BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of Amendment No. 1 to generation services agreement with Gulf Power Company, by Florida Public Utilities Company.	DOCKET NO. 110041-EI ORDER NO. PSC-12-0056-FOF-EI ISSUED: February 9, 2012

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

BY THE COMMISSION:

Background

On June 6, 2007, a 10-year agreement for Generation Services (existing agreement) between Florida Public Utilities Company (FPUC) and Gulf Power Company (Gulf) was approved in Order No. PSC-07-0476-PAA-EI.[1] Under the existing agreement, FPUC provides electric services to customers in the Jackson, Calhoun, and Liberty Counties, and the existing agreement had a contract termination date of 2017. The timeline for appealing that Order has expired.

On January 26, 2011, FPUC filed a petition for approval of Amendment No. 1 to its existing agreement (PPA Amendment) with Gulf. FPUC stated that the PPA Amendment was to enable adequate pricing flexibility to develop the Time of Use and Interruptible (TOU) rates consistent with FPUC's franchise agreement with the City of Marianna (City). The franchise agreement had a provision requiring that FPUC execute TOU rates by February 17, 2011 or the City can initiate proceedings to purchase FPUC's facilities within the City limits.[2] To develop the rates required by the franchise agreement, FPUC negotiated this PPA Amendment with Gulf.

[1] See Order No. PSC-07-0476-PAA-EI, issued on June 6, 2007, in Docket No. 070108-EI. In re: Petition for approval of agreement for generation services and related terms and conditions with Gulf Power Company for Northwest Division (Marianna) beginning 2008, by Florida Public Utilities Company (made final by Consummating Order No. PSC-07-0556-CO-EI, issued on July 2, 2007).

[2] We approved FPUC's TOU rates by Order No. PSC-11-0112-TRF-EI, issued on February 11, 2011, in Docket No. 100459-EI before the deadline required by the franchise agreement between FPUC and the City of Marianna. Docket No. 100459-EI is the Companion Docket to this docket.

On February 28, 2011, the City, located in Jackson County, was granted intervenor status in the PPA Amendment docket.[3]

On June 21, 2011, the PPA Amendment was approved for cost recovery calculation in Order No. PSC-11-0269-PAA-EI. As approved, the PPA Amendment is projected to result in savings of nearly $6 million for FPUC and its customers through 2017, and extend the term of the contract from 2017 to 2019. The existing agreement and the PPA Amendment are wholesale arrangements, and the Federal Energy Regulatory Commission has exclusive jurisdiction over the terms and rates of the existing agreement and the PPA Amendment. Our jurisdiction is limited to determining the regulatory treatment of the costs and/or savings associated with implementing the existing agreement and the PPA Amendment.

On July 12, 2011, the City filed a petition for a Section 120.57, Florida Statutes (F.S.), hearing (formal proceeding or formal hearing), protesting the PAA Order approving the PPA Amendment. The City alleged that its substantial interests is affected as: (1) the City is an FPUC customer with 112 service accounts; (2) FPUC's rates are unfair, unjust, and unreasonable; (3) the PPA Amendment is not reasonable for cost recovery calculations; and (4) the slight savings through 2017 will be outweighed by the high cost of 2018 and 2019.

On July 28, 2011, FPUC filed its motion to dismiss. In its motion, FPUC asserted that the City's petition should be dismissed as: (1) it failed to allege facts sufficient to show the City will incur an injury in fact sufficient to establish standing for a Section 120.57, F.S., hearing; (2) its alleged injury is not of the type protected by this proceeding; and (3) the City's goal is to obtain FPUC's facilities in Marianna after only 17 months into a 10-year franchise agreement.[4]

On August 4, 2011, the City of Marianna filed its response in opposition stating it has pled facts sufficient to establish standing and state a claim upon which relief can be granted.

Both parties requested Oral Argument.

We have jurisdiction pursuant to Chapter 366, Florida Statutes (F.S.).

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[3] See Order No. PSC-11-0137-PCO-EI, issued on February 28, 2011, in Docket No. 110041-EI, In Re: Petition for approval of Amendment No. 1 to generation services agreement with Gulf Power Company, by Florida Public Utilities Company.

[4] FPUC also asserted that the City protested the TOU order on March 1, 2011, and the next day, March 2, 2011, the City filed pleadings in the Fourteenth Judicial Circuit in Jackson County seeking a declaratory judgment that FPUC violated the terms of the franchise agreement. FPUC also claimed that the City send FPUC a letter indicating it would pursue the purchase of FPUC's facilities in Marianna. We dismissed the City's request for a Section 120.57, F.S., hearing on the TOU rates by Order No. PSC-11-0290-FOF-EI, issued on July 5, 2011, in Docket No. 100459-EI, 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.

