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Sent: Thursday, August 04, 2011 3:32 PM
To: Frank Bondurant; Beth Keating; J.R. Kelly; Cecilia Bradley; Filings@psc.state.fl.us; Jennifer Crawford; Pauline Robinson; Schef Wright
Subject: Electronic Filing - Docket No. 110041-EI
Attachments: 110041.Marianna.Resp2Mot2Dismiss.8-4-11.pdf

a. Person responsible for this electronic filing:

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b. 110041-EI

In Re: Petition for approval of Amendment No. 1 to Generation Services Agreement with Gulf Power Company, by Florida Public Utilities Company.

c. Document being filed on behalf of the City of Marianna, Florida.

d. There are a total of 26 pages.

e. The document attached for electronic filing is The City of Marianna's Response in Opposition to Motion to Dismiss.

(see attached file: 110041.Marianna.Resp2Mot2Dismiss.8-4-11.pdf)

Thank you for your attention and assistance in this matter.

Rhonda Dulgar
Secretary to Schef Wright
Phone: 850-222-7206
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DOCUMENT NUMBER-DATE

05516 AUG-4 =

FPSC-COMMISSION CLERK

8/4/2011

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Approval of Amendment No. 1 to)
Generation Services Agreement with Gulf Power) DOCKET NO. 110041-EI
Company, by Florida Public Utilities Company.) Filed: August 4, 2011
_____)

THE CITY OF MARIANNA'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

The City of Marianna, Florida ("Marianna" or "City"), pursuant to Rule 28-106.204(1), Florida Administrative Code ("F.A.C."), hereby files its response in opposition to Florida Public Utilities Company's ("FPUC") motion to dismiss ("Motion to Dismiss") the City's Petition Protesting Proposed Agency Action Order No. 11-0269-PAA-EI and Request for Formal Proceeding. In summary, contrary to FPUC's assertions, the City has pled sufficient facts to establish its standing because the City, as a substantial customer of FPUC (with more than 110 retail accounts), will be required to pay rates that are determined by the costs that FPUC will incur pursuant to the PPA Amendment, if it is approved. The wholesale power costs that FPUC would pay, and thus the rates that the City would pay if the PPA Amendment were approved, will be determined by the Commission in this docket, and therefore, the City's substantial interests will be determined by the Commission's actions herein. The City has thus stated a claim for relief that the Commission can grant: if the Commission can grant FPUC's requested relief, i.e., approval of the PPA Amendment, then the Commission can surely grant the City's requested relief, i.e., denial of the PPA Amendment. Taking the allegations in the City's Petition for Formal Proceeding as true, the City has pled sufficient facts to establish its standing and to state a claim upon which the Commission has the legal authority to grant the requested relief, and accordingly, FPUC's Motion to Dismiss must be denied.

PRODEDURAL BACKGROUND

1. The name, address, and telephone number of the Petitioner are as follows:

The City of Marianna, Florida
City Hall
2898 Green Street
Marianna, Florida 32446
Telephone: (850) 482-4353

DOCUMENT NUMBER-DATE

05516 AUG-4 =

FPSC-COMMISSION CLERK

2. All pleadings, orders, and correspondence should be directed to Petitioner's representatives as follows:

Robert Scheffel Wright, Attorney at Law
John T. LaVia, III, Attorney at Law
Young van Assenderp, P.A.
225 South Adams Street, Suite 200
Tallahassee, Florida 32301
Telephone: (850) 222-7206
Facsimile: (850) 561-6834

3. The agency affected by this Petition Protesting Proposed Agency Action is:

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

4. This docket was initiated by FPUC's filing, on January 26, 2011, of its Petition for Approval of the proposed Amendment No. 1 to FPUC's generation services agreement with Gulf Power Company ("Gulf" or "Gulf Power"). The City petitioned to intervene on February 11, 2011. No party opposed the City's petition to intervene, and the Commission granted the City's petition to intervene by Commission Order No. PSC-11-0137-PCO-EI, issued on February 28, 2011.

5. The Commission issued Proposed Agency Action Order No. 11-0269-PAA-EI (the "PAA Order") on June 21, 2011, stating, "The action proposed herein is preliminary in nature," PAA Order at 5, and providing that, "Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code." Thus, the PAA Order is preliminary and non-final at this time.

6. The City of Marianna timely filed its Petition Protesting Proposed Agency Action Order No. PSC-11-0269-PAA-EI and Requesting Formal Proceeding (the "City's Petition" or "Petition for Formal Proceeding") on July 12, 2011, in which the City requested a formal proceeding, *i.e.*, a de novo evidentiary hearing on FPUC's Petition for Approval of the PPA Amendment.

7. For convenience, the following abbreviations are used in the City's response to FPUC's motion to dismiss. The existing wholesale power purchase agreement between FPUC and Gulf, i.e., the "AGREEMENT FOR GENERATION SERVICES BETWEEN GULF POWER COMPANY AND FLORIDA PUBLIC UTILITIES COMPANY Dated as of December 28, 2006," is abbreviated as the "Existing Agreement." The amendment to the Existing Agreement that is the subject of this docket, i.e., the "AMENDMENT NO. 1 TO THE AGREEMENT FOR GENERATION SERVICES BETWEEN GULF POWER COMPANY AND FLORIDA PUBLIC UTILITIES COMPANY," is abbreviated as the "PPA Amendment." FPUC's petition for approval of the PPA Amendment is referred to as the "Petition for Approval." Order No. PSC-11-0269-PAA-EI is generally referred to as the "PAA Order."

FACTUAL BACKGROUND

8. The City of Marianna, Florida is a political subdivision of the State of Florida, with a population of approximately 6,200 persons. The City operates police and fire departments, water, wastewater, and natural gas utility systems, and provides other municipal services to its citizens. The City purchases retail electric service from FPUC through approximately 112 accounts, including accounts that are billed under FPUC's General Service – Non-Demand (GS), General Service – Demand (GSD), General Service – Demand Time of Use (GSDT-EXP), General Service – Large Demand (GSLD), and Street Lighting (SL) and Outdoor Lighting (OL) rate schedules. The City's Ordinance No. 981 is the Franchise Agreement or Franchise Ordinance between the City and FPUC.

