

State of Florida



Public Service Commission

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COMMISSION
CLERK**-M-E-M-O-R-A-N-D-U-M-****DATE:** June 2, 2011**TO:** Office of Commission Clerk (Cole)
FROM: Division of Economic Regulation (Draper, D. Lee)
Office of the General Counsel (Bennett)

EM *ca* *PL*
AB *FC* *CR* *BB*

RE: Docket No. 100459-EI – 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.
AGENDA: 06/14/11 – Regular Agenda – Motion to Dismiss – Oral Argument Requested**COMMISSIONERS ASSIGNED:** All Commissioners**PREHEARING OFFICER:** Balbis**CRITICAL DATES:** None
SPECIAL INSTRUCTIONS: The items for Florida Public Utilities Company should be considered in the following order: Docket No. 100459-EI, then Docket No. 110041-EI, and finally Docket No. 110001-EI
FILE NAME AND LOCATION: S:\PSC\ECR\WP\100459.RCM.DOC

Case Background

On December 14, 2010, Florida Public Utilities Company (FPUC) filed a petition to implement optional time-of-use and interruptible rate schedules and corresponding fuel factors in the Northwest Division on an experimental basis. The Office of Public Counsel (OPC) and the City of Marianna (City) were granted intervention in this docket. On January 24, 2011, the City filed a preliminary statement of issues and positions alleging FPUC's proposed time-of-use and interruptible rates are inappropriate, unjust, and unreasonable because they are not cost-based

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and do not provide appropriate price signals or incentives to FPUC's customers. By Proposed Agency Action (PAA) Order No. PSC-11-0112-TRF-EI, issued February 11, 2011, in this docket, the Commission granted FPUC's petition.

On March 1, 2011, the City of Marianna filed a petition for formal proceeding, protesting the Commission's Order. On March 17, 2011, FPUC filed a Motion to Dismiss Marianna's petition. On the same date, FPUC filed a request for oral argument on its motion to dismiss. On March 24, 2011, the City of Marianna responded to FPUC's motion to dismiss. This recommendation addresses FPUC's motion to dismiss.

The Commission has jurisdiction over the subject matter pursuant to Sections 366.041, 366.05, 366.06 and 366.075, Florida Statutes (F.S.). In proceedings where an Order is protested and a hearing is requested, the Commission is required to comply with the provisions of Sections 120.569, and 120.57, or Section 120.68 F.S.

Discussion of Issues

Issue 1: Should the Commission grant FPUC's request for oral argument?

Recommendation: Yes. The Commission should grant FPUC's request for oral argument. Oral argument should be limited to 5 minutes per side. (Bennett)

Staff Analysis:

FPUC states that oral argument on the motion to dismiss would aid the Commissioners in their evaluation of the viability of the City's Petition and FPUC's request for dismissal. FPUC contends that oral argument will facilitate the Commission's consideration of whether the City's request for formal hearing has merit. FPUC requests that each party be allowed 5 to 10 minutes for oral presentations.

Rule 25-22.022, Florida Administrative Code (F.A.C.) governs oral argument before the Commission. According to the rule the request shall state with particularity why oral argument would aid the Commissioner in understanding and evaluating the issues to be decided, Rule 25-22.022(1), F.A.C. Granting or denying the request for oral argument is within the sole discretion of the Commission, Rule 25-22.022(3), F.A.C. Staff believes oral argument will give the Commission additional insight into each party's position on the motion to dismiss. If oral argument is granted, staff recommends that it be limited to 5 minutes per side.

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

Recommendation: No. The Commission should not dismiss the City of Marianna's petition for formal hearing. The City's petition contains allegations of fact that, when taken as true, state a claim for relief for the City of Marianna. (Bennett, Draper)

Staff Analysis:

Standard of Review of a Motion to Dismiss

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). In reviewing a petition that is the subject of a motion to dismiss, the Commission first must assume that all the allegations pled in the petition are true. Varnes v. Dawkins, 624 So. 2d 349 (Fla. 1st DCA 1993). When making its review, only the petition and the documents incorporated in the petition can be reviewed. The answer or responsive pleadings of the opposing party are not to be considered. All reasonable inferences must be made in favor of the petitioner. Id. Using those guidelines, the Commission should review the City's petition to determine if the petition makes a claim (states a cause of action) for which the Commission can grant relief.

