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Subject: Docket No. 110041-EI
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Attached for electronic filing, please find Florida Public Utilities Company's Motion to Dismiss the Petition of the City of Marianna, Florida Protesting Proposed Agency Action Order No. PSC-11-0269-PAA-EI, and a separate Request for Oral Argument on the Motion to Dismiss. Please do not hesitate to contact me if you have any questions.

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b. Docket No. 110041-EI – Petition for Approval of Amendment No. 1 to Generation Services Agreement with Gulf Power Company, by Florida Public Utilities Company.

c. On behalf of: Florida Public Utilities Company

d. Total Number of Pages: Document 1 (ending in 8): Motion to Dismiss – 17 pages
Document 2 (ending in 1): Request for Oral Argument – 3 pages

e. Description: Document 1: FPUC's Motion to Dismiss Petition of Marianna
Document 2: FPUC's Request for Oral Argument on its Motion to Dismiss

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Approval of Amendment No. 1 to Generation Services Agreement with Gulf Power Company, by Florida Public Utilities Company.	))))	DOCKET NO. 110041-EI Filed: July 28, 2011

FLORIDA PUBLIC UTILITIES COMPANY'S MOTION TO DISMISS THE CITY OF MARIANNA, FLORIDA's PETITION PROTESTING ORDER NO. PSC-11-0269-PAA-EI

Florida Public Utilities Company ("FPUC" or "Company"), pursuant to Rule 28-106.204, Florida Administrative Code, requests that the Florida Public Service Commission ("Commission") dismiss the Petition Protesting Proposed Agency Action Order No. PSC-11-0269-PAA-EI and Request for Formal Proceeding filed by the City of Marianna, Florida ("City") on July 12, 2011 ("Protest"), because the Protest fails to allege facts sufficient to demonstrate that the City will incur an injury, in fact, sufficient to establish standing to pursue a protest and request a hearing under the test for standing required by Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981)("Agrico test")[1]. In support of this Motion, FPUC states as follows:

I. INTRODUCTION

1. This proceeding was initiated on January 26, 2011, when FPUC filed its *Petition for Approval of Amendment No. 1 to Generation Services Agreement with Gulf Power Company*. In that Petition, the Company requested Commission approval of a proposed Amendment No. 1 ("PPA Amendment") to the Agreement for Generation Services ("2008 PPA") between FPUC

[1] The Court in Agrico set forth a two-part test for standing in administrative proceedings, which the Commission has recognized time and again. Under Agrico, the Petitioner (here, the City) must demonstrate: (1) that he will suffer an injury, in fact, of sufficient immediacy to entitle him to a hearing under Chapter 120, F.S.; and (2) he must also demonstrate that the injury alleged is of the type or nature which the proceeding was designed to protect against.

and Gulf Power Company, pursuant to which Gulf Power Company supplies power to FPUC for its Northwest Division. The underlying 2008 PPA had been approved by the Commission by Order No. PSC-07-0476-PAA-EI, issued June 6, 2007, in Docket No. 070108-EI (PPA Order). It has been in effect since January 1, 2008.

2. As explained in the Company's initial Petition in this Docket, the Company entered into an electric distribution franchise agreement ("Franchise") with the City of Marianna, which became effective February 1, 2010.[2] The Franchise includes a provision that required the Company to have Time-of-Use ("TOU") and Interruptible rates in effect by February 17, 2011. If such rates were not in effect by that date, the franchise agreement would have allowed the City to initiate proceedings to purchase the FPUC facilities in the City of Marianna.

3. As part of its effort to develop the rates required by the franchise agreement, the Company negotiated the subject PPA Amendment with Gulf, in part, so that it would have adequate pricing flexibility to develop the TOU and Interruptible rates consistent with the franchise provisions. Ultimately, FPUC was successful in developing appropriate TOU and Interruptible rates, which the Commission approved by Order No. PSC-11-0112-TRF-EI ("TOU Order"), issued February 11, 2011, prior to the deadline in the franchise agreement.

