

State of Florida



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## Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** May 23, 2018

**TO:** Office of Commission Clerk (Stauffer)

**FROM:** Office of the General Counsel (Cowdery) *JK*  
Division of Accounting and Finance (Fletcher) *BS ALM JMC*  
Division of Economics (Draper, Guffey) *PA EJA*  
Division of Engineering (Graves, King) *W TW*

**RE:** <sup>*PL*</sup> Docket No. 20180029-WS – Proposed amendment of Rule 25-30.433, F.A.C.,  
Rate Case Proceedings.

**AGENDA:** 06/05/18 – Post-Hearing Recommendation – Participation Limited to  
Commissioners and Staff

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Brown

**RULE STATUS:** May be deferred

**SPECIAL INSTRUCTIONS:** None

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### Case Background

Rule 25-30.433, Florida Administrative Code (F.A.C.), addresses the procedures that apply in water and wastewater rate case proceedings. The rule includes the subsection (1) requirement that the Commission make a determination on the quality of service provided by the utility in every rate case. The rule states that this determination will be based on an evaluation of three separate components of water and wastewater utility operations: (1) quality of the utility's product (water and wastewater); (2) operational conditions of the utility's plant and facilities; and (3) the utility's attempt to address customer satisfaction. Rulemaking to amend Rule 25-30.433, F.A.C., was initiated by staff in order to remove consideration of the operational conditions of the utility's plant and facilities as one of the factors the Commission considers in evaluating a utility's quality of service under subsection (1). The rule was amended so that the

Commission considers operational conditions of the utility's plant and facilities separately from quality of service in a new subsection (2). In addition, the factors considered by the Commission in making these determinations were updated to clarify and codify existing agency practice.

The Office of Public Counsel (OPC) participated in the December 14, 2017, staff rule development workshop on Rule 25-30.433, F.A.C. OPC filed post-workshop comments that included its suggestion that paragraph (1)(d) concerning the Commission's determination of quality of service should be amended to require the Commission to consider all customer communications, verbal and written, to the greatest extent possible, in recognition of the customers' interest in the quality of service determination. In addition, OPC commented that paragraph (2), concerning the Commission's determination of operational conditions of the utility plant, should allow for customers, utility employees, or other knowledgeable persons to provide information related to the utility's infrastructure or operational conditions of the plant and facilities. OPC did not provide any specific language for amending the rule.

In response to OPC's comments, staff broadened the language of Rule 25-30.433, F.A.C., and recommended that rule paragraph (1)(d) be amended to require the Commission, as part of determining quality of service in rate cases, to consider: "Any testimony, complaints and comments of the utility's customers and others with knowledge of the utility's quality of service." Staff further recommended that paragraph (2)(c) be added to the rule to require the Commission, as part of determining whether the infrastructure and operational conditions of the plant and facilities are in compliance with Rule 25-30.225, F.A.C., to consider: "Any testimony, complaints and comments of the utility's customers and others with knowledge of the infrastructure and operational conditions of the utility's plant and facilities." In its recommendation to the Commission, staff stated that it believed that:

[T]he recommended rule language is broad enough to sufficiently cover the many ways that customer complaints and comments are provided to the Commission (e.g., both oral and written statements directly from customers, OPC testimony in its representation of customers, Commission staff testimony regarding customer complaints).

The Commission considered staff's recommended amendments to Rule 25-30.433, F.A.C., at its March 1, 2018, Agenda Conference. The Office of Public Counsel (OPC) spoke at the March 1, 2018, Agenda Conference, and suggested that additional language taken from the staff recommendation should be added to recommended paragraphs (1)(d) and (2)(c), as follows:

(1)(d) Any testimony, complaints and comments of the utility's customers and others with knowledge of the utility's quality of service (e.g., both oral and written statements directly from customers, OPC testimony in its representation of customers, Commission staff testimony regarding customer complaints); and

(2)(c) Any testimony, complaints and comments of the utility's customers and others with knowledge of the infrastructure and operational conditions of the utility's plant and facilities (e.g., both oral and written statements directly from

customers, OPC testimony in its representation of customers, Commission staff testimony regarding customer complaints); and

The Commission approved staff's recommended amendments to Rule 25-30.433, F.A.C., without the changes suggested by OPC. The Commission certified proposed Rule 25-30.433, F.A.C., as a minor violation rule, and approved the Statement of Estimated Regulatory Costs' findings. Proposed Rule 25-30.433, F.A.C., was published in the March 5, 2018, edition of the F.A.R., Volume 44, Number 44. A copy of proposed Rule 25-30.433, F.A.C., is attached as Attachment A.

