IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.,

Appellant(s),

vs.

FLORIDA PUBLIC SERVICE COMMISSION

Appellee(s).

Case No.: SC16-141
Lower Tribunal No.: 150001-EI

CITIZENS' REPLY BRIEF

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PRELIMINARY STATEMENT

OPC will employ the abbreviations that it identified in its Initial Brief. OPC will refer to the Commission's Answer Brief as "AB-PSC, p.__" and FPUC's Answer Brief as AB-FPUC, p. __."

ARGUMENTS

I. REPLY TO ARGUMENTS REGARDING THE FPUC SETTLEMENT AND ORDER ADOPTING IT CONSTITUTING OFFICIAL COMMISSION POLICY.

As this Court recognized in *Chiles v. PSC Nominating Council,* 573 So. 2d 829, 832 (Fla. 1991) the Commission's "primary function is setting rates, which is legislative in nature." See also *Storey v. Mayo,* 217 So. 2d 304, 307 (Fla. 1968) ("The established state policy in Florida is to supervise privately-owned electric utilities through regulation by a state agency.") Provisions of Chapter 366, including Sections 366.04, 366.041, 366.05 and 366.06, 366.07, 366.076 Fla. Stat., together describe a plenary and comprehensive scheme for the regulation and active supervision of electric utilities.[1] The Commission cited these statutory provisions in

[1] The Commission's active supervision of electric utilities is pervasive and related to the viability of the monopoly areas exclusively served by Florida's investor owned electric utilities. This active state supervision is an essential element of the utilities' state action immunity under the Sherman Act. See, *TEC Cogeneration v. Fla. Power & Light Co.*, 76 F. 3d 1560, 1567 (11th Cir. 1996).

approving the Settlement as being in the public interest. Among others, it approved policies that:

(1) Established base rates revenue increase levels for all FPUC's customers (Appendix, pp. 59, 66, 71-105); (2) set FPUC's authorized earnings levels until changed (Appendix, p. 58); (3) established through the BRFA the rules for what historical base rate type costs could be recovered in the Fuel Clause (Appendix, p. 60); (4) established a methodology for the recovery of storm damage costs (Appendix, pp. 60-61); (5) established accounting rules for deferral of unanticipated costs for future rate recovery consideration (Appendix, p. 63); and (6) approved other tariffs including rules and policies to be observed by the Company and its customers prospectively. (Appendix, pp. 71-105)

All of these provisions constitute official policy to be observed and enforced at least through the minimum term of the Settlement.[2] These active supervisory Commission policies are binding upon the utility and the customers it serves with rights and obligations flowing between the two.

[2] Paragraph XVI.c.ii of the Settlement supports the policy characteristic of the Settlement in this regard:

> Approval of this Agreement promotes planning and regulatory certainty for both FPUC and its customers.

The Commission describes Order No. 14546[3] as a statement of policy. Citizens agrees. It is an order that describes certain circumstances under which costs are to be recovered through the Fuel Clause and which should remain under base rates recovery. That is the nature of "policy." The function of Order No. 14546 and the 2014 Settlement Order are identical as each governs the circumstances regarding when and how costs can be recovered. The BRFA clearly establishes a rule of delineation between Fuel Clause and base rate recovery. In this regard, the BRFA is indistinguishable from Order No. 14546 as to its status as official Commission policy. Both policies became, and remain, binding and enforceable on the utilities and their customers as the result of stipulation or settlement and upon adoption by Commission order.

II. REPLY TO ARGUMENTS THAT A BURDEN HAD SHIFTED TO THE OPC TO GO FORWARD WITH EVIDENCE THAT THE BRFA PROHIBITED FUEL CLAUSE RECOVERY OF THE TIA.

