O/a 6-3-85

IN THE SUPREME COURT OF FLORIDA

FLORIDIANS UNITED FOR SAVE ENERGY, INC., Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, ET AL., Appellees.	CASE NO. 66,380
METROPOLITAN DADE COUNTY CONSUMER ADVOCATE, WALTER T. DARTLAND, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, ET AL., Appellees.	CASE NO. 66,444

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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STATEMENT OF FACTS AND CASE

The Appellants have presented a statement of facts that begs the question, is argumentative and contains citation to authority; as such, it is improper.

Florida Power and Light Company filed for rate increases in calendar years 1984 and 1985 in a Petition dated November 25, 1983. The Company sought these increase pursuant to the Commission's general rate making authority in section 366.06, Florida Statutes. The Company sought a $335,274,000 rate increase for calendar year 1984 and $120,279,000 rate increase for 1985. By Order No. 12919, the Commission suspended the rate schedules and proceeded to hearings. After appropriate notice, the Commission held hearings on January 30, 1984 in Miami; February 3, 1984 in Ft. Lauderdale; February 13, 1984, in Sarasota; February 16, 1984, in Daytona Beach; February 20, 1984, in Ft. Myers; March 30, 1984, in Palm Beach Gardens; and in Tallahassee, on April 9-13, 16, and 18-20, 1984.

The Company had filed what could best be described as a step increase case. FPL proposed to use calendar year 1984 as its base test year and calendar year 1985 as its "subsequent year" test year. It received preliminary approval of these test years at the outset of the proceedings. The Commission found that, as adjusted, the test periods reasonably represent expected operations during the periods that approved rates would be in effect. (Order No. 13537 at 8).

At the conclusion of all proceedings, the Commission found that the Company was entitled to $81,464,000 in annual gross

revenues for 1984 and $114,984,000 in annual gross revenues for 1985. (Order No. 13537 at 74).

FUSE and the Consumer Advocate for Dade County appealed that portion of the Order that imposed the second year adjustment in rates for calendar year 1985.

POINT I

THE PROVISION IN SUBSECTION 366.076(1), FLORIDA STATUTES, PROVIDING FOR LIMITED PROCEEDINGS, IS CONNECTED IN A NATURAL AND LOGICAL WAY TO THE APPROVAL OF TRANSMISSION LINE SITING AND AS SUCH, THE SECTION DEALS WITH ONE SUBJECT MATTER CONSISTENT WITH THE ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION.

Subsection 366.076(1), Florida Statutes, authorizes the Commission to conduct limited proceedings to consider any matter within the Commission's jurisdiction and grant or deny any request to expand the scope of the proceeding.

The statute provides:

> 366.076 Limited proceedings; rules on subsequent adjustments.--
> (1) Upon petition or its own motion, the commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction, including any matter the resolution of which requires a public utility adjust its rates to consist with the provision of this chapter. The Commission shall determine the issues to be considered during such a proceeding and may grant or deny any request to expand the scope of the proceeding to include other matters.

The Transmission Line Siting Act, sections 403.52-.536, Florida Statutes, and the provision for limited proceedings can serve one purpose: To provide a mechanism for the approval of construction and recovery of the costs associated with the construction of transmission lines. In determining the need for a transmission line, the Commission considers the costs of constructing the line. Through the use of a limited proceedings, the Commission can consider the recovery of those costs by permitting the inclusion of all or any part of that investment in

the rate base for rate making purposes. It is, therefore, as inseparable as the obverse and reverse of a coin. The test for a violation of the one subject matter provision of the Constitution is whether there is a natural and logical connection between the provisions. Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981).

Since the Commission is a party to the company's need determination hearings and procedures, section 403.52, et. seq., it follows that if the Commission is to concur on the front end as to the need for a transmission line, a mechanism should be provided for the recovery of those expenses through a limited form of rate making. The two are integral and completely related. There is a natural and logical connection between these two functions.

