

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: May 13, 2024

TO: Office of Commission Clerk (Teitzman)

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

RE: Docket No. 20240025-EI – Petition for rate increase by Duke Energy Florida, LLC.

AGENDA: 05/21/24 – Special Agenda – Motion for Reconsideration – Oral Argument Requested; Participation is at the Discretion of the Commission

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Passidomo

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

Duke Energy Florida, LLC (DEF or Utility) provides electric service to approximately 2 million customers across the state. DEF filed its Petition for Rate Increase, minimum filing requirements (MFRs), and testimony on April 2, 2024. DEF filed its MFRs based on three projected test years, from January 1 to December 31, 2025; January 1 to December 31, 2026; and January 1 to December 31, 2027.

OPC's intervention in this docket was acknowledged by Order No. PSC-2024-0041-PCO-EI, issued February 26, 2024. On April 19, 2024, intervention in this proceeding was granted to Florida Rising and the League of United Latin American Citizens of Florida (LULAC); Florida Industrial Power Users Group (FIPUG); Florida Retail Federation (FRF); and Sierra Club. On

April 24, 2024, intervention was granted to White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate - White Springs (PCS Phosphate); and Nucor Steel Florida, Inc. (Nucor). Petitions for Intervention are pending for Southern Alliance for Clean Energy (SACE) and Americans for Affordable Clean Energy, Inc.; Circle K Stores, Inc.; RaceTrac Inc.; and Wawa, Inc. (Fuel Retailers) as of the date of filing of this recommendation.

On March 8, 2024, OPC filed a Motion for Expedited Joint Docket Scheduling Conference, together with an April 3, 2024 supplement to that motion, by which OPC requested a conference “to consider fair and equitable key activities and hearing dates, consistent with due process.” DEF responded in opposition on April 3, 2024, stating that OPC’s proposed schedule does not provide adequate time for post-hearing proceedings. OPC’s request for a scheduling conference was denied as its motion set forth in detail OPC’s arguments and proposed controlling dates. Having considered the parties’ proposals, the Order Establishing Procedure (OEP) No. PSC-2024-0092-PCO-EI, issued April 11, 2024, established controlling dates and procedures for this proceeding, including for the filing of prefiled testimony and exhibits, conducting discovery, and other prehearing and hearing activities. Included among these events was the requirement that, in advance of the hearing, parties provide electronic copies of all exhibits they intend to offer into evidence at the hearing. Finally, the OEP scheduled these matters for an administrative hearing for August 12–16, 2024, with August 19–23, 2024, reserved for the continuation and conclusion of this hearing, if necessary.

On April 22, 2024, OPC timely filed a Motion for Reconsideration or, in the Alternative, Motion for Continuance (OPC Motion), concurrently with a request for oral argument on its Motion. OPC’s Motion was filed with respect to this docket as well as Docket No. 20240026-EI, *In re: Petition for rate increase by Tampa Electric Company*. As these dockets are not consolidated, a separate recommendation will be filed with respect to the Tampa Electric Company (TECO) rate case, in Docket No. 20240026-EI. In its Motion, OPC argues that the “severely compressed” hearing schedule established by the OEP does not allow sufficient time for the intervenors to prepare testimony and doesn’t account for the workload created by DEF requesting three projected test years, and that scheduling the DEF and TECO hearings within three weeks of each other unfairly prejudices OPC’s ability to represent the customers of DEF and TECO. OPC contends that DEF is not entitled to have its rates go into effect on January 1, 2025, and the certainty that OPC does not have enough time to prepare its case for the TECO and DEF hearings outweighs the possibility that the statutory timeline may need to be delayed.

Joinders to OPC’s Motion were filed by LULAC (April 22), PCS Phosphate (April 23), Sierra Club (April 24), and FRF (April 29), contending that the time afforded for the intervenors to conduct discovery and prepare their case is unfairly curtailed, especially given the magnitude of the requested increase and the complexity of the issues presented.

On April 29, 2024, DEF filed a Response in Opposition (Response) to OPC’s Motion and OPC’s request for oral argument. DEF contends that OPC’s arguments essentially say the same thing as OPC’s initial March 8, 2024 Motion for Expedited Joint Docket Scheduling Conference: that OPC believes it does not have adequate time to prepare its case. DEF contends that OPC has not identified any new information that would justify reconsideration of the OEP; therefore, OPC’s Motion should be denied.

