



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

RECEIVED
REC'D
NOV 19 1998
11 2:06
JDJ

DATE: NOVEMBER 19, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYD)

FROM: DIVISION OF ELECTRIC AND GAS (WHEELER) *DW ca*
DIVISION OF LEGAL SERVICES (C. KEATING) *WCK RVE*

RE: DOCKET NO. 981214-E.I. - PETITION FOR WAIVER OF RULE 25-6.0437(7), F.A.C., TO OBTAIN ADDITIONAL TIME TO SUBMIT RESULTS OF LOAD RESEARCH STUDY, BY FLORIDA POWER CORPORATION.

AGENDA: 12/01/98 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: DECEMBER 22, 1998 - PETITION DEEMED APPROVED IF NOT GRANTED OR DENIED WITHIN 90 DAYS OF RECEIPT

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\EAG\WP\981214.RCM

CASE BACKGROUND

Rule 25-6.0437, Florida Administrative Code, sets forth provisions concerning load research studies to be performed by all investor-owned electric utilities. Subsection (7) of the rule provides that each investor-owned electric utility shall perform a complete load research study in accordance with the specifications of the rule no less than every two years and shall, within 120 days of completion of each study, submit the results of the study to the Commission. Pursuant to this rule, Florida Power Corporation (FPC) was required to perform its most recent load research study for the period April 1997 through March 1998 and submit the results of that study in July 1998.

DOCUMENT NUMBER-DATE

13037 NOV 19 98

FPSC-RECORDS/REPORTING

DOCKET NO. 981214-LI
DATE: NOVEMBER 19, 1998

In August 1998, staff contacted FPC after the required report was not received. Staff then learned that the required study had not been performed. On September 23, 1998, FPC filed a petition for waiver of Rule 25-6.0437(7), Florida Administrative Code. Through this petition, FPC requests that the time requirements of subsection (7) be waived to allow FPC to perform a load research study for the period October 1998 through September 1999, rather than the required period, and submit the study's results to the Commission in December 1999.

Pursuant to Section 120.542(6), Florida Statutes, notice of FPC's petition was submitted to the Secretary of State for publication in the October 16, 1998, Florida Administrative Weekly. No comments concerning the petition were filed within the 14-day comment period provided by Rule 28-104.003, Florida Administrative Code. In accordance with Section 120.542(8), Florida Statutes, the petition is deemed approved if the Commission does not grant or deny it by December 22, 1998.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Florida Power Corporation's petition for waiver of Rule 25-6.0437(7), Florida Administrative Code?

RECOMMENDATION: No. The Commission should deny Florida Power Corporation's petition for waiver of Rule 25-6.0437(7), Florida Administrative Code, because the petition was untimely filed and does not satisfy the statutory criteria for a rule waiver. The Commission should require FPC to perform a load research study for the period October 1998 through September 1999, submit the study's results to the Commission in December 1999, and notify the Commission immediately if any problems arise in data collection that preclude the timely filing of valid load research results which meet the requirements of the rule. Staff will further evaluate FPC's actions in this matter to determine whether show cause proceedings should be initiated in a separate docket. (WHEELER, KEATING)

STAFF ANALYSIS:

A. Standard of Review

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).

B. FPC's Arguments

FPC cites two specific problems that delayed commencement of its load research study. The first problem involved the selection of the sample. Load research studies require the installation of special meters on a randomly selected, statistical sample of customers. These meters have the capability to continuously measure and record customer demand throughout the year, and data from the meters are used to estimate each rate class' demand at the time of the system peak demand. FPC states that its new billing system was unable to generate a statistically valid sample of customers. According to FPC, this inability was due to structural differences between its previous system, which was used for all previous studies, and the new system. After repeated attempts to adapt existing data extraction programs, FPC had to develop an entirely new extraction program specifically for load research purposes. In addition to being unable to select a new sample, the new system was unable to track the sample from the previous study. This resulted in delays in removing the test meters from the previous sample for redeployment in the new sample. According to FPC, these difficulties caused a delay of approximately eight months.

The second problem arose in retrieving data from a new type of recording meter used for a number of FPC's large customers. According to FPC, the new meters were installed because they offered considerable cost savings over the older meters; however, problems with the protocol in the meter reading devices prevented the retrieval of some data needed for load research. FPC states that these problems persisted for over a year and were only recently solved. FPC asserts that the resulting loss of data would have seriously degraded the accuracy of the study results for the General Service-Demand and Non-Demand customer classes to the point where they would not have met the requirements of the rule.

