

**BEFORE THE PUBLIC SERVICE COMMISSION**

In Re: Petition for Approval of Electric Reliability  
Infrastructure Program and Associated Cost Recovery  
Mechanism by Florida Public Utilities Company

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Docket No.: 170033-EI

Filed: February 24, 2017

**CITIZENS' MOTION TO DISMISS FLORIDA PUBLIC UTILITIES COMPANY'S (FPUC)  
PETITION OR IN THE ALTERNATIVE TO REQUIRE FPUC TO COMPLY WITH  
COMMISSION RULES AND THEN SET THIS MATTER FOR A SECTION 120.57(1)  
HEARING**

Pursuant to Sections 366.04, 366.05, 366.06, and 366.076, Florida Statutes, and Citizens v. Wilson, 568 So. 2d 904 (1990), Citizens, by and through the Office of Public Counsel, hereby file their Motion to Dismiss FPUC's Petition in this docket or in the Alternative to Require FPUC to Comply with Commission Rules and then Set This Matter for a Section 120.57(1) Hearing.

1. On February 14, 2017, FPUC filed its Petition for Approval of Electric Reliability Infrastructure Program and Associated Cost Recovery Mechanism (Petition). FPUC proposes to create a new surcharge mechanism for basic, garden-variety, traditional infrastructure and reliability projects which have been historically recovered in base rates.<sup>1</sup> FPUC calls its surcharge mechanism proposal the Electric System Transformation and Reliability (ESTAR) Program. FPUC is asking to collect revenue for multiple capital projects – to implement a Supervisory Control and Data Acquisition System (SCADA) computer software system for electronic process controls of the Company's distribution system, to implement a smart meter replacement installation program, and to construct various distribution infrastructure projects – without a full Commission review of these

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<sup>1</sup> See Attachment A of the stipulation and settlement in Order No. PSC-14-0517-S-EI, issued on September 29, 2014, in Docket No. 140025-EI (Stipulation).

projects, including a review of any offsetting adjustments, for example, a possible substantial reduction in the federal income tax rate. In its Petition, FPUC filed a tariff to implement an approximate \$6.24 per month charge for the typical FPUC residential customer using 12,000 kWh annually for the period June 1, 2017 through December 31, 2017. FPUC proposes a true-up of these costs in September 2017 for rates to go into effect January 2018. The Company further proposes the implementation of the ESTAR surcharge mechanism, with specific factors for each rate classification, using the cost of service methodology from the Company's last rate case conducted in Docket No. 140025-EI. The types of costs FPUC proposes to be included in the surcharge recovery mechanism include secondary distribution, meters, transmission and communication related costs, as well as incremental corporate administrative costs such as insurance, legal, accounting, information technology and safety needed to support the investments outlined in the Company's Petition. Thereafter, FPUC proposes to make an annual September filing detailing the investments made for each of the ESTAR categories. This filing will consist of the prior year's associated revenue requirements, the actual surcharge revenues collected, and a calculation of the program true-up for previous periods. It will also include projections for the next year's investments, revenue requirements, the recovery/refund of historic true-up, and the Company's proposed new surcharge factors. Further, FPUC has left the program open-ended with no stated or defined time that the program will end, with the suggestion that the program will end when the Company files its next base rate case. As part of its Petition, the Company seeks to waive the 60-day requirement for Commission action on the tariffs submitted with their Petition. Petition at p. 1.

2. The Public Counsel, pursuant to Section 350.0611, Florida Statutes, is the authorized statutory representative of the people of the state in proceedings before the Commission. On February 21, 2017, Citizens filed its Notice of Intervention. Citizens file its Motion to Dismiss FPUC's Petition because FPUC has failed to comply with the Commission Rules for seeking a general rate increase. In the alternative, Citizens request that the Commission (1) require FPUC to comply with the applicable Rules for seeking a general rate increase and (2) set the matter for a Section 120.57(1), Florida Statutes, evidentiary hearing.

