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Subject: Electronic Filing - Docket 100459-EI

Attachments: 100459.Marianna.RespOpposingMTD.8-19-11.pdf

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b. 100459-EI
In Re: Florida Public Utilities Company's Petition for Authority to Implement a Demonstration Project of Proposed Time-of-Use and Interruptible Rate Schedules in the Northwest Division.

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

d. There are a total of 28 pages.

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

(see attached file: 100459.Marianna.RespOpposingMTD.8-19-11.pdf)

Thank you for your attention and assistance in this matter.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Florida Public Utilities Company's Petition for Authority to Implement a Demonstration Project of Proposed Time-of-Use and Interruptible Rate Schedules In the Northwest Division	)))))	DOCKET NO. 100459-EI Filed: August 19, 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 the Motion to Dismiss the City's Amended Petition for Formal Proceeding ("Second Motion to Dismiss") filed by Florida Public Utilities Company ("FPUC") on August 12, 2011. In summary, contrary to FPUC's assertions, the City has pled sufficient facts to establish its standing, specifically that: the City is a customer of FPUC eligible to take service under all but one of the time-of-use ("TOU") and interruptible ("IS") rate schedules that the City opposes in this proceeding; the City is in fact a customer under one of the subject rate schedules; the rate schedules proposed by FPUC are not fair, just, and reasonable because they are not cost-based; the City is entitled to access to all of FPUC's rates for which it is otherwise eligible; the City is entitled to have the Commission ensure, through this proceeding, that the subject rate schedules are fair, just, and reasonable; and the City is being subjected to an immediate injury in fact by being deprived of access to fair, just, and reasonable TOU and IS rate schedules, and by being forced to make its decisions with respect to the unfair, unjust, unreasonable, and non-cost-based rate schedules that are presently in effect. The City has plainly stated a claim upon which relief can be granted, namely that the rates for which the City is eligible, and under which the City receives service, are not fair, just, and reasonable because they are not cost-based, and that the Commission has the jurisdiction,

authority, and mandate under several sections of Chapter 366, Florida Statutes,[1] to deny those rates, or alternately, to fix and determine proper rates, as may be indicated by competent substantial evidence of record in a hearing, accordingly. Taking the allegations in the City's Amended Petition for Formal Proceeding as true, and applying the well-settled standards of review for motions to dismiss, as articulated in Commission orders and applicable Florida authority, FPUC's Second Motion to Dismiss must be denied.

In further support of its rights to a timely formal proceeding in this docket, the City of Marianna states as follows.

BACKGROUND

1. This docket was initiated by FPUC's filing, on December 14, 2010, its petition for approval of certain optional time-of-use ("TOU") and interruptible service ("IS") rates on a pilot, experimental, or demonstration program basis. This pleading is referred to hereinafter as "FPUC's TOU/IS Rates Petition." The City petitioned to intervene on January 7, 2011, and the Commission granted the City intervenor status by its Order No. PSC-11-0129-PCO-EI on February 25, 2011.

2. On February 11, 2011, the Commission issued its tariff order, Order No. PSC-11-0112-TRF-EI (the "Tariff Order"), approving FPUC's proposed TOU and IS rates pending the filing of a petition for formal proceeding by a party whose substantial interests would be affected by the Commission's actions in the Tariff Order. Tariff Order at 8. The Tariff Order stated that it was "interim in nature" and that it would become final unless a person whose substantial interests are affected by the actions proposed in the Tariff Order filed a petition for a formal proceeding by March 4, 2011. Id. The City received notice of the Commission's interim action on FPUC's petition and tariff proposals when the City received a copy of the Tariff Order on

[1] All references to the Florida Statutes in the City's Response are to the 2010 edition thereof.

February 11, 2011. The City timely filed its original Petition for Formal Proceeding on March 1, 2011.

3. FPUC moved to dismiss the City's Petition for Formal Proceeding on March 17, 2011. The City responded in opposition to the Motion to Dismiss on March 24, 2011. By memorandum dated June 2, 2011, the Commission Staff recommended that the Commission deny FPUC's Motion to Dismiss. At its conference on June 14, 2011, the Commission voted to reject its Staff's recommendation and to grant the motion to dismiss, without prejudice. This vote was memorialized in Commission Order No. PSC-11-0290-FOF-EI, issued on July 5, 2011. As stated in this order, the Commission's decision was based on its conclusion that the City "has not sufficiently demonstrated that it will suffer an injury in fact which is of sufficient immediacy to entitle it to an administrative hearing." Order No. PSC-11-0290 at 3. While recognizing that the dismissal was without prejudice, the order did not specify a time for the City to submit an amended petition requesting a formal proceeding; by agreement with FPUC, the City filed its Amended Petition Requesting Formal Proceeding ("Amended Petition") on July 25, 2011. FPUC filed its Second Motion to Dismiss on August 12, 2011, and the City is timely filing its response opposing that motion.