4. Thereafter, on March 1, 2011, the City protested the TOU Order and requested a hearing on the matter. The very next day, March 2, 2011, the City also filed a suit in the Circuit Court for the Fourteenth Judicial Circuit in Jackson County seeking a declaratory judgment that FPUC had violated the terms of the franchise agreement. By Order No. PSC-11-0290-FOF-EI, issued July 5, 2011, the Commission dismissed the City's protest of the TOU Order. The proceedings

[2] City of Marianna, Ordinance No. 981, effective February 1, 2010.

before the Circuit Court are, however, ongoing. In addition, the City sent FPUC a letter indicating it would pursue the purchase of the Company's facilities in Marianna.

5. The PPA Amendment, which includes a two-year extension to the original 10-year term, would result in annual savings, on average, of $900,000 for FPUC's customers over the life of the Agreement.[3] These savings are critical for two reasons. First, as the Commission anticipated in the PPA Order issued in Docket No. 070108-EI, the 2008 PPA resulted in significant cost increases for customers across FPUC's Northwest Division. The savings produced by the PPA Amendment would provide a significant measure of relief to all customers in the Northwest Division by enabling the Company to reduce its fuel charges to customers, as recognized in the subject PPA Amendment Order and highlighted in the Company's Request for a Mid-Course Correction in Docket No. 110001-EI.[4] Second, the savings produced by the PPA Amendment support the Company's TOU and Interruptible Service rates, which were approved in Docket No. 100459-EI, thereby providing a mechanism to determine the effectiveness of these measures.[5]

6. In approving the PPA Amendment, the Commission concluded:

> We find that near-term rate reductions for FPUC are desirable. As discussed above, the proposed Amendment is projected to result in a savings of nearly $6 million through 2017 for FPUC and its customers. Moreover, we find that the modifications to the capacity purchase quantity provides the pricing flexibility necessary to develop conservation, or load control measures such as time-of-use and interruptible rates.

Order No. PSC-11-0269-PAA-EI ("PPA Amendment Order"), p. 3. The Commission also determined that:

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[3] The savings would inure to the benefit of all FPUC customers in the Northwest division. These savings were reflected in the Company's Request for a Mid-Course Correction, filed April 7, 2011. As such, one significant impact of the City's protest of the Commission's approval of the PPA Amendment, as discussed more fully in this Motion, is that the Company will likely experience a significant under-recovery in the future, which would then result in fuel charge increases for all customers in the Company's Northwest Division.

[4] *See* Order No. PSC-11-0289-FOF-EI, issued July 5, 2011, in Docket No. 110001-EI. This benefit was also recognized in Order No. PSC-11-0112-TRF-EI, at p 3.

[5] Order No. PSC-11-0112-TRF-EI, issued February 11, 2011.

> The Existing Agreement was approved based on the evaluation and outcome of a bid process. Given that the Existing Agreement does not terminate until the end of 2017, it is not reasonable to conclude that a similar process several years into the future would yield results that would out-weigh the projected savings of the proposed Amendment. Furthermore, the City identified the ratchet provision as a feature that is contributing to high rates and the Amendment eliminates that feature.

Id.

7. The essence of the City's protest is that the City, and other FPUC customers, will be required to pay unreasonably high rates in 2018 and 2019. The City, in fact, concedes that the PPA Amendment produces a reduction in retail rates in 2011 through 2017, but contends that the savings produced will be offset by the rates for service in the final two years of the agreement. Protest, pp. 6, 10. Thus, the City contends that the PPA Amendment will result in rates to customers that are not fair, just, and reasonable, and also not reasonable and prudent for purposes of cost recovery through the capacity and purchased power cost recovery clause. Protest, pp. 7, 10, 11.

8. The City further contends that the rates that FPUC will pay Gulf Power pursuant to the amended PPA are not "appropriate for purposes of developing conservation or load control measures such as time-of-use rates or interruptible service rates" and will not encourage energy conservation or efficiency. Protest, pp. 10, 11.

