BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for approval of storm cost recovery clause for recovery of extraordinary expenditures related to Hurricanes Charley, Frances, Jeanne, and Ivan, by Progress Energy Florida. Inc.	DOCKET NO. 041272-EI ORDER NO. PSC-05-0085-FOF-EI ISSUED: January 24, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

The instant docket was opened on November 2, 2004, when Progress Energy Florida, Inc. (PEF) filed a Petition for implementation of a storm cost recovery clause for recovery of extraordinary expenditures related to Hurricanes Charley, Frances, Jeanne, and Ivan (Petition). The requested clause would provide for the recovery of approximately $251.9 million plus interest over two years. On November 17, 2004, the Office of Public Counsel (OPC) and the Florida Industrial Power Users Group (FIPUG) (collectively, Movants) filed a joint Motion to Dismiss PEF's petition. That motion asserts that PEF's Petition is inconsistent with the stipulation and settlement agreement (Settlement) in PEF's last rate case. On November 24, 2004, PEF filed its response in opposition to the motion.

We approved the Settlement of PEF's last rate case by Order No. PSC-02-0655-AS-EI, issued May 14, 2002, in Docket No. 000824-EI. Among other things, the Settlement provided that PEF will not use the various cost recovery clauses to recover new capital items which traditionally and historically would be recoverable through base rates, except as provided for in Section 9 of the Settlement regarding PEF's Hines Unit 2. The Settlement further provided that PEF will not petition for an increase in its base rates and charges, including interim rate increases, that would take effect prior to December 31, 2005.

We have jurisdiction over this matter pursuant to Sections 366.04, 366.05, and 366.06, Florida Statutes.

DENYING MOTION TO DISMISS

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See id. at 350. In determining the sufficiency of the petition, we confine our consideration to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963), and Rule 1.130, Florida Rules of Civil Procedure.

OPC and FIPUG's Joint Motion to Dismiss

The Movants contend that PEF's request to establish a Storm Cost Recovery Clause is an attempt to circumvent the provisions of the Settlement, by which PEF agreed not to seek an increase in its base rates and charges that would take effect prior to December 31, 2005.

In support of their arguments, the Movants cite to Order No. PSC-93-0918-FOF-EI, issued June 17, 1993, in Docket No. 930405-EI, Petition to implement a self-insurance mechanism for storm damage to transmission and distribution system and to resume and increase annual contribution to storm and property insurance reserve fund by Florida Power & Light Company (FPL), which established the storm damage reserve for FPL. In that Order, we acknowledged that hurricane-related expenses were included in base rates and declined to create a 100% pass-through mechanism such as the clause PEF is proposing. By Order No. PSC-93-1522-FOF-EI, issued October 15, 1993, in Docket No. 930867-EI, Petition for authorization to implement a self-insurance program for storm damage to its transmission and distribution (T&D) lines and to increase annual storm damage expense by Florida Power Corporation, the creation of PEF's storm reserve fund was approved. That Order noted that PEF was collecting for transmission and distribution property damage in its base rates. The Order further noted that Rule 25-6.0143, Florida Administrative Code, governs the treatment of storm-related costs, and provides that balances in these storm accounts are to be evaluated at the time of a rate proceeding and adjusted as necessary, while permitting a utility to petition this Commission for a change in the provision level and accrual rate outside of a rate proceeding.

The Movants contend that both of these Orders and the Rule clearly demonstrate that storm damage expenses are part of base rates, and that PEF is attempting to have this Commission create a clause because, pursuant to the Settlement, PEF can not seek an increase in base rates that would be effective before January 1, 2006, which would include an increase to the storm reserve fund.

The Movants note that, pursuant to the Settlement, PEF has agreed not to use the various cost recovery clauses to recover new capital items that were traditionally and historically treated as recoverable through base rates. Thus, the Movants argue that we should uphold the

Settlement and not allow PEF to use a clause mechanism to obtain storm-related costs that have been traditionally and historically treated as recoverable through base rates.

The Movants further argue that approval of PEF's petition would weaken the Settlement, and permanently chill any possibility of future settlement of cases before this Commission. The Movants contend that PEF's Petition fails to state a claim upon which relief may be based, and should therefore be dismissed.

PEF's Response

In its Response, PEF states that the argument that its Petition is prohibited by the Settlement is belied by specific language in the Settlement addressing the Company's use of cost recovery clauses. That language prohibits one particular use of the clauses – the recovery of new capital items that are traditionally recovered through base rates. PEF argues that the Settlement imposes no restriction on its use of a clause to recover non-capital costs that have not been traditionally recovered through base rates, which PEF contends are the only costs subject to its proposed Storm Cost Recovery Clause. PEF states that its proposal is limited to only the incremental non-capital operating and maintenance ("O&M") costs associated with the catastrophic storms which exceed the reserve's balance. The proposal does not seek to recover or replenish the depleted reserve balance that had been accrued for non-catastrophic storms, nor does it seek a higher level of accruals to the reserve that recent experience suggests is needed. The Company considered those to be prospective matters outside its petition's limited scope related to the immediate consequences of the recent hurricanes, and therefore would be more appropriately dealt with in other proceedings.

