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Sent: Thursday, March 17, 2011 2:18 PM
To: Filings@psc.state.fl.us
Cc: Robert Scheffel Wright; 'fbondurant@embarqmail.com'; CHRISTENSEN.PATTY; Erik Sayler
Subject: Docket No. 100459-EI
Attachments: 20110317140653768.pdf; 20110317140724410.pdf

Attached for electronic filing, please find Florida Public Utilities Company's Motion to Dismiss the Petition of the City of Marianna, Florida, and a separate Request for Oral Argument on the Motion to Dismiss. Please do not hesitate to contact me if you have any questions.

Beth Keating
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a. Person responsible for this electronic filing:

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b. Docket No. 100459-EI - 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.

c. On behalf of: Florida Public Utilities Company

d. Total Number of Pages: Document 1 (ending in 8): Motion to Dismiss – 18 pages
Document 2 (ending in 0): Request for Oral Argument – 3 pages

e. Description: Document 1: FPUC's Motion to Dismiss Petition of Marianna
Document 2: FPUC's Request for Oral Argument on its Motion to Dismiss

GUNSTER
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March 17, 2011

BY ELECTRONIC FILING

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

Re: **Docket No. 100459-EI - 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.**

Dear Ms. Cole:

Attached for electronic filing in the referenced Docket, please find Florida Public Utilities Company's Motion to Dismiss the Petition of the City of Marianna, Florida. In conjunction with this filing, the Company is also submitting a Request for Oral Argument under separate cover.

Thank you for your assistance with this filing. If you have any questions whatsoever, please do not hesitate to let me know.

Sincerely,

Beth Keating
Gunster, Yoakley & Stewart, P.A.
215 South Monroe St., Suite 618
Tallahassee, FL 32301
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MEK

cc: Certificate List

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.	)	Docket No. 100459-EI Filed: March 17, 2011

FLORIDA PUBLIC UTILITIES COMPANY'S MOTION TO DISMISS PETITION OF CITY OF MARIANNA, FLORIDA

Florida Public Utilities Company ("FPUC" or "Company"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby moves for the Florida Public Service Commission ("Commission") to dismiss the Petition for Formal Proceeding filed by the City of Marianna, Florida ("City") on March 1, 2011, because the Petition fails in three critical areas: (1) it fails to meet the pleading requirements of Rule 28-106.201(2), Florida Administrative Code, and, for many of the same reasons, fails to sufficiently allege standing to maintain the Petition; (2) it fails to allege facts sufficient to state a cause of action upon which relief can be granted, and (3) it is premature in that it asks the Commission to address issues through a hearing in this Docket that the Commission has already stated will be addressed in other proceedings. In support of this Motion, FPUC states as follows:

I. INTRODUCTION

1. This proceeding was initiated when the Company filed, on December 14, 2010, its Petition to implement a demonstration project allowing the Company to offer time-of-use rates ("TOU") and interruptible rates ("Interruptible") to customers in the Northwest Division. As explained in the Company's initial Petition, the Company entered into an electric distribution

franchise agreement with the City of Marianna in February 2009. The agreement includes a provision that requires the Company have approved tariff TOU and Interruptible rates in effect by February 17, 2011.

2. FPUC purchases electric power from third parties and delivers the electricity to end-use customers through its distribution systems. In order to develop appropriate, functional TOU and Interruptible rates, the Company entered into negotiations with Gulf Power Company for amended terms in the Company's purchased power agreement for the Northwest Division ('PPA Amendment"). As the Commission recognized in Order No. PSC-11-0112-TRF-EI ("Tariff Order"), the amendment was ultimately finalized and provides cost reductions that will benefit FPUC's Northwest Division's customers in the form of lower fuel factors, as recognized in the Tariff Order. Order, p. 3. Moreover, as a result of the projected savings generated by the PPA amendment, the Company was able to develop TOU and Interruptible rates that the Commission determined to be reasonable. The Commission further determined that

> Since FPUC has no experience with TOU or interruptible rates, offering the tariff on an experimental basis will allow FPUC to gather customer-specific data to gauge customer demand response. FPUC stated that the savings resulting from the amended agreement are expected to increase annually, which will allow FPUC to modify the TOU and interruptible rates on a going-forward basis. We will evaluate, as part of the on-going fuel clause hearings, FPUC's TOU and interruptible fuel charges. Any interested parties will have the ability to participate in the evaluation of FPUC's TOU and interruptible fuel charges.

