BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Fuel and Purchase Power Cost Recovery Clause with Generating Performance Incentive Factor	Docket No: 140001-EI Filed: August 29, 2014

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO OFFICE OF PUBLIC COUNSEL'S MOTION TO DISMISS FPL'S JUNE 25, 2014 PETITION FOR LACK OF SUBJECT MATTER JURISDICTION

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby files its response in opposition to the motion to dismiss FPL's June 25, 2014 petition for approval of a gas reserve project (the "Gas Reserve Petition") that was filed by the Office of Public Counsel ("OPC") on August 22, 2014 (the "Motion to Dismiss"). For the reasons set forth below, the Gas Reserve Petition falls squarely within the Commission's jurisdiction over an electric utility such as FPL, and the Motion to Dismiss fails to point out any deficiency in that jurisdiction.

I. BACKGROUND AND INTRODUCTION

1. "The standard to be applied in disposing of a Motion to Dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id." *In re Petition for Expedited Review of Bellsouth Telecommunications, Inc.'s Intrastate Tariffs for Pay Telephone Access Services (PTAS) Rate With Respect to Rates for Payphone Line Access, Usage and*

Features, by Florida Telecommunications Association, Order No. PSC-03-0828-FOF-TP, Docket No. 030300-TP, dated July 16, 2003, at p. 9.

2. The Gas Reserve Petition asks the Commission to "determine that FPL's participation in the Woodford Gas Reserves Project is prudent and that the costs associated with the Woodford Gas Reserves Project are eligible for recovery through the Fuel Clause; and further requests that the Commission approve FPL's proposed guidelines under which FPL could participate in future gas reserve projects and recover their costs through the Fuel Clause without prior Commission approval, subject to the Commission's established process for reviewing fuel-related transactions in Fuel Clause proceedings." Gas Reserve Petition, at p. 26.

3. The rationale for FPL's proposed participation in the Woodford Gas Reserves Project and future gas reserve projects is clear and straightforward: to provide gas for FPL's power plants at a lower and more stable price than can be achieved by buying all of the needed gas at market prices, savings that would be directly and completely passed on to customers via the Fuel Clause. In this regard, the Gas Reserve Petition alleges on pages 19-20 that

> [t]he economic benefit of the Woodford Gas Reserves Project for FPL's customers is clear – FPL will be able to procure natural gas at a lower and more stable cost per MMBtu than would otherwise be incurred if the same amount of natural gas were to be purchased at market prices. This holds true even in the event that natural gas market prices decline further from current forecasted prices or production from the Woodford Gas Reserves Project is lower than expected. The benefits will start immediately upon FPL taking assignment of the PetroQuest Agreement and then continue over the productive life of the Woodford Project wells. *The revenue requirements associated with the project, on an NPV basis, are projected to be approximately $107 million lower than the forecasted cost of the natural gas FPL would otherwise be required to purchase over the expected economic life of the project. FPL's revenue requirements are projected to be lower than the forecasted market price of natural gas on a dollars per MMBtu basis during the entire life of the project, with customers experiencing a majority of their savings early in the life of the Project.*

(Emphasis added). The Gas Reserve Petition goes on to allege that the gas reserve projects would provide an important complement to FPL's current, short-term hedging program:

> By disassociating a portion of FPL's natural gas purchases from volatile market prices, and instead obtaining a portion of its natural gas requirements at a stable, lower cost of production, this investment will allow the Company to replace a portion of its short-term financial hedging program for fuel purchases with, in effect, a long term physical hedge.

Id., at p. 20.

4. Thus, taking the allegations of the Gas Reserve Petition as true (as one must when moving to dismiss), OPC is asking the Commission to reject out of hand a proposal that is projected to save FPL's customers approximately $107 million in fuel costs, with most of those savings in the early years,[1] and that would provide a longer-term form of hedging that would effectively complement the current program of short-term financial hedges. Why? The only rationale OPC gives for turning its back on these significant potential customer benefits is a tortured and unnecessarily narrow interpretation of the Commission's jurisdiction over electric utilities. Specifically, OPC asserts that gas reserve projects are not within the scope of electric-utility property over which the Commission has jurisdiction, that the Commission will not have jurisdiction over the wholly-owned subsidiary that FPL proposes to establish to hold the gas reserve investments, and that gas reserve projects are not suitable for Fuel Clause recovery because they entail the utility earning a return on its investment. As will be addressed below, none of these assertions is supportable.

