BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Duke Energy Florida, LLC.	DOCKET NO.: 20240025-EI
In re: Petition for rate increase by Tampa Electric Company.	DOCKET NO.: 20240026-EI
	FILED: April 22, 2024

CITIZEN'S EXPEDITED MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, MOTION FOR CONTINUANCE

The Citizens of Florida, through the Office of Public Counsel ("Citizens" or "OPC"), pursuant to Rule 25-22.0376, Florida Administrative Code, request the Florida Public Service Commission ("FPSC" or "Commission") to reconsider its decision in Order No. PSC-2024-0092-PCO-EI, issued on April 11, 2024 ("DEF Order"), and in Order No. PSC-2024-0096-PCO-EI, issued April 16, 2024 ("TECO Order"), or, in the alternative, to continue the hearing and corresponding key activity dates. In support, Citizens provide the following:

I. Standard of Review for Motion for Reconsideration

The standard of review on a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that the Commission failed to consider in rendering its Order.[1] As discussed below, a *de novo* standard should apply in the unique circumstances of this motion.

The OPC requests that the full Commission review these matters on an expedited basis, including in a specially-convened conference. Citizen's request that oral argument be granted and that this motion be heard on or before May 1, 2024, and that the Commission enter an order on or

[1] Order No. PSC-06-0949-FOF-EI, issued Nov. 13, 2006, p. 1, Docket No. 060001-EI, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*.

before May 7, 2024, due to the extremely time-sensitive issues raised in the Motion. The need to conduct discovery, schedule expert witness depositions, and prepare testimony is crucially affected by the hearing schedules and any delay may irreparably harm the OPC and intervenors' due process simply by the passage of time.

Each order was issued by an individual Commissioner sitting as prehearing officer in their respective dockets. This means that a majority of the Commission would not have reviewed, considered, or ruled upon the specific scheduling matters in either case, nor would they have considered the procedural issues raised in this pleading. The ordinary standard for reconsideration does not fit this scenario because the matters for which the OPC seeks review have either not been previously considered by a majority of the Commission or have not been the subject of any hearing or both. For this reason, the OPC asks that the Commission apply a *de novo* standard to this motion and the issues raised herein.

To the extent that OPC may pursue further review of the issues in this motion or any other issues in the DEF Order or TECO Order, OPC maintains and does not waive any appellate rights regarding the merits of these matters as well as the standards of review that the agency applies, despite not expressly addressing such other issues here. Additionally, OPC reasserts and reincorporates by reference its arguments from its Motion for Expedited Joint Docket Scheduling Conference and the Supplement to Motion for Expedited Joint Docket Scheduling Conference, filed March 8, 2024, and April 3, 2024, respectively.

II. Background

Duke Energy Florida, LLC ("DEF"), is an investor-owned electric utility with service

territory in thirty-five of Florida's sixty-seven counties.[2] DEF currently "provides generation, transmission, and distribution electric service to just under 2 million customers in Florida" and soon will serve "over 2 million customers in 2025 and over 2.1 million customers by 2027."[3] Rates were last established for DEF as the result of a settlement agreement in 2021.[4] DEF's' last litigated base rate proceeding where a hearing schedule was established was in 2009 and was resolved as reflected in Order No. PSC-10-0398-S-EI.[5] The hearing schedule in that case, which established the key activity dates that would have applied had the case not settled, gave intervenors 144 days between the filing of the utility's petition for a rate increase and when intervenor testimony was due.[6] On January 31, 2024, DEF filed a test year notification letter stating that DEF intended to file a formal request for three base rate increases effective in January of 2025, 2026, and 2027.[7] DEF filed the petition for rate increase, in addition to minimum filing requirements and 21 sets of witness testimony and exhibits, on April 2, 2024.[8]

Tampa Electric Company ("TECO"), is an investor-owned electric utility that provides retail electric service to approximately 844,000 customers in a 2,000 square mile service territory

[2] Document No. 01442-2024, p. 3, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*
[3] Document No. 01442-2024, p. 3, Document No. 00435-2024, p. 5, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC*.
[4] Order Nos. PSC-2021-0202-AS-EI and PSC-2021-0202A-AS-EI, issued June 4, 2021 and June 28, 2021, in Docket No. 20210016-EI, *In re: Petition for limited proceeding for recovery of incremental storm restoration costs related to Hurricane Michael and approval of second implementation stipulation, by Duke Energy Florida, LLC.; In re: Petition for limited proceeding for recovery of incremental storm restoration costs related to Hurricane Dorian and Tropical Storm Nestor, by Duke Energy Florida, LLC.; In re: Petition for limited proceeding to approve 2021 settlement agreement, including general base rate increases, by Duke Energy Florida, LLC.*
[5] Order No. PSC-10-0398-S-EI, issued June 18, 2010, in Docket No. 20090079-EI, *In re: Petition for increase in rates by Progress Energy Florida, Inc.; In re: Petition for limited proceeding to include Bartow repowering project in base rates, by Progress Energy Florida, Inc.; In re: Petition for expedited approval of deferral of pension expenses, authorization to charge storm hardening expenses to the storm damage reserve, and variance from or waiver of Rule 25-6.0143(1)(c), (d), and (f), F.A.C., by Progress Energy Florida, Inc*.
[6] Order No. 09-0190-PCO-EI, issued March 27, 2009, PSC Docket No. 20090079-EI, p. 9, *In re: Petition for increase in rates by Progress Energy Florida.*
[7] Document No. 00435-2024, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*
[8] Document No. 01442-2024, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*

in Hillsborough and portions of Polk, Pasco, and Pinellas counties.[9] Rates were last established for TECO as the result of a settlement agreement in 2021.[10] Prior to the settlement of that case, the Commission issued a hearing schedule that established the key activity dates that would have applied had the case not settled.[11] In that schedule, intervenors were given 134 days between the filing of TECO's petition for a rate increase and when intervenor testimony was due.[12] On February 1, 2024, TECO filed a test year notification letter stating that TECO intended to file a formal request for a base rate increase with a proposed 2025 test year.[13] TECO filed the petition for rate increase, in addition to minimum filing requirements and 19 sets of witness testimony and exhibits, on April 2, 2024.[14]

III. Facts

DEF's proposed rate increase amounts to $818 million in additional higher rates that DEF is seeking from customers from 2025-2027, which does not include other potential bill increases that may result from cost-recovery clauses or storm restoration cost dockets. TECO's requested rate increase amounts to $469 million in additional rates from TECO customers, which also does not include other potential bill increases that may result from cost-recovery clauses or storm restoration cost dockets. Both of these represent the largest ever base rate increase requests submitted by each utility.

