

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: June 23, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Brubaker)
Division of Economic Regulation (Willis)

RE: Docket No. 050078-EI – Petition for rate increase by Progress Energy Florida, Inc.

AGENDA: 07/05/05 – Regular Agenda – Decision Prior to Hearing – Parties May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Baez

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Request that this recommendation immediately follow the recommendation in Docket No. 050045-EI.

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050078.RCM.DOC

Case Background

On April 29, 2005, Progress Energy Florida, Inc. (PEF) filed a petition requesting a permanent increase in its retail rates and charges to generate \$205,556,000 in additional gross annual revenues. PEF asked that its proposed rate increase begin January 1, 2006. PEF's petition is set for a formal, administrative hearing before the Commission beginning September 7, 2005. A number of parties have intervened in this matter, including the Office of Public Counsel, AARP, the Florida Industrial Power Users Group, White Springs Agricultural Chemicals, Inc., and the Florida Retail Federation (FRF).

On April 4, 2005, the FRF filed a pleading entitled "Petition to Intervene, Petition to Conduct General Rate Case, and Request for Hearing of the Florida Retail Federation" (Petition). FRF's request for intervention was unopposed and granted by the Prehearing Officer, by Order

Docket No. 050078-EI

Date: June 23, 2005

No. PSC-05-0554-PCO-EI, issued May 20, 2005. On April 11, 2005, PEF filed a motion to dismiss the remainder of FRF's Petition. On April 18, 2005, FRF filed a response in opposition to PEF's motion to dismiss.

This recommendation addresses the appropriate disposition of FRF's Petition. The Commission has jurisdiction pursuant to Chapters 120 and 366, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant PEF's motion to dismiss FRF's Petition to Conduct General Rate Case and Request for Hearing?

Recommendation: Rather than dismiss, the Commission should deny FRF's Petition. Although the Petition filed by FRF is styled as a request to initiate proceedings, the relief sought by FRF is purely procedural. The Petition asks the Commission to conduct a rate case for PEF and suggests that the result of these requested rate case should become effective at the conclusion of the currently operative rate settlement for PEF. A proceeding to determine the fair, just, and reasonable rates for PEF to implement upon conclusion of the currently operative rate settlement has already been initiated, and FRF may fully and fairly represent its interests in that proceeding.

What is truly being sought by FRF is a procedural placeholder – in the form of separate but contemporaneous rate proceeding – that would allow FRF, in the event it is unsatisfied with a hypothetical stipulation among PEF and other parties to the docket, to press the case to hearing under the established time schedule. The Commission should not provide FRF such additional process rights beyond the due process rights afforded to all parties. (Brubaker)

Staff Analysis: In support of its Petition, FRF offers the following:

The FRF also petitions the Florida Public Service Commission to conduct a general investigation (a general rate case) of the rates to be charged by Progress Energy Florida, Inc. ("PEF" or "Progress") upon the expiration of the current Stipulation and Settlement entered into in 2002, and to conduct a hearing in that case in accordance with Chapters 120 and 366, Florida Statutes. The FRF asks and expects that its requested hearing will be the same hearing that the FRF presently expects the Commission to conduct in this docket pursuant to PEF's petition for a rate increase; if such is not the case, however, then, consistent with the Florida Supreme Court's opinion in South Florida Hospital & Healthcare Ass'n v. Jaber, the FRF asks the Commission to conduct the hearing in approximately the same time frame and to allow the FRF and all other parties to "access and rely on the evidence and testimony" that will be filed in this Docket No. 050078-EI. See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004). To be clear, the FRF is separately petitioning for a hearing, in an abundance of caution, to ensure that it does not later find itself in the same position that the South Florida Hospital and Healthcare Association found itself at the end of the 2002 FPL general rate proceedings that preceded the Supreme Court's decision cited above. As it did in 2002, the FRF stands fully ready to participate in good faith in any negotiations toward resolving this case via another stipulation and settlement.

FRF asserts that it is entitled to a hearing on PEF's rates because the current Stipulation and Settlement by which PEF's rates are governed will expire at the end of this year.

PEF's Motion to Dismiss

In its Motion to Dismiss, PEF contends that FRF's Petition is both superfluous and legally insufficient, and should therefore be dismissed. First, PEF asserts that there is no specific authority that allows entities such as FRF to initiate a general rate case for an investor-owned utility. In fact, the existing legal authority contemplates that the only entities that can initiate a general rate case before the Commission are utilities like PEF and the Commission itself. See e.g., Section 366.06, Florida Statutes; Rule 25-6.043, Florida Administrative Code.