PEF contends that the catastrophic storm damage costs for which it seeks recovery are not and never have been part of its base rates. In establishing the storm damage reserve for self-insured utilities in 1993, this Commission declined to provide for the recovery of costs associated with catastrophic storms, but made it clear the utilities could petition for recovery if they experience such costs. PEF also cites to Order No. PSC-93-1522-FOF-EI, in which we made the following statement after declining to act on the Company's request to address storm-related costs that exceed the reserve balance: "If FPC experiences significant storm related damage, it can petition for appropriate regulatory action."

PEF contends that the remaining points in the joint Motion simply state the parties' position on disputed issues of regulatory policy and fact, and are insufficient to support their motion to dismiss. PEF contends that our decision on the Motion to Dismiss must be based on issues of law, assuming all facts alleged in the Company's petition to be true. Moreover, by raising disputed issues of policy and fact, PEF argues that the Movants actually support the need for evidence adduced at hearing, since dismissal is not favored unless compelled as a matter of law.

Nevertheless, PEF does address the other points raised by the Movants in its Response. With respect to the allegation that PEF's recovery clause proposal is PEF's attempt to accomplish an "end run" around the Settlement's restriction on base rate increases, PEF argues that there are well-recognized characteristics of the extraordinary hurricane-related costs at issue that make the use of a cost recovery clause, rather than base rates, particularly well suited for the

recovery of these costs. PEF also contends that its proposal is not "a 100% pass through mechanism" which would "shift 100% of the risk to customers." Rather, PEF has limited the portion of its total hurricane-related costs that would be subject to recovery through the proposed clause to only the O&M expenses by excluding the significant amount of hurricane-related capital costs, by further limiting O&M expenses to only the portion that exceeds the reserve balance, by limiting the scope of the proposed clause to only the portion of O&M expenses that are a direct consequence of the hurricanes, and by not including other pressing concerns related to the effects of the hurricanes on the storm damage reserve, such as replenishment of the depleted reserve balance and adjustment of the annual accrual in light of recent events. Further, PEF states that under its proposal, it must demonstrate whether the costs were reasonable and prudent under the circumstances in which they were incurred, thus ensuring that PEF will assume some of the risk associated with those costs.

In summary, PEF states that the storm damage reserve included in base rates was never designed and has never been funded for catastrophic storm-related costs such as those experienced by PEF this year. PEF contends that we declined to do so because of the uncertainty as to if and when such a catastrophic event might occur and, if so, what the magnitude of the related costs might be. However, as cited in Order No. PSC-93-1522-FOF-EI, it was indicated that if a utility did, in fact, experience catastrophic storm-related costs, this Commission would be receptive to considering the utility's petition for relief on an expedited basis.

Denial of OPC and FIPUG's Motion to Dismiss

We first address whether the Petition should be dismissed because, as the Movants argue, it violates our past practice as to the recovery of storm-related damages. As stated previously, the Settlement provides that PEF agrees not to use the various cost recovery clauses to recover for new capital items that were traditionally and historically treated as recoverable through base rates. PEF notes, however, that it is limiting the types and amounts of costs for which it is seeking recovery, subject to a prudence review by this Commission. Further, PEF argues that the Settlement does not specifically bar PEF from seeking our approval to establish a storm cost recovery clause.

Both PEF and the Movants rely on Orders PSC-03-0918-FOF-EI and PSC-93-1522-FOF-EI, which established the storm damage reserve for FPL and PEF, respectively. The Movants cite the orders for the proposition that we have never created a 100% pass-through mechanism for recovery of storm damage via a clause mechanism, and that storm damage expenses are clearly part of base rates. However, PEF correctly notes that in Order No. PSC-93-1522-FOF-EI, we stated that:

> If FPC [PEF] experiences significant storm related damage, it can petition for appropriate regulatory action. In the past, this Commission has allowed recovery of prudent expenses and has allowed amortization of storm damage expense. Extraordinary events such as hurricanes have not caused utilities to earn less than a fair rate of return. FPC shall be allowed to defer storm damage loss over the amount in the reserve until we act on any petition filed by the company.

> No prior approval will be given for the recovery of costs to repair and restore T&D facilities in excess of the Reserve balance. However, we will expeditiously review any petition for deferral, amortization or recovery of prudently incurred costs in excess of the reserve.

