

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 150001-EI
ORDER NO. PSC-15-0418-PCO-EI
ISSUED: October 1, 2015

ORDER DENYING FLORIDA INDUSTRIAL POWER USERS GROUP'S
REQUEST TO INCLUDE DISPUTED ISSUES OF MATERIAL FACT

On August 13, 2015, Commission staff filed its recommendation for consideration at the August 27, 2015, Agenda Conference regarding Office of the Public Counsel's (OPC) Motion to Include Disputed Issues of Material Fact (OPC Motion) in which OPC requested the inclusion of three factual issues regarding the hedging of natural gas. On August 25, 2015, the Florida Industrial Power Users Group (FIPUG) filed a Response to Staff Memorandum and Recommendation (Response) in which it requested that two of its issues, Issues 3L and 3M, listed as contested on the issue list attached to the August 13 staff recommendation, be included and voted upon by the Commission.

Issue 3L and 3M state as follows:

Issue 3L: For the year 2014, what was the total net hedging gain or loss associated with FPL's Woodford hedging activities?

Issue 3M: Does FPL anticipate reporting a hedging gain or loss for calendar year 2015 related to its Woodford hedging activities, and if so, what is the projected amount of the anticipated hedging gain or loss associated with FPL's Woodford hedging activities?

FIPUG argues for the inclusion of these issues on the grounds that they are relevant to the ultimate issue to be decided: "the monetary sum the Commission should permit Florida Power & Light (FPL) to recover for 2014 and 2015." [Response at p. 2] FIPUG also argues that "the finder of fact in an evidentiary proceeding may not refuse to consider relevant issues raised by any party" citing Payne v. City of Miami, 52 So. 3d 707, 716 (Fla. 3d DCA 2010) (Payne); Westland Skating Center v. Gus Machado Buick, 542 So. 3d 959, 964 (Fla. 1989) (Westland) and Welch v. Dececco, 101 So. 3d 421 (Fla. 5th DCA 2012) (Welch). [Response at p. 3] In essence, FIPUG argues that if a factual issue is related to the ultimate issue to be decided in a docket, it must be independently considered and voted upon by the Commission.

On September 1, 2015, Florida Power & Light Company (FPL) filed a Response to Florida Industrial Power Users Group's Motion to Include Disputed Issues of Material Fact (FPL Response). FPL argues that FIPUG's Issues 3L and 3M are irrelevant since the Commission has already decided that its Woodford project should be deemed prudent for cost recovery purposes.¹

¹ Order No. PSC-15-0038-FOF-EI, issued on January 12, 2015, in Docket No. 150001-EI, In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.

[FPL Response at p. 1-2] FPL also contends that FIPUG's issues are redundant since Issues 3A and 3B² regarding FPL's 2015 hedging costs and proposed 2016 Risk Management Plan are already in the docket and allow FIPUG to fully address its concerns regarding the net gains and losses associated with the Woodford project. [FPL Response at p. 2-3] Finally, FPL argues that it is established Commission practice that the Prehearing Officer has the ability to exclude issues that are irrelevant, redundant or properly subsumed within other issues. [Id.]

First, although entitled "Response to Staff Memorandum and Recommendation," FIPUG's pleading is actually a request to include its issues in the docket. This is evident from the last sentence of the Request which states: "[t]he relevant issues FIPUG has identified as detailed in staff's Memorandum and Recommendation of August 13, 2015 [Issues 3L and 3M] should be heard and fully considered by this Commission in this docket." Based upon this requested relief, I will treat FIPUG's Response as a *de facto* motion to include the issues in the docket.

Second, a close reading of the Payne case does not support FIPUG's interpretation that if a factual issue is related to the ultimate issue to be decided in a docket, it must be independently considered and voted upon by the Commission. In the Payne case, the Third District Court of Appeal (Third District) reversed the trial court's decision denying Payne's request to amend his petition to include arguments associated with provisions of the City of Miami's Comprehensive Land Use Plan (Comprehensive Plan) related to land development regulations. Payne, 52 So. 3d at 711. Payne had originally sued to overturn the City of Miami's decision to allow the Comprehensive Plan's future land use map to be amended to allow multi-family residential development on the Miami River.