The Commission's reliance on *Fla Dep't of Transportation v. J.W.C. (Fla. 1st DCA 1981)* is wrong. In *J.W.C.,* the Florida Department of Transportation (FDOT) appealed the denial of a permit by the Florida Department of Environmental Protection (DEP) and contended that once the DEP had issued a notice of intent to issue the permit, the FDOT's burden was "discharged" and shifted to the objecting

[3] *In re: Cost recovery Methods for Fuel-Related Expenses,* Order No. 14546 (July 8, 1985); 1985 Fla. PUC Lexis 531

petitioners to go forward with the evidence. This Court held that the objectors' petition created a *de novo* hearing and rejected FDOT's position that the burden of proof had shifted. The Court pointed to *In Re Estate of Ziy*, 223 So. 2d 42, 43 (Fla. 1969) (citing a 1949 Alabama case) that:

> Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

Ziy involved a burden shift in a probate case. An adjudication of incompetency shifted the burden to the proponents to demonstrate testamentary capacity. By contrast, *J.W.C.* involved a permitting case where an initial determination had been made but was protested. Even so, no burden was found to have shifted since a binding adjudication had not occurred. In the Fuel Docket, no burden-shifting determination – binding or otherwise – occurred during the hearing. FPUC retained throughout the burden of demonstrating the lawfulness of the recovery of the TIA under the BRFA. FPUC never met its burden of demonstrating that the recovery of the TIA in the Fuel Clause was lawful. There is no dispute in the record that the TIA included FPUC's own investment in transmission assets and that those types or categories of its own investments had always been recovered by FPUC in base rates. (TR 577, 615-616) FPUC failed to produce evidence that it had ever recovered an investment in its own transmission assets in the Fuel Clause.

The OPC nevertheless undertook the task of producing the requisite evidence that FPUC recovers the costs of its own transmission investment historically and traditionally in base rates. (TR 577, 615-616) The OPC established that if the TIA was added to Fuel Clause recovery, it would be done as an amount representing an increase in the magnitude costs of FPUC's own investment in assets of the type that were historically and traditionally recovered in base rates. (Appendix, p. 60) OPC was able to elicit and produce this evidence without putting on an expert witness. Burden-shifting claims aside, no direct testimony was needed.

III. REPLY TO ARGUMENTS THAT THE COMMISSION CONCLUDED, CONSIDERED, INTERPRETED OR OTHERWISE MADE A FINDING THAT THE SETTLEMENT DID NOT BAR RECOVERY OF THE TIA.

FPUC argues that the Commission "concluded" that the Settlement did not bar TIA recovery in the Fuel Clause and that the Commission "considered" and interpreted the Settlement. (AB-FPUC, pp.11, 12, 24) Neither the record of deliberations nor the plain language of the Fuel Order reflect any sort of affirmative act of concluding, considering, or interpreting the Settlement. Relative to the TIA, the Commission only ignored the BRFA. In the Fuel Order, the Commission devotes 21 paragraphs to the discussion of Issues 4A and 4B. The first thirteen paragraphs are solely related to recounting the positions of the parties. The "analysis" begins in the fourteenth paragraph. The fourteenth and fifteenth paragraphs discuss the Commission's policy with respect to Fuel Clause recovery of "expenses" (not capital

costs). The sixteenth paragraph is solely related to analysis of the expenses that were only the subject of Issue 4B. Therein, the Commission made this affirmative finding:

> Because FPUC has "traditionally and historically" recovered these types of costs through the fuel clause, we find that the terms of the settlement agreement do not apply and do no prohibit recovery through the fuel clause at this time.

By contrast, no finding was made as to the application of the BRFA to the TIA.

The seventeenth through nineteenth paragraphs are exclusively devoted to discussing the Issue 4B expenses. The final two paragraphs (20th and 21st) mention the TIA however they make no reference to the Settlement or the BRFA. The Commission failed to make any conclusions, to perform any considerations or to conduct any interpretations of the BRFA or the Settlement relative to the TIA. This failure (and the accompanying lack of explanation) are a departure from the essential requirements of law. Section 120.68(7)(e)3, Fla. Stat.

IV. REPLY TO ARGUMENTS CLAIMING OPC WAS OBLIGATED TO FILE TESTIMONY IN SUPPORT OF THE ARGUMENT THAT RECOVERY OF THE TIA WAS PROHIBITED BY THE BRFA.

