

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens of the State
of Florida to require Progress Energy Florida,
Inc. to refund customers \$143 million.

DOCKET NO. 060658-EI
ORDER NO. PSC-07-0059-PCO-EI
ISSUED: January 22, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
MATTHEW M. CARTER II
KATRINA J. TEW

ORDER DENYING PROGRESS ENERGY FLORIDA'S MOTION TO DISMISS

BY THE COMMISSION:

Case Background

In the 2006 annual fuel cost recovery docket, Docket No. 060001-EI, the Office of Public Counsel (OPC) filed a petition on August 10, 2006, asking that the Commission require Progress Energy Florida (PEF) to refund \$143 million to Florida ratepayers for purchases of allegedly higher costing coal for Crystal River Units 4 and 5. Upon request of OPC and consent by PEF, the matter was removed from consideration in the fuel docket and is scheduled for a separate proceeding.

OPC alleges that from 1996-2005, PEF failed to utilize the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5. OPC alleges that PEF failed to act prudently in incurring the fuel charges and costs of SO₂ allowances. Because of PEF's allegedly imprudent actions, OPC argues, PEF's customers are entitled to a refund of \$143 million dollars. PEF filed a Motion to Dismiss on August 30, 2006, and requested oral argument on this motion. On September 13, 2006, OPC filed a response to the Motion to Dismiss and a response to PEF's request for oral argument. AARP filed a joinder to OPC's Petition and to the Response to Motion to Dismiss on September 27, 2006. We heard oral argument at our December 19, 2006 Agenda Conference. We have jurisdiction pursuant to Sections 366.01, 366.03, 366.04, 366.05, 366.06 and 366.07, Florida Statutes. For the reasons discussed below, we deny PEF's motion to dismiss.

Decision

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,

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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, the Commission should confine itself 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 DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963), and Rule 1.130, Florida Rules of Civil Procedure.

PEF's Motion

Progress Energy Florida's Motion to Dismiss was based on two grounds. First, PEF alleged that OPC's request for relief requires the Commission to engage in improper hindsight review of PEF's coal procurement policies. Secondly, PEF alleged that the Commission only had authority to set rates on a prospective basis. By granting OPC's petition, PEF claimed that the Commission would engage in prohibitive retroactive ratemaking.

OPC's Response

In response to PEF's motion to dismiss, OPC argued that the standard of review for a motion to dismiss is that the Commission must deem all of OPC's factual allegations in the pleadings to be true and the Commission must consider those facts in a light most favorable to OPC. According to OPC, the Commission cannot dismiss OPC's complaint unless PEF established that there was no set of facts whatsoever to support OPC's claim. The facts, according to OPC, are that PEF purposely built Crystal River Units 4 and 5 to have the flexibility to burn a 50/50 mixture of bituminous coal (from Appalachian coal mines) and sub-bituminous coal (from western coal mines) and PEF so stated that to regulators. OPC stated that from the commencement of operation in 1982 for CR4 and 1984 for CR5, there has not been a mixture of coal burned at the two units. The petition alleges that, while the delivery price of western (sub-bituminous) coal originally was unfavorable, cheaper sub-bituminous coal became available during the early 1990's and PEF knew or should have known about it. According to OPC, by authoring changes to its environmental permits, PEF unilaterally abandoned its rights under those permits to burn the 50/50 mixture of coal. OPC alleged that PEF subsequently tried to justify its decision to buy more expensive coal by citing the new permit limitations. OPC also claimed that PEF requested permission of environmental regulators to burn synfuel produced by its affiliates, even when less expensive coal was available to it. OPC concluded that based on the prices PEF paid for bituminous coal and synfuel provided by a sister company, as compared to the lower market price of delivered sub-bituminous coal that was known to be available at the time of the purchases during the period of 1996-2005, PEF paid substantially more for coal than a prudent utility should have. OPC alleges that the utility knew or should have known that less expensive coal was available to it and did not take advantage of the lower priced coal.

Analysis

After considering the arguments raised and relevant law, we deny PEF's Motion to Dismiss. OPC's petition states a cause of action upon which we may grant relief. The petition

and the motion to dismiss raise material factual issues that must be resolved by an evidentiary proceeding.

