BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Environmental cost recovery clause. DOCKET NO. 140007-EI

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FILED: November 05, 2014

CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF

Pursuant to Order No. PSC-14-0585-PHO-EI, issued October 15, 2014, the Office of Public Counsel ("Citizens" "OPC" or "Public Counsel") hereby submits this Post-Hearing Statement of Positions and Post-Hearing Brief on the disputed issues pertaining to the environmental cost recovery clause.

PRELIMINARY STATEMENT

The OPC will limit its post-hearing comments to Issue 9. For all other issues, the OPC restates and incorporates herein by reference its positions shown in Order No. PSC-14-0585-PHO-EI.

POSITIONS AND ARGUMENT ON DISPUTED ISSUES

ISSUE 9. **Should the Commission approve FPL's Waters of the United States Rulemaking Project such that the reasonable costs incurred by FPL in connection with the project may be recovered through the Environmental Cost Recovery Clause?**

OPC: *Legal and regulatory advocacy costs should not be recovered through the ECRC if they are of the type or amount already being recovered in base rates. Furthermore, any such advocacy costs should not be allowed for ratemaking recovery if they are not "environmental compliance costs" as intended in Section 366.8255, F.S. and/or do not provide a clear benefit to customers, or are

otherwise classified as below-the-line costs under applicable Commission precedent. It is the Company's burden to demonstrate that such advocacy costs: (1) meet the statutory requirements; (2) benefit customers; (3) are not impermissible ratemaking costs normally recorded below-the-line; and (4) are not otherwise being recovered in base rates.*

ARGUMENT

The OPC takes the position that the Commission should deny FPL's request to recover advocacy costs for two reasons – both of which are the result of the Company failing to meet its burden of proof.

First, FPL has not met its burden to demonstrate that the expenses of $228,500 are appropriately recorded pursuant to Commission precedent. FPL provided no competent, substantial evidence in the form of documentation or testimony that demonstrated that the costs of advocacy related to federal agencies in accordance with the Uniform System of Accounts. During opening argument, counsel for FPL made a statement that the disputed costs were recorded in Account 426.4, and he further stated that this comported with Commission precedent and the exclusion in the rule that allowed those expenses to be accorded above-the-line treatment and charged to customers. TR 228. However, the Commission has long recognized that opening statements are merely argument by attorneys and are not evidence upon which the Commission can rely. Section 120.57(1)(j), Florida Statutes requires that findings of fact shall be based on the evidence of record and on matters officially recognized. Statements of counsel are not evidence. FPL did ask the Commission to take official recognition of a document (TR 9-10); however, that document did not encompass the accounting for the expenses. During cross examination, FPL witness Randy LaBauve sought to bootstrap his testimony on the non-evidentiary statement of counsel. TR 260. In doing so, he mischaracterized the FERC USOA rule when he stated that there is "an exception for regulatory advocacy costs that affect your current or future operations..." Witness LeBauve's inaccurate parroting of his counsel's

argument does not constitute competent, substantial evidence. He admitted that he did not provide any pre-filed testimony on the matter. TR 261.

The Commission has addressed this issue in recent years. In Order No. PSC-09-0013-PAA-EI, issued January 5, 2009, the Commission addressed the issue of lobbying expenses and other costs recorded in Account 426.4 when it denied FPL cost recovery for $71,000 that the staff auditors identified as "lobbying" expenses. The Commission stated that '[a]though FPL has every right to lobby on its own behalf, it is our opinion that lobbying costs should not be considered as recoverable from the ratepayers and should be recorded "below-the-line." Order No. 09-0013 at 7. In its analysis, the Commission quoted the language from the Account 426.4 definition (including the exclusion language pointed to by FPL in this case) as follows:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures ***which are directly related to appearances before*** regulatory or other governmental bodies in connection with ***the reporting*** utility's existing or proposed operations.

(Emphasis added)

Nothing in evidence (or even in the statement of counsel or the errant testimony of Mr. LaBauve) demonstrated that the advocacy expenses are directly related to appearing before the regulatory agencies. Furthermore, the term "reporting" suggests that the appearance must be further related to some reporting or direct regulatory oversight obligation by FPL before the agency. For this reason, FPL has failed to meet its burden of demonstrating that the costs are appropriately recorded and recoverable under Commission precedent.

Additionally, FPL did not provide the documentation to justify the $228,500 that it seeks to recover. In response to a question from a Commissioner, Mr. LaBauve admitted that the

company had not placed that information in the record. TR 304. This missing documentation would allow the Commission and its staff to determine whether the costs were consistent with established Commission precedent with regard to ECRC recoverability and the appropriate recording of advocacy costs. Its absence from the record deprives the Commission of its ability to make its own independent determination of the appropriate regulatory treatment and consequently causes FPL to fail to meet its burden of justifying both the amount and nature of the costs in addition to its accounting.

CONCLUSION

For the reasons stated above, the Public Counsel requests that the Commission find that FPL failed to meet its burden of proof and deny FPL's request to recover $228,500 in advocacy costs for recovery in the ECRC for 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 5th day of November, 2014, to the following:

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