

Writer's Direct Dial Number: (850) 521-1706
Writer's E-Mail Address: bkeating@gunster.com

March 3, 2017

E-PORTAL FILING

Ms. Carlotta Stauffer, Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

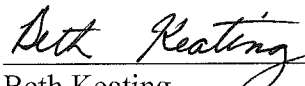
Re: Docket No. 170033-EI - Petition for Approval of Electric System Transformation and Reliability Program (ESTAR) by Florida Public Utilities Company.

Dear Ms. Stauffer:

Attached for filing on behalf of Florida Public Utilities Company, please find the Company's Response in Opposition to Citizen's Motion to Dismiss and Alternative Requests.

As always, please don't hesitate to let me know if you have any questions. Thank you for your assistance with this filing.

Kind regards,



Beth Keating
Gunster, Yoakley & Stewart, P.A.
215 South Monroe St., Suite 601
Tallahassee, FL 32301
(850) 521-1706

cc/ (Service List)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Approval of Electric System Transformation and Reliability Program (ESTAR) by Florida Public Utilities Company.	DOCKET NO. 170033-EI DATED: March 3, 2017
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FLORIDA PUBLIC UTILITIES COMPANY'S RESPONSE IN OPPOSITION TO
CITIZENS' MOTION TO DISMISS AND ALTERNATIVE REQUESTS

Florida Public Utilities Company ("FPUC" or "Company"), by and through its undersigned counsel, hereby responds to the Motion to Dismiss filed by the Office of Public Counsel ("OPC"), as well as the OPC's alternative request that FPUC be required to "comply with Commission Rules" and then for this matter to be set for hearing. OPC's Motion to Dismiss should be denied, because OPC has not demonstrated that, accepting all of the allegations in the Petition as true, the Petition fails to state a cause of action upon which the Commission can grant relief. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000); Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); and City of Gainesville v. Florida Dept. of Transportation, 778 So. 2d 519 (Fla. 1st DCA 2001). FPUC likewise opposes OPC's further requests, as discussed below, because the Company is in compliance with the Commission's Rules. The mere fact that OPC would have preferred that the Company file a petition for a base rate increase, rather than the instant request, does not equate to a failure by FPUC to comply with the Commission's rules. As such, OPC's Motion to Dismiss, as well as its alternative request that the Company be required to comply with Commission Rules, should be rejected *in toto*.

I. Introduction

1. As the Commission is aware, on February 14, 2017, FPUC submitted its Petition seeking approval of its proposed Electric Reliability Infrastructure Program and Associated Cost Recovery Mechanism (“Petition”). As set forth in the Company’s Petition, FPUC is proposing to implement an electric infrastructure reliability program akin to the Gas Replacement Infrastructure Program (“GRIP”) for the Company’s gas divisions. Like that program, the proposed Electric System Transformation and Reliability (“ESTAR”) Program is based upon the data used in FPUC’s last electric rate proceeding in Docket No. 140025-EI.¹

2. As also set forth in the Petition, FPUC has already made significant improvements throughout its system as a direct result of Chesapeake Utilities Corporation’s system-improvement strategy for FPUC. Following Chesapeake’s acquisition of FPUC in 2009, the Company initiated an aggressive strategy to implement changes to FPUC’s electric operations to improve reliability, system performance, and the customer experience. In essence, Chesapeake’s goal was, and continues to be, the modernization of FPUC’s electric system such that, regardless of its unique circumstances, the customer experience across the board is on par with that of customers of Florida’s largest IOUs.²

3. Nonetheless, there is more to be done. FPUC has identified specific projects that it believes will be beneficial for the Company and its customers. The planned projects target reliability improvements, while some include a modernization component that will improve overall service for the Company’s customers, as well as the Company’s ability

¹ Petition, at p. 1.