4. In a separate petition filed on January 26, 2011, FPUC initiated PSC 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; that petition is referred to herein as the "PPA Amendment Petition." In that petition, FPUC stated the following: "FPUC determined that, in order to develop TOU and Interruptible rates that would satisfy the requirements of the Franchise and also comply with Commission regulatory requirements, changes to the existing PPA with Gulf would be necessary." PPA Amendment Petition at 3. The

TOU and IS rates proposed by FPUC depend on the PPA Amendment being approved by the PSC by a final, non-appealable order by July 31, 2011. PPA Amendment Petition at 4 and Attachment A (to that petition) at 3. The PSC considered the PPA Petition as a "proposed agency action" item at its conference on June 14, 2011. The City opposed and continues to oppose the proposed PPA Amendment, and the City has accordingly intervened in PSC Docket No. 110041-EI, which the PSC opened for the purpose of evaluating the PPA Amendment. Following the Commission's issuance of its Order No. PSC-11-0269-PAA-EI, entitled "Notice of Proposed Agency Action Order Approving Amendment No. 1 to Purchased Power Contract for Generation Service Between Florida Public Utilities Company and Gulf Power Company for Purposes of Fuel Cost Recovery Calculation" (the "PAA Order") on June 21, 2011, the City of Marianna timely filed its petition protesting the PAA Order and requesting a formal proceeding on the proposed PPA Amendment. FPUC has also moved to dismiss the City's petition protesting the PAA Order and requesting a formal proceeding on that related matter, and the City timely responded to that motion to dismiss as well; action on that motion to dismiss is pending.

5. 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 is a substantial, major customer of FPUC; the City purchases retail electric service from FPUC through approximately 112 accounts,[2] including accounts that are billed under FPUC's General Service – Non-Demand (GS), General Service – Demand (GSD), General Service – Large Demand (GSLD), General Service – Demand Time of Use –

[2] The figure of 112 accounts is based on review of the City's billing statements from FPUC for accounts that were active as of early January 2011. The number of active accounts fluctuates from time to time, between 110 and 120 accounts. The City spends approximately $900,000 per year on electricity purchases from FPUC, which the City believes probably makes the City the largest customer in FPUC's Northwest Division.

Experimental (GSDT-EXP), 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. Among other things, the Franchise required FPUC to have developed and implemented Time of Use and Interruptible, or similar, rates that were to be (a) "mutually agreed to" by the City and FPUC, (b) available to all of FPUC's customers in the Northwest Division, and (c) in effect by February 17, 2011.

6. As a customer of FPUC, the City is eligible to take service under these rate schedules. Since the City takes service through many accounts that are served under FPUC's GS, GSD, and GSLD rate schedules, the City is eligible to take service under the time-of-use counterparts to each of these tariffs, as well as under FPUC's proposed Interruptible Service – Time-of-Use rate schedule. In fact, the City has already subscribed one of its accounts to time-of-use service under Rate Schedule GSDT-EXP.[3] Also, as a customer of FPUC, the City's substantial interests will be affected by whether the proposed TOU and IS rates are effective and cost-effective at accomplishing the purpose of promoting energy conservation and efficiency.

7. FPUC does not own or operate electric generation facilities. FPUC purchases the electric power it sells in its Northwest Division from Gulf Power Company ("Gulf"), pursuant to an Agreement for Generation Services dated December 28, 2006 (the "Existing Agreement"). Before the implementation of the PPA Amendment pursuant to the PAA Order, the rates paid by FPUC to Gulf under the Existing Agreement were among the highest, if not the highest, wholesale power rates in the State of Florida, resulting in FPUC's retail rates in its Northwest Division being among the highest, if not the highest, in the State of Florida. Even following the

[3] The City could not have subscribed this account, or any other of its accounts, to time-of-use service as of March 4, 2011, when it filed its original Petition Requesting Formal Proceeding, because service under FPUC's TOU rates was not available at that time. In its flyer describing its TOU rates, FPUC included the statement "Enrollment begins May 2, 2011."

implementation of the PPA Amendment pursuant to the PAA Order, with respect to which the City has timely filed its protest and request for a formal proceeding, the retail rates paid by customers in FPUC's Northwest Division remain among the highest retail electric rates in Florida. Since the wholesale rates paid by FPUC to Gulf are in fact FPUC's bulk power supply costs, those rates and the Existing Agreement, as modified by the PPA Amendment, are inextricably related to the retail rates charged by FPUC, including its proposed TOU and IS rates that are the subject of this Docket No. 100459-EI.

8 The City believes that it is undisputed that the only reason that FPUC filed its proposed TOU and IS rate schedules is that FPUC is required, by a contractual obligation to the City pursuant to its Franchise Agreement with the City, to have TOU and IS rates in effect by February 17, 2011. See Order No. PSC-0112 at 2, 6; and FPUC's TOU/IS Rates Petition at 2. In other words, this docket exists only because of FPUC's contractual obligation to the City to implement TOU and IS rates.

STANDARD OF REVIEW FOR MOTIONS TO DISMISS

9. 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 Meyers 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). The Commission has stated that, in evaluating a motion to dismiss, the Commission is "required to view the petition in the light most favorable to the petitioner, taking all allegations in the petition as true," In Re: Application

for Certificate to Provide Alternative Local Exchange Telecommunications Service by American Phone Corp., Docket No. 981017-TW, Order No. PSC-99-0146-FOF-TX at 2 (Fla. Pub. Serv. Comm'n, January 25, 1999). Moreover, the Commission is required to "resolve every reasonable conclusion or inference in favor of . . . the non-moving party." Meyers v. Jacksonville, 754 So. 2d at 202. Dismissal is "a severe sanction which should be granted only when the pleader has failed to state a cause of action, and it conclusively appears that there is no possible way to amend the complaint to state a cause of action." Id.