9. FPUC is a "public utility" within the meaning of Section 366.02(1), Florida Statutes.¹ FPUC provides retail electric service in two divisions, the Northeast Division, which is not affected by this proceeding, and the Northwest Division, which includes the City of Marianna and surrounding areas. FPUC does not produce any of the electricity that it sells to the City or its other retail customers. Rather, FPUC purchases the electricity that it sells at retail

¹ All references to the Florida Statutes in this Petition are to the 2010 edition thereof.

from Gulf Power Company pursuant to the Existing Agreement, which became effective on January 1, 2008. The Existing Agreement is the bulk electricity purchase and sale agreement through which FPUC buys wholesale electricity from Gulf Power Company, which electricity is then re-sold to the City and FPUC's other customers in the Northwest Division. The PPA Amendment would amend the Existing Agreement in two main ways: it would reduce the minimum purchase quantity under the Existing Agreement from 97,944 KW to 91,000 KW, thus reducing FPUC's capacity payments to Gulf under the Existing Agreement, and it would otherwise extend the Existing Agreement for two additional years, i.e., through December 31, 2019 as compared to the current termination date of December 31, 2017. As stated by the Commission in the PAA Order, "The capacity rates for 2018 and 2019 are escalated at a rate comparable to the escalation rates for the years contained in the Existing Agreement." PAA Order at 3.

10. Because of the purchased power costs that FPUC incurs under the Existing Agreement, FPUC's retail rates have been the highest, or among the very highest, in Florida for some time. Even after the reductions recently approved by the Commission in Order No. PSC-11-0289-FOF-EI, which included (a) \$9.64 per 1,000 kWh of Residential service to return amounts over-collected from customers through FPUC's Purchased Power Charges and (b) \$4.53 per 1,000 kWh of Residential service to reflect the effects of the proposed PPA Amendment, see Order No. PSC-11-0289-FOF-EI at 3-4, FPUC's rates remain among the very highest in the state. The effective wholesale power costs that FPUC incurs under the Existing Agreement, and the effective wholesale costs that FPUC would continue to incur even if the PPA Amendment were to become finally effective, are significantly above the market cost for wholesale power in Florida.

11. The Franchise Ordinance requires FPUC to develop "Time of Use" ("TOU") and "Interruptible" ("IS") electric rates or similar electric rate schedules. FPUC has proposed tariffs for such TOU and IS rates, and those proposals are the subject of Commission Docket No. 100459-EI. In FPUC's Petition that is the subject of this Docket No. 110041-EI, FPUC

characterized the PPA Amendment with Gulf Power Company as being necessary to support the TOU and IS rate schedules that are the subject of Docket No. 100459-EI. The Commission recognized the relationship of the PPA Amendment to the TOU and IS rates in the PAA Order that is the subject of the City's Petition; specifically, the Commission stated, "we find that the modifications to the capacity purchase quantity provides the pricing flexibility necessary to develop conservation, or load control measures such as time-of-use and interruptible rates." PAA Order at 3. (As set forth in the City's Petition for Formal Proceeding, in the City's statement of disputed issues of material fact and in its statement of ultimate facts alleged, the City disagrees with the Commission's preliminary conclusion that the modification to the capacity purchase quantity provides any support for the development of conservation, time-of-use, interruptible, or similar rates, and the City accordingly identifies this as a disputed issue of material fact to be determined in the formal proceeding requested by the City through its Petition.)

12. FPUC timely filed its Motion to Dismiss on July 28, 2011, and the City hereby responds in opposition to that motion.

SUMMARY OF ARGUMENT

13. FPUC's Motion to Dismiss raises two basic points. First, FPUC asserts that the City has not adequately pled facts to establish its standing, because, FPUC asserts, the impacts on the City's interests in 2018 and 2019 are too far in the future to satisfy the "injury of sufficient immediacy" requirement of the AgriCo standing test. Second, FPUC asserts that the City has not stated a claim upon which the Commission can grant relief, apparently asserting that because rates are not being set in this docket, the City cannot state a claim upon which the Commission can grant relief.

14. Naturally and obviously, the City strongly disagrees with FPUC's contentions. In considering – as it must² – all facts pled by the City as true, the Commission should conclude that the City has pled facts that are sufficient to establish its standing, facts that warrant the relief requested, and disputed issues of material fact that justify the City's request for a formal proceeding, including an evidentiary hearing on the factual issues raised in the City's Petition. This formal proceeding will lead to a decision, based on competent, substantial evidence of record, on the ultimate issue in this docket: whether to approve or deny the PPA Amendment for cost recovery purposes.

15. The City has pled facts sufficient to establish its standing because the City, as a substantial customer of FPUC (with more than 110 retail accounts), will be required to pay rates that are determined by the costs that FPUC will incur pursuant to the PPA Amendment, if it is approved. The wholesale power costs that FPUC would pay, and thus the rates that the City would pay if the PPA Amendment were approved, will be determined by the Commission in this docket. Thus, although the ultimate injury will not fall on the City "immediately," the City's substantial interests will, in fact, be determined now, once and for all time. This immediate determination of the City's substantial interests is an immediate injury within the standing requirements of Florida administrative law, just as a need determination for an electrical power plant that will impact rates several years in the future gives rise to standing for substantially affected customers and others. The City's concerns are well founded: under the Existing Agreement, the City is paying rates that are driven to extremely high levels by FPUC's wholesale power costs, which are dramatically above market costs – the total above-market cost to FPUC's Northwest Division under the Existing Agreement is in the range of \$12 million to \$14 million

² A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action. In re: Petition for Approval of Negotiated Purchase Power Contract with FB Energy, LLC by Progress Energy Florida, Docket No. 090372-EQ, Order No. PSC-10-0685-FOF-EQ at 2 (citing Mevers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000)). The standard of review for a motion to dismiss is whether, taking all facts pled in the petition of which dismissal is sought as true, the petition states a claim sufficient to proceed. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

per year, and the City has well-founded concerns that this above-market relationship will continue into the future.

