

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: December 28, 2023

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Thompson, Crawford, Dose) *JSC*
Division of Accounting and Finance (Vogel) *ALM*
Division of Economics (Draper, Hampson) *EJD*
Division of Engineering (Ballinger) *TB*

RE: Docket No. 20230122-EI – Petition for variance from Rule 25-6.043(1)(a), F.A.C., by Tampa Electric Company.

AGENDA: 01/10/24 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: La Rosa

CRITICAL DATES: 01/24/24 (Date by which petition must be ruled on pursuant to Section 120.542(8), F.S.)

SPECIAL INSTRUCTIONS: None

Case Background

Tampa Electric Company (TECO or Company) is an investor-owned public electric utility servicing 810,000 customers in four counties¹ in Florida. On October 24, 2023, TECO filed a Petition for Variance from Rule 25-6.043(1)(a), Florida Administrative Code (F.A.C.). According to TECO, it requires a variance from this Rule in order to comply with the terms of Order No. PSC-2021-0423-S-EI (2021 Settlement Agreement),² by which the Commission

¹ All of Hillsborough County and parts of Pasco, Pinellas, and Polk counties.

² Order No. PSC-2021-0423-S-EI, issued November 10, 2021, in Docket Nos. 20210034-EI, *In re: Petition for rate increase by Tampa Electric Company*, and 20200264-EI, *In re: Petition for approval of 2020 depreciation and dismantlement study and capital recovery schedules, by Tampa Electric Company*.

approved the unanimous stipulation and settlement agreement in TECO's 2021 base rate proceeding.³

Rule 25-6.043(1), F.A.C., (MFR Rule) sets forth the general filing instructions for investor-owned electric utilities' minimum filing requirements (MFRs) when submitting applications for changes in rates. The MFR Rule, states, in pertinent part:

(a) The petition under Sections 366.06 and 366.071, F.S., for adjustment of rates must include or be accompanied by:

1. The information required by Commission Form PSC/AFD/011-E (2/04), entitled "Minimum Filing Requirements for Investor-Owned Electric Utilities" which is incorporated into this rule by reference. The form may be obtained from the Commission's Division of Accounting and Finance.

Schedule E of the Minimum Filing Requirements for Investor-Owned Utilities form⁴ (MFR Form) incorporated into the MFR Rule requires utilities to provide a cost of service study⁵ with any application for adjustment of rates. Specifically, the cost of service study required by the MFR Rule must allocate production and transmission plant using the average of the twelve monthly coincident peaks and 1/13th weighted average of demand. This method of allocation is abbreviated as the 12CP and 1/13th method.

TECO seeks a variance from the 12CP and 1/13th method to instead use a four coincident peaks and full Minimum Distribution System (4CP and MDS) method⁶ for the cost of service study submitted as part of an anticipated rate case in 2024. Per TECO's petition, the use of the 4CP and MDS method is driven by the 2021 Settlement Agreement:

The parties have agreed . . . that the company will, for purposes of meeting its initial burden of proof in complying with Rule 25-6.043, F.A.C., in Tampa Electric's next general rate base proceeding, file the cost of service MFRs using the 4CP and full MDS methods for cost allocation.⁷

TECO believes that this provision in the 2021 Settlement Agreement requires it to use the 4CP and MDS method in its next base rate case and, significantly, that it is also prohibited from using an alternative method, such as the 12CP and 1/13th method required by the MFR Rule. Consequently, TECO filed the petition giving rise to this docket.

³ The signatories to the 2021 Settlement Agreement are TECO; the Office of Public Counsel; the Florida Industrial Power Users Group; the West Central Florida Hospital Utility Alliance; the Federal Executive Agencies; the Florida Retail Federation; and Walmart, Inc.

⁴ This form may be accessed at <http://www.flrules.org/Gateway/reference.asp?No=Ref-12642>.

⁵ A cost of service study determines the total costs incurred by a utility in providing service to its customers and the appropriate allocation of those costs among various customer classes.

⁶ The MDS is a method of allocating distribution plant costs.

⁷ Order No. PSC-2021-0423-S-EI, pp. 29-31.

Docket No. 20230122-EI

Date: December 28, 2023

Pursuant to Section 120.542(6), Florida Statutes (F.S.), a Notice of Variance or Waiver was published in the November 16, 2023 edition of the Florida Administrative Register. The time for filing comments, provided by Rule 28-104.003, F.A.C., expired on November 30, 2023.