² Petition, at p. 3.

to implement cost saving measures, including, but not limited to, reducing the amount of time employees are in the field for such tasks as meter reading, service initiation, and service disconnections.³

4. As further explained in the Petition, given the posture in which the Company currently rests, FPUC believes that conducting a rate case is not appropriate at this time as it would initiate a period of billing fluctuations that would ultimately be to the detriment of the Company's ratepayers. Specifically, were the Company to initiate a rate case at this time, given its current earnings level, the end result would likely be a rate increase for FPUC's customers – an increase that would include the added rate case expense that would inevitably be incurred in the rate case process. However, within a short time frame thereafter, the Company expects to have negotiated new purchase power agreements, which it anticipates will produce fuel savings that will flow through to the benefit of FPUC's customers as reductions in the fuel cost recovery factor. Thus, in a relatively short time frame, customers could see a base rate increase, resulting in an overall bill increase, followed by an overall bill decrease as a result of the new purchase power agreements. This would then be followed - again, in relatively short order - by either another rate case, or at a minimum, a limited proceeding to incorporate another of the scheduled capital projects not included in the prior rate case test year, which would, again, produce an overall increase in the bill and another round of rate case expense. In sum, barring approval of the ESTAR mechanism, FPUC envisions a period of three to five years in which customers could experience general instability in the amounts billed,

³ FPUC notes that other states are considering similar such plans. For instance, on February 23, 2017, Vectren filed with the Indiana Utility Regulatory Commission for approval of a system improvement plan to include Supervisory Control and Data Acquisition (SCADA) system, distribution automation, fault indicators, CVR, and an advanced metering infrastructure (AMI) system, which would be recovered through its transmission, distribution and storage system improvement charge, or TDSIC Plan, which has been assigned Cause No. 44910.

which the Commission has recognized can lead to customer confusion, if not outright rate shock.

5. In lieu of subjecting its customers to the uncertainty of these anticipated fluctuations, the Company has developed an alternative proposal, which it has specifically designed to be an interim, temporary mechanism that would remain in place only until the Company is able to file its next rate case following the negotiation of its next purchase power agreement for the Northwest Division, which should become effective at the beginning of the year 2020.⁴ Implementing the proposed surcharge mechanism would allow the Company to move forward with the identified projects, while at the same time promoting price (bill) stability and reducing customer confusion associated with significant bill fluctuations. In identifying price stability as one of ESTAR's key objectives, the Company took into consideration the fact that the Commission has historically recognized the benefits of rate stability and the value of providing customers with a greater level of certainty with regard to their rates.⁵ One such instance in which the Commission recognized the value and benefit of rate stability was in the context of the Commission's order approving FPUC's Gas Division's Gas Reliability Infrastructure Program ("GRIP").⁶

6. The Company's Petition is clear that the proposed surcharge mechanism is offered as a temporary alternative to a full base rate proceeding. It has also clearly outlined its reasons and rationale for seeking an alternative method of recovery pending its next rate proceeding, as well as the factual basis supporting its request. The Company also provided the statutory basis pursuant to which it believes the Commission is

⁴ Petition, pages 15-16.

⁵ See Order No. 98-0691-FOF-PU, issued May 19, 1998, in Docket No. 980269-PU.

⁶ Order No. PSC-12-0490-TRF-GU, issued September 24, 2012, in Docket No. 120036-GU, at p. 6.

authorized to act to grant the relief the Company has requested, as well as relevant Commission precedent which served as the basis for the proposed ESTAR program; i.e. GRIP.⁷ And, it has complied with the Commission rules applicable to its request of the Commission.

7. Notably, OPC makes no attempt to address the standard for dismissal within its Motion, instead utilizing its pleading as a vehicle to ask the Commission to initiate a base rate proceeding for the Company. OPC attempts to reframe FPUC's Petition as a request for a base rate increase, which by the plain language of the Petition it is not, then extends this fallacy to further contend that the Company has failed to comply with the rules for seeking a base rate increase. All told, OPC's Motion does not demonstrate a basis for dismissal of FPUC's Petition, nor does it reflect that FPUC has failed to comply with the Commission's Rules applicable to the Company's request. As such, FPUC respectfully asks that OPC's Motion to Dismiss, along with its alternative request, be denied.

II. Legal Standard

8. As the Commission has recognized time and again, the purpose, under Florida law, for a Motion to Dismiss is to test the legal sufficiency of the facts alleged to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000) and Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The moving party must demonstrate that, even accepting all of the allegations in the Petition as true, the Petition fails to state a cause of action upon which the Commission can grant relief. Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958) *overruled on other grounds*, 153 So.

⁷See also, Order No. PSC-13-0602-TRF-GU, issued November 13, 2013, in Docket No. 110320-GU (Petition for approval of Cast Iron/Bare Steel Pipe Replacement Rider (Rider CI/BSR), by Peoples Gas System.); and Order No. 16-0517-TRF-GU, issued November 21, 2016, in Docket No. 160198-GU (Petition for approval of safety, access, and facility enhancement program (SAFE) true-up and associated cost recovery factors, by Florida City Gas.).

