

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Rate Increase
by Tampa Electric Company

DOCKET NO. 080317-EI

FILED: November 21, 2008

**FLORIDA INDUSTRIAL POWER USERS GROUP'S RESPONSE TO TAMPA
ELECTRIC COMPANY'S MOTION FOR SUMMARY FINAL ORDER**

On November 14, 2008, Tampa Electric Company (TECO) filed a motion asking this Commission to remove the Florida Industrial Power Users Group (FIPUG) from this case. TECO is attempting to bar FIPUG's ability to participate in a proceeding in which TECO seeks a rate increase of over \$228 million, a return on equity of 12%, elimination of the interruptible rate schedules, and the adoption of a new cost of service methodology. TECO would like to turn the Commission's attention away from the substance of its requests and stop the Commission from hearing the views of the industrial segment of TECO's customer base, a group that has a long history of participation in proceedings before this Commission and which brings a unique view to many of the issues the Commission will consider.

TECO's motion is procedurally and substantively flawed and should be summarily denied. FIPUG has standing to participate in this case.

I. TECO'S MOTION MUST BE DENIED BECAUSE IT IS PROCEDURALLY FLAWED.

TECO's motion is procedurally flawed and must be denied on that basis alone. First, TECO has attempted to unlawfully and artificially extend the time frame in which to object to or move to dismiss FIPUG's petition to intervene. Rule 28-106.204(2) states that "motions to dismiss the petition or request for hearing shall be filed no later than 20 days after service."

FIPUG filed and served its petition to intervene (by electronic mail) in this docket on August 26, 2008. Thus, pursuant to rule 28-106.204(2), Florida Administrative Code, TECO's last date to file a motion to dismiss FIPUG's petition was September 15, 2008. No motion to dismiss FIPUG's petition was timely filed. By calling its pleading a "Motion for Summary Final Order on FIPUG's Lack of Standing," TECO hopes to skirt the clear requirement that all motions to dismiss must be filed no later than 20 days after service. Such procedural maneuvering, in an attempt to prevent FIPUG from participating in the case, must fail.

II. TECO'S MOTION MUST BE DENIED BECAUSE IT IS SUBSTANTIVELY FLAWED.

A. THE NATURE OF FIPUG.

As a preliminary matter, FIPUG is compelled to point out that it has participated in almost every major electric proceeding that this Commission has conducted for close to thirty years. Despite TECO's derogatory comments, FIPUG is an "ad hoc" association and as such is permitted to, and often has, appeared before the Commission. The fact that FIPUG is an ad hoc association simply means that, depending on the issue or the proceeding, FIPUG companies decide whether it is in their interest to participate in a particular matter. Of course, this depends on what the issue is as well as how each company chooses to utilize its limited resources. Such a structure is not a bar to standing, and is in fact an effective and efficient way to participate in Commission proceedings which can be lengthy, complicated and expensive.¹

FIPUG also notes that when TECO (belatedly) contacted the other parties to this proceeding in regard to its request that FIPUG be tossed out of the case, each party – the Office

¹ TECO claims that FIPUG is an "ever changing group," as though this is somehow problematic. Membership changes in most associations, which are not static entities, but whose participants come and go, depending on their resources and business needs.

of Public Counsel, AARP, the Attorney General's Office, and the Florida Retail Federation -- opposed the motion.

FIPUG has presented the Commission with the unique viewpoint of large industrial consumers in the state of Florida and believes that it has provided valuable and helpful information to the Commission. These consumers not only pay tremendous power bills each month, and thus have a substantial stake in proceedings in which rates and rate structure decisions are made, they also make significant contributions to the communities and tax bases of the areas in which they are located. These companies help fuel the economic development engine of this state and are integral to the functioning of the state's economy. For TECO to suggest that some of its largest customers cannot participate before this Commission and make their views and positions known is an affront to these companies.

TECO seeks to deny FIPUG the right to provide input into proceedings that will substantially affect it as well as preclude the Commission from hearing from some of Florida's largest energy consumers. If TECO's requests for a \$228 million rate increase and drastic cost of service changes are granted, FIPUG members will suffer real and immediate injury in fact in the form of higher electricity rates – rate increases of over 130%! And according to TECO, that should happen without FIPUG being able to utter a single word.

TECO's main complaint appears to be that FIPUG is not a "real" association but is attempting to hide behind "the cloak of a fictitious name."² This assertion is not only without merit, it is misleading. As noted above, FIPUG has appeared before this Commission representing industrial customers for decades. It is not a secret rogue cabal as TECO intimates. The names of the FIPUG companies participating in this case were provided to TECO and to the Commission when FIPUG responded to TECO's discovery request.³ FIPUG is not a group operating "behind a veil of secrecy."⁴ TECO is well aware of who the participating FIPUG companies are – they are some of TECO's largest customers; customers who TECO seeks to bar from its rate case!