Second, PEF asserts that it has already initiated a base rate proceeding in this docket, and that FRF, as an intervenor, can fully participate in this case. Thus, FRF's request is redundant and superfluous because the relief FRF requests has already been afforded. FRF suggests in its Petition that its request for a base rate proceeding is necessary in case other parties in this matter enter into a settlement agreement with PEF that, if approved by the Commission, will obviate the need for a hearing in this docket. However, PEF contends that FRF's reliance on the Florida Supreme Court's opinion in South Florida Hospital & Healthcare Ass'n v. Jaber (Jaber) is misplaced, because nothing in that opinion supports an argument that an entity such as FRF can initiate a general rate case and hearing for an investor-owned utility, especially when such a proceeding is already pending. PEF contends that the Jaber opinion does not provide FRF the authority to initiate a rate proceeding and hearing; rather, the Court's comment in Jaber regarding a party's ability to "initiate a separate rate proceeding" necessarily must refer to a customer's ability to file a complaint about a utility's rates and charges pursuant to Section 366.07, Florida Statutes.

Finally, PEF contends that even if the Jaber opinion did support FRF's request to initiate a general rate case and full evidentiary hearing for PEF, there is no need for the Commission to consider or rule on the request now:

FRF's speculation that the parties in this case may enter into a settlement that FRF may not agree with, that may be approved by the Commission, possibly obviating the need for an evidentiary hearing in this matter, does not provide the Commission with any reasonable basis to rule on FRF's request. At best, FRF's request is speculative and premature, and the Commission should dismiss FRF's request to initiate a general rate case and evidentiary hearing on that basis as well.

(Emphasis supplied).

FRF's Response

In its response, FRF asserts that it has the standing to initiate a general rate case pursuant to the relevant portions of Chapter 366, Florida Statutes; specifically, FRF asserts that the provisions of Chapter 366, Florida Statutes, authorize the Commission to initiate a rate proceeding "upon request made"¹ and "either upon its own motion or upon complaint."² FRF also asserts that granting its Petition is consistent with administrative efficiency. FRF explains

¹ Section 366.06(2), Florida Statutes.

² Section 366.07, Florida Statutes.

that in the event that other parties settle on terms that FRF finds unreasonable, FRF would be entitled under the Jaber decision to petition for further rate relief, and to presumptively rely upon the record developed up to the point that the other parties settled. FRF states that the hearing would already be scheduled, and it and other parties would be ready to proceed without delay. FRF contends that its request is not superfluous because “it will protect against a real, possible outcome, albeit one undesired and unhopd-for by the FRF, and because, should that unhopd-for outcome materialize, administrative efficiency will be best served by granting the FRF’s request now.”

Staff Analysis

For the reasons set forth below, staff recommends that the Commission deny FRF’s Petition.

Although FRF’s Petition is styled as a request to initiate a proceeding, the relief sought by FRF is purely procedural. The Petition fails to request any substantive relief. FRF does not allege that PEF’s rates are unfair, unjust, unreasonable, or otherwise inappropriate. Instead, the Petition asks the Commission to conduct a rate case for PEF even though FRF recognizes that the Commission is already conducting a rate case for PEF. Further, the Petition suggests that the result of its requested rate case should become effective at the conclusion of the currently operative rate settlement for PEF, just as PEF asked in its petition that initiated this proceeding.

What is truly being sought by FRF is a procedural placeholder that would allow FRF, in the event it is unsatisfied with a hypothetical stipulation among PEF and other parties to the docket, to press the case to hearing under the established time schedule. FRF’s Petition explicitly states this intent.