16. To put this in micro-terms, the short-term reduction in rates from the PPA Amendment is \$4.64 per 1,000 kWh, or less than one-half cent per kWh, for 2011. (Values computed from Table 1 and Table 2 of the Commission Staff's June 2, 2011 recommendation in Docket No. 110001-EI, the Fuel Cost Recovery Docket, Commission Document No. 03847-11.) As a customer, the City is exposed to having to pay an additional four cents or more per kWh in 2018 and 2019, depending on whether the current above-market cost relationship of FPUC's wholesale power costs holds or, as the City reasonably fears, worsens. To trade a half-cent per kWh saving for 6 years for a back-end, 4-cent per kWh "pay me later" impact for two years is a fool's bargain: FPUC should have rejected it, the City rejects it, and the Commission should likewise reject it. Moreover, even if FPUC asserts that these rate impact figures are incorrect, that assertion would highlight the existence of this significant disputed issue of material fact, thereby demonstrating the need for the evidentiary hearing requested by the City.

17. Moreover, FPUC's current rates are known to be dramatically above current market costs, and FPUC's responses to Staff's Second Data Request No. 3 indicates that the "Monthly Bill Impact" of the amended contract will remain almost constant, at approximately \$145.00 per 1,000 kWh of Residential service, for the full term of the PPA as amended by the PPA Amendment, i.e., through 2018 and 2019, based on certain assumptions – particularly that all savings, after those allocated to FPUC's TOU and IS rate classes, are allocated to residential customers. According to FPUC's response to Staff's Third Data Request No. 25, if those savings are allocated to all rate classes, the "Monthly Bill Impact" on residential customers will increase from \$147.10 per 1,000 kWh in 2011 to \$163.73 per 1,000 kWh of Residential service in 2019. These continued high bill impacts demonstrate the reasonableness and validity of the City's factual concerns, and of its disputed issues of material fact, relating to the reasonableness and prudence of the PPA Amendment. If FPUC wants to try to prove that the wholesale power

market in 2018 and 2019 will generally be in the range of \$145.00 to \$163.00 per 1,000 kWh, it can do so in the evidentiary hearing requested by the City.

18. The fact that some of the costs in dispute will be incurred in future years – here, 2018 and 2019 – does not make them "speculative," nor does it change the fact that the City's substantial interests will be determined, here and now, in this Docket No. 110041-EI. In fact, a major component of the costs that FPUC would incur under the PPA Amendment in 2018 and 2019, the Monthly Capacity Rates (basically, demand charges stated in dollars per kW-month) to be paid in 2018-2019 will be determined specifically in this proceeding, and the Monthly Energy Payments (basically charges that are based on Gulf's projected fuel and environmental costs divided by projected energy sales), which are subject to some variability, will be determined formulaically. Additionally, the "billing demand floor" in the PPA Amendment will continue in effect if the Amendment is approved; although it is probably an improvement over the unique-in-Florida demand ratchet in the Existing Agreement, this billing demand floor signifies another real and substantial cause for concern that FPUC's future costs and resultant rates under the PPA Amendment will continue to be above market. Moreover, FPUC's attempt to expropriate the statement in the Commission's PAA Order that "it is not reasonable to conclude that a similar process several years into the future would yield results that would out-weigh the projected savings of the proposed Amendment" (PAA Order at 3) is misplaced. The Commission's preliminary statement, in its inherently preliminary proposed agency action order, is untested and unanalyzed: considering that the current rates under the Existing Agreement result in customers of FPUC's Northwest Division over-paying, relative to current market wholesale power costs in Florida, by approximately \$12 million to \$14 million per year, and considering that the Monthly Capacity Rates (demand charges under the Existing Agreement) will continue to escalate, and considering the significant cost risks associated with Gulf's heavy, and increasing, dependence on coal as a generating fuel, it is certainly possible – the City believes that it is likely – that the Commission would reach the same conclusion, based on record evidence, that the City has reached based on its direct experience: that extending a very bad deal is a bad deal, and it is

entirely reasonable to expect the existing very bad deal to be a bad enough deal in the extension years, 2018-2019, to warrant denying approval of the PPA Amendment.

19. In fact, the City's concerns are far less speculative than FPUC's apparent blithe, untested, and un-analyzed assumption that costs and rates in 2018 and 2019 would be low enough to make the slight reductions in 2011-2017 a reasonable proposition. Because of the currently known facts as to the above-market costs that FPUC is incurring under the Existing Agreement, the fact that the PPA Amendment would extend and escalate the demand charges under the Agreement (as it would be amended), the fact that the billing demand floor would remain in effect through 2019, and numerous facts surrounding Gulf's heavy reliance on coal as its almost exclusive generating fuel and cost risks attendant to that reliance, it is far more speculative for FPUC to assert the slight rate reductions in 2011-2017 would be great enough to outweigh the significant excess costs that FPUC, and thus the City and FPUC's other customers, would incur in 2018 and 2019. (This is particularly true given FPUC's admission that the "Monthly Bill Impact" of the PPA Amendment will be between \$145.00 and \$164.00 per 1,000 kWh of Residential service over the entire 2011-2019 period.) The City believes that the excess costs in 2018-2019 will outweigh the slight reductions in 2011-2017, and this proves the point of the City's Petition for Formal Proceeding: that there are serious disputed issues of material fact that the Commission must decide before it can decide whether to approve or deny the PPA Amendment.

20. FPUC's argument that the City has not stated a complaint upon which relief can be granted apparently rests on its argument that the instant docket exists only to approve the PPA Amendment for cost recovery purposes, but not to approve future Purchased Power Cost Recovery charges, or "PPA per KWH" charges as those charges are stated on customers' bills. See FPUC's Motion to Dismiss at para. 22. This argument is both spurious and specious; while it is technically true that the actual purchased power cost recovery charges for 2018 and 2019 will not be set until 2017 and 2018, respectively, the costs that FPUC will incur, and thus the costs that FPUC would incorporate into its purchased power charges in 2018 and 2019 will, in fact, be

determined in this proceeding. FPUC itself argues that this proceeding is "designed" for the purpose of "determining the propriety of cost recovery for costs arising" under the PPA Amendment. FPUC's Motion to Dismiss at 10, para. 22. It is precisely these costs that the City will be required to pay in 2018 and 2019 if the PPA Amendment is approved. Critically, this docket is the only opportunity that the City will ever have to protect its interests³ in fair, just, and reasonable rates as those rates would be determined by the Commission's actions in this docket.

