BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Tampa Electric Company for approval of cost recovery for a new environmental program, the Big Bend Units 1 & 2 Flue Gas Desulfurization System.	DOCKET NO. 980693-EI ORDER NO. PSC-98-1260-PCO-EI ISSUED: September 22, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DENYING MOTIONS TO DISMISS

BY THE COMMISSION:

Pursuant to Section 366.8255, Florida Statutes, on May 15, 1998, Tampa Electric Company (TECO) filed a Petition for Approval of Cost Recovery for New Environmental Program. In its petition, TECO sought a determination by the Commission of the prudence of its plan to build a Flue Gas Desulfurization (FGD) system at its Big Bend Units 1 & 2. On June 2, 1998, the Florida Industrial Power Users Group (FIPUG) Petitioned to intervene in the docket. Intervention was granted by Order No. PSC-98-0806-PCO-EI issued on June 10, 1998. FIPUG filed a Motion to Dismiss on July 23, 1998. The Citizens of Florida through the Office of Public Counsel (OPC) filed a Notice of Intervention in this docket on July 29, 1998. OPC's Notice was acknowledged by Order No. PSC-98-1047-PCO-EI, issued August 3, 1998. OPC filed a Suggestion That The Florida Public Service Commission, On Its Own Motion, Dismiss Tampa Electric Company's Petition Without Prejudice, on July 29, 1998.

On August 14, 1998, the Legal Environmental Assistance Foundation (LEAF) petitioned to intervene and filed a Motion to Dismiss which adopted the background and arguments presented by both FIPUG and OPC. Because FIPUG, OPC and LEAF's filings are substantially the same, we addressed all of these parties' filings as Motions to Dismiss at the September 1, 1998, Agenda Conference.

The Parties' filings argue two grounds upon which TECO's petition should be dismissed. These are:

1. The Petition for cost recovery is premature.

   a. The assets for which TECO seeks cost recovery are not presently in used and useful service as required by Section 366.06(1), Florida Statutes.

   b. TECO failed to seek pre-construction prudence approval as required by Section 366.825, Florida Statutes, before seeking cost recovery under 366.8255, Florida Statutes.

   c. Section 366.825 and 366.8255, Florida Statutes, contemplate a finding that base rates are insufficient to cover environmental costs before the extraordinary provisions of a cost recovery surcharge can be employed. It is too early for regulators to determine what TECO's financial standing in January 2001, will be, and no evidence on the issue has been submitted in the petition or prefiled testimony.

2. It is too late to convert the TECO cost recovery petition into a preconstruction prudence approval case.

   a. The petition in this case asks for cost recovery, not prudence approval, and fails to supply the information expressly required by Section 366.825, Florida Statutes, which relates to rate impact and other essential elements needed for approval. Although it is inconsistent with the petition, TECO's prefiled testimony says that its purpose is "to demonstrate the reasonableness and prudence of Tampa Electric's selection of . . . FGD." The testimony likewise fails to supply the rate impact and financial information required to enable the Commission to make the determinations required by Section 366.825(3), Florida Statutes.

   b. TECO has been aware of the CAAA requirements for more than 8 years. The Phase II compliance deadline is less than a year after the scheduled final action in this case, without any consideration of the prospect of judicial review. According to the prefiled testimony, it is already too late to complete permitting and

> construction in time to meet the January 1, 2000, deadline for compliance.

In addition, the filings argue that CAAA compliance plans must first be brought under Section 366.825, Florida Statues, and not under Section 366.8255, Florida Statutes, if the utility seeks prudence review and cost recovery of any environmental compliance project in its filing.

RESPONSE TO MOTIONS TO DISMISS

In its response to the Motions to Dismiss described above, TECO asserts that the Motions to Dismiss "appear to be predicated on a misinterpretation of provisions of Chapter 366, Florida Statues, and a misunderstanding of the relief requested by Tampa Electric in this proceeding." TECO answered the Motions' contentions without breaking its answers into similar categories. TECO's contentions as they appear in its Memorandum in Opposition to the Florida Industrial Power Users Group's Motion to Dismiss and Response to the Office of Public Counsel's Suggestion for Dismissal are set out below.

