BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Florida Power & Light Company.	DOCKET NO. 080677-EI
In re: 2009 depreciation and dismantlement study by Florida Power & Light Company.	DOCKET NO. 090130-EI ORDER NO. PSC-09-0602-PCO-EI ISSUED: September 4, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

On March 18, 2009, Florida Power & Light Company (FPL) filed a petition for increase in rates. FPL requested an increase in base rates and charges to generate $1.044 billion in additional gross annual revenues, effective January 4, 2010. FPL based its request on a projected test year ending December 31, 2010. FPL also requested an additional increase in revenues of $247.4 million for a subsequent projected test year ending December 31, 2011. By Order No. PSC-09-0351-PCO-EI, issued May 22, we suspended FPL's rate request pending further review. An administrative hearing is currently scheduled for August 24-28, and 31, September 2-4, 2009.

The City of South Daytona (South Daytona) petitioned to intervene in the proceeding on April 14, 2009. We granted that intervention on April 29, 2009, by Order No. PSC-09-0282-PCO-EI. Thereafter, on July 2, 2009, South Daytona filed a Motion to Dismiss FPL's rate request on the grounds that the Commission does not have statutory authority to grant a rate increase based on projected test years. South Daytona did not request oral argument on its motion pursuant to Rule 25-22.022 (1), Florida Administrative Code (F.A.C.).

FPL filed a Response in Opposition to South Daytona's Motion to Dismiss on July 9, 2009, arguing that the motion was not timely filed, and the Commission had authority and discretion to set rates for an electric utility based on a projected test year. South Daytona then filed a Reply to FPL's Response to the Motion to Dismiss on July 17, 2009, and FPL filed a Motion to Strike South Daytona's reply on July 20, 2009.

As explained below, we grant the Motion to Strike, and we deny the Motion to Dismiss. We have jurisdiction of this subject matter pursuant to section 366.06, Florida Statutes (F.S.).

DECISION

Motion to Strike

We grant FPL's Motion to Strike South Daytona's Reply to FPL's Motion in Opposition to the Motion to Dismiss. A reply to a response to a motion is not contemplated by Florida's Uniform Rules of Administrative Procedure, or the Commission's prior practice. Rule 28-106.204(1), F.A.C., provides that requests for relief shall be made by motion, and other parties to the proceeding may file a response in opposition to the motion within seven days. The rule does not authorize the movant to reply to a response. We have disallowed such replies in our proceedings in many instances. See, for just one example, Order No. PSC-98-1435-PCO-EG, issued October 26, 1998, in Docket No. 971004-EG, In re: Adoption of Numeric Conservation Goals by Florida Power & Light Company, where we granted a motion to strike a reply to a response to a motion for a procedural order, stating that: "the pleading cycle must stop at a reasonable point." We did not consider the reply when we made our decision on FPL's Motion to Dismiss.

Motion to Dismiss

In its Motion to Dismiss, South Daytona challenges our statutory authority to set rates for FPL in this proceeding based on projected test years. South Daytona claims that Section 366.06(1), F.S. only authorizes us to set rates based on an historic test year. Section 366.06(1), F.S. provides as follows:

> (1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefore. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and

> experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

Contrasting Section 366.06(1) F.S. with Section 367.081(2), F.S., the rate setting statute for water utilities, South Daytona claims that because Section 366.06(1) does not expressly mention projected test years, and Section 367.081(2) does, we may not use them to set electric utility rates.

South Daytona contends that Citizens of the State of Florida v. Public Service Commission and Florida Power Corporation, 425 So. 2d 534 (Fla. 1982), supports the proposition that the general question of whether we can set rates for an electric utility based on a projected test year has not been addressed. While the Court approved a projected test year for inclusion of Construction Work in Progress (CWIP) in Florida Power Corporation's rate base, South Daytona argues that it left the issue of projected test years in general unresolved because it was not raised. The implication of South Daytona's assertion is that if the Court had the general issue before it, it would have used the plain language principle of statutory construction to disapprove the use of projected test years. South Daytona asserts that we should do the same, and dismiss FPL's rate petition.