21. In short, the Commission apparently has the jurisdiction to grant the relief requested by FPUC in this docket – approval today of a PPA Amendment that, if granted, would ensure by final agency action, not subject to future challenge by any party, that FPUC can recover costs that FPUC incurs under that PPA Amendment in 2018 and 2019. If the Commission has the jurisdiction to grant FPUC's requested relief if FPUC satisfies its burden of proving that all of the costs incurred thereunder will be reasonable and prudent for cost recovery purposes, then the Commission surely has the jurisdiction to grant the countervailing relief to the City, namely, to deny the requested approval if FPUC fails to carry its burden.

22. Finally, although not a proper basis for dismissal, FPUC has also incorrectly accused the City of Marianna of making additional arguments in support of its standing. FPUC has simply, but incorrectly, confused, conflated, and mischaracterized several "DISPUTED ISSUES OF MATERIAL FACT" and "STATEMENTS OF ULTIMATE FACTS ALLEGED" raised by the City with arguments for the City's standing. (The City's standing obviously derives from the fact that, as a substantial customer of FPUC, with more than 110 retail accounts, the City will have to pay the wholesale purchased power costs that FPUC incurs under the PPA Amendment if that Amendment is approved. The disputed factual issues are simply that: issues of fact that the Commission should consider in deciding the ultimate issue in this docket.) For example, in paragraph 25 of its motion to dismiss, FPUC alleges that the City has attempted a "kitchen sink" argument with respect to the City's factual issue that there are additional cost risks

³ Taking FPUC's argument to its logical conclusion, no customer or ratepayer would have standing to challenge the costs under the PPA Amendment, which will determine FPUC's retail rates in 2018 and 2019, because, FPUC would assert, any such injury would be "speculative."

inherent in the PPA Amendment, at least for the extension period of 2018-2019. This is not an argument for the City's standing: it is a factual issue, disputed by the City, clearly identified as a disputed issue of material fact in Paragraph 15.c of the City's Petition for Formal Proceeding, under the heading "STATEMENT OF ULTIMATE FACTS ALLEGED." It is not raised as grounds for the City's standing – those grounds, as explained rather extensively in the City's Petition, are that the City's substantial interests in receiving its electric service at fair, just, and reasonable rates, will be determined by the Commission in this docket. The specific factual allegation as to future cost risks, which is appropriately tested in an evidentiary hearing, addresses a disputed issue of material fact as to whether the costs that FPUC will incur pursuant to the PPA Amendment will outweigh the slight benefits of the short-term rate reductions provided by the PPA Amendment. At paragraph 28, FPUC further accuses the City of "[t]hrowing yet another argument at the wall" with respect to the City's factual issue as to whether the proposed PPA Amendment is or is not in the best interest of FPUC's customers and whether it is or is not in the public interest. Again, this is a proper factual issue, specifically identified as such under the heading "STATEMENTS OF ULTIMATE FACTS ALLEGED" in Paragraph 15.i of the City's Petition. This is a proper, and properly disputed, issue of material fact that the Commission should consider in making its decision herein as to whether to approve the PPA Amendment, based on evidence of record. The City simply did not assert this fact as a ground for the City's standing; rather, the City straightforwardly and explicitly raised it as a disputed factual issue that the Commission should, arguably must,⁴ consider in deciding the ultimate issue in this docket. With these and other allegations, FPUC, whether inadvertently or intentionally, has simply – but incorrectly and improperly – mischaracterized several of the City's properly raised disputed issues of material fact, and the City's factual allegations that correspond to those issues, as arguments for the City's standing.

⁴ Section 366.01, Florida Statutes, states as follows: "The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose."

23. FPUC even goes on to make its own factual arguments on several of these issues, which proves the City's point in responding to the motion to dismiss: there are disputed issues of material fact that must be decided by the Commission in order to reach an informed decision on the ultimate issue in this docket, namely, whether to approve or deny the PPA Amendment as being reasonable and prudent for cost recovery purposes.

24. With respect to FPUC's request for attorneys' fees, that request is a separate request for relief, which should have been – but was not – made as a separate motion in compliance with Rule 28-106.204, F.A.C. (Moreover, that request fails to comply with the procedural requirements of Sections 120.595 and 57.105, F.S.) Having conferred with counsel for FPUC, the City understands that FPUC will withdraw its request for attorneys' fees, and accordingly, relying on FPUC's representation, the City will not otherwise respond to that request.

ARGUMENT

I. The City Has Pled Facts Sufficient to Establish Its Standing and to Warrant the Requested Formal Proceeding.

25. The City has alleged facts sufficient to establish its standing, namely that it is a substantial customer of FPUC, with more than 110 retail service accounts, and that the rates that FPUC would pay under the PPA Amendment, which are the costs that FPUC will pass through to the City in FPUC's Purchased Power Cost Recovery charge (or "PPA per KWH," as it is shown on FPUC's bills), if the PPA Amendment were approved, will not be reasonable and prudent because they will produce rates that are not, considered in their totality over the entire period of the PPA Amendment, fair, just, reasonable. These are substantial interests that are precisely of the type that this proceeding is designed to protect: namely, whether the PPA Amendment should be approved as reasonable and prudent. The City's substantial interests will be determined, once and for all, by the Commission's decisions in this docket: the fact that the adverse impacts are in the future does not make them speculative.