SUMMARY OF ARGUMENT

10. FPUC's Second Motion to Dismiss the City's Amended Petition for Formal Proceeding raises essentially one point, that the City has not alleged or explained – to FPUC's satisfaction, at any rate – an immediate injury in fact sufficient to justify its standing to request a formal proceeding on FPUC's TOU and IS rates. Second Motion to Dismiss at 5, 10. Perhaps obviously, the City strongly and vigorously disagrees with FPUC's assertions. While FPUC appears to be trying to argue that the City has to "demonstrate standing" by explaining exactly what its injury is, perhaps in dollar terms, this assertion misstates the standard of review for motions to dismiss. Consistent with the proper standards of review, as well as applicable procedural rules, the City has pled sufficient facts to establish its claims as to immediate injury in fact, within the zone of interests protected by the Commission's statutes and this proceeding, and thereby to establish its standing. Further, the City has pled sufficient facts to state a claim upon which the Commission has the jurisdiction and the statutory mandate to grant relief.

11. The immediate injury alleged by the City is simply this: the City is eligible for fair, just, and reasonable time-of-use and interruptible rates, but the TOU and IS rates that the Commission has approved, albeit on an interim basis, are not fair, just, and reasonable because

they do not reflect either the cost or the value associated with time-of-use or interruptible service; stated differently, the facially obvious inference of these allegations is that the City is entitled to TOU and IS rates that do reflect the cost and value associated with taking time-of-use or interruptible service, and the City is being immediately injured by being deprived of access to such rates. The City is thus being deprived of access to fair, just, and reasonable TOU and IS rates and is entitled to a formal proceeding to vindicate its interests. This is a present, current, real-time, ongoing injury, and the City's interests in remedying this injury will be determined, one way or the other, in this docket. There is nothing speculative about the City's injury: the longer the rates continue in effect, and the longer the time before the situation is remedied, the longer and the greater will be the City's injury, and the City is accordingly entitled to the requested hearing on a timely basis. The City has also alleged that the subject rates are not effective or cost-effective at promoting energy conservation and efficiency, because they are not cost-based, and accordingly, allowing those rates to continue in effect is immediately determining the City's substantial interests, adversely to the City, in having fair, just, and reasonable rates, and immediately depriving the City of its substantive rights under numerous provisions of Chapter 366, Florida Statutes.

12. Although FPUC recognizes the applicability of the Agrico standing test,[4] FPUC has mischaracterized the holding of Agrico by attempting to assert that a "purely economic interest" is not cognizable as a basis for standing. Second Motion to Dismiss at 7. Agrico stands for the proposition that, to give rise to standing, an injury must be within the zone of interests protected by the given proceeding. In the Agrico case itself, the holding was that "injuries to a competitor's profit and loss statement," even though real, were not within the zone of interests to

[4] Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 135 (Fla. 1982).

be protected by Florida's environmental regulatory laws embodied in Chapter 403, Florida Statutes. Agrico, 406 So. 2d at 482. However, the interests protected by Chapter 366, Florida Statutes, are extensively – one might say almost entirely – economic interests: customers' economic interests in having adequate, reliable service provided at fair, just, and reasonable rates, and utilities' corresponding economic interests in having compensatory rates that enable the utility to recover its reasonable and prudent costs of providing service, including a reasonable return on its prudent investments. In other words, the interests protected by Chapter 366 are predominantly and fundamentally economic interests, such that those interests are exactly the type of interests that the vast majority of proceedings before the Commission are intended to protect. Here, the City is a major customer of FPUC, eligible for and taking service under the challenged rate schedules, and the City simply seeks the Commission's protection of the City's substantial economic interests as a customer of FPUC, which interests are squarely within the zone of interests protected by the Commission's statute, Chapter 366, under which this docket is being conducted.

13. FPUC's arguments that the City cannot be harmed because the challenged TOU and IS rates are optional, and because its proposals do not impose a "mandatory rate increase," are spurious at best. The mere fact that a tariff is optional does not exempt it from full Commission scrutiny: the Commission regularly reviews such tariffs and proposed modifications to them, and allows customers eligible for, or taking service under, optional TOU, IS, and other optional rates and riders to intervene in such proceedings. FPUC's argument that the City cannot be injured because the rates "do not result in any mandatory rate increase for the City," Second Motion to Dismiss at 10, is fallacious on its face: just because a proposed tariff (or set of tariffs) does not result in a mandatory rate increase does not mean that the tariffs are fair, just, and

reasonable per se; following this fallacious reasoning, customers would be precluded from challenging a proposed rate decrease even where they wanted to adduce evidence that the hypothesized rate decrease should be greater than that proposed by the utility.

14. FPUC's argument that because the rates challenged here are "experimental," they are exempt from the other requirements of Chapter 366 is misplaced. While a "trial period" is inherent in many experiments, the design of any experiment is subject to challenge, particularly here, where Section 366.075, Florida Statutes, states the criteria that experimental rates may be approved to encourage energy conservation and efficiency. The City disputes that the rates are appropriately designed to accomplish these purposes, and the City is therefore entitled to a hearing on this issue as well as on the issues whether the rates satisfy the general requirements of Chapter 366, i.e., that they be fair, just, and reasonable, taking account of the costs of service and value provided by customers participating under the TOU and IS tariffs.

