BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Storm Protection Plan, pursuant to Rule 25-6.030, F.A.C., Florida Power & Light Company.	DOCKET NO. 20220051-EI FILED: July 20, 2022

CITIZENS' RESPONSE IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO STRIKE

The Citizens of the State of Florida, by and through the Office of Public Counsel (OPC), pursuant to Rule 28-106.204, Florida Administrative Code, hereby respond in opposition to Florida Power & Light Company's (FPL's) Motion to Strike Certain Portions of the Testimony of OPC Witness Lane Kollen, and state as follows:

INTRODUCTION

A party's *ad nauseum* repetition of the word "new" does not, by itself, transform the standard use of basic, well-established regulatory principles like prudence into an alleged attempt to change policy or promulgate rules. Whatever the merits of repetition as a form of subliminal messaging, said repetition is not in and of itself necessarily tethered to reality or to the plain language of administrative rules or statutes. As such, counsel for FPL can repeat the word "new" as many times as they desire and on every page of their pleadings, but that does not convert any concept discussed in testimony into something it is not, particularly where the methodology referenced in the testimony at issue tracks the *exact* language of the operative administrative rule. In fact, to the extent there is anything new in this docket, it comes courtesy of FPL, in that never before has a party sought to induce the Commission to abandon the bedrock principles of reasonableness and prudence to the detriment, and at sole the expense, of rate-paying, captive customers who must not only pay the full cost of every project that gets approved, but must additionally pay the utility a robust profit. What FPL seeks to do is empty the commission's quiver of all arrows at its disposal to protect customers. The pending motion is directed not at the OPC, but at the Commission and its fundamental ability to regulate in the public interest for customers.

Speaking of "new," it bears noting that this is the first time that the SPP statute is truly before the Commission, as all the 2020 SPP and SPPCRC cases in 2020 were settled. The

Commission will be adjudicating these issues for the very first time and should proceed cautiously and reject efforts to cripple its ability to protect customers from excessive bills.

FPL'S CATEGORICAL OPPOSITION TO COST-EFFECTIVENESS

On page 6 of its motion, FPL inexplicably rails against both a "cost-benefit analysis" and "cost effectiveness." Mot. para. 14. Rule 25-6.030(3)(d)4, F.A.C. (the Rule) requires a utility's description of each storm protection program to include "a comparison of the ***costs*** identified in subparagraph (3)(d)3, and the ***benefits*** identified in subparagraph (3)(d)1." (emphasis added). The benefits identified in subparagraph (3)(d)1 explicitly include a reduction in "costs."

Moreover, in the enabling statute, the Florida Legislature expressed the main benefit of storm protection planning to customers as "reduced costs." Fla. Stat. Sec. 366.96(1)(f).

The plain meaning of a *comparison* of costs versus benefits contemplates the assessment of the two elements by using the same factors or units of measurement, i.e., comparing apples to apples, rather than apples to oranges. The Company has not pointed to any other instance in which the Commission allows such a disjointed, specious, and faulty comparison as the one suggested by FPL.

The concept of a quantitative comparison of costs and benefits in terms of dollars is not new in Commission precedent, but is instead a decades-old principle. *See In re: Petition by Gulf Power Company for Approval of Purchased Power Arrangement*, Order No. PSC-2001-1682-PCO-EI, Aug. 20, 2001, at 2, 4. Conducting a comparison of dollars to dollars is perfectly reasonable and consistent with both Commission precedent and the regulatory compact; it is not a novel idea, nor is it "unheard of" in utility regulation, and in fact a plausible reading of the enabling statute at issue suggests an evaluation of costs expressed in dollars is not prohibited anywhere in the express language of the Florida Legislature. FPL failed to point to any language in the SPP statute which prohibits the description of any benefits of SPP programs from including in that description the dollar values associated with said benefits.

FPL's reliance on *Town of Palm Beach, et al. vs. Palm Beach County, et al.*, is misplaced because Kollen's testimony did not debate the magnitude of the benefits, but instead testified about the Company's failure to quantify the alleged benefits in the first place. Kollen suggested that in making the comparison of costs and benefits required by the plain language of Rule 25-6.030(3)(d)4, F.A.C., the factor used to express the benefit should be the same or match the factor

used to express the cost. Otherwise, as a matter of basic logic, the comparison required by the Rule becomes a nullity; a superficial exercise; indeed, a fraud on the ratepaying public. Additionally, as to certain unquantified benefits alleged in *Palm Beach County*, the Supreme Court did find certain of them illusory, such that they failed the test of qualifying as real benefits. *Id.* at 885. The same argument could be made about FPL's unjustified failure to quantify the benefits that it seeks to compare to costs in the instant case.