[9] Document No. 01489-2024, p. 1, PSC Docket No. 20240026-EI, *In re: Petition for rate increase by Tampa Electric Company*.
[10] Order No. PSC-2021-0423-S-EI, issued November 10, 2021, PSC Docket No. 20210034-EI, *In re: Petition for rate increase by Tampa Electric Company.*
[11] Order No. PSC-2021-0172-PCO-EI, issued May 14, 2021, PSC Docket No. 20210034, *In re: Petition for rate increase by Tampa Electric Company; In re: Petition for approval of 2020 depreciation and dismantlement study and capital recovery schedules, by Tampa Electric Company.*
[12] *Id.* at p. 11.
[13] Document No. 00474-2024, p. 6, PSC Docket No. 20240026-EI, *In re: Petition for rate increase by Tampa Electric Company.*
[14] Document No. 01489-2024, PSC Docket No. 20240026-EI, *In re: Petition for rate increase by Tampa Electric Company*.

On March 8, 2024, OPC filed a Motion for Expedited Joint Docket Scheduling Conference.[15] OPC detailed its concerns about the dates, which, at that time, were listed as "Commission Hold PH" for July 28, 2024, and August 5, 2024, and "Commission Hold" for the weeks of August 12-16, 2024, and August 26-30, 2024. OPC assumed that the "Commission Hold PH" notations stood for prehearing conferences and the two, week-long "Commission Hold" notations stood for the hearings in these two dockets.

OPC requested the scheduling conference with all parties and the Commission, "in order to consider fair and equitable key activity dates, consistent with due process."[16] Relying on those assumptions and OPC's decades of experience litigating rate cases before the Commission, OPC estimated and noted in the motion that intervenor testimony would be due in late May or early June, which would be approximately two months sooner than when intervenor testimony was due in the last rate case proceedings for each company where a hearing schedule was established.

Intervenor testimony almost always represents an intervenor's one chance to present (pre-filed) direct testimony and exhibits in any given docket. Any other discovery obtained subsequent to the intervenor testimony due date could only be potentially entered into evidence through agreement of the parties or cross-examination challenging the assertions of a utility witness at the hearing. OPC has conferred with several of OPC's expert witnesses, who have advised that they would need, at a minimum, 12 weeks between the filing of the utility's case and when intervenor testimony is due in order to be able to fully review the utilities' filings, conduct discovery, and

[15] Document No. 01094-2024, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*
[16] *Id.* at p. 1.

draft and finalize testimony. Additionally, two of OPC's expert witnesses are expected to serve as witnesses in both dockets.

On April 2, 2024, DEF and TECO both filed their petitions for rate increases, minimum filing requirement schedules, and a combined total of 40 witness testimonies and exhibits. On April 3, 2024, OPC filed a Supplement to OPC's Motion for Expedited Joint Docket Scheduling Conference (Supplement), and included a proposed schedule for both dockets, which DEF and TECO opposed, but all other parties who had petitioned to intervene in the docket either supported or did not indicate any objection. DEF and TECO filed responses to OPC's Supplement, stating, in part, that "[i]t could be expected"[17] and was "foreseeable"[18] that both DEF and TECO would be filing rate cases in 2024 for 2025.

On April 11, 2024, the Commission issued the DEF Order denying OPC's Motion and Supplement in the DEF docket. The DEF Order set the prehearing conference for July 29, 2024, and the hearing for August 12-16, 2024.[19] Additionally, the DEF Order gave intervenors only 70 days between when DEF filed its petition for a rate increase and when intervenor testimony is due.

On April 16, 2024, the Commission issued the TECO Order, similarly denying OPC's Motion and Supplement in the TECO docket. The TECO Order set the prehearing conference for August 5, 2024, and the hearing for August 26-30, 2024.[20] Additionally, the TECO Order gave

[17] Document No. 01620-2024, p. 4, PSC Docket No. 20240026-EI, *In re: Petition for Rate Increase by Tampa Electric Company.*
[18] Document No. 01713-2024, p. 1, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*
[19] Order No. PSC-2024-0092-PCO-EI, p. 12, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*
[20] Order No. PSC-2024-0096-PCO-EI, p. 13, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Tampa Electric Company.*

intervenors only 65 days between when TECO filed its petition for a rate increase and when intervenor testimony is due.

Both the DEF Order and the TECO Order separately state that the prehearing officers "fully considered the representations and proposals by OPC in the Motion and Supplement," before setting the prehearing and hearing dates exactly as reflected on the Commission's Calendar as early as March 1, 2024.[21] The orders do not indicate that the entire commission had reviewed or made any determinations regarding any of these matters. To date, the Commission has not provided a single justification or explanation for its denial of OPC's motion for an expedited joint docket scheduling conference or its failure to use any of OPC's proposed dates.

On the same day that the TECO Order was issued, TECO served responses to OPC's First Set of Requests for Production, including a request for production to OPC Request for Production No. 9, which sought copies of Board of Director's meeting minutes of TECO, Emera (TECO's parent company), and Emera US Holdings, Inc, (holding company). Although the discovery response is considered highly confidential, TECO has stipulated that the following fact is not confidential:

> As of February 1, 2024, Tampa Electric Company was informed that the hearing dates for its rate case would likely be in the fourth week of August 2024.