15. The applicable standards of review require the Commission to deny FPUC's Second Motion to Dismiss because, taking all facts pled by the City as true, viewing the City's petition in the light most favorable to the City, and resolving every reasonable conclusion and inference in favor of the City, the City has clearly pled sufficient facts to establish its standing to request a formal proceeding, including an evidentiary hearing, on FPUC's petition for approval of its TOU and IS rates, and the City has also pled sufficient facts that, taken as true, establish a basis upon which the Commission can grant relief to the City. When the Commission takes as true the City's allegations that the City is a customer of FPUC, that the City is eligible for and taking service under the challenged rates, that the City must accordingly operate under FPUC's rates and rate structures, and that the challenged TOU and IS rates are not fair, just, and reasonable because they are not cost-based, the Commission should readily conclude that the

City has established its standing to challenge the rates, and the Commission should accordingly deny FPUC's Second Motion to Dismiss. To hold otherwise would turn long-standing Commission practice and precedent on its head, and violate the Florida Administrative Procedure Act's due process guarantees to substantially affected parties, by denying a utility's customer the right to challenge the rates that the customer pays and rates under which the customer is entitled to receive service.

ARGUMENT

I. The City of Marianna Has Pled Facts Sufficient to Establish Its Standing and to State a Claim Upon Which the Commission Can Grant Relief.

16. The City has pled sufficient facts that, taken as true, state a claim upon which the Commission can and should grant relief, including sufficient facts to establish that the City is suffering an immediate injury in fact, and that that injury is squarely within the zone of interests protected by numerous provisions of Chapter 366. FPUC has mischaracterized Agrico and at least one Commission order relative to standing, and FPUC's suggested standard of review – that the City must "demonstrate" standing, Second Motion to Dismiss at 8 – simply misconstrues the pleading requirements at issue here. Moreover, FPUC's attempts to avoid full Commission review of the proposed rates on the grounds that the rates are optional, that the City has access to other, "standard" (non-time-of-use or non-interruptible) rates that have been approved by the Commission, that the rates "do not result in any mandatory rate increase for the City," Second Motion to Dismiss at 10, and that the rates are experimental are without merit and, if followed in other proceedings, would lead to untenable and absurd results. The interpretations advanced by FPUC would wander far astray from extensive Commission precedent granting individual customers, including major commercial or industrial customers or individual residential customers, standing to challenge a utility's proposed (and existing) rates and would, if followed,

deprive many customers who take service under time-of-use and interruptible rate schedules of the opportunity to challenge proposed modifications to those rates, based on FPUC's proposed rationale that such customers still have the "ability to receive electric service pursuant to rates approved in accordance with Chapter 366, Statutes." Second Motion to Dismiss at 10. Accordingly, FPUC's Second Motion to Dismiss must be denied.

A. The City Has Pled Sufficient Facts to Establish Its Standing.

17. The City has pled sufficient facts that, taken as true, establish its standing by alleging an immediate injury in fact and that that injury is within the zone of interests protected by this proceeding under Chapter 366, Florida Statutes. Specifically, the City has alleged that:

a. The City is a major customer of FPUC.

b. The City is eligible to take service under 4 of the 5 proposed rate schedules.[5]

c. The City actually takes service under one of the challenged rate schedules.

d. The City, as a major customer of FPUC, has substantial interests in having the Commission ensure that the proposed TOU and IS rates work effectively and cost-effectively to promote energy conservation and efficiency.

e. FPUC's proposed TOU rates are not cost-based, and are therefore not fair, just, or reasonable.

[5] The City is eligible for service under Rate Schedules GST-EXP, GSDT-EXP, GSLDT-EXP, and IS-EXP. The City is also an actual customer under the GSDT-EXP rate schedule that is currently in effect. The City agrees with FPUC that the City does not receive residential service and accordingly that it is not eligible for service under FPUC's proposed RST-EXP rate schedule, and the City does not purport or claim to represent residential customers in this proceeding. The City specifically pled that "[t]he City of Marianna is a substantial customer of FPUC," Amended Petition at 1, and that the "City purchases retail electric service from FPUC through approximately 112 accounts." Amended Petition at 5. The City also pled, in its Amended Petition at 5, that the City is eligible to take service under three of the four TOU schedules as well as under the proposed IS rate.

f. FPUC's TOU rates do not send appropriate price signals that reflect either the costs that FPUC incurs to provide service during on-peak and off-peak periods, or in the seasons of the year, and therefore are not fair, just, and reasonable.

g. FPUC's IS rates are not cost-based and do not reflect the value provided by customers who are willing to be interrupted, and therefore are not fair, just, and reasonable.

h. FPUC's IS rates accordingly do not send appropriate price signals to customers who actually take, or who might consider taking, service under FPUC's IS rates, and therefore are not fair, just, and reasonable.

i. FPUC's proposed TOU rates are not appropriately designed to effectively promote energy conservation or efficiency.

j. FPUC's proposed TOU rates are not appropriately designed to promote energy conservation or efficiency in a cost-effective manner.

k. FPUC's proposed IS rate schedule is not appropriately designed to effectively promote energy conservation or efficiency.

l. FPUC's proposed IS rate schedule is not appropriately designed to promote energy conservation or efficiency in a cost-effective manner.