Prior to the legislative enactment, the Commission had the general authority to consider issues such as the inclusion of transmission line siting costs in the rate base for rate making purposes as part of its general rate making authority in section 366.06, Florida Statutes. The Commission's concern, however, was limiting those proceedings to consideration of just that single issue. It did so in Docket No. 810181-EU(MC). There, the Commission decided to consider the inclusion of a transmission line in Florida Power and Light's rate base. The Commission, although conducting a limited scope proceeding, has not had the inherent or express power to limit the scope of the proceeding to just the consideration of a single issue. If a utility petitioned for the inclusion of a transmission line in its rate base, other intervening parties could petition for the expansion of that

proceeding for consideration of ancillary issues. The Commission felt that under its general rate making statutes it could not decline to consider issues dealing with the same company, but unrelated to the issue framed by the Company. In order to enforce a limited scope proceeding, the Commission needed this specific authority.

The two main areas where the Commission has need for limited scope proceedings is for the inclusion of transmission lines and for the addition of power plants to the rate base. The Commission has prior need determination authority under the statutes for both power plants and transmission lines. Sections 403.519 and 403.537 respectively. It therefore makes sense that the Commission should also have the ability to consider the inclusion of those facilities in the rate base on a limited basis.

Occasionally a transmission line may be of such magnitude that it is essential that it be considered in a limited proceeding. In the aforementioned Docket No. 810181-EU(MC), Florida Power and Light petitioned for the determination of need for the proposed Duval-Poinsett electrical transmission lines. In the final order in that case, Order No. 10110, the Commission found that the cost of that construction alone would be $278,920,500.

Projects of that magnitude often dictate the consideration of just those costs for rate making purposes without forcing the company to institute complete rate cases. Often the Company may not need additional rate increases if it can include in the rate base, the new construction that has become used and useful.

Admittedly the limited rate case case statutory authority

encompasses more than limited proceedings for the consideration of transmission line siting, however, the only other area now envisioned where this section could be used, is for consideration of power plant inclusion. In these situations, the magnitude of the dollars would justify holding a limited proceeding. This authority does have a double edged effect, it could be utilized to retire plant and transmission lines from the rate base as well as add them to the rate base.

The one subject matter provision is not violated so long as all of the provision of the act seem to be incidentally related and properly connected to the primary subjects expressed in the title and naturally germane thereto. State v. Volusia Cty. Ind. Development Auth., 400 So.2d 1222 (Fla. 1981).

The proceedings envisioned by the Legislature in enacting this legislation were limited proceedings where the issues could be narrow in scope and covering one or two issues. This is contrasted with a rate case where the Commission may consider hundreds of issues. The Appellant's characterization of this section as a broad grant of powers to the Commission is specious. What the Legislature has granted to the Commission is the jurisdiction to limit the scope of its inquiry in any one proceeding. The Commission has far broader authority in it general rate making authority. Simply, the Legislature has stated with particularity that the Commission has the jurisdiction to confine its inquiry without having to expand every case into a full rate proceeding.

Appellants contend that the statute gives the Commission

unbridled authority to conduct limited proceeding in water cases and for telephone companies. The language in section 366.076, Florida Statutes, appears only in Chapter 366, and has no other tracing table reference to the other chapters dealing with the Commission's regulatory authority over water and sewer utilities and telephone companies. Additionally, the section itself uses the limiting language "to adjust its rates consistent with the provisions of this chapter."

Chapter 366 relates only to electric and gas utilities. But, the section further restricts the Commission's authority to "public utilities." This term has a specific definition found earlier in the chapter in subsection 366.02(1), Florida Statutes. It is defined as a corporation that supplies electricity or gas to the public, but excludes cooperatives and municipal utilities. Considering the Appellants' contentions most charitably, it is ludicrous to interpret this section, as the Appellants have done. It allows the Commission to conduct limited proceedings for only investor owned electric and gas utilities under the Commission's jurisdiction.

Finally, Appellants contend that "ratemaking 'in no way' is affected by 'Transmission Line Siting Act.'" This is analogous to saying that "paying for a house 'is in no way' affected by buying a house." The two functions, that of considering the need and cost of proposed transmission facilities and the recovery of the cost of those facilities, are inextricably entwined. The subjects of the law, Chapter 83-222, Laws of Florida, have a natural and logical connection that comport with the essential requirements of

the one subject matter provision of the Florida Constitution. State v. Lee, 256 So.2d 276 (Fla. 1978).

POINT II

APPELLANTS MISREADS SECTION 366.076(2), FLORIDA STATUTES, IN ASSERTING THAT THE SUBSECTION GRANTS THE COMMISSION THE AUTHORITY TO CONDUCT LIMITED PROCEEDINGS.