Tariff Order, p. 6. The Commission thus approved the proposed rates, effective February 8, 2011, because

> The proposed rates are designed to provide customers who are capable of modifying their electric usage with savings on their bills and ensure that FPUC's peak demand remains at or below the 91 MW. It will also allow FPUC to gather important data on price responsiveness to TOU rates while protecting the nonparticipating customers from lost revenue impacts.

Tariff Order, p. 7.

3. The City's core contention is that the Company's TOU and Interruptible rates are not fair, because they are not based upon the costs incurred by the Company's generation services provider, Gulf Power Company, nor do the rates reflect the costs that FPUC incurs on a "time-differentiated basis." As such, the City contends that the rates will not provide "accurate price signals" to FPUC's retail customers. The City further suggests that the rates, ". . . do not reflect the value that customers will create by modifying their consumption, either by shifting their times of use or by being interrupted. . . ." Petition, p. 7. For these reasons, the City alleges that the approved rates are not fair, just and reasonable. *See* Petition, p. 5, 6.

4. The City also alleges that the subscription limits in the Company's tariff are not appropriate, although the City fails to explain why or what harm or violation, if any, results.

5. On these bases, the City asks that the Commission conduct a full evidentiary proceeding to address the questions raised in its Petition, and conclude that the Company's TOU and Interruptible rates should be cancelled.

6. Read in the light most favorable to the City, the Petition fails to state a cause of action upon which relief can be granted and should be summarily dismissed. Moreover, the City has utterly failed to identify an injury in fact which of sufficient immediacy to warrant relief.[1] In a nutshell, the City has simply not adequately alleged any harm or statutory violation that will arise as result of these rates, and has not provided any

[1] Although the Commission has authorized intervention by the City in the Docket, such authorization does not automatically mean that the City has sufficiently plead standing to withstand dismissal. It should not be overlooked that the City would, at best, be able to demonstrate standing to contest rates applicable to the City itself, as a customer of the utility. The City is not authorized by statute to represent other customers before the Commission. *See also, ENVIRONMENTAL CONFED. OF SOUTHWEST FL., INC. v. IMC Phosphates, Inc.*, 857 So.2d 207 (Fla. 1st DCA 2003) ("An organization is not entitled to seek judicial review of an administrative decision merely because it has a general interest in the issue decided.")

explanation of why the allegations it has raised warrant cancellation of the TOU and Interruptible Rates.

7. Even taking all the allegations in the Petition as true, none of the City's assertions would support a finding that the approved TOU and Interruptible rates are not fair, just and reasonable, nor would they support a finding that the City, as a customer of the Company, would suffer as a result of service provided under these optional rates; thus, the City has provided no basis to move forward with a Section 120.57 hearing.

8. Finally, the City's request is premature in that it fails to recognize that the Commission stated, in Order No. PSC-11-0112-TRF-EI, that the approved, experimental TOU and Interruptible rates would be evaluated as part of the ongoing fuel clause proceedings, and that interested parties would have the opportunity to participate in that review. The review requested by the City in this proceeding would be redundant of that which is already contemplated for consideration in the Fuel and Purchased Power clause proceeding, Moreover, less data would be available for consideration now than will be available for the later Fuel and Purchase Power proceedings. This is due to the simple fact that these TOU and Interruptible rates are a new offering of the Company and are being offered as experimental for the express purpose of determining their efficacy and customer interest.

9. Accordingly, the Petition should be dismissed because: (1) the City has not established standing to maintain its Petition, nor has it met the pleading requirements of Rule 28-106.201, Florida Administrative Code; (2) the City has failed to allege facts establishing a cause of action; and (3) its request is premature and counter to the fact that these rates are offered on an experimental basis.

II. STANDARD OF REVIEW

10. The City's Petition was received by undersigned counsel on March 1, 2011; thus, this Motion to Dismiss is timely filed pursuant to Rule 28-106.204, Florida Administrative Code.

