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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: INVESTIGATION INTO THE EQUITY RATIO AND RETURN ON EQUITY OF FLORIDA POWER & LIGHT COMPANY

PSC Docket No. 981390-EI
Date: January 27, 1999

COALITION'S RESPONSE TO MOTION TO DISMISS

COALITION FOR EQUITABLE RATES ("Coalition") hereby files its response to the Motion to Dismiss filed by Florida Power & Light Company ("FPL"). In response, the Coalition states:

In a Motion dated January 15, 1999, FPL attempted to dismiss each and every petitioner on this docket. FPL argues a number of points. However, the true measure as to whether FPL's Motion should be dismissed is whether the Coalition has alleged that its substantial interests. Nevertheless, FPL alleges that the Coalition and others have failed to establish their right to proceed as associations. FPL also complains that the Coalition and others fail to meet the two-part test for standing stated in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981) because the Petitioners have not suffered an injury of sufficient immediacy and because the claims brought by Petitioners are not with the zone of interest meant to be protected by this proceeding. FPL's claims are misplaced in each instance.

The Standard Applicable to a Motion to Dismiss

The Motion to Dismiss sought by FPL may only be granted if the pleading filed by the Coalition is not in substantial compliance with the requirements of Rule 28-106.201(2)(b), Florida Administrative Code. Rule 28-106.201(4), Fla. Admin. Code. Among the possible errors in the

Coalition's Petition, FPL has only alleged that the Coalition failed to allege that its "substantial interests will be affected by agency determinations." Rule 28-106.201(2)(b), Fla. Admin. Code.

When deciding a motion to dismiss, the reviewing authority must accept allegations within the face of the complaint, or petition, as true. *Pizzi v. Central Bank and Trust Company*, 250 So.2d 895 (Fla. 1971). This is equally true in the administrative setting. *St. Francis Parkside Lodge of Tampa Bay v. Department of Health and Rehabilitative Services*, 486 So.2d 32 (Fla. 1st DCA 1986), *University Psychiatric Center, Inc. v. Department of Health and Rehabilitative Services*, 597 So.2d 400 (Fla. 1st DCA 1992).

Upon even a cursory examination, the Coalition's Petition meets this standard. In its Petition on Proposed Agency Action, the Coalition alleged:

> 13. The Coalition is an association of entities which purchase electricity from FPL. In all, The Coalition members pay approximately $100 million to FPL annually for electric power.
>
> 14. As described in the Argument below, The Coalition and its members object to the Order under challenge and believe it would not provide rate relief to ratepayers, such as the Coalition and its members.
>
> 15. If proper amortization were applied to FPL, ratepayers such as the Coalition and its members would receive a reduction in rates paid to FPL. Thus, the Order under challenge has the effect of a rate *increase* from amounts which would otherwise be paid to FPL.
>
> 16. If the Order under challenge is adopted and made final agency action, The Coalition and its members will sustain losses of at least $2.2 million and as much as $5.1 million.

Coalition's Petition on Proposed Agency Action, Paragraphs 13-16, pages 4-5.

The Coalition's Petition provides a short and plain statement of how its interests are affected by this proceeding. The Coalition has alleged that it represents entities (most nursing homes in Florida, many hotels and motels, and perhaps the largest group of retailers in the State)

which pay approximately $100 million to FPL annually and may be affected by the Order under challenge in this docket in an amount between $2.2 and $5.1 million. Such figures are material. Thus, the Coalition and its members have a substantial interest in the proposed agency determination and, for that reason alone, the Motion to Dismiss should be denied.

Standing as an Association

In order to prove standing as an association, the Coalition must simply demonstrate that: (1) a substantial number of its members, although not necessary a majority, have substantial interests which are affected by the proposed action; (2) the subject matter is within the association's general scope of interest and activity; and (3) that the relief requested is of a type appropriate for an association to receive on behalf of its members. *Florida Home Builders Ass'n v. Department of Labor and Employment Sec.*, 412 So.2d 351, 352-53 (Fla. 1982); *In re: Petition by Florida Power & Light Company for Modification of Duct System Testing and Repair Program*, Docket No. 970540-EG, Order No. PSC-98-0374-FOF-EG, pages 2-3.