The agency cites to no authority requiring a non-petitioner party to put on its own witness to introduce competent, substantial evidence. (AB-PSC, pp. 16-17) This is not a requirement of the APA and it would have been inappropriate here. The Commission historically has not allowed testimony on legal issues. The interpretation of the Settlement, which is a legal document and a contract, is properly

the subject of a legal brief.[4] Moreover, the application of a Commission order to a fact situation is a function of a legal analysis that does not lend itself to expert testimony. The OPC introduced the necessary predicate facts to demonstrate that the BRFA barred Fuel Clause recovery of the TIA, and thus fully satisfied any obligation under the APA to produce evidence.

V. REPLY TO ARGUMENTS SUGGESTING THE OPC HAD AN OBLIGATION TO RAISE AN ISSUE CONTAINING ITS ARGUMENT THAT RECOVERY OF THE TIA WAS PROHIBITED BY THE BRFA AND THAT AS A RESULT, ANY FINDING OF PROHIBITION WOULD HAVE PREJUDICED FPUC.

The Commission is in error in its representation to this Court that the OPC should have raised an issue that was encompassed in the "argument" that the BRFA prohibited Fuel Clause recovery of the TIA. (AB-PSC, pp. 15-17) This assertion is flatly contradicted by the Commission's practice of refusing to separately hear issues that can be "subsumed within" other broadly stated issues.

The Commission has likewise consistently rejected parties' attempts to have

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[4] *In re: Investigation Into the Appropriate Rate Structure for SOUTHERN STATES UTILITIES, INC. for all Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties* Order No. PSC-94-0371-PCO-WS, at 3 (March 30, 1994) ("It has not been Commission practice to allow expert testimony on legal issues… Legal argument is more appropriately reserved for argument of counsel in a party's brief.")

separately stated issues heard if a party's argument could be accommodated as a position or argument within the broader framing of the issue.[5] It is improper for the agency to represent one thing to the Court as a procedural defect while rigidly enforcing a practice that creates the supposed defect. The OPC's position and argument that the BRFA barred recovery was a position that was properly maintained under the Commission's well-recognized procedural policy. There was no error since FPUC was not only fully aware of the obligations on its year-old Settlement but also is charged with knowing its obligations to meet the BRFA test. FPUC framed its initial position in its prehearing statement by paraphrasing an essential element of the BRFA, stating as a part of its position on Issue 4A the following:

> Moreover, the costs for which FPUC seeks recovery are not indicative of an increase in costs that otherwise would have been recovered through base rates.

R. V. 2, p.315. FPUC also acknowledged in footnote No. 9 in its post-hearing brief that "OPC had previously [i.e., assumedly prior to the filing of OPC's prehearing

[5] *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor,* Order No. PSC-15-0354-PCO-EI at 11-12 (September 3, 2015) See also, *In re Nuclear Cost Recovery Clause*, Order No. PSC-12-0441-PCO-EI at 2 (August 27, 2012) ("Issues 28, 29 and 29A, provide ample opportunity for any party to this matter to argue in support or opposition of FPL's conduct with regard to any aspect of the EPU project. Therefore Issue 28A shall be disallowed and stricken from the Prehearing Order.")

statement] suggested that it was reviewing the Settlement with some concern that the FPL interconnect might, in OPC's opinion, run afoul of the settlement agreement…" (R.V.4, p. 643)

Together, these admissions contradict the claim by FPUC that "[t]he Settlement was not identified as having any relevance to FPUC's request until OPC filed its Prehearing Statement…" (AB-FPUC, p. 27) The admissions also impeach the arguments raised by both the Commission and FPUC that the Company was caught off-guard and unable to respond to the OPC position on the impact of the BRFA. (AB-PSC, p.17; AB-FPUC, p. 27) Regardless, FPUC failed to ask for an opportunity to file supplemental testimony once it learned about the OPC position – either when it first learned of OPC's objection, or later when the OPC prehearing statement was filed.[6] There was no surprise or harm to FPUC's continuing burden to prove the appropriateness of recovery of the TIA to the Commission. The Company's burden of proof was made clear in the BRFA, which was the

[6] The Commission has generally entertained and granted motions for filing supplemental testimony where new information is filed or new issues arise. See, *In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc.*, Order No. PSC-96-0511-PCO-WS, at 1-2 (April 15, 1996) (OPC's motion to file the second supplemental testimony of Kimberly Dismukes is granted); *In re: Fuel and purchased power cost recovery clause and generating performance incentive factor*, Order No. PSC-01-1881-PCO-EI, at 1-2 (September 20, 2001) (Supplemental testimony allowed where new issues were added or modified).

