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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-95
Lower Tribunal No(s).: 140001-EI

CITIZENS OF THE STATE OF FLORIDA vs. ART GRAHAM, ETC., ET AL.

CASE NO.: SC15-113
Lower Tribunal No(s).: 150001-EI

CITIZENS OF THE STATE OF FLORIDA vs. ART GRAHAM, ETC., ET AL.

CASE NO.: SC15-115
Lower Tribunal No(s).: 140001-EI

CITIZENS OF THE STATE OF FLORIDA vs. ART GRAHAM, ETC., ET AL.

CASE NO.: SC15-274
Lower Tribunal No(s).: 150001-EI
140001-EI

FLORIDA INDUSTRIAL POWER USERS GROUP vs. ART GRAHAM, ETC., ET AL.

Appellant(s) Appellee(s)

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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 an Initial Brief as "IB-___, p.___" and Answer Brief as "AB-___, p."

ARGUMENT

I. REPLY TO APPELLEE'S UNLIMITED EXPANSION OF COMMISSION JURISDICTION

A. Standard of Review

The function of an electric utility is critical to these consolidated cases, because it is axiomatic that an electric utility cannot recover, from customers, monies for services that are outside the statutorily defined scope of an electric utility. (IB-OPC, p. 15-23). Evaluating the statutorily defined scope of an electric utility, set forth in Section 366.02(2), F.S., does not involve agency deference when the plain language of the statute is clear. *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007). Appellees argue this Court should apply a deferential standard of review (AB-PSC, p. 16; AB-FPL, p. 9-10), even though the deferential standard does not apply when the plain language of the statute is clear and umambiguous. *GTC, Inc.*, 967 So. 2d at 785.

Appellees' reliance on *Florida Power Corp. v. Garcia*, 780 So. 2d 34 (Fla. 2001) and *Panda-Kathleen, L.P. v. Clark*, 701 So. 2d 322 (Fla. 1997) is misplaced. (AB-PSC, p. 16, AB-FPL, p. 9-10). In *Florida Power Corp*., the "narrow question presented" involved the preclusive effect of a prior declaratory statement on a later

and similar petition for declaratory statement. *Id*. at 35. *Kathleen-Panda* dealt with the Commission's interpretation of its own rules. Neither *Florida Power Corp.* nor *Kathleen-Panda* implicate an agency's interpretation of the plain meaning of a statute. Therefore, the *de novo* standard is the appropriate standard of review in this case.

B. Appellees Urges an Unlimited Scope of Recovery by Utilities

Appellees' arguments ignore the fact that the Commission is a creature of statute and must derive its powers from statute. *Peoples Gas Sys., Inc. v. City Gas Co.*, 167 So. 2d 577 (Fla. 1964); *Florida Tel. Corp. v. Carter*, 70 So. 2d 508 (Fla. 1954). FPL then inexplicably argues that the statute defining the scope of an electric utility, Section 366.02(2), F.S., is irrelevant or superfluous in determining what costs the utility may recover from its customers. (AB-FPL, p. 17). Not only does FPL argue the statutorily prescribed scope of a utility is irrelevant in determining what that utility may recover through rates, FPL goes even further by arguing that the Commission has no restrictions on its authority to approve the types of costs a utility may recover. (AB-FPL, p. 14). FPL then makes the novel argument that the language of Section 366.01, F.S., means the Commission can ignore the statutorily defined scope of a utility in considering cost recovery and only limit cost recovery if a statute or case restricts a particular type of cost recovery. (AB-FPL, p. 16-17).

Aside from ignoring the statutory limitations on an electric utility's activities, FPL cites two cases for its unlimited expansion of Commission jurisdiction argument.

Gulf Power Co. v. Wilson, 597 So. 2d 270 (Fla. 1992), is inapplicable here as used by FPL. It was cited for the proposition that the Commission has broad discretion when setting a rate of return. (AB-FPL, p. 14). Rate of return allowance is irrelevant to the primary question of statutory jurisdiction and provides no support to an argument that the Commission has unfettered discretion to allow recovery for any type of cost. FPL then quotes *GTC, Inc.*, 967 So. 2d at 787, "[t]he PSC is invested with discretion to determine what amount of [ ] recovery costs are reasonable to be charged to the consumer." The word FPL failed to include in this quote is "storm," which is significant and undermines their citation of the case. In *GTC, Inc.*, the Court was looking at the Commission's interpretation of the storm recovery statute, Section 364.051(4)(b), F.S. (2007). FPL's citation to *GTC, Inc.* for the Commission's discretion in cost recovery that involved a situation where a statute specifically existed allowing storm cost recovery is not relevant in this case, as no statute addresses recovery of mining investments. Moreover, that case actually supports Citizens' position that deference to the Commission should only apply where a statute specifically addressing the issue requires interpretation.

