimony of Billy R. Dickens should be granted.

Consideration of Staff's Preliminary Issue Number 6 would Violate the Fundamental Principle that Hindsight Review of a Utility's Cost Decisions is Improper.

Staff's proposed answer to its preliminary issue number 6 would require periodic reconsideration of the "cost recovery" for the Hines 2 power plant by the Commission. (Dickens Testimony, p. 8). Even assuming this proceeding were the proper forum and the Commission had jurisdiction to entertain the issue (which is not the case), such periodic reconsideration of Hines 2's costs by the Commission would unfairly and impermissibly charge FPC with the benefit of hindsight.

In Florida Power Corp. v. Public Service Comm'n, 424 So. 2d 745, 747 (Fla. 1982), the Florida Supreme Court held that the Commission may not do this. At issue was the refund of replacement fuel costs that FPC collected during an outage of its nuclear plant, which the Commission ultimately ordered. The Court reversed the Commission because it relied on reports prepared after the accident that were critical of FPC's management decisions, ruling that

"[h]indsight should not serve as the basis for liability in this instance." See also Florida Power Corp. v. Public Service Comm'n, 456 So. 2d 451, 452 (Fla. 1984) (reversing Commission order with respect to rates for the same nuclear outage because "[t]he lack of procedures which might have prevented the accident, suggested by the [Commission], amounts to an application of the 20-20 vision of hindsight" and, therefore, the Commission's findings were unsupported by competent substantial evidence.). "Hindsight" proof, simply put, is a totally inappropriate basis for evaluating the costs of management decisions.

Yet, "hindsight" proof is exactly what Mr. Dickens proposes the Commission should consider in evaluating the costs of FPC's Hines 2 power plant. Accepting the fact that Hines 2 is the most cost effective means of meeting FPC's reliability needs at this time by recommending that the Commission "should allow" the inclusion of Hines 2's costs in FPC's rate base, Mr. Dickens suggests, nevertheless, that the Commission should periodically review those costs and deny recovery "[i]f a more cost effective alternative becomes apparent" in the future. (Dickens Testimony, p. 8). Such "second-guessing" of FPC's decision to build Hines 2 based entirely on hindsight is impermissibly unfair --- a point the Florida Supreme Court has made abundantly clear to the Commission before. It is no less clear now, and accordingly, the Commission cannot "second guess" FPC's decision to build Hines 2, even if "a more cost effective alternative becomes apparent" at some point in the future, if it is the most cost effective alternative available to FPC now.

CONCLUSION

For all of the foregoing reasons, FPC respectfully requests the Commission grant its motion to strike Staff's preliminary issue number 6 from consideration in this proceeding and,

accordingly, strike the testimony of Staff's witness, Mr. Billy R. Dickens, who provides testimony only on Staff's preliminary issue number 6.

Respectfully submitted this 3RD of October, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to Deborah Hart, Esq., as counsel for the Public Service Commission, and by U.S. Mail to all other interested parties of record as listed below on this 2nd day of October, 2000.

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