Section 366.076(2) acknowledges the Commission's jurisdiction to authorize subsequent year adjustments under the Commission's rate making jurisdiction and specifically authorizes the Commission to promulgate rules to carry out that objective.

The statute states:

> 366.076 Limited proceedings; rules on subsequent adjustments.--
> (2) The commission may adopt rules for the determination of rates in full revenue requirement proceedings which rules provide for adjustments of rates based on revenues and costs during the period new rates are to be in effect and for incremental adjustments in rates for subsequent periods.

If the section was intended to grant the Commission jurisdiction to authorize subsequent year adjustments it would have simply said so! What it says is, the Commission has authority to adopt rules of procedure for the determination of how those subsequent year adjustments are to be made. The Commission is not mandated to adopt rules--the subsection says: "may adopt." The Appellants misconstrue the plain meaning of the statute. Even the subject matter here is related to the recovery of transmission line expenses through the process of subsequent year adjustments.

The Commission has been using projected test periods and other regulatory devices trying to decrease regulatory uncertainty. The

Commission is experimenting with procedures for the handling of projected data and use of new rate making techniques for reducing the inaccuracies connected with setting rates for the future. The Commission has jurisdiction to authorize second year adjustments under its general rate making authority. The very language of the subsection acknowledges that authority. It states: "[t]he commission may adopt rules for the determination of rates in full revenue requirement proceedings ... during the period new rates are to be in effect and for incremental adjustments in rates for subsequent periods."

Prior to the enactment of this legislation, the Commission had articulated its authority to conduct limited proceedings. In Docket No. 820007-EU, Petition of Tampa Electric Company for an increase in rates and charges, the Commission considered Tampa Electric's request for a subsequent year adjustment:

> 2. The Company has proposed a mechanism for limited rate relief in 1983 to recognize changes in rate base and cost of capital occurring after our decision in this case. The Company's Automatic Financial Integrity Review Mechanism (AFIRM) would involve granting additional revenue requirements based on: (1) the difference between the projected 1982 average rate base approved herein, excluding working capital, and the projected 1983 year end rate base and (2) an updated cost of capital for 1983 utilizing the last authorized return on equity and 1983 cost rates for other capital.
>
> We cannot approve AFIRM as proposed. Although we approve of the use of limited make-whole type rate cases and find their use permissible under Chapter 366, Florida Statutes, the Company's mechanism fails to recognize the right of interested parties to raise their own issues. Any limited rate case mechanism must recognize the rights of other

> parties to raise new issues. While other parties may raise their own issues, this does not dictate reliance upon a full revenue requirements case each time a utility seeks rate relief.... (emphasis supplied)

Order No. 11307, dated November 10, 1982, at 50.

In the Florida Power and Light rate case, the Company offered the Commission another opportunity to, "on a case-by-case basis," experiment with a procedure for setting rates on a step or incremental basis. With refinements to that procedure, the Commission will in the future seek to promulgate rules on the subject. This Court has acknowledged that the Commission is not required to adopt rules prior to having an established policy. The Commission developes its policy on a case-by-case basis before instituting rule making. In City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla. 1983), the Commission was asked, in a proceeding concerning municipal utility surcharges, to institute rule making to define how the Commission would treat extra-territorial surcharges. The Commission declined stating that it did not know and would develop a policy on a case-by-case basis. This Court held:

> We have held in the past and continue to hold in this case that administrative agencies may develop policies by adjudication and that formal rulemaking is not necessary in all cases. ... We have also suggested that rulemaking is preferable if the impact of the rule would be industry-wide.

(at 508).

The Appellants state, this is the first time that the Commission has had a proceeding where a subsequent year adjustment

has been used. The use of this procedure is only applicable to Florida Power and Light and has no industry-wide application. If the Commission is satisfied with the results of the procedure and decides that it may be a viable alternative, the Commission will institute proceedings to adopt this policy as a rule.

III.

RATE MAKING POLICY SUPPORTS THE COMMISSION'S INTERPRETATION OF THE LAW.

It is somewhat difficult to understand what the Commission has done in this proceeding from the inartful description set forth by the Appellants.

