State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: December 4, 2014

TO: Office of Commission Clerk (Stauffer)

FROM: Division of Engineering (Graves, Buys, Mtenga)
Division of Accounting and Finance (Barrett, Holmes, Mouring, Springer, Vogel)
Division of Economics (Draper, Rome, Wu)
Office of the General Counsel (Murphy)

RE: Docket No. 140007-EI – Environmental cost recovery clause.

AGENDA: 12/18/14 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

As part of the Florida Public Service Commission's (Commission) continuing environmental cost recovery clause[1] (ECRC) proceedings, the Commission conducted a hearing in this docket on October 22, 2014. The parties resolved all issues by stipulation, except for the Commission's review of Florida Power & Light Company's (FPL or Company) Waters of the United States Rulemaking Project (WOUS Project). Testimony on that project was heard at the October 22, 2014 hearing. On November 5, 2014, FPL, the Office of the Public Counsel (OPC or Citizens), the Southern Alliance for Clean Energy (SACE), and the Florida Industrial Power Users Group (FIPUG) filed post-hearing briefs addressing the WOUS Project. Depending on the Commission's decision regarding the WOUS Project, "fall out" adjustments may be needed to

[1] Section 366.8255, Florida Statutes (F.S.).

other stipulated decisions related to FPL. These decisions currently include no dollars associated with the WOUS Project and are identified with an asterisk in Order No. PSC-14-0643-FOF-EI, issued on November 4, 2014.

This Commission has jurisdiction in this matter pursuant to Section 366.8255, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: 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?

Recommendation: No. The costs of the WOUS Project do not meet the threshold requirement of being incurred in complying with environmental laws or regulations as required by Section 366.8255, F.S. (Murphy)

Positions of the Parties:

FPL: Yes. The proposed change to the definition of the Waters of the United States would substantially increase compliance costs for utilities. FPL intends to engage in advocacy to limit the cost impact. FPL's estimated costs are reasonable, and recovery of such costs for such advocacy is consistent with Commission policy.

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.

SACE: No. Customer dollars should not be used to weaken clean water protection. It is clearly impermissible by statute. Lobbying activities are patently not "environmental compliance costs" as defined in Section 366.8255, F.S. Moreover, such costs are already being funded by FPL shareholders and should not be shifted to customers.

FIPUG: 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 [1] 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. [SIC] 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.

Staff Analysis:

This recommendation does not address the prudency of FPL's efforts to control costs through the rule making process, or whether recovery of such advocacy expenses should be "above or below the line;" rather, the scope of this recommendation is whether expenses for activities intended to influence a nonfinal EPA rule are recoverable under the ECRC.

Notwithstanding FPL's commendable goal of limiting the impact of proposed environmental regulations on its customers' rates, staff recommends that the costs of the WOUS Project are not recoverable under the ECRC. The heart of the matter before the Commission is whether FPL's costs to affect a nonfinal environmental rule comport with the requirements of Section 366.8255, F.S., which provides in part, that "[a]n electric utility may submit to the commission a petition describing the utility's proposed environmental compliance activities and projected environmental compliance costs . . . . If approved, the commission shall allow recovery of the utility's prudently incurred environmental compliance costs . . . through an environmental compliance cost-recovery factor that is separate and apart from the utility's base rates."[2] At subsection (1)(c), the statute defines "environmental laws or regulations" to include "all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment." At subsection (1)(d), the statute defines "environmental cost recovery costs" to include "all costs or expenses incurred by an electric utility in complying with environmental laws or regulations" and provides a non-exhaustive list of such costs.

[2] *Id.* at (2).

Staff recommends that FIPUG and SACE argue persuasively that the statutory phrase, "in complying with environmental laws and regulations," is a clear condition precedent to FPL recovering costs under the ECRC and that the WOUS Project fails to comport with the plain meaning of this statutory language. FPL, SACE, FIPUG, and OPC take different positions on whether the WOUS Project constitutes "lobbying" versus "advocacy" and OPC argues that FPL has not created a record sufficient to make this determination. However, staff recommends that the lobbying versus advocacy argument is not relevant because the costs of the WOUS Project do not meet the threshold requirement for recovery under the ECRC.

