

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 140001-EI

FUEL AND PURCHASED POWER COST
RECOVERY CLAUSE WITH GENERATING
PERFORMANCE INCENTIVE FACTOR.

PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 2

COMMISSIONERS
PARTICIPATING: CHAIRMAN ART GRAHAM
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER RONALD A. BRISÉ
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Tuesday, November 25, 2014

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: DEBRA R. KRICK
Court Reporter and
Notary Public in and for
State of Florida at Large

PREMIER REPORTING
114 W. 5TH AVENUE
TALLAHASSEE, FLORIDA
(850) 894-0828

1 P R O C E E D I N G S

2 CHAIRMAN GRAHAM: All right. So let's look
3 back around to item number two.

4 Commissioner Edgar.

5 COMMISSIONER EDGAR: Thank you, Mr. Chairman.

6 Just for my own clarification on -- you said
7 that item 23 has been deferred. I do note that in the
8 item it says that it may not be deferred because the
9 statutory deadline was only waived until December 15th.
10 Has there been a further waiver, or is there other
11 action on that item?

12 MS. HELTON: Mr. Chairman and Commissioner, at
13 the request of Floyd Self, who filed the original
14 petition, he is going to file a new pleading at the
15 beginning of next week, and he has specifically asked
16 that it be deferred, and he said he would put a letter
17 in the docket file today to that effect. So he has
18 waived the 90 days for you to make a ruling today.

19 COMMISSIONER EDGAR: All right. Thank you.

20 CHAIRMAN GRAHAM: So if that letter does not
21 go in the file before December 15th, what happens?

22 MS. HELTON: It's -- we will -- it is not
23 something that is insurmountable if the letter does not
24 go into the file today, and I think Mr. Floyd
25 understands that we have asked for the letter to go into

1 the file today.

2 CHAIRMAN GRAHAM: I mean, but what's the
3 defunct -- what's the fallout action if it's not there?
4 I mean, is this item just gone? Is there -- what do we
5 do?

6 MS. HELTON: There is -- in some -- in some
7 parts in the statute when there is a deadline, there is
8 some action that will happen if the deadline is not met.
9 That is not the case for a petition for declaratory
10 statement. The statute says that it has to be done
11 within 90 days. If it is not acted upon within 90 days,
12 then I have always assumed that the available remedy to
13 the petitioner is that they would go and seek a Writ of
14 Mandamus in appellate court for the body to take action
15 on the Petition for Declaratory Statement.

16 CHAIRMAN GRAHAM: Okay. I was just trying to
17 understand.

18 All right. Item number two, correct?

19 Commissioner Edgar, did that answer your
20 question on the --

21 COMMISSIONER EDGAR: Yes. Thank you for the
22 opportunity to ask and understand better where we are
23 procedurally. I appreciate it.

24 MS. BARRERA: Good morning, Commissioners.
25 Item 2 involves a deferred portion of the fuel docket

1 that was schedule today for a ruling on OPC's motion to
2 dismiss FPL's petition for approval of a gas reserve
3 project.

4 The parties have requested oral argument, and
5 staff is available to respond to any questions.

6 CHAIRMAN GRAHAM: All right. I have down here
7 that we are going to grant oral arguments at 10 minutes
8 per side. And I take it it's just you guys, huh?

9 MR. REHWINKEL: Yes.

10 CHAIRMAN GRAHAM: All right. Who wants to go
11 first?

12 MR. REHWINKEL: I guess it's our motion.

13 I hope I can keep it to 10. In the rec it
14 said 15, so I kind of planned around that, but I don't
15 think I am even at the 10-minute mark.