B. LEGAL STANDARD FOR INTERVENTION.

The Commission itself has already done the appropriate standing analysis in its order granting FIPUG intervention in this case.⁵ The Commission stated:

It appears that FIPUG meets the two prong standing test in Agrico as well as the three prong associational standing test established in Florida Home Builders. FIPUG asserts that it is an *ad hoc* association consisting of industrial users of electricity in TECO's territories and that the cost of electricity constitutes a significant portion of these customers' overall costs of production. FIPUG further states that this is the type of proceeding designed to protect its members' interests. Therefore, FIPUG's members meet the two prong standing test of Agrico.

With respect to the first prong of the associational standing test, FIPUG asserts that its members are retail electric customers of TECO and that its members' substantial interests will be directly affected by the Commission's decision in this proceeding. With respect to the second prong of the associational standing test, the

² TECO motion at 3.

³ FIPUG's reluctance to provide such names to TECO stemmed from its attempt to protect FIPUG companies from harassment from TECO due to their participation in this rate case.

⁴ TECO motion at 3.

⁵ Order No. PSC-08-0597-PCO-EI.

subject matter of the proceeding appears to be within FIPUG's general scope of interest and activity. FIPUG is an *ad hoc* association whose members are industrial consumers of electricity in Florida. FIPUG contends that its members will be directly affected by the proposed rates. Furthermore, FIPUG has been granted party status in similar proceedings, such as the Progress Energy Florida rate case. As for the third prong of the associational standing test, FIPUG is seeking intervention in this docket to represent the interests of its members in reviewing the prudence of the proposed rate increase and to ensure that the rates its members pay to TECO are just and reasonable. Because those costs affect the electric rates that its members must pay, FIPUG appears to be in a position to request the Commission to grant relief on behalf of its members.

Because FIPUG meets the two prong standing test established in Agrico as well as the three prong associational standing test established in Florida Home Builders, FIPUG's petition for intervention shall be granted. Pursuant to Rule 25-22.039, F.A.C., FIPUG takes the case as it finds it.⁶

Thus, as the Commission found in its intervention order in this case, FIPUG's Petition to Intervene was appropriately filed pursuant to rule 25-22.029(3), Florida Administrative Code, as it is "[o]ne whose substantial interests may or will be affected by the Commissions' proposed action may file a petition. . . ."

The substantial injury FIPUG alleges is of sufficient immediacy. Further, it is the type of injury which these proceedings are designed to protect against. The Commission is constitutionally tasked to protect consumers while preserving an adequate supply of electricity for all Floridians.

Nowhere does *Agrico* or *Florida Home Builders* require that an association be a registered corporate entity or a partnership in Florida or in any other state. TECO, however, without legal basis, appears to suggest that this is a requirement to appear before the

⁶ Order No. PSC-08-0597-PCO-EI at 2, emphasis supplied, footnote omitted.

Commission. To the contrary, such a requirement would unduly burden trade groups and restrict their rights to petition government and participate in proceedings, such as this one, which directly affect them. While TECO argues that an “ad hoc” association cannot maintain association standing, as discussed below, the Commission has granted standing to FIPUG, and others, on that very basis many times.

C. THE COMMISSION HAS REGULARLY AND ROUTINELY GRANTED FIPUG, AND OTHER SIMILAR GROUPS, INTERVENOR STATUS IN ITS PROCEEDINGS.

This Commission has granted FIPUG intervenor status in many proceedings. The Commission has recognized that FIPUG has standing as a party pursuant to the above-referenced tests. FIPUG regularly participates in Commission dockets regarding rate increases, rate structure, and energy policy, as well as the annual fuel adjustment proceedings. To deny FIPUG standing would eliminate a significant consumer voice for adequate, reasonable energy rates and supply.

Further, in granting FIPUG intervenor status, the Commission has *explicitly* recognized the fact that FIPUG is an *ad hoc* association. As recently as September 16, 2008, in the intervention order in this case, the Commission held:

It appears that FIPUG meets the two prong standing test in *Agrico* as well as the three prong associational standing test established in *Florida Home Builders*. . . . FIPUG is an *ad hoc association* whose *members* are industrial consumers of electricity. . . .⁷

In addition, FIPUG has been granted party status in dockets which are too numerous to mention. A representative list is provided below:

⁷ Order No. PSC-08-0297-PCO-EI, emphasis added. Though the term “ad hoc association” is used two times in the intervention order, TECO did not seek reconsideration of that order. Its time to do so has long run. *See*, rule 25-22.0376, Florida Administrative Code.