Docket No. 20240025-EI

Date: May 13, 2024

This recommendation addresses OPC's Request for Oral Argument and Motion for Reconsideration, and the joinders and Response thereto. The Commission has jurisdiction over this matter pursuant to Chapter 366, Florida Statutes (F.S.), including Section 366.06, F.S.

Discussion of Issues

Issue 1: Should OPC's Request for Oral Argument on its Motion for Reconsideration of Order No. PSC-2024-0092-PCO-EI be granted?

Recommendation: No. Staff believes that the pleadings are sufficient on their face for the Commission to evaluate and rule on the Motion. However, if the Commission wants to exercise its discretion to hear oral argument, staff recommends that 5 minutes per side is sufficient. (Crawford)

Staff Analysis:

Law

Rule 25-22.0022(1), Florida Administrative Code (F.A.C.), allows a party to request oral argument before the Commission for any dispositive motion (such as motions for reconsideration) by filing a separate written pleading filed concurrently with the motion on which argument is requested, and stating with particularity why oral argument would aid the Commission. Granting or denying oral argument is within the sole discretion of the Commission under Rule 25-22.0022(3), F.A.C.

OPC's Position

OPC requests the opportunity to provide 15 minutes of oral argument on the Motion to further elaborate on its arguments and to aid the Commissioners in understanding and evaluating the issues it raises as well as answer any questions.

DEF's Position

In its Response, DEF argues that oral argument isn't necessary, as the Commission can make its decision based on the written filings. However, if oral argument is permitted, DEF will participate.

Conclusion

Granting or denying oral argument is within the sole discretion of the Commission. Staff believes that the pleadings are sufficient on their face for the Commission to evaluate and decide OPC's Motion. However, if the Commission wants to exercise its discretion to hear oral argument, staff recommends 5 minutes per side is sufficient.

Issue 2: Should Reconsideration of Order No. PSC-2024-0092-PCO-EI or a continuance of this proceeding be granted?

Recommendation: No. Reconsideration should be denied because the request for reconsideration fails to raise a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering their decision. A continuance should not be granted as OPC has failed to provide adequate grounds for doing so, in contravention of the statutory time frames established by Section 366.06(3), F.S. (Crawford)

Staff Analysis:

Law

The appropriate standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering the order under review. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 162 (Fla. 1st DCA 1981). It is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959) (citing *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958)). Furthermore, a motion for reconsideration should not be granted “based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.” *Stewart Bonded Warehouse, Inc.*, 294 So. 2d at 317.

OPC’s Motion for Reconsideration

In its Motion, OPC acknowledges that the standard of review on a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission either overlooked or failed to consider. However, OPC argues that a *de novo* standard of review should apply in this case because the underlying order is a procedural order that hasn’t been issued by the full Commission or been the subject of a hearing.

With respect to the merits of its Motion, OPC requests the Commission to reconsider the hearing schedules for six reasons: (1) intervenors have insufficient time to prepare testimony; (2) the utilities could have easily avoided this scheduling “disaster” and are not entitled to new rates by January 1, 2025; (3) the current ratemaking framework cannot fully accommodate analysis of DEF’s three proposed test years simultaneously and then contemporaneously with the TECO rate case docket; (4) Commission staff does not have sufficient time to conduct their standard audit; (5) the certainty that OPC does not have enough time to prepare their cases outweighs the possibility that the timeline may need to be delayed; and (6) asymmetrical advance knowledge of the hearing dates created additional harm to intervenors. OPC also contends that it is burdensome and a violation of due process to require the parties to provide, in advance of the hearing, electronic copies of all exhibits they plan to offer into evidence at the hearing.

Joinders by LULAC, PCS Phosphate, Sierra Club, and FRF

On April 22, 2024, LULAC filed a Notice of Joinder in Citizens' Motion. LULAC noted that, in addition to the arguments put forth by OPC, LULAC had to wait for intervention to be granted before it could file enforceable discovery.

On April 23, 2024, PCS Phosphate filed a Response in Support of Citizens' Motion, echoing OPC's contention that the procedural timeline established does not provide sufficient time to evaluate DEF's petition, develop testimony, and prepare for a hearing. PCS Phosphate further contends that the twelve day advance submission of cross-examination exhibits will result in a prolonged hearing and, therefore, supports Citizens' request for reconsideration.