### **Motion to Dismiss**

3. FPUC cited Section 366.06, Florida Statutes, as the Commission's authority for this matter. Pursuant to Section 366.06(1), Florida Statutes, "[a] applications for changes in rates **shall** be made to the commission in writing under rules and regulations prescribed . . ." Sections 366.06(1) and (4), Florida Statutes, are cited as the authority for Rule 25-6.140, Florida Administrative Code (F.A.C). Rule 25-6.140 (1), F.A.C., provides that "[a]t least 60 days prior to filing a petition for a general rate increase, a company shall notify the Commission in writing of its selected test year and filing date." Further, Rule 25-6.043, F.A.C., requires that a petition filed under Section 366.06, Florida Statutes, for an adjustment of rates **must** include or be accompanied by the information required by the Commission's "Minimum Filing Requirements for Investor-Owned Electric Utilities" (MFRs) Form dated (2/04).
4. As set forth in the 2014 Stipulation and Settlement Agreement (Stipulation) approved by the Commission in Order No. PSC-14-0517-S-EI in Docket No. 140025-EI, issued on September 29, 2014, the minimum term or base rate freeze period expired at the end of the December 2016 billing cycle wherein the Parties agreed that no increase or reduction in base rates would be sought. Stipulation at p. 2. Thus, there is no prohibition for FPUC

filing a request for a base rate increase to appropriately review all expenses as well as the requested rate base items requested in this Petition. Essentially, the Company is attempting to have the benefit of a general base rate case by asking the Commission to approve only the revenue increases for multiple capital projects and requested incremental administrative costs without a full review of FPUC's overall operation and maintenance expenses, including any offsetting adjustments for construction work in progress (CWIP), accumulated depreciation of plant already included in rate base, cost savings that will occur from the proposed plant improvements, potential significant adjustments in the federal corporate income tax rate and changes in the cost of capital.

5. One obvious example of the problem associated with this surcharge relates to CWIP. In its last rate case, based on the projected test year ended September 30, 2015, FPUC requested recovery of \$4.6 million in CWIP. The reported balance of CWIP in the Company's September 2015 Earnings Surveillance Report (ESR) was only \$835,291 and the balance rose to \$3.5 million in its September 2016 ESR. Thus, the requested CWIP balance in the rate case was materially higher than the actual amounts recorded by the Company. Further, the revenue requirement in this Petition included \$25,000 for 2016 and \$50,000 for 2017 for incremental corporate administrative costs such as insurance, legal, accounting, information technology and safety needed to support the Company's requested investments. All of the above costs are unsubstantiated and there is no showing at all that these amounts are not already included in base rates. Allowing the recovery of these costs in a surcharge that is subject to a true-up is essentially a guaranteed recovery of costs normally recovered in base rates. This type of risk-free recovery certainly is not deserving of an equity return in excess of 10%.

6. Another example of how this mechanism will skew the ratemaking process is shown by comparing FPUC's request in this Petition versus FPUC's last base rate case. In this Petition, FPUC seeks to implement an approximate \$6.24 per month charge for the typical FPUC residential customer for 2017. In FPUC's last base rate case, FPUC's full revenue request (without any adjustments) would have increased the monthly base rates for residential customers by \$6.12. After the litigation process, the Commission approved the Stipulation with a monthly base rate change of \$2.02 for a minimum period of two years. FPUC's proposed ESTAR mechanism in the first year is triple the increase approved by the Commission in FPUC's last base rate case. Moreover, the Petition provides a list of projects it may include in the recovery mechanism for the next five years but there has been no projection of the annual rate impact for residential customer beyond the first year. Thus, allowing this piecemeal type ratemaking would be poor policy and lead to skewed rates that are not fair, just and reasonable. If FPUC is earning below its authorized range, the appropriate approach under Florida's ratemaking mechanism is to file a general base rate petition and determine – based on a showing by the utility consistent with the burden of proof that it has -- all the relevant cost inputs and to prospectively set rates based on demonstrated overall revenue requirements.
7. Moreover, the ordinary, customary and reasonable capital expenditures that all utilities are expected to incur, for which FPUC is now requesting to bypass the established base rate relief process, were recognized in revenue requirements as part of FPUC's last base rate case. In the Stipulation, the Company identified the types of normal capital projects that would be undertaken based on the base rate increase, such as pole replacement, moving transmission and distribution lines, and rebuilding substations. FPUC has failed to