The Record

FPL asserts that proposed rule changes by the Environmental Protection Agency and the U.S. Army Corps of Engineers to revise the definition of WOUS under the Clean Water Act (CWA) will impact existing electric utility facilities and future electric utility projects resulting in higher permitting and operational costs with projects.[3] FPL argues that newly required systems and controls could cost $25 million to $30 million in capital expenditures and $3 million to $6 million in annual O&M expenses for each plant.[4] The Company asserts that it is prudent to actively participate in the rulemaking process to attempt to limit the compliance cost impact of potential costly revisions to the benefit of both FPL and its customers.[5]

To this end, FPL has retained the services of specialized consultants and legal counsel (collectively, consultants).[6] While these efforts have been ongoing, FPL seeks recovery only for activities conducted after the date of its petition filed in this Docket.[7] The Company estimates that costs incurred from August 2014, through December 2015, for the anticipated activities will total approximately $228,500.[8] FPL seeks ECRC recovery of this projected amount for activities that are intended to limit the compliance cost impact of proposed changes to the definition of WOUS and that, if successful, these activities could avoid more than $100 million in compliance costs that would otherwise be borne by customers through the ECRC.[9]

FIPUG notes that the WOUS Project is related to a rule proposed by the EPA to implement the Clean Water Act (CWA), and that the rule is not effective and may never go into effect.[10] Similarly, SACE argues that the Company has offered no record evidence that the requested cost recovery is for compliance but instead is to "actively participate in the rulemaking process," in order to proactively influence policy.[11]

OPC asserts that FPL did not provide documentation to justify the $228,500 that it seeks to recover, that FPL witness LaBauve admitted that the Company did not place that information in the

[3] FPL BR. at 2, *citing* TR. at 237-38.
[4] FPL BR. at 3, *citing* TR. at 308-09.
[5] FPL BR. at 3, *citing* TR. at 238.
[6] FPL BR. at 4, *citing* TR. at 265-66, 293 *and* Exhibit 2, FPL's Answer to Staff's Interrogatory No. 8.
[7] FPL BR. at 5, *citing* TR at 239-40, 293-94.
[8] FPL BR. at 5, *citing* TR at 239.
[9] FPL BR. at 6, *citing* TR at 239, 257, 308-09.
[10] FIPUG BR. at 3, *citing* TR. at 269-73.
[11] SACE BR. at 4, *citing* TR at 238.

record and that the Company has failed to create a record that is sufficient for the Commission to determine whether the costs are appropriately recoverable under the ECRC.[12]

Prior Decisions

In addressing the applicability of the ECRC in this case, the parties reference two lines of Commission orders. FPL relies on cases in which the Commission has approved costs for projects that are, arguably, similar to those presented by the WOUS Project. FPL asserts that, "in the absence of evidence to support deviation from the precedent, the Commission must adhere to the policy established in these prior decisions."[13] Conversely, FIPUG refers to a line of Commission orders that require a project to meet a three prong test for approval.[14] A brief review of the referenced orders follows.

Cited by FPL

FPL relies on five Commission ECRC orders as precedent for approving the WOUS Project.[15] The orders contain nuanced language supporting the purpose of controlling compliance costs to the benefit of ratepayers. With one exception, the language in the orders was stipulated, or ultimately uncontested, by the parties in the respective ECRC proceedings. The one contested case referenced by FPL is distinguished from the instant case in that the order is the result of a bench decision approving ECRC cost recovery of litigation costs to oppose a final EPA rule. A brief description of the projects approved by the referenced orders follows.

Order No. PSC-96-1171-FOF-EI[16] The parties agreed to recovery through the ECRC of Gulf Power Company's request to recover legal expenses to challenge a Department of Environmental Protection proposal through the ECRC.[17]

Order No. PSC-08-0775-FOF-EI[18] The parties stipulated to the recovery of litigation and consulting costs associated with FPL's activities to minimize the compliance cost impact of the Second Circuit Court of Appeals' remand of certain portions of an EPA rule related to the Clean Water Act.