26. In this and other respects, the issue posed here – whether to approve an amendment to a power purchase agreement – is very similar to the issue posed in need determination proceedings, which is whether to determine the need for a proposed electrical power plant, taking into the required statutory criteria, including whether the proposed plant is the most cost-effective alternative available to meet the utility's need for power. In need determinations, the future construction costs and future operating costs associated with a proposed power plant are rarely, if ever, known with certainty, and billions of dollars worth of relevant costs may not even be expected to be incurred until years after the Commission's need determination proceeding. Even so, the Commission must consider – and does routinely consider, in its need determination dockets – those projected costs, as uncertain or "speculative" as they may be, and make its decision accordingly; and even so, utility customers and other substantially affected persons have standing to participate in need determination proceedings to protect their interests in ensuring that the future impacts of the Commission's decisions are made based on full consideration of record evidence. Moreover, the Commission's need determination is the final action on the matter, not subject to challenge in the future. Fla. Stat. § 403.519 ("The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum.")

27. This docket is the one and only opportunity that the City will have to challenge the costs that FPUC will incur under the PPA Amendment. If the Commission were to approve the PPA Amendment now, the City would be barred by the doctrines of res judicata and administrative finality from litigating in 2018 and 2019 issues as to whether the costs incurred under the PPA Amendment were unreasonable and imprudent. The Commission's action in this PPA-approval docket is also very similar to the Commission's need determination orders in this way: although the finality of a need determination is prescribed by statute, it is no less final than the Commission's order in this docket will be; the only difference is that the Commission's decisions herein will be barred from future challenge by the doctrines of res judicata and administrative finality, rather than by statute.

28. The fact that the adverse impacts that the PPA Amendment will impose on the City will occur in the future does not make them "speculative," as argued by FPUC. The facts are: (a) that the Monthly Capacity Rates that FPUC will pay to Gulf pursuant to the PPA Amendment, if approved, will in fact be precisely determined in this docket; (b) the Monthly Capacity Rates are "escalated at a rate comparable to the escalation rates for the years contained in the Existing Agreement" (Order No. PSC-11-0269-PAA-EI at 3); (c) the "billing demand floor" or "Minimum Capacity Purchase" of 91,000 KW will be determined for the entire period of the amended PPA, including the years 2018 and 2019; and (d) the Monthly Energy Payments that FPUC would pay in 2018 and 2019 will be determined formulaically if the Commission approves the PPA Amendment in this proceeding.

29. Since those Monthly Energy Payments are based on Gulf's fuel and environmental costs, and since Gulf's heavy dependence on coal as its primary, nearly exclusive generating fuel will only increase over the next 8 years,⁵ the City is greatly concerned that the Monthly Energy Payments will be excessive, relative to the market in the extension years. Coal costs are uncertain and potentially risky. According to the U.S. Energy Information Administration, "Electric power sector coal prices have been rising relatively steadily over the last 10 years, reflecting longer-term coal contracts initiated during a period of high energy prices, rising transportation costs, and increased consumption." U.S. Energy Information Administration, Short-Term Energy Outlook, July 12, 2011, web address <http://www.eia.gov/steo/>. This trend is expected to continue in 2011 before stabilizing in 2012. *Id.* Historical EIA data show that, in

⁵ According to Schedule 6.2, Energy Sources, of Gulf Power Company's Ten Year Site Plan, 2011-2020, published in April 2011, Gulf's generation from coal will grow from 80.68 percent in 2011 to 96.50 percent in 2018 and then decline slightly to 92.63 percent in 2019. World demand for coal is increasing, particularly demand for coal as a generating fuel and for coking, and particularly from China and India. Pittsburgh Tribune-Review, February 13, 2011, reporting that "surging U.S. coal exports to China and India last year are expected to increase exports to 86.5 million tons, up from 79.5 million tons in 2010, according to the U.S. Energy Information Administration."

Demand for coal fuels U.S. exports - Pittsburgh Tribune-Review
http://www.pittsburghlive.com/x/pittsburghtrib/business/s_722635.html#ixzz1ToFWMLNI.
Moreover, those increased demands must be considered in light of the fact that the world economy has not recovered from the Great Recession.

rough terms, depending on the type of coal, coal costs increased by plus-or-minus 50 percent from 2005 to 2009, EIA Annual Energy Review, <http://www.eia.gov/totalenergy/data/annual/txt/ptb0708.html>, and U.S. coal exports are predicted to increase significantly from 2010 to 2011. See note 4 above. With the world economy not fully recovered from the Great Recession, it is entirely reasonable to be concerned about the price and cost impacts that further increases in world coal demand may have. It is reasonable to at least be very concerned, if not to conclude outright, that such increases will continue in light of increasing world demand for coal. It is also reasonable to at least be very concerned about the potential impacts on coal-fired power plants of the U.S. Environmental Protection Agency's recently promulgated MACT ("Maximum Achievable Control Technology") Rules and potential future environmental rules, such as potential costs of complying with carbon emissions regulation. In a recent need determination case, the Commission considered the costs of potential carbon emissions regulations in its decision to deny the proposed Glades Power Park electrical power plant. In Re: Petition for Determination of Need for Glades Power Park Units 1 and 2 by Florida Power & Light Company, PSC Docket No. 070098-EI, Order No. PSC-07-0557-FOF-EI (July 2, 2007) at 2-4.

30. Significantly and perhaps ironically, FPUC itself has proposed approval of the PPA Amendment, including the actual Monthly Capacity Rates and the formula for determining the Monthly Energy Payments in 2018 and 2019; if the City's concerns are speculative – which the City strongly denies, as explained above – then FPUC's own assertions are at least equally speculative and would not afford a basis for FPUC's requested approval.