The Commission's arguments do not reach the unlimited scope of recovery that FPL advocates; however, the Commission also fails to acknowledge that, as a creature of statute, it is bound by limits set by the Legislature. The Commission ignores the statutory scope of an electric utility in its jurisdictional arguments and relies on a self-

serving list of its own orders to argue it possesses jurisdiction over any fuel-related expenses. (AB-PSC, p. 18-19). The entire list of Commission orders presented on pages 18-19 of the Commission's Answer Brief involved physical capital investments owned by the utility that lowered the cost of fuel. The capital investments were rail cars (cheaper than leasing cars to deliver fuel) and turbine upgrades to burn cheaper fuel in Order No. PSC-95-1089-FOF-EI; physical plant uprates to generate electricity more efficiently in Order No. PSC-96-1172-FOF-EI; and plant turbine/fuel conversions to burn cheaper fuel or burn fuel more efficiently in Order Nos. PSC96-0353-FOF-EI, PSC-97-1045-FOF-EI, PSC-97-0359-FOF-EI, PSC 98-0412-FOF-EI, PSC-12-0498-FOF-EI, and PSC-14-0309-PAA-EI. None of these orders involve an investment in a mining operation where the utility will not own anything except a time-limited, exclusive right to attempt to capture natural gas. (Gas TR V. 2, pp. 198-99). Clearly, recovery of costs incurred during an attempt to capture fugacious minerals is not comparable to physical items added or attached to a utility's generation facility.

Furthermore, the Commission previously recognized that a utility's fuel supply and delivery network created through a system of wholly-owned subsidiaries is not subject to the jurisdiction of the Commission. *In re: Investigation into affiliated cost-plus fuel supply relationships of Florida Power Corporation*, Order No. 21847, 1989 Fla. PUC LEXIS 1415, *5 (Sept. 7, 1989). In Order No. 21847, the Commission

examined affiliate transactions where a utility's wholly-owned subsidiary invested in coal mines and sold the fuel to the utility. The Commission used a market-based pricing standard to evaluate affiliated transactions, excluding any profit or recovery of investment costs. The fuel costs were based solely on the market price of coal as though the utility purchased the fuel from an unaffiliated entity. *Id.* at 3-6. The Commission recognized the subsidiary was not within the jurisdiction of the Commission, which is precisely analogous to the situation in the Woodford Project. USG, the entity that will hold the gas reserves, is a wholly-owned subsidiary of FPL. (Gas TR V. 1, p. 86). In Woodford, FPL will recover the costs of the investment, with a guaranteed profit for shareholders, from the customers on behalf of FPL's wholly-owned supply and delivery entity that is not subject to the Commission's jurisdiction.

FPL's argument regarding cost recovery of supporting materials such as vehicles, computer systems, etc. (AB-FPL, p. 17) aligns with the argument presented in Citizens' initial brief. (IB-OPC, p. 20, 22-23). Citizens acknowledge that the Commission has jurisdictional authority to grant cost recovery for the purchase in the marketplace of those items that directly support the generation, transmission, and distribution of electricity, such as vehicles, spare parts, and computer systems. *Id.* However, FPL creates its own dichotomy by manufacturing a comparison between mining investments and support equipment, when it argues mining investments cut out the middlemen that normally supply that direct support equipment and, instead,

transgressing the scope of an electric utility by mining for its own fuel. Logically, moving beyond a middleman that supplies a product or service used by the utility takes the utility at least one step further from the scope of generating, transmitting, and distributing electricity to the production of a natural resource and into a realm of risk incurrence not contemplated by the statutory definition of electric utility.

