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August 12, 2011

VIA ELECTRONIC FILING: *FILINGS@PSC.STATE.FL.US*

Ms. Ann Cole
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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.**

Dear Ms. Cole:

Attached for electronic filing, please find the Motion to Dismiss The Amended Petition of the City of Marianna, Florida, submitted in the referenced Docket on behalf of Florida Public Utilities Company.

Thank you for your kind assistance with this filing. As always, please do not hesitate to contact me if you have any questions whatsoever.

Sincerely,

Beth Keating
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MEK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.	)	Docket No. 100459-EI Filed: August 12, 2011

FLORIDA PUBLIC UTILITIES COMPANY'S MOTION TO DISMISS THE AMENDED PETITION OF THE CITY OF MARIANNA, FLORIDA

Florida Public Utilities Company ("FPUC" or "Company"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby respectfully requests that the Florida Public Service Commission ("Commission") dismiss the Amended Petition for Formal Proceeding filed by the City of Marianna, Florida ("City")(herein referred to as the "Amended Protest") on July 25, 2011, because the Amended Protest fails to allege facts sufficient to demonstrate that the City will incur an injury, in fact, sufficient to establish standing to pursue a protest and request a hearing under the test for standing required by Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981)("Agrico test")[1]. In support of this Motion, FPUC states as follows:

I. INTRODUCTION

1. This proceeding was initiated when the Company filed, on December 14, 2010, its Petition to implement a demonstration project allowing the Company to offer time-of-use rates ("TOU") and interruptible rates ("Interruptible") to customers in the Northwest Division. As

[1] The Court in Agrico set forth a two-part test for standing in administrative proceedings, which the Commission has recognized time and again. Under Agrico, the Petitioner (here, the City) must demonstrate: (1) that he will suffer an injury, in fact, of sufficient immediacy to entitle him to a hearing under Chapter 120, F.S.; and (2) he must also demonstrate that the injury alleged is of the type or nature which the proceeding was designed to protect against.

explained in the Company's initial Petition, the Company entered into an electric distribution franchise agreement with the City of Marianna in February 2009. The agreement includes a provision that requires the Company to have TOU and Interruptible rates in effect by February 17, 2011.

2. As has been well-established in this Docket, FPUC purchases electric power from third parties and delivers the electricity to end-use customers through its distribution systems. In order to facilitate the development of functional TOU and Interruptible rates, the Company entered into negotiations with Gulf Power Company for amended terms in the Company's purchased power agreement for the Northwest Division ("PPA Amendment"). As the Commission recognized in Order No. PSC-11-0112-TRF-EI ("Tariff Order"), the amendment was ultimately finalized and provides significant cost savings, as recognized in the Tariff Order. Order, p. 3. Moreover, as a result of the projected savings generated by the PPA Amendment, the Company was able to develop TOU and Interruptible rates that the Commission determined to be reasonable. The Commission further determined that

> Since FPUC has no experience with TOU or interruptible rates, offering the tariff on an experimental basis will allow FPUC to gather customer-specific data to gauge customer demand response. FPUC stated that the savings resulting from the amended agreement are expected to increase annually, which will allow FPUC to modify the TOU and interruptible rates on a going-forward basis. We will evaluate, as part of the on-going fuel clause hearings, FPUC's TOU and interruptible fuel charges. Any interested parties will have the ability to participate in the evaluation of FPUC's TOU and interruptible fuel charges.

Tariff Order, p. 6. The Commission thus approved the proposed rates, effective February 8, 2011, because

> The proposed rates are designed to provide customers who are capable of modifying their electric usage with savings on their bills and ensure that FPUC's peak demand remains at or below the 91 MW. It will also allow FPUC to gather important data on price responsiveness to TOU rates while protecting the nonparticipating customers from lost revenue impacts.

Tariff Order, p. 7.

3. Thereafter, on March 1, 2011, the City protested the TOU Order and requested a hearing on the matter (herein referred to as the "First Protest").[2] The City's core contention in that First Protest, was that the Company's TOU and Interruptible rates are not fair, because they are not based upon the costs incurred by the Company's generation services provider, Gulf Power Company, nor do the rates reflect the costs that FPUC incurs on a "time-differentiated basis." As such, the City argued that the rates will not provide "accurate price signals" to FPUC's retail customers. The City maintained that the rates, ". . . do not reflect the value that customers will create by modifying their consumption, either by shifting their times of use or by being interrupted. . . ." Petition, p. 7. The City also alleged that the subscription limits in the Company's tariff are not appropriate, although the City fails to explain why or what harm or violation, if any, results. For these reasons, the City alleged that the approved rates are not fair, just and reasonable. *See* First Protest, pp. 5, 6.