31. The Commission regularly considers future impacts, both costs and benefits, in its decisions. Perhaps the proceedings in which the Commission does this the most is in power plant need determination proceedings, which are analogous to this proceeding in that both a need determination and this PPA Amendment Docket address whether costs incurred in the short term are reasonable and prudent in light of benefits and costs to be realized over the life of the respective project – a power plant in a need determination case and the PPA Amendment,

obviously FPUC's alternative to building its own generation, in this docket. Cost and rate impacts are inherent in the need determination proceeding's consideration of cost-effectiveness, just as cost impacts – *i.e.*, the impacts on the costs incurred by FPUC through the rates that it would pay under the PPA Amendment – are inherent in this docket. It is unthinkable that the Commission would tell a substantial consumer that it did not have standing to challenge a utility's need determination on the alleged ground that the project was not cost-effective. Applying FPUC's reasoning, that "future costs are speculative," the Commission could easily conclude that a need determination for a very expensive power plant that was not projected to produce benefits for the first 15-20 years of its life was too "speculative" to warrant the relief requested by the utility proposing the plant. Of course, the Commission does no such thing: it holds hearings, with customers and other substantially affected persons participating as full parties, and considers all of the available evidence in making such determinations, based on short-run and long-run costs and benefits. That is all the City of Marianna is asking the Commission to do here.

32. The City's concerns raised in its Petition for Formal Proceeding and PAA Protest are not speculative: they are based on known facts relating to the Existing Agreement and the PPA Amendment, and on known considerations and developments in relevant energy markets. The City's concerns and disputed factual issues are no more speculative than issues relating to future costs and benefits that are routinely raised, considered, and decided in need determination cases. Both the City's concerns, and FPUC's anticipated assertions that those concerns are not well-founded, pose disputed issues of material fact that are completely appropriate for testing in an evidentiary hearing. Accordingly, FPUC's motion to dismiss must be denied.

33. Moreover, the finality of the Commission's decisions here makes the City's alleged injury immediate. Accordingly, the City's allegations satisfy the standing requirements of Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), *rev. denied*, 415 So. 2d 135 (Fla. 1982). FPUC's Motion to Dismiss must be denied.

34. Of course, the City has already been found by Commission Order No. PSC-11-0129-PCO-EI, to have standing in this docket. FPUC did not object to the City's petition to intervene and did not seek reconsideration of the Commission's Order granting the City's intervention. While the City might be required to prove facts sufficient to establish its standing in a formal hearing,⁶ FPUC's assertions here that the City does not have, or has not adequately pled, standing are misplaced. Accordingly, FPUC's Motion to Dismiss must be denied.

**II. The City of Marianna Has Stated a Claim Upon Which
the Commission Can Grant Relief.**

35. The City has also alleged facts that, if true, are sufficient to form the basis for the Commission to grant relief, including the City's requested relief of denying approval of the PPA Amendment. The City has stated a claim upon which relief can be granted: that, taking all costs and benefits into account, the costs that FPUC will incur under the PPA Amendment are unreasonable and imprudent, and that they will result in unfair, unjust, and unreasonable rates, because the excess costs that will be incurred under the PPA Amendment in 2018 and 2019 significantly outweigh the slight savings in 2011 through 2017. If the Commission has the jurisdiction and authority to grant the relief requested by FPUC – approval of the PPA Amendment – then the Commission surely has the jurisdiction and authority to grant the countervailing relief requested by the City, namely denial of the PPA Amendment for cost recovery purposes. In other words, if FPUC has presented a petition upon which the Commission can grant relief, then the City has equally stated a claim upon which the Commission can grant relief. Accordingly, FPUC's Motion to Dismiss must be denied.

⁶ There is some doubt about this proposition in the present circumstances because FPUC did not object to the City's intervention, did not move for reconsideration of the Order Granting Intervention, and did not appeal. The Commission's order granting intervention specifically stated, "Having reviewed the City's petition to intervene in this proceeding, it appears that the City has met both prongs of the Agrico test and that its substantial interest may be affected by this proceeding. The City states that it is a customer of FPUC and its service accounts and electric costs will be determined by the proposed Amendment." The Order Granting Intervention further provides that "Any party adversely affected by this order . . . 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." FPUC neither moved for reconsideration nor sought judicial review of the Commission's order granting the City's petition to intervene.

III. FPUC Has Incorrectly Mischaracterized Several "Disputed Issues of Material Fact" Raised by the City and "Ultimate Facts Alleged" by the City as Arguments for Standing.

36. In its Petition for Formal Proceeding, and as required by Rule 28-106.201(2)(d), F.A.C., the City included a list of ten "Disputed Issues of Material Fact," including the ultimate issue of whether FPUC's request for approval of the PPA Amendment should be approved. Petition for Formal Proceeding at para. 14. Explicitly recognizing that it is FPUC's burden to prove that the PPA Amendment is reasonable and prudent, the City, as required by Rule 28-106.201(2)(e), F.A.C., further included its "Statement of Ultimate Facts Alleged," which included ten factual allegations. Petition for Formal Proceeding at para. 15. The first five issues and corresponding facts alleged by the City addressed whether the proposed rates to be paid under the PPA Amendment are reasonable and prudent, whether they would result in fair, just, and reasonable rates, and whether the Existing Agreement, as amended, would include significant additional cost risks that the Commission should consider in making its decision in this case. The ninth disputed issue and factual allegation addressed the issue whether the proposed PPA Amendment is consistent with, or contrary to, the public interest and the best interests of FPUC's customers. The tenth disputed issue and allegation framed the ultimate issue: whether the Commission should approve or deny FPUC's request for approval of the PPA Amendment. The other three issues and factual allegations addressed whether the rates to be paid under the PPA Amendment are appropriate for purposes of developing conservation or load control measures, and whether FPUC appropriately evaluated the costs that FPUC would incur in 2018 and 2019.

37. In its motion to dismiss, FPUC has incorrectly attempted to characterize several of the City's factual allegations, both in the above-cited lists and elsewhere in the City's Petition, as arguments for the City's standing. As explained here, these assertions are false and misleading: the City's standing is established by the facts that the City is a substantial customer of FPUC, with more than 110 retail service accounts, that the costs that FPUC will incur under the PPA Amendment will be translated directly into the rates that the City will pay, and that the

Commission's actions in this docket will determine the City's substantial interests in having access to electric service at fair, just, and reasonable rates. The arguments raised by FPUC are spurious and misleading, because FPUC has incorrectly – whether inadvertently or intentionally – mischaracterized factual allegations, in some cases explicitly identified as "Disputed Issues of Material Fact" and "Ultimate Facts Alleged" as being equal to arguments for standing. The Commission must reject these arguments and deny FPUC's motion to dismiss.

