

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 (Harper, Sparks, Marquez) *AH*

RE: Docket No. 20240026-EI – Petition for rate increase by Tampa Electric Company.

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: Clark

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On April 2, 2024, Tampa Electric Company (TECO or Utility) filed its Petition for Rate Increase, minimum filing requirements (MFRs), and testimony. TECO provides service to approximately 844 thousand customers in a 2,000 square mile service territory in Hillsborough and portions of Polk, Pasco, and Pinellas counties, Florida. In compliance with Section 366.06(3), Florida Statutes (F.S.), an administrative hearing has been scheduled for these matters for August 26–30, 2024.

The Office of Public Counsel's (OPC) intervention was acknowledged by Order No. PSC-2024-0048-PCO-EI, issued February 26, 2024. On April 23, 2024, intervention in this proceeding was granted to Federal Executive Agencies (FEA); Sierra Club; Florida Rising, Inc. (Florida Rising);

League of United Latin American Citizens of Florida (LULAC); Florida Retail Federation (FRF); and Florida Industrial Power Users Group (FIPUG). Petitions for Intervention are pending for Americans for Affordable Clean Energy, Inc.; Circle K Stores, Inc.; RaceTrac Inc.; and Wawa, Inc. 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.” TECO responded in opposition on April 4, 2024, stating that it did not support OPC’s proposed schedule. 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-2024-0096-PCO-EI, issued April 16, 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 26–30, 2024.

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. 20240025-EI, *In re: Petition for rate increase by Duke Energy Florida, LLC*. As these dockets are not consolidated, a separate recommendation will be filed with respect to the Duke Energy Florida, LLC (DEF) rate case, in Docket No. 20240025-EI.

In its Motion, OPC argues that the hearing schedule established by the OEP does not allow sufficient time for the intervenors to prepare testimony 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 further contends that the utilities are not entitled to have 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 Florida Rising (April 22), LULAC (April 22), 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, TECO filed its Response to OPC’s Motion and OPC’s request for oral argument. TECO contends that OPC has not identified any new information that would justify reconsideration of the OEP; therefore, OPC’s Motion should be denied. TECO also contends that OPC’s concerns about the proposed test years in Docket No. 20240025-EI should not form a basis for adjusting the schedule in this docket, and that OPC improperly minimizes the importance of the legislative deadline found in Section 366.06(3), F.S.

Docket No. 20240026-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, 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-2024-0096-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. (Sparks, Marquez)

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.

TECO's Position

In its Response, TECO argues that oral argument is not necessary to support the Motion filed by OPC and it should therefore be denied.

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-2024-0096-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 times frames established by Section 366.06(3), F.S. (Sparks, Marquez)

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 has not 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 Florida Rising, LULAC, 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 24, 2024, Sierra Club filed a Notice of Joinder in Citizens' Motion. Sierra Club argues that the current hearing schedule prejudices 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.

TECO's Response

On April 29, 2024, TECO filed a Response to OPC's Motion. TECO argues OPC has not identified a mistake of law or fact that would justify reconsideration of the hearing schedule. TECO contends that OPC's concerns about Docket No. 20240025-EI should not be a basis for adjusting the schedule in this docket, and that OPC improperly minimizes the importance of the legislative deadline found in Section 366.06(3), F.S. TECO notes that the schedule in the OEP appears crafted to avoid the operation of the statutory deadline in this case, and that it has worked in good faith with all parties to facilitate discovery, even prior to the filing of its Petition and to the granting of intervenor status to certain parties. TECO also argues that OPC's motion improperly attempts to turn procedural conversations with staff about the possible timing of a hearing into something significant.

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

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*

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 TECO'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., TECO 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 TECO'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 is driven by when the Utility elects to file its case, which is not a matter susceptible to the Commission's control, and the requirements of the Commission's authorizing statutes.

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

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* (balancing competing interests of new counsel desiring more time to prepare and party seeking to proceed with discovery by delaying deposition).

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*.

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 eight 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.

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: This docket should remain open pending the Commission's final resolution of TECO's requested permanent base rate increase. (Sparks, Marquez)

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