18. These facts establish: (a) that the City is directly and substantially affected by the Commission's approval of the TOU and IS rates – rates that only exist because of FPUC's effort (inadequate in the City's opinion) to comply with its contractual obligation to the City – because the City is a customer eligible for service under the TOU and IS rates, as well as an actual customer under one of the TOU rate schedules, as well as having substantial interests in the rates doing what they are supposed to do – encourage conservation and efficiency, and (b) that, again

assuming the City's allegations to be true, the City is presently being injured, in fact, because it is presently, currently, and immediately being deprived of access to appropriate, cost-based, fair, just, and reasonable TOU and IS rates. (Relative to Section 366.075, Florida Statutes, the City, as a "general" or "non-participating" customer with respect to the majority of its accounts, is also entitled to have the Commission ensure that any rates for which approval is sought pursuant to that section are effective and cost-effective at promoting energy conservation and energy efficiency, and the City is being deprived of its ability to protect that interest as well.) 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).

19. Of course, the City has already been found by Commission Order No. PSC-11-0129-PCO-EI, to have standing in this docket. That Order specifically stated, "Having reviewed the [City's] Petition, it appears that the City's substantial interests may be affected by this proceeding. There has been no response filed in opposition to this request. Therefore, the Petition shall be granted. Pursuant to Rule 25-22.039, F.A.C., Marianna takes the case as it finds it." 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, in the case of an electric, gas or telephone utility." As noted in the Order Granting Intervention, FPUC did not object to the City's petition to intervene, and the Commission expressly granted the petition. Order No. 11-0129 at 2. Moreover, despite the opportunities expressly provided by the Order, FPUC neither moved for reconsideration nor sought judicial review of the Commission's order granting the City's petition to intervene. Finally, the City believes that FPUC's attempts to

differentiate between standing to intervene and participate in early stages of the proceeding (apparently, in FPUC's view of the world, akin to "interested person" status) and standing to request a hearing are misplaced, and it is clear that FPUC failed to challenge the City's intervenor status as specifically provided for in Order No. 11-0129. The Commission's Order granted the City intervenor status, without limitation other than the notation that the City "takes the case as it finds it." Id.

20. While the City might be required to prove facts sufficient to establish its standing in a formal hearing,[6] all that is required at this point in this proceeding is that the City plead or allege facts that, taken as true, state a claim upon which the Commission can grant relief. It is facially clear that the City has alleged facts that, taken as true, state a claim upon which the Commission can and should, and arguably must, grant relief. FPUC's assertions here that the City does not have, or has not adequately pled, standing are misplaced, and accordingly, its Second Motion to Dismiss must be denied.

21. Moreover, the City has satisfied the express and specific requirement of Rule 28-106.201(2)(e), F.A.C., to include in its petition a "concise statement of ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action." As set forth in its Amended Petition and recited above, the City has alleged numerous specific facts that, taken as true, warrant reversal or modification of the Commission's preliminary action in Order No. 11-0112-TRF-EI. The City is not required to put on its case now, at this preliminary stage of these proceedings, and the City is not required to

[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.

plead every detailed fact that would provide a basis for relief. FPUC's Motion to Dismiss must accordingly be denied.

22. With regard to the injury in fact prong of the Agrico test, at several places in its Second Motion to Dismiss, FPUC asserts that the City did not "identify an injury in fact" that it would incur as a result of the implementation of the challenged TOU and IS rates. Second Motion to Dismiss at 5, 10. FPUC misses the point: the City's injury is that it is presently being deprived of access to fair, just, and reasonable rates – i.e., rates that are "wrong" in that they are not cost-based. The City believes that if the rates were cost-based and if they properly reflected both the cost of providing service and the value that customers, such as the City, would provide to FPUC's system by shifting their consumption patterns in response to appropriate cost-based TOU rates, and the value that customers on the IS rate (or, more aptly, the one customer who might take service under that subscription-limited rate schedule) would provide by being interruptible, they would be appropriate and the City could take advantage of them accordingly. Moreover, the City believes that if the rates were properly designed to promote energy conservation and efficiency, they would send proper price signals reflecting cost to serve and value provided, thereby making them appropriate under the criteria set forth in Section 366.075, Florida Statutes.

23. The Agrico standing test requires that a petitioner be subject to an injury in fact of sufficient immediacy to warrant a hearing, and that the injury be within the zone of interests that the proceeding is designed to protect against (or that the interest that the petitioner seeks to have protected is within the zone of interests to be protected by the proceeding). As to the first prong, the City is experiencing an immediate injury in fact by being deprived of access to fair, just, and reasonable TOU and IS rates. Quite simply, the City is being required to operate under an unfair

rate structure right now. FPUC has mischaracterized the Agrico standing test when it asserted that the Agrico case, and also the Commission's order in FB Energy, hold that a "purely economic interest" is not cognizable as a basis for standing. Second Motion to Dismiss at 7. The issue of economic interests being protected or not goes to the zone of interest prong of the Agrico standing test. Contrary to FPUC's assertion, however, Agrico stands for the proposition that, to give rise to standing, an injury must be within the zone of interests protected by the given proceeding. In the Agrico case itself, the holding was that "injuries to a competitor's profit and loss statement," even though real, were not within the zone of interests to be protected by Florida's environmental regulatory laws, Chapter 403, Florida Statutes. Agrico, 406 So. 2d at 482. However, the interests protected by Chapter 366, Florida Statutes, are extensively – one might say almost entirely – economic interests: the economic interests of customers in fair, just, and reasonable rates, and in adequate, reliable service, and the economic interests of public utilities in having compensatory rates that allow the utility to recover its reasonable and prudent costs. Thus, the City's economic interests in fair, just, and reasonable rates are squarely within the zone of interests to be protected in this proceeding, which directly involves Commission approval or denial (or modification) of the challenged rates.