On April 24, 2024, Sierra Club filed a Notice of Joinder in Citizens' Motion. Sierra Club argues that the current hearing schedules in the Duke and TECO rate cases prejudice its ability for a fair hearing and joins OPC's Motion requesting reconsideration of the hearing schedule.

On April 29, 2024, FRF filed a Notice of Joinder in Citizens' Motion and argues it has a substantial interest in having the Commission grant the relief requested by the Motion.

No other parties provided comment in support of OPC's Motion.

DEF's Response in Opposition

On April 29, 2024, DEF filed a Response in Opposition to OPC's Motion. DEF argues OPC has not identified a mistake of law or fact that would justify reconsideration of the hearing schedule. DEF contends that OPC was well aware of both DEF and TECO filing their respective rate cases in 2024 and notes that the current hearing schedule is consistent with the statutory time frames established in Section 366.06(3), F.S. As to the issue of "asymmetric advance knowledge," DEF notes that there is no evidence DEF had advance knowledge of the hearing schedule but, even if it did, it would not be improper or lead to harm that would justify a scheduling change. Finally, DEF notes that OPC's alternative request to continue the hearing is, functionally, simply a request for reconsideration and requests that OPC's Motion be denied.

Analysis

Motion for Reconsideration

OPC contends that the Commission should review its Motion on a *de novo* basis rather than "the ordinary standard for reconsideration." OPC contends a mistake of fact or law standard does not fit this scenario because the matters for which OPC seeks review have either not been previously considered by the majority of the Commission, or have not been the subject of a hearing. However, the setting of a procedural schedule for a hearing-track docket is a function of the Prehearing Officer's duties, not those of the Commission as an agency, nor are such procedural matters appropriate for an evidentiary hearing. Further, the Commission has held that a mistake

of fact or law standard applies to reconsideration by the Commission of a Prehearing Officer's order.¹

The Prehearing Officer is the procedural administrator of a hearing-track case. They rule on motions and procedural matters and conduct prehearing conferences, prior to referral of such cases to the Commission for final decision. Pursuant to Rule 28-106.211, F.A.C., the Prehearing Officer may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case, including bifurcating the proceeding. "The Prehearing Officer has wide discretion in balancing the interests of parties in the furtherance of the orderly administration of justice."² The schedule approved by a Prehearing Officer is controlled in part by the selection of hearing dates by the Chairman, which is in turn based upon the availability of the Commission's calendar and the existence of any applicable statutory deadlines.

The statutory deadlines in this docket are established under Section 366.06(3), F.S., which requires the Commission to take action on DEF's proposed final rates within eight months. If the Commission does not act by the end of this eight month period, pursuant to Section 366.06(3), F.S., DEF is entitled to place its proposed rates into effect, subject to refund. The statute further provides that the Commission must take final action in the docket and enter its final order within 12 months of the commencement date for final agency action. The official filing date for this proceeding is April 2, 2024, pursuant to Section 366.06(3), F.S. Therefore, the eight month period expires on December 2, 2024. Before the Commission can take a final vote on DEF's proposed rates, there are a number of post-hearing activities that must take place: post-hearing briefs are filed by the parties, and two post-hearing recommendations and two post-hearing votes take place – one on the revenues, and one on the final rates. The OEP in this docket balances the needs of both pre-hearing and post-hearing process, for the parties, staff, and Commissioners, consistent with the deadlines under Section 366.06(3), F.S. Adherence to the eight month clock is a consistent and appropriate Commission practice. The schedule in this docket isn't driven by DEF wanting new rates to be placed in effect by January 1, 2025; it's driven by when the companies elect to file their case, which is not a matter susceptible to the Commission's control, and the requirements of the Commission's authorizing statutes.