9. On these bases, the City asserts that its substantial interests, as well as those of other FPUC customers, will be determined by this proceeding, and that a Section 120.57, F.S. hearing is warranted. [6]

10. Even read in the light most favorable to the City, the Protest should be dismissed because the City has failed to identify any injury in fact that is of sufficient immediacy to warrant relief.

[6] The City is without authority to represent anyone else, including citizens with residential service accounts, in this or any other matters before the Florida Public Service Commission. The authority to represent consumers before the Florida Public Service Commission is reserved, by statute, for the Public Counsel. Section 350.0611, Florida Statutes. Moreover, FPUC suggests that the City's actions in this proceeding are detrimental to the interests of other FPUC customers in the Northwest Division.

The City has, as previously noted, conceded that the PPA Amendment will result in savings through 2017 over what would have been paid under the 2008 PPA, and its contentions with regard to the rate impacts in 2018 and 2019 are entirely speculative and unsupported by industry market projections. Moreover, the allegations pertaining to whether the PPA Amendment is appropriate for purposes of developing conservation and efficiency rates or programs are entirely beyond the scope of the proceeding, and are not of the type or nature that this proceeding was designed to address.

11. FPUC further suggests that the City's Protest is filed for improper purposes. By all appearances, it is another thinly-veiled attempt to bolster the City's position in proceedings before the 14th Judicial Circuit and further its ultimate goal of obtaining FPUC's facilities in Marianna – all within a mere 17 months into a 10-year franchise agreement with the Company. It is not difficult to see past the subterfuge and divine that the City's Protest is primarily designed to leverage its ability to delay the regulatory process in an effort to gain a stronger foothold in its efforts to obtain FPUC's system and facilities in Marianna. The City's interest in this matter is not a concern for whether the PPA Amendment will produce fair rates. It is instead an economic, competitive interest in obtaining the electric system in Marianna and becoming an electric service provider itself.

12. Perhaps most telling with regard to the City's true motives is the fact that the City's protest puts at risk savings, and a fuel charge decrease, that would benefit FPUC's customers throughout the Northwest Division. The City's action has a potential adverse impact well beyond its own interests as a customer.

13. In view of the City's unabashed attempts to use the regulatory process to leverage its litigation position, the Company also includes in this Motion a request that the Commission

consider whether FPUC should be awarded its reasonable attorneys' fees and costs associated with responding to and defending against this Protest.

14. Accordingly, FPUC asks that the Protest should be dismissed, with prejudice, because the defect identified in the City's Protest cannot be cured. See Section 120.569 (2)(c), F.S. There is no injury or harm of sufficient immediacy to warrant a formal hearing. Moreover, there is no harm or injury to the City *that is within the Commission's jurisdiction to resolve.*[7]

II. STANDARD OF REVIEW

15. The City's Petition was received by undersigned counsel on July 12, 2011; thus, this Motion to Dismiss is timely filed pursuant to Rule 28-106.204, Florida Administrative Code.

16. As the Commission has recognized time and again, the purpose, under Florida law, for a Motion to Dismiss is to test the legal sufficiency of the facts alleged to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000) and Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The moving party must demonstrate that, even accepting all of the allegations in the Petition as true, the Petition fails to state a cause of action upon which the Commission can grant relief. *Id.;* Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958); City of Gainesville v. Florida Dept. of Transportation, 778 So. 2d 519 (Fla. 1st DCA 2001).

17. The Commission has also recognized that, as a threshold matter, one must demonstrate standing to participate in a proceeding as a party and to request a hearing. The accepted test for "substantial interests," and thus standing, is set forth in Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), wherein the Second

[7] No party has contended that the terms of the Franchise Agreement, Ordinance No. 981, are within the Commission's purview. In fact, the interpretation and enforcement of the Franchise Agreement is currently before the Circuit Court, as noted herein.