- *In re: Nuclear cost recovery clause*, Order No. PSC-08-0297-PCO-EI. FIPUG was granted intervenor status in a proceeding addressing the ability of Florida Power and Light Company and Progress Energy Florida, Inc. to recover certain costs associated with nuclear power plant construction. The Commission held: “FIPUG has been granted party status in similar proceedings, such as the Commission’s annual fuel clause proceedings.”
- *In re: Petition for authority to recover prudently incurred storm restoration cost related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company*, Order No. PSC-04-1207-PCO-EI. FIPUG was granted intervenor status in an action where FPL sought to assess and collect storm restoration costs.
- *In re: Petition for exemption under Rule 25-22.082(18), F.A.C., from issuing request for proposals (RFPs) by Florida Power & Light Company*, Order No. PSC-06-0630-PCO-EI. FIPUG was granted intervenor status in a FPL action to pass through costs to consumers. The Commission held: “Upon consideration of FIPUG’s petition to intervene, it appears that FIPUG’s substantial interests may be affected by this proceeding.”
- *In re: Petition for determination of need for expansion of Crystal River 3 nuclear power plant, for exemption from Bid Rule 25-22.082, F.A.C., and for cost recovery through fuel clause, by Progress Energy Florida, Inc.*, Order No. PSC-06-1044-PCO-EI. FIPUG was granted intervention in a Progress energy action seeking an exemption from the bid rule.

- *In re: Petition for rate increase by Progress Energy Florida, Inc.*, Order No. PSC-05-0284-PCO-EI. FIPUG’s petition to intervene was granted in this rate case.
- *In re: Fuel and purchased power cost recovery clause and generating performance incentive factor*, Docket Nos. 080001-EI, 070001-EI, 060001-EI, 050001-EI, 040001-EI. The Commission said: “FIPUG participated as an intervenor [in these dockets] on issues regarding electric rates its *ad hoc* members would pay for the succeeding years.”⁸ FIPUG has appeared in the fuel and purchased power cost recovery clause with generating performance incentive factor docket (“01” docket), the energy conservation cost recovery clause docket (“02” docket), the purchased gas adjustment docket (“03” docket), and the environmental cost recovery clause docket (“07” docket) every year for approximately the past twenty years.
- *In re: Petition for Declaratory Statement Regarding Applicability of Rule 25-6.0423, F.A.C., by Florida Power and Light Company*, Order No. PSC-08-0231-PCO-EI. FIPUG was granted intervenor status in an action where FPL sought to collect all costs, as opposed to carrying costs, in advance.
- *In re: Petition for Issuance of Storm Recovery Financing*, Order No. PSC-06-0265-PCO-EI.
- *In re: Petition for Rate Increase by Florida Power and Light Company*, Order No. PSC-05-0338-PCO-EI.

⁸ Order No. PSC-08-0297-PCO-EI.

- *In re: Petition for Approval of New Environmental Program for Cost Recovery Through Environmental Cost Recovery Clause*, Order No. PSC-05-0165-PCO-EI. FIPUG was granted intervenor status to challenge TECO's request to raise electricity rates following the 2004-2005 hurricane season.
- *In re: Petition for Approval of Storm Cost Recovery Clause for Recovery of Extraordinary Expenditures Related to Hurricanes Charley, Frances, Jeanne, and Ivan, by Progress Energy Florida, Inc.*, Order No. PSC-04-1190-PCO-EI.
- *In re: Petition for Approval of Numeric Conservation Goals by Tampa Electric Company*, Order No. PSC-04-0465-PCO-EG. FIPUG was granted intervenor status in this proceeding to set conservation goals for TECO.
- *In re: Petition for Approval of Numeric Conservation Goals by Gulf Power Company*, Order No. PSC-04-0467-PCO-EG.
- *In re: Review of Tampa Electric Company's 2004-2008 Waterborne Transportation Contract with TECO Transport and Associated Benchmark*. Order No. PSC-031464-PCO-EI. FIPUG was granted intervenor status in an action where the Commission determined whether TECO could recover costs associated with waterborne transportation services.

In addition, FIPUG has been involved in several matters that have been appealed to the Florida Supreme Court. In each of those cases, FIPUG has been recognized as an appropriate party. A representative list of such cases appears below:

- *South Florida Hospital and Healthcare Association v. Jaber*, 887 So.2d 1210 (Fla. 2004);
- *Florida Industrial Power Users Group v. Jaber*, 833 So.2d 750 (Fla. 2002);
- *Citizens of State of Florida v. Wilson*, 571 So.2d 1300 (Fla. 1990);
- *City of Plant City v. Mann*, 400 So.2d 952 (Fla. 1981).