4. On these bases, the City asked that the Commission conduct a full evidentiary proceeding to address the questions raised in its Petition, and conclude that the Company's TOU and Interruptible rates should be cancelled.

5. By Order No. PSC-11-0290-FOF-EI, issued July 5, 2011, the Commission dismissed the City's protest of the TOU Order without prejudice, finding that the City had failed to identify an injury in fact of sufficient immediacy to entitle it to an administrative hearing. Order, p. 3.

[2] Coincidentally, the following day, March 2, 2011, the City also filed a suit in the Circuit Court for the Fourteenth Judicial Circuit in Jackson County seeking a declaratory judgment that FPUC had violated the terms of the franchise agreement.

6. On July 25, 2011, the City renewed its objections to the Company's TOU and Interruptible rates by filing its Amended Protest. Much as it argued in its First Protest, the City contends that, as a customer of FPUC, and now a customer actually taking service under the General Service Demand Time of Use tariff (GSDT-EXP), its substantial interests in having access to fair, just, and reasonable TOU and Interruptible rates will be determined in this Docket.

7. The City does little, however, to expand upon its previous efforts to demonstrate that it will incur an injury, in fact, of sufficient immediacy to entitle it to a Section 120.57(2), Florida Statutes, hearing. The only new factual assertion put forth by the City is that it has now signed up to participate under the Company's GSDT-EXP Time-of-Use tariff, which the Company does not dispute. Amended Protest, p. 5. The City also further emphasizes that, as a customer declining to participate under the other TOU and Interruptible service tariff provisions, it has a right to have those rates be "fair, just, and reasonable. . ." and "evaluated as to whether they are effective, and cost-effective, at encouraging energy conservation and efficiency." Amended Protest, p. 7.

8. The City also alleges that the Commission erred to the extent Commissioners considered the optional nature of the rates at the Commission's June 14, 2011 Agenda Conference.[3] The City suggests that there is no exemption from the "fair, just, and reasonable" standard for "optional" rates, and that if the Commission adheres to this rationale, no customer would ever have standing to object to an optional rate.

[3] FPUC notes that this assertion is, quite arguably, more in the nature of an untimely request that the Commission reconsider its decision in Order No. PSC-11-0290-FOF-EI. If so deemed, this allegation should be rejected. To be clear, while the Company did agree that it would not object to the City's Amended Protest based on timeliness, if filed on or before July 25, the Company did not reach such an agreement with regard to a Motion for Reconsideration of Order No. PSC-11-0290-FOF-EI, nor did the City ask it to do so. Moreover, the Company believes that the time for filing a Motion for Reconsideration is a jurisdictional matter that cannot be modified by agreement of the parties.

9. Read in the light most favorable to the City, the Amended Protest should be dismissed because the City has failed to identify any injury in fact that is of sufficient immediacy to warrant relief. The City does not adequately allege any harm or statutory violation that will arise as result of these rates, and has not provided any explanation of why the allegations it has raised warrant cancellation of the TOU and Interruptible Rates.

10. Even taking all the renewed allegations in the Amended Protest as true, none of the City's assertions would support a finding that the City, as a customer of the Company, would suffer as a result of service provided under the TOU and Interruptible rates; thus, the City has provided no basis to move forward with a Section 120.57 hearing.

11. Accordingly, the Petition should be dismissed, because the City has again failed to identify an injury, in fact, of sufficient immediacy to entitle the City to an administrative hearing and which is of the type or nature which this proceeding was designed to protect against.

II. STANDARD OF REVIEW

12. The City's Petition was received by undersigned counsel on July 25, 2011; thus, this Motion to Dismiss is timely filed pursuant to Rule 28-106.204, Florida Administrative Code.

13. As the Commission has recognized time and again, the purpose, under Florida law, for a Motion to Dismiss is to test the legal sufficiency of the facts alleged to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000) and Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The moving party must demonstrate that, even accepting all of the allegations in the Petition as true, the Petition fails to state a cause of action upon which the Commission can grant relief. *Id.;* Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958); City of Gainesville v. Florida Dept. of Transportation, 778 So. 2d 519 (Fla. 1st DCA 2001).