In response to TECO's request, the Commission received 136 comments in opposition to TECO's petition and one joint notice of support from the signatories to the 2021 Settlement Agreement. These comments are discussed in Issue 1.

This recommendation addresses TECO's petition. Pursuant to Section 120.542(8), F.S., the Commission must grant or deny a request for variance within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition. As such, the statutory deadline for this proceeding is January 24, 2024. The Commission has jurisdiction pursuant to Chapters 120 and 366, F.S.

Discussion of Issues

Issue 1: Should the Commission grant TECO’s petition for variance from Rule 25-6.043(1)(a), F.A.C.?

Recommendation: No, the Commission should deny TECO’s petition for variance from Rule 25-6.043(1)(a), F.A.C. (Thompson)

Staff Analysis:

Legal Standard for Rule Variances and Waivers

Florida law allows agencies to waive or provide other relief (variances) to persons subject to regulation where the strict application of uniformly applicable rule requirements leads to “unreasonable, unfair, and unintended results in particular instances.” Section 120.542(1), F.S. Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. Section 120.542(2), F.S.

TECO’s Petition

TECO requests a variance of the MFR Rule to use a 4CP and full MDS cost of service methodology when preparing the E Schedule MFRs in its next rate case, in lieu of the 12 CP and 1/13th methodology specified in the MFR Rule. TECO contends that the underlying purpose of the statute would not be affected by granting the waiver. Further, TECO contends that requiring TECO to use the 12CP and 1/13th methodology specified in the MFR Rule in the MFRs of TECO’s next base rate case would violate principles of fairness, because doing so would cause the Company “to violate the terms of its approved 2021 rate case settlement agreement.”

Purpose of the Underlying Statute

The MFR Rule primarily implements Section 366.06, F.S.,⁸ which sets forth the Commission’s statutory obligation to approve rates that are fair, just, and reasonable. Section 366.06, F.S., states, in pertinent part, that “the commission shall consider the cost of providing service to the class. . . ; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.”

The MFR Rule serves to provide the Commission a uniform method to consider the cost of providing services to the customer classes as well as to look at the consumption and load characteristics of those classes. TECO’s petition requests a variance from the MFR Rule to provide an alternative method for the Commission to consider the cost of providing service to the customer classes and to look at the consumption and load characteristics of those classes. Since the statute does not require a particular cost of service study, such as the 12CP and 1/13th method, the 4CP and MDS method would still allow the Commission to fulfill its statutory obligation. Therefore, staff believes that the first prong of the rule waiver test is met, which is that the purpose of the underlying statute is still met if the MFR Rule is waived.

⁸ The MFR Rule also implements Sections 366.04(2)(f) and 366.071, F.S.

Substantial Hardship and Principles of Fairness

The second prong of the rule waiver test is met if strict application of the rule either (1) creates a substantial hardship or (2) would violate the principles of fairness. The utility may meet the second prong through either path and is not required to show both. In its petition, TECO does not argue that application of the MFR Rule creates a substantial hardship, but rather that application of the MFR Rule would violate the principles of fairness.

“Principles of fairness” are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Section 120.542(2), F.S. TECO argues that it is uniquely affected because the 2021 Settlement Agreement – approved by an order from the Commission - requires it to file a cost of service study that is inconsistent with the MFR Rule. Paragraph 6(d) of Attachment A to the 2021 Settlement Agreement lays out the cost of service study requirements for TECO in its next general base rate proceeding:

This revenue attribution was derived by application of the 4CP methodology for allocating production and transmission plant costs and the use of the full Minimum Distribution System (“MDS”) costing method for allocating distribution plant costs, as mitigated. The Parties have agreed to the transitional revenue percentage allocations shown in Exhibit K[,] with the further understanding that the company will, for purposes of meeting its initial burden of proof in complying with Rule 25-6.043, F.A.C., in Tampa Electric Company’s next general base rate proceeding, file the cost-of-service MFRs using the 4CP and full MDS methods for cost allocation. The company further commits to base its filed revenue attribution among customer classes in its next general base rate proceeding on full implementation of the 4CP and MDS methodologies, and in that initial filing to substantially and materially improve the position of all above-parity customer classes toward parity, such that costs are allocated and revenue is collected consistent with 4CP and full MDS methods. All Parties and affiliates of TECO (“Precluded Parties”) will either not oppose, or will support, the 4CP and full MDS implementation. If the 4CP or full MDS methodology is opposed in the next general base rate case by an entity other than a Precluded Party, the Parties will indicate that they continue to support or not oppose implementation of the 4CP and full MDS, but in response, may offer responsive information on alternative cost-of-service methodologies and revenue allocation methodologies solely on an alternative basis.