2d 759, 765 (Fla. 1st DCA 1963); City of Gainesville v. Florida Dept. of Transportation, 778 So. 2d 519 (Fla. 1st DCA 2001). As set forth in Order No. PSC-11-0420-PCO-TP, issued in Docket No. 090538-TP, the Commission itself has recognized that the moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations.⁸ Thus, in rendering its determination of the sufficiency of FPUC's Petition, the Commission's review should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss.⁹ To evaluate a motion to dismiss, all allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted.¹⁰ Accepting all of the allegations in FPUC's Petition as true, the Company has stated a basis for relief which is within the Commission's jurisdiction to provide. The OPC has not alleged that FPUC's request exceeds the Commission's jurisdiction, nor does OPC contend that FPUC has failed to state a basis for relief. Instead, OPC contends that FPUC should have pursued a different course of action. Such disagreement simply cannot serve as the basis for dismissal.

9. In its Petition, FPUC has invoked Sections 366.04, 366.041, 366.05, and 366.06, Florida Statutes, as the bases for the Commission to consider FPUC's request. In accordance with these provisions, the Commission is authorized to establish rates and charges for public utilities, including the relief requested herein, and to consider, among

⁸Citing, Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

⁹Citing, Barbado v. Green and Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure. See also, Order No. PSC-06-0260-PCO-EI, issued in Docket No. 060038-EI; Order No. PSC-10-0619-FOF-GU, issue in Docket No. 100315-GU; and PSC-12-0620-PCO-WU, issued in Docket No. 110200-WU.

¹⁰ Also, citing, See, e.g. Ralph v. City of Daytona Beach, 471 So. 2d 1,2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So. 2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So. 2d 233, 235 (Fla. 4th DCA, 1986); Ocala Loan Co. v. Smith, 155 So. 2d 711, 715 (Fla. 1st DCA, 1963).

other things, the adequacy of facilities, as well as the utility's ability to improve such facilities. The Commission itself has recognized that it is vested with authority to consider alternative recovery mechanisms, noting circumstances in which it has entertained such mechanisms in its decision approving the Company's GRIP mechanism, Order No. PSC-12-0490-TRF-GU, issued in Docket No. 120036-GU, at p. 10. Thus, to the extent that OPC seems to suggest, at p. 6 of the Motion, that the Commission is without authority to create a temporary cost recovery mechanism consistent with FPUC's request, the Commission has reached the contrary conclusion in Docket No. 120036-GU, as well as the other cases noted therein.¹¹ Other instances in which the Commission has approved temporary cost recovery mechanisms, include Order No. PSC-00-2263-FOF-GU, issued in Docket No. 000108-GU on November 28, 2000, at p. 11, approving, in concept, a cost recovery mechanism for recovery of transportation service costs for Chesapeake, and subsequent Order No. PS-02-0110-TRF-GU, issued January 24, 2002, approving cost recovery factors for Chesapeake for the recovery of costs associated with the transition to transportation service and the exiting of the merchant function, as well as Order No. PSC-03-1109-PAA-GU, issued October 6, 2003, in Docket No. 030462-GU, approving a recovery mechanism to enable Indiantown Gas to recover costs associated with the transition to transportation-only service.

10. Moreover, the statutes themselves clearly reflect that the Commission has the authority to consider FPUC's Petition and grant the relief requested. As set forth in

¹¹ *Citing, Action Group v. Deason*, 615 So. 2d 683 (Fla. 1993), wherein the Florida Supreme Court upheld the Commission's Order No. PSC-92-1468-FOF-EU approving a 15-year rate rider charged to customers in a specific service area to retire the existing debt of a bankrupt system that Florida Power Corporation (now Progress Energy Florida, Inc.) had purchased; Order No. PSC-05-0937-FOF-EI, issued September 21, 2005, in Docket No. 041291-EI, approving a surcharge to cover FPL's unanticipated storm restoration costs; and Order No. PSC-05-0748-FOF-EI, issued July 14, 2005, in Docket No. 041272-EI, approving a two-year surcharge to recover Progress's storm costs.