14. The Commission has also recognized that, as a threshold matter, one must demonstrate standing to participate in a proceeding as a party and to request a hearing. The accepted test for "substantial interests," and thus standing, is set forth in Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), wherein the Second District Court of Appeal addressed the issue of "substantial interest" standing, explaining that the petitioner must demonstrate that: 1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. As the Court further elucidated, "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Id.*[4] To prove standing, the petitioner must satisfy both prongs of the Agrico test. Ybor III, Ltd. v. Florida Housing Finance Corp., 843 So. 2d 344 (Fla. 1st DCA 2003). The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also Village Park mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987)(speculation on the possible occurrence of injurious events is too remote to establish standing– "The injury or threat of injury must be both *real and immediate, not conjectural or hypothetical*. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct.")(*emphasis added).* See also Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) (threatened viability of plant and possible relocation do not

[4] The PSC has previously determined that the *Agrico* test for standing applies to governmental entities by Order No. PSC-95-0062-FOF-WS, issued January 11, 1995, in Docket No. 940091-WS, *Application for transfer of facilities of LAKE UTILITIES, LTD. to SOUTHERN STATES UTILITIES, INC.; amendment of Certificates Nos. 189-W and 134-S, cancellation of Certificates Nos. 442-W and 372-S in Citrus County; amendment of Certificates Nos. 106-W and 120-S, and cancellation of Certificates Nos. 205-W and 150-S in Lake County;* and Order No. PSC-93-0363-FOF-WS, issued March 9, 1993, Docket No. 921237-WS, *In re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc.*

constitute injury in fact of sufficient immediacy to warrant a Section 120.57, Florida Statutes hearing). In addition, as the Commission has recognized, a purely economic interest cannot serve as the basis for standing. See Order No. PSC-10-0685-FOF-EQ, issued in Docket No. 090372-EQ, *citing* Agrico, 403 So. 2d at 482; and International Jai-Alai Players, 561 So. 2d at 1225-26.

15. In this case, the City petitioned to intervene in this proceeding very early in the process. The Commission granted intervenor status pursuant to Rule 25-22.039, Florida Administrative Code. However, in granting the Petition to Intervene, the Commission did not make a conclusive determination that any subsequent agency action would, in fact, affect the City's substantial interests. Instead, the Commission's Order Granting Intervention provides that the intervenor's substantial interests "**may**" be affected by the outcome of the proceeding.[5] This preliminary determination does not, however, preclude the Commission from revisiting the subject of standing to determine whether the City has sufficiently demonstrated that it "**will**" sustain an injury, in fact, sufficient to maintain a protest. In fact, the Notice of Further Proceedings at page 8 of the Tariff Order specifically provides that the decision will become final, ". . . unless a person whose substantial interests are affected by the proposed action files a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code." In turn, Rule 28-106.201(2)(b), Florida Administrative Code, includes a specific requirement that the City include in its Petition an "explanation of how [its] substantial interests will be affected by the agency determination. . . ." [emphasis added]. The fact that intervention has been granted, on a provisional basis, under Rule 25-22.039, Florida Administrative Code, does not override the application of the pleading requirements in Rule 28-

[5] Order No. PSC-11-0129-PCO-EI, allowing the City to intervene, provides only that the City's "substantial interests may be affected by this proceeding." [emphasis added]. Order at p. 2.

106.201(2)(b), Florida Administrative Code, to a new, separate pleading filed pursuant to that Rule. As such, the Order Granting Intervention did not guarantee that the City would, in fact, be able to make a demonstration of standing, consistent with the Agrico standard, sufficient to maintain a protest of the subsequent agency action.[6] The question of whether the City has adequately pled that its substantial interests will be affected is, therefore, *Ag*properly before the Commission. Related aspects on this point are more fully addressed later in this Motion.

III. THE CITY HAS FAILED TO DEMONSTRATE STANDING

16. As noted in the previous section, the Agrico test is a two-part test for standing, which requires that both components of the test be met. The first component of the test is a demonstration that there exists, or will exist, an injury in fact of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing. Applying this test to the City's Petition, the City has clearly failed to meet the test.