The Commission is free to give the OPC expert's accounting opinion the weight it thinks is required without abandoning the use of quantitative evidence to make the costs and benefits comparison required by the Rule. What the Commission should do is to resist the crude invitation to divest itself of the fundamental ability to perform the rudiments of regulation.

Witness Kollen's testimonial opinions on accounting methodologies and the evaluation of the reasonableness of programs proposed for approval to a glide path for cost recovery is completely different from the issue in Order No. PSC-99-0099-PCO-TP, cited by FPL, where a lawyer/law professor's testimony included an extensive legal analysis of a Federal Communications Commission order where the Commission suggested the federal order was not relevant to the issues in the state proceeding. *In re: Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc.*, at 3. The testimony FPL seeks to strike in the instant case is that of a nationally-recognized accountant with decades of experience working, first for a utility, and now for customers providing expert opinions on the fundamentals of ratemaking around the country. Here, he offers thoughtful and well-reasoned opinions on accounting issues and standard accounting methodologies used in Florida and virtually every other state which recognizes the balancing of interests inherent in the regulatory compact. This testimony is for the Commission's benefit in crafting the most reasonable approach to the SPP process. It should be accepted and used for this purpose. Moreover, the testimony at issue is consistent with, and tracks the language of, the controlling statute and administrative rule. The testimony is demonstrably relevant to the issues in this docket and to strike it would result in reversible error.

Despite the fact that the operative statute discusses considerations regarding base rates, rate impacts and the prohibition on a utility recovering certain SPP costs through both base rates and the SPP cost recovery mechanism, FPL argues that witness Kollen's testimony is irrelevant and

beyond the scope of the SPP proceeding.[1] Mot. p. 14. The plain language of the statute and rule reveal FPL to be wrong. Mr. Kollen's testimony tracks the exact issues outlined in the statute and rule. FPL's mere disagreement with Mr. Kollen's opinions on proper accounting treatment and methodology does not render his testimony irrelevant. The balance of Commission precedent, including that cited by FPL, demonstrates the Commission should give Mr. Kollen's testimony the weight it is due; the Commission may decide any outstanding question of relevance once the testimony is tendered at the hearing. This is the reasonable and prudent course of action. *See e.g.*, Order No. PSC-2006-0261-PCO-TP, at 5; Order No. PSC-1999-1809-PCO-WS at 8; Order No. PSC-2002-0876-PCO-TP, at 3. FPL's reliance on Order No. PSC-2020-0162-PCO-EI is misplaced regarding relevance because the dispute in that case was about discovery on programs and costs which were not listed in the utility's proposed SPP. *In re: Review of 2020-2029 Storm Protection Plan*, Order No. PSC-2020-0162-PCO-EI at 9. In the instant case, the testimony relates solely to programs listed in the SPP and the plain language of the comparison required by Rule 25-6.030(3)(d), F.A.C., thus the 2020 SPP order denying the motion to compel has absolutely no bearing on the issues in the instant motion to strike.

The Legislature charged the Commission with adopting rules which specify the elements to be included in a utility's SPP filing. Fla. Stat. Sec. 366.96(3). In doing so, the Legislature did not strip the Commission of its discretion to determine how to evaluate the elements in its fact-intensive determination of whether a plan in in the public interest. As such, the directive in Fla. Stat. 366.96(4) does not prohibit the manner or methodology by which the Commission analyzes the way in which the non-exhaustive list of items serves the public interest. FPL failed to pinpoint any text in the statute or any rule of statutory construction which suggests otherwise. As a well-qualified expert in utility accounting, it is not merely appropriate, but is in fact imperative that witness Kollen provide the Commission with his opinion on the methodology by which an SPP can correctly meet the public interest standard required by the statute. As with all expert testimony, the Commission should give this expert's opinion the weight it is due. Mr. Kollen's testimony

[1] In addition to its rejection of the suggestion that even the most conservative parameters should guide the Commission's evaluation of whether an SPP is in the public interest, FPL suggests that the estimated rate impacts required by Rule 25-6.060. F.A.C. need not be free of known errors. In response to witness Kollen's testimony that property tax expense is correctly calculated based on valuations at the beginning of the year, not the end of the year (as reflected in FPL's calculations), FPL acknowledged the accuracy of Kollen's point, but downplayed the relevance of the discrepancy by stating that only estimates are required, so FPL's calculation of revenue requirements in the SPP is adequate. Fuentes Testim. p. 5, lines 12-19.

squarely addresses the proposals made in FPL's SPP and faithfully follows the dictates of both the controlling statute and administrative rule. It would be prejudicial to the Citizens' case and reversible error to strike virtually every substantive line of the Citizens' expert testimony.