In contrast, apart from the speculation that OPC engaged in, it was not until the DEF Order and the TECO Order were issued that the intervenors or the public were informed by the Commission that the two rate case schedules had been established. OPC is unaware of any

[21] Document No. 01094-2024, p. 7-9, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*

compelling reason why the rate case hearings for the second and third largest investor-owned electric utilities in Florida, which represent nearly $1.3 billion of potential rate increases to their combined customer base over the next three years, must be conducted within three weeks of each other. The hearing schedules currently established in the DEF Order and TECO Order unfairly prejudice OPC's ability to represent the customers of DEF and TECO and to adequately prepare for the back-to-back hearings, which will be detailed further in the argument section.

Additionally, this motion seeks reconsideration of some of the procedural requirements that further exacerbate the severe constraints of the overlapping and severely compressed hearing schedules.

IV. Argument

a. Hearing Schedule

The Commission should reconsider the DEF Order and TECO Order hearing schedules for one or all of the following 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 TECO's rate request; (4) Commission staff have insufficient 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 be need to be delayed; and (6) asymmetrical advance knowledge created additional harm to intervenors.

(1) Insufficient Time to Prepare Intervenor Testimony

The first fact that the Commission overlooked and failed to consider with regard to the hearing schedule is that now that the DEF and TECO Orders have been issued, the time given to

intervenors to prepare their testimony is grossly inadequate to simultaneously and critically analyze such massive, record-breaking rate increase requests.

In DEF's last rate case for which there was a hearing schedule, intervenors had 144 days between the filing of the utilities petition and when intervenor testimony was due; now, intervenors have 70 days.[22] In TECO's last case for which there was a hearing schedule, intervenors had 134 days between the filing of the utilities petition and when intervenor testimony was due; now, intervenors have 65 days.[23] The prejudice, harm, and injustice of this timetable cannot be understated. The utilities have had months and perhaps years to prepare their cases. This schedule poses the question: are intervenors expected to be able to critically analyze the filings, engage in sufficiently-comprehensive discovery, and prepare their own expert testimony in two simultaneous rate cases (one with three projected test years) in barely more than two months?

Intervenor testimony is the intervenors' singular opportunity to provide the Commission with a challenge to the utility's version of the story when it comes to a rate increase request. Utilities have the burden of proof regardless of whether an intervenor files testimony. Intervenor testimony typically includes analysis of all sorts of information that puts the utility's request in perspective relative to what the entirety of the evidence shows. Setting timetables as contained in the DEF and TECO Orders effectively eliminates intervenors' opportunity to effectively challenge whether the utilities have met their burden of proof. Furthermore, these inadequate timetables were set without Commission explanation or justification.[24]

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[22] Order No. 09-0190-PCO-EI, PSC Docket No. 20090079-EI, p. 9, *In re: Petition for increase in rates by Progress Energy Florida.*

[23] Order No. PSC-2021-0172-PCO-EI, issued May 14, 2021, PSC Docket No. 20210034, p. 11, *In re: Petition for rate increase by Tampa Electric Company; In re: Petition for approval of 2020 depreciation and dismantlement study and capital recovery schedules, by Tampa Electric Company.*

[24] An agency's exercise of discretion that is inconsistent with officially state agency policy or prior agency practice is subject to judicial review. §120.68(7)(e)(3), Fla. Stat. (2024).

This harshly reduced timeline unjustly eliminates the amount of discovery that can be conducted by intervenors before intervenor testimony is due. The 20-day discovery turnaround window does not remedy the inadequacy of the limited rounds of discovery responses that intervenors can request, receive, analyze, and then ask follow-up questions about before intervenor testimony is due. OPC began asking routine, preliminary discovery questions in advance of the utilities' April 2, 2024 filing date. This discovery was not and could not have been based on the filing. OPC served this discovery in a good faith effort to be proactive in advance of the filing; however, this effort did not and cannot replace the time needed to analyze these massive filings before intervenor testimony is due.

OPC conferred with several of its expert witnesses, who advised, based on decades of experience, that they need a minimum of 12 weeks between the filing of the utility's case and when intervenor testimony is due in order to adequately represent the customers of DEF and TECO in this matter. 12 weeks would still be almost two months less time than intervenors were allowed during each utility's last rate case proceeding where a hearing schedule was established. Even assuming *arguendo* that intervenors could have multiple chances to amend their testimony, such changes to testimony could detract from the witness' credibility. Allowing amended testimony would be an inadequate remedy. The hearing scheduling issues must be addressed now.

(2) <u>The Scheduling Crisis was Created by the Utilities</u>

The second fact that the Commission overlooked and failed to consider with regard to the hearing schedule is that if "[i]t could be expected"[25] and was "foreseeable"[26] that DEF and TECO

[25] Document No. 01620-2024, p. 4, PSC Docket No. 20240026-EI, *In re: Petition for Rate Increase by Tampa Electric Company.*
[26] Document No. 01713-2024, p. 1, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*

would be filing rate cases in 2024 for 2025, then the utilities should have filed their test-year notification letters and petitions earlier in 2024. Had they done so, then the Commission, staff, and intervenors would not find themselves in the middle of this manufactured scheduling crisis. OPC would much prefer to focus on analyzing the utilities filings and substantively preparing to represent DEF and TECO's customers before the Commission at the hearings instead of litigating how much time OPC and other intervenors should be allowed to have to prepare their case while that clock is ticking. The utilities should not be able to delay filing their requests for the highest rate increases in their history and then demand that these new rates be placed into effect by January 1, 2025. Just as the basic tenant of utility regulation holds that cost causers should pay the cost of utility service, the crisis causers who manufactured this situation should pay the nominal costs of participating in a full, fair rate case hearing, even if that means the utilities do not get new rates by January 1, 2025. Punishing OPC and other intervenors with an extremely short window of time to prepare their cases rewards the utilities for their avoidable delay and unjustly harms the customers of DEF and TECO. Setting fair, just, and reasonable rates requires a realistic and equitable schedule.