However, the level of proof, or in this case allegations, necessary to establish an Association's standing is not as high as FPL's Motion might lead one to believe:

> It is not necessary for [an association] to elaborate how each member would be personally affected by the proposed rule, because a substantial portion of the [association's] members will be regulated by the rule.

Florida League of Cities, Inc. v. Department of Environmental Regulation, 603 So.2d 1363, 1367 (Fla. 1st DCA 1992) citing *Coalition of Mental Health Professions v. Department of Professional Reg.*, 546 So.2d 27 (Fla. 1st Dca 1989).

The test for standing for associations is the same whether it relates to a rule challenge or a request for a formal proceeding, such as the instant case. *Farmworker Rights Organization, Inc. v. Department of Health and Rehabilitative Services*, 417 So.2d 753, 754 (Fla. 1st DCA 1982).

Indeed, the participation of associations within the administrative processes one of the core reasons behind Florida law:

> Because one of the purposes of the Administrative Procedure Act was to expand public access to the activities of governmental agencies, both trade and professional associations are accorded standing to represent the interests of their injured members.

Florida League of Cities, Inc. v. Department of Environmental Regulation, 603 So.2d 1363, 1366 (Fla. 1st DCA 1992) citing *Florida Homebuilders Ass'n v. Department of Labor and Employment Security*, 412 So.2d 351, 352-53 (Fla. 1982).

Again, the Commission must accept the facts as alleged in the Coalition's Petition as true. The Coalition has met the threshold question of whether it is an association that has standing to bring this proceeding through the allegations made in its Petition. As noted above, the Coalition has alleged a huge financial impact which will be suffered by its members, in an amount ranging between $2.2 and $5.1 million, if the Proposed Agency Action is allowed to stand. Further, the insistence on fair rates on behalf of its members is within the general scope of interest and activity of the Coalition and the action requested by the Coalition, essentially rate relief, is the type of relief appropriate for an association to receive on behalf of its members. The very name of the Petitioner, Coalition for Equitable Rates, indicates that its purpose includes the prevention of unfair accounting allowances which hide the profits of utilities at the expense of over-charged ratepayers.

The Two-Pronged *Agrico* test for Standing

Although at this stage of the proceedings, a Motion to Dismiss should be decided upon whether a petition complied with the pleading requirements of Rule 28-106.201(2), Florida Administrative Code, FPL has nevertheless alleged that the Coalition's Petition should be dismissed because the Coalition has not established the two-part test for standing in Florida. The

Coalition does not agree that such a standard is applicable at this stage, but avers that the allegations within its Petition meet that standard in any event.

The core test for standing is the two-pronged test set forth in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981), *rev. denied*, 415 So. 2d 1359,1361 (Fla. 1982). That test requires a showing that the injury alleged in a petition is of sufficient immediacy and that the type of injury is within the zone of interest intended to be protected by the proceeding. The first prong tests the *degree* of injury, the second tests the *type* of injury.

The Coalition has alleged a degree of injury that is real and immediate. The Order under challenge adjusts the rate of return and return on equity enjoyed by FPL, but it fails to do so by a significant enough degree. Additionally, and perhaps more importantly, the Order extends the amount of depreciation which FPL may take. The Coalition alleges that it does so unfairly. If the Coalition is correct, and at this stage of the proceedings, one must assume that it is, then the Order prevents FPL from otherwise offering rate reductions to its customers, including members of the Coalition.