17. As noted herein, the City's core contention is that the TOU and Interruptible rates are not cost-based, and are therefore, not fair, just, or reasonable. Thus, according to the City, it has the right to seek a hearing in this matter, because Chapter 366 contemplates that the Commission will ensure that only fair, just, and reasonable rates are charged by a utility. The City contends that its allegation that the rates are not fair, just, and reasonable establishes that there is a "disputed issue of material fact," which, in turn, automatically entitles it to a hearing under Sections 120.569 and 120.57(1), Florida Statutes. Amended Protest, p. 10.

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[6] *See also, American Trucking Associations, Inc. v. ICC*, 669 F. 2d 957, 964 (5th Cir. 1982)(stating that ". . . intervention in agency proceedings and standing to challenge agency actions in judicial review proceedings are not governed by the same standards.), *citing* 1 K. Davis, Administrative Law Treatise § 8.11, at 564 (1958). *See also, In Re: Application for Amendment of Certificate No. 427-W to Add Territory in Marion Count y by Windstream Utilities Company*, 97 FPSC 4:556 (differentiating between intervention as an "intervenor" or "interested party" under Rule 25-22.039, F.A.C., and intervention as an "objecting party.")

18. To the contrary, the bare allegation that the rates are not "fair, just, and reasonable," even if true (which it is not), is entirely insufficient to establish that the City will suffer an injury as a result of the Commission's approval of these rates. To be clear, FPUC contests the City's standing to seek a hearing in this matter - a question to which the Agrico standard applies. As such, whether or not there is a "disputed issue of fact" does not, by itself, guarantee that the City is entitled to a hearing. The City must still demonstrate that it will sustain an injury, in fact, of sufficient immediacy to meet the Agrico standard in order to maintain its Amended Protest.

19. The City, however, relies on provisions of Section 120.569 and 120.57, Florida Statutes, to argue that it is entitled to the hearing it has requested. However, this argument overlooks the fact that Section 120.569(1), Florida Statutes, specifically provides that it applies to proceedings ". . . in which the substantial interests of a party are determined by an agency." [emphasis added]. The converse is therefore true -- these provisions do not apply if a party's substantial interests will not be determined, as is the case here.[7]

20. More specifically, even assuming, *arguendo*, that the rates are not cost based, the City fails to explain how it will suffer as a result. To the contrary, these optional rates offer the City the opportunity to better manage its electricity bills. If the City, or any other customer, does not wish to participate, they may continue receiving service under other Company rates, which the Commission has previously approved consistent with the requirements of Chapter 366, Florida Statutes.

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[7] Section 120.57, F.S., only applies when a hearing is warranted under Section 120.569, F.S.. Also, pursuant to Section 120.52(13), F.S. –

> "Party" means:
> (a) Specifically named persons whose substantial interests are being determined in the proceeding.
> (b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

[emphasis added].

21. Addressing this argument another way, the City ignores the fact that, in order to demonstrate that its substantial interests will be affected, it must identify a real, impending injury that will result from the Commission's action in this Docket. Instead, the City relies on the general assertion that, as a customer, it has a substantial interest in receiving service (and in having the option to receive service) pursuant to fair, just and reasonable rates, and thus, its substantial interests will be determined in this Docket. Amended Protest, pp. 10 – 11. This allegation, however, disregards the fact that the Agrico standard requires that the City identify an injury that it will actually incur as a proximate result of the implementation of the Commission's action approving FPUC's TOU and Interruptible service rates. The City provides neither an explanation as to what it is about the rates that is not fair, just and/or reasonable, nor identifies what impact the proposed rates will have on the City as a customer. FPUC posits that the City can provide no such explanation because there is, in fact, no harm that the City will suffer.

22. **To be perfectly clear, the TOU and Interruptible service rates do not result in any mandatory rate increase for the City, nor do they impair the City's ability to receive electric service pursuant to rates approved in accordance with Chapter 366, Florida Statutes.** Instead, the TOU and Interruptible service rates provide an avenue for customers that opt to take service under the rates to manage their energy usage in a way that will produce savings on their overall energy bill. Thus, the Company is at a loss to discern any actual harm that will come to the City as a result of these rates.

