BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Environmental cost recovery clause.	DOCKET NO. 140007-EI
	DATED: November 5, 2014

SACE'S POST HEARING STATEMENT AND BRIEF

On October 22, 2014 an evidentiary hearing was held on contested "Issue 9" in Docket No. 140007-EI. Pursuant to Order No. PSC-14-0087-PCO-EI, filed February 4, 2014, Southern Alliance for Clean Energy ("SACE"), through it undersigned attorney, files its Post-hearing Statement, and Brief in the above-styled docket.

POST HEARING STATEMENT

ISSUE 9: Should the Commission approve FPL's Waters of the United States Rulemaking Project such that the reasonable costs incurred by FPL in connection with the project may be recovered through the Environmental Cost Recovery Clause?

POSITION: *No. Customer dollars should not be used to weaken clean water protection. It is clearly impermissible by statute. Lobbying activities are patently not "environmental compliance costs" as defined in Section 366.8255, F.S. Moreover, such costs are already being funded by FPL shareholders and should not be shifted to customers.*

BRIEF

I. INTRODUCTION

On July 25, 2014, Florida Power and Light ("FPL" or the "Company") filed a request with this Commission for a finding that FPL policy-influencing "advocacy" (herein referred to as "lobbying"), from August 2014 to December 2015, to weaken the proposed EPA Waters of the United States ("WOUS") rule, be found reasonable. It requested that $228,500 in prospective

cost be found reasonable for cost recovery under the environmental cost recovery statute. In its petition and testimony, FPL characterizes its lobbying activities as "environmental compliance" activity. If approved by the Commission as reasonable, FPL will request recovery of these costs from customers in environmental cost recovery clause docket. The lobbying activities proposed by the Company for a reasonableness determination and future recovery are not environmental compliance activities under Florida law and therefore not eligible to be recovered from customers. While FPL argues that Federal Energy Regulatory Commission ("FERC") accounting rules permit it to label and account for its activity as "advocacy" instead of "lobbying," this is an arbitrary label and misses the threshold issue that the costs associated with activities of this type are not permitted to be recovered from customers under Florida law. Should the Commission find the legal argument unpersuasive, the Company, regardless, should pay for its own lobbying efforts to weaken proposed clean water protection. The Company states that it has already expended shareholder dollars to attack the rule, and will continue to do so in the event the Commission disapproves its request. Therefore, it begs the question: why would the Commission shift costs to customers that are already being funded by FPL shareholders? Given that FPL earned over $1.3 Billion in net income in 2013, it is more equitable for the Company to continue to pay for its own lobbying activity. Moreover, the public health and environmental value of wetlands is well established. There are customers that value the many benefits of wetlands, and those customers may oppose FPL's efforts to weaken the rule, but nevertheless, would be forced to pay for activities for which they do not support. Therefore, FPL's request that customers fund lobbying activities to weaken the WOUS rule should be denied.

II. FLORIDA LAW DOES NOT PERMIT RECOVERY OF LOBBYING-TYPE COSTS FROM CUSTOMERS

When the statute is clear and unambiguous, it is not necessary to look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002). In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. *See State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004).

In this instance, the Florida statute that dictates what an electric utility may recover from customers for environmental compliance costs is likewise clear and unambiguous, and reads in relevant part as follows:

> "Environmental compliance costs" includes all costs or expenses incurred by an electric utility in complying with environmental laws or regulations, including, but not limited to:
> 1. Inservice capital investments, including the electric utility's last authorized rate of return on equity thereon.
> 2. Operation and maintenance expenses.
> 3. Fuel procurement costs.
> 4. Purchased power costs.
> 5. Emission allowance costs.
> 6. Direct taxes on environmental equipment.
> 7. Costs or expenses prudently incurred by an electric utility pursuant to an agreement entered into on or after the effective date of this act and prior to October 1, 2002, between the electric utility and the Florida Department of Environmental Protection or the United States Environmental Protection Agency for the exclusive purpose of ensuring compliance with ozone ambient air quality standards by an electrical generating facility owned by the electric utility.
> §366.8255(1)(b), Fla. Stat. (emphasis added)

The statute is unambiguous as to what constitutes and environmental compliance cost, it is a cost incurred by an electric utility in complying with environmental laws or regulations. Compliance is commonly defined as "the act or process of doing what you have been asked or

ordered to do."[1] The Company has offered no evidence on the record that the recovery is related to an act of compliance. In fact, the activity for which it seeks a reasonableness determination and future recovery is to "actively participate in the rulemaking process." (T. p. 238). In so doing, it intends to hire a consultant to assist in the development of comments to the rule and to work with state and federal government agencies and legislators to advocate FPL's positions (T. p. 239). These type of activities, and associated costs, are clearly intended to proactively influence policy. They are not acts in compliance with environmental laws or regulation. In fact, FPL concedes that the Company is not required to take any actions in regards to permitting on the proposed WOUS rule because it's not final. (T. p. 270). If one further considers the list provided in statute as examples of what might be considered as environmental compliance, such as "operation and maintenance expenses" or direct taxes on environmental equipment," it becomes even clearer that the preemptive activity by FPL proposed for cost recovery from customers is not contemplated by Florida law.