TECO asserts in its Memorandum in Opposition to the Florida Industrial Power User's Group's Motion to Dismiss at pages 1 and 2 that TECO's petition is for a determination by the Commission that the

> proposed project is a reasonable compliance option; that it is a project which qualifies for environmental cost recovery; and, that funds prudently invested and expended in implementing the project will be recoverable through the ECRC mechanism.

TECO explained in its Memorandum in Opposition that it expects to accrue AFUDC and come before the Commission with additional exhibits and testimony in a hearing in which the ECRC factors will be set for the cost recovery period once the FGD system is put into service. TECO also explained that its Petition clearly stated that it wished the prudence and the cost recovery determinations made under Section 366.8255, Florida Statutes, to be bifurcated in two proceedings, with prudence review coming first and cost recovery coming after the system was placed in service. TECO also claims that Section 366.8255, Florida Statues, permits utilities "to seek recovery of <u>any</u> environmental costs, not just Clean Air Act related costs." [emphasis in original] TECO further asserts that the

Commission pursuant to Section 366.8255, Florida Statutes, "has approved environmental compliance projects, both from a prudence and cost perspective, not contained in a pre-approved compliance plan."

TECO asserts that the contention in the Motions that Sections 366.825 and 366.8255, Florida Statutes, contemplate a finding that base rates are insufficient to cover environmental costs before a utility may request recovery under the ECRC is erroneous given the Commission's Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 930613-EI. This Order outlined three criteria for cost recovery through the ECRC for projects associated with compliance with environmental regulations. These three criteria are:

1. such costs were prudently incurred after April 13, 1993;

2. the activity is legally required to comply with a governmentally imposed environmental regulation enacted, became effective, or whose effect was triggered after the company's last test year upon which rates are based; and,

3. such costs are not recovered through some other recovery mechanist or through base rates.

TECO cites this same Order to counter the Motions' arguments that the utility's achieved rate of return determines whether or not the utility may recover the costs of environmental compliance.

TECO also opposes the Motions' argument that Section 366.8255, Florida Statues is the wrong statute under which to bring CAAA compliance activities before the Commission for prudence and cost recovery review. TECO asserts that Section 366.8255, Florida Statues, allows the Commission to review any environmental project for prudence and cost recovery. TECO maintains that the provisions of Section 366.8255, Florida Statutes do not contemplate a "pre-approval" of the plan, under Section 366.825, Florida Statutes, before the project may be "rolled over" into Section 366.8255, Florida Statutes for Commission consideration. TECO also contends that the Motions' arguments that CAAA compliance plans must first be filed under Section 366.825, Florida Statutes is erroneous. TECO asserts that neither statute requires a Petitioner to file the plan requirements of Section 366.825, Florida Statutes with a petition for approval of environmental compliance activities under Section 366.8255, Florida Statutes.

TECO rejects the contention that it is required to meet the filing requirements set forth in Section 366.825, Florida Statutes, for a determination of its Petition under Section 366.8255, Florida Statutes. Even though it rejects this contention, TECO asserts that it has met the requirements of a filing under Section 366.825, Florida Statues, despite the fact that it was not required to do so. In TECO's response to Office of Public Counsel's Suggestion for Dismissal at page 3, TECO states:

> Even assuming, but not conceding, the information required to accompany a voluntary petition for compliance plan approval under Section 366.825, Florida Statutes, must accompany a petition under Section 366.8255, Florida Statutes, Tampa Electric has met such requirement. Attached hereto as Exhibit "A" is a detailed list of the categories of information Tampa Electric has submitted in this proceeding in support of the prudence of its proposed FGD system as a means of complying with CAAA Phase II SO2 emissions limitation. The supporting data supplied by the company surpasses the spirit and the letter of Section 366.823, Florida Statutes.