FPUC's Motion to Dismiss

According to FPUC, the Petition should be dismissed for three reasons. First, FPUC claims the City has not established standing to maintain its petition, nor has it met the pleading requirements of Rule 28-106.201, F.A.C. Second, FPUC alleges that the City has failed to allege facts establishing a cause of action. Finally, FPUC claims that the City's request is premature and counter to the fact that the rates are offered on an experimental basis.

Failure to Establish Standing or Meet Pleading Requirements

FPUC contends that even though the City was granted intervention in the proposed agency action process, the Commission must still determine whether the City has a right to present a challenge to the order. FPUC contends that the standard for determining whether the City has established its right to bring a petition is 1) whether the city has demonstrated that there exists, or will exist, an injury to the City of sufficient immediacy to entitle the City to a Section 120.57, F.S. (administrative law) hearing; and 2) if the injury is established, whether the Commission proceeding is the correct venue to address that injury.¹ FPUC argues that the petition filed by the City demonstrates that the City fails to meet either prong of the test. FPUC notes that the City's core contention is that the time-of-use and interruptible rates are not cost-based, and are therefore, not fair, just, or reasonable. FPUC argues that these allegations are

¹ Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). Agrico is cited by the Commission in granting intervention and reviewing a parties' right to intervene in or bring a suit. According to the Second District Court of Appeal in Agrico, a petitioner demonstrates his right to bring an action "standing" when he demonstrates that 1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 (administrative law) hearing, and 2) that his substantial interest is of a type or nature which the proceeding is designed to protect.

bare, and even if true, are not sufficient to identify an injury to the City as a result of the Commission's approval of the rates. FPUC states that even assuming that the rates are not cost-based, the City has not stated what injury it would suffer.

FPUC contends that the City has not adequately pled how it is harmed by the Commission's decision and therefore does not comply with Rule 28-106.201, F.A.C. FPUC asserts that the City's petition does not 1) explain how the City's substantial interests are affected by Commission's order; 2) provide a specific statement as to the rules or statutes that require reversal or modification of the Commission's decision; and 3) include an explanation of how the alleged facts relate to the specific rules or statutes identified.

FPUC complains that the City's petition merely asserts that the rates are not cost-based, that the subscription limits placed on the rates are inappropriate, and that the rates do not send customers the appropriate price signals. FPUC asserts that the City fails to explain how its interests will be affected, even if the rates are not cost-based. FPUC also asserts that the City did not explain in its petition how those (allegedly non-cost-based) rates are not fair, just, and reasonable. FPUC contends that the City must provide more information about why the subscription limits are inappropriate, whether those limits violate any statutory provision and what harm befalls the City as a result of the implementation of the subscription limited rates. FPUC alleges that the City does not explain why it believes the customer will not receive appropriate price signals if the rates are adopted. FPUC states that the petition does not identify any violation that has occurred or injury that may be incurred by the adoption of those rates. Finally, FPUC contends that the remainders of the City's portion of the ultimate facts alleged are not factual allegations but are legal or policy conclusions.

Failure to State a Cause of Action Upon Which Relief Can Be Granted

FPUC also claims that the pleadings do not state a cause of action upon which relief can be granted by the Commission. FPUC contends that the rate-setting provisions, which are referenced by the City, notably Sections 366.041 and 366.06, F.S., do indicate the Commission may consider the cost of providing service, as one of the factors in setting rates. But, FPUC argues, the City's assertion that the rates are not cost-based is inadequate to establish a cause of action given the fact that the statutory reference lists cost as one of several criteria the Commission may consider in setting rates. FPUC also argues that because the rates are experimental rates under Section 366.075, F.S., cost is not an element of the Commission's decision to approve those rates.

Premature and Contrary to Principles of Administrative Efficiency

FPUC argues that this protest and any subsequent hearing is premature because the order protested states that the Commission will review the rates in the ongoing fuel and purchased power clause and that other parties will be able to participate in that review. Additionally, FPUC argues that the rates are experimental and available on a trial basis and it will later be determined whether the rates will actually encourage customers to reduce usage in peak periods.

