

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power & Light Company for waiver of Rule 25-17.015(1), F.A.C., which would require filing of Energy Conservation Cost Recovery (ECCR) for period January 1, 1999 through December 31, 1999, consistent with filings of other adjustment clauses.

DOCKET NO. 980740-EI
ORDER NO. PSC-98-1211-FOF-EI
ISSUED: September 14, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING PETITION FOR RULE WAIVER

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administration Code.

I. CASE BACKGROUND

By Order No. PSC-98-0691-FOF-PU, issued May 19, 1998, this Commission ordered that factors for all components of all cost recovery clauses for investor-owned electric and natural gas utilities should be determined on a calendar year basis at one annual hearing. We ordered that a hearing be held in November 1998 to determine factors for the fuel clause, purchased gas adjustment true-up, and environmental cost recovery clause. We further ordered the initiation of rulemaking to amend Rule 25-17.015, Florida Administrative Code, in order to allow factors for the energy conservation cost recovery clause (ECCR Clause) to be determined along with the other cost recovery clauses beginning at

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a November 1999 hearing. In the order, we approved schedules detailing the manner in which the transition for each cost recovery clause was to be implemented.

On June 11, 1998, Florida Power & Light Company (FPL) filed a petition for waiver of Rule 25-17.015(1), Florida Administrative Code. FPL seeks this waiver so that it may file for approval of a calendar-year ECCR factor at the November 1998 hearing rather than the November 1999 hearing contemplated by our order. Pursuant to Section 120.542(6), Florida Statutes, notice of FPL's petition was submitted to the Secretary of State for publication in the July 2, 1998, Florida Administrative Weekly. No comments concerning the petition were filed within the 14-day comment period required by Rule 28-104.003, Florida Administrative Code.

By Order No. PSC-98-1084-FOF-PU, issued August 10, 1998, we modified Order No. PSC-98-0691-FOF-PU to amend the transition schedule for the ECCR Clause. That modification has only a minimal effect on FPL's petition, as discussed below.

II. THE PETITION

In its petition, FPL seeks a waiver of the hearing and filing timetable set forth in Rule 25-17.015(1), Florida Administrative Code. FPL has proposed an alternative hearing and filing timetable for itself. Specifically, FPL's petition requests the following:

1. Waiver of the requirement in Rule 25-17.015(1), Florida Administrative Code, that ECCR proceedings be conducted "during the first quarter of each calendar year." FPL seeks permission to have an ECCR hearing in November 1998 rather than February 1999.

2. Waiver of the requirement in Rule 25-17.015(1)(a), Florida Administrative Code, that the annual final true-up filing be "for the most recent 12-month historical period from April 1 through March 31 that ends prior to the annual ECCR proceedings." For the February 1999 ECCR hearing, FPL is required to file its final true-up data for the period April 1997 through March 1998. FPL seeks permission to use a final true-up period of October 1997 through March 1998 instead. (We note that this request was made moot by our decision in Order No. PSC-98-1084-FOF-PU, issued August 10, 1998, to modify Order No. PSC-98-0691-FOF-PU to amend the ECCR transition schedule. The amended schedule provides that the parties shall use, at the February 1999 ECCR hearing, a final true-up period of October 1997 through March 1998.)

3. Waiver of the requirement in Rule 25-17.015(1)(b), Florida Administrative Code, that there be "an annual estimated/actual true-up filing showing eight months actual and four months projected" data for the period beginning April 1 immediately following the period in paragraph (1)(a) of the rule. For the February 1999 ECCR hearing, FPL is required to file its estimated/actual true-up data for the period April 1998 through March 1999. FPL seeks permission to use an actual/estimated true-up period of April 1998 through December 1998 instead.

4. Waiver of the requirement in Rule 25-17.015(1)(c), Florida Administrative Code, that the annual projection filing show data for a 12-month period beginning April 1 following the annual hearing. For the February 1999 ECCR hearing, FPL is required to file projected data for the period April 1999 through March 2000. FPL seeks permission to file projected data for the period January 1999 through December 1999 instead.

5. Waiver of the requirement in Rule 25-17.015(1)(d), Florida Administrative Code, that the annual ECCR petition set forth proposed ECCR factors for the 12-month period beginning April 1 following the annual hearing. For the February 1999 ECCR hearing, FPL is required to file a petition with proposed ECCR factors for the period April 1999 through March 2000. FPL seeks permission to file a petition with proposed ECCR factors for the period January 1999 through December 1999 instead.

