State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: January 11, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Robinson)
Division of Regulatory Analysis (Graves, Ma)
Division of Economic Regulation (Draper, Lee, Lester)

RE: Docket No. 110041-EI – Petition for approval of Amendment No. 1 to generation services agreement with Gulf Power Company, by Florida Public Utilities Company.

AGENDA: 01/24/12 – Motion to Dismiss – Oral Argument Requested. Participation at the Commission's discretion.

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brisé

CRITICAL DATES: PPA Amendment is expressly conditioned upon the receipt of an approval order by March 31, 2012.

SPECIAL INSTRUCTIONS: The Commission will address Docket No. 110041-EI and then address Companion Docket No. 100459-EI

FILE NAME AND LOCATION: S:\PSC\GCL\WP\110041.RCM.DOC

Case Background

On June 6, 2007, the Commission approved a 10-year agreement for Generation Services (existing agreement) between Florida Public Utilities Company (FPUC) and Gulf Power Company (Gulf) in Order No. PSC-07-0476-PAA-EI.[1] Under the existing agreement, FPUC

[1] See Order No. PSC-07-0476-PAA-EI, issued on June 6, 2007, in Docket No. 070108-EI. In re: Petition for approval of agreement for generation services and related terms and conditions with Gulf Power Company, for

would provide electric services to customers in the Jackson, Calhoun, and Liberty Counties. The existing agreement had a contract termination date of 2017. The timeline for appealing that Order has expired.

On January 26, 2011, Florida Public Utilities Company (FPUC) filed a petition for approval of Amendment No. 1 to its existing agreement (PPA Amendment) with Gulf. FPUC stated that the PPA Amendment was to enable adequate pricing flexibility to develop the Time of Use and Interruptible (TOU) rates consistent with FPUC's franchise agreement with the City of Marianna. The franchise agreement had a provision requiring that FPUC have TOU rates in effect by February 17, 2011 or the City can initiate proceedings to purchase FPUC's facilities within the City limits.[2] To develop the rates required by the franchise agreement, FPUC negotiated this PPA Amendment with Gulf.

On February 28, 2011, the Commission granted the City of Marianna (the City), located in Jackson County, intervenor status in the PPA Amendment docket in Order No. PSC-11-0137-PCO-EI.[3]

On June 21, 2011, the Commission approved the PPA Amendment for cost recovery calculation in Order No. PSC-11-0269-PAA-EI. As approved, the PPA Amendment is projected to result in savings of nearly $6 million for FPUC and its customers through 2017, and extend the term of the contract from 2017 to 2019. The existing agreement and the PPA Amendment are wholesale arrangements, and the Federal Energy Regulatory Commission has exclusive jurisdiction over the terms and rates of the existing agreement and the PPA Amendment. The Commission has jurisdiction to determine the regulatory treatment of the costs and/or savings associated with implementing the existing agreement and the PPA Amendment.

On July 12, 2011, the City filed a petition for a Section 120.57, Florida Statutes (F.S.), hearing (formal proceeding or formal hearing), protesting the Commission's order approving the PPA Amendment. The City alleged that its substantial interests will be affected as: (1) the City is an FPUC customer with 112 service accounts; (2) FPUC rates will be unfair, unjust, or unreasonable; (3) the PPA Amendment is not reasonable for cost recovery calculations; and (4) the slight savings through 2017 will be outweighed by the high cost of 2018 and 2019.

On July 28, 2011, FPUC filed its motion to dismiss. In its motion, FPUC asserted that the City's petition should be dismissed as (1) it failed to allege facts sufficient to show the City will incur an injury in fact sufficient to establish standing for a Section 120.57, F.S., hearing; (2)

Northwest Division (Marianna) beginning 2008, by Florida Public Utilities Company (made final by Consummating Order No. PSC-07-0556-CO-EI, issued on July 2, 2007).

[2] The Commission approved FPUC's TOU rates by Order No. PSC-11-0112-TRF-EI, issued on February 11, 2011, in Docket No. 100459-EI before the deadline required by the franchise agreement between FPUC and the City of Marianna. Docket No. 100459-EI is the Companion Docket to this docket.