District Court of Appeal addressed the issue of "substantial interest" standing, explaining that the petitioner must demonstrate that: 1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. As the Court further elucidated, "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Id.*[8] To prove standing, the petitioner must satisfy both prongs of the *Agrico* test. Ybor III, Ltd. v. Florida Housing Finance Corp., 843 So. 2d 344 (Fla. 1st DCA 2003). The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also Village Park mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987)(speculation on the possible occurrence of injurious events is too remote to establish standing– "The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct."). See also Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) (threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy to warrant a Section 120.57, Florida Statutes hearing). In addition, as the Commission has recognized, a purely economic interest cannot serve as the basis for standing. See Order No. PSC-10-0685-FOF-EQ, issued in Docket No. 090372-EQ, *citing* Agrico, 403 So. 2d at 482; and International Jai-Alai Players, 561 So. 2d at 1225-26.

[8] The PSC has previously determined that the *Agrico* test for standing applies to governmental entities by Order No. PSC-95-0062-FOF-WS, issued January 11, 1995, in Docket No. 940091-WS, *Application for transfer of facilities of LAKE UTILITIES, LTD. to SOUTHERN STATES UTILITIES, INC.; amendment of Certificates Nos. 189-W and 134-S, cancellation of Certificates Nos. 442-W and 372-S in Citrus County; amendment of Certificates Nos. 106-W and 120-S, and cancellation of Certificates Nos. 205-W and 150-S in Lake County;* and Order No. PSC-93-0363-FOF-WS, issued March 9, 1993, Docket No. 921237-WS, *In re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc.*

18. To be clear, the City's prior intervention in the early stages of this proceeding has no bearing on standing. To the contrary, intervention allowed under Rule 25-22.039, Florida Administrative Code, does not assure that a petitioner will, in fact, be able to demonstrate a sufficient injury in fact to establish standing to maintain a protest of subsequent agency action.[9] Typically, as in this case, when the Commission grants intervenor status under Rule 25-22.039, Florida Administrative Code, it applies the *Agrico* test for standing to the Petition to Intervene. However, in ruling on such a Petition, the Commission, as it did in this case, does not make a conclusive determination that any subsequent agency action will, in fact, affect the Petitioner's substantial interests. Instead, the Commission's Orders Granting Intervention will typically provide that the intervenor's substantial interests "**may**" be affected by the outcome of the proceeding.[10] This is a preliminary determination that allows the intervenor to participate fully in the proceeding as a party, but does not preclude the Commission from revisiting the subject of standing if the question arises under another pleading rule.[11] Specifically, in this instance, the City has filed a Petition for Formal Proceeding pursuant to Rules 25-22.029 and 28-106.201, Florida Administrative Code. Rule 28-106.201(2)(b), Florida Administrative Code, includes a

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[9] Order No. PSC-11-0137-PCO-EI, allowing the City to intervene, provides only that the City's "substantial interests **may** be affected by this proceeding." [emphasis added]. Order at p. 2. *See also, American Trucking Associations, Inc. v. ICC*, 669 F. 2d 957, 964 (5th Cir. 1982)(stating that ". . . intervention in agency proceedings and standing to challenge agency actions in judicial review proceedings are not governed by the same standards.), *citing* 1 K. Davis, Administrative Law Treatise § 8.11, at 564 (1958). *See also, In Re: Application for Amendment of Certificate No. 427-W to Add Territory in Marion Count y by Windstream Utilities Company*, 97 FPSC 4:556 (differentiating between intervention as an "intervenor" or "interested party" under Rule 25-22.039, F.A.C., and intervention as an "objecting party.")

[10] *See,* for instance, ORDER NO. PSC-01-0548-PCO-TP, issued in Docket No. 010102-TP; and ORDER NO. PSC-10-0527-PCO-EG, issued in Docket No. 100158-EG, among others, stating that the proposed intervenors' substantial interests "may" be affected.

