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Subject: Docket No. 070231-EI - Florida Power & Light Company's Motion to Dismiss
Attachments: Motion to Dismiss MUUC Protest FINAL.doc

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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for approval of 2007 revisions to underground residential and commercial distribution tariff, by Florida Power & Light Company	Docket No. 070231-EI Filed: November 20, 2007

MOTION TO DISMISS PROTEST AND REQUEST FOR FORMAL PROCEEDING OF THE MUNICIPAL UNDERGROUND UTILITIES CONSORTIUM AND THE CITY OF COCONUT CREEK, FLORIDA

Pursuant to 28-106.204, Florida Administrative Code, Florida Power & Light Company ("FPL") hereby respectfully moves this Commission to dismiss the protest and request for formal proceeding filed by the Municipal Underground Utilities Consortium ("MUUC") and the City of Coconut Creek, Florida ("Coconut Creek") (the "MUUC Protest"), and in support thereof states:

1. On October 16, 2007, the Commission issued Order No. PSC-07-0835-TRF-EI (the "Tariff Order"), approving FPL's revisions to its underground residential distribution ("URD") tariff and underground commercial/industrial distribution ("UCD") tariff. The Tariff Order provided that a protest could be filed within 21 days thereafter. The MUUC Protest was filed and served on November 6, 2007. FPL is filing this motion to dismiss within 20 days of service of the MUUC Protest, as contemplated by Rule 28-106.204(2), F.A.C.

2. Drawing all reasonable inferences in favor of MUUC and Coconut Creek, the MUUC Protest must be dismissed with prejudice as a matter of law. MUUC and Coconut Creek do not have standing to request a formal proceeding, and the MUUC Protest alleges no legitimate basis upon which the Commission can grant the requested relief.

I. Standing

3. MUUC and Coconut Creek do not have standing to request a formal proceeding. Section 120.569(2)(c), Florida Statutes, requires that a petition or request for a hearing include a statement of how the petitioners' "substantial interests are or will be affected by the action or

proposed action." *See also* § 120.54(5)(b)4, Fla. Stat. The standard to establish whether a party has a "substantial interest" in a proceeding under the Administrative Procedure Act was set forth in *Agrico Chemical Co. v. Department of Environmental* Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982):

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

The MUUC Protest does not allege facts concerning the impact of FPL's updated URD and UCD tariff charges sufficient to show that MUUC or Coconut Creek will suffer injury in fact that is of sufficient immediacy to entitle them to a hearing or that the alleged injury is of a type that such a hearing would be designed to protect.

A. MUUC

4. MUUC has alleged generally that a number of its members "purchase electric service from FPL," and that they are "considering" underground utility projects and are "working with developers" on projects that may require underground conversions and/or new underground construction. MUUC Protest at 5-6. These allegations cannot support MUUC's claim of standing.

5. MUUC's allegations concerning receipt by its members of electric service from FPL are irrelevant to standing in this proceeding. FPL's tariffs concerning the rates and terms at which electric service is taken by customers are not at issue here. The only tariffs at issue (*i.e.*, the URD and UCD Tariffs) provide specific charges that an applicant must pay to help defray the added cost to FPL of installing new underground electric facilities. Nothing in the URD or UCD Tariffs specifies the rate that a customer then would pay for electric service delivered through

those facilities. Therefore, the mere fact that MUUC members take electric service from FPL would not give them an interest in changes to the URD or UCD Tariffs, which is the interest that this proceeding is intended to protect. *See AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997) (to establish standing under the second prong of the *Agrico* test, a putative party must demonstrate that its alleged interest is one that the proceeding in which it wishes to participate is designed to protect); *see also Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund,* 595 S.2d 186, 189-90 (Fla. 1st DCA 1992).

6. MUUC's allegations concerning its members' involvement with underground conversions are likewise irrelevant to this proceeding. FPL has a separate tariff concerning underground conversions. That tariff was never the subject of this proceeding, and it is unaffected by the revisions to the URD and UCD Tariffs at issue here. MUUC's allegations on this point are again ones that this proceeding is not designed to protect. *Id.*

7. The only allegation with respect to MUUC members' involvement with the construction of new underground facilities is that some of them are "considering" and "working with developers" on such projects. These allegations do not demonstrate injury in fact of sufficient immediacy to entitle MUUC to a hearing. The allegation that MUUC members are "considering" such projects raises, at most, the possibility of future economic harm. The mere possibility of future economic harm is insufficient to establish standing. *AmeriSteel Corp.*, 691 So. 2d at 477-78 (affirming the Commission's decision that entity did not have standing to protest order because customer's claim of future economic harm was not an injury in fact of sufficient immediacy to entitle the customer to a hearing). And even this possibility of future harm is based on vague allegations about MUUC members "working with developers" on undergrounding projects. One can only speculate from these allegations as to what, if any,

economic impact to MUUC members would result from "working with developers" on such projects. Speculation about economic injury cannot confer standing. *See, e.g., International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission*, 561 So.2d 1224, 1225-1226 (Fla. 3rd DCA 1990), *rehearing denied* (explaining that administrative decision's effect on labor dispute to the economic detriment of the association's members was "far too remote and speculative in nature to qualify under the first prong of the *Agrico* standing test").

