

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor

Docket No: 150001

Filed: July 7, 2015

MOTION TO INCLUDE DISPUTED ISSUES OF MATERIAL FACT

The Citizens of the State of Florida, through the Office of Public Counsel (“Citizens” or “OPC”), pursuant to Section 120.57(1), Florida Statutes (F.S.), and Rule 28-106.204, Florida Administrative Code (“F.A.C.”), file this Motion to Include Disputed Issues of Material Fact to be determined by the Florida Public Service Commission (“Commission”), and in support thereof, Citizens state as follows:

1. On January 5, 2015, Florida Power & Light Co. (“FPL”), Duke Energy Florida, Inc. (“Duke”), Gulf Power (“Gulf”), and Tampa Electric Company (“TECO”), collectively the Inventor Owned Utilities (IOUs), filed notices of intent to retain party status.

2. On January 6, 2015, Office of Public Counsel filed its notice of intent to retain party status on behalf of the IOU ratepayers.

3. Order No. PSC-15-0096-PCO-EI, the Order Establishing Procedure (“OEP”) governing this docket, was issued on February 10, 2015.

4. On April 23, 2015, OPC propounded its first set of discovery on the Florida IOUs related to their hedging gains and losses to which the IOUs responded on May 26, 2015.

5. On June 1, 2015, the first issue identification meeting was held in this docket for the parties to raise all known issues in this proceeding. At this meeting, OPC proposed six issues related to whether the Florida IOUs should continue hedging natural gas in the face of nearly \$6 billion in hedging losses which were incurred from 2002 through 2014, and which losses are

borne by the IOUs' ratepayers ("hedging issues"). OPC's hedging issues were discussed. TECO objected to OPC's issues and suggested a substitute issue. After discussion amongst the parties and staff, OPC agreed to drop two of its six issues leaving OPC's four remaining issues. None of the other IOUs or intervenor parties objected to the inclusion of OPC's four remaining hedging issues. Staff stated at the time that OPC's hedging issues were bona fide relevant issues which could be raised by any party in this docket and the issues were included in the tentative issues list.

6. Subsequently, On June 11, 2015, staff counsel stated that staff now believed that three of OPC's four hedging issues should be deleted or moved to issues in dispute. OPC asserted that any changes to the June 1, 2015 agreed upon Tentative List of Issues should be made at a noticed issue identification meeting.

7. A second issue identification meeting was held on June 23, 2015. At this meeting, Commission staff asserted that three of OPC's hedging issues (identified as Issues 1A, 1B, and 1C) were "fact issues" and in the opinion of staff should not be separately decided by the Commission. When asked for a position on the inclusion of OPC's hedging issues, the IOUs stated they did not object to the Commission staff's decision that OPC's three factual hedging issues should be deleted. However, OPC and FIPUG objected to the deletion of OPC's three factual hedging issues. OPC pointed out that the development of the facts related to the accumulation of hedging losses over a more than decade-long period are more than simple raw, objective facts. Instead, the issues frame a factual scenario that is both disputed¹ and important to understand as far as the evolution of the accumulation of billions of dollars in customer-absorbed losses. Thus, the three factual issues are necessary predicates for determining the ultimate policy

¹ Based on OPC's preliminary analysis of the underlying facts through discovery, there appears to be potential factual disputes regarding the actual amount of hedging losses and the volatility of natural gas prices.

issue raised by OPC in Issue 1D: “Is it in the consumers’ best interest for the utilities to continue financial hedging activities?”

8. The three hedging issues were moved to the back of the tentative issues list and identified by Commission staff as disputed issues. The disputed issues of material fact, Issues 1A, 1B, and 1C, are as follows:

ISSUE 1A: For the years 2002 through 2014, what was the total net hedging gain or loss associated with each utility’s hedging activities?

ISSUE 1B: Does the utility anticipate reporting a hedging gain or loss for calendar year 2015, and if so, what is the projected amount of the anticipated hedging gain or loss associated with each utility’s hedging activities?

