

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint Regarding Electric Rate
Structure of Gainesville Regional Utilities

DOCKET NO.: 130188-EM

FILED: August 12, 2013

**PETITIONERS' RESPONSE IN OPPOSITION TO
GAINESVILLE REGIONAL UTILITIES MOTION TO DISMISS**

Petitioners Eye Associates of Gainesville, LLC and Deborah L. Martinez ("Petitioners"), by and through undersigned counsel, and pursuant to Rules 28-106.204(1), 28-106.103¹, and Rule 25-22.0022², Florida Administrative Code, hereby file their Response in Opposition to Gainesville Regional Utilities ("GRU") Motion to Dismiss and respectfully requests the Florida Public Service Commission ("Commission") to deny the GRU motion. In support thereof, the Petitioners state as follows:

I. The GRU Motion to Dismiss Must be Denied Because the Petitioners' Complaint States a Cause of Action Upon Which Relief May be Granted.³

A. Standard of Review

A motion to dismiss questions the legal sufficiency of a complaint.⁴ In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the complainant, the petition still fails to state a cause of action for which relief may be granted.⁵ When making this determination, only the petition and documents attached to or incorporated therein by reference can be reviewed and all reasonable inferences drawn from

¹ Petitioners attorney received service of the GRU Motion to Dismiss by regular U.S. Mail on August 5, 2013.

² Pursuant to Rule 25-22.0022, F.A.C., a separate written request for oral argument on the dispositive motion will be filled concurrently with this response.

³ The Petition filed by Petitioners was the Initiation of Formal Proceedings pursuant to Rule 25-22.036, F.A.C. Subsequent to filing, the Commission reclassified the Petition as a complaint and revised the docket title.

⁴ *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

⁵ *Id.* at 350. See also *Wilson v. News-Press Publ'g Co.*, 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

the petition must be made in favor of the petitioner.⁶ A court may not look beyond the four corners of the complaint in considering its legal sufficiency.⁷

Applying the Standard of Review to Petitioners' Complaint, the GRU Motion to Dismiss must be denied because the Complaint filed by Petitioners is facially sufficient and states a cause of action upon which relief may be granted. As clearly set forth within the four corners of the Complaint, Petitioners are seeking review of the existing and proposed GRU electric retail rate structure to ensure that the electric rate structure is fair, just, and reasonable, non-discriminatory, allocates the recovery of costs appropriately between the customer classes, and allocates the recovery of costs equitably between members of a customer class. As the Commission has jurisdiction over the electric rate structure of a municipal utility pursuant to Sections 366.02(2) and 366.04(2)(b), Florida Statutes, Petitioners' Complaint is properly before the Commission as Petitioners have no other adequate remedy at law to address the disputed issues of material fact relating to GRU's retail rate structure. Additionally, Exhibit A and Exhibit B to the Petitioners' Complaint set forth a prima facie showing of existing retail rate structure inequities between the GRU customer rate classes upon which the requested relief is being sought. Furthermore, the GRU motion contains arguments that are not applicable to the cause of action stated within the Petitioners' Complaint and therefore should not be considered by the Commission. Despite these attempts to confuse the issue and distract the Commission's attention elsewhere, the fact remains that the Petitioners' Complaint is facially sufficient and states a specific cause of action upon which relief may be granted. Finally, the GRU motion cites no authority which bars Petitioners from requesting a formal evidentiary hearing to address disputed issues of material fact relating

⁶ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

⁷ Barbado v. Green and Murphy, P.A., 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000) (citing Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997)).

to GRU's electric retail rate structure. Petition at ¶ 20. Accordingly, the GRU motion is insufficient to establish a basis for dismissal and must be denied because the Complaint filed by Petitioners is facially sufficient and states a cause of action upon which relief may be granted.

B. Ripeness

Contrary to the assertions, mischaracterizations, and erroneous conclusions contained within the GRU motion, Petitioners' Complaint is sufficiently "ripe" for consideration by the Commission. Petitioners have sought Commission review of the existing and proposed GRU electric retail rate structure to ensure that the rate structure is fair, just, and reasonable, non-discriminatory, allocates the recovery of costs appropriately between the customer classes, and allocates the recovery of costs equitably between members of a customer class. Disputed issues of material fact exist with respect to the portion of the Complaint seeking review of the inequities associated with the existing GRU electric retail rate structure. The Commission has jurisdiction over the electric rate structure of a municipal utility pursuant to Sections 366.02(2) and 366.04(2)(b), Florida Statutes. Therefore, Petitioners' Complaint is properly before the Commission as Petitioners have no other adequate remedy at law to address the disputed issues of material fact relating to GRU's retail rate structure. The GRU motion cites no authority which bars Petitioners from requesting a formal evidentiary hearing to address disputed issues of material fact relating to GRU's existing retail rate structure. Accordingly, the controversy between the parties is fully "ripened" on this issue and warrants denial of the GRU motion.