11. The pleading requirements of Rule 28-106.201(2), Florida Administrative Code, are clearly set forth in the Rule, and require no explanation:

> (2) All petitions filed under these rules shall contain:
> (a) The name and address of each agency affected and each agency's file or identification number, if known;
> (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
> (c) A statement of when and how the petitioner received notice of the agency decision;
> (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
> (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
> (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
> (g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

12. 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. *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. *Id.; Flye v. Jeffords*, 106 So. 2d 229 (Fla. 1st DCA 1958); *City of Gainesville v. Florida Dept. of Transportation,* 778 So. 2d 519 (Fla. 1st DCA 2001).

13. Likewise, the Commission has recognized that the accepted test for "substantial interests," and thus standing, is set forth in Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), wherein the Second District Court of Appeal addressed the issue of "substantial interest" standing, explaining that the petitioner must demonstrate that: 1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. As the Court further elucidated, "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Id.*[2] To prove standing, the petitioner must satisfy both prongs of the *Agrico* test. *Ybor III, Ltd. v. Florida Housing Finance Corp.*, 843 So. 2d 344 (Fla. 1st DCA 2003). The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990).

14. To be clear, intervention allowed under Rule 25-22.039, Florida Administrative Code, does not assure that a petitioner will, in fact, be able to demonstrate a sufficient injury in fact to establish standing to maintain a protest of subsequent agency action.[3]

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[2] The PSC has previously determined that the *Agrico* test for standing applies to governmental entities by Order No. PSC-95-0062-FOF-WS, issued January 11, 1995, in Docket No. 940091-WS, *Application for transfer of facilities of LAKE UTILITIES, LTD. to SOUTHERN STATES UTILITIES, INC.; amendment of Certificates Nos. 189-W and 134-S, cancellation of Certificates Nos. 442-W and 372-S in Citrus County; amendment of Certificates Nos. 106-W and 120-S, and cancellation of Certificates Nos. 205-W and 150-S in Lake County;* and Order No. PSC-93-0363-FOF-WS, issued March 9, 1993, Docket No. 921237-WS, *In re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc.*

[3] Order No. PSC-11-0129-PCO-EI, allowing the City to intervene, provides only that the City's "substantial interests **may** be affected by this proceeding." [emphasis added]. Order at p. 2. *See also, American Trucking Associations, Inc. v. ICC*, 669 F. 2d 957, 964 (5th Cir. 1982)(stating that ". . . intervention in agency proceedings and standing to challenge agency actions in judicial review proceedings are not governed by the same standards.), *citing* 1 K. Davis,

Typically, as in this case, when Commission grants intervention status under Rule 25-22.039, Florida Administrative Code, it applies the *Agrico* test for standing to the Petition to Intervene. However, in ruling on such a Petition, the Commission, as it did in this case, does not make a conclusive determination that any subsequent agency action will, in fact, affect the Petitioner's substantial interests. Instead, the Commission's Orders Granting Intervention will typically provide that the intervenor's substantial interests "**may**" be affected by the outcome of the proceeding.[4] This is preliminary determination allows the intervenor to participate fully in the proceeding as a party, but does not preclude the Commission from revisiting the subject of standing if the question arises under another pleading rule. Specifically, in this instance, the City has filed a Petition for Formal Proceeding pursuant to Rule 28-106.201, Florida Administrative Code. Rule 28-106.201(2)(b), Florida Administrative Code, includes a specific requirement that the City include in its Petition an "explanation of how the [its] substantial interests will be affected by the agency determination. . . ." [emphasis added]. The fact that intervention has been granted, on a provisional basis, under Rule 25-22.039, Florida Administrative Code, does not override the application of the pleading requirements in Rule 28-106.201(2)(b), Florida Administrative Code, to a new, separate pleading filed pursuant to that Rule. Thus, the question of whether the City has adequately plead that its substantial interests will be affected is properly before the Commission.

Administrative Law Treatise § 8.11, at 564 (1958). *See also, In Re: Application for Amendment of Certificate No. 427-W to Add Territory in Marion Count y by Windstream Utilities Company*, 97 FPSC 4:556 (differentiating between intervention as an "intervenor" or "interested party" under Rule 25-22.039, F.A.C., and intervention as an "objecting party."