demonstrate that the Commission possesses the authority to create an annual base rate clause akin to the Environmental cost recovery clause or the Nuclear Cost recovery Clause which authority is the within the exclusive purview of the Florida Legislature. Moreover, FPUC has failed to justify that these routine, customary and ordinary capital projects – SCADA program, smart meter replacement, and distribution infrastructure projects – should now be considered for base rate cost recovery differently than capital costs considered in a routine base rate proceeding. In fact, deviation from a standard base rate case would make FPUC’s ratepayers liable for only the increasing capital costs and related expenses without receiving the potential benefits of any appropriate offsetting adjustments.

8. FPUC asserts that this proposed ESTAR program is akin to its Gas Replacement Infrastructure Program (GRIP). However, the approval of the GRIP and the associated tariffs arose out of significantly distinct factual and legal circumstances. FPUC’s 2012 petition seeking approval for the GRIP makes clear that the surcharge was in direct response to new federal safety requirements. In its Order approving the GRIP surcharge, Order No. PSC-12-0490, issued September 24, 2012, in Docket No. 120036-GU, (GRIP Order) the Commission specifically noted that the Department of Transportation’s Pipeline and Hazardous Material Safety Administration amended the Federal Pipeline Safety Regulations to require natural gas distribution pipeline operators to develop Distribution Integrity Management Plans (DIMPs) to be reviewed by the Pipeline and Hazardous Material Safety Administration by August 2, 2011. The Commission acknowledged that Congress passed the “Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011” requiring the Department of Transportation Secretary to review DIMPs to evaluate, among other things, “the continuing priority to enhance protections for public safety” and “the

continuing importance of reducing risk in high consequence areas.” GRIP Order at pp. 1-2. The Commission further noted that multiple states had already established similar cost recovery programs to cover the costs of cast iron/bare steel replacement and recognized that the GRIP surcharge was a direct result of the Federal mandate relating to pipe replacement.<sup>2</sup> GRIP Order at p. 2. Similar to the circumstances giving rise to the approval of the GRIP surcharge, the Commission allowed recovery of certain incremental security costs – costs traditionally recovered in base rates – through the fuel adjustment clause because of Nuclear Regulatory Commission Order No. EA-02026 issued following the terrorist acts of September 11, 2001. See Order No. PSC-02-1761-FOF-EI at pp. 5-6. In its petition filed in this docket, FPUC has not cited to a federal order, directive or law which gives a special, exigent status to these costs that sets them apart from routine and ordinary utility expenditures and requires the implementation of this ESTAR program. FPUC’s claim here is totally unlike the GRIP program docket. Here, FPUC seeks to use the ESTAR program to recover costs associated with infrastructure, such as distribution infrastructure and smart meters, that are normally and historically recovered in base rates in an effort to circumvent a full base rate proceeding. There is no extenuating legal circumstance that would allow FPUC to utilize the ESTAR program as a “bridge to its next rate case.”

9. In summary, FPUC has not sought any waiver of the application of the Commission Rules for this type of rate adjustment. FPUC did not file any notification to the Commission requesting approval of a test year pursuant to Rule 25-6.140(1), F.A.C, prior to filing its

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<sup>2</sup> Additionally, the Commission approved similar cost recovery mechanisms for cast iron/bare steel replacement made by other companies in Docket Nos. 150116-GU and 110320-GU.