Section 366.041(1) and (2), Florida Statutes, respectively, in setting fair, just and reasonable rates, the Commission is entitled to consider, among other things, “the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public,” as well as “the ability of the utility to improve such service and facilities,” and in so doing, its authority is to be “construed liberally to further the legislative intent that adequate service be rendered by public utilities in the state. . . .” That is, at its core, all that FPUC has requested in its Petition.

III. Response

A. Motion to Dismiss

11. The only specified basis for OPC’s request that FPUC’s Petition be dismissed is that the Petition constitutes a request for a base rate increase. As such, OPC argues that FPUC has failed to comply with the Commission’s Rules regarding notice of its selected test year and filing date, has likewise failed meet the Commission’s requirements for filing the “Minimum Filing Requirements for Investor-Owned Electric Utilities” (“MFRs”) form, and neglected to seek a waiver of the Commission’s Rules regarding these requirements. While the remainder of OPC’s argument regarding dismissal makes it quite clear that OPC does not agree that a surcharge mechanism is an acceptable alternative to a rate case, OPC states no other basis for dismissal.

12. Undoubtedly, OPC’s arguments will serve as the basis for a healthy discussion of the merits of FPUC’s request as this proceeding unfolds. OPC’s arguments cannot, however, serve as the basis for dismissal. As plainly set forth in the Petition, FPUC has proposed the ESTAR mechanism as a temporary, alternative to a rate case - a “bridge,” in fact, to the next rate case. The Petition is further clear that the mechanism contemplated

is designed as a surcharge, akin to the GRIP surcharge approved by the Commission in Docket No. 120036-GU. The Company is not proposing a base rate increase at this time. Furthermore, in apparent conflict with its asserted basis for dismissal, OPC even seems to acknowledge that FPUC's request does not constitute a request for a base rate increase, noting at page 4 of the Motion to Dismiss that there is no prohibition for the Company to seek a base rate increase at this time.

13. In fact, nowhere in OPC's Motion does OPC contend that FPUC has failed to state a cause of action upon which relief can be granted. OPC argues, instead, that the proposal presents an approach that will "skew the ratemaking process," and that FPUC has failed to justify that recovery of these projects outside of a base rate case is appropriate.¹² OPC's assertions dispute the merits of FPUC's proposal, but do not address the question of whether FPUC has stated a cause of action upon which relief can be granted by the Commission. Thus, applying the Commission's accepted standard of review for a Motion to Dismiss, OPC's Motion to Dismiss should be denied.

14. It bears noting that OPC suggests at p. 7 of its Motion that there is "no extenuating legal circumstance that would allow FPUC to utilize the ESTAR program. . . ." There is, however, no basis in Chapter 366 for a standard of review of the ESTAR program based upon "extenuating legal circumstances." To the extent that, as a matter of ratemaking policy, the Commission has determined that surcharge mechanisms should be implemented in limited situations, FPUC has stated a basis for the Commission to consider the proposed ESTAR mechanism, which will be limited in duration and designed to avoid a specific problem otherwise associated with a full base rate proceeding given FPUC's unique situation at this point in time.

¹² Motion at pgs. 5 and 6.

15. FPUC has stated a cause of action upon which relief can be granted. The relief requested is within the Commission's jurisdiction to grant. The Rules with which OPC contends FPUC has failed to comply are not applicable to FPUC's request in this proceeding given that FPUC is not seeking a base rate increase. Ultimately, the mere fact that OPC does not agree with FPUC's approach is not an adequate basis for dismissal under the applicable standard. Therefore, FPUC respectfully requests that OPC's Motion to Dismiss be denied.

B. Alternative Request for Hearing

16. In the alternative, OPC has requested that the Commission set this matter directly for hearing. OPC contends that there are disputed issues of fact that can only be addressed at hearing and that a full review of the costs at issue is necessary in order to "set base rates on a going-forward basis. . . ." ¹³

17. While FPUC again maintains that it is not seeking a base rate increase at this time, the Company does not dispute that the Commission could set this matter directly for hearing, should it deem that course of action appropriate. FPUC respectfully requests, however, that the Commission refrain from setting this matter directly for hearing at this time. Instead, FPUC asks that the Commission proceed with a preliminary proposed agency action/tariff approval review of the Company's proposal as a means to gain additional information and provide a full airing of FPUC's proposal without the immediate investment of time and expense associated with a full hearing. FPUC suggests that delaying setting this matter for hearing will cause no harm to either FPUC, OPC, or the Company's ratepayers, but may ultimately prove more administratively efficient. Should the Commission issue a preliminary decision approving FPUC's request, the OPC

¹³ Motion, p. 9.

will have the clearly defined opportunity to file a protest of the Commission's decision. Furthermore, delaying setting the matter for hearing pending an initial decision by the Commission will allow the parties to better define where the areas of disagreement lie between them and consequently refine the scope of any subsequent hearing.