The parties, therefore, are in disagreement as to which statute this action properly should have been brought under. TECO stands by its filing under Section 366.8255, Florida Statutes. OPC, FIPUG and LEAF all contend that the action properly should have been brought under Section 366.825, Florida Statutes.

ANALYSIS

Rule 28-106.204(2), Florida Administrative Code, requires that motions to dismiss a petition shall be filed no later than 20 days after service of the petition unless otherwise provided by law, and the law does not provide otherwise. However, in so recommending, we are cognizant of the fact that the new uniform rules became effective on July 1, 1998, and that the petition was filed in May of 1998. While application of a new uniform rule in this instance may appear harsh, on the balance of our analysis, the motion should be denied anyway. In this case, none of the Motions were made in a timely manner. TECO filed its initial Petition May 15, 1998. FIPUG did not petition to intervene until June 2, 1998, and did not file its Motion to Dismiss until June 23, 1998, more than 20 days after TECO's Petition was initially filed/served. OPC did not file its "Suggestion" until July 29, 1998, and LEAF did not file its Motion to Dismiss until August 14, 1998. However, even if timeliness were not an issue, the Motions should be denied.

A Motion to Dismiss raises as a question of law whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). Varnes v. Dawkins describes the standard for disposing of motions to dismiss as whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, the tribunal must consider only the petition. All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957).

The substantive law governing this docket is found in Section 366.8255, Florida Statutes. This Section provides that an electric utility may:

> submit to the Commission a petition describing the utility's proposed environmental compliance costs in addition to any Clean Air Act compliance activities and costs shown in a utility's filing under Section 366.825. If approved, the Commission shall allow recovery of the utility's prudently incurred environmental compliance with the Clean Air Act, and any amendments thereto or any change in the application or enforcement thereof, through an environmental compliance cost-recovery factor that is separate and apart from the utility's base rates . . . .

Past Commission precedent as set forth in Order No. PSC-94-0044-FOF-EI, issued January 12, 1994 in Docket No. 930613-EI, recognizes that Section 366.8255, Florida Statues, "authorizes the recovery of prudently incurred environmental compliance costs through the environmental cost recovery factor." In that proceeding, Gulf Power Company (Gulf) requested the collection of revenues through the ECRC prior to a showing that the costs were necessary or prudent, Gulf was denied recovery without prejudice. A formal hearing then was held under Section 366.8255, Florida Statutes, to consider Gulf's petition and the prudence of its request. The Commission considered and rejected OPC's argument that if the utility is earning within its range, it is already being compensated for all environmental expenses and should not be

granted recovery of any environmental expenses through the ECRC. OPC also argued that the statute only permits recovery of in-service capital investments. Both of OPC's arguments were rejected by the Commission. Both of these arguments are made again in this petition and are hereby rejected. According to past Commission precedent, Section 366.8255, Florida Statutes, operates as a mechanism whereby a utility may seek determination of the prudence of any anticipated and mandated environmental compliance project before bringing the project before the Commission in a cost recovery proceeding.

After negotiations between the parties and staff, issues relating to cost recovery, ROE, and recovery period were deferred until a later proceeding. At that time, TECO will come back before the Commission to seek recovery for expenses associated with implementing the FGD system. Thus, any mention of ROE, cost recovery, or the proper recovery period in the Motions is no longer relevant to this proceeding. This leaves for consideration questions of substantive law and the proper statute under which the petition should have been filed.

We believe that if the petition is taken in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. Varnes v. Dawkins, at 350. The petition states with sufficient clarity the elements necessary for relief under Section 366.8255, Florida Statues. TECO submitted a petition which described "the utility's proposed environmental compliance activities and projected environmental compliance costs in addition to any Clean Air compliance activities and costs" as required by Section 366.8255, Florida Statutes.