February 1, 2017, Petition requesting a general rate increase via a tariff filing and proposed ESTAR mechanism. In addition, FPUC did not file with its Petition the required MFRs necessary for an adjustment of rates related to this request pursuant to Rule 25-6.043, F.A.C. The failure of the Company to comply with these Commission Rules requires that this Petition be dismissed.

**Section 120.57(1), Florida Statutes, Evidentiary Hearing**

10. Pursuant to Citizens v. Wilson, 568 So. 2d 904, 908 (1990), under the file and suspend law provided in Section 366.06, Florida Statutes, when the Commission approves in an order or chooses not to withhold its consent within 60 days of a new tariff filing, the new tariff rates that go into effect are merely interim rates pending a final order.<sup>3</sup> The Florida Supreme Court opined that the “file and suspend” statute survived the adoption of the Administrative Procedure Act, Chapter 120. Id. at 905. Footnote 1 clearly shows that the Court contemplated the then applicable electric “file and suspend” provision in this analysis as well as the then applicable telephone “file and suspend” provision. Id. Further, under Citizen v. Wilson, the Commission cannot enter a final order without giving interested parties the right to a hearing. Moreover, pursuant to Citizens v. Wilson, FPUC will have the burden to show that its proposed rate increases are fair, just and reasonable as it would in any other request for a rate increase. Id.
11. Section 120.569(1), Florida Statutes, provides that it applies in all proceedings in which the substantial interests of a party are determined by an agency and further, states that “[u]less waived by all parties, s. 120.57(1) applies whenever the proceeding involves a

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<sup>3</sup> To be clear, the Citizens request that to the extent that FPUC’s petition is not dismissed, the tariff filed by FPUC be suspended for all the reasons stated in the dismissal portion of this pleading and that the matter be fully investigated through the hearing process.



disputed issue of material facts.” In this docket, Citizens aver that the substantial interests of FPUC ratepayers, represented by and through the Public Counsel, are affected by the determination of any costs to be recovered from them by the Commission. Further, Citizens assert that there are disputed issues of material facts in the instant case as it relates to costs FPUC is seeking to recover and that a full review of all costs is necessary to set base rates on a going-forward basis, which entitle Citizens to request a full evidentiary hearing pursuant to Section 120.57(1), Florida Statutes.

12. In order to appropriately address FPUC’s request to increase its general base rates based on its desire to implement multiple capital projects, the Commission should require FPUC to comply with the applicable Commission rules. Specifically, should FPUC wish to proceed, the Commission should require FPUC to comply with Rule 25-6.140 (1), F.A.C., which provides “[a]t least 60 days prior to filing a petition for a general rate increase, a company shall notify the Commission in writing of its selected test year and filing date.” The Commission should further require FPUC to comply with Rule 25-6.043, F.A.C., which requires that a petition filed under Section 366.06, Florida Statutes, for an adjustment of rates **must** include or be accompanied by the information required by the Commission’s “Minimum Filing Requirements for Investor-Owned Electric Utilities” (MFRs) Form dated (2/04).
13. Citizens aver that the issues include, but are not limited to, the general issues established in a base rate case and the following issues for resolution in the Section 120.57(1), proceeding:
  - a) What is the appropriate rate base?
  - b) What is the appropriate cost of capital?

- c) What is the appropriate net operating income?
- d) What is the appropriate revenue requirement?
- e) What are the appropriate rates?
- f) What is the appropriate corporate income tax rate to apply in determining the revenue requirements?

14. Citizens request that any evidentiary hearing in this matter be set with sufficient time after FPUC complies with the Commission Rules related to general rate increases to allow Citizens ample opportunity to conduct its required due diligence and issue discovery to appropriately vet FPUC's request.

Wherefore, Citizens, by and through the Public Counsel, hereby request that the Commission grant its Motion to Dismiss FPUC's Petition, or in the Alternative to Require FPUC to Comply with Commission Rules and then Set This Matter for a Section 120.57(1) Hearing.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail to the following parties on this 24<sup>th</sup> day of February, 2017

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