Utility companies in rate proceedings had been using a test period as a representative period of operations to establish:

1. Reasonable and necessary expenses for the provision of utility services;

2. Prudent investments in plant used and useful; and,

3. Construction expenditures for planned additions to plant.

In determining expenses for the test year, the utility starts with actual booked expenses for a historical test year. It then makes pro forma adjustments for known changes which are non-recurring. It groups recurring expenses and makes an adjustment known as an attrition allowance. Recurring expenses like cost of living increases in a labor contract are easily handled by a single attrition allowance. Southern Bell Tel. & Tel. v. Florida Public Service Commission, 443 So.2d 92 (Fla. 1983).

When the Company uses a projected test period, it actually starts with a historical test period and makes adjustments for known changes or anticipated changes. In effect, the company constructs what the company expects to be paying in a future period. The difference is in form and not substance. The company adjusts for those changes which are treated as pro forma

adjustments, and those that are attrition related, and creates a view of the future.

From a rate making standpoint, there is no difference in treatment between a historical test year with pro forma adjustments and an attrition allowance and a projected test period.

Often the projected test period becomes a historical test period, because of the time required for processing a rate case. When this occurs, the Commission requires the Company to provide actual cost information to replace the projected data. In this way, the Commission gets to consider the most recent information for rate making purposes and evaluate the accuracy of the projections. The shortcoming in this is, as the projected test period becomes a historic test period, the rates being generated for future operations are not reflecting future costs. This malady has been recognized as regulatory lag. The process is too slow to keep up with the changing cost environment of the utility. It is for this reason that the Commission has tried to shift the emphasis in rate cases from historical reporting, to projected test data, with supplemental filing during the hearings for actual data as it becomes available. Once a projected test period becomes a historic test period, the utility is again confronted with the fact that rates are set for the future based upon a historic costs. For this reason and others, the Commission allowed the Company to file for rate relief using two separate test periods.

The Company, in this case, filed for rate relief on November 23, 1983 using calendar year 1984 as its projected test

period for its first test period and using calendar year 1985 for its second test period. In the Commission's order granting rate relief dated July 24, 1984, the rates were to be applied to billing rendered on meter reading taken on or after July 20, 1984. By that time, more than half of the Company's first year's projected data had become historic. The Commission and the Company were left with a year and five months of projected data. In this way, regulatory lag was accounted for, and the Company was not deprived an opportunity to earn a fair rate of return.

In reducing regulatory lag, the risk associated with regulation is less. In a market where risk is compensated for with a premium, the cost of financing is less when uncertainty is reduced. This directly results in a savings to the ratepayer in lower costs of capital.

The Commission granted this relief under its existing rate making authority in section 366.06, Florida Statutes. Appellants' assertions to the contrary, section 366.076(2), Florida Statutes, simply does not grant the Commission the authority to grant "subsequent year" adjustments to rates.

CONCLUSION

Subsection 366.076(1), Florida Statutes, contains one subject matter. It defines a procedure for the certification of need for and a means for the recovery of the cost of construction of a transmission line. These two issues are inextricably entwined and there is a natural and logical connection between the provisions. The bill therefore comports with the essential requirements of law and specifically the one-subject provision of Article III, section 6, Florida Constitution.

Clearly the procedure used by the Commission is consistent with the requirement acknowledged by this Court: the Commission has authority to set rates only for the future. Westwood Lake, Inc. v. Dade County, 264 So.2d 7, 12 (Fla. 1972). By the use of projected data, the Commission has been doing just that without the new section. The new subsection directs the Commission to consider rule making when the policy for the handling of projected period and subsequent year adjustments gets sufficiently established to merit institution of rule making. The Commission has been refining the procedures for the resolution of projected hearing, but the procedures are still premature for the promulgation of rules.

Respectfully submitted,

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Date: April 19, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION has been furnished by U.S. Mail this 19th day of April, 1985 to the following:

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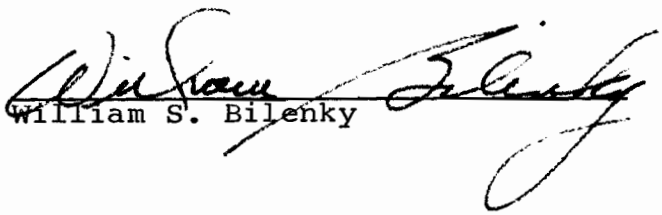

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