BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 140001-EI ORDER NO. PSC-14-0697-PCO-EI ISSUED: December 17, 2014

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING THE OFFICE OF PUBLIC COUNSEL'S MOTION TO DISMISS PETITION FOR LACK OF SUBJECT MATTER JURISDICTION

BY THE COMMISSION:

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.

On August 22, 2014, OPC moved for an order dismissing FPL's petition on the grounds that we do not have subject matter jurisdiction (motion). On August 29, 2014, FPL filed its response in opposition to the motion (response). We heard oral argument on the motion at Agenda Conference on November 25, 2014.

We have jurisdiction over OPC's motion and request for oral argument pursuant to the provisions of Chapter 366, Florida Statutes (F.S.), including Sections 366.04, 366.05, and 366.06, F.S.

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., we lack 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 our lack of jurisdiction over the unregulated subsidiaries or affiliates of FPL involved in the transaction deprives us of jurisdiction over the subject matter of the petition. It contends we have no jurisdiction over PetroQuest Energy Inc., the entity engaged in production in which FPL seeks to invest. It further asserts that we have no jurisdiction over USG Properties Woodford I, LLC (USG), an FPL subsidiary, and the wholly owned subsidiary FPL proposes to create. OPC contends that we have 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 our 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 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 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, we 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). We 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 we determine that we lack subject matter jurisdiction, we must dismiss the complaint. Order No. PSC-02-0484-FOF-TP, in 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.

Decision

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 our enabling legislation authorizes us to award monetary damages; thus, we lack 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 we must look to our enabling statutes and the relief sought to examine whether we have jurisdiction over a particular matter. Where FPL petitioned for authority to recover storm restoration costs, we cited our enabling legislation and the powers conferred upon us by Chapter 366, F.S., and asserted jurisdiction upon finding FPL's petition to be a request for rate relief by a public utility. Order No. PSC-05-0187-PCO-EI, in 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 our jurisdiction to issue a certificate to a proposed water and wastewater system whose service would transverse county boundaries, we looked to the relevant provisions of Chapter 367, F.S., specifically the plain language of Section 367.171(7), F.S., which granted us exclusive jurisdiction to issue the certificate. Order No. PSC-10-0123-FOF-WS, in 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 our the authority 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., grants us 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, we have 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 we 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. See Order No. PSC-10-0671-PCO-GU, in 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."[1] There appears to be no controversy over whether FPL is a public utility. However, OPC argues that we have no subject matter jurisdiction because we have no jurisdiction over unregulated subsidiaries and related companies involved in the gas reserve project. OPC's reliance on Order No. 21847[2] to support its position is misplaced. The issue in the Florida Power Corporation (FPC)[3] docket was whether a long-term contract between the utility and its unregulated subsidiary was prudent, not whether we had jurisdiction over the subsidiary. We found we 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 our broad statutory authority over rate proceedings, we have 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 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, we annually evaluate the public utilities' fuel cost projections and expenditures and assesses the

[1] 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 this 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. We find that PW Ventures is not applicable to the issue of subject matter jurisdiction.

[2] 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,.

[3] Now Duke Energy Florida, Inc.

reasonableness of those costs and expenditures. In Order No. 13452,[4] we 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.[5]

OPC recognizes that the issue before us is whether we 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 our subject matter jurisdiction is that the relief sought by the petition is a rate increase passed through the fuel docket for costs related to the gas reserve project. Undisputedly, we have 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

We have jurisdiction over the subject matter of FPL's petition under our 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. We do 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. Thus, OPC's motion to dismiss shall be denied.

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[4] 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).

[5] In Order No. 13452, this 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 this Commission.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion to Dismiss is hereby denied.

By ORDER of the Florida Public Service Commission this 17th day of December, 2014.

Carlotta S Stauffer

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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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.