This language is substantially similar to that which appears in Order No. PSC-93-0918-FOF-EI, regarding FPL's proposal to create a storm cost recovery clause in Docket No. 930405-EI. In that Order, we declined to approve FPL's proposal, stating that:

> FPL's cost recovery proposal goes beyond the substitution of self-insurance for its existing policy. The utility wants a guarantee that storm losses will have no effect on its earnings. We believe it would be inappropriate to transfer all risk of storm loss directly to ratepayers. The Commission has never required ratepayers to indemnify utilities from storm damage. Even with traditional insurance, utilities are not free from this risk. This type of damage is a normal business risk in Florida. ...
>
> Storm repair expense is not the type of expenditure that the Commission has traditionally earmarked for recovery through an ongoing cost recovery clause. Conservation, oil backout, fuel and environmental costs are currently recoverable under Commission created cost recovery clauses. These expenses are different from storm repair expense in that they are ongoing rather than sporadic expenditures. ...
>
> Therefore, we decline to authorize the implementation of a Storm Loss Recovery Mechanism, in addition to the base rates in effect at the time. ...
>
> If a hurricane strikes, FPL can petition at that time for appropriate regulatory action. In the past, we have acted appropriately to allow recovery of prudent expenses and allowed storm damage amortization. We do not believe that regulated utilities should be required to earn less than a fair rate of return because of extraordinary events such as hurricanes or storms.
>
> The Commission will expeditiously review any petition for deferral, amortization or recovery of prudently incurred costs in excess of the reserve. Our vote today does not foreclose or prevent further consideration at a future date of some type of a cost recovery mechanism, either identical or similar to what has been proposed in this petition. The Commission could implement a cost recovery mechanism, or defer the costs, or begin amortization, or such other treatment as is appropriate, depending on what the circumstances are at that time.

(Emphasis added). Although we have never approved recovery of storm damages through the establishment of a storm cost recovery clause, the plain language of Order No. PSC-93-0918-FOF-EI indicates that we have not foreclosed reviewing a similar proposal, depending on what the circumstances are at that time. Whether or not such circumstances exist to support the relief

requested in the current Petition, it is apparent that a cause of action for review of PEF's Petition exists, based on past Commission precedent.

The Movants further contend that PEF's request to establish a Storm Cost Recovery Clause is nothing more than an attempt to circumvent the provisions of the Settlement, by which PEF agreed not to seek an increase in its base rates and charges that would take effect prior to December 31, 2005. PEF contends that there are characteristics of extraordinary hurricane-related costs at issue that make the use of a cost recovery clause, rather than base rates, particularly well-suited for the recovery of those costs. Taking PEF's assertions as true, PEF's position states a basis on which we could grant the requested relief. The proper interpretation of the Settlement and its application to the factual circumstances described in PEF's Petition is a matter to be resolved at hearing. The existence of a dispute about the applicability of the Settlement does not present a proper ground for dismissing the Petition.

The Movants argue that approval of PEF's petition would weaken the Settlement, and permanently chill any possibility of future settlement of cases before this Commission. We have a longstanding commitment to the support and encouragement of negotiated settlements. Further, the principle of administrative finality assures that there will be a terminal point in proceedings at which the parties and the public may rely on an agency's decision as being final and dispositive of the rights and issues involved therein. See Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966) (the inherent authority of the Commission to modify its final orders is a limited one).

However, we are also charged to act in the public interest. Assuming for the sake of argument that PEF's proposal were inconsistent with Order No. PSC-02-0655-AS-EI (approving the Settlement), our obligation to act in the public interest might nevertheless authorize us to revisit that Order. For example, in Peoples Gas System, supra, the Florida Supreme Court vacated an order which modified its previous approval of a territorial service agreement. In support of its decision, the Court stated that the vacated order was not entered on rehearing or reconsideration as permitted by our rules of procedure, it was entered more than four years after the entry of the order which it purported to modify, and it was not based on any change in circumstances or on any demonstrated public need or interest.

The Court also recognized, however, the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated, and which are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Id. at 339. The Court noted that pursuant to Sections 366.03, 366.04, 366.05, 366.06, and 366.07, Florida Statutes, the legislature has given this Commission broad powers to regulate the operation of electric utilities. Id. Furthermore:

> Nor can there be any doubt that the Commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and

> hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified. This view accords requisite finality to orders of the Commission, while still affording the Commission ample authority to act in the public's interest.

Id. at 339-340. We are cognizant of the concerns raised by the Movants that granting PEF's Petition would weaken the Settlement, or could chill future settlement of cases before this Commission. However, we do not believe that this concern, in and of itself, states sufficient grounds to dismiss PEF's petition. Section 366.04, Florida Statutes, is the substantive law from which we derive our authority to regulate and supervise the rates and charges of public utilities. Whether a rate case is resolved through a fully adjudicated evidentiary hearing, or through a settlement agreement negotiated by the parties which we then approve, we have a continuing responsibility to exercise our regulatory jurisdiction in a manner consistent with the public interest.

Whether PEF's proposal may or may not contravene the Settlement, we find that PEF's Petition, taken in the most favorable light, does state a cognizable claim on which we can take further action. An evidentiary hearing is the appropriate forum for weighing the various interests that are at stake in this case. Whether or not PEF is ultimately persuasive in carrying its evidentiary burden of proof, the petition on its face states a sufficient cause of action to survive a motion to dismiss. Accordingly, OPC and FIPUG's Motion to Dismiss is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel and the Florida Industrial Power Users Group's joint Motion to Dismiss is denied. It is further

ORDERED that this docket shall remain open to accommodate the hearing currently scheduled in this docket.

By ORDER of the Florida Public Service Commission this 24th day of January, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

JSB

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 Director, Division of the Commission Clerk and Administrative Services, 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 Director, Division of the Commission Clerk and Administrative Services 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.