

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida) DOCKET NO. 950272-EG
Public Utilities Company for) ORDER NO. PSC-95-0721-DS-EG
Declaratory Statement Regarding) ISSUED: June 16, 1995
Non-Application of Section)
366.82, F.S. and Commission)
Orders OS. PSC-94-1082-PCO-EG)
and PSC-95-0065-S-EG)
_____)

The following Commissioners participated in the disposition of this matter:

Susan F. Clark, Chairman
J. Terry Deason
Diane K. Kiesling
Julia L. Johnson
Joe Garcia

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

By The Commission:

BACKGROUND

On March 10, 1995, petitioner Florida Public Utilities Company (FPUC) filed a Petition for Declaratory Statement (petition) seeking a declaration that FPUC is not a "utility" as that term is defined in Section 366.82(1) and that the conservation goals established for FPUC are aspirational rather than mandatory. As a corollary, FPUC petitions for a statement that the regulatory requirements of Rules 25-17.0021 and 25-17.008 are not applicable to FPUC.

In its discussion and analysis, FPUC acknowledges that, in Order No. PSC-95-0065-S-EG,¹ we approved a joint stipulation between FPUC and the Florida Department of Community Affairs (DCA) to the effect that the goals for FPUC's Marianna division are set at three percent of Gulf Power Company's (Gulf) goals for the years 1994-2003. The goals for FPUC's Fernandina Beach division are set at three percent of the goals established for the Jacksonville Electric Authority (JEA).

¹ Issued January 12, 1995 in Docket No. 930552-EG.

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FPSC-RECORDS/REPORTING

FPUC also notes that the goals set by us in Order No. PSC-94-1313-FOF-EG² for Florida's four largest investor-owned electric public utilities, including Gulf, are concededly "non-aspirational".³ Significantly, for the purposes of this issue, we stated at p. 24 of Order No. 1313:

FEECA and Rule 25-17.0021, Florida Administrative Code, require the Commission to set overall goals. Overall goals are mandatory and must be set. [e.s.]

DISCUSSION

In pertinent part, Section 366.82(1), F.S. defines "utility" as

any person or entity of whatever form which provides electricity . . . at retail to the public . . . specifically excluding . . . any person whose annual sales to end-use customers is less than 500 gigawatt hours.

The gravamen of FPUC's contention that it is not a "utility" as defined in the above statutory section is that, although FPUC supplies more than 500 gigawatts of electricity to the public, its individual divisions, Marianna and Fernandina Beach, respectively, each supply considerably less than that amount. In support of this theory, FPUC cites the Senate staff analysis in Exhibit A to the petition, which states:

"Utilities making retail sales of less than 500 gigawatt-hours, will realize a cost-savings as a result of the exemption from FEECA contained in the bill".

FPUC concludes that it is reasonable to infer a legislative intent to exclude small utilities, such as FPUC, from the requirements of FEECA.

However, that still begs the question of whether the Legislature meant to exclude utilities such as FPUC, or utilities

² Issued October 25, 1994 in Dockets Nos. 930548-EG, 930549-EG, 930550-EG, 930551-EG.

³ Petition, p. 3.

whose total sales of electricity are less than 500 gigawatt-hours. Based on the definition of "utility" and recent court opinions interpreting it, we believe the latter is the case.

The definition of "utility" as a person or entity supplying electric, gas or water service to the public is not limited to Section 366.82(1), but also appears in substantially similar form in Section 366.02 ("Public utility") and Section 367.021(12) ("water or wastewater utility"), though with various exclusions therein applicable.

Recently, in Charlotte County, Florida v. General Development Utilities, Inc., (Charlotte County) Case No. 94-1558 (1st DCA, April 13, 1995), the First District Court of Appeal construed Section 367.021(12) when it considered the argument by the petitioner County that the Commission had no jurisdiction where a customer of a PSC-regulated utility filed suit for refund of alleged overcharges after the utility's applicable facility was sold to a governmental entity. In rejecting the County's argument, the Court held:

The record is clear that after sale of its North Port facility to the City of North Port, GDU continued as a utility, and as such, is still serving the public. [e.s.]

Charlotte County, p. 8. Under the Charlotte County rationale, FPUC is a utility for Section 366.82(1), purposes because it is the person or entity supplying electricity to the public, though it does so through two separate facilities located in different areas of the state.

In another opinion issued one week prior to Charlotte County, Citrus County, Florida and Cypress and Oaks Villages Association v. Southern States Utilities, Inc. and the Florida Public Service Commission, 20 Fla. L. Weekly, D 838, the same court discussed various aspects of rate setting⁴ for Southern States, a utility described as having

127 systems involved in this case [which] are fiscally related, . . . [but] are not otherwise related in a utility operational sense.

⁴ Issues concerning rate setting are pending disposition of motions for rehearing, but do not affect this analysis.

Citrus County, D 839. Yet, the Citrus County Court did not refer to Southern States as 127 utilities, but as a single utility:

the Commission's refusal to take into account the utility's gain on the sale of two of its systems is affirmed. [e.s.]

Citrus County, D 839.

Because the recent Charlotte County and Citrus County opinions have clearly and consistently differentiated between the definition of "utility" and the separate facilities, divisions and systems which may constitute a utility, we believe that FPUC's suggestion that it is not a utility for Section 366.82(1) purposes must be rejected, under the given facts and circumstances.

Though FPUC seeks a statement as to the non-mandatory ("aspirational") nature of the goals (and non-applicability of the cited rules) "independent from a determination that FPUC is not a utility subject to Section 366.82(1)",⁵ the arguments offered appear to be inconsistent with the assumed facts.

FPUC admits to having stipulated to a fixed percentage of other utilities' goals and FPUC itself referenced Order No. 1313, supra, in which we defined such goals as "mandatory". Moreover, we stated therein that FEECA required us to set those "mandatory" goals. Therefore, the mandatory nature of FPUC's goals and the applicability of the regulatory rules governing them, Rules 25-17.0021 and 25-17.008, cannot be determined independently of whether FPUC is a utility subject to FEECA as defined in Section 366.82(1). Having found that to be the case, we believe that FPUC's goals are mandatory and that the cited regulatory rules apply to FPUC.

In view of the foregoing, it is

ORDERED by the Florida Public Service that Florida Public Utilities Company's Petition for Declaratory Statement is denied. It is further

ORDERED that this docket is closed.

⁵ Petition, p. 4.

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By ORDER of the Florida Public Service Commission, this 16th
day of June, 1995.

Blanca S. Bayó

BLANCA BAYÓ, Director
Division of Records and Reporting

(S E A L)

Commissioners Deason and Johnson dissented.

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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.