[4] *See,* for instance, ORDER NO. PSC-01-0548-PCO-TP, issued in Docket No. 010102-TP; and ORDER NO. PSC-10-0527-PCO-EG, issued in Docket No. 100158-EG, among others, stating that the proposed intervenors' substantial interests "may" be affected.

III. THE CITY HAS FAILED TO MEET THE PLEADING REQUIREMENTS AND DEMONSTRATE STANDING

15. As noted in the previous section, the *Agrico* test is a two-part test for standing, which requires that both components of the test be met. The first component of the test is a demonstration that there exists, or will exist, an injury in fact of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing. Applying this test to the City's Petition, the City has clearly failed to meet either prong of the test.

16. In addition, the City's Petition does not comply with the essential pleading requirements in Rule 28-106.201(2)(b),(f) and (g), Florida Administrative Code, in that the Petition does not: (1) explain how the City's substantial interests are affected by Order No. PSC-11-0112-TRF-EI; (2) provide a specific statement as to the rules or statutes that require reversal or modification of the Commission's decision; and (3) include an explanation of how the alleged facts relate to the specific rules or statutes identified.

17. Specifically, the City's Petition outlines a series of "ultimate facts" that serve as the basis for its Petition. Review of these statements, however, reveals that none of them, even when taken as true, demonstrate that the City, as a customer will suffer any injury as a result of the approval and implementation of these rates, much less an injury of sufficient immediacy to warrant a hearing. In fact, most of the assertions put forth by the City are so broad and bereft of explanation that the Petition fails on two fronts: (1) it fails the first prong of the *Agrico* test by failing to sufficiently allege injury in fact; and (2) it fails to meet the essential pleading requirements of Rule 28-106.201, Florida Administrative Code. Because the Company's arguments regarding the City's failure to

allege harm, and thus standing, as well as the City's failure to meet the pleading requirements of Rule 28-106.201, Florida Administrative Code, are similar and somewhat interrelated, we address them here together.

18. As noted herein, the City's core contention is that the TOU and Interruptible rates are not cost-based, and are therefore, not fair, just, or reasonable. This bare allegation, even if true (which it is not), is entirely insufficient to identify an injury that will befall the City as a result of the Commission's approval of these rates. Even assuming that the rates are not cost based, the City identifies no injury that would befall the City as a result. To the contrary, these rates offer the City the opportunity to better manage its electricity bills. The fact that these rates are offered as an option to customers, not a mandate, should also not be overlooked. If the City, or any other customer, does not wish to participate, they may continue receiving service under other Company rate schedules.

19. Likewise, this allegation fails to meet the pleading requirements of Rule 28-106.201(2)(b) and (f), Florida Administrative Code, because the City fails to explain how the City's substantial interests will be affected if the rates are not cost-based, nor how any pertinent statutes or rules relate to the alleged fact and result in rates that are not fair, just and reasonable.

20. Similarly, the City alleges that the subscription limits applicable to the Company's TOU and Interruptible rates are "not appropriate." Petition, p. 6. Again, without more, this statement provides no information about why the subscription limits are inappropriate, whether they violate any statutory provision, and what harm befalls the City as a result of their implementation. Nowhere in the Petition does the City explain why the subscription limits are "not appropriate," neither does the City provide any

further explanation of this statement, such as how the subscription limits might adversely impact the City. As such, this allegation, fails to identify an injury, in fact, of sufficient immediacy to warrant an administrative hearing, and by the same token, it fails to meet the pleading requirements of Rule 28.106.201(2)(b) and (f), Florida Administrative Code.

21. The same arguments apply to the City's assertion that the TOU and Interruptible rates do not send customers "appropriate price signals." Petition, p. 6. Again, the City provides no explanation other than to suggest that the rates do not reflect the costs incurred by the Company during the on-peak and off-peak periods. The City provides no explanation as to why it believes that customers will not receive appropriate price signals, nor does it identify any violation that has occurred or injury that may be incurred by the City. Thus, this allegation too fails to identify an injury in fact sufficient to meet the *Agrico* test, and it also fails to meet the pleading requirements of Rule 28-106.201(2)(b) and (f), Florida Administrative Code.