16 CHAIRMAN GRAHAM: If you are still making good
17 points, I won't cut you off at 10 minutes.

18 MR. REHWINKEL: All right. Thank you. That
19 may mean I get early cutoff.

20 CHAIRMAN GRAHAM: And that's huge for me.

21 MR. REHWINKEL: Thank you, Commissioners.
22 Charles Rehwinkle for the Office of Public Counsel.

23 Commissioners, today the Public Counsel's
24 motion to dismiss is based on a simple proposition. The
25 Florida Public Service Commission does not have the

1 power, authority or jurisdiction over the transaction
2 for which FPL seeks approval.

3 FPL's request, which is to establish capital
4 investment in the unregulated competitive natural gas
5 production industry as a component of its utility rate
6 base and to collect a guaranteed return on such
7 investments through the fuel cost recovery clause is
8 without precedent and beyond the regulatory purview of
9 this commission. For this reason, the commission cannot
10 adjudicate the merits of FPL's petition that was filed
11 on June 25th of this year.

12 We are asking you to dismiss the petition
13 because you do not have the authority to include this
14 investment in a nonregulated venture in the rate base,
15 and thus, in the rates of a public utility under your
16 jurisdiction.

17 Commissioners, FPL is asking you to recognize
18 the cost of a whole loaf of bread while purporting to
19 bestow upon you not a half a loaf of true regulatory
20 oversight, but a mere slice in the form of an invoice
21 and summary reporting of activity of their proposed gas,
22 exploration, drilling and production venture.

23 On its face, the FPL petition describes an
24 investment transaction, or a series of transactions to
25 be housed in a special FPL created, but not

1 legislatively authorized, subsidiary, the substantive
2 decision-making activities of which we believe will be
3 off limits from Commission oversight or regulatory
4 authority.

5 You will not be able to adjudicate the
6 prudence of FPL management decisions made in secret and
7 in conjunction with FPL's proposed exploration, drilling
8 and production partner. Instead, you and the
9 commissioners -- you and the ratepayers will be given
10 full access from nothing more than an invoice and the
11 ability to see that FPL puts dollars into the right
12 pigeon holes. In return, you will be required to
13 guarantee FPL a return of the midpoint of the authorized
14 rate of return and weighted cost of capital for the next
15 50 years on this investment.

16 Regardless of what you think about the merits
17 of this proposal, and that is not before you here today,
18 you cannot act upon it. You have the authority to
19 regulate outside the statu -- you have no authority to
20 regulate outside the statutory grant of authority from
21 the Legislature. As you well know, and as the staff
22 points out at the bottom of page five of the
23 recommendation, you are a creature of the Legislature,
24 and your powers are only those that the Legislature has
25 granted you, and you cannot expand those powers.

1 We point out in our motion at pages four
2 through six that the plain language of the applicable
3 statutory provisions do not contemplate or authorize an
4 investment in natural gas exploration and production
5 business as an activity or venture that can be included
6 in a public utility's rate base. It is this basis upon
7 which we make our motion before the hearing starts in an
8 effort to avoid the needless and wasteful and futile
9 expenditure of finite administrative resources.

10 The Legislature has only given this commission
11 the power to regulate the rates and service of public
12 utilities as they are defined by Section 366.041.
13 Section 366.021 Florida Statutes defines a public
14 utility as every person, corporation, partnership,
15 association or other legal entity supplying electricity
16 or gas to or for the public within the state.

17 FPL is an electric utility pursuant to Section
18 366.022, which defines an electric utility as any
19 municipal electric utility, investor owned electric
20 utility or rural electric cooperative which owns,
21 maintains or operates an electric generation,
22 transmission or distribution system within the state.
23 366.041 -- so 366.061 further provides that only utility
24 property that is used and useful in serving the public
25 is reflected in the rates that customers pay.

1 Simply put, investing in the exploration,
2 drilling and fracturing of shale to release gas is not
3 part of owning, maintaining or operating an electric
4 generation transmission or distribution system. As a
5 consequence, you do not have the jurisdiction to
6 authorize the inclusion of those investments in
7 regulated rate base and rates. It is just that simple.
8 With all due respect to the staff, their legal analysis
9 misses the mark, in our opinion.