[1] At the request of Commission Staff, FPL filed its 2015 Fuel Clause Factors on August 22, 2014 in this docket, with and without the costs and savings associated with the Woodford Gas Reserves Project. As shown in that filing, the Fuel Clause Factors will need to recover about $14 million more in projected fuel costs for 2015 alone if the Project is not included. *See* Document No. 04690-14.

II. OPC HAS FAILED TO SHOW ANY JURISDICTIONAL DEFICIENCIES

A. The Commission's Jurisdiction Over Public Utilities is to be Liberally Construed

5. In assessing OPC's assertions about jurisdiction, it is important to recognize that the Florida Legislature has expressly directed the opposite approach from that taken by OPC. Whereas OPC has strained to interpret the Commission's jurisdiction narrowly so that it would not apply to the Gas Reserve Petition, the Legislature has mandated that "[Chapter 366] shall be deemed an exercise of the police power of the state for the protection of the public welfare and *all provisions hereof shall be liberally construed* for the accomplishment of that purpose." Section 366.01, Florida Statutes (2014) (emphasis added). Similarly, section 366.041, Florida Statutes, sets forth factors that the Commission is to consider in setting rates for public utilities and again the Legislature directs that the Commission's rate-setting powers "*shall be construed liberally* to further the legislative intent that adequate service be rendered by public utilities in the state in consideration for the rates, charges, fares, tolls, and rentals fixed by said commission and observed by said utilities under its jurisdiction." (Emphasis added). It is surprising that when, as here, there is an opportunity to save customers money on their electric bills, OPC would offer the Commission excuses to reject FPL's proposal out of hand based on a highly constrained view of the Commission's jurisdiction.

B. Investing in Gas Reserves in Order to Reduce the Cost of Fuel for Customers is Squarely Within the Commission's Jurisdiction Over a Public Utility Such as FPL

6. OPC's first assertion is that the Commission does not have jurisdiction over gas reserves because such assets are not central to a public utility's role in providing electric service. *See* Motion to Dismiss, at pp. 4-6. Specifically, OPC cites to section 366.02(2), Florida Statutes, which defines an "electric utility" as an entity that "owns, maintains, or operates an electric generation, transmission, or distribution system within the state" and to section 366.06(1), Florida Statutes, which says that rates are to be set based on the "property of each utility

company, actually used and useful in the public service." OPC asserts that ownership of gas reserves falls outside these provisions, but it does not and cannot support that assertion.

7. OPC fundamentally misconstrues the definition of an "electric utility" in section 366.02(2). The definition simply describes the minimum, essential attributes of an electric utility, not the full scope of activities in which it may engage in furtherance of its role. If the Legislature intended the definition to be as restrictive as OPC contends, it would have said something along the lines of "an electric utility is limited to the ownership, maintenance and operation of electric generation, transmission and distribution facilities." Nothing to that effect appears in section 366.02(2) or elsewhere in Chapter 366.

8. OPC's interpretation of section 366.02(2) would lead to absurd results and distinctions in regulation and ratemaking that would be exceptionally difficult to administer. No electric utility could function effectively if the *only* activities in which it engaged were the ownership, maintenance and operation of its generators and power lines. To give just a few examples, this would leave out ownership, operation and maintenance of:

- vehicles needed to inspect and maintain the generators and power lines;
- warehouses in which materials needed to maintain the generators and power lines are stored;
- offices buildings in which the personnel who conduct the utility's business are housed;
- computer systems used to monitor and control the electric system, and to bill and process payments from customers; and
- fuel storage tank yards, as well as oil and gas pipeline laterals, needed to keep the generators supplied with fuel around the clock.