[11] This is particularly true when, as here, the City petitioned to intervene very early in the proceeding even though the case was set for a Proposed Agency Action decision, as opposed to a formal hearing. The appropriate point in time, under Commission rules, when an interested person should, and must, demonstrate that its substantial interests will be affected is when said interested person files a protest of proposed agency action requesting a hearing and seeks to participate as a party in such proceeding. Until such time, the Commission's rules do not contemplate that an interested person would be required to demonstrate the impact on its substantial interests in order to participate in the Proposed Agency Action process, as demonstrated by the numerical order of Rules 25-22.029 (Point of Entry) and 25-22.039 (Intervention).

specific requirement that the City include in its Petition an "explanation of how [its] substantial interests will be affected by the agency determination. . . ." [emphasis added]. The fact that intervention has been granted, on a provisional basis, under Rule 25-22.039, Florida Administrative Code, does not override the application of the pleading requirements in Rule 28-106.201(2)(b), Florida Administrative Code, to a new, separate pleading filed pursuant to that Rule. Thus, the question of whether the City has adequately pled that its substantial interests will be affected is properly before the Commission.

III. ARGUMENT

19. As noted in the previous section, the Agrico test is a two-part test for standing, which requires that both components of the test be met. The first component of the test is a demonstration that there exists, or will exist, an injury in fact of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing. Applying this test to the City's Petition, the City has clearly failed to meet the Agrico test.

20. Specifically, the City's Petition outlines a series of "ultimate facts" that serve as the basis for its Petition. Review of these statements, however, reveals that none of them, even when taken as true, demonstrate that the City, as a customer will suffer any injury as a result of the PPA Amendment, much less an injury of sufficient immediacy to warrant a hearing nor one that this proceeding is designed to address.

21. Here, FPUC notes that the Commission's Order approving the PPA Amendment, which is the subject of the City's Protest, approved the PPA Amendment for purposes of prudence and

cost recovery calculations. This is consistent with prior decisions of the Commission, including the Commission's approval of the underlying 2008 PPA.[12]

22. The City first contends that its substantial interests ". . . in its electric bills, in the rates that make up the City's bills, and in having rates that are fair, just, and reasonable. . ." will be determined in this docket. To be clear, the purpose of this docket is to address an amendment to the 2008 PPA. The underlying 2008 PPA has already been approved by the Commission with an effective term through 2017. Neither rates nor actual fuel cost recovery charges will be set in this proceeding, which is designed only for purposes of reviewing the prudence of the PPA Amendment and determining the propriety of cost recovery for costs arising thereunder. The fuel cost recovery charges that will be applied to recover the costs associated with power purchases under the subject PPA Amendment will instead be developed and established in the context of the annual Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor proceedings.[13]

23. First, the City contends that the rates to be charged under the PPA Amendment in the extension years (2018 and 2019) will result in FPUC's rates being unfair, unjust, and unreasonable and so excessive as to outweigh the benefits of the reductions in the years 2011 – 2017. This contention is entirely speculative, laden with incorrect assumptions, and, as such,

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[12] In its Petition initiating this Docket, FPUC also referenced Order No. PSC-05-0272-PAA-EI, wherein the Commission determined certain Power Sales Agreements were reasonable and prudent, and therefore recovery of the energy and capacity costs through the Clause was appropriate. The Commission noted therein that the approval was subject to review of the actual expenses in the context of the Clause proceeding. Order at p. 4. FPUC acknowledges that specific expenditures under this PPA Amendment remain subject to review in the appropriate Clause proceeding.

[13] The purpose of the Fuel and Purchased Power Cost proceeding, as the Commission has recognized, is to provide a mechanism for utilities to recover prudently incurred costs for fuel and purchased power, recognizing that the market fluctuations in the cost of both cannot reasonably be accounted for in base rates. See In re: General Investigation of Fuel Adjustment Clauses of Electric Companies, Order No. 6357, issued in Docket No. 74680-CI, on November 26, 1974. The clause also provides a means to pass along savings to customers that may result from fuel or purchased power cost decreases (as in the case of FPUC's mid-course correction in Docket 110001-EI). Id., *citing* Order No. 2515-A.

cannot serve as a basis to demonstrate standing. First, the City draws unsupported, speculative conclusions about the possible outcome of a bid process that would not take place for several more years. It also offers baseless assumptions about the costs of fuel and purchased power in the market in the years 2018 and 2019 that are simply not consistent with current industry projections.