10 FPL cannot create jurisdiction by artful
11 pleading. The cases cited on page five of the
12 recommendation do not have any bearing here. These
13 cases deal with the appropriate forum for otherwise
14 valid causes of action.

15 The line of cases here cited arise from some
16 old cases from the 1920s dealing originally with and
17 whether the controversy was more appropriately conducted
18 in chancery or equity court as opposed to a court of
19 law. This is not the situation that you have before
20 you. This case is about whether you have the power or
21 authority to act, and you do not.

22 This case is a singular and unique set of
23 facts. There is no gray area, no amount of liberal
24 construction or fancy pleading or bootstrapping or
25 lipstick on this pig can give you jurisdiction.

1 Again, simply put, the issue is whether FPL
2 can place an investment in natural gas exploration,
3 drilling and production into rate base and earn a
4 regulated return on it.

5 You have really all but answered this question
6 in order number 21847. I will call this the electric
7 fuels order. We cite that to you on page seven. In
8 1989, you ruled that Florida Power Corp.'s affiliate
9 that owned coal reserves and the complex supply and
10 delivery network they created were not subject to the
11 jurisdiction of this commission. That same type of
12 nonregulated investment, although this time it's gas
13 reserves, is present in the FPL gas reserves proposal.

14 As the staff has noted in their
15 recommendation, that 1989 case, the Commission went
16 ahead and adjudicated, as they should have. There, in
17 stark contrast to here, FPC, now Duke, did not seek to
18 make the investment in the coal reserves part of the
19 electric utility's rate base or to include any portion
20 of the subsidiary and later affiliate's operations in
21 the regulated operations. Instead, the issues
22 adjudicated there, were the affiliate pricing terms
23 between the nonregulated but affiliated vendor and the
24 regulated utility. Totally different situation, but the
25 ruling about your jurisdiction was right on point.

1 By asking for authority to create the
2 so-called regulated subsidiary and to place the assets
3 of that subsidiary into rate base for Fuel Clause
4 purposes, and to set rates based on that investment, FPL
5 has crossed an impermissible jurisdictional line. And
6 for these reasons, we respectfully disagree with the
7 staff's assertion contained on page seven.

8 In the last sentence it states that, thus, the
9 basis for the Commission's subject matter jurisdiction
10 is that the relief sought by the petition is a rate
11 increase passed through to the duly fuel docket for cost
12 related to the gas reserve's project.

13 This is plainly wrong. It puts the cart
14 before the horse, and completely ignores the fundamental
15 threshold determination about whether the organic
16 statutes that govern this agency and its jurisdiction,
17 and define its jurisdiction, allow the proposed
18 investment to be included in rates.

19 The plain language of the statute that we have
20 cited you to governs your determination. Those statutes
21 say, no. No jurisdiction. No power. No authority. No
22 to FPL.

23 We have also cited the P.W. Ventures as being
24 jurisdictional in nature insofar as it reveals the
25 Supreme Court's view of the legislative mindset when it

1 defined commission jurisdiction. That court is
2 effectively observing at 533 So.2d 281, at 282 and 283,
3 that the grant of your jurisdiction or authority to
4 regulate is coextensive with the monopoly provision of
5 service. That's an important point.

6 As we have noted on page five of our motion,
7 the scope of FPL's monopoly is defined by its authority
8 to produce and sell electricity to the public. P.W.
9 Ventures effectively illustrates that FPL's monopoly
10 authority and the Commission's jurisdictional authority
11 are coextensive. Exploring for, drilling and fracking
12 for and producing natural gas 1,000 miles away in
13 Oklahoma does not, by any stretch of the imagination,
14 fall within FPL's monopoly provision of electric utility
15 service.

16 As a result, the P.W. Ventures case is
17 instructive for of this case and, along with the
18 electric fuels order, comprise strong indicators of the
19 jurisdictional boundary that you are bound by. The
20 production of natural gas and, of course, the associated
21 investment in that production fall outside of your
22 jurisdictional boundaries.

