BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for authority to implement a demonstration project consisting of proposed time-of-use and interruptible rate schedules and corresponding fuel rates in the Northwest Division on an experimental basis and request for expedited treatment, by Florida Public Utilities Company.	DOCKET NO. 100459-EI ORDER NO. PSC-11-0290-FOF-EI ISSUED: July 5, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER GRANTING FLORIDA PUBLIC UTILITIES COMPANY'S MOTION TO DISMISS

BY THE COMMISSION:

On December 14, 2010, Florida Public Utilities Company (FPUC) filed a petition to implement optional time-of-use and interruptible rate schedules and corresponding fuel factors in the Northwest Division on an experimental basis. The Office of Public Counsel (OPC) and the City of Marianna (City) were granted intervention in this docket. On January 24, 2011, the City filed a preliminary statement of issues and positions alleging FPUC's proposed time-of-use and interruptible rates are inappropriate, unjust, and unreasonable because they are not cost-based and do not provide appropriate price signals or incentives to FPUC's customers. By Proposed Agency Action (PAA) Order No. PSC-11-0112-TRF-EI, issued February 11, 2011, in this docket, we granted FPUC's petition.

On March 1, 2011, the City of Marianna filed a petition for formal proceeding, protesting our Order. On March 17, 2011, FPUC filed a Motion to Dismiss Marianna's petition. On the same date, FPUC filed a request for oral argument on its motion to dismiss, which was granted. On March 24, 2011, the City of Marianna responded to FPUC's motion to dismiss. We heard oral argument from both sides at our June 14, 2011, Commission Conference.

We have jurisdiction over the subject matter pursuant to Sections 366.041, 366.05, 366.06 and 366.075, Florida Statutes (F.S.). In proceedings where an Order is protested and a hearing is requested, we are required to comply with the provisions of Sections 120.569, and 120.57, F.S.

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000).

In reviewing a petition that is the subject of a motion to dismiss, we first must assume that all the allegations pled in the petition are true. Varnes v. Dawkins, 624 So. 2d 349 (Fla. 1st DCA 1993). When making our review, only the petition and the documents incorporated in the petition can be reviewed. The answer or responsive pleadings of the opposing party are not to be considered. All reasonable inferences must be made in favor of the petitioner. Id. Using those guidelines, we reviewed the City's petition to determine if the petition states a cause of action for which we can grant relief.

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

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

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

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

Finally, FPUC contends that the remainders of the City's portion of the ultimate facts alleged are not factual allegations but are legal or policy conclusions.

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

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

Having considered the pleadings and arguments of the parties, we agree with FPUC. The City of Marianna has not met the Agrico test for standing because it has not sufficiently demonstrated that it will suffer an injury in fact which is of sufficient immediacy to entitle it to an administrative hearing. Pursuant to Section 120.569(2)(c), F.S., the dismissal is without prejudice.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the City of Marianna's Petition for Formal Proceeding is dismissed, without prejudice. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission this 5th day of July, 2011.

HONG WANG
Chief Deputy Commission Clerk
Florida Public Service Commission
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CERTIFICATE OF SERVICE

In accordance with Section 28-106.110, Florida Administrative Code, documents are electronically served on each party or each party's counsel or representative at the last e-mail address of record. Where there is no e-mail address, documents are electronically served via the last facsimile number of record and, if unavailable, documents are served via U.S. Mail at the last address of record.

LCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida

Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.