[3] See Order No. PSC-11-0137-PCO-EI, issued on February 28, 2011, in Docket No. 110041-EI, In Re: Petition for approval of Amendment No. 1 to generation services agreement with Gulf Power Company, by Florida Public Utilities Company.

its alleged injury is not of the type protected by this proceeding; and (3) the City's goal is to obtain FPUC's facilities in Marianna after only 17 months into a 10-year franchise agreement.[4]

On August 4, 2011, the City of Marianna filed its response in opposition stating it has pled facts sufficient to establish standing and state a claim upon which the Commission can grant relief.

Both parties requested Oral Argument.

The Commission has jurisdiction pursuant to Chapter 366, Florida Statutes (F.S.).

[4] FPUC also asserted that the City protested the TOU order on March 2, 2011, and the next day, March 2, 2011, the City filed pleadings in the Fourteenth Judicial Circuit in Jackson County seeking a declaratory judgment that FPUC violated the terms of the franchise agreement. FPUC also claimed that the City send FPUC a letter indicating it would pursue the purchase of FPUC's facilities in Marianna. The Commission dismissed the City's request for a Section 120.57, F.S., hearing on the TOU rates by Order No. PSC-11-0290-FOF-EI, issued on July 5, 2011, in Docket No. 100459-EI, In re: Petition for authority to implement a demonstration project consisting of proposed time-of-use and interruptible rate schedules and corresponding fuel rates in the Northwest Division on an experimental basis and request for expedited treatment, by Florida Public Utilities Company.

Discussion of Issues

Issue 1: Should the Commission grant FPUC and City of Marianna's requests for oral argument?

Recommendation: Yes. The Commission should grant FPUC and the City of Marianna's requests for oral argument. Oral argument should be limited to 5 minutes per party. (Robinson)

Staff Analysis: Rule 25-22.0022(3), Florida Administrative Code (F.A.C.), states that granting or denying a request for oral argument is within the sole discretion of the Commission or the Prehearing Officer, whichever presides over the matter to be argued.

In its request, FPUC asserted that oral argument would aid the Commission in evaluating the viability and merit of the City of Marianna's petition for formal proceeding and FPUC's dismissal motion. The City of Marianna, in its request, stated that oral argument will aid the Commission in determining the City's standing and right for a formal evidentiary hearing.

The Commission has broad discretion to grant or deny oral argument. If the Commission chooses to grant oral argument, staff believes that granting oral argument may provide more insight on the parties' positions regarding the dismissal motion and response in opposition of dismissal. Staff suggests that, if granted, oral argument should be limited to 5 minutes per party.

Issue 2: Should FPUC's Motion to Dismiss the City of Marianna's petition for formal hearing be granted?

Recommendation: Yes. The Commission should grant FPUC's Motion to Dismiss the City of Marianna's petition for formal hearing without prejudice. (Robinson)

Staff Analysis:

Standing

The Agrico case established the two prong test that a petitioner must meet to demonstrate standing for a Section 120.57, F.S., hearing.[5] Prong One of the Agrico test requires an injury in fact that is of "sufficient immediacy" to warrant a Section 120.57, F.S., hearing, while Prong Two of the test requires that the "substantial injury be of a type or nature that the proceeding is designed to protect."[6]

The first prong of the Agrico test deals with the degree of injury, which must be both real and immediate and not speculative, too remote, or conjectural. The second prong of the test deals with the nature of the injury. Failure to satisfy either or both prongs of the test is grounds for dismissal, as demonstrated by the Florida Supreme Court. In 2007, the Court affirmed the Commission's denial of Nuvox's petition for a formal hearing for lack of standing in Nuvox Communications, Inc. v. Lisa Polak Edgar, Etc.[7] In 1997, the Florida Supreme Court also affirmed the Commission's dismissal of Ameristeel Corporation's petition for a Section 120.57, F.S., hearing for lack of standing in Ameristeel Corp. v. Clark.[8] See also Order No. PSC-11-0290-FOF-EI, issued on July 5, 2011, wherein the Commission dismissed the City of Marianna's petition for a Section 120.57, F.S., hearing for lack of standing.[9]

Motion to Dismiss

A motion to dismiss questions the legal sufficiency of a complaint.[10] In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the complainant, the petition still fails to state a cause of action for which relief may be