To the extent that the Commission feels constrained to authorize rates to be effective January 1, 2025, pursuant to the 8-month requirement in section 366.06(3), Florida Statutes, there is precedent for cases filed on or before the end of March where rates were put in place in March of the following year, i.e., 12 months.[27] These cases indicate that the Commission gave precedence to the 12-month clock over the 8-month clock in major electric rate cases. Under the circumstances

[27] Order No. PSC-2010-0153-FOF-EI, PSC Docket No. 080677-EI, *In re: Petition for increase in rates by Florida Power & Light Company. In re: 2009 depreciation and dismantlement study by Florida Power & Light Company.*; Order No. PSC-2010-0131-FOF-EI, PSC Docket Nos. 090079-EI, 090144-EI, 090145-EI, *In re: Petition for increase in rates by Progress Energy Florida, Inc.; In re: Petition for limited proceeding to include Bartow repowering project in base rates, by Progress Energy Florida, Inc.; In re: Petition for expedited approval of deferral of pension expenses, authorization to charge storm hardening expenses to the storm damage reserve, and variance from or waiver of Rule 25-6.0143(1)(c), (d), and (f), F.A.C., by Progress Energy Florida, Inc.*

of the pending cases where the companies chose to file their request for rate increases in April and demand new rates by January 1, 2025, the hearing schedule available for an August hearing date is extraordinarily deficient from a due process standpoint. The Commission should afford due process by holding hearings that allow rates to go into effect by the 12-month deadline rather than the 8-month deadline. The Commission must not sacrifice OPC's due process rights in favor of the utilities' preferences, especially not to solve a problem created by the utilities in the first place.

OPC also notes that the "clock" for each company does not start ticking until the utilities have satisfied any MFR deficiencies. In Docket 20240025-EI, OPC has submitted its observations about certain deficiencies in DEF's filing, and DEF has responded.[28] As of the date of this filing, the Commission has not yet addressed whether it deems DEF's MFRs deficient.

(3) <u>The Ratemaking Framework was Not Designed to Handle Three Proposed Test Years in Addition to Another Utility's Rate Increase Request Simultaneously</u>

The third fact that the Commission overlooked and failed to consider with regard to the hearing schedule is the effect of DEF's request for three projected test years rather than the single test year anticipated by the ratemaking statutes and the framework developed to process the single projected test year rate cases within the 12-month clock. DEF's requested three projected test years stress OPC's resources with the weight of three simultaneous rate cases in addition to TECO's pending request. This is unprecedented, unjustly inures to the benefit of utilities, and harms the customers of both utilities, especially on such an egregiously brief timetable.

(4) <u>Commission Staff Has Insufficient Time to Conduct the Audit</u>

The fourth fact that the Commission overlooked and failed to consider with regard to the hearing schedule is that the short hearing schedules impact the time that Commission staff have to

[28] Document No. 01788-2024, PSC Docket No. 20240025-EI, *In re: Petition for rate increase by Duke Energy Florida, LLC*; Document No. 01999-2024, PSC Docket No. 20240025-EI, *In re: Petition for rate increase by Duke Energy Florida, LLC.*

conduct an audit. Commission staff's audit reports in both pending cases are due a mere two months after DEF and TECO filed their petitions.[29] In DEF's 2009 rate case, Commission staff was given over four months to complete the staff audit.[30] Two months is a vast reduction in the time to conduct a rate case audit, especially for these uniquely situated dockets. It has become much more common for financial irregularities to be identified in large rate cases by intervenor experts. However, under the unique posture of the truncated rate schedules for these dockets, it is far less likely that any participant in the rate case process will identify these matters to the same degree achieved by more reasonably-paced rate case schedules. Here, staff has only been given two months to perform its audit. This further demonstrates why the Commission should reconsider the DEF Order and TECO Order. The current truncated hearing schedules are unjust and extremely harmful to the customers of DEF and TECO.

(5) <u>Possibility of Delay Versus Certainty of Harm</u>

The fifth fact that the Commission overlooked and failed to consider with regard to the hearing schedule is that DEF's argument that OPC's proposed schedule "would be unable to accommodate any further delays that could result during the pendency of this docket" values the <u>possibility</u> of a delay over the <u>certainty</u> that OPC would not have adequate time to prepare for either hearing.[31]

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[29] Document No. 01795-2024, p. 2, PSC Docket No. 20240025-EI, *In re: Petition for rate increase by Duke Energy Florida, LLC*; Document No. 01796-2024, p. 2, PSC Docket No. 20240026-EI, *In re: Petition for rate increase by Tampa Electric Company. In re: Petition for approval of 2023 Depreciation and Dismantlement Study, by Tampa Electric Company. In re: Petition to implement 2024 Generation Base Rate Adjustment provisions in Paragraph 4 of the 2021 Stipulation and Settlement Agreement, by Tampa Electric Company.*

[30] Document No. 03794-2009, p. 2, PSC Docket No. 20090079-EI, *In re: Petition for increase in rates by Progress Energy Florida, Inc.; In re: Petition for limited proceeding to include Bartow repowering project in base rates, by Progress Energy Florida, Inc.; In re: Petition for expedited approval of deferral of pension expenses, authorization to charge storm hardening expenses to the storm damage reserve, and variance from or waiver of Rule 25-6.0143(1)(c), (d), and (f), F.A.C., by Progress Energy Florida, Inc*.

[31] The intervenors also note that an aspect of the scheduling constraints may also be impacting the scheduling of customer service hearings as demonstrated in Citizens' Motion for Additional Customer Service Hearings, filed April 17, 2024. To the extent that such is the case, the Citizens incorporate the arguments and facts from that motion herein.