24. The other case cited (by order number only) by FPUC, FB Energy, held that in a Commission docket to consider approval of a power purchase agreement between a public utility and a renewable energy producer (FB Energy, LLC), a land developer that alleged damages to its business interests and to its environmental interests did not satisfy the Agrico test because it was not a customer of the public utility involved (Progress Energy Florida) and because its alleged business and environmental damages were speculative. FB Energy at 5-6. Significantly, with respect to the standing of customers to protect their economic interests in Commission

proceedings, the Commission also stated in that order, "PEF's ratepayers have a clear interest in this proceeding in that they will be required to pay, through their rates, the approved costs associated with the negotiated contract [with FB Energy]." Id. at 6. Clearly, the City's position is like that of PEF's customers in the FB Energy case, and unlike the position of the non-customer land developer whose petition was properly dismissed in that docket.

25. Additional Commission precedent further supports the City's standing in this proceeding. In a 2011 order, the Commission denied a motion to dismiss filed by a group of telecommunications providers against another telecommunications provider where the non-moving provider (Qwest Communications Company) had alleged that it was subject to unreasonable rate discrimination resulting from secret agreements between the parties that moved for dismissal. In re: Complaint of Qwest Communications Company, Docket No. 090538-TP, Order No. PSC 11-0145-FOF-TP at 5-6 (March 2, 2011). The Commission stated, "Upon review of the parties' arguments and consistent with our previous decision [footnote omitted], we find that the Movants' Motion to Dismiss shall be denied because Qwest's petition established sufficient factual allegations, which, when taken in the light most favorable to Qwest, state a cause of action which is not subject to dismissal. An evidentiary hearing will allow us to determine whether the Movants engaged in anticompetitive behavior and unlawful rate discrimination." Id. at 6-7. Further, in a 2009 order, the Commission denied a motion to dismiss filed by AT&T against Cbeyond Communications, LLC, another telecommunications provider, where Cbeyond alleged injuries that, Cbeyond claimed, resulted from "cramming" of customers by AT&T and petitioned the Commission to "open an investigation to determine the magnitude and extent of this [cramming] problem as it affects customers who are attempting to leave AT&T," even though Cbeyond had not even sought relief for any bills sent to Cbeyond by

AT&T. In re: Complaint by Cbeyond Communications Against BellSouth Telecommunications, Docket No. 090135-TP, Order No. PSC-09-0382-PCO-TP (May 29, 2009) at 2-4. The City suggests that the injury alleged by Cbeyond, which gave rise to Cbeyond's standing to request an investigation of AT&T's cramming practices, is much more remote than the direct and current injury alleged by (and currently being experienced by) the City in the instant docket.

B. FPUC's Suggested Standard of Review Misconstrues the Applicable Pleading Requirements.

26. FPUC's assertion that the City has not demonstrated standing (Second Motion to Dismiss at 8) misses the point and misconstrues the applicable standards: the City is not required to demonstrate standing, but rather, the City is only required to allege facts that, taken as true, viewed in the light most favorable to the City, and with all reasonable conclusions and inferences resolved in the City's favor, would state a claim upon which the Commission can grant relief. Varnes v. Dawkins at 350; Meyers v. Jacksonville at 202; FB Energy at 2; American Phone Corp. at 2; Qwest Communications at 5-6; Cbeyond v. BellSouth at 4. The City has fully satisfied its burden of pleading sufficient facts that state a claim for relief that the Commission has the jurisdiction and the mandate to grant, and accordingly, FPUC's Second Motion to Dismiss must be denied.

C. The City Has Stated a Claim Upon Which the Commission Can Grant Relief.

27. The City has 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 FPUC's rate proposals, or the alternate relief of fixing and determining fair, just, and reasonable TOU and IS rates based on evidence presented at hearing. In the context of utility rates subject to the Commission's jurisdiction under Chapter 366, to state a claim upon which the Commission can grant relief, the petitioner must simply allege that the petitioner is subject to, or entitled to,

service under the challenged rates, that the rates are wrong, e.g., not fair, just, and reasonable (or that such rates are unduly discriminatory or otherwise in violation of law) and that the Commission has jurisdiction to make the rates right, and then to ask the Commission to take appropriate action, i.e., either to deny the challenged rates or to fix and determine the fair, just, and reasonable rates to be charged by the utility. See Sections 366.04(1), 3660.5(1), 366.06(1), and 366.07, Florida Statutes.

28. The City has specifically and concisely stated a claim upon which relief can be granted: that FPUC's TOU and IS rates, which are presently in effect, are not fair, just, and reasonable because they are not cost-based; that the City is eligible for service under 4 of the 5 challenged rate schedules; that the City is an actual customer under one of the challenged TOU rate schedules; that the City is entitled to have the Commission ensure that the challenged rates are fair, just, and reasonable; that the City is further entitled to have the Commission ensure that, relative to Section 366.075, Florida Statutes, any proposed "experimental" rates are effective and cost-effective at promoting energy conservation and energy efficiency; and that the Commission has the statutory jurisdiction and mandate to grant the relief requested.

