BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Environmental Cost Recovery Clause _____/	Docket No. 140007-EI Filed: November 5, 2014

THE FLORIDA INDUSTRIAL POWER USERS GROUP'S POST-HEARING BRIEF ADDRESSING ISSUE 9, PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Florida Industrial Power Users Group (FIPUG), by and through its undersigned counsel, files this Post-Hearing Brief Addressing Disputed Issue 9, Proposed Findings of Fact and Conclusions of Law in this proceeding. Issue 9 provides:

> 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?

BASIC POSITION AND SUMMARY

For a host of reasons, the Commission should deny FPL's request to allow it to recovery advocacy expenses, including lobbying fees and expenses, through the Environmental Cost Recovery Clause as framed by Issue 9 above.

Legally, this type of recovery is not contemplated by the plain words of the environmental cost recovery statute, s. 366.8255, Florida Statutes. Tellingly, the statute permits the recovery of "Environmental compliance costs" which is defined as all costs or expenses incurred by an electric utility in complying with environmental laws or regulations. (emphasis added). See s. 366.8255(1)(d) F.S. The environmental cost recovery statute authorizes a utility to "submit to the commission a petition describing the utility's proposed environmental compliance activities and projected environmental compliance costs…." (emphasis added). See

s. 366.82.55(1)(d) F.S. Put simply, the statute authorizes the recovery from ratepayers of monies spent complying with environmental regulations; it does not authorize the recovery from ratepayers of monies spent attempting to influence, through lawyers, lobbyists or otherwise, proposed environmental rules or regulations that may or may not result in compliance obligations.

Furthermore, using ratepayer monies to pay for lobbyists should be avoided. In utility rate cases, it is FIPUG's understanding that utilities typically place lobbying fees "below the line" and do not seek to have ratepayers fund lobbying efforts. This "below the line" practice should continue, as it avoids the following situation which, hypothetically and potentially, could indeed occur: an overwhelming majority of a utility's customers support a particular legislative initiative; the utility in question opposes the legislative initiative and hires a team of lobbyists to work actively against the legislative initiative; the legislative initiative fails as a result of the advocacy and efforts of the utility lobbying team; the utility pays its lobbying team using ratepayer funds, the same ratepayers who overwhelmingly supported the legislative initiative. This situation should be avoided.

For the reasons set forth above, the Commission should deny FPL's request to recover advocacy expenses through the environmental cost recovery clause. FIPUG maintains that the respective utilities must satisfy their burden of proof for any and all monies or other relief sought in this proceeding.

FINDING OF FACT

1. FPL seeks to recover from ratepayers $228,500 through the environmental cost recovery clause for "regulatory advocacy work" to be performed by the Michael J. Bradley firm.[1] Tr. 265.

2. This firm was specifically retained to provide "regulatory advocacy services" related to a rule proposed by the Environmental Protection Agency ("EPA"), which, if adopted, will implement provisions of the Clean Water Act and further delineate jurisdictional waters of the state compared to jurisdictional waters of the federal government. Tr. 237.

3. The Michael J. Bradley firm seeks to influence policymakers of federal agencies and Congress. Tr. 239 ("Continue to work with state and federal government agencies and legislators to advocate FPL's positions following the [rule] comment period, as the rule moves to finalization and as necessary, thereafter.")

4. The firm is not a law firm and does very little, if any, legal work. It engages in "regulatory advocacy" or lobbying. Tr. 294-295.

5. The proposed rule is not effective. Tr. 270. It may never go into effect. Consequently, there are no compliance costs imposed by or associated with the proposed rule. Tr. 269-273.

6. FPL is not required to by the proposed rule or any other environmental law spend $228,500 to retain the regulatory advocacy firm. Tr. 284.

7. Lobbying expenses are expenses that are not properly charged to ratepayers. Tr. 260.

[1] Citations to the transcript in this proceeding are referred as Tr. followed by the page number.

8. The statute which addresses whether certain costs are recoverable through the environmental cost recovery clause is section 366.8255, Florida Statutes. Tr. 256.