22. As an aside, even if the City's Petition did meet the *Agrico* test for standing, the City could only pursue its Petition as it pertains to the specific rates that would apply to the City, as a customer of Florida Public Utilities. More specifically, the City has no residential service accounts with the Company. Thus, even assuming that the Petition otherwise met *Agrico*, as well as the pleading requirements of Rule 28-106.201, F.A.C., the City still could only establish standing to maintain its Petition with regard to the TOU and Interruptible rates as they are offered to the GS, GSD, and GDLD rate classes. To the point, the City is without authority to represent anyone else, including citizens with residential service accounts, in this or any other matters before the Florida Public Service Commission. The authority to represent consumers before the Florida Public Service

Commission is reserved, by statute, for the Public Counsel. Section 350.0611, Florida Statutes.

23. With regard to the remainder of the City's "ultimate facts alleged," these assertions are simply not facts at all, and as such, do not identify any injury that would be incurred by the City. The City merely states that the TOU and Interruptible rates are "not appropriate" for implementation as experimental rates and that they should not be approved. Likewise, the City asserts that the subscription limitations are "not appropriate."[5] These assertions are legal or policy conclusions that can in no way be construed as factual allegations sufficient to support the City's Petition. Moreover, these assertions do not identify the harm to the City. As the Commission has found in prior cases, blanket statements, such as these, without sufficient facts to support the statements, are not enough to meet the Agrico standard. There must be more than a mere assertion of harm. Order No. PSC-99-0146-FOF-TX, issued January 25, 1999, in Docket No. 981016-TX.

24. As for the section of the City's Petition entitled "Issues of Material Fact," (Petition, p. 4 – 5), here, the City has posed a series of questions that it believes are appropriate for further consideration and resolution by the Commission. These questions are not, however, framed as factual allegations sufficient to maintain the City's Petition under Rule 28-106.201, Florida Administrative Code, or Section 120.57(2), Florida Statutes. Moreover, to the extent these "Issues" are otherwise encapsulated in the City's

[5] Notwithstanding the fact that this statement fails the pleading requirements and does not state a cause of action, the Company emphatically rejects this notion. The rates will be available, on a "first-come, first-served" basis, to any customers in the Northwest Division that wish to participate. As the Commission recognized, without some upper limit cap on participation in this experimental program, ". . . [P]articipation beyond this break even point would require non-participants to subsidize participants." Tariff Order, p. 6. The Commission further noted that "It will also allow FPUC to gather important data on price responsiveness to TOU rates while protecting the nonparticipating customers from lost revenue impacts." Tariff Order, p. 7.

"Ultimate Facts" previously discussed herein, the Company restates and adopts the same arguments offered with regard to the "Ultimate Facts;" i.e., none of these questions identify any injury to the City, in fact, or any violation of law that might otherwise afford the basis for a Section 120.57 hearing.

25. For all of these reasons, the City has failed to meet the first prong of the *Agrico* test for standing, and at the same time, the Petition fails to meet the pleading requirements of Rule 28-106.201, Florida Administrative Code. The City's Petition fails to allege detailed facts sufficient to warrant proceeding to hearing and should, therefore, be dismissed.[6]

26. With regard to the second prong of the *Agrico* test, even if one assumes that the City has established that it will incur some harm as a result of the Company's TOU and Interruptible rates and, thus, a correlating cause of action, any harm identified is certainly not one of sufficient immediacy to warrant a hearing at this time.[7] As noted in the Tariff Order, the TOU and Interruptible rates are offered on an experimental basis in order to allow the Company to gather additional data on customer demand response. Moreover, these rates are offered on an optional basis – the City is not required to avail itself of these rates. As such, even if some harm has been identified, it is certainly not one of sufficient "immediacy" to warrant a hearing. Any harm alleged, if any can be gleaned