Discussion

Standing

The Agrico case established the two prong test that a petitioner must meet to demonstrate standing for a Section 120.57, F.S., hearing.[5] Prong One of the Agrico test requires an injury in fact that is of "sufficient immediacy" to warrant a Section 120.57, F.S., hearing, while Prong Two of the test requires that the "substantial injury be of a type or nature that the proceeding is designed to protect."[6]

The first prong of the Agrico test deals with the degree of injury, which must be both real and immediate and not speculative, too remote, or conjectural. The second prong of the test deals with the nature of the injury. Failure to satisfy either or both prongs of the test is grounds for dismissal, as demonstrated by the Florida Supreme Court. In 2007, the Court affirmed our denial of Nuvox's petition for a formal hearing for lack of standing in Nuvox Communications, Inc. v. Lisa Polak Edgar, Etc.[7] In 1997, the Florida Supreme Court also affirmed our dismissal of Ameristeel Corporation's petition for a Section 120.57, F.S., hearing for lack of standing in Ameristeel Corp. v. Clark.[8]

Motion to Dismiss

A motion to dismiss questions the legal sufficiency of a complaint.[9] 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.[10] When a motion to dismiss a petition is filed, a court may not look beyond the four corners of the petition in considering its legal sufficiency.[11]

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[5] See Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981)(reversing the DEP's determination that appellee, a competitor of Agrico, had standing for a Section 120.57, F.S., hearing where the appellee's alleged injury was "far too remote and speculative in nature" to satisfy the first prong of the Agrico test and the alleged injury was not of the type the proceeding was designed to protect).
[6] See Agrico, 406 So. 2d 478 at 482.
[7] See Nuvox Communications, Inc. v. Lisa Polak Edgar, Etc., 958 So. 2d 920 (Fla. 2007).
[8] See Ameristeel Corp. v. Clark, 691 So. 2d 473, 479-480 (Fla. 1997). See also Order No. PSC-11-0290-FOF-EI, issued on July 5, 2011, in docket No. 100459-EI, 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 (wherein the City of Marianna's petition was dismissed for a Section 120.57, F.S., hearing for lack of standing).
[9] See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).
[10] See Varnes v. Dawkins, at 350.
[11] See 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)).

FPUC's Motion to Dismiss

In its dismissal motion, FPUC stated that the City lacked standing and failed to state a cause of action upon which relief can be granted.

Standing

FPUC stated that the City failed to show injury in fact that is of sufficient immediacy to warrant a Section 120.57, F.S., hearing or that the alleged injury is of the type the proceeding is designed to protect in that:

- the City's acknowledgement that the PPA Amendment reflects definite savings through the year 2017 cannot be construed as a "harm" or "injury," and its contentions regarding cost of the PPA Amendment's extension for 2018 and 2019 are speculative.

- the City's unsubstantiated allegations of "additional cost risks" such as fuel and environmental cost risks and cost of fuel and purchased power for 2018 and 2019 are speculative and do not demonstrate an "injury in fact of sufficient immediacy" to warrant a hearing.

- the City failed the second prong of the Agrico test in that this docket will not set rates or actual fuel cost recovery charges, and the ability to design conservation or load control measures is not a statutory criteria for determining the propriety of the PPA Amendment. The City is motivated by economic gain and is attempting to interfere with the City's 10-year franchise agreement with FPUC and obtain FPUC's facilities in Marianna.

Cause of Action

FPUC asserted that the City's petition failed to state a cause of action upon which this Commission can grant relief, in that:

- even when taken as true, there is no injury in fact, and this docket does not set rates or actual fuel cost recovery charges, but only reviews the prudency of the PPA Amendment and the propriety of cost recovery.

- even when read in light most favorable to the City, the petition failed to meet the Agrico test for standing.

City of Marianna's Response

The City of Marianna opposed FPUC's dismissal motion and alleged it has pled facts sufficient to establish standing and a claim for which this Commission can grant relief.

Standing

The City asserted it has standing in that:

- whether FPUC adequately evaluated all of the impacts of the PPA Amendment is an immediate injury in fact, and this docket determines cost for 2018 and 2019.

- while it is technically true that the actual purchased power cost recovery charges for 2018 and 2019 will not be set until 2017 and 2018 respectively, the costs that FPUC will incur and incorporate into its purchased power charges in 2018 and 2019 will be determined in this proceeding. The City will have to pay these costs in 2018 and 2019 if the PPA Amendment is approved.

- the imposition of the adverse impact of the PPA Amendment on the City in the future does not make them speculative. Additionally, FPUC's costs under the PPA Amendment equal unjust, unfair, and unreasonable rates that the City will pay, which constitutes the City's injury.