(6) <u>Asymmetrical Advance Knowledge Created Additional Harm to Intervenors</u>

The sixth fact that the Commission overlooked and failed to consider with regard to the hearing schedule, because it was not known to OPC until TECO responded to OPC's First Request for Production of Documents on April 16, 2024, is that TECO has now acknowledged that, "[a]s of February 1, 2024, Tampa Electric Company was informed that the hearing dates for its rate case would likely be in the fourth week of August 2024."[32] That time period just happens to be exactly when OPC suspected that it would be based on of the Commission's March 1st calendar and when it would ultimately be set in the TECO Order on April 16th.[33] OPC did not have the benefit of knowing, outside of speculation, when the TECO hearing dates would be until the TECO Order was issued on April 16th. The fact that at least one utility had advance knowledge about the "likely" hearing date two-and-a-half months before it was first publicly confirmed is additional, highly relevant information that the Commission should consider when setting the hearing schedules.

This fact also further demonstrates that this scheduling crisis was avoidable, as argued in (2) of this argument. While it does not appear that any effective efforts were made to stagger the filing dates or to direct the utilities to make their filings sooner than April 2, improved communication and transparency would have reduced the harm to the intervenors resulting from the unprecedented simultaneous case filings, truncated schedules, and back-to-back hearing dates in August.

b. Due Process

In several subsections of the DEF Order and the TECO Order, the Commission has overlooked and failed to consider several facts that are unfairly prejudicial to OPC. Although

[32] At this time, OPC is unaware of the extent of DEF knowledge of the likely hearing dates.
[33] Document No. 01094-2024, p. 2, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*

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," the subsections of the DEF Order and TECO Order at issue in this section of OPC's argument were issued without motion or hearing. Therefore, this represents OPC's first opportunity to challenge certain subsections that unfairly prejudice OPC's due process rights and ability to represent the customers of DEF and TECO in these matters.

(1) <u>Provision of Exhibits</u>

The Commission overlooked and failed to consider with regard to due process is the required exchange of exhibits in the "Provision of Exhibits" (hereinafter "Exhibit Provision") section of both the DEF Order and the TECO Order.[34] The OPC seeks reconsideration or full Commission review of this provision because the issue is one of first impression and was not the subject of a hearing in any sense of the word. The OPC contends that oral argument and review by the full Commission of the Exhibit Provision would be superior to reconsideration by the Prehearing Officer in either docket. The Commission should not implement major proposals that pose a great risk of interfering with intervenors' ability to represent the utility customers. As discussed below, the Exhibit Provision constitutes an *ad hoc*, haphazard, and piecemeal implementation of what probably should be a rule.[35] Rulemaking would provide an opportunity for thoughtful input from all practitioners before the Commission.

The Exhibit Provision is set out in the DEF Order as follows:

[34] In the DEF Order, the "Provision of Exhibits" subsection is listed under the section entitled "VI Prehearing Procedures. In the TECO Order, the "Provision of Exhibits" subsection is listed under the section entitled "VII Prehearing Procedures.

[35] Sections 120.52(16), Fla. Stat. and 120.54(1) appear to require rulemaking on matters of procedure relating to the practice requirements of the agency affecting the private interests of intervenors and other parties appearing before the Commission. Reconsideration or review should discern whether and to what extent these provisions apply to the proposal. The Agency should also determine whether such a procedural requirement is consistent with the uniform rules requirements of Section 120.54(5), Fla Stat.

G. Provision of Exhibits

By July 31, 2024, each party must provide an electronic copy of all exhibits that the party plans to offer into evidence or use for demonstrative purposes during the hearing, except for exhibits that have already been prefiled with witness testimony that are in the docket file. Each party shall also provide a list of the exhibits it has electronically submitted. Absent a showing of good cause, the failure of a party to timely provide exhibits in compliance with this order may bar admission of such exhibits.

Each exhibit must be saved as a distinct and separate electronic file; multiple exhibits combined in a single electronic file are not acceptable. No cover pages are required; however, as with all exhibits, a top margin of not less than one inch is required for stamping purposes. Each exhibit shall be named with the party's acronym and sequential numbering as follows:

DEF-1 – short document title, DEF-2 – short document title, etc.

OPC-1 – short document title, OPC-2 – short document title, etc.

Parties may use exhibits in their native Excel format for demonstrative purposes; however, any exhibits created in Excel that a party seeks to admit into the record must be converted to Adobe portable document format (pdf) and provided to the Commission as a separate electronic file. Any attachment to a discovery response that a party wishes to offer as an exhibit must be provided as a separate electronic file to be marked as a separate exhibit. Cumulative or irrelevant attachments are not appropriate exhibits.

Confidential information will be handled as described below in the following section. However, parties must also provide an electronic, redacted, non-confidential version of each confidential exhibit they intend to use at the hearing.

All non-confidential exhibits and a list of these exhibits must be provided to the Commission Office of the General Counsel on either USB flash drives or CDs, or emailed to discovery-gcl@psc.state.fl.us. A copy of all exhibits and the accompanying list shall also be served electronically or by regular mail, overnight mail, or hand delivery to all other parties no later than the date provided to the Commission's Office of the General Counsel.[36]

It is this provision for which the OPC seeks review and reconsideration.

[36] The only difference in the language of this section between the DEF Order and the TECO order is that the date included in the TECO order is August 14, 2024.

For the first time in the 50-year history of the OPC, the Commission proposes through the Exhibit Provision, the requirement for the public filing of all exhibits in advance of the hearing. This would mean all cross-examination evidence would have to be completely prepared and filed 12 days before hearing. In the DEF docket, that would be only three business days after the close of discovery. The DEF Order and TECO Order threatened that noncompliance may bar admission at hearing.

