

State of Florida



## Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** November 13, 2014

**TO:** Office of Commission Clerk (Stauffer)

**FROM:** Division of Accounting and Finance (Maurey)  
Office of the General Counsel (Barrera) *ALM*  
*MBJC*

**RE:** Docket No. 140001-EI – Fuel and purchased power cost recovery clause with generating performance incentive factor.

**AGENDA:** 11/25/14 – Regular Agenda – Motion to Dismiss, Participation dependent on Issue No. 1.

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Brown

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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### Case Background

On June 25, 2014, Florida Power & Light Company (FPL) filed a petition requesting a prudence determination on FPL's proposal to acquire an interest in a natural gas reserve project and that the revenue requirements associated with investing in and operating the gas reserves are eligible for recovery through the Fuel Clause (petition). By motion filed August 1, 2014, FPL and the Office of Public Counsel (OPC) sought approval of a stipulation they entered into to modify the Order Establishing Procedure's schedule for discovery, prefiled testimony, and briefs so that the novel gas reserve issues could be heard at the October 22-24, 2014, hearing and a vote be taken before the end of the calendar year. On August 22, 2014, by Order No. PSC-14-0439-PCO-EI the gas reserve issues were deferred to a December 1 and 2, 2014 hearing.

Docket No. 140001-EI  
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On August 22, 2014, OPC moved for an order dismissing FPL's petition on the grounds that the Commission does not have subject matter jurisdiction (motion). Also on August 22, 2014, OPC filed a request for oral argument on its motion to dismiss. On August 29, 2014, FPL filed its response in opposition to the motion (response). FPL did not file a response to OPC's request for oral argument.

Jurisdiction over OPC's motion and request for oral argument in the instant docket is vested in the Commission through several provisions of Chapter 366, Florida Statutes (F.S.), including Sections 366.04, 366.05, and 366.06, F.S., and Rule 25-22.0022, Florida Administrative Code (F.A.C.).

### **Discussion of Issues**

**Issue 1:** Should oral argument on OPC's Motion to Dismiss be granted?

**Recommendation:** Oral argument should be granted at the Commission's discretion. If oral argument is granted, 15 minutes for each side appears reasonable. (Barrera)

**Staff Analysis:** Rule 25-22.0022(1), F.A.C., provides that a request for oral argument should be filed and shall state with particularity why oral argument would aid the Commission in understanding and evaluating the issues to be decided. Rule 25-22.0022(7), F.A.C. states that oral argument at an Agenda Conference will be entertained for dispositive motions such as motions to dismiss. OPC's request for oral argument on its motion was filed concurrently with its Motion to Dismiss. OPC's request states that the motion and petition raise "significant, fundamental disagreements regarding the purpose of the fuel cost recovery clause, the import of past precedents, the nature and extent of Florida's regulation of public utilities under chapter 366, Florida Statutes, and the jurisdictional boundaries of the Commission's powers and ratemaking authority." OPC's motion requests 15 minutes per side be allowed for oral argument. FPL did not file a response to the request for oral argument.

Rule 25-22.0022(3), F.A.C. provides that granting or denying a request for oral argument is within the sole discretion of the Commission. Oral argument may assist the Commission in understanding and evaluating OPC's motion and FPL's response. Whether to hear oral argument is at the Commission's discretion. If oral argument is granted, 15 minutes for each side appears reasonable.

**Issue 2:** Should OPC's motion to dismiss be granted?

**Recommendation:** No. The Commission has jurisdiction over the subject matter of FPL's petition under its broad statutory authority to set rates for a public utility. The fuel and purchased power cost recovery clause with generating performance incentive factor is a rate proceeding and FPL's petition requests a prudence determination for its gas reserve project and a ruling that the costs are recoverable through the fuel and purchased power cost recovery clause. The Commission does not have to assert jurisdiction over unregulated entities to rule on the merits of the petition. The issues raised in the motion mainly address the prudence of FPL's request and may be more appropriately presented as part of OPC's position on the hearing issues. (Barrera)