Clearly, no utility could carry out its primary function of generating, transmitting and distributing electricity without these secondary, supporting activities. But under OPC's absurdly narrow view of section 366.02(2), those supporting activities would not be part of an electric utility's business and the Commission would be powerless to regulate them.

9. OPC's suggestion that an investment in gas reserves could not be "actually used and useful in the public service" as contemplated by section 366.06(1) is likewise insupportable. As noted above, the Gas Reserve Petition states that the Woodford Gas Reserve Project is projected to save customers $107 million, while providing greater stability in the fuel costs incurred to generate electricity. It is hard to imagine a more "used and useful" investment than one which reduces and stabilizes the cost for a fundamental input to electric power production, particularly for a utility such as FPL that purchases more natural gas than any other electric generator in America and generates approximately two-thirds of its electricity with this fuel. *See* Gas Reserve Petition, at p. 9.

10. In fulfilling its obligation to serve, consistent with the terms of Florida law and within the scope of the Commission's jurisdiction over the rates and charges for such service, electric utilities routinely make "build or buy" decisions: for example, capital investments versus leases, power plants versus purchased power agreements, rail cars versus rail-car lease payments (discussed more fully below). Here, the opportunity exists for FPL to invest in gas reserves to help stabilize the price of gas for a portion of its supply requirements, and at the same time produce significant customer savings. Clearly, such an investment would be used and useful in the public service, wholly within the framework of decision-making in which a prudent utility engages and which a regulator assesses for purposes of cost recovery.

11. OPC cites *PW Ventures, Inc. v. Nichols,* 533 So.2d 281 (Fla. 1988) for the proposition that "the reach of regulation is coextensive with the monopoly ('production and

sale') that the utility enjoys." Motion to Dismiss, at p. 5. Nothing remotely approaching that conclusion is reached by the Supreme Court in *PW Ventures*. The case involved a determination by the Commission that a co-generator which sought to provide thermal energy and electric power to an industrial customer was a public utility within the Commission's jurisdiction. The Court upheld that determination, noting "the well-established principle that the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight." 533 So.2d at 283. In essence, the Court found that FPL had been granted a monopoly in the public interest to provide electric service within a prescribed service area and that it would be deleterious to allow an unregulated entity to cherry pick FPL's customers within that area. The case does not address or decide what activities of a regulated public utility might fall outside the Commission's jurisdiction. It has no relevance to OPC's Motion to Dismiss.

12. In sum, OPC has pointed to nothing in the statutes, case law or logic that would justify applying a narrow, restrictive interpretation of the Commission's jurisdiction. To the contrary, the Legislature's and Supreme Court's exhortations are to interpret the Commission's jurisdiction broadly in order to promote the public interest. It is hard to imagine a better way to promote the public interest than by reducing and stabilizing the fuel costs FPL's customers pay through their electric rates.

C. The 1989 Order on Fuel-Related Affiliates Cited by OPC Stands for the Exact Opposite of the Proposition Asserted by OPC

13. The Gas Reserve Petition contemplates that FPL will establish a separate, wholly-owned direct subsidiary to hold FPL's interest in the Woodford Project, conduct its gas production activities and transact the sale of the commodity to FPL utility for its customers at production costs. This structure provides the following benefits:

- Allow maximum flexibility to minimize state income tax obligations;

- Allow for the separation of Federal Energy Regulatory Commission ("FERC") electric chart of accounts for regulatory reporting purposes (FERC Form 1 requires the subsidiaries to be deconsolidated);
- Provide clearer definition and transparency for the investment and activities associated with gas reserve projects; and,
- Since costs associated with gas production will be recovered through the Fuel Clause, the separate legal entity facilitates segregation for ratemaking and earnings surveillance related to base rates.

Gas Reserve Petition, at pp. 22-23.

14. OPC asserts that the Commission has no jurisdiction over fuel-related affiliates or subsidiaries, citing to Order No. 21847, issued in Docket No. 860001-EI on September 7, 1989. Motion to Dismiss, at pp. 7-10. In fact, however, Order No. 21847 stands for the exact opposite proposition.