23 We have cited other cases and circumstances
24 that provide further circumstantial support for the
25 relief we request. I am happy to answer questions about

1 them, but I reiterate that we base our motion to dismiss
2 on the simple proposition that the Legislature did not
3 give you the authority to approve this transaction.

4 Thank you.

5 CHAIRMAN GRAHAM: You see, and you only used
6 10 minutes.

7 MR. BUTLER: Good morning, Mr. Chairman,
8 Commissioners. John butler on behalf of the Florida
9 Power & Light Company. You have allotted me 10 minutes,
10 but I think I can be briefer than that.

11 FPL fully supports staff's recommendation that
12 OPC's motion to dismiss be denied. The Commission has
13 jurisdiction over FPL's gas reserves petition under its
14 statutory rate setting authority. As staff notes, OPC's
15 motion mainly just challenges the prudence of FPL's
16 petition. That topic should and will be addressed at
17 next week a week's hearing.

18 Dismissing FPL's petition now would deprive
19 the Commission of the opportunity to evaluate the
20 benefits for FPL's customers of gas reserve investments,
21 which FPL believes would be substantial. As stated in
22 our petition, the first gas reserve investment is
23 projected to deliver \$107 million of fuel savings to
24 customers on a net present value basis. Frankly, FPL is
25 mystified as to why Florida's legislatively created

1 advocate for customers would want to foreclose
2 evaluation of such a promising proposal.

3 OPC's motion is based on three arguments, none
4 of which has merit, and I will address them very
5 briefly.

6 First, OPC argues that this commission's
7 jurisdiction over an electric utility's generation,
8 transmission and distribution system applies only to the
9 generators and power lines themselves. This narrow
10 interpretation flies in the face of the Legislature's
11 explicit mandate that the Commission's jurisdiction
12 under Chapter 366 is to be liberally construed in order
13 to permit the Commission to regulate in the public
14 interest.

15 OPC's interpretation is also completely
16 unrealistic. No utility could function effectively if
17 the only thing that it owned and operated were
18 generators and power lines. Among other things, a
19 utility must own and operate vehicles to inspect and
20 maintain the generators and power lines, warehouses to
21 store materials for generators and power lines, offices
22 for the personnel who run the utility's business,
23 commuter systems to monitor and control the electric
24 system as well as to bill customers and account for the
25 utility's business, and fuel storage and transportation

1 facilities. Each of those types of assets is absolutely
2 essential to the provision of safe, reliable and
3 efficient electric service, but none of them would be
4 regulated under OPC's absurdly narrow view of the
5 Commission's jurisdiction.

6 Second, OPC argues that the Commission would
7 not have jurisdiction over the subsidiary that FPL will
8 establish to hold its investment in gas reserves.
9 That's based on a complete misstatement of the
10 Commission's decision in order number 21847, that Mr.
11 Rehwinkle referred to. On page four of that order, the
12 Commission, in fact, held the exact opposite to OPC's
13 contention.

14 I will quote, "purchases by affiliated
15 companies for a utility must meet the same standards as
16 the purchases by the utility itself. Therefore, in this
17 proceeding, we will review and subject the activities of
18 EFC" -- that was the affiliate -- "to the same scrutiny
19 and standards that we would apply to FPC" -- that was
20 the utility -- "if they had procured their own fuel."

21 FPL's petition assures the Commission that we
22 will have full access it to our subsidiary's books and
23 records. Consistent with order number 21847, we
24 understand and expect that FPL would only be able to
25 recover through the Fuel Clause actual cost that the

1 subsidiary prudently incurs for gas reserve projects.

2 Finally, OPC vainly argues that FPL's petition
3 must be dismissed because it impermissibly seeks a,
4 quote, "profit," unquote, under the Fuel Clause. This
5 totally misconstrues both FPL's petition and the
6 Commission's policies for the Fuel Clause.

