Dorothy Menasco

From: Kim Hancock [khancock@kagmlaw.com]

Sent: Monday, November 07, 2011 1:48 PM

To: Filings@psc.state.fl.us

Cc: Larry Harris; Jessica.Cano@fpl.com; Wade_Litchfield@fpl.com; rdc_law@swbell.net; george@cavros-law.com; suzannebrownless@comcast.net; jbrew@bbrslaw.com; jwhitlock@enviroattorney.com; john.burnett@pgnmail.com; Vicki Gordon Kaufman; Jon Moyle

Subject: Docket Nos. 100155-EG and 100160-EI

Attachments: FIPUG Brief in Opposition 11.7.11.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

a. The name, address, telephone number and email for the person responsible for the filing is:

Vicki Gordon Kaufman
Keefe Anchors Gordon & Moyle
118 North Gadsden Street
Tallahassee, FL 32301
(850) 681-3828
vkaufman@kagmlaw.com

b. This filing is made in Docket Nos. 100155-EG and 100160-EI.

c. The document is filed on behalf of Florida Industrial Power Users Group

d. The total pages in the document are 9 pages.

e. The attached document is FIPUG BRIEF IN OPPOSITION TO SACE PROTEST.

Kim Hancock
khancock@kagmlaw.com

Keefe, Anchors Gordon & Moyle

Keefe, Anchors, Gordon and Moyle, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301
(850) 681-3828 (Voice)
(850) 681-8788 (Fax)
www.kagmlaw.com

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of approval of demand-side Management Plan of Florida Power & Light Company. /	DOCKET NO.: 100155-EG
In re: Petition of approval of demand-side Management Plan of Progress Energy Florida, Inc. /	DOCKET NO.: 100160-EI FILED: November 7, 2011

FIPUG BRIEF IN OPPOSITION TO SACE PROTEST

The Florida Industrial Power Users Group (FIPUG), pursuant to Order No. PSC-11-0469-PCO-EG, hereby files its Brief in Opposition to the protest of the Southern Alliance for Clean Energy (SACE) to Order Nos. 11-0346-PAA-EG and PSC-11-0347-PAA-EG (DSM Orders). It is FIPUG's position that the Commission acted within its authority when it entered the DSM Orders related to the Demand-Side Management (DSM) plans of Florida Power & Light (FPL) and Progress Energy Florida (PEF) and that its decision should not be overturned.

Background

On September 6, 2011, SACE protested the DSM Orders on legal grounds. Subsequently, the Commission entered Order No. PSC-11-0469-PCO-EG directing the parties to brief the issues SACE raised.

These two dockets represent the culmination of several years of work on the conservation plans of the utilities. Pursuant to the Florida Energy and Efficiency Act (FEECA)[1], the Commission is required to set annual conservation goals for utilities. Such goals were set for FPL in Docket No. 080407-EI and for PEF in Docket No. 080408-EI.

[1] Sections 366.80-366.85, 403.519, Florida Statutes.

Following goal setting, the Commission engaged in extensive review of several iterations of the DSM plans filed by FPL and PEF. On August 16, 2011, the Commission, after due consideration of the arguments of all parties, as well as the rate impact of the DSM plans, approved the DSM plans currently in place for FPL and PEF. It is these decisions to which SACE objects. SACE's objections are without merit as the Commission is statutorily authorized to deny plans that have an undue impact on costs passed through to consumers.

Issues

ISSUE 1: WHETHER THE COMMISSION VIOLATED FLORIDA STATUTE § 366.82(7) BY ORDERING A "NEWLY MODIFIED DSM PLAN" FOR FPL THAT MATCHES ITS DSM PLAN CURRENTLY IN PLACE?

ISSUE 3: WHETHER THE COMMISSION VIOLATED FLORIDA STATUTE § 366.82(7) BY ORDERING A "NEWLY MODIFIED DSM PLAN" FOR PEF THAT MATCHES ITS DSM PLAN CURRENTLY IN PLACE?[2]

FIPUG Position: No. The Commission did not violate section 366.82(7), Florida Statutes, when it ordered newly modified DSM plans for FPL and PEF that match their current plans. The Commission is clearly given the statutory authority to modify plans or programs that would unreasonably increase ratepayers' costs.

The crux of SACE's argument is that somehow the Commission failed to fulfill its FEECA responsibilities and surreptitiously changed the previous conservation goals without following the proper process. Such an argument must be rejected. SACE's argument fails to recognize that the very statute upon which it relies for its protest explicitly permits the Commission to consider rate impact in evaluating plans and programs and this is precisely what the Commission did.

[2] Because these issues are the same with the exception of the utility, they are addressed together.