15. OPC selectively cites the following passage from Order No 21847:

> Chapter 366, Florida Statutes (1987), provides the statutory basis for the exercise of the Commission's jurisdiction over public utilities. Public utilities are defined as "every person, corporation … supplying electricity … to or for the public within this state." Section 366.02, Florida Statutes. FPC is a public utility as defined in Chapter 366 and is therefore subject to the jurisdiction of the Commission. EFC and the complex supply and delivery network they have created are not subject to the jurisdiction of the Commission under Chapter 366.

Motion to Dismiss, at p. 7. This passage is from a section of Order No. 21847 entitled "Background." The Background section goes on to review the relationship between FPC (Florida Power Corporation, now Duke Energy Florida) and EFC (Electric Fuels Corporation, an affiliate of FPC) and ultimately concludes that:

> [W]e believe it reasonable then as well as now that purchases by affiliated companies for a utility meet the same standards as the 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.

Order No. 21847, at p.4 (emphasis added). The Commission then reviewed five fuel-related transactions between EFC and FPC, finding certain ones prudent and allowing recovery from FPC customers of the full amount charged by EFC, while finding others imprudent and reducing the amounts that FPC could recover. Thus, the Commission exercised precisely the sort of jurisdiction over fuel-related affiliate transactions that OPC erroneously asserts was eschewed by the Commission.

16. The Commission will have full access to the books and records of the wholly-owned subsidiary that will hold the gas reserve investments, no different than the access it has for FPL. As stated on page 23 of the Gas Reserve Petition, the subsidiary will be fully consolidated with FPL for regulatory and financial reporting purposes. The direct testimony of FPL witness Kim Ousdahl, which is incorporated by reference into the Gas Reserve Petition, goes on to explain on page 26 that "[t]he FPSC auditors, upon request, will be provided all information necessary to review charges associated with these recoveries annually in the fuel audit. They will have full access to FPL's and [the subsidiary's] books and records containing all transactions recorded from the [monthly invoices that the subsidiary receives from the gas reserve projects in which FPL has invested]." FPL understands and expects that it will only be able to recover through the Fuel Clause the actual and prudently incurred costs for gas reserve projects. This is the same standard that applies to all other types of costs recovered through the Fuel Clause, and it is the standard that the Commission applied to EFC in Order No. 21847. OPC's concern over the Commission's jurisdiction and ability to review the gas reserve costs that FPL proposes to recover through the Fuel Clause is unfounded and simply not accurate.

D. Recovery of Actual Costs and Authorized Return on Prudent Investment is Consistent with Established Clause-Related Procedures

17. OPC's last assertion is that the Commission should dismiss the Gas Reserve Petition because FPL is "impermissibly" seeking to "profit" from gas reserve projects. OPC is sophisticated enough to know that FPL is seeking to recover only its actual costs for the projects (including its Commission-authorized rate of return on investment), no different than any other project or investment made in furtherance of providing electric service. This is clearly stated on pages 20-21 of the Gas Reserve Petition:

> FPL seeks to recover the investment and operating costs of the Woodford Project through the Fuel Clause. The recoverable costs would include the following types: exploration expense, depletion expense, operating expenses, G&A, taxes, transportation costs and a return on the unrecovered investment, including working capital. *These costs would be projected for each year based on the drilling plan and quantities of gas to be produced and then adjusted to reflect actual costs subsequently through the existing Fuel Clause true-up process.*

(Emphasis added).

18. OPC's assertion that FPL is seeking impermissible "profits" is premised on a flawed conflation of the concepts of profit and return on investment. For example, Order No. PSC-11-0579-FOF-EI (cited on page 11 of the Motion to Dismiss) does not stand for the proposition that OPC contends it does. In fact, its focus is on a different topic entirely: the timing of cost recovery under the Fuel Clause. "The fuel clause was originally designed to allow a pass through of fuel costs, so the utility will be able to recover the costs as they are incurred. This manner of fuel cost recovery matches the time the cost is incurred with the time the cost is recovered and makes the fuel factors cost-based, which provides the appropriate price signals to customers." Order No. PSC-11-0579-FOF-EI, at p. 12. The sole reference to "profit" in that order is in the context of this goal under the Fuel Clause of matching fuel revenues with fuel costs, so that a utility does not collect more of the former than it incurs of the latter.