29. The Commission has the statutory authority and mandate to grant the relief requested: Section 366.04(1), Florida Statutes, provides that the Commission has "jurisdiction to regulate and supervise each public utility with respect to its rates and service." Section 366.041, Florida Statutes, provides that "the commission is authorized to give consideration, among other things, to . . . the cost of providing such service and the value of such service to the public." Section 366.06(1), Florida Statutes, directs the Commission to consider the cost of providing service and the value of service, as follows: "In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing

service to the class, as well as the . . . value of service . . . ." Relative to this provision, the City specifically alleged the following in its Amended Petition at page 19: "The rates proposed by FPUC are not cost-based and do not reflect the value that customers will create by modifying their consumption, either by shifting their times of use or by being interrupted, and accordingly, the cited statutes warrant denial of FPUC's proposed TOU and IS rates." The City has alleged all of these factors, and the City has respectfully asked the Commission for appropriate relief within the Commission's jurisdiction to grant. Accordingly, FPUC's Second Motion to Dismiss must be denied.

D. The Optional Nature of the Challenged TOU and IS Rates Does Not Exempt Them From the Substantive Requirements of Chapter 366, Florida Statutes.

30. The optional nature of the challenged TOU and IS rates does not exempt them from the requirement that they be fair, just, and reasonable. Surely the Commission, in considering the TOU and IS rates that are offered by Florida's other investor-owned utilities, routinely takes evidence as to whether those rates are fair, just, reasonable and cost-based whenever any of those rates, or proposed amendments to those rates, come before the Commission. The Commission also allows routinely intervention by customers taking service under, or eligible for, such rates, notwithstanding the fact that almost all TOU and interruptible service tariffs are optional. The fact that those TOU and IS rates are optional does not exempt them from full, normal scrutiny by the Commission, and the fact that they are optional does not remove the City's injury in being deprived of access to fair, just, and reasonable time-of-use and interruptible rates that are cost-based and reflect the value provided by participation under such rate schedules. FPUC's Second Motion to Dismiss must be denied.

31. FPUC also argues that because the challenged TOU and IS rates are optional, and because the implementation of the challenged rates does "not impair the City's ability to receive

electric service pursuant to rates approved in accordance with Chapter 366, Florida Statutes," the City cannot be sustaining any injury. Second Motion to Dismiss at 9, para. 20, and 10, para. 22. In other words, FPUC argues that since the challenged rates are optional and since the City has other options (the standard, non-time-of-use rates) available, the City cannot experience any actual harm. This argument is spurious and misplaced, and this reasoning would lead to absurd results: if customers lacked standing to challenge a TOU rate or an interruptible service rate because standard rates were available, then no large industrial customer, either served under or desiring service under a TOU or interruptible tariff, would have standing to assert claims regarding the propriety of those rates. There are dozens of customers on interruptible and other non-firm rates in Florida, and hundreds, if not thousands, of commercial and industrial customer accounts in Florida who are served under TOU rates, and it is absurd and unthinkable that the Commission would even entertain the suggestion that those customers lack standing to challenge provisions of those tariffs. The City of Marianna is no different: it is a large, major customer of FPUC – probably the largest customer in FPUC's Northwest Division – and the Commission must recognize that the City has standing to challenge the rates in tariff schedules for which the City is eligible and under which the City takes service.

32. In short, it doesn't matter whether a proposed rate is optional: even an optional rate must be fair, just, and reasonable. Moreover, it doesn't matter that an eligible customer does not have to take service under a challenged tariff; what matters is that the customer is in fact eligible for that service, which gives rise to the customer's standing to request a formal hearing to ensure either that the rates are fair, just, and reasonable, or that they are not approved. FPUC's arguments are spurious and misplaced, and its Second Motion to Dismiss must be denied.

E. The Fact That the Challenged TOU and IS Rates Do Not Impose a Mandatory Rate Increase on the City Does Not Exempt Those Rates from Full Commission Scrutiny.

33. FPUC also argues that the City cannot be injured because the rates "do not result in any mandatory rate increase for the City," Second Motion to Dismiss at 10. This argument is closely related to its argument that no injury can befall the City because the rates are optional. Like FPUC's "optional rates cannot cause injury" argument, its "no mandatory rate increase" is fallacious on its face: just because a proposed tariff (or set of tariffs) does not result in increased rates does not mean that the tariff (or tariffs) is fair, just, and reasonable per se, and accordingly, the fact that rates are optional does not mean that a substantially affected customer is not entitled to demand that the Commission require such optional rates to comply with the statutes. Following FPUC's fallacious reasoning, customers would be precluded from challenging a proposed rate decrease even where they wanted to adduce evidence that the hypothesized rate decrease should be greater than that proposed by the utility.

34. In fact, the Commission has considered cases where customers wanted greater rate decreases than those sought by a public utility. In Docket No. 870220-EI, In re: Request by Occidental Chemical Corporation for Reduction of Retail Rates Charged by Florida Power Corporation, Occidental Chemical Corporation, incidentally a customer of the public utility involved, initiated a rate case in which it sought to reduce Florida Power's rates by $362.6 million per year. The Commission ordered Florida Power to file Minimum Filing Requirements, which included proposed rate schedules that would have reduced its annual base rate revenues by $61.7 million. The consumer parties in the case naturally believed that the reduction should be greater. Eventually, on the day of the scheduled prehearing conference, the parties reached a settlement that provided for a permanent rate reduction of $121.5 million per year, plus a one-time flow-through to customers of $18.5 million of excess deferred income taxes. Order No. 18627, "Order Approving Joint Motion for Approval of Settlement" (January 4, 1988).