**Staff Analysis:**

**OPC's Motion**

Distilled to its essence, OPC bases its argument on the merits of the proposed joint venture involving FPL, its subsidiaries, related companies, and PetroQuest. OPC argues that under the statutory scheme of Chapter 366, F.S., the Commission lacks subject matter jurisdiction over the "production" of the fuel that is burned during the generation of electricity. OPC further argues that the proposed gas reserve project does not fall under a utility's statutory role in providing electric service. OPC asserts that the gas reserve project involves "a capital investment in a nonutility, competitive fuel production industry," that FPL will derive a profit from the transaction, and that such investment does not qualify for base rates and is not appropriate for the fuel docket. It contends that the Commission's lack of jurisdiction over the unregulated subsidiaries or affiliates of FPL involved in the transaction deprives the Commission of jurisdiction over the subject matter of the petition. It contends the Commission has no jurisdiction over PetroQuest Energy Inc., the entity engaged in production in which FPL seeks to invest. It further asserts that the Commission has no jurisdiction over USG Properties Woodford I, LLC (USG), an FPL subsidiary, and the wholly owned subsidiary FPL proposes to create. OPC contends that the Commission has no jurisdiction over these entities as they are not electric utilities under the definitions of Sections 366.04(1), 366.06(1), and 366.02(1), F.S. Relevant to the issue of subject matter jurisdiction, OPC states that FPL's petition is a request "to establish capital investments ... as a component of its utility rate base and to collect a guaranteed return on such investment through the fuel cost recovery clause."

**FPL's Response**

In its response, FPL argues that the allegations in its petition are sufficient to state a cause of action. The response summarizes the petition's issues of fact regarding the prudence and appropriateness of the gas reserve project. The response argues that investing in gas reserves in order to reduce fuel costs is within the Commission's jurisdiction, and that OPC's interpretation of the definition of electric utility under Section 366.02(2), F.S., is too narrow as it does not include the supporting activities of an electric utility necessary for it to function. FPL discusses the rationale for its proposed participation in present and future gas reserve projects, describes the gas reserve project as a form of hedging, and recites particular portions of its petition, all in

support of its assertion that the allegations in the complaint are sufficient to state a cause of action. FPL states that the Commission orders and court opinions cited in the motion do not stand for the principles for which they are cited. Relevant to the issue of subject matter jurisdiction, the company asserts that the petition seeks a ruling from the Commission that its investment in the gas reserve project is prudent and that the project's actual costs are recoverable.

### Standard of Review

Subject matter jurisdiction is defined as the tribunal's power to hear the type of case or controversy before it. "Generally, it is tested by the good faith allegations, initially pled, and is not dependent upon the ultimate disposition of the lawsuit." Calhoun v. New Hampshire Ins. Co., 354 So. 2d 882, 883 (Fla. 1978). Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the *class* of cases to which the particular controversy belongs. Lusker v. Guardianship of Lusker, 434 So. 2d 951, 953 (Fla. 2d DCA 1983). In any cause of action, a court must not only have jurisdiction over the parties but must also be vested with subject matter jurisdiction in order to grant relief. See Keena v. Keena, 245 So. 2d 665 (Fla. 1st DCA 1971). Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence. See: Board of Trustees of Internal Improvement Trust Fund of State v. Mobil Oil Corp., 455 So. 2d 412 (Fla. 2d DCA 1984), quashed in part on other grounds by Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339 (Fla. 1986).

In considering a motion to dismiss based on lack of subject matter jurisdiction, the Commission may properly go beyond the four corners of the complaint on the issue of law. See Mancher v. Seminole Tribe of Florida and Seminole Management Assoc. 708 So. 2d 327 (Fla. 1998); citing Houghtaling v. Seminole Tribe of Fla., 611 So. 2d 1235 (Fla. 1993); Seminole Police Dept. v. Casadella, 478 So. 2d 470, 471 (Fla. 4th DCA 1985). The Commission may consider other legal authority beyond that set forth in the petition, motion, and response. Regardless of whether the allegations in a complaint are facially correct, if the Commission determines that it lacks subject matter jurisdiction, the complaint has to be dismissed. Order No. PSC-02-0484-FOF-TP, Docket No. 001097-TP, issued April 8, 2002, In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes.