The Motions argue that the language in the statute which states that "in addition to any Clean Air compliance activities and costs shown in a utility's filing under s. 366.825" means that any filing under Section 366.8255, Florida Statutes must first be addressed under Section 366.825, Florida Statutes. This is erroneous. Neither statute contemplates this scenario. We believe that, in light of past Commission precedent, Section 366.8255, Florida Statutes contemplates that the utility may submit a petition to the Commission describing proposed environmental compliance activities and projected environmental costs which may be addition to (or supplemental to) any Clean Air Act compliance plan which the utility may have filed under Section 366.825, Florida Statutes. The language is inclusive of, rather than exclusive of Clean Air Act compliance activities. Section 366.8255(2)continues:

> If approved, the commission shall allow recovery of the utility's prudently incurred environmental compliance costs, including the costs incurred in compliance with the Clean Air Act, and any amendments thereto or any change in the application or enforcement thereof, through an environmental compliance cost-recovery factor that is separate and apart from the utility's rate base.

Obviously, the legislature contemplated Clean Air Act compliance activities to be addressed under 366.8255, Florida Statutes.

Additionally, there is no nexus between the Motions' arguments that the FGD system must be in used and useful condition before cost recovery can be had and the requirements of Section 366.8255, Florida Statutes. The basis for this argument was that Section 366.06(1), Florida Statues, prevents the Commission from including in rate calculations any charge or cost of any property of a utility that is not in used and useful service. This is a matter which, as discussed above, is no longer at issue in this docket. Cost recovery for TECO's proposed FGD system will be considered at a later date.

The Motions also argue that Section 366.825, Florida Statues, requires TECO to seek preconstruction prudence review before seeking cost recovery under Section 366.8255, Florida Statues. This is false. The two Sections, 366.825 and 366.8255, Florida Statues, are not dependent one upon the other. They are separate statutes. A filing under one has no bearing upon a filing in the other. TECO has appropriately filed for prudence review under Section 366.8255, Florida Statues, and has reserved until a later docket the cost recovery aspect of a filing under Section 366.8255, Florida Statutes.

The Motions argue that Section 366.825 and 366.8255, Florida Statutes, contemplate a finding that base rates are insufficient to cover environmental costs before the extraordinary provisions of a cost recovery surcharge can be employed. Section 366.8255(2), Florida Statutes, clearly states that if a utility's proposed environmental compliance project is approved by the Commission, "the commission shall allow recovery of the utility's prudently incurred environmental compliance costs . . . through an environmental compliance cost-recovery factor that is separate and apart from the utility's base rates." There is no mention in this section that a finding that base rates are insufficient to cover compliance costs must be made before the extraordinary provisions of a cost recovery surcharge can be employed.

The Motions also argue that TECO's petition was filed too late to comply with all the necessary permitting and construction associated with the FGD system before the January 1, 2000, deadline for CAAA Phase II compliance. Compliance with Federal and State regulations in a timely manner is TECO's responsibility.

Section 366.8255, Florida Statutes, only contemplates that the Commission address whether petitions for environmental activities are prudent and reasonable, given the alternatives. This section does not require the Commission to set a timetable for the completion of activities by the Petitioner to ensure Petitioner's timely compliance with its obligations.

For the foregoing reasons, we deny the Motions to Dismiss as untimely. Even if the Motions are considered on the merits, neither OPC, FIPUG, nor LEAF have alleged grounds supporting a Motion to Dismiss because, with all the allegations in TECO's petition assumed to be true, TECO's petition has stated a cause of action under Section 366.8255, Florida Statues, for which relief may be granted.

It is therefore

ORDERED that the Motion to Dismiss filed by Florida Industrial Power Users Group, The Suggestion that the Florida Public Service Commission, On Its Own Motion, Dismiss Tampa Electric Company's Petition Without Prejudice filed by the Office of Public Counsel, and the Motion to Dismiss filed by the Legal Environmental Assistance Foundation are denied. It is further

ORDERED that this docket shall remain open to proceed to hearing on Tampa Electric Company's petition and until such time as all issues identified by the prehearing order are resolved.

By ORDER of the Florida Public Service Commission this 22nd day of September, 1998.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)
GAJ

DISSENT

Chairman Johnson dissents.

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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Records and Reporting, 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.