23. In addition, the City asserts that the subscription limits applicable to the Company's TOU and Interruptible rates are not appropriate. Amended Protest, p. 17 and 18. While the City does not specifically address this assertion in the portions of its Amended Protest dedicated to its discussion of its standing, the Company presumes that the City has identified

those "issues" in which it [the City] has a direct interest. As such, and in an abundance of caution that this might be considered within the debate of the City's standing, the Company notes that the City does not tie this stated "Issue of Material Fact" to any injury that the City will incur.[8] The City merely asserts that the subscription limitations are "not appropriate." Amended Protest, pp. 17, 18. As such, this allegation, fails to identify an injury, in fact, of sufficient immediacy to warrant an administrative hearing.

24. The City also asserts that the TOU and Interruptible rates do not send customers appropriate price signals, and are not "effective or cost-effective at encouraging energy conservation or efficiency." Amended Protest, p. 11, 13, 15 - 18. The City provides no explanation other than to suggest that the rates do not reflect the costs incurred by the Company during the on-peak and off-peak periods.[9] Likewise, the City offers no specific insight as to why it believes that customers will not receive appropriate price signals and why the rates will not promote energy efficiency, other than to assert that they do not accurately reflect costs. Amended Protest, p. 15. But, more importantly, the City does not identify any injury it will suffer associated with these allegations.[10] Instead, the City merely contends that it is entitled to a hearing, because it has identified a disputed issue of material fact; i.e. that the rates do not

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[8] In fact, subscription limits of varying design are not at all uncommon in experimental or pilot programs. See, for example, Order No. PSC-09-0501-TRF-EG, issued in Docket No. 090228-EG (approving TECO's GSVP-1 tariff); and Order No. PSC-99-0058-FOF-EG, issued in Docket No. 981356-EG (approving FPL's RTP-GX tariff).

[9] Again, the Company suggests that there is sufficient evidence to support that these rates will send appropriate price signals. As the Commission noted, "The proposed rates appear to provide a sufficient differential between on-and off-peak rates to encourage some customers to shift usage." Tariff Order, p. 6. Moreover, the Commission recognized that "Since FPUC has no experience with TOU or interruptible rates, offering the tariff on an experimental basis will allow FPUC to gather customer-specific data to gauge customer demand response." Tariff Order, p. 6.

[10] To the extent that the City, as set forth in its lists of Material Facts and Ultimate Facts (Amended Protest, pp. 16 and 18) suggests that the Company's TOU and Interruptible rates must accurately reflect the costs that are incurred by Gulf Power Company, FPUC's wholesale provider, the City identifies no logical nexus between the costs that Gulf Power incurs to provide service and FPUC's tariffed TOU and Interruptible rates. Under the various provisions of Chapter 366, Florida Statutes, referenced by the City, if any costs are to be considered, the relevant costs would be those incurred by FPUC. Thus, this assertion would also fail the second prong of the Agrico test for standing, because this proceeding is designed to address the Company's TOU and Interruptible rates; it is not designed to address Gulf Power's costs to provide service.

reflect costs and therefore will not encourage energy conservation or efficiency, as contemplated by Section 366.075, Florida Statutes. This argument completely disregards that Section 366.075, Florida Statutes, also contemplates the implementation of such rates on an "**experimental**" basis.

25. Specifically, Florida courts have consistently held that "[i]t is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." Hilton v. State, 961 So. 2d 284 (Fla. 2007); *citing* *Hechtman v. Nations Title Ins. of New York*, 840 So.2d 993, 996 (Fla. 2003). The only reading of this provision that gives the word "experimental" any relevance is one that contemplates that rates approved pursuant to this provision will be implemented for a defined trial period to allow the Company (and the Commission) to gather data upon which a subsequent Commission determination can be made as to whether the rates do, in fact, encourage energy conservation or efficiency, and consequently, whether the rates should be implemented on a more permanent basis.

26. Contrary to the plain language of the statute, the City generally disputes the notion that the Legislature contemplated a different process for experimental rates designed to promote efficiency and conservation consistent with Section 366.075, Florida Statutes. Rather, the City claims that FPUC's interpretation would lead to the absurd result that no party would ever be able to demonstrate standing to challenge a rate filed under Section 366.075, Florida Statutes. This is, however, the proverbial *red herring* argument designed to insert fear and concern where none would otherwise exist.

