BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the matter of:)	
)	Undocketed
Initiation of Rulemaking to)	
Amend Rule 25-30.0371, Florida)	
Administrative Code, Acquisition)	June 21, 2010
Adjustments)	

Comments of Florida's Citizens

Florida's Citizens, through the Office of Public Counsel, provide these comments on the draft amendments to Rule 25-30.0371, F.A.C., promulgated in a notice provided by the Florida Public Service Commission dated May 3, 2010.

The Commission Must Continue to Require Proof of Extraordinary Circumstances Before Allowing a Positive Acquisition Adjustment

Rule 25-30.0371 has long required proof of "extraordinary circumstances" before the Commission would entertain recognition of a positive acquisition adjustment. A positive acquisition adjustment allows the purchasing utility to increase rate base over original cost and to ultimately pass through additional costs to customers. We appreciate the fact that it is not staff's intent to make it easier for utilities to obtain recognition of positive acquisition adjustments (workshop, page 8) or to make any material changes to the treatment of positive acquisition adjustments (workshop, page 7). However, deletion of the requirement for proof of "extraordinary circumstances" would do just that. The term "extraordinary circumstances" establish a high bar that the utilities must meet before they may recognize a positive acquisition adjustment. If the term is deleted from the rule, the high bar is removed.

Proof of "extraordinary circumstances" is something that continues to be used by the Commission in other areas. For example, in order to evaluate a public utility's decision regarding the addition of generating capacity pursuant to Section 403.519, Florida Statutes, the Commission requires the use of a Request for Proposals (RFP) process as a means to ensure that a public utility's selection of a proposed generation addition is the most cost-effective alternative available. If the public utility selects a self-build option, costs in addition to those identified in the need determination proceeding are not recoverable unless the utility can demonstrate that such costs were prudently incurred *and due to extraordinary circumstance* (Italics added). Rule 25-22.082, F.A.C. To our knowledge, no one has suggested that the term "extraordinary circumstances" as used in Rule 25-22.082, F.A.C., is problematic, yet nothing in that rule provides guidance to the factors that might be considered in evaluating whether "extraordinary circumstances" exist. In contrast, the use of the term "extraordinary circumstances" is more specific and defined in Rule 25-30.0371, F.A.C., than it is in Rule 25-22.082, F.A.C. Unlike Rule 25-22.082, F.A.C., Rule 25-30.0371 provides a list of factors to be considered in evaluating whether the company has met its burden of proof to show the existence of "extraordinary circumstances." Surely, if the use of the term "extraordinary circumstances" is acceptable in Rule 25-22.082, then it is acceptable in Rule 25-30.031, F.A.C., as well.

Staff has used the test of "extraordinary circumstances" in another area. In 2008, Florida City Gas filed a petition to approve creation of a regulatory subaccount related to

certain meter installations. The company asked for approval to recognize the change in accounting treatment retroactively to prior years. Staff's response to this request was as follows: "Staff believes that ... a company would have to demonstrate extraordinary circumstances to change its accounting retroactively, several years *after the fact*." Staff recommendation dated August 7, 2008, in Docket No. 080163-GU. Staff believed it appropriate to require a showing of "extraordinary circumstances" without providing more details as to what would qualify as "extraordinary circumstances."

As a last example, in an appeal of an order involving Aloha Utilities, the First District Court of Appeal required parties to show "extraordinary circumstances" before it would authorize further abatement of the proceeding. Order of the First District Court of Appeal dated May 16, 2006, Case No. 1D04-5242 (PSC docket 010503-WU). The purpose of requiring a showing of "extraordinary circumstances" was to create a high threshold before the Court would consider any further abatements.

These examples show that it is perfectly acceptable to require a showing of "extraordinary circumstances" in appropriate matters. The Commission has used it for many years dealing with positive acquisition adjustments, and it uses it in areas including the evaluation of the decision of public utilities to build additional generating capacity, as well as in evaluating whether it is appropriate to change an accounting standard retroactively.

The Commission must not delete the requirement that utilities prove the existence of "extraordinary circumstances" before the Commission allows the utility to recognize a positive acquisition adjustment. Requiring proof of "extraordinary circumstances" provides an important protection for consumers – particularly since a positive acquisition adjustment allows the utility to recover a return on and a recovery of an investment in excess of original cost from customers. Despite the intent of staff to make no material change to the treatment of positive acquisition adjustments, deletion of this requirement will do just that. The provision should remain in the rule.

The Commission Should Add Two Additional Factors Related to Extraordinary Circumstances

Rule 35-30.0371 currently lists a number of factors relevant to the issue of whether the utility has proven "extraordinary circumstances" when seeking recognition of a positive acquisition adjustment. We believe two factors should be added to the existing list. First, the Commission should consider all of the elements of the transaction. For example, was the purchase limited to the utility system, or did it include other items, such as a golf course? If it included other items, how was the purchase price allocated between the utility system and the other items? Questions such as these should be answered in order to insure that the amount of the positive acquisition adjustment is fair.

A second factor which should be added is the question whether the purchase was made as part of an arms-length transaction. If the entities are related in some fashion through any common ownership or governance, the purchase should receive a

higher level of scrutiny to insure that the purchase price has not been artificially inflated. Other business relationships between the entities should also be reviewed to insure that the purchase price hasn't been used to provide an advantage or disadvantage in another transaction.

The Commission Should Require Companies to Recognize the Full Negative Acquisition Adjustment if the Acquired System is Neither Physically Nor Financially Distressed

The current rule on acquisition adjustments allows companies to ignore a portion of a negative acquisition adjustment. The portion recognized would depend on the purchase price. This provision allows the acquiring company to record a rate base which is higher than its cost of acquiring a system, and thus requires customers to pay more than they would otherwise pay. The underlying notion behind allowing the purchasing utility to ignore a portion of the negative acquisition adjustment is that customers will still be better off being served by a larger company. However, if the acquired company is already in good shape physically and financially, there is no reason for the Commission to provide an extra incentive to facilitate the sale. A company which is neither physically nor financially distressed is capable of providing good service to customers without being purchased by a larger utility. In fact, the purchase by a larger utility may bring additional overhead costs to the purchased utility, which in turn could result in higher rates. Recognition of the full negative acquisition adjustment could mitigate those additional costs.

Other Items

We believe the new staff proposal regarding amortization periods for negative acquisition adjustments represents a good balance between the relative size of a negative acquisition adjustment and the amortization period for the negative acquisition adjustment. In addition, we agree with staff's comments at the workshop that transaction and transition costs can be addressed as part of a rate case rather than in Rule 25-30.0371, F.A.C.

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