Commission's policy for recoverability of costs outside of base rates once the 2014 Settlement Order became final.

VI. REPLY TO ARGUMENTS THAT THE BRFA DID NOT APPLY TO THE TIA BECAUSE OF THE FIRST SIX WORDS OF THE PROVISION.

FPUC argues that the BRFA is a nullity because of the phrase "Except as provided in this Agreement…" at the beginning of the BRFA. (AB-FPUC, p.21) This argument is misplaced and in error. The phrase was never cited by FPUC in its brief before the Commission as having any significance or connection to the first sentence of Paragraph VI.[7] As a practical matter, had the drafters of the Settlement nonsensically intended for the very specific prohibition of the BRFA to be instantly rendered meaningless by the permissive language of the first sentence it would have been easier to state "Except as otherwise provided in this Paragraph…," or to have simply omitted the sentence. The Commission does not contend that the phrase creates an exception that allows it to permit Fuel Clause recovery under the provisions of sentence one of Paragraph VI. The Commission did not raise the notion in the Fuel Order, nor did it even mention it in its Answer Brief. That order is silent on this.

[7] To the contrary, FPUC devoted nearly two pages of its brief to the Commission in addressing the BRFA and arguing that it met the test as applied. It waived any argument that there was an earnings escape clause. (R.V. 4, pp. 644-645)

VII. REPLY TO ARGUMENTS THAT THE PARTIES DID NOT INTEND FOR THE BRFA TO APPLY AS COMMISSION POLICY GOING FORWARD.

The Court should reject the Commission's unfounded claim that its cited passage in Paragraph XVI can be interpreted to mean that the parties "did not intend for the language of the Settlement to establish Commission policy going forward but only to affect the individual rights of the signatories to the Settlement as a means to resolve FPUC's 2014 rate case." (AB-PSC, p. 23) This is an absurd claim. The true "signatories" (i.e., the customers and the utility) to the agreement were not the individuals whose names appear on the document. Rather, they were 100% of those in Florida who could be affected for at least the next 26 months by all aspects of service and rates of FPUC. The Settlement's statement about precedential value plainly means only that the case-specific terms of the agreement (or that the concessions made to reach a compromise) cannot be used against the signatories nor can individual provisions be "mined" from the whole of the agreement and used as precedent or against the interests of a party in a future case. The plain intent of the parties was that the entire document must be enforced in all of its terms, and that the BRFA is to be applied as written and cannot be ignored. Neither the Fuel Order nor the Settlement Order made a finding of intent of the type that is now being untimely advanced by the Commission.

VIII. REPLY TO ARGUMENTS THAT FPUC WAS UNDEREARNING AND THAT THE BRFA, THUS, DID NOT APPLY.

The Commission submits to this Court that "[c]ommon sense would dictate" and that it "contends" that the BRFA is "inapplicable" or "lifted" because of the allegation that FPUC was underearning at the time of the hearing. (AB-PSC, pp. 24, 28) This is improper argument. The Fuel Order made no finding as to the actual earnings of FPUC, or that the alleged underearnings made the BRFA inapplicable. The Commission did not make a finding as to what steps would need to be taken to relieve the Company from the BRFA. The Settlement provided that FPUC "may" file a petition for a base rate increase if it is underearning (Appendix, p. 61). The Commission did not find this provision to be self-executing, or that FPUC took steps to trigger it. FPUC did not raise this defense with the Commission and has waived it.[8]

IX. REPLY TO ARGUMENT THAT THE COSTS AT ISSUE HAVE BEEN TRADITIONALLY AND HISTORICALLY RECOVERED IN BASE RATES

Both the Commission and FPUC repeatedly attempt to recast the evidence in a way that is entirely inconsistent with the finding of the Fuel Order and the record so that it fits their effort to ignore or diminish the application of the BRFA. The agency refers to the TIA costs more broadly as "interconnection costs" without

[8] See footnote 7.