With respect to the proposed electric retail rate structure, the Petitioners' Complaint is also sufficiently "ripe" for consideration by the Commission at this time. The GRU motion interjects a lengthy discussion of events that occurred subsequent to the filing of Petitioners' Complaint to suggest that this aspect of Petitioners' Complaint has not sufficiently ripened. For

the reasons set forth herein, Petitioners dispute the characterizations and assertions made within the GRU motion. As a preliminary matter, Petitioners stipulate that the Gainesville City Commission voted not to adopt the two-tiered residential rate structure during the meeting held on July 25, 2013.⁸ Irrespective of this subsequent development, however, disputed issues of material fact still remain as to the inequities associated within the proposed residential and commercial retail electric rate structures.⁹ Petition at ¶¶ 13, 20.

Well beyond the four corners of Petitioners' Complaint, the GRU motion also interjects a lengthy discussion regarding the procedural filing requirements that a municipal electric utility must follow when submitting proposed changes to its rate structure in accordance with Commission rules.¹⁰ Rule 25-9.052, Florida Administrative Code, requires a municipal electric utility to submit any proposed changes in its rate structure, "at least 30 days prior to *final adoption* by the utility."¹¹ (emphasis supplied). The GRU motion further states that the City has already given tentative approval to the proposed electric rate structure.¹² GRU motion at ¶ 12.

Petitioners' note that *final adoption* of the Ordinance approving the proposed changes to the electric retail rate structure will occur upon the perfunctory, roll call vote immediately following second reading of the Ordinance on September 19, 2013. Therefore, GRU would be required to submit documentation regarding the proposed changes to the electric retail rate structure to the Commission on, or before, August 21, 2013 in accordance with the Rule.

⁸ Petitioners are willing to amend the Complaint to strike references to the two tier residential rate structure.

⁹ During July 25th meeting, two or more members of the City Commission publicly stated that GRU was not following the recommendations of the Cost of Service study performed by Baker Tilly characterizing GRU management actions as "cherry picking", "gimmicks" and playing a "shell game" in reference to changes affecting the retail electric rate structure. Petitioners further dispute the assertion within the GRU motion suggesting that these changes are merely a continuation of the existing rate structure. Petitioners have a statutory right to challenge the existing electric retail rate structure rendering GRU's ripeness argument contradictory and moot.

¹⁰ These procedural rules have no bearing on the statutory right of the Petitioners to request a formal evidentiary hearing to address disputed issues of material fact relating to GRU's electric retail rate structure.

¹¹ The cited rule specifically uses the term "final adoption" rather than "effective date".

¹² This admission clearly contradicts the assertion that rate structure changes have not been "crystallized" by the City Commission. GRU motion at ¶ 20.

Therefore, Petitioners challenge to the proposed changes to the GRU electric retail rate structure is also sufficiently “ripe” to the extent that GRU is already required to submit the proposed electric rate structure changes to the Commission prior to the time that the GRU motion will be heard by the Commission.¹³ Accordingly, the assertion within the GRU motion that suggests that Petitioners’ Complaint regarding the proposed rate structure fails for lack of ripeness is without merit and should be rejected by the Commission.

C. Petitioners Have a Statutory Right to Request an Evidentiary Hearing on Disputed Issues of Material Fact Related to GRU’s Electric Retail Rate Structure

Petitioners requested a formal evidentiary hearing to address disputed issues of material fact relating to GRU’s electric retail rate structure.¹⁴ Petition at ¶ 20. The ability to prescribe a rate structure for electric utilities pursuant to Sections 366.02(2) and 366.04(2)(b), Florida Statutes is one of the few areas in which the Commission has jurisdiction over a municipal electric utility.¹⁵ Although the GRU motion engages in lengthy discussion that would seemingly render the Commission’s jurisdiction over a municipal utility meaningless, the GRU motion fails to establish a legal basis for dismissal and must be denied because the Complaint filed by Petitioners is facially sufficient and states a cause of action upon which relief may be granted. Furthermore, the GRU motion cites no authority which bars Petitioners from requesting a formal evidentiary hearing to address disputed issues of material fact relating to GRU’s electric retail

¹³ Assuming, *arguendo*, that this single aspect of the Petitioners’ Complaint was not sufficiently “ripe” and was ultimately dismissed without prejudice, Petitioners would be entitled to re-file the Complaint within days of the dismissal. Pursuant to Section 120.569(2)(c), Fla. Stat., a petition shall be dismissed at least once without prejudice. As the parties are now properly before the Commission no purpose would be served by dismissing the Complaint.

¹⁴ Petitioners are hopeful that a stipulated settlement between the parties can be reached in this docket that would avoid the need to conduct evidentiary hearing. Petitioners will advise the Commission if any agreement is reached in discussions with GRU counsel.

¹⁵ Section 366.04(7), Fla. Stat., is also included within the jurisdiction of the Commission but represents a legislative solution enacted to provide for independent governance of a municipal utility. At present, GRU does not currently fall within the statutory definition of “affected municipal electric utility”.

rate structure. Accordingly, the GRU motion must be denied because the Complaint filed by Petitioners is facially sufficient and states a cause of action upon which relief may be granted.

WHEREFORE, Petitioners respectfully request the Commission to deny the GRU Motion to Dismiss because the Petitioners' Complaint is facially sufficient and states a cause of action upon which relief may be granted.

Respectfully submitted this 12th day of August, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the parties of record indicated below via electronic mail on August 12, 2013:

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