Before turning to the specific statute at issue, it is important to review the Commission's overriding regulatory role. Among the Commission's duties, one of its most important charges is to ensure that the rates customers are charged are fair and reasonable. In fact, Chapter 366, Florida Statutes, mentions several times that the Commission is to fix fair and reasonable rates and charges.[3] Ensuring fair and reasonable rates requires the Commission to take a myriad of factors into consideration, including the impact of proposed rates on consumers. The Commission exercised that discretion in this case when dealing with its review of the DSM programs.

Interestingly, SACE argues that the Commission's charge to set just and reasonable rates is in conflict with its authority to review DSM plans. Thus, argues SACE, the Commission should ignore its rate setting duties because the more specific statute relating to DSM plans must control under principles of statutory construction.[4] Acceptance of SACE's argument would lead to an absurd result which would require the Commission to set unreasonable rates for DSM plan recovery, in contravention of the statute it is implementing and upon which SACE tries to rely. Such a premise must be rejected out of hand.

Further, there is no conflict between the Commission's responsibility to set just and reasonable rates and its responsibility to review DSM programs. The statutes are entirely consistent. Both require the Commission to set reasonable rates and to take into account costs to ratepayers.

The *specific* subsection on which SACE bases its argument that the Commission impermissibly allowed the current FPL and PEF DSM plans to remain in place provides for the *very* action the Commission took in these dockets. Section 366.82(7) states:

---

[3] *See,* sections 366.04(1), 366. 05(1), 366.06(1), Florida Statutes.
[4] SACE Brief at 21.

> The commission may require modifications or additions to a utility's plans and programs at any time it is in the public interest consistent with this act. In approving plans and programs for cost recovery, *the commission shall have the flexibility to modify or deny plans or programs that would have an undue impact on the costs passed on to customers.*[5]

That is, the statute *specifically* allows the Commission to modify DSM plans or programs when it is in the public interest. The statute *specifically* allows the Commission to consider undue impact on consumers when evaluating conservation programs.

At the July 26, 2011 Agenda Conference, the Commission carefully considered the hardship that increased DSM costs would impose on ratepayers during these difficult economic times. Chairman Graham stated:

> I'm sure we all have stories like this, but I know in my own personal life, I have more friends and colleagues and family members and acquaintances and family members of friends who are out of work, certainly to a degree that I have never experienced in my lifetime. And I'm sure we all have similar experiences. And so when I put that on top of the realization that if we are to adopt programs and plans today that will result in some additional monthly costs....[6]

Commissioner Balbis also expressed concern with the undue rate impact of the DSM plans:

> Undue rate impact, which is where I'm trying to -- I'm struggling now with what is justifying a $6.13 monthly increase....[7]

In regard to the rate impact of the DSM programs under consideration, Public Counsel said:

> [W]e have always been concerned about the impact that the rates will have on the residential ratepayers, but all ratepayers, because we do represent all ratepayers.[8]

---

[5] Emphasis added.
[6] Agenda Conference transcript, Docket No. 100160-EG at 7.
[7] *Id.* at 67-68.
[8] *Id.* at 69.

As to FPL, the Commission held:

> We find that both plans filed by FPL (Modified and Alternative) will have an undue impact on the costs passed on to consumers, and that the public interest will be served by requiring modifications to FPL's DSM Plan. Therefore, we hereby determine to exercise the flexibility specifically granted us by statute to modify the Plans and Programs set forth by FPL.[9]

In the FPL DSM Order, the Commission carefully considered the rate impact that approval of the FPL plan would have on consumers. The Commission noted that DSM plans have an *immediate* impact on customer bills.[10] For example, in 2014, FPL's Modified DSM plan was projected to add over $4.00 every month to a residential bill.[11] The Commission also noted that DSM programs can impact utility base rates.[12]

As to PEF, the Commission concluded:

> We believe the increase to an average residential customer's monthly bill that would result from implementing PEF's Compliance Plan is disproportionately high and clearly constitutes an undue rate impact on PEF's customers. As will be discussed below, Florida Statutes provide a remedy for addressing such cases of conservation plans having an undue impact on customer rates.[13]
>
> ...
>
> After deliberation, we find that both Plans filed by PEF will have an undue impact on the costs passed on to consumers, and that the public interest will be served by requiring modifications to PEF's DSM Plan. Therefore, we hereby determine to exercise the flexibility specifically granted us by statute to modify the Plans and Programs set forth by PEF.[14]

Apparently, it is SACE's view that such action is impermissible unless the utilities submit entirely new plans for an entirely new review. Such a position elevates form over substance.

---

[9] FPL Order at 4-5.
[10] FPL DSM Order at 3.
[11] *Id.*
[12] *Id.* at 4.
[13] PEF DSM Order at 5.
[14] *Id.* at 7.

