BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Public Utilities Company for Declaratory Statement Regarding Non-Application of Section 366.82, F.S. and Commission Orders Nos. PSC-94-1082-PCO-EG and PSC-95-0065-S-EG	DOCKET NO. 950272-EG ORDER NO. PSC-95-1242-FOF-EG ISSUED: October 9, 1995

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

On July 3, 1995, Florida Public Utilities Company (FPUC) filed a Motion for Reconsideration of Order No. PSC-95-0721-DS-EG (Motion). In that Order, we denied FPUC's petition for a declaratory statement. The current Motion seeks reconsideration of that denial and presents additional argument in support of a declaratory statement to the effect that FPUC is not a utility whose annual retail sales of electricity exceed 500 gigawatt hours for the purposes of Section 366.82(1) and that FPUC's stipulated conservation goals are aspirational rather than mandatory.

The nature of the fundamental argument relied upon by FPUC is unchanged from the Petition for Declaratory Statement filed March 10, 1995 (Petition). As in the Petition, FPUC contends that our treatment of FPUC's Fernandina Beach and Marianna divisions as separate utilities for ratemaking purposes should lead us to treat those divisions as separate utilities for Section 366.82(1) purposes. The result of this suggestion, if followed, would be that FPUC would not be a utility whose annual retail sales of electricity exceed 500 gigawatt hours, but two separate utilities, neither of whose annual retail sales of electricity exceeded 500 gigawatt hours. This reiterated position is now accompanied by case citations and argument concerning statutory interpretation sufficient to support further consideration of the Motion for Reconsideration. On the basis of this argument, FPUC further

asserts that, as a non-FEECA utility, i.e., one not exceeding the 500 gigawatt hour annual sales threshold, FPUC's conservation goals should be viewed as aspirational and not mandatory.[1]

DISCUSSION

FPUC's main points in the petition were that its Fernandina Beach and Marianna divisions were treated as separate utilities for ratemaking purposes and that it would be consistent with legislative intent to spare FPUC, as a small utility, the expenses associated with FEECA compliance by also applying the 500 gigawatt hour threshold in Section 366.82(1), F.S. to the Fernandina Beach and Marianna divisions as if they were separate utilities. (While neither division separately meets the 500 gigawatt hour threshold, FPUC exceeds that threshold). Thus, the argument may have presented an alternative within our discretion, which we rejected.

The argument on reconsideration now relies on cases said to support the assertion that we, having set rates for the two divisions separately, in effect must treat the two divisions as separate utilities for Section 366.82(1) purposes, as a matter of statutory consistency. In this regard, FPUC notes that in Order No. PSC-94-0170-FOF-EI, we set rates for the Marianna division on a PAA (proposed agency action) basis and that Section 366.06(5), which permits rates to be set PAA, also has a 500 gigawatt hour applicability threshold. Under this reasoning, it would be inconsistent for us to treat the Marianna division as a utility with annual sales of less than 500 gigawatt hours for Section 366.06(5) purposes and to treat FPUC, which includes the Marianna division, as a FEECA utility for Section 366.82(1) purposes.

We reject this argument. The cases cited utilize statutory consistency as one component among others of statutory

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[1]This position appears to be inconsistent with FPUC's petition, which sought a declaration as to the aspirational nature of FPUC's conservation goals "independent from a determination that FPUC is not a [FEECA] utility...." Petition, p.4 [e.s.]

interpretation.[2] In this case, that interpretation must begin with the definition of public utility in Section 366.02 itself:

> "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity...to or for the public within this state....

The emphasis on ownership, as opposed to individual plant sites, is so apparent in this definition that any decision to treat individual plants as separate "utilities" must be viewed as an exception. FPUC's argument, which would turn such isolated examples into a general rule of statutory construction, is therefore rejected as inconsistent with Section 366.02(1). The mere fact that we may have treated the Marianna division separately for ratemaking purposes or as qualified for PAA ratemaking pursuant to Section 366.06(5) does not establish that we considered and then approved a claim that FPUC is a utility with annual sales of less than 500 gigawatt hours for every other purpose, including FEECA. An obvious drawback to that conclusion is the lack of any limitation thereon. Should, for example, a utility with three plants, rather than two, or ten plants, for that matter, be treated as three utilities, or ten utilities for FEECA purposes? Moreover, the definition of utility applies so broadly to the objects of our regulatory activity that it would be impossible to anticipate the ways in which utilities might seek to define themselves as individual plant sites, contrary to the plainly stated intent of Section 366.02(1). That is why the cases relied upon by us in

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[2]The cases cited, Dade County v. AT&T Information Systems, 485 So.2d 1302, 1305 (Fla. 3rd DCA 1986) and Miller v. Agrico Chemical Company, 383 So.2d 1137, 1139 (Fla. 1st DCA 1984), are tax cases governed by significant considerations specifically relevant to tax law in addition to statutory consistency. These include strictly construing the law against the taxing authority and disfavoring an absurd result in which similarly situated persons are treated differently for tax purposes. These considerations are not present in this case, where our denial of the petition merely affirms that all utilities with annual sales exceeding 500 gigawatts are subject to FEECA.

denying the petition[3], though claimed to be irrelevant by FPUC, are relevant. They illustrate the importance of the definition of utility as stated in Section 366.02(1) in terms of ownership of the entity supplying electricity (or other services), rather than the individual plant sites which comprise the utility.[4]

It should also be noted that during the pendency of the petition, the Legislature considered and rejected raising the FEECA threshold to 1000 gigawatt hours. In so doing, the Legislature reaffirmed its intent to apply FEECA's requirements to all public utilities whose annual sales of electricity exceed 500 gigawatts. This is a recent expression of legislative intent which is directly on point.

Finally, FPUC now agrees that the question of whether its conservation goals are mandatory or aspirational is not independent from the question of whether or not FPUC is a FEECA utility. Motion, p.5. In view of our ruling on the latter question, it is therefore unnecessary to address as a separate issue whether the nature of FPUC's conservation goals should be reconsidered.

In view of the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Public Utilities Company's Motion For Reconsideration of Order No. PSC-93-0721-DS-EG is denied. It is further

ORDERED that this docket be closed.

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[3]Charlotte County, Florida v. General Development Utilities, Inc., 20 F.L.W. 940 (Fla. 1st DCA 1995); Citrus County, Florida v. Southern States Utilities, Inc., 20 F.L.W. 838 (Fla. 1st DCA 1995).

[4]Contrary to FPUC, we were not relying on dicta in those cases. For example, the finding in Charlotte County that the regulated utility continued to exist after the sale of its North Port plant was a crucial holding in favor of the appellee. Appellant had argued that our jurisdiction over the utility ceased because, after the sale of the North Port plant, the "utility" -- as defined by the plant site -- ceased to exist.

BY ORDER of the Florida Public Service Commission this 9th day of October, 1995.

BLANCA BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

RCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 Director, Division of Records and Reporting 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 or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.