35. Obviously, the outcome was a rate reduction greater than that advocated by the utility. Following FPUC's reasoning that no injury can occur where there is no "mandatory rate increase," this case could not have proceeded. This is an absurd result, and the Commission should accordingly reject FPUC's spurious assertion and deny its Second Motion to Dismiss.

F. Experimental Rates Are Not Exempt from the Substantive Requirements of Chapter 366, and the Design of Such Rates Must Be Consistent with the Criteria Set Forth in that Statute.

36. The fact that FPUC has sought approval of the TOU and IS rates as "experimental" rates under Section 366.075, Florida Statutes, does not exempt those rates from the other substantive requirements of Chapter 366, nor does it insulate the proposed "experiment" from scrutiny – and testing by evidence in a hearing – as to whether the design of the "experiment" is proper and consistent with the criteria in Section 366.075, Florida Statutes. Section 366.075 provides no exception or exemption for experimental rates from the basic requirements of the Commission's statutes relating to electric rates, including the provision of Section 366.03, Florida Statutes, that "all rates and charges . . . shall be fair and reasonable" or the Commission's jurisdiction and mandates to fix and determine fair, just, and reasonable rates for services provided by public utilities. Moreover, Section 366.075 does not prohibit the Commission from considering all of the factors set forth in Section 366.041, Florida Statutes, and other applicable provisions of the Statutes, in acting on proposed experimental rates. Accordingly, the City's claims that the rates must be fair, just, and reasonable, and that the Commission must at least consider cost and value in making any determination regarding the rates, are well-founded, and the City is entitled to the formal proceeding that it has requested.

37. Moreover, while an experiment generally contemplates doing something and then testing the results of that action, this "trial period" concept advanced by FPUC does not exempt

the alleged "experiment" from challenge as to whether it is appropriately designed, as specifically alleged in the City's Amended Petition. The idea that an experiment should be appropriately designed to test something, considering what it is supposed to accomplish – here, whether the rates would promote energy conservation and efficiency – is a fundamental precept of any reasonable approach to experimentation, and the Commission should follow it here by examining whether the proposed TOU and IS rates are, as a matter of fact, appropriately designed to encourage energy conservation and efficiency as required by Section 366.075, Florida Statutes. The Commission should also consider, as matters of fact, whether the proposed rates satisfy the other substantive requirements of Chapter 366, Florida Statutes.

38. To the extent that FPUC's argument that an assessment of whether the challenged TOU and IS rates send appropriate price signals cannot be made until those rates have been in effect for some period of time is a continuation of FPUC's assertions that a hearing at this point in time is premature, the City rejects such an assertion: a timely hearing is fully appropriate, in due course according to the Commission's procedures and calendar, because there is a present factual dispute as to whether the rates that are now in effect are appropriately cost-based, fair, just, and reasonable, and there is also a present factual dispute as to whether the challenged rates are appropriately designed to reflect cost to serve and value provided, as well as whether the challenged rates are appropriately designed to promote energy conservation and efficiency, which is the criterion of Section 366.075, Florida Statutes. Accordingly, the Commission must deny FPUC's Second Motion to Dismiss.

39. If FPUC wishes to assert that its TOU and IS rates, even though they do not accurately reflect the costs that FPUC incurs to provide those services on a time-of-use or interruptible basis, do in fact send "appropriate price signals," e.g., because they may induce

some desired customer responses, FPUC is free to make that argument in its testimony and briefs. By the same token, the City can – and will – argue through its testimony and briefs that the rates do not and cannot send accurate price signals to customers because they do not reflect either the cost to serve or the value provided by customers who might shift their usage patterns. The Commission can then decide, based on competent substantial evidence of record, whether the rates are appropriate as experimental rates, and appropriately designed to promote conservation and efficiency, and make its decision accordingly. Regardless, this is a matter to be determined based on evidence of record in an evidentiary proceeding, and FPUC's Second Motion to Dismiss must be denied.

CONCLUSION

As explained above, the City of Marianna has pled facts that, taken as true, are sufficient to establish its standing, namely that it is a customer of FPUC eligible to take service under all but one of the rate schedules that the City opposes in this proceeding, and that the City is presently being deprived of access to fair, just, and reasonable TOU and IS rates, and the City has plainly stated a claim upon which relief can be granted, namely that the rates for which the City is eligible are not fair, just, and reasonable because they are not cost-based, and that the Commission has the jurisdiction, authority, and mandate to deny those rates (or to "fix and determine" proper rates) accordingly. FPUC's arguments that the City cannot have a cognizable injury in fact because the challenged rates are optional and because those rates do not impose a mandatory rate increase are spurious and fallacious, and the Commission should reject them accordingly. FPUC's argument that the challenged rates are not subject to full scrutiny because they are nominally experimental is likewise misplaced. FPUC's Second Motion to Dismiss must accordingly be denied.

RELIEF REQUESTED

WHEREFORE, as explained in the foregoing, the City of Marianna respectfully asks the Commission to deny FPUC's Second Motion to Dismiss and to continue this docket in accordance with the Commission's normal procedures

Respectfully submitted this 19th 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 19th day of August, 2011, to the following:

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