19. The practice of allowing utilities to earn a return on investments through the Fuel Clause and other clauses is well established, so much so that the Commission approved in 2012 a stipulation setting out the details of how the weighted average cost of capital ("WACC") for such investments is to be calculated. Order No. PSC-12-0425-PAA-EI, Docket No. 120001-EI, issued August 16, 2012. In its analysis of the WACC stipulation, the Order observed that "*[t]his Commission, when appropriate, allows recovery of a return on capital investments through the Fuel and Purchased Power Cost Recovery Clause*, the Conservation Cost Recovery Clause, and the Environmental Cost Recovery Clause." Order No. PSC-12-0425-PAA-EI, at p. 2 (emphasis added). The order then goes on to refer approvingly to the WACC stipulation, because it is "[a] methodology that more closely *aligns current costs with current cost recovery*." *Id.* (emphasis added). Thus, the Commission expressly recognized that a return on investment may be recovered through the Fuel Clause and that doing so constitutes recovery of an actual cost, not an impermissible "profit" as suggested by OPC.

20. It is astounding that OPC conflates earning a return on actual investment with profit, in the face of Order No. PSC-12-0425-PAA-EI. This is especially so because OPC actively and willingly participated in the WACC stipulation that was approved by the Commission in that Order. The WACC stipulation was entered into and signed by FPL, the four other investor-owned utilities, the Florida Industrial Power Users Group, *and OPC*. *See* Order No. PSC-12-0425-PAA-EI, at pp. 6 and 19. There truly is no fitting term other than disingenuous for OPC's disparagingly characterizing a return on gas reserve investments as impermissible "profits" in the Motion to Dismiss, a scant two years after stipulating to how a return on investment properly should be calculated and recovered through the fuel and other clauses.

21. Beyond this glaring inconsistency with the very precedent that it helped to set, OPC's categorical opposition to allowing FPL a return on its investment in gas reserves flies in the face of common sense and would work to customers' disadvantage. Customers are properly concerned with the electric rates they pay; they have little concern over the accounting components comprising those rates. Said another way, if the overall cost to customers (including a return on investment) for a capital expenditure is lower than the cost of expense items for which the capital substitutes, then customers surely would prefer that the utility make the capital investment. This is often referred to as "capital substitution," and it has been used effectively for many years by FPL to help keep rates low. In the Fuel Clause, a good example is FPL's purchase of rail cars to deliver coal to the Scherer plant (where FPL is a co-owner), because the cost to customers of paying a return on the coal cars was lower than the lease payments FPL otherwise would have to make. *See* Order No. PSC-95-1089-FOF-EI, Docket No. 950001-EI, issued September 5, 1995.

22. The same type of opportunity exists here: by investing in the Woodford Gas Reserves Project, FPL is projected to save customers $107 million over the life of the project. OPC's categorical opposition to such an opportunity without even exploring its merits is short-sighted and frankly mystifying.

III. DISMISSING THE GAS RESERVE PETITION WOULD PREJUDICE FPL'S CUSTOMERS

23. OPC's final assertion in the Motion to Dismiss is that "dismissing FPL's petition will not prejudice FPL." In a sense, OPC is correct. Dismissing the Gas Reserve Petition would not prejudice FPL so much as harm FPL's customers. If the Petition is dismissed, FPL will not invest in the Woodford Gas Reserves Project. Instead, the Project will continue to be held by FPL's unregulated affiliate, USG, which will receive all the Project's benefits. *See* Gas Reserve

Petition, at p. 5. FPL then will have to buy at market prices the gas that it could have received from the Project, and customers will pay a projected $107 million more for that gas through the Fuel Clause, as well as be subjected to more of the volatility that is inherent in the procurement of natural gas at market prices over the long term. FPL fails to see how OPC – the customers' legislatively-created advocate – could consider that a "win."

WHEREFORE, FPL respectfully requests that the Commission deny OPC's Motion to Dismiss.

Respectfully submitted,

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