The Third District, citing Section 120.68(7)(d), F.S., reversed and remanded for a new trial noting that any change in a future land use map constitutes a policy decision regarding all of the change's impacts on land development as well as land use. Payne, 52 So. 3d at 712. The Court further noted that based on the record developed at hearing, all of the evidence presented at trial would compel a finding that the proposed amendment was inconsistent with the provisions of the Comprehensive Plan. Payne, 52 So. 3d at 712-3. Therefore, the Court found that the trial court had erred because it had prohibited Payne from presenting evidence on the land development impacts associated with the proposed future land use amendment, based on its misinterpretation of the requirements of Section 120.68(7)(d), F.S., i.e., that only the policy associated with land use, not land development, were relevant to the determination of the ultimate issue, whether the land use development plan amendment proposed by the developer was consistent with the Comprehensive Plan.

In the instant case, any party will be able to present evidence on the net gains and losses associated with the Woodford project for 2014 and projected net gains and losses for 2015. The

² Issue 3A: Should the Commission approve as prudent FPL's actions to mitigate the volatility of natural gas, residual oil, and purchased power prices, as reported in FPL's April 2015 and August 2015 hedging reports?"; Issue 3B: Should the Commission approve FPL's 2016 Risk Management Plan?

Commission will then be able to give that information the weight that it deserves with regard to its decisions on Issues 3A, 3B and 3K.³

The Welch case does not deal with the exclusion of issues or evidence at all but was remanded because it “is unclear from the trial court’s order whether the court focused exclusively on the stock registration, or properly considered it as one fact along with all the other evidence relevant to donative intent.” Welch, 101 So. 3d at 422. In the Westland case, the issue was whether Machado Buick should be compensated for damages to its property caused by storm water runoff from its higher-elevation neighbor, the Westland Skating Center. The trial court issued a partial summary judgment in favor of Westland Skating Center applying a “reasonable use” standard. In reaching its decision, the trial court relied upon evidence presented at trial that the Westland Skating Center had been constructed in accordance with the South Florida Building Code (Building Code). The Third District Court of Appeal reversed the trial court finding that the correct legal standard was the “civil law rule” and that evidence of compliance with the Building Code was irrelevant and should have been excluded. The Florida Supreme Court restored the trial court’s summary judgment finding that the proper legal standard was, in fact, the “reasonable use” standard. Therefore, evidence of compliance with the Building Code was properly admitted and considered by the trial court. Westland, 542 So. 2d at 962-964. This factual situation is the reverse of the Payne case. In Westland, facts were admitted into evidence which supported the trial court’s decision not to award damages to Machado Buick. In Payne, the trial court excluded facts from evidence which would have supported a positive outcome for the plaintiff had the proper legal standard been applied. Evidence of the net gain and loss associated with the Woodford project will not be excluded from this proceeding. Thus, none of these cited decisions are applicable here.

Third, it has been long-established procedure for the Prehearing Officer to rule upon contested issues and to exclude issues that are irrelevant, redundant or properly subsumed within other issues that have been included for resolution.⁴ The costs of the Woodford project are already addressed in the docket by Issue 3K: What costs are appropriate for FPL’s Woodford natural gas exploration and production project for recovery through the Fuel Clause? The decision of whether the Woodford project is a prudent investment for which recovery should be allowed has already been made by this Commission and shall not be re-litigated here.

Finally, I agree with FPL that to the extent that net hedging gains and losses for the Woodford project are relevant to our decision whether cost recovery for natural gas hedging should be continued, these facts can be used to support FIPUG’s positions on the broad hedging issues, Issues 1D⁵ and 1E⁶, and the FPL-specific hedging issues, Issues 3A and 3B.

³ Issue 3K: What impact, if any, has FPL’s Woodford natural gas exploration and production project had to date on FPL ratepayers?

⁴ Order No. PSC-15-0354-PCO-EI, issued on September 3, 2015, in Docket No. 150001-EI, In re: fuel and purchased power cost recovery clause with generating performance incentive factor; Order No. PSC-12-0441-PCO-EI, issued on August 27, 2012, in Docket No. 120009-EI, In re: Nuclear Cost Recovery Clause; Order No. PSC-12-0323-PHO-TP, Docket No. 110234-TP, dated June 22, 2012, In re: Complaint and petition for relief against Halo Wireless, Inc. for breaching the terms of the wireless interconnection agreement, by Bell South Telecommunications, LLC d/b/a AT&T Florida.

⁵ Issue 1D “Is it in the consumers’ best interest for the utilities to continue financial hedging activities?”

Therefore, it is

ORDERED by Commissioner Art Graham, as Prehearing Officer, that the request by the Florida Industrial Power Users Group to include disputed issues in the docket is hereby denied.

By ORDER of Chairman Art Graham, as Presiding Officer, this 1st day of October, 2015.


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Chairman and Presiding Officer
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of

⁶ Issue 1E "What changes, if any, should be made to the manner in which electric utilities conduct their financial hedging activities?"

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of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.