On March 22, 2018, pursuant to Section 120.54(3)(c), Florida Statutes (F.S.), OPC filed a Petition for a Hearing on paragraphs (1)(d) and (2)(c) of proposed Rule 25-30.433, F.A.C. (Petition). A rule hearing was held before the full Commission on May 8, 2018, pursuant to notice appearing in the March 13, 2018, edition of the F.A.R., Volume 44, Number 73. At the rule hearing, OPC suggested different language for changing the proposed rule than it had requested in its Petition. Following OPC's argument, the Commission directed staff to bring a recommendation to the June 5, 2018, Agenda Conference, on the changes to the proposed rule suggested by OPC.

This recommendation addresses whether the Commission should make changes to paragraphs (1)(d) and (2)(c) of proposed Rule 25-30.433, F.A.C., as suggested by OPC. The Commission has jurisdiction pursuant to Sections 120.54, 350.127(2), 367.0812(5), 367.0814, 367.121, and 367.1213, F.S.

## Discussion of Issues

**Issue 1:** Should the Commission make the Office of Public Counsel's suggested changes to paragraphs (1)(d) and (2)(c) of proposed Rule 25-30.433, F.A.C.?

**Recommendation:** No. Staff recommends that the Commission should not make changes to paragraphs (1)(d) and (2)(c) of proposed Rule 25-30.433, F.A.C. Proposed Rule 25-30.433, F.A.C., as set forth in Attachment A, should be filed with the Department of State pursuant to the provisions of Section 120.54, F.S. (Cowdery, King, Graves, Fletcher, Draper, Guffey)

**Staff Analysis:** A rule hearing was held by the Commission on May 8, 2018, on OPC's Petition to make changes to paragraphs (1)(d) and (2)(c) of proposed Rule 25-30.433, F.A.C. (Petition). Pursuant to subparagraph 120.54(3)(c)1., F.S., the Commission is required, in making its decision, to consider OPC's Petition and documents introduced by OPC at the May 8, 2018, rule hearing.

### OPCs Arguments at the Rule Hearing

OPC's Petition requested that the Commission change proposed Rule 25-30.433, F.A.C., by adding the following underlined language when making its quality of service determinations in rate case proceedings:

(1)(d) Any testimony, complaints and comments of the utility's customers and others with knowledge of the utility's quality of service (e.g., both oral and written statements directly from customers, OPC testimony in its representation of customers, Commission staff testimony regarding customer complaints); and

OPC also requested that the Commission change proposed Rule 25-30.433, F.A.C., by adding the following underlined language when making its determination in rate case proceedings on whether infrastructure and operational conditions of utility plant and facilities are in compliance with Rule 25-30.225, F.A.C.:

(2)(c) Any testimony, complaints and comments of the utility's customers and others with knowledge of the infrastructure and operational conditions of the utility's plant and facilities (e.g., both oral and written statements directly from customers, OPC testimony in its representation of customers, Commission staff testimony regarding customer complaints); and

At the May 8, 2018 rule hearing, OPC submitted language for changing Rule 25-30.433, that was different from the changes it had requested in its Petition, as follows:

(1)(d) Any testimony, complaints and comments of the utility's customers and others with knowledge of the utility's quality of service (including both oral and written statements provided by customers, informal and formal testimony by any party, and Commission staff testimony regarding customer complaints); and

(2)(c) Any testimony, complaints and comments of the utility's customers and others with knowledge of the infrastructure and operational conditions of the

utility's plant and facilities (including both oral and written statements provided by customers, formal and informal testimony by any party, and Commission staff testimony regarding customer complaints); and

OPC characterized its suggested examples as stating a minimum of what the Commission shall consider when determining quality of service and the infrastructure and operational conditions of the utility plant without excluding anything else from consideration. OPC stated that it does not believe proposed Rule 25-30.433, F.A.C., is deficient, but that it could be improved by including the suggested examples.