Despite the lack of any complaint by any active litigant in any recent case, the Commission proposes to adopt this requirement for the OPC and any other intervenor to deduct 12 days from an already severely-compressed and due process-deficient hearing schedule, as argued above and in OPC's Motion for Expedited Joint Docket Scheduling Conference and related Supplement. In addition to the severe impact on preparation time, the Exhibit Provision mandates that the intervenors must deliver to the utility all exhibits that could be used in the hearing as evidence.

On both the schedule impact and requirement for delivering cross-examination strategy to the utilities, the abrupt imposition of the Exhibit Provision proposal appears to be based on a misapprehension of the way intervenors have come to rely on the process of preparing for and conducting hearings that has evolved over the past 50 years. Most intervenor litigants prepare by utilizing all of their preparation time up to (and even including) the hearing in preparing cross-examination that is designed to challenge the assertions contained in the testimony of a utility who bears the burden of proof to prove its entitlement to rate increases in support of cost recovery. The allotted preparation time here is bad enough, but the Exhibit Provision and its confluence with the schedule compression and the layering of two major rate cases eviscerates the minimum level of due process to which intervenors are entitled.

This litigation strategy is borne of the rather unique nature of utility ratemaking. While both the utility and intervenors file testimony in a rate case, asymmetry in burden of proof is the

rule. The utility has the obligation to file testimony on all aspects of the case, including supporting MFRs. Intervenors, with no obligation to put on any testimony or evidence, will often file expert testimony addressing selected assertions by the utility. This intervenor testimony, though styled as "direct," is more in the form of responsive testimony. In the existing case, DEF and TECO have pre-filed the testimony of a total of 40 witnesses on direct and thousands of pages of MFRs in the form of exhibits. The OPC intends to file the testimony of five to six expert witnesses in each of the pending dockets. The OPC is not asserting that rates should change or that these cases should even be occurring. Instead, the responsive nature of the intervenor case challenges the sufficiency of the company's evidence in meeting the company's burden. Neither the OPC nor any other intervenor is affirmatively putting on a direct, competing case seeking rate relief. The notion that there is a level playing field that requires the mutual exchange of exhibits is misplaced and misunderstood. The OPC suspects that the proposed change is rooted in some misguided notion of fairness. More to the point, under the Exhibit Provision concept, the adversarial parties of intervenors and the utility will "exchange" exhibits in some exercise of fairness. The OPC and other intervenors have routinely and without objection utilized cross-examination exhibits without advance revelation to the utility in order to obtain frank and honest answers related to the materials and testimony that the utility has submitted in its case. The overwhelming number of exhibits is drawn from utility discovery documents and other information prepared by the utility. There is no surprise or ambush in the information when presented in this fashion. This is a process that has worked and upon which advocacy has been based without incident for decades.

There appear to be several aspects of the Exhibit Provision that have been overlooked and misapprehended. First, to date, the OPC is unaware that utility litigants have expressed any fairness concerns before the Commission or any appellate court. The reason for this is that the utilities are

keenly aware of the burden that they shoulder. Second, given that the utility has had months and perhaps years to prepare the petition, testimony, and MFRs and an obligation to file its request and testimony under oath, there is no surprise or ambush involved in submitting these matters to cross-examination with documents that test the veracity of its assertions. The only thing that the advance provision of potential impeachment exhibit does is give the opportunity for the utility to evaluate the exhibits and prepare the witness if challenged on a difficult point on the stand.

Additionally, the proposed requirement will deprive intervenor cross-examiners of the ability to use an impeachment exhibit if a witness makes an unanticipated statement in testimony (e.g., from a revision made on the stand to an answer to a previous questioner), unless they can meet some unstated "good cause" standard. Put another way, the prohibition against the use of undisclosed impeachment exhibits may allow for live testimony to be modified with impunity if a witness is familiar with the disclosed exhibits and finds comfort in knowing that the pool of impeachment exhibits cannot be increased. Even though the Exhibit Provision statement says "[a]bsent a showing of good cause, the failure of a party to timely provide exhibits in compliance with this order may bar admission of such exhibits," there are no standards established for what would constitute good cause or even the intent behind the phrase "may bar admission."

To the extent that the Exhibit Provision is seen as being symmetrical for the utility and the intervenors, the order adopting it has overlooked the fact that cross-examination of intervenor witnesses by a utility is extremely rare, and even when it does occur, it is even rarer for an exhibit to be used. Thus, the only value of advance opportunity from this "exchange" of exhibits inures to the utility, creating an uneven field in the adversarial process. There is no indication that the strictures of the Exhibit Provision would apply to Commission staff, who are not a party, but may

also participate in cross-examination of any witness but their own. This is yet another overlooked element of the proposal. Furthermore, there is no explanation regarding the purpose or level of detail that must be provided in the list of exhibits. This is further evidence that the Exhibit Provision is an *ad hoc* creation that is not based on any real-life case management issues.

One of the more fundamental oversights of the Exhibit Provision is that it is directed at exhibits that a party "plans to offer into evidence." This misunderstands the nature of most exhibits utilized on cross-examination. Often there is a lack of intent to offer the exhibit into evidence. The exhibits that the OPC uses in cross-examination are normally used for impeachment purposes. To the extent that the predicate answer does not provide a basis for impeachment, there would be no intent to offer the exhibit into evidence. Whether the exhibit is ultimately moved into evidence (and thus whether any intent to do so exists) is a "game time" decision based on multiple factors such as the witness' familiarity with the exhibit, the response given under questioning, and perhaps other aspects of answers. The Commission should revisit and rescind this provision and only consider adoption of such material changes to its procedures in a rulemaking.