ISSUE 1C: What fuel price volatility, if any, does each utility forecast for natural gas through 2040?

ARGUMENTS

1. First, there is no dispute that the Florida IOUs’ hedging practices and activities are at issue in this docket as evidenced by the inclusion of Commission staff drafted hedging issues included in the Tentative Issues List. Further, the issues surrounding hedging practices, including hedging results, are material and relevant to the fuel factor being established in this annual fuel adjustment proceeding. There has been no sound legal or policy reason advanced for the Commission, its staff or any utility to seek to evade an explication of these enormous losses (perhaps as high as \$6 billion). The hedging losses have been, and continue to be, paid by customers and it is unfair to them and contrary to good public policy to obscure the true magnitude of what customers have paid for these losses by not including simple issues that allow the Commission to make a separate determination on the size of the hedging losses and future volatility of natural gas prices.

2. The OEP governing this docket states: “The scope of this proceeding will be based upon these issues as well as other issues *raised by the parties* up to and during the Prehearing Conference, unless modified by the Commission.” OEP at 2 (emphasis added).

3. As it relates to a party’s prehearing statement, Section VI. A.(4) of the OEP states:

(4) *A statement of each question of fact, question of law, and policy question that the party considers at issue, along with the party’s position on each issue, and, where applicable, the names of the party’s witness(es) who will address each issue. Parties who wish to maintain “no position at this time” on any particular issue or issues should refer to the requirements of subsection C, below;*

OEP at 6. (emphasis added). This is yet another means by which a party identifies disputed issues of material fact at issue in this proceeding.

4. It is axiomatic that if a party fails to raise an issue up to and during the October 19, 2015 prehearing conference, then those issues are deemed waived. OEP at 7 (“Any issue not raised by a party either before or during the Prehearing Conference shall be waived by that party, except for good cause shown.”) Further, the OEP stipulates that issues may be “raised by the parties” and, in fact, must be raised by the parties prior to the Prehearing Conference. Commission staff has previously told the parties of record that Commission staff is not a party to this proceeding. Thus, pursuant to the OEP, only parties of record raise issues of material dispute.

5. The OEP plainly states that “this proceeding will be based upon . . . issues raised by the parties.” OEP at 2. There is no dispute that OPC has raised several issues of material fact related to hedging. Thus, according to the OEP, the three disputed hedging issues should be included in the List of Issues to be resolved by the Commission in this year’s fuel adjustment clause proceeding because they were raised in advance of the Prehearing Conference.

6. Second, OPC asserts that its fact issues are the natural, necessary and predicate issues for the ultimate policy issue (Issue 1D) to be determined, to wit, whether the Florida IOUs should continue financially hedging natural gas. OPC further asserts that predicate fact issues are commonly determined by the Commission prior to addressing larger policy issues. For example, in a rate case when the utility is seeking affirmative relief, there are predicate “fact issues” which are important to the understanding and establishment of the ultimate relief requested (e.g. a bottom-line rate increase) which are the predicates decided before the Commission establishes the most fundamental building blocks of rate base, net operating income (NOI), or the return on equity (ROE), and then the ultimate issue of overall rate relief to be awarded. The historical and continuing evolution of immense hedging losses form a similar predicate to the ultimate relief that the OPC is affirmatively seeking in this case. These “building block” issues must be allowed analogous to the fundamental “fact” issues decided in utility-sought rate relief proceedings.

7. Third, under the Florida Administrative Procedure Act (“APA”), the parties of record in a Section 120.57(1), F.S., hearing set forth the disputed issues of material fact to be decided by the agency. In this fuel adjustment clause proceeding, which is a Section 120.57(1), F.S., proceeding, the Commission operates in a quasi-judicial capacity to decide issues of fact and conclusions of law. Commission staff has stated it is not a party to a proceeding. As such, Commission staff should take a neutral position on which issues are included in the List of Issues.²

² Such staff advocacy could infringe on the due process rights of the party whose disputed issues of material fact are advocated for and recommended to be excluded by the same Commission attorney and staff. Said staff advocacy violates the principles of fairness set forth by the Florida Supreme Court because the same staff advocating for the exclusion of a disputed factual issue will likely be advising whether a party’s disputed issues should be excluded. *See Cherry Commun. v. Deason*, 652 So. 2d 803, 805 (Fla 1995).