Appellees fail to explain why this Court should abandon the statutory scope of an electric utility presented in Section 366.02(2), F.S., in determining what cost recovery the Commission can grant to an electric utility. The Commission's attempted comparison of physical plant modifications and improvements approved through prior Commission orders to a leasehold interest to enter land and attempt to capture minerals falls short as well. Finally, it is inconceivable that the Legislature granted the Commission completely unfettered power to allow recovery of any cost requested by an electric utility and only limit recovery if a statute explicitly excludes such recovery as FPL argues. Thus, FPL asks this Court to ignore at least 60 years of precedent that the Commission "has only such powers as has been granted to it by the Legislature." *Florida Tel. Corp.*, 70 So. 2d at 510. Electric utilities are not oil and gas owners or operators (those are found in Chapter 377, F.S., not Chapter 366, F.S.), and the Florida Statutes do not grant the Commission the power, either explicitly or implicitly, to allow electric utilities to recover intangible mining investments from their customers.

C. The Fuel Clause and Hedging

After asking this Court to ignore the defined scope of an electric utility when considering what costs an electric utility may recover from its captive customers, Appellees then attempt to shoehorn gas reserves investments into the fuel clause by creating fragile analogies that contradict their own positions. Furthermore, Appellees mis-portray several important differences between gas reserves investments and prior Commission policy.

First, FPL misstates Commission policy by attempting to conflate fuel and fuel-related capital investments. FPL claims Citizens is incorrect in stating utilities do not earn a profit on fuel, and then proceeds to discuss profits on fuel-related capital investments. (AB-p. 21). It is undisputed that utilities do not earn a profit on the fuel commodity itself. *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, p. 6, Order No. PSC-11-0579-FOF-EI (Dec. 16, 2011); *In re: General investigation of fuel adjustment clauses of electric companies*, Order No. 6357, 1974 Fla. PUC LEXIS 70 (Nov. 26, 1974); Gas TR V. 2, p. 313; AB-PSC, p. 27 (Commission acknowledges utilities do not earn a profit on fuel they purchase.)

Next, FPL argues the Woodford Project involves buying natural gas in the ground and sidestepping the middlemen. (AB-FPL, p. 18). This rationale cannot stand. FPL is placing itself in the business of natural gas mining and assuming on the

customers' behalf all of the attendant risks that the Legislature walled off when it defined the statutory scope of the electric utility. Moreover, FPL is not buying natural gas in the ground in the Woodford Project; FPL is recovering costs, from customers, for the right to attempt to capture natural gas in the ground. (Gas TR V. 2 pp., 198-99; *see also Frost v. City of Ponca City*, 1975 Okla. LEXIS 538, (Okla. 1975)).

Appellees then attempt to construct a false equivalence between gas reserves investments and fuel-related capital projects approved in prior Commission orders. (AB-FPL, p. 21; AB-PSC, pp. 28-29). The laundry list of orders cited, discussed above, entail physical plant modifications or additions, which are tangible assets directly performing the generation, transmission, and/or distribution functions of an electric utility under Section 366.02(2), F.S., not cost recovery for mining fugacious minerals in another state. FPL's assertion that "no difference exists between the capital investment here and others related to producing electricity" evades reality. (AB-FPL, p. 22). FPL fails to cite any precedent or Commission order that involves recovery of a capital investment in an intangible asset, which is precisely what the Woodford Project is – a capital investment in a mining operation where the investment secures only the right to attempt to capture natural gas. (Gas TR V. 2, pp. 198-99).

The Commission then argues that the adjective "fixed price" in the definition of hedging activities on page 1 of Attachment A to Commission Order No. PSC-08-

0667-PAA-EI may only apply to one of the two adjectives modifying transactions, specifically financial transactions and not physical transactions. (AB-PSC, pp. 25-26). Aside from the fact that the Commission's argument frustrates basic rules of grammar, the Court need only look at the confidential portions of FPL's Commission approved hedging plan (Att. 3, page 5 of document 03997-14 under "2015 Hedging Strategy" paren 2) to determine which terms "fixed price" actually modifies. Moreover, Appellees' briefs continually refer to savings (which is irrelevant under hedging according to Order No. PSC-08-0667) while claiming "essentially fixed" is the same as fixed price in their arguments that there was no deviation from prior policy. Simultaneously, Appellees' carry the theme that deviation from prior policy was adequately explained throughout their briefs. These inconsistencies show that Appellees' positions are tenuous at best.

FPL also attempts to attack Citizens' arguments regarding fixed price by proposing that "largely fixed [costs], even if the exact amount of gas to be extracted will not be known" is somehow equivalent to fixed price for fixed quantities. (AB-FPL, p. 20). The record shows that all prior hedging activities have involved fixed prices for fixed quantities. (Gas Ex. 55, pp. 392-93). Order No. PSC-08-0667-PAA-EI requires hedging activities to be fixed price. Any assertion that paying an "essentially fixed" price for a variable quantity is equivalent to an actual fixed price for a fixed quantity is without merit, because a fixed price for an unknown and

variable quantity cannot truly be a fixed price for a commodity that is sold on a given price per quantity basis.