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[6] *See*, Order No. PSC-10-0619-FOF-GU at p. 7, issued October 18, 2010, in Docket No. 100315-GU, *Complaint by Miami-Dade County for Order requiring Florida City Gas to show cause why tariff rate should not be reduced and for the Commission to conduct a rate proceedings, overearnings proceeding, or other appropriate proceeding regarding Florida City Gas' Acquisition Adjustment; citing* Order No. 15765, issued March 3, 1986, in Docket No. 860058-EI, *Petition by the Citizens of the State of Florida to initiate a show cause action that directs Florida Power Corporation to justify why Crystal River 3 should remain in the utility's rate base,* 86 FPSC 3:14, at 15(finding that the broad allegations leveled by the Public Counsel were insufficient to put FPC on notice as to what it would defendant against, and also noting that an y request for a proceeding under Section 366.06, F.S., must also include sufficient facts upon which warrant the Commission proceeding.)

[7] Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987)(speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process).

from the Petition, is speculative at best. As such, the City's Petition fails to meet the second prong of the *Agrico* test for standing.

IV. FAILURE TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED

27. With regard to the City's assertion that the "cited statutes warrant denial of FPUC's proposed TOU and IS rates," the City's Petition apparently suggests that the TOU and Interruptible rates do not comply with the rate-setting provisions in Chapter 366, Florida Statutes. Petition, p. 7. Taking this assertion on its face, and overlooking - for now - the fact that this assertion also fails to meet the pleading requirements, the allegation, even if true, fails to state a cause of action. The rate-setting provisions, which are referenced by the City, notably Sections 366.041 and 366.06, F.S., do indicate that the Commission may consider, "among other things,"[8] the cost of providing a service, "to the extent practicable,"[9] in determining the propriety of rates. Nonetheless, the City's bald assertion that the rates are not "cost-based" is patently inadequate to establish a cause of action given the fact that both of the referenced statutory provisions are quite clear that "cost" is but one of several criteria that the Commission may consider in determining the propriety of proposed rates. Moreover, the statutes give no indication that cost is the principle, determinative factor for the Commission to consider. Thus, even assuming that the City's assertion is true, the City has failed to identify a cause of action arising under Chapter 366, Florida Statutes.[10]

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[8] Section 366.041, F.S.

[9] Section 366.06, F.S.

[10] The Company, of course, contends that this allegation is simply not true. To the contrary, as the Company has argued previously in this proceeding, the rates are based on costs already recognized by the Commission in the Fuel and Purchased Power cost recovery proceeding with the annualized savings derived from the PPA Amendment No. 1 incorporated to produce the on-peak and off-peak rates. The Commission recognized in Order No. PSC-11-0112-TRF-EI that "FPUC's proposal to use a portion of the savings resulting from the amended agreement to establish time-differentiated rates appears to be a reasonable first step to designing viable TOU rates." Tariff Order, p. 6. If

28. Moreover, the City ignores that fact that the Company's TOU and Interruptible rates have been submitted, and approved, under Section 366.075, Florida Statutes, as experimental rates. Section 366.075(1), Florida Statutes, provides, in pertinent part, that, "The commission is authorized to approve rates on an experimental or transitional basis for any public utility to encourage energy conservation or to encourage efficiency." There is no reference therein to the Commission's consideration of costs for experimental rates. Thus, the City's allegation could not give rise to a cause of action under Section 366.075, Florida Statutes, which is the provision pursuant to which the Company filed the tariffed rates at issue here.

29. The City also contends that the Company's TOU and Interruptible rates "do not provide appropriate price signals that reflect either the costs that FPUC incurs to provide service during on-peak and off-peak periods, or in seasons of the year" and thus, the City contends that they are not fair, just, and reasonable. As with the assertions previously discussed herein, this broad allegation provides no insight into the injury, harm, or violation that will result. Moreover, this assertion makes a leap of Olympic proportions by contending that rates which "do not provide appropriate price signals" are, consequently, not fair, just and reasonable. Notably, the City provides no rationale to explain this curious assertion.[11]

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the Company were unable to rely upon the savings produced by the PPA Amendment No. 1, any TOU and Interruptible rates structured for the Northwest Division would likely run the afoul of prohibition on cross-subsidization.