[5] See Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981)(reversing the DEP's determination that appellee, a competitor of Agrico, had standing for a Section 120.57, F.S., hearing where the appellee's alleged injury was "far too remote and speculative in nature" to satisfy the first prong of the Agrico test and the alleged injury was not of the type the proceeding was designed to protect).
[6] See Agrico, 406 So. 2d 478 at 482.
[7] See Nuvox Communications, Inc. v. Lisa Polak Edgar, Etc., 958 So. 2d 920 (Fla. 2007).
[8] See Ameristeel Corp. v. Clark, 691 So. 2d 473, 479-480 (Fla. 1997).
[9] See Order No. PSC-11-0290-FOF-EI, issued on July 5, 2011, in docket No. 100459-EI, In re: Petition for authority to implement a demonstration project consisting of proposed time-of-use and interruptible rate schedules and corresponding fuel rates in the Northwest Division on an experimental basis and request for expedited treatment, by Florida Public Utilities Company.
[10] See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

granted.[11] When a motion to dismiss a petition is filed, a court may not look beyond the four corners of the petition in considering its legal sufficiency.[12]

FPUC's Motion to Dismiss

In its dismissal motion, FPUC stated that the City lacked standing and failed to state a cause of action upon which relief can be granted.

Standing

FPUC stated that the City failed to show injury in fact that is of sufficient immediacy to warrant a Section 120.57, F.S., hearing or that the alleged injury is of the type the proceeding is designed to protect in that:

- the City's acknowledgement that the PPA Amendment reflects definitive savings through the year 2017 cannot be construed as a "harm" or "injury," and its contentions regarding cost of the PPA Amendment's extension for 2018 and 2019 are speculative.

- the City's unsubstantiated allegations of "additional cost risks" such as fuel and environmental cost risks and cost of fuel and purchased power for 2018 and 2019 are speculative and do not demonstrate an "injury in fact of sufficient immediacy" to warrant a hearing.

- the City failed the second prong of the Agrico test in that this docket will not set rates or actual fuel cost recovery charges, and the ability to design conservation or load control measures is not a statutory criteria for determining the propriety of the PPA Amendment. The City is motivated by economic gain and is attempting to interfere with the City's 10-year franchise agreement with FPUC and obtain FPUC's facilities in Marianna.

Cause of Action

FPUC asserted that the City's petition failed to state a cause of action upon which the Commission can grant relief, as:

- even when taken as true, there is no injury in fact, and this docket does not set rates or actual fuel cost recovery charges, but only reviews the prudency of the PPA Amendment and the propriety of cost recovery.

- even when read in light most favorable to the City, the petition failed to meet the Agrico test for standing.

[11] See Varnes v. Dawkins, at 350.
[12] See Barbado v. Green and Murphy, P.A., 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000) (citing Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997)).

City of Marianna's Response

The City of Marianna opposed FPUC's dismissal motion and alleged it has pled facts sufficient to establish standing and a claim for which the Commission can grant relief.

Standing

The City asserted it has standing in that:

- whether FPUC adequately evaluated all of the impacts of the PPA Amendment is an immediate injury in fact, and this docket determines cost for 2018 and 2019.
- 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 incorporate into its purchased power charges in 2018 and 2019 will be determined in this proceeding. The City will have to pay these costs in 2018 and 2019 if the PPA Amendment is approved.
- the imposition of the adverse impact of the PPA Amendment on the City in the future does not make them speculative. Additionally, FPUC's costs under the PPA Amendment equal unjust, unfair, and unreasonable rates that the City will pay, which constitutes the City's injury.
- this docket is the City's only opportunity to challenge the costs FPUC will incur under the PPA Amendment, and approval of the amendment bars the City from litigating in 2018 and 2019 regarding the unreasonableness and imprudence of the costs.

Cause of Action

The City alleged that its disputed issues of material facts include the following:

- it disagrees with the Commission's preliminary conclusion that the modification to the capacity purchase quantity provides support to develop conservation, time-of-use, interruptible, or similar rates.
- FPUC's costs under the PPA Amendment are unreasonable and imprudent and will result in unfair, unjust, and unreasonable rates, and risks associated with full costs and environmental costs that Gulf power may incur are additional risks identified by the City in its petition.

Staff Analysis

For the following reasons, staff agrees with FPUC that the City lacks standing and recommends that the City's petition for a Section 120.57, F.S., hearing be dismissed without prejudice.