D. Order No. 14546

Appellees misinterpret the conflict presented by *In re: Cost recovery methods for fuel-related expenses,* Order No. 14546 (July 8, 1985), 1985 Fla. PUC LEXIS 531, and *In re: Petition for increase in rates by Florida Power & Light Company*, Order No. PSC-13-0023-S-EI (Jan. 14, 2013). First, Citizens is in no way attempting to challenge Order No. PSC-13-0023-S-EI that this Court affirmed in *Citizens v. Florida Public Service Commission*, 146 So. 3d 1143 (Fla. 2014). FPL's assertion that illustrating conflicting provisions of existing orders is somehow a challenge to the validity of an order is an attempt to obfuscate the actual issue – i.e., that the orders conflict, and the conflict must be resolved.

Appellees argue that the clause "traditionally and historically would be, have been, or are presently recovered through cost recovery clauses or surcharges" on page 5 of Attachment A to Order No. PSC-13-0023-S-EI allows the inclusion of base rate items (which is a requirement for inclusion in the Fuel Clause under Order No. 14546); however, this does not correct the defect. As discussed above, traditionally and historically recovered hedging costs involved fixed prices for fixed quantities. (*see supra* Section I. C.). The Woodford Project's gas reserves investments are not fixed. At best they are only essentially fixed, and the quantities are not fixed as FPL

acknowledged in its Answer Brief on page 20. Therefore, the conflict between Order Nos. 14546 and PSC-13-0023-S-EI exists and cannot be reconciled.

II. Reply to Competent and Substantial Evidence

As discussed above, the key requirement for classification as a hedging activity is fixed price as evidenced by Commission practice of approving fixed price for fixed quantity hedging transactions. The Commission argues Witness Taylor's testimony supports Witness Forrest's testimony regarding the inputs to price/quantity determinations (AB-PSC, p. 36); however, this assertion is incorrect. Witness Forrest acknowledged that he defers to Witness Taylor for those very inputs. (Gas TR V. 2, p. 177). And, as discussed previously, if a quantity of the commodity is expected to vary by 10% to 20% in the aggregate (Gas TR V. 8, p. 856) with prices that are essentially fixed, then it cannot satisfy the long-standing Commission practice that requires fixed price for fixed quantity hedging activities.

FPL argues that the chart in the Woodford Order showing the potential savings with a 10% production band instead of the 10% to 20% supported by the record (AB-FPL, p. 26) is not an actual finding, and therefore cannot be attacked as unsupported by the record. This position supports Citizens' arguments in the initial brief that the lack of citations or references to the record frustrates judicial review since one cannot know what portions of the Woodford Order are findings and what portions are not. According to FPL, the sole chart containing figures related to production volumes and

savings, which were figures the Commission used as justification, is not a finding. Although that rationale avoids the issue presented by ignoring Witness Taylor's production level testimony (the only competent and substantial evidence in the record on production levels), it only serves to illustrate Citizens' arguments that it is unclear, at best, as to what evidence the Commission relied upon to deviate from prior Commission policy.

III. Reply to Inconsistencies in Evidentiary Requirements and Procedure

The Woodford and Fuel Clause hearings were hearings affecting the substantial interests of the parties. The hearings conducted below were Chapter 120 hearings. This is not in dispute. Rule 28-106.101, F.A.C., states that Rule Chapter 28-106, F.A.C., applies to all Chapter 120, F.S. proceedings except for three instances, none of which apply here. Rule 28-106.206, F.A.C., states Florida Rules of Civil Procedure 1.280 through 1.400 apply to Chapter 120 proceedings. Rule 28-106.213, F.A.C., incorporates specific sections of the Florida Evidence Code for Chapter 120 proceedings. Section 120.569(2)(g), F.S., also governs evidence during Chapter 120 proceedings. The law is clear and straightforward on these issues. Appellees' argument that a ratemaking proceeding negates or lessens these requirements is incorrect and baseless.

OPC stated below that Commission staff made clear it was not a party (Gas TR V. 1, p. 30), and FPL acknowledges Commission staff was not a party. (AB-FPL, p.