Order No. PSC-09-0759-FOF-EI[19] The parties stipulated recovery of costs for Duke Energy Florida's (DEF) (then Progress Energy Florida) Total Maximum Daily Loads Hg Emission (TMDLs-Hg emissions) Program. DEF was participating in a research program at the invitation of the Florida Department of Environmental Protection (FDEP) that was undertaken pursuant to Section 303(d) of the federal Clean Water Act and a 1999 federal consent decree. FDEP was in the

[12] OPC BR. at 3-4, *citing* TR at 304.
[13] FPL BR. at 8.
[14] FIPUG BR. at 5, *citing* Order No. PSC-11-0080-PAA-EI, Issued on January 31, 2011, in Docket No. 100404-EI (referenced by FIPUG as "Order No 100404-EI") recounting the history to that point of the Commission's interpretation of the ECRC.
[15] FPL BR. at 7-8.
[16] Issued September 18, 1996, in Docket No. 960007-EI, at 7.
[17] The Order emphasized that it would continue to examine each such expenditure on a case-by-case basis in order to determine the prudence of its recovery through the clause.
[18] Issued November 24, 2008, in Docket No. 080007, at 7-8.
[19] Issued November 18, 2009, in Docket No. 090007-EI, at 17-18.

process of developing rules to regulate Hg emissions and had invited stakeholders to participate in the design and completion of the Hg TMDLs study.

Order No. PSC-12-0613-FOF-EI[20] The parties stipulated approval of FPL's Effluent Guidelines Revised Rule project which related to anticipated EPA revisions to Title 40 Code of Federal Regulations Part 423, which was promulgated under the authority of the CWA and limits the discharge of pollutants into navigable waters. FPL was to conduct studies to be presented to the EPA with the goal of convincing the EPA that oil ash handling effluent does not need to be regulated under the same strict requirements that apply to coal ash handling effluent.

Order No. PSC-05-1251-FOF-EI[21] In reaching a bench decision on a contested issue, the Commission found that,

> the definition of environmental compliance costs in Section 366.8255, Florida Statutes, includes prudently incurred *litigation costs* associated with FPL's complying with the Clean Air Interstate Rule. . . . If there is a legitimate argument that the rule is not consistent with the statute being implemented then the utility may recover the costs of challenging the rule through the ECRC. (Emphasis added).[22]

Cited by FIPUG

FIPUG references a Commission order requiring that, for a cost to be recoverable under the ECRC, the activity must be legally required to comply with a governmentally imposed environmental regulation.[23] Staff observes that, by Order No. PSC-94-0044-FOF-EI, issued on January 12, 1994, in Docket No. 930613-EI, the Commission first interpreted the ECRC. In that Order, the Commission found that,

> the following policy is the most appropriate way to implement the intent of the environmental cost recovery statute:
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> Upon petition, we shall allow the recovery of costs associated with an environmental compliance activity through the environmental cost recovery factor if:
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> 1. such costs were prudently incurred after April 13, 1993;
>
> 2. 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,

[20] Issued on Nov. 16, 2012, in Docket No.120007-EI, at 12.
[21] Issued December 22, 2005, in Docket No. 050007-EI, at 13.
[22] In its brief in the instant docket, FPL notes that it used the funds approved by the Commission, in Docket No 050007-EI, to challenge CAIR in the U.S. Court of Appeals for the D.C. Circuit. BR. FN 2, at 8.
[23] FIPUG BR. at 5, *citing* "Order No 100404-EI" (which is believed to be a reference to Order No. PSC-11-0080-PAA-EI, issued on January 31, 2011, in Docket No. 100404-EI).

3. such costs are not recovered through some other cost recovery mechanism or through base rates. *Id.* at 6.

The history of this policy is recounted in Order No. PSC-11-0080-PAA-EI,[24] referenced by FIPUG, which reflects that such decisions are made on a "*case-by-case basis*, and with some flexibility; but, [the Commission has] required fundamental compliance with the provisions of Section 366.8255, F.S." *Id.* at 3. (Emphasis added). By that Order, the Commission reiterated that it has "consistently enforced the requirement that projects eligible for ECRC cost recovery must be required to comply, or remain in compliance with, a governmentally imposed environmental regulation." *Id.* The three prong test was applied again by Order No. PSC-13-0506-PAA-EI, issued on October 28, 2013, in Docket No. 130092-EI.