FRF attempts to use the Florida Supreme Court’s opinion in Jaber as support for the procedural relief sought through its Petition. Its reliance on this case is misplaced. The Court’s opinion in Jaber arose from a Commission order approving a Stipulation and Settlement resolving FPL’s last rate case. The South Florida Hospital & Healthcare Association (SFHHA) had not signed the Stipulation and Settlement and appealed the Commission’s order, arguing, among other things, that the Commission’s approval of the settlement in the absence of an evidentiary hearing violated SFHHA’s due process and statutory rights. The Court rejected SFHHA’s arguments, emphasizing that SFHHA was in the same posture as any other non-signatory to the settlement and could have initiated a subsequent proceeding before the Commission to seek an even greater rate reduction than the reduction set forth in the settlement:

[W]e determine that in the instant context, SFHHA should not be precluded or estopped from seeking a reduction in the rates provided for in the settlement agreement approved in April 2002. SFHHA is not a signatory to the settlement agreement, has no rights or liabilities thereunder, and cannot be precluded by its terms from petitioning for an even greater rate decrease. Moreover, we resolve that in any such proceeding, SFHHA and the PSC may presumptively access and rely on the evidence and testimony compiled in the proceeding below, subject to any confidentiality or use restrictions governing the initial introduction of that evidence.

Jaber, 887 So. 2d at 1214.

The Court's opinion in Jaber does not contemplate the novel procedural arrangement sought through FRF's Petition. Instead, the Court's opinion suggests the possibility of a separate petition seeking specific relief (e.g., a rate reduction) upon conclusion of an existing rate case by non-unanimous settlement. As noted above, FRF has not alleged in its Petition that PEF's rates are unfair, unjust, unreasonable, or otherwise require any specific adjustment.³ Further, the Petition hinges upon the *possibility* that this docket may be resolved through a settlement that it may not wish to accept. The Court's opinion in Jaber does not create a separate cause of action based on such speculation, nor does it suggest or endorse the type of shadow proceedings sought by FRF.⁴

FRF has intervened in this docket to represent the interests of its members who are PEF ratepayers. It has not explained why a separate, shadow proceeding is required to fully and fairly represent those interests. It appears to staff that the only purpose for FRF's Petition is to attempt to gain, in the currently ongoing rate case proceeding, some additional process right that would serve to give FRF more control over the processing of the case.⁵ The Jaber decision does not create such additional process rights for intervenors in an established, ongoing rate proceeding; instead, it simply describes the rights of parties who are unhappy with a non-unanimous settlement that is approved by the Commission at the conclusion of such a proceeding.

In the event that the Commission approves a non-unanimous settlement in this docket, as it did in FPL's last rate case, and any party who does not sign the settlement wishes to pursue a rate decrease, the Jaber decision makes it clear that such a party may subsequently petition for a rate decrease. At that point, a cause of action may be established upon which the Commission may proceed and, as the Court stated, the Commission and any parties to the new proceeding could presumably access and rely on the evidence and testimony compiled in the original proceeding.

In conclusion, staff recommends that the Commission deny FRF's Petition. A proceeding to determine the fair, just, and reasonable rates for PEF to implement upon conclusion of the currently operative rate settlement has already been initiated, and FRF may

³ As noted above, FRF does not seek any change in rates prior to the conclusion of the currently operative PEF rate settlement that was the subject of the Jaber decision. FRF was a signatory to that settlement and is thus precluded from seeking a change in rates to be effective prior to the conclusion of the settlement.

⁴ Oddly, the relief sought by FRF attempts to take *dicta* from the Jaber decision to undermine the main holding in Jaber which affirmed the Commission's approval of a non-unanimous settlement agreement. Under the procedural arrangement sought by FRF, the Commission, even if presented with a proposed settlement that it believed to be reasonable, would be forced to proceed to hearing as scheduled simply because FRF did not agree with the settlement. The Jaber decision allowed the Commission to approve a non-unanimous settlement and clarified that non-signatories, *at that point*, may choose to petition for different relief. The burden of proof would presumably shift to the non-signatory petitioner to support whatever rate relief it may request. Thus, the procedure envisioned in the Petition of FRF is not consistent with the Jaber decision because it effectively eliminates the Commission's ability to approve a non-unanimous settlement, and it effectively removes the burden on the non-signatory petitioner to support any petition made subsequent to the Commission's approval of a non-unanimous settlement.

⁵ If the Petition is granted, staff would not be surprised if other intervenors in this rate case files a similar petition to obtain the same additional process rights requested by FRF. Further, staff can envision a scenario in which such petitions would become commonplace in rate cases and perhaps other Commission proceedings as well.

Docket No. 050078-EI

Date: June 23, 2005

fully and fairly represent its interests in that proceeding without the need to create layers of shadow proceedings that provide FRF some additional process right beyond the due process rights afforded to all parties.

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open. (Brubaker)

Staff Analysis: This docket should remain open to allow the Commission to process PEF's pending rate increase request.