38. At the outset, it is perhaps worthwhile to reiterate that the City has asserted both the grounds for its standing and the exact nature of the injury that the City asks the Commission to protect it from: unfair, unjust, and unreasonable rates that will flow directly from excessive costs that FPUC will pay in 2018 and 2019 if the PPA Amendment is approved. To be blunt, the total savings alleged by FPUC over the first seven years of the Existing Agreement, as it would be amended by the PPA Amendment, would be slightly less than \$5.9 million. Order No. PSC-11-0269 at 3. In contrast, the current rates for FPUC's Northwest Division under the Existing Agreement are approximately \$12 million to \$14 million above current market costs. If this relationship were to hold, or to worsen, the corresponding excess costs in 2018 and 2019 could exceed \$25 million, as compared to the short-term savings of less than \$5.9 million from 2011-2017. (And, as noted above, FPUC's own projections of the "Monthly Bill Impact" on residential customers are projected to range between \$145.00 and \$164.00 per 1,000 kWh of Residential service in 2018 and 2019.) While the actual costs to be incurred in 2018 and 2019 are not known with certainty at this time – although, in fact, the Monthly Capacity Rates under the PPA Amendment are known, as is the continuation of the minimum capacity purchase "floor" of 91,000 KW – the City has raised appropriate disputed issues of fact outlining its concerns and demonstrating the reasonableness of those concerns. FPUC has not performed any comparative analysis of the costs that FPUC will incur under the PPA Amendment relative to other purchased power options for either the entire 2011-2019 period or for the extension years 2018 and 2019. FPUC's Response to City's Interrogatory No. 5. Further, FPUC has performed no "analysis of the economic benefits and costs associated with the PPA Amendment relative to projected prices

of alternative sources of bulk power supply for the 2018-2019 time frame." FPUC's Response to City's Interrogatory No. 6. Although FPUC claims to have "1) reviewed historical costs of integrated electric utilities, 2) developed projections of generation costs of integrated electric utilities in Florida, and 3) has reviewed and developed projections of primary fuel prices and wholesale market prices of generation services within the Eastern Interconnection," (which the City will explore through further discovery), at this point, the City will simply observe that these asserted reviews and projections appear to be facially irrelevant to FPUC's situation, because FPUC is, obviously, a distribution utility that obtains all of its power supply through wholesale power contracts, thus rendering comparison to costs incurred by "integrated electric utilities" irrelevant.

39. At paragraph 25 of its motion to dismiss, FPUC claims that the City has not identified what "additional cost risks" the City believes constitute factual considerations that the Commission should consider. This is at best misleading: in its Petition, the City specifically identified "risks associated with fuel costs and environmental costs that Gulf Power may incur that would affect" FPUC's costs under the PPA. City's Petition at 8, para. 14.c.

40. At paragraph 27, FPUC contends that the City's disputed issue relating to whether FPUC adequately evaluated the cost impacts of the PPA Amendment "identifies no injury in fact that the City will incur." This is misleading and mischaracterizes the City's statement. Whether FPUC adequately evaluated all of the impacts of the PPA Amendment is a perfectly appropriate factual issue for the Commission to consider in determining whether to approve the PPA Amendment. The City believes that FPUC did not conduct an appropriate analysis, which in turn makes FPUC's suggestion – that the costs in 2018 and 2019 would be so low as not to outweigh the slight cost savings in 2011-2017 – speculative on its face.

41. With some further gratuitous name-calling, FPUC mischaracterizes the City's assertion that the PPA Amendment is contrary to the best interests of FPUC's customers and contrary to the public interest as a failed attempt to state an injury in fact, so as to provide grounds for the City's standing. Again, this is misleading: as explained several times herein, the

City's standing is based on the fact that it is a substantial customer of FPUC asking the Commission to protect it against the injury of excessive costs in the extension years of the PPA, costs that the City believes will greatly outweigh the slight short-term savings provided by the PPA Amendment. The City's factual issue here is the obvious issue that the Commission should consider in this case, i.e., whether the action requested by the utility is in the public interest. This is a perfectly appropriate issue of fact, specifically cognizable under Section 366.01, Florida Statutes. FPUC further attempts to confuse the issue by implying that the City might be trying to represent FPUC's other customers in the Northwest Division. This is pure fabrication: nothing in the City's pleadings even suggests that the City is attempting any such representation – all the City has done is to raise an appropriate factual issue that the Commission should, arguably must, consider in this docket.

42. With regard to FPUC's assertion that no other customer in the Northwest Division has expressed concern about the PPA Amendment, the City would invite – and will likely submit a motion requesting – the Commission to hold a "customer hearing" in Marianna to hear directly from customers.

43. Finally, in paragraph 30 of its motion to dismiss, FPUC criticizes the City for raising the issue whether the PPA Amendment will encourage energy efficiency or conservation, and further attempts to translate its criticism into an alleged failure to satisfy the second prong of the Agrico test. Again, FPUC has mischaracterized a disputed issue of material fact as an argument for standing: the City included this issue specifically because the Commission, in the PAA Order, made the preliminary finding that "the modifications to the capacity purchase quantity provides the pricing flexibility necessary to develop conservation, or load control measures such as time-of-use and interruptible rates." If it is appropriate for the Commission to make a preliminary factual finding on an issue, then it is appropriate for a party with standing to raise that issue in its petition requesting a formal proceeding.