The two cases most relevant to this determination are Gulf Power Company v. Florida Public Service Commission, 487 So. 2d 1036 (Fla 1986), and Richter v. Florida Power Corp., 366 So. 2d 798 (Fla 2d DCA 1979). In Gulf, the Florida Supreme Court affirmed an order of the Commission that required Gulf Power Company to refund \$2,200,000 to its customers for imprudently entering into and then failing to terminate a coal contract. The issues presented for the Court's review were whether there was competent substantial evidence to support the Commission's findings of managerial imprudence, whether the calculation for the amount of the refund was proper, and whether the refund order constituted retroactive ratemaking and was, therefore, prohibited. Gulf at 1037.

The Gulf case is dispositive of both issues presented by PEF in its motion to dismiss. The Court considered both the appropriateness of the Commission's review of prior utility actions and whether a refund for prior imprudent actions constituted retroactive ratemaking. As to whether the review of prior management decisions was improper hindsight review, the Court stated: "Contrary to Gulf's contentions, the commission sought to evaluate Gulf's managerial decisions *under the conditions and times they were made*. Witnesses testified that these actions were imprudent, and this testimony was adequately predicated on pertinent factual data." Id. (emphasis supplied). In finding that the Commission had the authority to order refunds of prior imprudent management decisions, the Court held: "Likewise, the method of determining the effects of these imprudent decisions on its rate payers was an acceptable method and with sufficient supporting data to sustain the amount ordered to be returned to the customers." Id.

Hindsight Review

As the Court held in Gulf, this Commission may review PEF's actions to determine if PEF management's decisions regarding fuel procurement were prudent under the conditions and time they were made. This is not hindsight review. Hindsight, as PEF states in its motion to dismiss, "makes a different course of action look preferable." Richter v. Florida Power Corp., 366 So. 2d 798, 800 (Fla 2d DCA 1979). Hindsight review involves applying facts as we know them today to decisions made in the past. But this Commission can consider decisions made in the past, by applying facts that were available to the company at the time of its management decision, just as the prior Commission did in its decision regarding Gulf. Based on Richter and Gulf, PEF's motion to dismiss fails.

Retroactive Ratemaking

The Supreme Court also addressed the issue of whether, after reviewing prior decisions, an order requiring a refund constituted prohibited retroactive ratemaking. Justice McDonald opined:

Nor do we find that the order constitutes prohibited retroactive ratemaking fuel adjustment. Fuel adjustment charges are authorized to compensate for utilities' fluctuating fuel expenses. The fuel adjustment proceeding is a continuous

proceeding and operates to a utility's benefit by eliminating regulatory lag. This authorization to collect fuel costs close to the time they are incurred should not be used to divest the commission of the jurisdiction and power to review the prudence of these costs. The order was predicated on adjustments for 1980, 1981, and 1982. We find them to be permissible.

Gulf at 1037.

The Supreme Court did not limit the Commission's ability to review expenditures of and require refunds from a utility under the facts presented to it in Gulf. OPC's petition includes factual allegations of PEF's imprudence in its expenditures and is seeking a refund from the utility for excessive expenditures resulting from those imprudent decisions, just as in Gulf. Here, like the Gulf case, the Commission will not be engaging in retroactive ratemaking if, after considering the evidence submitted by OPC and PEF, it determines that under the facts existing at the time, PEF's decision to purchase higher cost coal was imprudent and requires a refund. For these reasons, the motion to dismiss must also fail as to the issue of retroactive ratemaking.

Conclusion

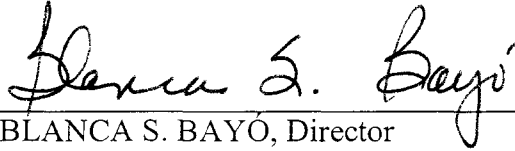
Upon consideration, we find that OPC's petition sets forth sufficient factual allegations which, when taken in the light most favorable to OPC, states a cause of action upon which relief may be granted. An evidentiary hearing is the most appropriate way for us to determine whether to grant OPC's request to order PEF to refund \$143 million to ratepayers. In ruling against the utility's motion to dismiss, we are not determining whether PEF's management's decisions were imprudent. Rather we will resolve that question during the course of the evidentiary proceeding, based on the facts there presented. Likewise, a decision regarding refunds in this case must be based on the evidence provided at a full administrative hearing. PEF will not be denied its due process of law by being required to present its case to us.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Progress Energy Florida's Motion to Dismiss the Office of Public Counsel's Petition to Refund Ratepayers \$143 Million is denied.

ORDERED that this docket shall remain open in order to conduct an evidentiary proceeding.

By ORDER of the Florida Public Service Commission this 22nd day of January, 2007.



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

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LCB

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 Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, 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.