### Commission's Statutory Authority

An administrative agency has only such power as granted by the Legislature and may not expand its own jurisdiction. Rinella v. Abifaraj, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005). See also, Diamond Cab Owners Ass'n v. Florida R. & Public Utilities Com., 66 So. 2d 593, 596 (Fla. 1953) ("Commission may make rules and regulations within the yardstick prescribed by the Legislature, but it cannot amend, repeal or modify an Act of the Legislature by the adoption of such rules and regulations."). For example, nothing in its enabling legislation authorizes the Commission to award monetary damages; thus, the Commission lacks subject matter jurisdiction over a petition seeking monetary relief. Southern Bell Tel. Co. v. Mobile America Corp., Inc., 291 So.2d 199 (Fla. 1974).

OPC correctly states that the Commission must look to its enabling statutes and the relief sought to examine whether it has jurisdiction over a particular matter. Where FPL petitioned for authority to recover storm restoration costs, the Commission, citing its enabling legislation and the powers conferred upon it by Chapter 366, F.S., found FPL's petition to be a request for rate relief by a public utility and asserted jurisdiction. Order No. PSC-05-0187-PCO-EI, Docket No. 041291-EI, issued February 17, 2005, In re: Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company. In a case challenging the Commission's jurisdiction to issue a certificate to a proposed water and wastewater system whose service would transverse county boundaries, the Commission looked to the relevant provisions of Chapter 367, F.S., specifically the plain language of Section 367.171(7), F.S., which granted the Commission exclusive jurisdiction to issue the certificate. Order No. PSC-10-0123-FOF-WS, Docket No. 090478-WS, issued March 1, 2010, In re: Application for original certificates for proposed water and wastewater system, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.

Chapter 366, F.S., sets forth the authority of the Commission over public utilities that provide electric power to the public. Section 366.01, F.S., provides that the regulation of public utilities is an exercise of the police power of the state for the protection of the public welfare and that the provisions of Chapter 366, F.S., must be liberally construed. See Gulf Power Company v. Bevis, 296 So. 2d 482, 487 (Fla. 1974) ("As pointed out by the Commission, it has considerable discretion and latitude in the rate-fixing process."), and City of Miami v. FPSC, 208 So. 2d 249 (Fla. 1968) (The Commission has considerable discretion in the ratemaking process). Section 366.04(1), F.S., provides that the Commission has jurisdiction to regulate and supervise each investor-owned public utility with respect to its rates and service. Section 366.05, F.S., provides that in the exercise of such jurisdiction, the Commission has the power to prescribe fair and reasonable rates and charges to be observed by each public utility. Section 366.06(1), F.S. provides that the Commission has 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. See Order No. PSC-10-0671-PCO-GU, Docket No. 090539-GU, issued November 5, 2010, In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department.

A public utility is defined by Section 366.02(1), F.S., as 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."<sup>1</sup> There appears to be no controversy over whether FPL is a public utility. However, OPC argues that the Commission has no subject matter jurisdiction because it has no jurisdiction over unregulated subsidiaries and related

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<sup>1</sup> The motion and response cite PW Ventures v. Nichols, 533 So. 2d 281, 284 (Fla. 1981), where the issue involved whether a co-generator proposing to produce and provide electricity to a customer was a public utility within the meaning of Ch. 366, F.S., and thus under Commission jurisdiction. The Court agreed with the Commission that PW was an electric utility and prohibited from providing electricity to the public as FPL had been granted a monopoly to provide electric service to the subject area. Staff believes that PW Ventures is not applicable to the issue of subject matter jurisdiction.

companies involved in the gas reserve project. OPC's reliance on Order No. 21847<sup>2</sup> to support its position is misplaced. The issue in the Florida Power Corporation (FPC)<sup>3</sup> docket was whether a long-term contract between the utility and its unregulated subsidiary was prudent, not whether the Commission had jurisdiction over the subsidiary.<sup>4</sup> The Commission found that it had no jurisdiction over FPC's affiliates, but that it was reasonable that "purchases by affiliated companies for a utility meet the same standards as purchases by the utility itself. Therefore, in this proceeding we will review and subject the activities of EFC to the same scrutiny and standards that we would apply to FPC if they had procured their own fuel." The facts in the FPC docket are not unlike the factual posture of the transaction alleged in FPL's gas reserve petition. The FPL petition seeks a finding of prudence and recovery of costs for the proposed venture. Order No. 21847 supports the proposition that under its broad statutory authority over rate proceedings, the Commission has jurisdiction to examine the prudence of FPL's transaction and other issues raised in its petition without asserting jurisdiction over FPL's affiliates and subsidiaries.