D. AD HOC ASSOCIATIONS MEET THE STANDING REQUIREMENTS.

As discussed above, this Commission has already recognized that FIPUG is an ad hoc organization and has granted it standing in many proceedings. In addition to FIPUG, other non-corporate entities have been granted standing to intervene in Commission proceedings. For example, the “Federal Executive Agencies” (FEA) filed a petition to intervene in a Gulf Power rate case. The Commission granted the petition to intervene in Order No. PSC-01-1934-PCO-EI despite the fact that the FEA is not a corporate entity in Florida or elsewhere. The Order noted that:

[t]he Federal Executive Agencies consist of certain federal agencies that have offices, facilities or installations in Gulf’s service area and that purchase electricity from Gulf.⁹

The Order further stated that FEA was not filing pursuant to any sovereign authority and sought “intervention in their proprietary *capacity as customers* of Gulf, not in a sovereign capacity.”¹⁰ Much like FEA, FIPUG is an ad hoc association of *customers* affected by increases in the cost of energy.

The Commission has also granted standing to another ad hoc association - the “Ad Hoc Telecommunications Users Group” (Ad Hoc) in numerous dockets. *See*, Order No. PSC-95-

⁹ Order No. PSC-01-1934-PCO-EI at 1.

¹⁰ *Id.*, emphasis supplied.

1541-PCO-TL; Order No. PSC-94-0158-PCO-TL; 1992 WL 474760. *See also*, Order No. PSC-94-0994-FOF-TL, in which a motion for emergency relief was filed by several parties to the case, including Ad Hoc. Like FEA and Ad Hoc, FIPUG clearly has standing and the Commission has recognized this many times.

Just recently, a “consortium” of cities and towns filed a complaint against FPL relating to the underground facilities. *See, In re: Petition and Complaint of the Municipal Underground Utilities Consortium for Relief from Unfair Charges and Practices of Florida Power & Light Company*, Docket No. 080522-EI. There has been no suggestion that this consortium cannot file a complaint against FPL.

Importantly, TECO fails to identify any public policy justification for abandoning long-standing Commission precedent to grant ad hoc associations standing in matters affecting them. Conversely, allowing ad hoc groups to freely associate and prevent substantial injury fosters equitable public policy by strengthening the voice of the consumer against the well-funded special interests of energy producers. The ability of ad hoc groups to appear before the Commission is critical to foster open, accessible government. The granting of TECO’s motion would signal a dramatic shift of the Commission away from the *Agrico* and *Florida Home Builders* tests and toward a more limited, inaccessible government decision-making process.

The Commission has regularly recognized the substantial impact that energy rate increases have on FIPUG companies. *See*, Order No. PSC-08-0297-PCO-EI; *see also*, Order No. PSC-04-1207-PCO-EI (granting FIPUG standing to intervene in an FPL action to increase the cost of electricity, the Commission found: “the cost of electricity constitutes a significant portion of these [FIPUG] customers’ overall costs of production.”); Order No. PSC-06-0630-PCO-EI

(granting FIPUG standing to intervene in an FPL action to pass-through costs); Order No. PSC-06-1044-PCO-EI (granting FIPUG standing to intervene in a Progress Energy action.)

However, rather than referencing Commission determinations on standing, as this response does, TECO mistakenly relies upon two inapposite cases. In *Walton-Okaloosa-Santa Rosa Medical Society v. Spires*, 153 So.2d 325 (Fla. 1st DCA 1963), the issue was whether service on the president of a medical society gave the court jurisdiction over each individual society member. The court found it did not and quashed service of process. In *Asociacion De Perjudicados Por Inversiones Efectuadas En U.S.A. v. Citibank*, 770 So.2d 1267 (Fla. 3rd DCA 2000), foreign investors organized under Spanish law attempted to sue a United States bank. The court found this foreign group without capacity to sue. Neither of these cases is factually or legally on point in regard to a situation where a utility's customers seek to present their views to this Commission in a multi-million dollar rate case.

FIPUG seeks to advocate on behalf of its members for appropriate rate treatment. It does not seek relief independent of its participating companies, each of whom is a TECO customer that will be impacted by this rate case. TECO should not be permitted to erode the associational rights of individual entities to pool resources when the need for advocacy arises – just as they have been doing before this Commission for many years.

III. CONCLUSION

TECO's motion is without merit and should be rejected on procedural and substantive grounds. TECO seeks to silence a long-time participant in Commission proceedings, whose positions are often adverse to TECO. The Commission should reject this transparent attempt to eject a significant voice from this proceeding. The Commission should continue its long and time-honored practice of considering the views of all affected parties.

WHEREFORE, TECO's motion should be denied.

s/ Vicki Gordon Kaufman
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Florida Industrial Power Users Group's Response to Tampa Electric Company's Motion for Summary Final Order has been furnished by electronic mail and U.S. Mail this 21st day of November, 2008, to the following:

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