6. Waiver of the requirement in Rule 25-17.015(1)(e), Florida Administrative Code, that FPL file a form PSC/EAG/44 for the first six months of the reporting period in paragraph (1)(a) of the rule.

III. ANALYSIS AND FINDINGS

Section 120.542, Florida Statutes, mandates threshold proofs and notice provisions for variances and waivers from agency rules. Subsection (2) of the statute states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statutes will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic,

technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Section 120.542(2), Florida Statutes (1997). FPL argues that application of the rule creates a substantial hardship on FPL. FPL further argues that the purpose of the underlying statute will be achieved if FPL's petition is granted.

A. Purpose of the Underlying Statute

In its petition, FPL points out that Rule 25-17.015(1), Florida Administrative Code, implements Section 366.82(5), Florida Statutes. FPL asserts that the purpose of this underlying statute is to provide an adjustment clause for the recovery of conservation costs. FPL contends that this purpose will continue to be achieved with the rule waiver sought by FPL.

We agree and find that the purpose of the underlying statute will continue to be achieved with the requested rule waiver. FPL's rule waiver petition simply seeks a timetable for recovery different than the timetable provided in the rule. We believe that the use of either timetable will allow the purpose of the underlying statute to be achieved.

B. Substantial Hardship

In its petition, FPL asserts that it faces substantial hardships due to the ECCR factor for 1999 not coinciding with the recovery period for its other adjustment clauses. FPL's argument is based on our recent decision, memorialized in Order No. PSC-98-0691-FOF-PU, that factors for all components of all cost recovery clauses for investor-owned electric and natural gas utilities should be determined on a calendar year basis at one annual hearing.

FPL asserts that, absent the waiver it requests, it will lose the advantages found by this Commission to be associated with annual cost recovery proceedings. First, FPL states that the number of hearing days per year for its adjustment clauses will not be reduced because it will be required to undertake two hearings in

1999. Thus, FPL argues, this Commission, the parties, and FPL will not be able to gain efficiencies contemplated by our Order by saving the time and expense associated with an additional hearing. Second, FPL states that it and its customers would face confusing adjustment clause rates associated with differing periods. Thus, FPL argues, the more certain and stable prices envisioned in the Order, as well as the customer's ability to more easily project electricity costs, will not be realized.

FPL further asserts that, absent the waiver it requests, it will lose the advantages found by this Commission to be associated with a calendar-year period for adjustment clauses. Those advantages included: an ECCR factor that coincides with most commercial and industrial customers' budget periods; easier analysis of cost information; simplification of Commission audits; and greater administrative efficiencies for the Commission and the parties.

We note that the Legislature intended the provisions of Section 120.542, Florida Statutes, to remedy situations where "strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results . . ." Section 120.542(1), Florida Statutes (1997). We believe that this language should be read together with subsection (2) of the statute in order to determine whether FPL has demonstrated a substantial hardship in this case.

In terms of the rule's impact on FPL alone, it is arguable whether the rule creates a substantial hardship. However, FPL's ratepayers may achieve substantial benefits, as delineated in Order No. PSC-98-0691-FOF-PU, if FPL's request for a rule waiver is granted. Conversely, if the rule waiver is not granted, FPL's ratepayers must forego those benefits. We believe that this is the type of "unreasonable, unfair, and unintended result" that Section 120.542, Florida Statutes, was intended to remedy. Therefore, given the interests of FPL's ratepayers and our responsibility to those ratepayers, we find that FPL has demonstrated that application of Rule 25-17.015(1), Florida Administrative Code, creates a substantial hardship.

IV. CONCLUSION

Because FPL has met the requirements of Section 120.542, Florida Statutes, we find that FPL's petition for waiver of the requirements of Rule 25-17.015, Florida Administrative Code, should

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be granted. FPL may file for approval of a calendar-year 1999 ECCR factor at the scheduled November 1998 fuel adjustment hearing under the terms requested in its petition.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's petition for waiver of the requirements of Rule 25-17.015(1), Florida Administrative Code, is granted. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 14th day of September, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 5, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.