The Commission had all the information needed to make a decision – the current plans as well as the modified plans. The requirement of resubmission of what the Commission already had before it would be an unnecessary exercise.[15]

Finally, FIPUG agrees with SACE that section 366.82(7) is plain on its face. However, contrary to SACE's argument, that plain language supports the very action the Commission took in considering rate impact in its decision.[16] It was the Commission's conclusion, based on the evidence, that PEF's and FPL's current DSM plans were appropriate and should remain in place so as to properly consider rate impact. To require resubmission of these plans, as SACE urges, would simply be a time-wasting futile exercise. The Commission relied upon and recognized the flexibility expressly granted to it by the Florida Legislature to modify or deny DSM plans that would impose an undue rate impact on consumers.

[15] SACE characterizes this as a "procedural" issue. (SACE Brief at 9, 10). Even accepting this characterization, which FIPUG does not, it is a "procedural" issue with no impact. SACE's real issue is its displeasure with the Commission's decision.

[16] SACE's penalty argument is similarly flawed. SACE admits the reward/penalty provision is permissive. (SACE Brief at 22). The Commission's decision does not construct two sets of goals but rather uses a reasonable approach to implement its decision.

ISSUE 2: WHETHER THE COMMISSION VIOLATED FLORIDA STATUTE § 366.82(7) BY NOT REQUIRING FPL TO SUBMIT A MODIFIED PLAN FOLLOWING THE DENIAL OF FPL'S "MODIFIED DSM PLAN" AND "ALTERNATE DSM PLAN" SUBMITTED ON MARCH 25, 2011?

ISSUE 4: WHETHER THE COMMISSION VIOLATED FLORIDA STATUTE § 366.82(7) BY NOT REQUIRING PEF TO SUBMIT A MODIFIED PLAN FOLLOWING THE DENIAL OF PEF'S "ORIGINAL GOAL SCENARIO DSM PLAN" AND "REVISED GOAL DSM PLAN" SUBMITTED ON NOVEMBER 29, 2010?[17]

FIPUG Position: No. As discussed above, the Commission has the flexibility to require modified DSM plans, taking into consideration the factors enumerated in the statute.

SACE's argument on this issue is simply a variant of its argument on Issues 2 and 4. SACE contends the Commission should have required PEF and FPL to submit their current plans for Commission review even though such plans were already before the Commission.

While the Commission could certainly have required FPL and PEF to submit modified DSM plans for its review following the denial of the plans as submitted, the requirement of such submissions would have done nothing but waste the parties' time and require them to incur unnecessary expense, as discussed above. The current DSM plans were before the Commission and it had the flexibility to keep them in place.

[17] Because these issues are the same with the exception of the utility, they are addressed together.

WHEREFORE, the Commission did not violate section 366.82(7), Florida Statutes, when it required FPL and PEF to keep their current conservation plans in place. The Commission's orders should remain in place.

s/ Vicki Gordon Kaufman

Vicki Gordon Kaufman
Jon C. Moyle, Jr.
Keefe Anchors Gordon & Moyle, PA
118 North Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 681-3828
Facsimile: (850) 681-8788
vkaufman@kagmlaw.com
jmoyle@kagmlaw.com

Attorneys for Florida Industrial Power Users Group

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing FIPUG Brief in Opposition to SACE Protest has been furnished by electronic mail and U.S. Mail this 7th day of November, 2011, to the following:

Larry D. Harris
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
lharris@psc.state.fl.us

Jessica A. Cano
R. Wade Litchfield
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420
Jessica.Cano@fpl.com
Wade_Litchfield@fpl.com

Rick D. Chamberlain
Behrens, Taylor, Wheeler & Chamberlain
6 N.E. 63rd Street
Suite 400
Oklahoma City, OK 73105-1401
rdc_law@swbell.net

George Cavros
120 East Oakland Park Blvd.
Suite 105
Ft. Lauderdale, FL 33334
george@cavros-law.com

Suzanne Brownless
Suzanne Brownless, PA
1978 Buford Blvd.
Tallahassee, FL 32308
suzannebrownless@comcast.net

James W. Brew/F. Alvin Taylor
Brickfield, Burchette, Ritts & Stone, PC
Eighth Floor, West Tower
1025 Thomas Jefferson Street, NW
Washington, DC 20007-5201
jbrew@bbrslaw.com

Jamie Whitlock
Gary A. Davis & Associates
PO Box 649
61 North Andrews Avenue
Hot Springs, NC 28743
jwhitlock@enviroattorney.com

John T. Burnett
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, FL 33733-4042
john.burnett@pgnmail.com

s/ Vicki Gordon Kaufman

Vicki Gordon Kaufman