27. First, to be clear, FPUC does not assert that the rates filed pursuant to Section 366.075, Florida Statutes, are immune from challenge. Instead, FPUC contends that: (1) persons

seeking to challenge a Proposed Agency Action approval of such rates must be able to demonstrate that the experimental rates result in a real, direct, and immediate injury to the challenger that is within the Commission's jurisdiction to remedy; (2) the mere assertion that the rates are not cost-based, or fair, just, and reasonable, is insufficient to maintain a challenge to rates filed under Section 366.075, Florida Statutes; and (3) the "experimental" nature of rates filed pursuant to this provision cannot be ignored in the analysis of a challenge to such rates. In other words, if a challenger can demonstrate that the implementation of the rates, even on an experimental basis, will: (1) result in some direct, cognizable harm to that challenger, and (2) that the harm is not one that can be adequately remedied at the end of the trial period, then, FPUC submits, a challenge could be maintained. This analysis is entirely consistent with the Agrico test for standing. By the same token, it incorporates the appropriate maxim of statutory interpretation by giving meaning to word "experimental" in the statute.

28. Realistically speaking, an assessment simply cannot be made, even through the hearing process, as to whether these rates do, in fact, send "appropriate price signals" unless and until these rates have been available to customers for some reasonable period of time. The trial period will allow the Company to obtain additional data, which will assist it [and the Commission] in determining whether these rates truly encourage customers to reduce usage in peak periods. As the Commission recognized, "The experimental pilot will allow FPUC to determine participating customers' load response and the effect on participating customers' bills." Order at p. 6. Thus, conducting a hearing regarding these rates would not only be premature, but also counterproductive to the experimental nature of these rates.[11]

[11] Consistent with this analysis, it is worth noting that Section 366.075 provides that the Commission may "approve" experimental rates, whereas the other ratemaking provisions, namely Sections 366.041,366.05, 366.06, and 366.07, use the more active terms "fixing," "prescribe," "determine," and "fix," respectively, which, when given their accepted meanings, contemplate a more active role in the development of the permanent, generally available rates

29. The City next takes aim at the optional nature of the rates at issue, arguing that the rates are also not immune from scrutiny or challenge simply by virtue of the fact that they are "optional." Amended Protest, p. 13. In fact, FPUC does not dispute this contention at all. To the contrary, FPUC agrees that the rates are subject to challenge, as provided by the Notice of Further Proceedings language included in Order No. PSC-11-0112-TRF-EI. FPUC disagrees, however, with the City's contention that such challenge can be maintained without some demonstration of a tangible, immediate injury that will result if the Commission does not take action. The fact that these rates are offered on an optional basis – the City was not required to avail itself of these rates – must be given due consideration. The City's bare assertion that the rates are neither fair nor reasonable does nothing more than reference the statutory standard applicable to the rates and charges of a public utility. It does nothing to illuminate the Company or the Commission as to how the TOU and Interruptible rates violate that statutory standard, or how such violation results in an injury in fact to the City.

30. More specifically, the City's decision to voluntarily take service under one of the rates should not be viewed in isolation as giving the City any greater claim to standing than it has otherwise been able to demonstrate.[12] The City must still demonstrate that: 1) it will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that its substantial injury is of a type or nature which the proceeding is designed to protect. Even as a customer taking service under one of the rates, the City is unable to identify an injury that it

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contemplated by these provisions, as opposed to the approval and testing process contemplated by Section 366.075, F.S.

[12] With regard to the City's reference to the timing of its enrollment (Amended Protest, p. 5, fn. 3), the Company notes that the City did not enroll until June 21, 2011, after the Commission's decision at the June 14 Agenda Conference to dismiss the City's First Protest.

has, or will, incur as a result of the Commission's approval of these experimental rates. [13]

31. In sum, the City's broad assertions do not identify any actual harm to the City. As the Commission has found in prior cases, blanket statements, such as these, without sufficient facts to support the statements, are not enough to meet the Agrico standard. There must be more than a mere assertion of harm. Order No. PSC-99-0146-FOF-TX, issued January 25, 1999, in Docket No. 981016-TX.

VI. CONCLUSION

For all the foregoing reasons, the Company asks that the Commission dismiss the City's Amended Protest, with prejudice. The pleading is flawed beyond repair in that it fails, for a second time, to identify any injury in fact to the City that is of sufficient immediacy to warrant a hearing. Thus, it fails to demonstrate the City has standing to maintain its Amended Protest.

Respectfully submitted, this 12th day of August, 2011.

Respectfully submitted,

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[13] See also Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987)(speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via Electronic* or U.S. Mail on August 12, 2011 to:

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