7 FPL proposals only to recover actual costs for
8 gas reserve projects, including a return on investment
9 at FPL's approved weighted average cost of capital, it's
10 referred to as the WAC. The Commission has a well
11 established policy for allowing a return on at proved
12 WAC, or after approved WAC, for investments that are
13 recovered through the Fuel Clause. In fact, the
14 Commission entered order 120425 in the 2012 Fuel Clause
15 proceeding to explicitly define how the WAC is to be
16 calculated. OPC not only didn't oppose the Commission's
17 establishing a method for calculating the WAC, but it
18 actually stipulated to it.

19 In short, FPL's gas reserve petition makes a
20 proposal that should be very familiar to you on the
21 Commission in concept, if not in detail.

22 We are proposing capital substitution. That
23 is, we are proposing to make an investment that will
24 allow us to reduce the level of an expense we are
25 currently incurring by far more than the revenue

1 requirements for that investment.

2 FPL's customers deserve to have this exciting
3 opportunity considered on its merits rather than having
4 it shoved aside on spurious and insupportable
5 jurisdictional grounds.

6 Thank you. Those are my comments, and I would
7 be happy to answer any questions that you have.

8 CHAIRMAN GRAHAM: Mr. Moyle.

9 MR. MOYLE: Mr. Chairman, on behalf of the
10 Florida Industrial Power User's Group, you had asked
11 whether this -- these were only the two parties, and we
12 don't seek to be heard at oral argument, but I did want
13 to make you aware that FIPUG has filed a Notice of
14 Joinder with OPC on these arguments and would adopt
15 them, both made in the briefs and as set forth here
16 today, so thank you.

17 CHAIRMAN GRAHAM: Thank you, sir.

18 Commissioner Brown.

19 COMMISSIONER BROWN: I thought we were voting
20 on issue one first, to allow oral argument.

21 MR. BUTLER: It's going to be awkward if you
22 deny it.

23 CHAIRMAN GRAHAM: Okay. Commissioners.
24 Commissioner Balbis.

25 COMMISSIONER BALBIS: Thank you, Mr. Chairman.

1 I have had discussions with staff and reviewed
2 the motion and responses and listened to oral arguments,
3 and I am somewhat baffled because it seems like a
4 relatively simple issue that's before us, because I
5 believe that we clearly have the jurisdiction. It's too
6 important of an issue not to thoroughly review and
7 investigate. So with that, I move staff's
8 recommendation on issue number two, since issue one is
9 now moot.

10 CHAIRMAN GRAHAM: It's been moved and seconded
11 staff recommendation on item number two, issue number
12 two.

13 Any further discussion?

14 Commissioner Edgar.

15 COMMISSIONER EDGAR: Thank you, Mr. Chairman.

16 I would just add that I do agree with the
17 motion, and I am glad to support it. It I did find both
18 oral arguments to be very interesting, and I appreciate
19 the opportunity to hear those discussions from both of
20 those participating parties. However, I do feel that
21 statutorily it is most appropriate for us to move
22 forward and hear the evidence on the issues as is
23 scheduled later this month.

24 CHAIRMAN GRAHAM: Any further discussion?

25 Seeing none, all in favor of the motion, say

1 aye.

2 (Chorus of ayes.)

3 CHAIRMAN GRAHAM: Any opposed?

4 (No response.)

5 CHAIRMAN GRAHAM: By your action, you have
6 approved staff recommendations on items number two,
7 issue number two.

8 MR. BUTLER: Thank you, Commissioners.

9 MR. REHWINKEL: Thank you.

10 (Agenda item concluded.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, DEBRA R. KRICK, Professional Court Reporter, certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages, numbered 2 through 18 , are a true and correct record of the aforesaid proceedings.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 2nd day of December, 2014.



DEBRA R. KRICK
NOTARY PUBLIC
COMMISSION #EE212307
EXPIRES JULY 13, 2016