44. Moreover, FPUC even proceeds to improperly argue factual allegations in apparent efforts to counter the City's disputed issues of fact and thereby to induce the

Commission not to hold an evidentiary hearing on the multi-million dollar issues presented by FPUC's Petition for Approval of the PPA Amendment. For example, in its Petition for Approval at page 3, footnote 3, FPUC asserts that "savings would inure to the benefit of all FPUC customers in the Northwest division," because the short-term reductions will be implemented through FPUC's mid-course correction to its Purchased Power Cost Recovery charge. FPUC further argues that the City's concerns with respect to excessive costs – specifically alleged as a disputed issue of material fact by the City – are "unsupported by industry market projections." Petition for Approval at 5. FPUC goes on to assert that the City's concerns are based on "incorrect assumptions . . . about the possible outcome of a bid process" in the future and, as asserted by FPUC, "baseless assumptions about the costs of fuel and purchased power" in the future. Petition for Approval at 10-11, para. 23. FPUC's factual assertions prove the City's point: that there are disputed issues of material fact that the Commission must decide in determining whether to approve the PPA Amendment, and accordingly, that the City is entitled to its requested formal proceeding and evidentiary hearing. FPUC's factual assertions are particularly inappropriate because they fly in the face of the requirement that, in determining whether to grant or deny FPUC's Motion to Dismiss, the Commission must take all facts pled by the City as true. See Varnes v. Dawkins, 624 So. 2d at 650.

45. In summary, this docket poses numerous disputed issues of material fact. FPUC asserts that the short-run rate reduction benefits under the PPA Amendment are worth whatever the City (and FPUC's other customers) will ultimately have to pay in 2018 and 2019. The City asserts that the long-term costs are not worth the short-term reductions, and respectfully asks that the Commission conduct a formal proceeding to decide these disputed factual issues, before making its final decision on the ultimate issue, i.e., whether to approve or deny the PPA Amendment. Again, this case poses issues much like those inherent in need determination proceedings, where the Commission must consider short-term and long-term costs and benefits – incidentally, costs and benefits that are projected over much longer time horizons than the 9 years at issue in this docket – in making decisions that will determine customers' interests by

determining – through final agency action – the costs that those customers will pay over the life of a proposed power plant.

46. Having heard and seen all of the evidence, the Commission may decide that FPUC's projections for its costs under the PPA Amendment in 2018 and 2019 are reasonable, and that the costs that FPUC will incur in those extension years are reasonable and prudent, even when compared to the relatively small savings to be realized in the 2011-2017 time period. On the other hand, having heard and seen all of the evidence, the Commission may agree with the City that it is likely that the costs that FPUC would incur in 2018 and 2019 under the PPA Amendment are so great as to outweigh the small short-term benefits. Either way, these are disputed issues of material fact that the Commission must decide in making its final determination as to whether to approve or deny FPUC's Petition for Approval of the PPA Amendment. Either way, the City, as a substantial customer that will have to pay rates based on the costs to be incurred under the Amendment, is entitled to its requested formal proceeding. FPUC's motion to dismiss must be denied.

IV. FPUC Has Taken Inconsistent Positions Regarding Jurisdiction Before the Commission and Before the Circuit Court.

The Commission should note that FPUC has taken facially inconsistent positions on jurisdiction in the civil litigation and before the Commission. FPUC is attempting to dismiss the City's claims before the Commission, but in its Answer and Affirmative Defenses in the civil litigation, FPUC has taken the opposite position, stating as follows:

Fourth Affirmative Defense

Defendant [FPUC] affirmatively alleges and asserts that Plaintiff's claims for relief are based upon interpretations of relevant contract provisions that encroach upon the PSC's exclusive jurisdiction to regulate public utility rates in the State of Florida.

Try as it may, FPUC cannot have it both ways – it cannot assert that the City's circuit court action under the Franchise Agreement should be dismissed because jurisdiction lies at the Commission, and then, from the other side of its mouth, argue that the Commission should

dismiss this proceeding on FPUC's costs that will determine its retail rates, and thus the City's substantial interests. FPUC's Motion to Dismiss must be denied.

CONCLUSION

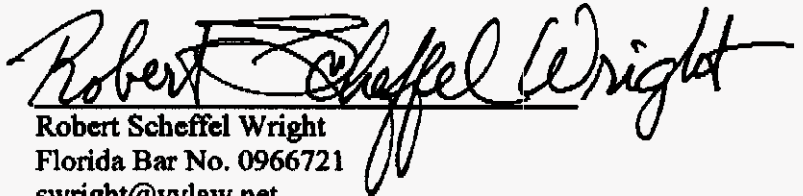
The City of Marianna is a substantial retail customer of Florida Public Utilities Company; the City purchases retail electric service from FPUC through more than 110 accounts. The City of Marianna's substantial interests in having access to electric service at fair, just, and reasonable rates, as required by numerous sections of Chapter 366, Florida Statutes, will be determined by the Commission's actions in this proceeding. The City has pled facts that, taken as true, are sufficient to establish the City's standing, sufficient to warrant the relief requested by the City herein, namely, denial of the PPA Amendment, and more than sufficient to warrant the requested formal proceeding – a de novo evidentiary hearing – on FPUC's Petition for Approval of the PPA Amendment for cost recovery purposes. In its Petition for Formal Proceeding, the City identified numerous disputed issues of material fact that must be determined by the Commission in its consideration of whether to approve the PPA Amendment "as being a reasonable and prudent agreement for purposes of purchased power" as requested by FPUC. Because the City's substantial interests will be determined, and because there are disputed issues of material fact involved in the Commission's decision herein, the City is entitled to a formal proceeding pursuant to Section 120.57(1), Florida Statutes. FPUC's arguments in its motion to dismiss are largely spurious and specious, and frequently mischaracterize the City's allegations. Accordingly, FPUC's motion to dismiss must be denied.

RELIEF REQUESTED

WHEREFORE, for the reasons set forth above and based upon the City's right to a formal proceeding in this matter, as well as the City's right to electric service at fair, just, and reasonable rates, the City of Marianna, Florida, hereby requests that the Commission:

- a. Deny FPUC's Motion to Dismiss filed in this proceeding;
- b. Conduct a formal proceeding on FPUC's Petition for Approval of the PPA Amendment, pursuant to Section 120.57(1), Florida Statutes; and
- c. At the conclusion of that formal proceeding and evidentiary hearing, deny FPUC's Petition for Approval of the PPA Amendment.

Respectfully submitted this 4th day of August, 2011.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery and U.S. Mail this 4th day of August, 2011, to the following:

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