City of Marianna's Response

Standing

The City of Marianna contends that its petition includes facts sufficient to establish standing. The City of Marianna asserts it is a customer of FPUC, eligible to take electricity under the proposed rate schedules. According to the City, these facts establish that the City is directly and substantially affected by the Commission's approval of the time-of-use and interruptible service rates. The City states that the petition shows the City is being injured because it does not have access to appropriate, cost-based, fair, just, and reasonable time-of-use and interruptible rates. The City contends that the injury is immediate because the rates are currently in effect. The City claims that it can and did plead injury, that the injury is that the rates are not fair, just, and reasonable because they are not cost-based. According to the City, because the proposed rates are not cost-based, those rates do not reflect the value the customers provide to the utility when the customers shift their energy consumption to time periods when it is less expensive for the utility to serve those customers. The interruptible rates do not reflect the value to the utility that customers provide by being interrupted. The City urges that it is entitled to have access to all of a utility's rates on a non-discriminatory basis, and that those rates must satisfy the statutory requirements that they be fair, just, and reasonable.

The City contends that it is the Commission's long-standing precedent that customers have standing to challenge utility rates. The City discusses several statutory references that rates are to be fair, just, and reasonable, Sections 366.03, 366.04(1), 366.05(1), 366.06(1), and 366.07, F.S. Furthermore, Section 366.06(1), F.S., requires the Commission to look at the cost of providing service to that class as well as the value of the service. The City argues that it does not matter whether a proposed rate is optional or experimental; it is still required to be fair, just, and reasonable. The City contends that as a customer it has standing to request a formal hearing to ensure rates are fair, just, and reasonable.

Stating a Cause of Action Upon Which Relief May be Granted

The City contends that it has alleged that the proposed rates are not fair, just, and reasonable because those rates are not cost-based and because they do not reflect the value that customers will create by modifying their consumption, either by shifting their time of use or by being interrupted. It argues that a fundamental principle of ratemaking is that rates should be cost based. The City explains that if rates are not cost-based and the utility is still collecting its full revenue requirement, then some customers are overpaying relative to their cost responsibility while others, who are underpaying are being subsidized. The City also asserts that the Commission generally regards inter-class subsidization as unfair, unjust, and unreasonable. It contends that the Commission has the statutory authority and responsibility to grant the requested relief. The City concludes that it has presented a claim upon which the Commission can grant relief.

Premature Claim

The City states that the issues are ripe for a hearing because they present a factual dispute regarding the challenged rates that are already in effect. According to the City, the injury alleged

is that it is entitled to fair, just, and reasonable time-of-use and interruptible rates. The City contends that the rates approved by the Commission are not fair, just and reasonable because the rates do not reflect either the cost or the value associated with the time-of-use or interruptible service. The City asserts the rates are currently in effect and so the injury is real and present.

Staff Analysis

Staff believes that the City has pled sufficient facts to state a claim upon which the Commission can act. As required by case law, staff begins with the assumption that all the facts stated in the City's petition are true. The alleged facts follow. The Commission, by order, set experimental time-of-use and interruptible service rates for FPUC's customers (p. 1, City's Petition). Those rates are currently in effect (Order No PSC-11-01112-TRF-EI, incorporated into City's petition by reference). The City is a customer of FPUC (p. 1, City's Petition). The City is eligible for time-of-use and interruptible rates (p. 3, City's Petition). The rates are not cost-based (p. 6, City's Petition). The rates are not available to all customers of FPUC (p. 6, City's Petition). The rates do not provide appropriate price signals (p. 6, City's Petition).

As described in detail by the City, the Commission is responsible for setting fair, just, and reasonable rates. Two of the determinants the Commission considers in setting rates, are the costs of the rates and the value of the service. Accordingly, this is the type of proceeding for which the Commission has statutory jurisdiction. The City has alleged sufficient facts to show that it has an immediate injury in operating under a rate structure that it alleges is not cost-based, is limited in availability, and does not send the appropriate cost signals to customers. Accordingly, the City has standing to bring the action before the Commission. The City's assertions give rise to facts that the Commission can examine in a formal hearing to determine whether FPUC's experimental time-of-use and interruptible rates are fair, just, and reasonable. Accordingly, staff believes that FPUC's Motion to Dismiss should be denied.

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Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open pending the outcome of the hearing on the protest filed by the City of Marianna.

Staff Analysis: This docket should remain open pending the outcome of the hearing on the protest filed by the City of Marianna.