The Exhibit Provision also proposes that any attachment to a discovery request must be provided as a separate exhibit. This issue has never been manifested as a problem at hearing. It appears to be a housekeeping measure that will have an outsized impact on the scant preparation time available to the OPC and other intervenors. Many interrogatory or document production request responses have a separate document stating the question and then a separate attached answer. For interrogatories an additional document in the form of a separate affidavit also exists. This provision would require two, three, or even more exhibits where only one has been used to-date. Also, the accompanying statement that "Cumulative or irrelevant attachments are not

appropriate exhibits," is vague and does not provide notice as to what the Commission means by the terms "cumulative" or "irrelevant" in the context of a discovery response provided by a utility. Does it require subjective rescission or redaction in advance of the 12-day submittal deadline? Furthermore, such a subjective requirement presents a trap for an intervenor merely seeking to cross-examine a witness in the context of discovery information provided by the utility. It also is potentially inconsistent with the rule of completeness. This proposed requirement only would introduce uncertainty and needless motion practice into an already severely-constrained time frame. It should be dropped along with the other aspects of the Exhibit Provision.

Perhaps one of the most troubling aspects of the Exhibit Provision overlooked by the Commission is the one that would require all confidential documents to be filed 12 days in advance in an electronic, redacted, non-confidential version. Here, the proposed Exhibit Provision has failed to consider or has misapprehended the impact the actual practical nature of this proposal will have on the workload of intervenors and on the severely constrained hearing schedule. On top of the due-process deficient hearing preparation time afforded by the compressed schedule, this would require that precious substantive preparation time of the case in the crucial period leading up to trial be supplanted by administrative interaction with the utility. This would mean that time would be wasted on redactions of documents that will not likely be used in their redacted form, given the high likelihood that any information that would be used for impeachment/cross-examination in the hearing would be the part that would be considered confidential by the utility. Thus, any wholesale redaction of the document would be akin to "busy work" of little value for the intervenor in preparing for hearing. Any detailed redaction that parses out confidential and non-confidential information can be exceedingly time consuming and has, for the past 30-plus years, been reserved only for documents actually entered into the record. Spontaneously inserting

this requirement at this stage of a severely-constrained hearing schedule would be a time drain of monumental proportion. Historically, in a large electric utility rate case, significant information is provided in the rebuttal testimony process that often includes new witnesses. This often entails the use of depositions for discovery in order to develop cross-examination. The time for providing discovery responses is pushed to the brink. The arbitrary 12-day advance exhibit exchange requirement following the discovery cut-off (three days earlier) in this exceedingly narrow rebuttal discovery window, does not recognize the practical reality. An intervenor will need to receive discovery, consult with experts on it, and convert it to actual exhibits that would have to comply with the proposed new Exhibit Provision requirements. These facts and circumstances could not have been taken into account or considered when developing the schedule or the Exhibit Provision requirements.

One of the seemingly mundane proposals of the Exhibit Provision is that all intervenor cross-examination exhibits[37] must have a one inch margin for the convenience of stamping pages. This may seem an innocuous requirement, but it completely misapprehends the fact that not all documents are uniform and utility discovery often has its own stamping in the very same region. The margin requirement could likely require time consuming exhibit preparation. This would come in the hectic post-rebuttal and discovery timeframe. These facts do not appear to have been considered in the issuance of the Exhibit Provisions. These provisions, when taken as a whole,

[37] This proposed requirement is predicated with the phrase "as with all exhibits" to create the illusion that this is just a routine consistency requirement. Pre-filed exhibits accompanying testimony have for decades been required to meet a margin requirement. However, this requirement (actually 1.25 inches) was initially developed for transcript binding in the days when hand production of the record was less digitized. The requirement was not instituted for document pagination. The requirement for exhibit numbering that is driving this margin requirement in the Exhibit Provision is brand new and totally unrelated to the binding of prefiled testimony exhibits.

appear to be an excellent example of a current phenomenon: when the purely administrative preferences of a few improperly intrude upon the conduct of the hearing.

(2) <u>Deposition Use</u>

An adjunct feature of the Exhibit Provision that has been included in previous dockets' Order Establishing Procedure is found in Section VII B. and reads:

> Each party shall be required to provide by a time certain and in a manner to be announced at a later date, all exhibits (whether for substantive, corroborative, impeachment, or rebuttal purposes, including deposition transcripts that may be used for impeachment) reasonably expected or intended to be offered at the hearing.

When contrasted with the Exhibit Provision, this provision creates uncertainty about exactly what documents need to be provided in advance. For example, the OPC never expects to use a deposition at hearing. Regardless, depositions (including copies) are maintained in case the need for impeachment arises. OPC's experience is that these circumstances are quite rare. In most cases, the OPC notices, conducts and pays for the depositions often at an expedited preparation rate and including the appearance fee. The custom in the legal community recognizes that court reporters earn a living by selling their transcribed depositions and that parties intending to use them should separately and individually pay the reporter for copies. More frequently, deposition transcripts are often deemed confidential and number in the hundreds of pages. The evaluation and redaction of them is time consuming and usually only done if there is a chance that they will be needed at hearing or for other specialized needs. The OPC does not, as a practice, give away the work product of the highly-valued court reporting community and should not be forced to do so here. Furthermore, filing heavily-redacted deposition transcripts would be a waste of time for no valid reason.

For these reasons, the OPC asserts that the Commission did not comprehend the potential cost in time under any schedule, much less a severely compromised one like here, of having to engage the utility in the laborious and time consuming, diversionary process of review and redacting multiple depositions with the remote chance they would be used for impeachment at hearing. Upon reconsideration or further review, the Commission should make clear that this would not be required. The infliction of these additional administrative burdens upon intervenors violates due process and severely impacts OPC's ability to adequately prepare for the hearings. The unnecessarily abbreviated hearing schedule in both simultaneous dockets only exacerbates that impact.