regard to whether they are capital costs or expenses (AB-PSC, pp. 39-42) or "transmission costs" (AB-PSC, p. 42) instead of the investment in assets that they uncontrovertibly represent. Types or categories of investment in assets become costs "associated with items" (AB-FPUC, p. 21) in FPUC's effort to reshape into expenses what are unequivocally capital assets and thus mask the Commission's actions. The BRFA is highly specific and the appellees have resorted to semantic devices to evade the requirements of the Settlement Order. The Commission practically concedes that the TIA meets the "cost-type" test of the BRFA, in stating:

> The interconnection project is a capital project, the transmission interconnection costs of which are generally of a type that is traditionally and historically recovered in base rates

(AB-PSC, p.41) Nevertheless, the Commission ignores the ownership-in-the-asset-investment element of the BRFA and claims that "FPUC is currently recovering certain costs associated with transmission through the Fuel Clause." (AB-PSC, p. 42) This claim has no basis in fact relative to BRFA. The BRFA would not prohibit TIA Fuel Clause recovery if the historical type of costs at issue had been FPUC's *own* investment in capital costs (or assets) and had been recovered in the Fuel Clause (or another clause). (Appendix, p. 60) However, this was not the case. The record evidence cited by the Commission (AB-PSC, p. 42) relates only to irrelevant historical expenses that include a payment to another company for a portion of *that other company's* recovery of its fuel-related costs, including transmission costs. The

TIA fails the BRFA's test. There is no evidence that FPUC incurred those historical costs as anything other than expenses. The Commissions assertions are baseless and misleading and must be rejected.

X. REPLY TO ARGUMENTS THAT THE COURT SHOULD DISREGARD THE MATTERS CONTAINED WITHIN THE ENTIRETY OF ORDER NO. PSC-14-0517-S-EI (THE SETTLEMENT ORDER).

In suggesting that the OPC's brief relied on matters outside the record, the Commission and FPUC are wrong. (AB-PSC, pp. 14-15; AB-FPUC, p.21) The Commission seeks to disavow its own order merely because it has adopted a shortcut method of sloppy record keeping. The Court should summarily reject the Commission's efforts to block the Court from fully reviewing the agency's errors. That portion of the Settlement Order actually crafted by the Commission is a mere four pages long; however, it expressly incorporates the entirety of a single document that contains the Settlement and the joint motion by the signatories seeking approval of both.[9]

[9] At page three of the Settlement Order it states:

> ORDERED by the Florida Public Service Commission that the Joint Motion of Florida Public Utilities Company and the Office of Public Counsel for Approval of the Stipulation and Settlement is hereby granted and that the Stipulation and Settlement dated August 29, 2014, Document No. 04856-14, is hereby approved and incorporated herein by reference.

The entirety of Document No. 04856-14 is part of the Settlement Order by Commission designation. There is no defect in the Settlement Order as far as its veracity or its place in the record. The documents that are incorporated into the Settlement Order are not "evidence" in the sense that they must be admitted under the rules of evidence, but instead are fully part of the Commission's own order of which it can and should take official notice. The Commission's citation to *Diversified Numismatics, Inc. v. City of Orlando,* 959 F. 2d 382 (11th Cir. 1991) is misplaced. The improperly referenced material was a newspaper article.

CONCLUSION

For the reasons set out and (here reaffirmed) in Citizens' Initial Brief and contained in this Reply Brief, OPC reasserts that the Commission departed from the essential requirements of the law when it failed to follow the policy of the BRFA contained in the comprehensive rate order resolving a general base rate case, which expressly prohibits FPUC from recovering the TIA through the Fuel Clause. Citizens ask the Court to set aside the Commission's Fuel Order on this limited point and to direct the Commission to enforce its own policy contained in the BRFA and Order No. PSC-14-0517-S-EI, and to order FPUC customers' fuel adjustment cost recovery clause rates to be reduced by $107,333 accordingly.

Respectfully submitted,

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I HEREBY CERTIFY that a true and foregoing copy of CITIZENS' REPLY BRIEF has been furnished by electronic mail on this 18th day of July, 2016, to the following:

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I HEREBY CERTIFY, pursuant to Rule 9.100(l), Florida Rules of Appellate Procedure, that the CITIZENS' REPLY BRIEF was prepared using a Times New Roman 14-point font.

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