24. Moreover, even the most accurate and reliable fuel and purchased power projections are just that – projections. A projection is, to put in more plainly, a really good, educated guess. That is precisely the reason that the Commission conducts that Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor proceedings – because even yearly projections can prove to be wrong. As such, any assumptions regarding costs and rate impacts that may occur some 7 – 8 years down the road are most certainly "speculative" and thus insufficient to demonstrate any immediate harm. This is particularly true when the City has acknowledged the subject PPA Amendment reflects definitive savings through the year 2017, which could hardly be construed as a "harm" or "injury." Protest, p. 7.

25. The City also alleges that there are "additional cost risks," such as fuel and environmental cost risks, that could effect the monthly energy payments and which make the PPA Amendment inappropriate and contrary the best interests of the City and other FPUC customers. There were, however, no changes in the contractual relationship with Gulf Power arising under the PPA Amendment that would include any "additional cost risks" over and above any such risks that already applied under the approved 2008 PPA. With this "kitchen sink" argument, it is entirely unclear what "additional cost risks" the City believes will arise. As such, this allegation can only be viewed as speculative and entirely insufficient to demonstrate and "injury in fact of sufficient immediacy" to warrant a hearing.

26. The City further contends that the rates to be paid to Gulf Power under the PPA Amendment are not reasonable for purposes of cost recovery calculations or for power purchases. In view of the fact that, under the existing, approved 2008 PPA, FPUC's purchased power costs would have been higher for the remaining 7-year term of the agreement, the City would seem to be saying that the PPA Amendment is inappropriate, because FPUC will not be paying enough under the contract with Gulf Power. Clearly, that is not the City's intent, but it highlights the absurdity of their argument. There simply can be no demonstrable harm to the City as a result of the real, known cost reductions that will take place over the period through 2017, and any assumptions as to harm that would arise in 2018 and 2019 are, at best, speculative and, at worst, pure fabrication. [14]

27. The City also argues that FPUC did not properly evaluate the costs that will be incurred in the years 2018 and 2019. This bare assertion, standing alone, identifies no injury in fact that the City will incur. Even coupled with the other assertions, this allegation cannot serve to rehabilitate the speculative nature of the City's other assertions regarding costs in 2018 and 2019.

28. Throwing yet another argument at the wall, the City further asserts that the PPA Amendment is not in the best interests of FPUC's customers and is contrary to the public interest. This allegation, however, simply does not identify an injury in fact. [15] Moreover, the City is without authority to represent or speak for any FPUC customers other than itself. To the

[14] One could likewise speculate that FPUC's customers could be subject to significant harm and increased rates, even in 2018 and 2019, if the Company had declined to enter the PPA Amendment, and instead waited until the end of the 2008 PPA term to issue a Request for Proposals. There is simply no angle from which the City's allegations can be viewed as anything other than speculation based on unsound reasoning.

[15] In addition, the Commission has previously recognized that "While the phrase "public interest" is undefined and subject to a broad reading, the phrase should not be read so broadly as to extend the Commission's authority to grant relief which is beyond the type or nature which this proceeding is designed to protect." Order No. PSC-10-0685-FOF-EQ, issued in Docket NO. 090372-EQ.

point, no other customer in the Northwest Division has expressed concern about the subject PPA Amendment. This baseless assertion is further indicative of the fact that the City's opposition to the PPA Amendment arises solely because the savings created thereunder allowed FPUC to develop TOU and Interruptible service rates in compliance with Ordinance No. 981, which impairs the City's efforts in the matters before the Circuit Court. The Commission should not countenance this blatant attempt to throw a wrench in the regulatory works in order to benefit the City's interests outside the regulatory forum.

29. Moreover, none of these assertions identify any harm to the City. As the Commission has found in prior cases, blanket statements, such as these, without sufficient facts to support them, are not enough to meet the Agrico standard. There must be more than a mere assertion of harm. Order No. PSC-99-0146-FOF-TX, issued January 25, 1999, in Docket No. 981016-TX.