[11] Again, the Company suggests that there is sufficient evidence to support that these rates will send appropriate price signals. As the Commission noted, "The proposed rates appear to provide a sufficient differential between on- and off-peak rates to encourage some customers to shift usage." Tariff Order, p. 6. Moreover, the Commission recognized that "Since FPUC has no experience with TOU or interruptible rates, offering the tariff on an experimental basis will allow FPUC to gather customer-specific data to gauge customer demand response." Tariff Order, p. 6.

30. The City also suggests that the Company's TOU and Interruptible rates do not accurately reflect the costs that are incurred by Gulf Power Company, FPUC's wholesale provider. There is, however, no logical nexus (and indeed the City has failed to allege one) between the costs that Gulf Power incurs to provide service and FPUC's tariffed TOU and Interruptible rates. Under the various provisions of Chapter 366, Florida Statutes, referenced by the City, if any costs are to be considered, the relevant costs would be those incurred by FPUC. As such, this allegation cannot serve as the basis to move this matter forward to hearing.[12]

V. PREMATURE AND CONTRARY TO PRINCIPLES OF ADMINISTRATIVE EFFICIENCY

31. Finally, in Order No. PSC-11-0112-TRF-EI, the Commission stated that it will review the Company's TOU and Interruptible rates through the ongoing Fuel and Purchased power clause, and that other parties will be able to participate in this review. Thus, any suggestion for a cost review, or any other similar such review, is entirely premature.

32. Furthermore, as already noted herein, these rates are experimental rates implemented on a trial basis. The trial period will allow the Company to obtain additional data, which will assist it in determining whether these rates truly encourage customers to reduce usage in peak periods. As the Commission itself recognized, "The experimental pilot will allow FPUC to determine participating customers' load response and the effect on participating customers' bills." Order at p. 6. The purpose of implementing rates such as these on an experimental, pilot basis is to allow the utility

[12] Similarly, this assertion would fail the second prong of the *Agrico* test for standing, because this proceeding is designed to address the Company's TOU and Interruptible rates; it is not designed to address Gulf Power's costs to provide service.

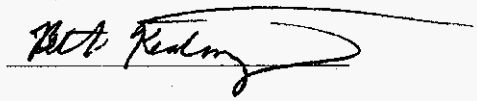
time to gather data regarding the efficacy of the rates in the program, and to determine whether tweaks need to be made. An assessment simply cannot be made, even through the hearing process, as to whether these rates do, in fact, send "appropriate price signals" unless and until these rates have been available to customers for some reasonable period of time. Thus, conducting a hearing regarding these rates would not only be premature, it would be counterproductive to the rationale of implementing these rates on an experimental basis.

VI. CONCLUSION

33. For all the foregoing reasons, the Company asks that the Commission dismiss the City's Petition. The pleading is flawed beyond repair on two fronts, in that it (1) fails to meet the pleading requirements of Rule 28-106.201(2), Florida Administrative Code; and (2) fails to identify any injury in fact of sufficient immediacy to warrant a hearing, and thus, to demonstrate standing to maintain its Petition. The Petition also fails to state a cause of action upon which relief can be granted by the Commission and is entirely premature. Moreover, given the paucity of support for its allegations before this Commission, the Company respectfully suggests that the City's Petition is interposed for purposes unrelated to matters within the Commission's jurisdiction.

Respectfully submitted, this 17th day of March, 2011.

Respectfully submitted,



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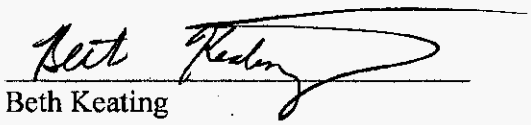
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via Electronic* or U.S. Mail on March 17, 2011 to:

Office of the Public Counsel c/o The Florida Legislature 111 West Madison St., Rm. 812 Tallahassee, FL 32399-1400	Robert Scheffel Wright* John T. LaVia c/o Young Law Firm 225 South Adams Street, Suite 200 Tallahassee, FL 32301
Frank E. Bondurant, City Attorney Bondurant and Fuqua, P.A. 4450 Lafayette St. P.O. Box 1508 Marianna, FL 32447	Erik Sayler, Esquire* Office of the General Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850



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