AGENCY DISCRETION

FPL's tangent on rulemaking is a red herring. After spending a substantial portion of its motion extolling the power and virtues of the Commission's broad discretion, FPL turns on a dime to suggest the Commission is prohibited from considering the cost and benefit comparison (required by the Rule) in terms of dollar values or cost effectiveness. FPL failed to cite a single binding authority for this alleged prohibition.

The Commission's authority to consider reasonableness and prudence is not limited to cost recovery dockets. The controlling statute explicitly references both reasonableness and prudence. Fla. Stat. Sec. 366.96(2)(c). Still, FPL argues that the standard of review for whether SPP projects should be approved cannot include considerations of whether the projects are reasonable or prudent. It is contrary to the face of the statute to engage in the fiction promoted by FPL that the Commission is prohibited from considering the reasonableness of projects it is asked to approve. Where the controlling statute is replete with references to the reduction in costs as its driving force, to pretend the SPP docket should be wholly and completely severed from any consideration of the eventual results of the projects proposed (including the results on costs, thus rates and charges to customers) is simply not rational. The fact that there is a separate docket for final approval or disapproval of recovery after the costs have actually been incurred does not preclude the Commission from following the dictates of the Rule to evaluate the cost estimates and compare costs and benefits before approving a storm protection plan.

So, while misconstruing the statute and without citing to a single case or Commission order squarely on point, FPL proposed the Commission should strike numerous pages of witness Kollen's testimony, thus OPC's direct case. The SPP statute explicitly states that once a plan has been approved in the SPP docket, a utility's actions to implement the plan "shall not constitute or be evidence of imprudence." Fla. Stat. Sec. 366.96(7). There is nothing in the statute that suggests the Legislature intended the principle of prudence to be used as both a shield and a sword by utilities against their customers. It is contrary to the language of the statute and the concepts of balance and fairness to suggest the Commission cannot evaluate whether a plan (including each of

its elements) is prudent while deciding whether to approve it, but then after making a decision to approve the plan, the Commission is prohibited from determining whether the utility's related actions are imprudent. It cannot be two one-way streets traveling only in the utilities' direction. If the prudence of actions undertaken after approval are off limits, the agency must have a genuine role in determining prudence on the front end.

Contrary to FPL's effort to upend the fundamentals of utility regulation, reasonableness is not an incorrect consideration in utility regulation, but rather it is a prime consideration. The evidence of this primacy is readily apparent in the order of the statute chapter which governs public utilities in Florida. Immediately after setting out the applicable definitions, the Legislature devoted a section to the duties of public utilities and established the standard that all rates and charges for service rendered, "or to be rendered" shall be fair and reasonable. Fla. Stat. Sec. 366.03. As such, when the Commission is considering whether to approve projects which are designed to result in service to be rendered at some later date, the Commission is not simply allowed to consider reasonableness, but it required to include reasonableness in its decision-making.

Similarly, determining the prudence of actions and the resultant costs is the touchstone for virtually every decision made by the Commission, and has been for decades. The principle of prudence is not severable from any public interest analysis.

PREJUDICE

FPL's request to strike essentially all of witness Kollen's testimony is extremely prejudicial to the Citizens' case and their constitutional right to be heard on a substantial issue in their lives, i.e., access to electric service at fair, reasonable rates, in recognition that electric service is essential for daily living and working in the modern world. See Fla. Stat. Sec. 366.03 (describing the duties of public utilities in Florida and mandating that all rates and charges "shall be fair and reasonable").

The Florida Supreme Court has previously noted utility company overreach in cost recovery clause pass-through charges which occur outside the normal base ratemaking process. *Citizens v. Graham*, 213 So. 3d 703, 717 (Fla. 2017), citing *Scherer Unit 4*, Order No. PSC-11-0080-PAA-EI. Accordingly, the Citizens' expert witness Kollen has presented his opinion on a conservative, systematic approach to evaluating the cost and benefit elements and comparison required by the Rule. The Citizens' approach is designed to lawfully protect customers from the abuses of supplemental utility charges which precedent demonstrates have unfortunately occurred

in the past. Striking any of the Citizens' expert testimony would result in both a violation of due process and extraordinary prejudice to the Citizens.

SUMMARY

In this time of economic uncertainty, global economic pressures, inflation, lingering effects of the pandemic, and strained household budgets, it is unimaginable for the state's largest utility to make daily life even more difficult for its customers. The Commission should preserve its powers to regulate in the public interest and should reject FPL's histrionics over the mention of the word "dollars" and the thought of having to describe proposed projects, thus proposed expenses, as required by the controlling statute and administrative rule. Looking beyond the harm it would cause to the ratepaying customers, the Commission should recognize the pending motion for what it is – an effort to shackle the Commission and deprive it of the ability to regulate. For this reason alone, it should be rejected.

Respectfully Submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 20220051-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 20th day of July 2022, to the following:

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