Should the Commission consider further statutory interpretation, it's axiomatic that the plain language of a statute is the starting point in statutory interpretation. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla.2000); *accord BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla.2003). While, the Commission has some level of deference to interpret statutes that provide statutory authority to the agency, an agency's interpretation of its statute is not entitled to deference if it is clearly erroneous. *GTC Inc., v. Edgar,* 967 So.2d at 785. It is well-settled law that a statutory interpretation that leads to an absurd result should be avoided. *Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995). FPL asks the Commission to find prospective lobbying activity as compliant under Section 366.8255, F.S. Yet, the statute plainly

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[1] Merriam-Webster Dictionary, at http://www.merriam-webster.com/dictionary/compliance

states that recovery from customers is permitted for costs in complying with an environmental law or regulation. FPL concedes that there is no action it must take under the proposed WOUS rule. Therefore, interpretation by this Commission that the statute allows for recovery for activities inconsistent with the plain meaning of the statute, past Commission orders aside, is clearly erroneous, produces an absurd result, and not entitled to deference afforded an agency.

III. ACCOUNTING RULES IS NOT THE ISSUE BEFORE THE COMMISSION

The Company's argument that recovery is allowed under FERC accounting rules conflates FERC accounting rules and Florida law. FPL states that system of accounting provision has an exception for regulatory advocacy costs that affect its current or future operations, and that it is the provision under which it would be seeking recovery here. (T. p. 260). Whether the substance of the argument is correct is irrelevant in this case, as the law is clear on its face. The threshold issues is: can FPL recover costs from customers for prospective activities to influence public policy, regardless how one labels such activity, under the Florida environmental cost recovery statute. As highlighted above, the answer is clearly no.

Additionally, FPL's argument that its activities are "advocacy" as opposed to "lobbying" is largely arbitrary. Advocates attempt to influence public policy. (T. p. 286). FPL hires lobbyists to advocate on its behalf. (T. p. 289). Therefore, lobbyist attempt to influence public policy. There is no distinction between the activities of a legislative lobbyist versus and administrative lobbyist in that both attempt to influence public policy. But for the alleged different accounting treatment of the individual activities, the activities are essentially the same – to influence public policy. It is important to note again that the label given to the activities isn't an issue here as such preemptive policy-influencing activities are not permitted by statute.

IV. COSTS SHOULD NOT BE SHIFTED TO CUSTOMERS

FPL is already actively lobbying to influence the outcome of the proposed WOUS rule. (T. p. 239). It is not seeking recovery of previous costs associated with that lobbying in this docket. (T. p. 267). The Company will continue to lobby against the proposed rule even if its request in the year's docket is rejected by this Commission. (T. p. 264). If the Company intends to continue its lobbying activity on the WOUS rule and fund the cost of its lobbying, regardless of the Commission's decision in this docket, it begs the question: why shift costs to customers? The Company made a hefty net income of $1.35 billion in 2013. (T. p. 290). The amount in question for recovery, $228, 500, (T. p. 239) is less than one one-thousandth of its net income in 2013. As such, and considering that the Company will continue on its lobbying activities, regardless of the outcome of the Commission's decision, there is no compelling financial reason to shift costs to customers by approving the FPL request. Additionally, while FPL believes that the proposed rule is "unnecessary," (T. p. 238) Witness Labauve concedes that this is merely an FPL contention. (T. p. 292). Since there is no compliance requirement under the proposed rule, FPL customers should not be funding activity that at this point, is merely a contention of what might happen.

Moreover, it is well established that wetlands provide critical public health and environmental benefits. The benefits include the recharge and purification of drinking water aquifers and flood protection. (T. p. 290-1). Given the public health and environmental benefits or wetlands, FPL customers may oppose the Company's lobbying effort to weaken the proposed WOUS rule. If the Commission were to approve FPL's request, FPL customers that do not support the Company's lobbying activities will nevertheless be supporting FPL's activities by simply paying their monthly bill. There is no compelling public policy reason to force FPL customers into that position. Therefore, FPL's request to shift costs from its shareholders to its

customers for its lobbying activity to weaken the proposed WOUS rule should be rejected by the Commission.

V. CONCLUSION

Customer dollars should not be used to weaken proposed clean water protection. It is clearly impermissible by statute. Lobbying-type activities are patently not "environmental compliance costs" as defined in Section 366.8255, F.S. Moreover, there is no compelling public policy reason to for costs associated with such activities, which are already being funded by FPL shareholders, to be shifted to FPL customers. Therefore, the Commission should deny FPL's request for a reasonableness determination and recovery for lobbying costs to weaken the WOUS rule.

Respectfully submitted this 5th day of November, 2014 by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail this 5th day of November, 2014, to the following:

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