OPC argued that the Commission's intent should be expressed in the rule, especially in an arena where ambiguity has been found in the qualitative nature of customer testimony and other forms of customer input. OPC cited to Order No. 15490, issued December 23, 1985, Docket No. 850116-TL, In re: Show cause to Southern Bell regarding customer calling features, as an example where the plain language of the rule was inconsistent with the Commission's intent. The Commission in that case withdrew its order to show cause after determining that even though the Commission's intent was that the rule apply to each person seeking information on basic telephone service, the rule language itself referred to "applicants."

OPC explained that the reason why OPC suggested changing proposed Rule 25-30.433, F.A.C., to include examples of the types of comments, complaints, and statements the Commission must consider was OPC's concern that the rule as proposed could be subject to different interpretations in the future. OPC stated that in past rate cases there has been uneven or limited consideration of customer comments by the Commission. OPC pointed to a 1997 water and wastewater overearnings rate case, In re: Investigation of Rates of Gulf Utility, Order No. 97-0847-FOF-WS, issued July 15, 1997, Docket No. 960329-WS, citing to the order's statement that the Commission in evaluating customer service "also evaluated by a review of recent complaints and with direct customer testimony at hearing." OPC stated that the word "direct" suggests that the testimony was given "live" only at a formal hearing, indicating that the Commission could have discretion to define in a limiting manner what "any" means and what "testimony" means. OPC also noted that in recent Docket No. 20170222-WS, In re: Proposed amendment of Rules 25-30.130, Record of Complaints, and 25-30.355, Complaints, F.A.C., the Commission proposed amending Rule 25-30.130, F.A.C., to more specifically define "complaints," and didn't just say "any complaints."

OPC further argued that the Commission created ambiguity in interpreting proposed rule paragraphs (1)(d) and (2)(c) because the Commission considered and then rejected OPC's suggested language that gave examples of types of testimony and comments for consideration in future cases. OPC also raised a concern that paragraphs (1)(d) and (2)(c) might be read too narrowly because it read proposed paragraph (1)(b) as having narrowed the scope of information to be considered by the Commission in determining quality of service. OPC did not object to proposed paragraph (1)(b), but interprets it as constricting the scope of documentation to be considered because the rule language was amended from requiring consideration of "consent orders" to requiring consideration of "provisions of consent orders that relate to quality of service."

OPC stated that the reason it submitted the modified changes at hearing was to meet the concerns it perceived from the March 1, 2018, Agenda Conference. However, based on questioning by the Commissioners at the rule hearing, OPC concluded that of its two rule change options, it recommended that the Commission change the proposed rule as suggested originally at the March 1, 2018, Agenda Conference and in its Petition, except that the Latin phrase “e.g.” should be replaced with the phrase “for example.”

### **Staff Analysis**

Existing Rule 25-30.433, F.A.C., requires that in determining quality of service, the Commission must consider the testimony of utility’s customers. In order to clarify and codify existing agency practice, and in response to post-workshop comments by OPC, the Commission proposed paragraph (1)(d) that requires the Commission in determining quality of service to consider any testimony, complaints, and comments of the utility’s customers and others with knowledge of the utility’s quality of service. In addition, the Commission proposed paragraph (2)(c) that requires the Commission in determining infrastructure and operational conditions of the utility plant to consider any testimony, complaints, and comments of the utility’s customers and others with knowledge of the infrastructure and operational conditions of the utility’s plant and facilities. Staff believes that the plain meaning of this proposed language encompasses the specific examples suggested by OPC.