Staff does not agree that TECO is affected in a manner significantly different from the way the MFR Rule affects other similarly situated entities subject to the rule. The MFR Form specifically contemplates multiple cost of service studies being utilized:

Provide under separate cover a cost of service study that allocates production and transmission plant using the average of the twelve monthly coincident peaks and 1/13 weighted average demand (12CP and 1/13th) method. In addition, if the company is proposing a different cost allocation method, or if a different method

was adopted in its last rate case, provide cost of service studies using these methods as well. All studies must be at both present and proposed rates. The cost of service analysis must be done separately for each rate class.

(Emphasis added). The MFR Form makes several more references to multiple cost of service studies. Therefore, the MFR Rule allows for and, in fact, requires a utility to provide a cost of service study with the 12CP and 1/13th method alongside any other methodologies adopted in a prior rate case.

TECO argues that the 2021 Settlement Agreement specifically prohibits TECO from providing a cost of service study using any alternative method besides 4CP and MDS. Staff disagrees. While the 2021 Settlement Agreement does bind TECO and others in some ways, staff's reading of this provision does not prohibit or preclude TECO from filing the 12CP and 1/13th method alongside the 4CP and MDS method. TECO can comply with both the MFR Rule and the 2021 Settlement Agreement. Therefore, TECO is not being affected by the 2021 Settlement Agreement in a manner significantly different from the way the MFR Rule affects other similarly situated entities subject to the rule.

Comments to TECO's Petition

As of the time of filing this recommendation, the Commission received 136 comments related to TECO's petition. Among them were 133 comments from customers, 2 comments from Hillsborough County Commissioners, and 1 joint comment from Florida Rising and the Florida League of United Latin American Citizens (LULAC). All 136 comments were in opposition to TECO's request for variance.

Florida Rising and LULAC claim that TECO's petition does not meet the standard for variance as it fails to demonstrate compliance with the purpose of the underlying statute and fails to show that application of the statute would present a substantial hardship to TECO or violate the principles of fairness. Florida Rising and LULAC further claim that the Commission should reject the petition as a matter of policy as it pertains to its impact on residential customer bills.

As previously discussed, staff agrees with Florida Rising and LULAC that TECO has not shown a violation of the principles of fairness. However, staff believes Florida Rising and LULAC's other arguments lack merit. Specifically, the policy considerations of impacts on residential customer bills are not an appropriate means to grant or deny a petition for a rule waiver or variance. Staff notes that Florida Rising and LULAC were not parties to TECO's 2021 base rate proceeding. However, parties of appropriate standing wishing to contest impacts on residential customers' bills will have an opportunity to intervene in TECO's next base rate proceeding.

The signatories to the 2021 Settlement Agreement provided the following joint statement:

Consistent with Paragraph 16 of the August 6, 2021 Stipulation and Settlement Agreement ("SSA") adopted and approved by the Commission in Order No. PSC-2021-04230S-E1 [*sic*], Docket Number 20220122-EI [*sic*], all parties to that docket reaffirm and support the SSA in its entirety, as provided for in Paragraph 16(a).

Conclusion

The MFR Rule specifically contemplates the use of multiple cost of service studies, including cost of service studies adopted in a utility's prior rate case. By its plain language, the 2021 Settlement Agreement does not preclude TECO from filing another cost of service study alongside the required 4CP and MDS study. Staff believes that the 2021 Settlement Agreement and MFR Rule can and should be read harmoniously, and that compliance with the former does not compel waiver of the latter. Because TECO has failed to demonstrate how the application of the rule would violate principles of fairness, staff recommends that TECO's petition for a rule variance should be denied.

Issue 2: Should this docket be closed?

Recommendation: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. (Thompson)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.