8. Beyond these defects in the standing arguments of individual MUUC members, MUUC has not provided a sufficient basis on which it could be conferred associational standing. MUUC must demonstrate that a "substantial number of its members, although not necessarily a majority, are substantially affected by the agency's decision." *Florida Home Builders Association v. Dept. of Labor and Employment Security*, 412 So. 2d 351, 353-54 (Fla. 1982). MUUC claims that it meets this requirement because a "substantial majority of the MUUC's members...receive retail electric service from FPL." MUUC Protest at 9. However, as explained above, the receipt of electric service from FPL is irrelevant to standing in this proceeding, because FPL's tariffs concerning the rates and terms at which electric service is taken by customers are not at issue here.

B. Coconut Creek

9. The standing allegations for Coconut Creek are likewise unavailing. The MUUC Protest alleges that Coconut Creek is "attempting to partner with developers" on redevelopment projects that will include the "undergrounding of ... existing distribution lines and the installation of new UG distribution lines." MUUC Protest at 6. These vague allegations are insufficient to confer standing on Coconut Creek for the same reasons just discussed for MUUC: they raise only a speculative possibility of future economic harm and, as to underground

conversions of existing lines, that harm would not even relate to the URD or UCD Tariffs that are at issue in this proceeding. The cases cited in Paragraphs 5, 6 and 7 above apply with equal force to Coconut Creek.

10. Coconut Creek also alleges as part of its standing argument that it has asked FPL to treat areas where new underground facilities are being installed as part of the contiguous area that would qualify for FPL's Governmental Adjustment Factor ("GAF") waiver. *Id.* However, as discussed below, FPL's GAF waiver expressly applies only to underground conversions, and FPL's tariffs for underground facilities conversions are not at issue in this proceeding. *Agrico* expressly rejects this use of "bootstrapping" to establish standing, by requiring that the substantial interests upon which standing is premised be ones that the proceeding in question is actually designed to protect. There is nothing in the Tariff Order or elsewhere in this proceeding to suggest that it is intended to protect Coconut Creek's interests in FPL's underground facilities conversion tariffs. *See AmeriSteel Corp. v. Clark* and *Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, supra.*

II. Failure to State Viable Claims for Relief

11. In addition to failing to demonstrate standing, the MUUC Protest fails to assert any legal issues that would provide legitimate bases for a hearing. The MUUC Protest asserts essentially three issues as to which MUUC and Coconut Creek wish to be heard. As shown below, none of these issues raises any viable claim for relief from the terms of the approved URD or UCD Tariffs.

A. Operational Cost Differential

12. The MUUC Protest complains that the URD and UCD Tariffs do not take into account differences in the net present value of operational costs between overhead and

underground facilities, as contemplated by Rule 25-6.078, F.A.C, as it was most recently amended. *See* MUUC Protest at 10 (Issues 1 and 3). However, the Tariff Order expressly recognized that the amendment to Rule 25-6.078 requiring that this operational cost differential be taken into account does not govern the approval of FPL's tariffs in this proceeding.

13. The amendment in question, which added subsection (4) to the current Rule 25-6.078, became effective almost four months after FPL initiated this proceeding. Pursuant to Rule 25-6.078, FPL is required to file a schedule showing the increase or decrease in the construction-cost differential between overhead and underground facilities for a standard low-density subdivision by October 15 of each year. If this construction-cost differential varies from the last approved URD Tariff charge by 10 percent or more, then FPL is required to file an updated URD Tariff for Commission approval by April 1 of the following year. FPL complied with that requirement by initiating this proceeding and notifying the Commission on October 13, 2006 that its cost differential varied from the last approved URD differential by 31.01 percent. *See* Tariff Order at 1. The amendment adding the current subsection (4) to Rule 25-6.078 did not become effective until February 5, 2007[1]. The Commission expressly acknowledged in footnote 1 of the Tariff Order that those amendments do not apply to the FPL URD charges that are at issue in this proceeding.