The injury alleged by the Coalition is immediate. FPL alleges in its Motion to Dismiss that this is not a rate proceeding, and that therefore no attention should be paid to the effect large depreciation allowances have on ratepayers. The Coalition takes the opposite view and participates in this proceeding in order to protect the interests of its members by seeking to modify the Order by reducing allowed depreciation, rates of return and return on equity such that FPL will, as an immediate result of these proceedings, reduce rates to be paid by the Coalition's members.

Moreover, the Coalition's view that Public Service Commission proceedings which do not necessarily fly under the banner of "rate cases" still have a real and immediate effect on ratepayers is a view that has been adopted by the Commission in previous orders

As recently as September 10, 1997, Florida Public Service Commission has denied a similar attempt to deny standing to an affected party. *In re: Proposal to Extend Plan for Recording of Certain Expenses for years 1998 and 1999 for Florida Power & Light Company*, Docket No. 970410-EI, Order No. PSC-97-1070-PCO-EI. In *In re: Proposal*, Ameristeel Corporation filed a protest of a proposed agency action which would extend a plan for the recording of certain expenses by FPL. FPL argued in that case, as it does here, that the action taken by the PSC could only have a speculative and indirect impact on Ameristeel, thus arguing that the injury alleged by Ameristeel lacked sufficient immediacy to satisfy the first prong of the *Agrico* test.

The PSC disagreed. The Order (No. PSC-97-1070-PCO-EI) cites at length the arguments raised by Ameristeel describing how the extension of the plan would have the effect of preventing FPL from reaching an earnings sharings threshold which would require refunds to FPL's customers, including Ameristeel. As the Coalition argues here, Ameristeel argued in that case that, but for the order under review, Ameristeel would receive rate refunds. The PSC agreed that Ameristeel demonstrated a substantial interest in the proceeding, concluding that the amount at issue is by any standard material. The interest alleged by the Coalition is analogous and similarly satisfies the first prong of the *Agrico* test.

Finally, the interests alleged by the Coalition are the type of interests that this proceeding was designed to protect, thus satisfying the second prong of the *Agrico* test. In the same case cited above, the Public Service Commission concluded that Ameristeel's interest were in zone of

interest intended to be protected by a proceeding to review an extension of a plan to allow recording of certain expenses. The proceeding involved in the AmeriSteel case was not a rate proceeding. Nevertheless, the Commission agreed with AmeriSteel that its alleged injuries, suffered if FPL were permitted to avoid rate reductions, were meant to be protected in a proceeding like the one invoked in the instant case.

The Commission noted that §366.04(1), Florida Statutes granted the Commission jurisdiction to regulate and supervise each public utility with respect to its rates and services. Part of the regulation and supervision included the determination of appropriate levels of expense to be included by utility and its rates. The fact the regulatory approval was required was important to the Commission and its determination that Ameristeel had standing. Because the action under review would alter the manner in which FPL maintained its books and records it fell within the jurisdiction of the Commission. AmeriSteel, as a rate paying customer, also was granted standing and therefore recognized as within the zone of interest of Chapter 366 which protects the public from unjustified rates.

The Coalition has demonstrated that it has standing to proceed in this issue. The rate reduction the Coalition seeks would total between $2.2 and 5.1 million, a material and immediate impact. The Coalition's interests are within the zone protected by Chapter 364, Florida Statutes.

WHEREFORE, the Coalition respectfully requests that FPL's Motion to Dismiss be denied.

Respectfully submitted this 27th day of January, 1999.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and fifteen (15) copies and one (1) diskette of the foregoing has been furnished by Hand Delivery to Blanca S. Bayo, Director, Public Service Commission Director, Division of Records and Reporting, Florida Public Service Commission, 4750 Esplanade Way, Room 110, Tallahassee, FL 32399; a copy has been furnished via Hand Delivery to Matthew M. Childs, Steel, Hector & Davis, LLP, 215 South Monroe Street, Suite 601, Tallahassee, FL 32301-1804, and a copy has been served via U.S. Mail to the parties on the attached mailing list this 27th day of January, 1999.

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