In its Response to the Motion to Dismiss, FPL contends that we should deny the Motion because it was filed out of time, contrary to Rule 28-106.204(2), F.A.C. FPL states that it filed its Petition for Rate Increase on March 18, 2009, and South Daytona filed its Petition to Intervene on April 14, 2009. South Daytona did not file its Motion to Dismiss, however, until July 2, 2009, too late to comply with the time requirements of Rule 28-106(2), F.A.C.

FPL also argues in its response that South Daytona misconstrues the import of Citizens, which, FPL argues, is that if a projected test year is appropriate for one element of rate setting, it is appropriate for all elements of rate setting. FPL also points to another Supreme Court case, Southern Bell Telephone and Telegraph Company v Florida Public Service Commission, 443 So. 2d 92 (Fla. 1983), which FPL contends demonstrates clearly that the Court has approved our authority to use projected test years in utility rate cases where we determine they are appropriate. In Southern Bell, the Court interpreted language in Section 364.035(1), F.S., the rate regulation statute for telephone companies that was virtually identical to Section 366.06(1), F.S., the rate regulation statute for electric utilities. The Court stated that:

> Nothing in the decisions of this Court or any legislative act prohibits the use of a projected test year by the Commission in setting a utility's rates. We agree with the Commission that it may allow the use of a projected test year as an accounting mechanism to minimize regulatory lag. The projected test period established by the Commission is a ratemaking tool which allows the Commission to determine, as accurately as possible, rates which would be just and reasonable to the customer and properly compensatory to the utility. We also agree with the Commission that the utility met its burden of establishing the accuracy of the test period used and that the decision to use the projected test period was supported by competent, substantial evidence.

Southern Bell, at 97.

FPL also argues that the issue of projected test years has been raised in this proceeding and extensively discussed in pleadings, correspondence, and other communications between the Commission and the parties. FPL mentions the preliminary approval of a projected test year in Chairman Carter's Test Year Letter, which makes clear that the issue of the appropriate test year or years on which to base FPL's permanent rates will "be an issue subject to deliberation during the evidentiary proceeding."

Analysis

Uniform Rule 28-106.204(2), F.A.C., states that: "[u]nless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after service." While we do not believe that the 20 day timeframe in Rule 28-106.204(2) is strictly applicable in all cases before us, which involve multiple stakeholders who do not often receive actual service[1] or notice of the initiation of Commission proceedings, our Rule 25-22.039, F.A.C., does provide that intervenors take the case as they find it. Here, South Daytona filed its Petition to Intervene in the proceeding on April 15, 2009, and clearly had notice of the case at that time. We granted South Daytona's intervention on April 29, 2009. South Daytona did not file its Motion to Dismiss until July 2, 2009, approximately 2 months later, and South Daytona made no request or good cause showing why its Motion to Dismiss should be allowed out of time. On this basis, we deny South Daytona's Motion to Dismiss.

It is not necessary to address the substantive issues of the motion and the response at this time, because those matters will be addressed at the hearing and in post-hearing filings. The question of which test year we should use to set FPL's rates is controversial, and is specifically addressed in several issues in the case. South Daytona will have full opportunity to present its position during the course of the proceeding.

It is therefore

ORDERED by the Florida Public Service Commission that the Motion to Strike filed by Florida Power & Light Company is granted for the reasons set forth in the body of this Order. It is further

ORDERED that the Motion to Dismiss filed by the City of South Daytona is denied for the reasons set forth in the body of this Order. It is further

ORDERED that these dockets shall remain open.

[1] See Uniform Rule 28-106.110, F.A.C., titled "Service of Papers," which provides: "Unless the presiding officer otherwise orders, every pleading and every other paper filed in a proceeding, except applications for witness subpoenas, shall be served on each party or on each party's counsel or representative at the last address of record."

By ORDER of the Florida Public Service Commission this 4th day of September, 2009.

ANN COLE
Commission Clerk

(SEAL)

MCB

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.