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JACK SHREVE
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July 5, 2001

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 000824-EI

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Public Counsel's Response in Opposition to Florida Power Corporation's Motion for Reconsideration. A diskette in WordPerfect 6.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

John Roger Howe
Deputy Public Counsel

CJB:bsr

Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light	)	Docket No. 000824-EI Filed: July 6, 2001

PUBLIC COUNSEL'S RESPONSE IN OPPOSITION TO FLORIDA POWER CORPORATION'S MOTION FOR RECONSIDERATION

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 25-22.060, Florida Administrative Code, respond in opposition to Florida Power Corporation's Motion for Reconsideration of the Requirement in Order No. PSC-01-1348-PCO-EI to Hold Revenues Subject to Refund, filed July 2, 2001, which should be denied for the following reasons:

1. The interim rate-setting procedures first sanctioned by the Florida Supreme Court and now codified in statutes have always been distinct from other ratemaking practices. Florida Power's motion fails to appreciate either the procedural or substantive differences involved in capturing excessive revenues for its customers' protection after a docket was initiated to lower the company's rates. The $114 million ordered held subject to refund was quantified consistent with the statutory process defined by Section 366.071, Florida Statutes (2000), and did not result from any mistake of fact or law. The interim decrease ordered by the Commission is, if anything, inadequate to protect the utility's customers while this docket winds its way to resolution.

2. The 1973 Southern Bell[1] case gave rise to the make-whole standard for interim rate relief now reflected in Section 366.071. In that case, Southern Bell was not seeking to change its allowed return on equity (ROE). Higher rates were sought only because Southern Bell wanted to continue earning the same return the Commission had previously found in the last rate case to be fair and reasonable. The company simply wanted to make up for an erosion of earnings since that time. The Commission, however, felt constrained by its own prior orders which only allowed for interim relief in emergency financial situations. The Florida Supreme Court disagreed, finding that, since Southern Bell had made out a prima facie case to be made whole, the Commission had to grant rate relief on at least an interim basis pending the outcome of the full case.

3. In 1974, the file-and-suspend statutes were enacted in Chapter 74-195, Laws of Florida. (File-and-suspend for electric utilities is now codified in Section 366.06(3).) The Florida Supreme Court found that the Commission could exercise its discretion within a range of alternatives implicit within those statutes. If the Commission could suspend proposed rates altogether or allow them to go into full effect during the pendency of the proceeding, it could certainly find a middle ground in the form of interim rates (even though the word "interim" did not appear in the law).[2] The Court also found that the make-whole standard from the Southern Bell case was an appropriate way to quantify interim rates even when utilities were not asking to

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[1] Southern Bell Telephone & Telegraph Co. v. Bevis, 279 So. 2d 285 (Fla. 1973).

[2] Citizens of the State of Florida v. Mayo, 333 So. 2d 1 (Fla. 1976).

maintain the status quo but were instead seeking a higher ROE.[3] Now utilities might be brought up to their last allowed ROE in any full-blown rate case (presumably, even one in which a possible outcome was a reduction in both rates and ROE). Interim rates, which were first defined as a way to avoid the problem of retroactive ratemaking in a make-whole case, were now an integral part of the file-and-suspend procedures for all base rate cases. Electric utilities might be entitled to higher, interim rates without regard to any concerns for administrative finality attaching to earlier orders setting permanent rates at a lower level.[4]

4. The Office of Public Counsel, in the United Telephone[5] case, argued that, if utilities could get interim rate increases, then customers were entitled to interim rate decreases when a utility's earnings exceeded the ceiling of the last allowed ROE range. The Commission agreed, but because of the difficulty in getting money back from customers if too much was refunded, rates were merely conditioned subject to refund pending the outcome of the rate case. The make-whole standard for both interim rate increases and interim rate decreases since 1980

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[3] Maule Industries, Inc. v. Mayo, 342 So. 2d 63, 68 (Fla. 1976). In the Southern Bell case, 279 So. 2d at 286, the court had found the Commission's reliance on the emergency-financial-need standard from prior Commission cases was inappropriate because those cases involved utilities asking to increase both their rates and their ROE. In Maule Industries, the make-whole standard was found acceptable for those very cases.