14. It is appropriate that amendments to Rule 25-6.078 do not apply to the review and approval of new URD Tariff charges when the amendments are adopted during the period between a utility's notification and its filing of new charges. Rule 25-6.078 contemplates a six-month preparation period for a utility to develop the detailed data and analyses that support the estimated average cost differential calculation, with that period running from October to April 1

[1] Pursuant to the Commission's Amendatory Notice of Adoption of Rules, issued January 17, 2007, the effective date of the amendments referred to herein was February 5, 2007. Order No. PSC-07-0043A-FOF-EU.

of the following year. The initial Notice of Adoption of Rules, adopting the current subsection (4) of Rule 25-6.078, was issued on January 16, 2007. If that amendment were retroactively applied in this proceeding, it would have reduced the time available for FPL to determine the appropriate cost differentials and prepare its supporting data and analyses to less than three months. Such an abbreviated time frame would be overly burdensome and contrary to the process contemplated by the rule.

15. MUUC's and Coconut Creek's argument that the *UCD* Tariff is deficient because it did not comply with amended Rule 25-6.078 is even less plausible. As stated on page 7 of the Tariff Order, "the [UCD] tariff provisions are patterned after those that are required by rule to be filed for underground residential service. *Rule 25-6.078, F.A.C., does not require tariffed differentials for commercial and industrial activities.*" (Emphasis added). Thus, the requirements of Rule 25-6.078, including the recent amendments to that rule, simply do not govern the filing of FPL's revised UCD Tariff.

B. Storm Hardening of Hypothetical Overhead System

16. Rule 25-6.078 was also amended in February 2007 to add a subsection (2) requiring that, in calculating the cost of a hypothetical overhead system that would be built if the electric facilities in question were not installed underground, the utility must take into account the added cost of building the hypothetical overhead system to hardening standards approved pursuant to Rule 25-6.0342, F.A.C. The MUUC Protest complains that the URD and UCD Tariffs do not take into account the cost of a storm-hardened hypothetical overhead system as contemplated by the amendment that added the current subsection (2). *See* MUUC Protest at 10 (Issues 2 and 3). For all of the reasons just discussed with respect to the operational cost

differential, that amendment does not apply retroactively to the URD or UCD Tariffs at issue in this proceeding.

17. Additionally, it would have been logistically impossible for FPL to take the storm-hardening requirements of Rule 25-6.0342 into account when it filed the revised URD and UCD Tariffs. FPL filed its Electric Infrastructure Storm Hardening Plan for Commission approval on May 7, 2007 and has participated in a series of workshops and a hearing on the Plan throughout the Summer and early Fall. The Commission is scheduled to make a decision on approval of FPL's Plan at its December 4, 2007 agenda conference. FPL believes that its Plan is appropriate and should be approved, but cannot know until December 4 what hardening activities the Commission will approve. Until then, FPL therefore cannot know what hardening costs would appropriately be reflected in its calculation of a hypothetical overhead system as contemplated by the current Rule 25-6.078(2).

C. Application of GAF Waiver to New Underground Facilities

18. Finally, the MUUC Protest argues that underground facilities at new developments should qualify for the GAF waiver. MUUC Protest at 10 (Issue 4). This is tantamount to requesting an amendment to FPL's GAF Tariff, which is not at issue in this proceeding. Accordingly, that issue exceeds the scope of this proceeding and has been improperly raised.

19. Nothing in either the URD or UCD Tariffs mentions the GAF waiver. FPL's GAF Tariff, including the GAF waiver, was approved by Order No. PSC-07-0442-TRF-EI, issued May 22, 2007 in Docket No. 060150-EI. The eligibility criteria for the GAF waiver, as stated in the tariff and approved by the Commission, clearly apply only to "conversions" of existing overhead facilities to underground facilities – not to new underground facilities. MUUC

was a party in that docket and had ample opportunity to raise issues related to the eligibility criteria. Instead, MUUC is now advocating a change to those criteria in a proceeding where that tariff is not at issue.

III. Conclusion

As demonstrated in this motion, MUUC and Coconut Creek do not have standing to request a hearing on the Commission's approval of the URD and UCD Tariffs. Additionally, each of MUUC and Coconut Creek's alleged disputed issues of material fact is premised upon rule amendments that are inapplicable to this proceeding or relates to tariffs that are not at issue in this proceeding. FPL is aware of no revisions that MUUC or Coconut Creek could make to the MUUC Protest that would cure these defects. Accordingly, the MUUC Protest must be dismissed with prejudice. *See* § 120.569(2)(c), Fla. Stat.

WHEREFORE, for the above and foregoing reasons, FPL respectfully requests that the Commission dismiss MUUC and Coconut Creek's protest and request for formal proceeding, with prejudice.

Respectfully submitted this 20th day of November, 2007.

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CERTIFICATE OF SERVICE
Docket No. 070231-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery on the 20th day of November, 2007, to the following:

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