### The Fuel Docket is a Rate Case Proceeding

The fuel and purchased power cost recovery clause with generating performance incentive factor was originally designed to allow a pass through of fuel costs, so the utility would be able to recover the costs as they are incurred. Through the fuel cost recovery process, the Commission annually evaluates the public utilities' fuel cost projections and expenditures and assesses the reasonableness of those costs and expenditures. In Order No. 13452,<sup>5</sup> the Commission described the fuel docket as a rate proceeding stating:

The fuel cost recovery clause (fuel clause) is a regulatory tool designed to pass through to utility customers the costs associated with fuel purchases. The purpose is to prevent regulatory lag. Regulatory lag occurs when a utility incurs expenses but is not allowed to collect offsetting revenues until the regulatory body approves cost recovery. Regulatory lag has historically been a problem because of the volatility of fuel costs. Regulatory lag is not of as much concern when expenses, such as capital improvements, and operations and management costs, can be planned for and included in base rate calculations.<sup>6</sup>

OPC recognizes that the issue before the Commission is whether the Commission may authorize FPL "to establish capital investments ... as a component of its utility rate base and to collect a guaranteed return on such investment through the fuel cost recovery clause." Thus, the basis for the Commission's subject matter jurisdiction is that the relief sought by the petition is a

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<sup>2</sup> Order No. 21847, issued September 7, 1989, in Docket No. 860001-EI-G, In re: Investigation into affiliated cost-plus fuel supply relationships of Florida Power Corporation.

<sup>3</sup> Now Duke Energy Florida.

<sup>4</sup> Staff notes that in that docket, the Commission held a hearing to determine the prudence of the transaction.

<sup>5</sup> Issued June 22, 1984, in Docket No. 820001-EU-A, In re: Investigation of Fuel Cost Recovery Clauses of Electric Utilities (Gulf Power Company – Maxine Mine).

<sup>6</sup> In Order No. 13452, the Commission also found that approval of fuel costs was not a finding of prudence and that the prudence of a particular expenditure could be addressed through the fuel clause, as long as an issue of prudence was identified and fully vetted by the Commission.

rate increase passed through the fuel docket for costs related to the gas reserve project. Undisputedly, the Commission has jurisdiction over FPL, a public utility and jurisdiction to determine the prudence of the gas reserve project and whether FPL can recover its costs and expenses.

Both the motion and response, when examined, raise disputed issues of material fact, and do not satisfy the legal standard for dismissal for subject matter jurisdiction. OPC's central argument can be rephrased as whether the costs incurred by FPL's investment are appropriate for recovery through the fuel clause. FPL's response can be rephrased as whether its investment is prudent and its costs are appropriate for recovery through the fuel clause. Whether the project is prudent, whether FPL ought to recover rates to pay the costs of the project, whether FPL profits from the transaction with PetroQuest, whether the costs of the project are reasonable, and whether the recovery of the costs should go through the fuel docket are questions of fact best left for a determination at a hearing on the merits. They are not impediments to jurisdiction.

### Conclusion

The Commission has jurisdiction over the subject matter of FPL's petition under its broad statutory authority to set rates for a public utility. The fuel clause is a rate proceeding and FPL's petition requests a prudence determination for its gas reserve project and a ruling that the costs are recoverable through the fuel docket. The Commission does not have to assert jurisdiction over unregulated entities to rule on the merits of the petition. The issues raised in the motion mainly address the prudence of FPL's request, which are appropriate for a hearing on the issues and not a motion for subject matter jurisdiction. Staff recommends that the Commission find that it has jurisdiction over the petition, deny OPC's motion to dismiss, and proceed to hearing.