There is no ambiguity in the proposed language. The adjective “any” modifies the nouns testimony, complaints, and comments in each proposed paragraph, meaning that the Commission shall consider any testimony, any complaints, and any comments of utility customers and others with knowledge of the utility’s quality of service or infrastructure and operational conditions of the utility’s plant and facilities. See, e.g. State v. Huggins, 802 So. 2d 276 (Fla. 2001)(in interpreting a statutory provision where an adjective was followed by two nouns, the court stated that such phrases are commonly construed to mean that the adjective modifies subsequent nouns). OPC ultimately agreed with this interpretation of “any” at hearing. Further, as is generally the case, “any” in this context means “all.” E.g. Baker v. Economic Research Services, Inc., 44 Fla. L. Weekly D643 (Fla. 1st DCA 2018)). Staff believes that the plain language of the proposed rule should result in consistency in the Commission’s consideration of all listed input into its determinations of quality of service and the infrastructure and operational conditions of utility plant and facilities in rate cases.

Staff does not believe that In re: Show cause to Southern Bell, Order No. 15490, is applicable to the proposed rule language. In that case, the Commission ordered Southern Bell to show cause why it should not be fined for violation of Rule 25-4.107(1), F.A.C., that required a telephone company, upon initial contact, to inform an applicant for service of the least expensive service available. Staff had conducted an investigation by telephoning various Southern Bell business offices and inquiring as to the cost for basic telephone service, with responses not in compliance with Rule 25-4.107(1), F.A.C. The Commission withdrew the order to show cause because although it was the Commission’s intent that Rule 25-4.107(1), F.A.C., apply to each person seeking information about basic telephone service, the plain language of the rule addressed only “applicant.” Staff agrees with OPC that if the plain language of a rule does not reflect the Commission’s intent, the plain language must control. However, in this case, the plain language in the proposed rule is not restrictive, but broadly covers any testimony, complaints, and

comments of utility customers and others with knowledge of the utility's quality of service or infrastructure and operational conditions of the utility's plant and facilities.

OPC gave an example of what it believed showed the Commission's "uneven application" of the type of information considered in determining quality of service. OPC stated that Order No. 97-0847-FOF-WS, issued July 15, 1997, Docket No. 960329-WS, In re: Investigation of Rates of Gulf Utility, suggested that the Commission considered only direct customer testimony given at formal hearing in determining quality of service. Staff disagrees with OPC's position because the order indicates that in determining quality of service, in addition to reviewing recent complaints and hearing direct testimony at hearing, the Commission also heard testimony of customers attending the service hearing. Further, there is nothing in Order No. 97-0847 that would limit the plain language interpretation of proposed rule paragraphs (1)(d) and (2)(c) requiring the Commission to consider "any testimony, complaints and comments of the utility's customers and others with knowledge" of the quality of service or of the infrastructure and operational conditions of the utility's plant and facilities.

Including examples of types of comments, testimony, and complaints in the proposed rule may lead to confusion and ambiguity, raising the question of whether listing certain specific types of input excludes other specific types of input. Staff believes that the better practice is to not include unnecessary, superfluous, and duplicative language in rules. Staff likewise is of the opinion that the proposed language is clear and unambiguous, plainly includes all the examples identified by OPC, and that the proposed language should not be changed as suggested by OPC.

Staff notes that if the Commission does not change the proposed rule, it may choose to state in the Notice of Adoption of Rule that the language of paragraphs (1)(d) and (2)(c) is broad and includes by its plain language both oral and written statements provided directly by customers, testimony of any party, and Commission staff testimony regarding customer complaints.

If the Commission decides to change the proposed rule to include additional language in paragraphs (1)(d) and (2)(c), as suggested by OPC, staff would recommend that the Commission use the language suggested in OPC's Petition, except that the Latin abbreviation "e.g." should be replaced with the phrase "for example" because plain language is clear and as such preferable to the use of jargon and Latin abbreviations common to legal writing. (See Attachment B hereto) If the Commission makes these changes, it would not affect the conclusion in the SERC and would not change the rule's status as a minor violation rule.

### **Conclusion**

As discussed above, staff recommends that the Commission should not make changes to paragraphs (1)(d) and (2)(c) of proposed Rule 25-30.433, F.A.C. Proposed Rule 25-30.433, F.A.C., as set forth in Attachment A, should be filed with the Department of State pursuant to the provisions of Section 120.54, F.S.