[4] The doctrine of administrative finality (Motion, at 6-7) has never been extended to interim rate procedures which necessarily evaluate the adequacy of prior rates established in a "final" order to achieve the intended ROE. Although unstated, this is probably because interim rate awards do not independently modify previous orders. Interim rate orders are, instead, just part of the process leading to the next "final" order.

[5] United Telephone Co. v. Mann, 403 So. 2d 962 (Fla. 1981). This case is notable because the court upheld the Commission's authority to impose an interim rate decrease without referring to the file-and-suspend statute for the telephone industry, thus seeming to find the authority for interim rate decreases resides within the Commission's overall regulatory powers.

has been embodied in the various utility industry interim statutes, such as Section 366.071. One question that remains unanswered is whether the adoption of specific statutes on the subject limited the Commission's discretion to continue setting interim rates pursuant to the file-and-suspend statutes or its general ratemaking jurisdiction.

5. Throughout this process of development, interim procedures were recognized as something outside the normal rate-setting mainstream, often referred to as "quick and dirty" evaluations based upon the Commission's own expertise. This practice is made permissible by an exemption to Chapter 120, Florida Statutes (2000), the Administrative Procedure Act (APA):

> Notwithstanding any provision of this chapter, all public utilities and companies regulated by the Public Service Commission shall be entitled to proceed under the interim rate provisions of Chapter 364 or the procedures for interim rates contained in chapter 74-195, Laws of Florida, or as otherwise provided by law.
>
> Section 120.80(13)(f), Florida Statutes (2000).

Whether the Commission follows the file-and-suspend route or uses the subsequently enacted interim statutes, procedures for setting interim rates are outside the APA.[6] (The first page of each agenda conference notice has, for many years, allowed for participation by affected parties "other

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[6] Even in the 1973 Southern Bell case, 279 So. 2d at 287, the court had found that setting interim rates "must be considered as the other provisions of law which the Administrative Procedure Act specifically excepts." In Citizens v. Mayo, 333 So. 2d at 4, it was the Public Counsel who argued unsuccessfully for full due process in all interim rate proceedings. In Citizens v. Public Service Commission, 425 So. 2d 534, 540 (Fla. 1982), an appeal of a Florida Power Corporation case, the court evaluated its decision in United Telephone v. Mann, 403 So. 2d 962, and said in that case "[t]he Court was clearly upholding the Commission's discretion to determine, on a case by case basis, what evidence it will consider in fixing interim rates." Florida Power cites (Motion, at 20) to United Telephone Co. of Florida v. Beard, 611 So. 2d 1240 (Fla. 1993), for the proposition that due process rights attach to interim decisions. But in that case, the Court agreed with the Commission's decision not to proceed under the interim statute. Having decided on that approach, the Commission could not invoke any similarity its conceptual approach had to the interim statute to avoid a hearing.

than actions on interim rates in file and suspend cases.") Thus, the due process arguments which lie at the heart of Florida Power's motion are simply inapplicable in the interim-rate-setting context. The motion for reconsideration is an attempt by Florida Power to introduce the company's positions on issues into a process where the Commission is free to exclude them. There simply is no requirement for the "meaningful input by FPC" (Motion, at 2) the company is now insisting upon.

6. In addition to being wrong on the procedures, Florida Power is also wrong on the facts. The interim statute for electric utilities uses current financial data and last-rate-case principles to quantify interim revenue requirements. The result is a quick-and-dirty, temporary, mini-rate-case decision often made without participation by either the company or its customers. The interim award results in prospective rates (or a refund condition imposed on current rates) which, within the constraints of the interim process, are established on the same basis as permanent rates.