31). Rules 1.280 through 1.400 of the Florida Rules of Civil Procedure, specifically Rule 1.330, is for use by parties per the plain language of the Rule. FPL's argument that Florida Rule of Civil Procedure 1.330(a)(3)(F) allows staff to enter depositions into the record fails on two fronts. (AB-FPL, p. 29) First, staff was not a party during the proceedings below per the clear and unambiguous language of the rule and the acknowledgement of all parties. And, second, even if staff were able to use a provision applicable only to parties, Florida Rule of Civil Procedure 1.330(a)(3)(F) does not negate the provision found in 1.330(c) (which specifically exempts only uses under 1.330(a)(2)) that entry of the deposition makes the deponent the party's witness. Thus, entering the deposition of a party into the record places staff in the position of adopting one party's witness and making staff adverse to another party in the proceeding below.

Furthermore, the cases cited by Appellees stand only for the proposition that Commission staff may "test the validity, credibility, and competence of the evidence presented." *S. Fla. Natural Gas Co., v. Public Serv. Comm'n*, 534 So. 2d 695, 698 (Fla. 1988); *Legal Envtl. Assistance Found. v. Clark*, 668 So. 2d 982, 986 (Fla. 1996) ("*LEAF*"). Although Commission staff entered evidence into the record in *LEAF*, the Court did not address the specific action of entering evidence into the record over the objection of other parties, thus, the Florida Rules of Civil Procedure govern. Appellees also clearly misunderstood Citizens' arguments regarding irrelevant or

immaterial evidence. Citizens' reference to objections made by FPL in the deposition transcripts (IB-OPC, p. 40) was an example of instances where FPL objected to issues, such as relevance, that were never addressed by the Commission in its acceptance of deposition transcripts wholesale. The lack of citation to the record combined with a record that included irrelevant/immaterial/unduly repetitious evidence contrary to Section 120.569(2)(g), F.S., creates a defective procedure that materially affects the review of the proceedings below by forcing the Court to wade through a morass of unnecessary materials and attempt to guess at what the Commission used to make its decisions. This can only serve to chill the use of discovery and frustrate the Court's review.

IV. Reply to Waiver of Challenge to the Fuel Order

Appellees' assertions that OPC stipulated to FPL's Risk Management Plan ("RMP")(AB-FPL, p. 8; AB-PSC, p. 15, 48) approved in the Fuel Order are incorrect. At no time did OPC stipulate to FPL's RMP. (R.V. 6, 1005-19, 1079). Moreover, as discussed in Citizens' Initial Brief (IB-OPC, p. 4-6), at the time of the hearing for the Fuel Order, Citizens' took no position on FPL's RMP, because OPC's Motion to Dismiss on FPL's Gas Reserves issues was still pending. Therefore, FPL's inclusion of gas reserves in its RMP was merely a hypothetical at the time the Commission approved FPL's RMP. The Commission approved FPL's gas reserves investment request after the Fuel Hearing, thereby retroactively creating an issue in the RMP

approved at the preceding Fuel Hearing. OPC placed all parties on notice that it objected to FPL using gas reserves investments through its Motion to Dismiss. (R.V. 4, pp. 678-701). At the Fuel Hearing, the inclusion of gas reserves investments was merely a hypothetical and not ripe. Appellees cannot use timing issues (the fact that gas reserves investments did not transition from a challenged hypothetical to approved by the Commission until after the Fuel Order hearing ended) to bar Citizens' challenge of the inclusion of gas reserves investments.

VI. Conclusion

For the reasons set forth in the Initial Brief and this Reply Brief, the Commission lacked subject matter jurisdiction to grant FPL's request to recover costs of mining investments and associated profits from FPL's customers. This Court should reverse and remand with instructions the Commission's Motion to Dismiss Order, the Woodford Order, and the portion of the Fuel Order approving gas reserves investments as part of FPL's Risk Management Plan. The Commission should receive instructions that it lacks subject matter jurisdiction to allow the recovery of gas reserves investments, that the Commission cannot deviate from prior policies/decisions or Commission rules without acknowledgement or explanation, and that the Commission is bound to follow the applicable evidentiary and procedural requirements discussed in the Initial Brief and Reply Brief.

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I HEREBY CERTIFY that a true and correct copy of the foregoing **CITIZENS' REPLY BRIEF** has been furnished by electronic mail on this 8th day of September, 2015, to the following:

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CERTIFICATE OF COMPLIANCE

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

s/ John J Truitt
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