**Issue 2:** Should this docket be closed?

**Recommendation:** Yes. If the Commission approves staff's recommendation in Issue 1, the rule may be then filed for adoption with the Department of State no sooner than 14 days after the June 5, 2018, Agenda Conference, and this docket should be closed. (Cowdery)

**Staff Analysis:** If the Commission approves staff's recommendation in Issue 1, the rule may be then filed for adoption with the Department of State no sooner than 14 days after the June 5, 2018, Agenda Conference, and this docket should be closed.

If the Commission votes to make changes to proposed Rule 25-30.433, F.A.C., a Notice of Change will be published in the Florida Administrative Register. The rule may be then filed for adoption with the Department of State 21 days after the Notice of Change is published in Florida Administrative Register, and this docket should be closed

1       **25-30.433 Rate Case Proceedings.**

2       In a rate case proceeding, the following provisions shall apply, ~~unless the applicant or any~~  
3 ~~intervenor demonstrates that these rules result in an unreasonable burden. In these instances,~~  
4 ~~fully supported alternatives will be considered by the Commission. Any alternatives proposed~~  
5 ~~by the utility must be filed with the minimum filing requirements.~~

6       (1) The Commission in every rate case shall make a determination of the quality of service  
7 provided by the utility by evaluating the. ~~This shall be derived from an evaluation of three~~  
8 ~~separate components of water and wastewater utility operations: quality of utility's product~~  
9 ~~(water and wastewater); operational conditions of utility's plant and facilities; and the utility's~~  
10 ~~attempt to address customer satisfaction (water and wastewater). In making this~~  
11 ~~determination, the Commission shall consider: Sanitary surveys, outstanding citations,~~  
12 ~~violations and consent orders on file with the Department of Environmental Protection (DEP)~~  
13 ~~and county health departments or lack thereof over the preceding 3 year period shall also be~~  
14 ~~considered. DEP and county health department officials' testimony concerning quality of~~  
15 ~~service as well as the testimony of utility's customers shall be considered.~~

16       (a) The most recent chemical analyses for each water system as described in Rule 25-  
17 30.440(3), F.A.C.;

18       (b) Any Department of Environmental Protection (DEP) and county health department  
19 citations, violations and provisions of consent orders that relate to quality of service;

20       (c) Any DEP and county health department officials' testimony concerning quality of  
21 service;

22       (d) Any testimony, complaints and comments of the utility's customers and others with  
23 knowledge of the utility's quality of service; and

24       (e) Any utility testimony and responses to the information provided in paragraphs (1)(a) –  
25 (d) above.

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from existing law.

1       (2) In order to ensure safe, efficient, and sufficient service to utility customers, the  
2 Commission shall consider whether the infrastructure and operational conditions of the plant  
3 and facilities are in compliance with Rule 25-30.225, F.A.C. In making this determination,  
4 the Commission shall consider:

5       (a) Any testimony of DEP and county health department officials;

6       (b) Inspections, including sanitary surveys for water systems and compliance evaluation  
7 inspections for wastewater systems; citations, violations and consent orders issued to the  
8 utility;

9       (c) Any testimony, complaints and comments of the utility's customers and others with  
10 knowledge of the infrastructure and operational conditions of the utility's plant and facilities;  
11 and

12       (d) Any utility testimony and responses to the information provided in paragraphs (2)(a) –  
13 (c) above.

14       ~~(3)(2)~~ Working capital for Class A utilities shall be calculated using the balance sheet  
15 approach. Working capital for Class B and C utilities shall be calculated using the formula  
16 method (one-eighth of operation and maintenance expenses).

17       ~~(4)(3)~~ Used and useful debit deferred taxes shall be offset against used and useful credit  
18 deferred taxes in the capital structure. Any resulting net debit deferred taxes shall be included  
19 as a separate line item in the rate base calculation. Any resulting net credit deferred taxes shall  
20 be included in the capital structure calculation. No other deferred debits shall be considered in  
21 rate base when the formula method of working capital is used.

22       ~~(5)(4)~~ The averaging method used by the Commission to calculate rate base and cost of  
23 capital shall be a 13-month average for Class A utilities and the simple beginning and end-of-  
24 year average for Class B and C utilities.