7. The statutory requirement for adjustments consistent with the last rate case precludes blind acceptance of self-serving surveillance reports. Permissible expenses recorded in the past do not give Florida Power license to avoid an interim decrease before a permanent rate reduction is ordered. The issue is not the company's "reported" earnings for the previous twelve months. It is the "calculated" earnings using adjustments from the last rate case required by Section 366.071(5)(b). Contrary to Florida Power's assertions (Motion, at 4), the Commission need not "demonstrate that the public utility did in fact earn too much in the prior 12-month period." The Commission need only find that calculations permitted by statute allow it to order monies held subject to refund pending the outcome of the full case. The intended result is to

avoid regulatory lag (and the retroactive ratemaking prohibition) by making rate changes conditionally effective at an early stage of a protracted, eight-month process.[7] That the Legislature may appear to have created an artificial construct in the eyes of one utility is beside the point.

8. The limitations inherent in interim evaluations pursuant to Section 366.071 are obvious in this proceeding -- and they work to Florida Power's benefit. Anyone with an understanding of the financial world at large knows that a 13% ROE is excessive today. In all likelihood, the midpoint ROE that is used to set permanent rates at the end of this case will be substantially below 13%. Yet, because of the workings of the interim statute, Florida Power does not have nearly enough money held subject to refund -- even after the Commission adjustments Florida Power is complaining about -- to reduce its earnings during the pendency of this proceeding to the level that will be found just and reasonable on a going-forward basis. An argument could certainly be made that the Commission, based upon its inherent authority recognized in case law, should increase the amount held subject to refund to protect customers down to a return level more in keeping with current financial conditions.

9. The discretionary Tiger Bay amortization was properly excluded as an expense to calculate Florida Power's earnings because: (1) it was not an adjustment made in the last rate case (it does not even arise out of the last case); (2) it is not a predictable recurring expense for the future; (3) it is not the type of expense the Commission has allowed when evaluating interim rate relief; (4) while paragraph 2(e) of the stipulation does provide for inclusion of the

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[7] "The purpose of section 366.06(4) [now (3)], which gives the Commission the authority to award interim relief, is to protect utilities from the 'regulatory lag' associated with full blown rate proceedings." Citizens v. Public Service Commission, 425 So. 2d at 540.

amortization for surveillance purposes, the stipulation does not provide for the discretionary amortization to be treated as a recurring or otherwise recoverable expense in any future rate proceeding, whether interim or permanent; and (5) allowance of a discretionary expense would prevent the Commission from complying with its statutory duties because it could not know whether the amounts captured subject to refund would permit Florida Power to earn above the ceiling of its last ROE range during the pendency of this proceeding. Moreover, the discretionary Tiger Bay amortization was implicitly tied to the potential for excess earnings until the next rate case, a proposition which expired with the creation of this docket. Further, the possibility that the Commission might allow for some accelerated Tiger Bay amortization in permanent rates is not sufficient to deviate from established policy with regard to interim rates.

10. The $10.7 million for prior period flow-through of taxes was also properly excluded from the calculation of interim revenues subject to refund. The fact that staff may have asked that the expense be recorded does not alter its character as a nonrecurring expense when the issue is reasonable earnings for the future. The Commission does not have to pretend it was a recurring expense eligible for future recovery if reflected in a test year used for either interim or permanent rates, or both.

11. The equity ratio adjustment for CR3 was properly discontinued for interim purposes. It was not made in the last rate case. Its continued viability is not established in the stipulation. And it may or may not be allowed by the Commission when permanent rates are established. In short, it is precisely the type of questionable adjustment requiring record development, and for this very reason, it is not appropriately decided at the interim stage.

12. Florida Power also misses the point about its severance pay expenses. It is not an issue of whether the return on equity for a past period was reported correctly. It is an issue whether such nonrecurring expenses should be allowed to affect rates prospectively. To allow the expenses would assume that Florida Power will continue to incur such expenses and that disallowance of the expenses would prevent the company from earning a fair return on its investment in the future. Yet the Commission (and everyone else) reasonably believes just the opposite to be true. If severance pay were allowed, Florida Power is guaranteed to overearn during the pendency of this proceeding, the very thing interim rate decreases are expected to militate against.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to deny Florida Power Corporation's Motion for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 000824-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing PUBLIC COUNSEL'S RESPONSE IN OPPOSITION TO FLORIDA POWER CORPORATION'S MOTION FOR RECONSIDERATION has been furnished by U.S. Mail or *Hand-delivery to the following parties on this 6th day of July, 2001.

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