ECRC

FPL asserts that advocacy costs such as the WOUS Project meet the requirements of Section 366.8255, F.S., for recovery through the ECRC and that the Commission has consistently applied these principles in approving utilities' requests for ECRC recovery of advocacy costs, including those for proposed changes to environmental standards.[25]

Both SACE and FIPUG argue that costs are recoverable under the ECRC only when they are "incurred by an electric utility in complying with environmental laws or regulations"[26] which are defined as "all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment."[27] FIPUG argues that 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.[28] SACE and FIPUG argue that when a statute is clear and unambiguous, it is not necessary to look behind the statute's plain language for legislative intent or to resort to rules of statutory construction to ascertain intent.[29] In such an instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent.[30]

SACE argues that "compliance" means "the act or process of doing what you have been asked or ordered to do."[31] Based on the plain meaning of the statute, FIPUG and SACE argue that costs associated with the WOUS Project do not meet this threshold requirement because the rule is not final and no compliance activities are required at this time.[32] More specifically, FIPUG argues

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[24] Issued on January 31, 2011, in Docket No. 100404-EI.
[25] FPL BR. at 7-9, *citing* the Commission Orders referenced above in this recommendation under the heading "*Cited by FPL.*"
[26] FIPUG BR at 4; SACE BR. at 3, *quoting* Section 366.8255 (1)(d), F.S. (cited by SACE as Section "366.8255(1)(b)" with emphasis added.).
[27] Section 366.8255 (1)(c), F.S.
[28] FIPUG BR. at 4.
[29] FIPUG BR. at 4 and SACE BR. at 3.
[30] SACE BR. at 3.
[31] SACE BR. at 3-4, *quoting* Merriam-Webster Dictionary, at http://www.merriam-webster.com/dictionary/compliance.
[32] FIPUG BR. at 3, 5-7 ; SACE BR at 4.

that the legislature made no provision in the ECRC for any costs incurred pursuing activities that are not compelled by an existing environmental statute, rule or regulation and that FPL is asking the Commission to impermissibly expand the scope of the controlling statute.[33] Similarly, SACE asserts that cost recovery under the ECRC for the preemptive activity proposed by FPL is inconsistent with the plain meaning of the statute, clearly erroneous, produces an absurd result, and is not entitled to deference afforded an agency.[34]

Conclusion

Recovery under the ECRC is reviewed on a case-by-case basis. Staff reiterates that this recommendation does not address the prudency of FPL's efforts to control costs through the rule making process, or whether recovery of such advocacy expenses should be "above or below the line;" rather, the scope of this recommendation is whether expenses for activities intended to influence a nonfinal EPA rule are recoverable under the ECRC.

Staff recommends that: 1) statutory analysis begins with the language of the statute[35] which must be given its plain and obvious meaning;[36] 2) the plain meaning of the ECRC is dispositive in this case; 3) the Commission has only those powers conferred upon it by the legislature;[37] and, 4) a Commission order cannot expand the scope of the Commission's statutory authority,[38] in this case, to authorize the recovery under the ECRC of costs to shape environmental policy. To be recovered under the ECRC, a utility's costs must be incurred "in complying with environmental laws or regulations"[39] when such laws and regulations are uniformly defined as "requirements."[40] Thus, staff recommends that SACE and FIPUG are persuasive in their argument that FPL's advocacy costs to influence the development of a rule do not meet the threshold for recovery established by the ECRC because the WOUS Project encompasses neither *costs of complying* nor an *environmental law or regulation* as required by the statute. Thus, notwithstanding the orders relied upon by FPL, based upon the plain meaning of Section 366.8255, F.S., staff recommends that the Commission lacks the authority to extend ECRC cost recovery to activities involved in shaping policies as opposed to complying with laws or regulations. Based on the record in this docket, staff recommends that the Commission should not approve recovery through the ECRC of FPL's costs associated with its WOUS Project.

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[33] FIPUG BR. at 5.
[34] SACE BR. at 5.
[35] *See Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 198 (Fla.2007).
[36] *See Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984).
[37] *See City of Cape Coral v GAC Utilities, Inc. of Florida*, 281 So.2d 493 (FLA 1973).
[38] *See, Rinella v. Abifaraj*, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005).
[39] Section 366.8255(1)(d), F.S.
[40] Section 366.8255(1)(c), F.S.

Issue 2: Should this docket be closed?

Recommendation: No. At the appropriate time, this docket should be closed and a 2015 ECRC docket opened by separate order. (Murphy)

Analysis: At the appropriate time, this docket should be closed and a 2015 ECRC docket opened by separate order.