V. Motion to Continue

In the alternative, OPC moves the Commission to continue the final hearings scheduled in the DEF and TECO dockets and adjust the key activity dates accordingly. OPC respectfully requests that the Commission continue the final hearings scheduled in the DEF and TECO dockets to the dates previously proposed by OPC. The Commission has adopted Uniform Rule 28-106.210, F.A.C., governing continuances. The rule authorizes presiding officers to grant a continuance of a hearing for good cause shown. OPC has met this burden.

Anticipating that the schedules for both rate cases may be truncated, OPC has been proactive in trying to resolve these matters without resorting to moving for to a continuance. OPC filed for intervention in both matters within three weeks of both companies submitting their respective test year approval letters. OPC submitted its Motion for Expedited Joint Docket Scheduling Conference in a good faith attempt to resolve these issues ahead of the entry of any

Order Establishing Procedure using the suspected "Commission Hold" dates.[38] Meanwhile, OPC was already seeking and retaining experts so that OPC could be ready to review the companies' petitions and MFRs as soon as they were filed. As part of this goal to be prepared as possible, OPC served discovery on both companies before the companies filed their petitions and MFRs to begin the discovery process as soon as possible.

Unfortunately, despite OPC's good faith attempts to be proactive and mitigate or avoid scheduling issues, the DEF and TECO Orders in both of these cases establish such abbreviated schedules that OPC has no other recourse than to ask for continuances. As discussed above, rate cases in prior years afforded interveners five months to submit testimony. OPC's experts advised it would take at least 12 weeks to develop and submit adequate testimony. And yet, with two record rate cases for two of Florida's largest investor-owned electric utilities consisting of thousands of pages of testimony and exhibits, the DEF and TECO Orders presume that intervener testimony can be developed and submitted within two months. It cannot be done. Continuing one or both of the final hearings and corresponding key activity dates in these cases would allow the Commission to reissue Orders Establishing Procedure that afford intervenors adequate time to represent the millions of DEF and TECO customers who will be affected by these cases for years to come.

The granting or denial of a motion for continuance is within the discretion of the trial court.[39] The same discretion applies in administrative hearings involving disputed issues of material fact.[40] However, the exercise of that discretion is not absolute.[41] The following factors apply when evaluating trial court rulings on motions for continuance: whether the movant suffers injustice from the denial of the motion; whether the underlying cause for the motion was

[38] The arguments and facts of that motion and the above motion for reconsideration are incorporated here by reference.
[39] *Williams v. State*, 438 So. 2d 781, 785 (Fla. 1983).
[40] *Milanick v. Osborne*, 6 So. 3d 729, 730 (Fla. 5th DCA 2009) (citing Fla. Admin. Code R. 28-106.210).
[41] *Neal v. Swaby*, 975 So. 2d 431, 433 (Fla. 2d DCA 2007).

unforeseen by the movant; whether the motion is based on dilatory tactics; and whether prejudice and injustice will befall the opposing party if the motion is granted.[42]

As discussed above, OPC will face injustice from a failure to grant this motion for a continuance. The established hearing schedules and key activity dates do not afford OPC sufficient time to complete discovery or prepare adequate testimony. OPC has been proactive in attempting to litigate this matter without recourse to a motion for continuance and asserts that the purpose of this motion is not to cause undue delay.

Finally, DEF and TECO will not be unfairly prejudiced or suffer injustice by continuing these proceedings. Both companies raised the concern in their responses to OPC's initial motion that Commission staff will not have enough time for post-hearing proceedings, especially in time for new rates to become effective with notice to customers for the first billing cycle in January 2025. With regard to affording Commission staff sufficient post-hearing time, a continuance and according schedule changes would precisely address this issue. As for rates going into effect in time for the January 2025 billing cycle, this is simply not something that any utility company is entitled to. If DEF and TECO wanted their rates to go in effect by that date, then it was fully within their control to submit their petitions and MFRs earlier, especially as both companies acknowledged it was foreseeable that they would be bringing rate cases this year.[43] In the case of TECO, not only was it fully within TECO's control when they decided to file their petition, but also TECO had the benefit of knowing the likely hearing date in months in advance of any other party.[44]

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[42] *Id.*
[43] Document No. 01620-2024, p. 4, PSC Docket No. 20240026-EI, *In re: Petition for Rate Increase by Tampa Electric Company;* Document No. 01713-2024, p. 1, PSC Docket No. 20240025-EI, *In re: Petition for Rate Increase by Duke Energy Florida, LLC.*
[44] There is no evidence that DEF's docket was not in a similar posture.

The public policy of this state favors traditional due process rights in rate hearings, whether permanent or interim.[45] There cannot be any "compromise on the footing of convenience or expediency . . . when the minimal requirement of a fair hearing has been neglected or ignored."[46] OPC has demonstrated that it will be prejudiced by failure to grant this motion, that this motion is not brought with improper intent, and that DEF and TECO will not suffer prejudice if this motion were granted. The Commission should ignore the siren calls of convenience and expediency and continue the final hearings and corresponding key activity dates in this matter.

VI. Conferral

OPC has conferred with all parties who have either petitioned or been granted intervention in either docket regarding their positions on these motions. DEF and TECO have indicated that they are unable to take a position at this time but reserve the right to file a response in opposition, if required. The Federal Executive Agencies take no position. Florida Rising, the League of United Latin American Citizens, PCS Phosphate, Southern Alliance for Clean Energy, NUCOR Steel, the Florida Retail Federation, Sierra Club, and the Florida Industrial Power Users Group support these motions.

WHEREFORE, OPC asks the Commission to grants Citizen's motion reconsider the DEF and TECO Orders as argued above, or, in the alternative, grant the motion to continue the hearings and corresponding key activity dates as previously proposed by OPC.

[45] *Citizens of Fla. v. Mayo*, 333 So. 2d 1, 6 (Fla. 1976).
[46] *Florida Gas Co. v. Hawkins*, 372 So. 2d 1118, 1121 (Fla. 1979).

Respectfully submitted,

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 22nd day of April, 2024, to the following:

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