8. Fourth, the fuel adjustment clause proceeding culminates in a Section 120.57(1), F.S., hearing involving disputed issues of material fact. Under the plain language of Section 120.57, F.S., disputed issues of material fact should be included in a proceeding to be decided by the agency. Under the APA, agencies are required to make findings of fact to resolve disputed issues of material fact and conclusions of law on matters within its jurisdiction.

9. Fifth, the three factual issues raised by OPC, in addition to being disputed issues of material fact, require a specific finding of fact by the Commission. The first two issues, Issue 1A and 1B, pertain to enormous hedging losses incurred by the utilities – more than \$6 billion in natural gas hedging losses since 2002. In addition to alleging an historical, ongoing pattern of accumulating hedging losses, the OPC also asserts that its preliminary investigation shows there appears to be some factual disputes as to the actual cumulative amount of the hedging gains or losses incurred by the Florida IOUs and reported to the Commission. The third issue, Issue 1C, concerns the volatility of the price of natural gas. The Commission’s stated purpose for allowing the Florida IOUs to hedge natural gas is to reduce fuel price volatility experienced by the customers. Further, there could be a dispute regarding how fuel price volatility is evaluated since minimizing fuel price volatility has been the Commission’s stated rationale for allowing utilities to implement hedging practices which have resulted in enormous, unprecedented hedging losses. Therefore, these three issues are essential to the development of the ultimate relief sought by the OPC and are in dispute, and thus they are ripe for Commission consideration and decision on the merits.

10. Sixth, administrative agency orders are intended to resolve factual issues, legal issues, and policies issues related to decisions affecting substantial interests which are subject to the agency’s statutory jurisdiction. According to the APA, an agency order should have findings of fact and conclusions of law to support its underlying policy decision. *See e.g.*, Section

120.57(1)(k) and (l), F.S. However, it is impossible to obtain a finding of fact on a disputed issue if bona fide factual issues are excluded from an agency's consideration.

11. Seventh, Commission staff advocated that OPC's fact issues should be excluded on the same basis that FIPUG's fact issue was excluded; however, the purpose for OPC's fact issues and FIPUG's fact issue is distinguishable. OPC's fact issues lay the groundwork for the Commission's ultimate policy decision on whether to continue allowing the IOUs to financially hedge natural gas. On the other hand, the policy decision to approve the Woodford Project (FIPUG's fact issue) has been made; thus, FIPUG's fact issue is not designed to lead the Commission to any particular policy decision on that matter.

12. For the reasons stated above, OPC requests Issues 1A, 1B, and 1C be included in the final issues list for consideration and determination by the Commission. In accordance with Rule 28-106.204(3), F.A.C., OPC consulted with counsel for Commission staff and the other parties of record prior to the filing of this motion. PCS Phosphate/ White Springs and Florida Retail Federation support this motion. In addition, the following parties have represented that they take No Position on OPC's Motion: TECO, Duke, Gulf, and FPUC. FPL and Commission staff represented they object to the motion and FIPUG has not responded by the filing of this motion.

13. Pursuant to Rule 25-22.0022, F.A.C., OPC filed a separate request for oral argument on OPC's Motion to Included Disputed Issues of Material Fact.

WHEREFORE, the Office of Public Counsel, on behalf of the customers of Duke, FPL, Gulf, and TECO, respectfully requests this Motion to Include Disputed Issues of Material Fact be granted.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Citizens' Request for Oral Argument on Office of Public Counsel's Motion to Include Disputed Issues of Material Fact has been furnished by electronic mail and/or U.S. Mail on this 7th day of July, 2015, to the following:

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