CONCLUSIONS OF LAW

9. Section 366.8255, Florida Statutes, provides that certain qualifying expenses spent to comply with environmental regulations can be recovered through the environmental cost recovery clause. Specifically, the statute defines "Environmental compliance costs" as "all costs or expenses incurred by an electric utility in complying with environmental laws or regulations.". The phrase "in complying with environmental laws and regulations" is clear and a condition precedent to recovering eligible costs: namely, the costs must have been incurred as a result of an environmental law or regulation.

10. The applicable statute is not ambiguous on this point; to the contrary, it is quite clear. There is no need for statutory interpretation when the when the statutory language is clear. Instructively and recently, the Florida Supreme Court reiterated the proper statutory analysis to be undertaken:

> Our statutory analysis begins with the plain meaning of the actual language of the statute, as we discern legislative intent primarily from the text of the statute. *See* *Heart of Adoptions, Inc. v. J.A .*, 963 So.2d 189, 198 (Fla.2007). If statutory language is "clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (Fla.1931))....

See *Parker v. Board of Trustees of City Pension Fund for Firefighters & Police Officers in the City of Tampa***,** 2014 WL 5365843 (Fla. 2014) (Opinion released on October 23, 2014). The

legislature made no provision in section 366.8255, Florida Statutes, to allow for lobbying costs or advocacy costs, or any other costs incurred pursuing activities that are not compelled by an existing environmental statute, rule or regulation.

11. FPL's arguments that its efforts to shape the proposed rule through the federal rulemaking process could save ratepayers significant sums of money is a policy argument more appropriately made to the Legislature in an effort to change the statute, but is not persuasive when made to this Commission to impermissibly expand the scope of the controlling statute. Stated simply, this Commission should not overstep its role and apply the environmental cost recovery statute overlooking the plain meaning of the statute in question.

12. Furthermore, this Commission has established a three prong test to determine whether a cost is recoverable under the environmental cost recovery clause:

- such costs were incurred after April 13, 1993;
- 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
- such costs are not recovered through some other costs recovery mechanism or through base rates.

See Commission Order No. 100404-EI, Page 3.

13. The costs FPL seeks to recover do not meet the second prong of the Commission's test, a prong that is consistent with the statutory requirement that the costs in question must be incurred while complying with an existing environmental legal requirement. Tellingly, on cross-examination, FPL witness LaBauve, admitted that FPL must be able to pass

the Commission's three prong test, but admitted that the costs in question are not compelled or required to comply with a governmentally imposed environmental regulation. Tr. at 283-284.

14. The Commission emphasized that "we have consistently enforced the requirement that that projects eligible for ECRC cost recovery must be required to comply, or remain in compliance with, a governmentally imposed environmental regulation." Commission Order No. 100404, page 3. The Commission should not retreat from its three prong test or its "consistently enforced requirement" that costs must be incurred "to comply, or remain in compliance with, a governmentally imposed regulation.".

15. The costs for which FPL seeks recovery are lobbying costs under Florida law as detailed below; the euphemism "regulatory advocacy costs", which involves attempting to influence federal agency policy-makers (and admittedly legislators) is a term synonymous with lobbying and does not somehow transform the activity in question into something else. Furthermore, a distinction between lobbying an executive branch agency as compared to the legislative branch is immaterial. Specifically, to this point, section 112.3215(1)(f), Florida Statutes, defines lobbying the executive branch as " seeking on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy …." This is precisely what FPL is doing by retaining the Michael J. Bradley firm, lobbying, and ratepayers should not be charged for this expense.

CONCLUSION

For the foregoing reasons, the Commission should deny FPL's petition to recover costs associated with lobbying or "regulatory advocacy" efforts to influence EPA's proposed Waters of the United States rulemaking.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FIPUG's Post-Hearing Statement of Issues and Positions and Post-Hearing Brief, was served by Electronic Mail this 5th day of November, 2014 to the following:

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