25       ~~(6)(5)~~ Non-used and useful adjustments shall be applied to the applicable depreciation  
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existing law.

1 expense. Property tax expense on non-used and useful plant shall not be allowed.

2 ~~(7)(6)~~ Charitable contributions shall not be recovered through rates.

3 ~~(8)(7)~~ Income tax expense shall not be allowed for subchapter S corporations, partnerships  
4 or sole proprietorships.

5 ~~(9)(8)~~ Non-recurring expenses shall be amortized over a 5-year period unless a shorter or  
6 longer period of time can be justified.

7 ~~(10)(9)~~ The amortization period for forced abandonment or the prudent retirement, in  
8 accordance with the National Association of Regulatory Utility Commissioners Uniform  
9 System of Accounts, of plant assets prior to the end of their depreciable life shall be calculated  
10 by taking the ratio of the net loss (original cost less accumulated depreciation and  
11 contributions-in-aid-of-construction (CIAC) plus accumulated amortization of CIAC plus any  
12 costs incurred to remove the asset less any salvage value) to the sum of the annual  
13 depreciation expense, net of amortization of CIAC, plus an amount equal to the rate of return  
14 that would have been allowed on the net invested plant that would have been included in rate  
15 base before the abandonment or retirement. This formula shall be used unless the specific  
16 circumstances surrounding the abandonment or retirement demonstrate a more appropriate  
17 amortization period.

18 ~~(11)(10)~~ A utility is required to have the right of access and continued use of own the land  
19 upon which the utility treatment facilities are located, ~~or possess the right to the continued use~~  
20 ~~of the land, such as a 99-year lease.~~ Documentation of continued use shall be in the form of a  
21 recorded warranty deed, recorded quit claim deed accompanied by title insurance, recorded  
22 lease such as a 99-year lease, or recorded easement. ~~The Commission may consider a written~~  
23 ~~easement or other cost-effective alternative.~~

24 ~~(12)(11)~~ In establishing an authorized rate of return on common equity, a utility, in lieu of  
25 presenting evidence, may use the current leverage formula adopted by Commission order. The  
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existing law.

1 equity return established shall be based on the equity leverage order in effect at the time the  
2 Commission decides the case.

3 ~~(13)~~(12) Nonutility investment should be removed directly from equity when reconciling  
4 the capital structure to rate base unless the utility can show, through competent evidence, that  
5 to do otherwise would result in a more equitable determination of the cost of capital for  
6 regulatory purposes.

7 ~~(14)~~(13) Interest expense to be included in the calculation of income tax expense shall be  
8 the amount derived by multiplying the amount of the debt components of the reconciled  
9 capital structure times the average weighted cost of the respective debt components. Interest  
10 expense shall include an amount for the parent debt adjustment in those cases covered by Rule  
11 25-14.004, F.A.C. Interest shall also be imputed on deferred investment tax credits in those  
12 cases covered by 26 CFR Part 1, s. 1.46-6(b)(2)(i), (3) and (4)(ii) issued May 22, 1986 and  
13 effective for property constructed or acquired on or after August 15, 1971.

14 *Rulemaking Authority 350.127(2), 367.0812(5), 367.0814, 367.121, 367.1213 FS. Law*  
15 *Implemented 367.081, 367.0812(1), 367.0814, 367.0822, 367.1213, ~~376.1213~~ FS. History—*  
16 *New 11-30-93, Amended 12-14-93, \_\_\_\_\_.*

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**Office of Public Counsel's suggested changes to proposed Rule 25-30.433, F.A.C.**

Section (1)

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(d) Any testimony, complaints and comments of the utility's customers and others with knowledge of the utility's quality of service (for example, both oral and written statements directly from customers, Office of Public Counsel testimony in its representation of customers, Commission staff testimony regarding customer complaints); and

Section (2)

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(c) Any testimony, complaints and comments of the utility's customers and others with knowledge of the infrastructure and operational conditions of the utility's plant and facilities (for example, both oral and written statements directly from customers, Office of Public Counsel testimony in its representation of customers, Commission staff testimony regarding customer complaints); and