- this docket is the City's only opportunity to challenge the costs FPUC will incur under the PPA Amendment, and approval of the amendment bars the City from litigating in 2018 and 2019 regarding the unreasonableness and imprudence of the costs.

Cause of Action

The City alleged that its disputed issues of material facts include the following:

- it disagrees with this Commission's preliminary conclusion that the modification to the capacity purchase quantity provides support to develop conservation, time-of-use, interruptible, or similar rates.

- FPUC's costs under the PPA Amendment are unreasonable and imprudent and will result in unfair, unjust, and unreasonable rates, and risks associated with full costs and environmental costs that Gulf power may incur are additional risks identified by the City in its petition.

Analysis

Standing

FPUC challenges the City's standing for a Section 120.57, F.S., hearing. Therefore, the City is required to show conclusively that it has an injury in fact of sufficient immediacy to warrant a Section 120.57, F.S., hearing and that the alleged injury is of the type protected by this proceeding. The City is protesting a PAA Order approving FPUC's proposed PPA Amendment, which should result in a savings of nearly $6 million for FPUC and its customers through 2017, and extend the contract year from 2017 to 2019.

Although the City is a customer of FPUC, the City's allegations of future costs in 2018 and 2019 are "speculative and conjectural" and fails to demonstrate the requisite "injury in fact" that is both real and immediate to warrant a Section 120.57, F.S., hearing. The City's allegations of a possible increase in FPUC costs for 2018 and 2019 is also "far too remote and speculative in nature" to qualify as an immediate harm under the first prong of the Agrico standing test.

The City's assertion that it is "technically true" that the actual purchased power cost recovery charges for 2018 and 2019 will not be set until 2017 and 2018 further supports our conclusion that the City's assertions are speculative and too remote at this time to constitute immediate harm sufficient to warrant a Section 120.57, F.S., hearing. Additionally, the City acknowledged that the amendment will result in a rate reduction through 2017, which does not demonstrate an immediate harm to the City. Therefore we find that the City has failed to show that its alleged injury in fact is of sufficient immediacy to warrant a section 120.57, F.S., hearing.

The City also failed to demonstrate that its alleged injury is of the type protected by this proceeding. This docket addresses the cost recovery calculation for the PPA Amendment. Additionally, the PPA Amendment is a wholesale arrangement, and the Federal Energy Regulatory Commission has exclusive jurisdiction over the terms and rates of the PPA Amendment. Here, the City asserted that this docket sets rates that are unjust, unfair, and unreasonable. However, in this docket, as outlined in the order approving the PPA Amendment, our jurisdiction is limited to determining the regulatory treatment of the costs and/or savings associated with implementing the PPA Amendment. Therefore, the City has not demonstrated that its alleged injury is of the type protected by this proceeding.

Cause of Action

The Order approving the PPA Amendment should result in savings of nearly $6 million for FPUC and its customers through 2017 and extend the contract year from 2017 to 2019.

The City's petition, if taken as true, does not demonstrate that the City, as a customer, will suffer injury from the PPA Amendment as the PPA Amendment is only approved for cost recovery calculations, resulting in savings to FPUC and its customers. The City's statements of unfair, unjust, and unreasonable rates are conclusory and not demonstrative of a disputed issue of material fact or an injury for which relief can be granted in this docket. The City's allegation that the savings through 2017 will be outweighed by potential costs of 2018 and 2019 also failed to demonstrate an immediate injury.

Section 120.569(2)(c), F.S., provides that the "dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured." The PAA Order protested by the City is projected to result in $6 million in savings to FPUC and its customers through 2017. The City's petition failed to establish an immediate harm or an alleged injury of the type protected by this proceeding. The City's petition also failed to state a cause of action. It is conclusive, from the face of the petition, that the defects in the City's pleadings cannot be cured. Therefore, we find it appropriate to dismiss the City's petition with prejudice,

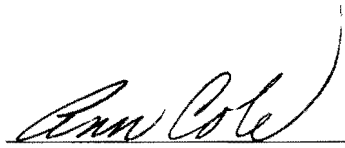
and a Consummating Order shall be issued reviving Order No. PSC-11-0269-PAA-EI, making it final and effective.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the City of Marianna's Petition Protesting Proposed Agency Action Order No. PSC-11-0269-PAA-EI and Requesting Formal Proceeding is dismissed with prejudice. It is further

ORDERED that the docket shall be closed, and a Consummating Order shall be issued reviving Order No. PSC-11-0269-PAA-EI and making it final and effective.

By ORDER of the Florida Public Service Commission this 9th day of February, 2012.



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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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.