30. Finally, the City contends that the PPA Amendment should be rejected because the rates paid thereunder will not encourage energy efficiency or conservation and are not appropriate for developing load control measures. This allegation clearly fails the second prong of Agrico. The PPA Amendment was submitted, and approved, for purposes of determining that it is reasonable and prudent, and that recovery through the appropriate cost recovery clause of costs arising under the PPA Amendment is allowed.[16] Although certainly beneficial (if not integral) to the development of FPUC's TOU and Interruptible Service rates, whether or not the PPA Amendment itself actually encourages energy efficiency, conservation, or load control measures is simply not a statutory criteria for determining either the propriety of the PPA Amendment, or the resulting fuel charges that will be passed on to customers.

[16] Again, as the Company has acknowledged, the Commission retains authority to review specific costs and charges in the regular Fuel and Purchase Power Clause cost recovery proceedings.

IV. REQUEST FOR ATTORNEYS' FEES

31. Pursuant to Section 120.595(1)(b and c), F.S., the Commission may award attorneys' fees when it determines that a party has participated in a proceeding for improper purposes. Section 120.595(1)(e), F.S., defines "improper purpose" to include participation designed:

> . . . primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

Likewise, Section 57.105(1 and 5), F.S., authorizes the Commission to award reasonable attorney's fees when the opposing party knew or should have known that the claim was not supported by the necessary facts or would not be supported by the application of the existing law to the material facts. Such is the situation in this matter as demonstrated in the discussion above. There is no injury of fact of sufficient immediacy to warrant a hearing in this matter, much less any injury arising under the rules or statutes enforced by the Commission. Again, the City has even acknowledged the cost reductions that will take place through 2017. FPUC respectfully asks that the Commission recognize that this is the second proceeding (the first one was Docket No. 100459-EI) in which the City has taken action merely for purposes of delay and to try to bolster its position in the civil court proceedings regarding its Franchise Agreement with FPUC.[17] The Commission should not tolerate such abuse of its processes and resources for purposes of gaining leverage over FPUC in other forums. As a direct result of the City's actions, FPUC has incurred, and continues to incur, additional, unnecessary costs associated with defending itself against these repeated, unwarranted regulatory filings. Thus, in light of the apparent "improper purpose" of the subject Protest by the City, FPUC respectfully asks that the

[17] The City filed an Amended Petition (Protest) in Docket No. 100459-GU on July 12, 2011.

Commission award FPUC its reasonable attorney's fees and costs associated with responding to, and defending against, the illusory allegations set forth therein.

VI. CONCLUSION

32. For all the foregoing reasons, the Company asks that the Commission dismiss the City's Petition with prejudice. Applying the Agrico test for standing, the City fails both prongs of the test. Specifically, the pleading is flawed beyond repair because the City has not, and in fact cannot, demonstrate any injury in fact of sufficient immediacy to warrant a Section 120.57, F.S., hearing. In addition, certain specified allegations are also not of the type or nature this proceeding was designed to address. The Company submits that the City's protest is interposed for improper purposes, including purposes of harassment, delay, and to bolster its position in civil proceeding before the Circuit Court for the 14th Judicial Circuit in and for Jackson County, Florida. Thus, FPUC respectfully requests that the Commission dismiss the City's Protest, render Order No. PSC-11-0269-PAA-EI final, and award FPUC its reasonable attorney's fees and costs associated with responding to the City's Protest, as may be deemed appropriate.

Respectfully submitted, this 28th day of July, 2011.

By: Beth Keating

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CERTIFICATE OF SERVICE

I HEREBY ATTEST that a true and correct copy of the foregoing has been served upon the following by Electronic Mail(*) and/or U.S. Mail this 28th day of July, 2011:

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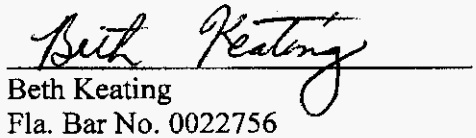

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