¹ See Order No. PSC-2016-0231-FOF-EI, issued June 10, 2016, in Docket No. 20160021-EI, *In re: Petition for rate increase by Florida Power & Light Company*; Order No. PSC-2002-1442-FOF-EI, issued October 21, 2002, in Docket Nos. 20020262-EI, *In re: Petition to Determine Need for an Electrical Power Plant in Martin County by Florida Power & Light Company* and 20020263-EI, *In re: Petition to Determine Need for an Electrical Power Plant in Manatee County by Florida Power & Light Company*; Order No. PSC-2001-2021-FOF-TL, issued October 9, 2001, in Docket No. 19960786A-TL, *In re: Consideration of BellSouth Telecommunications, Inc.'s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996*; Order No. PSC-1997-0098-FOF-EU, issued January 27, 1997, in Docket No. 19930885-EU, *In re: Petition to Resolve territorial dispute with Gulf Coast Electric Cooperative, Inc. by Gulf Power Company*; Order No. PSC-1996-0133-FOF-EI, issued January 29, 1996, in Docket No. 19950110-EI, *In re: Standard offer contract for the purchase of firm capacity and energy from a qualifying facility between Panda-Kathleen, L.P., and Florida Power Corporation*.

² Order No. 25245, issued October 23, 1991, in Docket No. 19880069-TL, *In re: Petitions of Southern Bell Telephone and Telegraph Company for Rate Stabilization and Implementation Orders and Other Relief* (Prehearing Officer balanced competing interests of new counsel desiring more time to prepare and party seeking to proceed with discovery by delaying deposition).

As to requiring the provision of exhibits in advance of the hearing, Rule 28-106.209, F.A.C., provides that any time after a matter has been filed with an agency, the presiding officer can direct the parties to confer for the purpose of examining documents and other exhibits. The purpose of discovery is to eliminate the element of surprise, encourage settlement, and to assist in arriving at the truth.³ The exchange of exhibits in advance of hearing is a common feature in proceedings before the Division of Administrative Hearings, and was used in a number of virtual hearings before the Commission during the pandemic. The requirement that parties and staff list and exchange all exhibits in advance of the hearing promotes due process, transparency, and judicial economy.

Finally, much of OPC's argument on reconsideration repeats matters raised in its Motion for Expedited Joint Docket Scheduling Conference, which the Prehearing Officer considered in setting the hearing schedule. It is not appropriate to reargue matters on reconsideration that have already been considered. OPC has not clearly identified any specific mistakes of fact or law the Prehearing Officer made in issuing the OEP. Without a specific mistake of fact or law, a motion for reconsideration must be denied, even if the reviewing body would have reached a different decision.⁴ Based on the above, OPC's Motion for Reconsideration should be denied.

Alternative Request for Continuance

In the alternative, OPC moved the Commission to continue the final hearings scheduled in the DEF and TECO dockets and to adjust the major activity dates correspondingly. OPC argued it has met the burden established by Rule 28-106.210, F.A.C., which governs motions for continuance and grants the presiding officer the authority to continue a hearing for good cause shown. Generally, hearing officers enjoy broad discretion when ruling on motions to continue.⁵ Section 366.06(3), F.S., establishes an 8 month time period during which the Commission can withhold its consent to the operation of rates proposed by a Utility and after which the rates take effect subject to refund. The dates established by the OEP are designed to allow the parties and Commission staff the maximum time to prepare for and conduct the final hearings in these matters within that statutory framework. Any delay in the established schedule increases the likelihood that the proposed rates will go into effect subject to refund and therefore the Motion for Continuance should be denied and the hearing and major activity dates established by the OEP should remain in place.

Conclusion

For the reasons discussed above, staff recommends that OPC's Motion for Reconsideration and Alternative Request for Continuance be denied.

³ Order No. PSC-2022-0194-PCO-EI, issued May 25, 2023, in Docket No. 20220051-EI, *In re: Review of Storm Protection Plan, pursuant to Rule 25-6.030, F.A.C., Florida Power & Light Company*.

⁴ *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315, 317 (Fla. 1974); Order No. PSC 2016-0231-FOF-EI, issued June 10, 2016, in Docket No. 20160021-EI, *In re: Petition for rate increase by Florida Power & Light Company* (page 5).

⁵ *Milanick v. Osborne*, 6 So. 3d 729, 730 (Fla. 5th DCA 2009)(“ A motion for continuance is addressed to the sound judicial discretion of the trial court and absent abuse of that discretion its decision will not be reversed on appeal”).

Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open pending the Commission's final resolution of DEF's requested permanent base rate increase. (Crawford)

Staff Analysis: This docket should remain open pending the Commission's final resolution of DEF's requested permanent base rate increase.