Standing

FPUC challenges the City's standing for a Section 120.57, F.S., hearing. Therefore, the City must show conclusively that it has an injury in fact of sufficient immediacy to warrant a Section 120.57, F.S., hearing and that the alleged injury is of the type protected by this proceeding. The City is protesting the Commission's Order approving FPUC's proposed PPA Amendment, which should result in a savings of nearly $6 million for FPUC and its customers through 2017, and extends the contract year from 2017 to 2019.

Although the City is a customer of FPUC, staff agrees with FPUC that the City's allegations of future costs in 2018 and 2019 are "speculative and conjectural" and fails to demonstrate the requisite "injury in fact" that is both real and immediate to warrant a Section 120.57, F.S., hearing. The City's allegations of a possible increase in FPUC costs for 2018 and 2019 is also "far too remote and speculative in nature" to qualify as an immediate harm under the first prong of the Agrico standing test.

Staff believes that the City's assertion that it is "technically true" that the actual purchased power cost recovery charges for 2018 and 2019 will not be set until 2017 and 2018 further supports that the City's assertions are speculative and too remote at this time to constitute immediate harm sufficient to warrant a Section 120.57, F.S., hearing. Additionally the City acknowledged that the amendment will result in a rate reduction through 2017, which does not demonstrate an immediate harm to the City. Staff believes that the City has failed to show that its alleged injury in fact is of sufficient immediacy to warrant a section 120.57, F.S., hearing.

Staff also believes that the City failed to show that its alleged injury is of the type protected by this proceeding. This docket addresses the cost recovery calculation for the PPA Amendment. Additionally, the PPA Amendment is a wholesale arrangement, and the Federal Energy Regulatory Commission has exclusive jurisdiction over the terms and rates of the PPA Amendment. Here, the City asserts that this docket sets rates that are unjust, unfair, and unreasonable. However, in this docket, as outlined in the order approving the PPA Amendment, the Commission's jurisdiction is limited to determining the regulatory treatment of the costs and/or savings associated with implementing the PPA Amendment. Therefore, staff does not believe that the City has met its burden of demonstrating that its alleged injury is of the type protected by this proceeding.

Section 120.569(2)(c), F.S., provides that the dismissal of a petition should be without prejudice to petitioner's filing a timely amended petition curing the defect. Staff believes that the City has failed to establish either prong of the two-prong test in Agrico and its petition should be dismissed. However, as provided by Section 120.569(2)(c), the dismissal should be without prejudice, and the City may file an amended petition.

Cause of Action

The Order approving the PPA Amendment should result in savings of nearly $6 million for FPUC and its customers through 2017 and extends the contract year from 2017 to 2019.

Staff believes that the City's petition, if taken as true, does not demonstrate that the City, as a customer, will suffer injury from the PPA Amendment as the Commission only approved the PPA Amendment for cost recovery calculations, resulting in savings to FPUC and its customers. Staff believes that the City's statements of unfair, unjust, and unreasonable rates are conclusory and not demonstrative of a disputed issue of material fact or an injury which the Commission can grant relief in this docket. Staff also believes that the City's allegation that the savings through 2017 will be outweighed by potential costs of 2018 and 2019 does not demonstrate an immediate injury for which the Commission can grant relief.

Conclusion

Staff believes that the City has not conclusively demonstrated that it has standing for a section 120.57, F.S., hearing and has failed to state a cause of action upon which the Commission can grant relief. Therefore, staff recommends that the City's petition be dismissed without prejudice, and a Consummating Order be issued reviving Order No. PSC-11-0269-PAA-EI and making it final and effective.

Issue 3: Should the docket be closed?

Recommendation: Yes. If the Commission agrees with staff regarding Issue 2, then the City of Marianna's Petition Protesting Proposed Agency Action Order No. PSC-11-0269-PAA-EI and Requesting Formal Proceeding should be dismissed without prejudice. The docket should be closed, and a Consummating Order should be issued reviving Order No. PSC-11-0269-PAA-EI and making it final and effective. (Robinson)

Staff Analysis: If the Commission agrees with staff regarding Issue 2, then the City of Marianna's Petition Protesting Proposed Agency Action Order No. PSC-11-0269-PAA-EI and Requesting Formal Proceeding should be dismissed without prejudice. The docket should be closed and a Consummating Order should be issued reviving Order No. PSC-11-0269-PAA-EI and making it final and effective.