18. Should the Commission decide to set this matter for hearing, any such proceeding should be limited in scope to the request presented by FPUC to the Commission. To the extent that OPC has asked that the Commission require that FPUC comply with the Rules for initiating a base rate case, including the filing of MFRs, OPC's request is not ripe for a decision. FPUC has requested that the Commission consider an alternative cost recovery mechanism for FPUC given the unique circumstances that will occur over the next few years impacting bills to FPUC's customers. Requiring FPUC, instead, to file MFRs and commence a base rate proceeding would significantly negate the benefits of FPUC's proposal and effectively reject FPUC's Petition without consideration of the merits. The Commission can, and should, address FPUC's proposal as filed before proceeding to a full base rate case.

19. Specifically, requiring FPUC to immediately proceed with preparing and filing MFRs will only serve to delay consideration of FPUC's proposal and unnecessarily increase the costs associated therewith – costs that FPUC's ESTAR program was designed, in part, to avoid. Moreover, immediately transitioning to a base rate proceeding will, in and of itself, negate the purpose and intent of FPUC's proposal, which is to promote rate stability over the next five years. For these reasons, FPUC respectfully requests that the Commission reject OPC's alternative request, decline to set this matter directly for hearing, and proceed to address FPUC's request for approval of its ESTAR

Program through a preliminary decision, subject to protest, at a regularly scheduled Commission Agenda Conference.

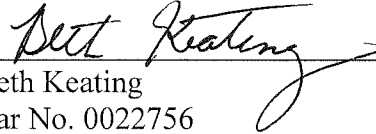
IV. Conclusion

20. OPC's Motion leaves no doubt that OPC strongly opposes FPUC's request. It does not, however, demonstrate a basis for dismissal. Viewing the Petition in the light most favorable to FPUC, the Company has stated a cause of action upon which relief can be granted by the Commission. As such, the Petition should not be dismissed. Instead, the Commission should proceed with consideration of FPUC's proposal as filed, giving consideration to the unique circumstances at hand, as well as the merits and policy arguments asserted by both FPUC and OPC. Contrary to OPC's rhetoric, FPUC maintains that its proposed approach will provide benefits to its ratepayers in the form of rate stability. Moreover, ESTAR will: 1) address capital projects to which a sense of urgency is attached, as reflected in Attachment B to the Petition; 2) be maintained for a limited duration not to exceed 5 years, as reflected in the Petition itself and Attachment A; and 3) avoid having FPUC incur the rate case expense associated with multiple rate cases within a relatively short time span – all valid objectives that inure to the benefit of ratepayers and to which OPC's Motion gives no countenance.

WHEREFORE, for all these reasons, Florida Public Utilities Company respectfully requests that the Citizens' Motion to Dismiss Florida Public Utilities Company's Petition or in the Alternative to Require FPUC to Comply with Commission

Rules and Then Set this Matter for a Section 120.57(1) Hearing be denied in its entirety.

RESPECTFULLY SUBMITTED this 3rd day of March, 2017.

A handwritten signature in cursive script that reads "Beth Keating". The signature is written in black ink and is positioned above a horizontal line.

Beth Keating

Bar No. 0022756

Gunster, Yoakley & Stewart, P.A.

215 South Monroe St., Suite 601


Tallahassee, FL 32301

(850) 521-1706

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via Electronic Mail on March 3, 2017 to:

<p>P. Christensen/C. Rehwinkel Office of Public Counsel c/o The Florida Legislature 111 W. Madison Street, Room 812 Tallahassee, FL 32399-1400 Christensen.patty@leg.state.fl.us Rehwinkel.Charles@leg.state.fl.us</p>	<p>Suzanne Brownless Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 sbrownle@psc.state.fl.us</p>
<p>Mr. Mike Cassel 1750 S 14th Street, Suite 200 Fernandina Beach FL 32034-3052 mcassel@fpuc.com</p>	


Beth Keating
Gunster, Yoakley & Stewart, P.A.
215 South Monroe St., Suite 601
Tallahassee, FL 32301
(850) 521-1706