1. Purpose of the Underlying Statutes

FPC asserts that Rule 25-6.0437, Florida Administrative Code, was promulgated to implement Sections 366.05(1) and 366.06(1), Florida Statutes. These statutes provide the Commission power to "prescribe fair and reasonable rates and charges" (Section 366.05(1), Florida Statutes), and to "determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its services" (Section 366.06(1), Florida Statutes). Section 366.06(1), Florida Statutes, directs the Commission, in fixing rates, to consider "the

consumption and load characteristics of the various classes of customers."

FPC points out that, consistent with this statutory language, subsection (2) of the rule states the following as its purpose:

The primary purpose of this rule is to require that load research that supports cost of service studies used in ratemaking proceedings is of sufficient precision to reasonably assure that tariffs are equitable and reflect the true cost of serving each class of customers. Load research data gathered and submitted in accordance with this rule will also be used by the Commission in evaluating proposed and operating conservation programs, for research, and for other purposes consistent with the Commission's responsibilities.

FPC argues that the requested waiver will achieve the purpose of these statutes in two ways. First, FPC asserts that updated load research data will be available to support the cost of service study used in FPC's next ratemaking proceeding due to the fact that, pursuant to a Commission-approved stipulation, a base rate freeze will be in effect and binding on FPC and the other parties to the stipulation until July 2001. Second, as to any other uses of load research data, FPC asserts that its currently available load research data will provide a reasonably accurate measure of the coincident peak demand for each customer class until results from a new study are available. FPC asserts that each customer class' 12-month coincident peak load factors from FPC's last four load research studies have remained relatively stable.

2. Substantial Hardship

FPC argues that application of the rule's two-year cycle for the preparation and submission of load research data would subject FPC to a substantial hardship. First, FPC contends that application of the rule would create a legal hardship on FPC. FPC asserts that, in order to prepare and submit load research data by December 1998, FPC would be forced to use an improperly prepared and statistically invalid customer sample as well as incomplete, inaccurate data for its large-demand customers. Thus, FPC argues, it would be forced to violate subsection (3) of the rule, which requires that load research results must meet a specified accuracy criterion, and subsection (5) of the rule, which requires that load research studies be performed using a Commission approved sampling plan.

Second, FPC contends that application of the rule would create an economic hardship on FPC. As stated above, FPC asserts that if it is required to prepare and submit a load research study at this time, such a study would necessarily include inaccurate and/or invalid results. Thus, FPC argues, it would be forced to expend time and resources on a pointless initial study when, instead, it could resolve the study deficiencies and expend only the time and resources needed for a single, properly performed study.

C. Staff Analysis

1. Timeliness of the Petition

Staff recommends that the Commission deny the petition without addressing the merits of FPC's arguments. Through its petition, FPC is asking the Commission to grant it a rule waiver retroactive approximately 18 months based upon FPC's circumstances 18 months ago. Section 120.542, Florida Statutes, does not make provision for granting such an untimely rule waiver. Instead, the statute provides a mechanism for those persons seeking *permission* to act in a manner other than that required by rule. FPC did not timely request or receive a rule waiver or an extension and, thus, failed to comply with the rule.

FPC's petition essentially seeks a pardon by means of a retroactive rule waiver. Granting FPC's petition would set the precedent that a regulated entity may violate Commission rules and later be pardoned if it could successfully argue that it could have met the statutory criteria for a rule waiver at the time of the rule violation. Such a precedent would invite the violation of Commission rules by taking out of the Commission's hands the decision of whether a regulated entity must act in compliance with a rule. Further, it would encourage regulated entities who wish to avoid Commission rules by giving credence to the idea that asking forgiveness is easier than asking permission. In addition, such a precedent would provide no incentive for utilities to keep up with their responsibilities under the Commission's rules. As in this case, the Commission's hands may be tied when it comes to requiring compliance with the rule because the violation has already occurred and no action can cure the problem.

Staff does not suggest that the Commission should exercise no flexibility in its decisions on requests for rule waivers filed after the time for compliance. Staff believes it is appropriate for the Commission to consider the merits of any such request if it is made within a reasonable time after compliance is required and if it is otherwise reasonable under the circumstances. For

example, in Order No. PSC-98-0706-FOF-GU, issued May 21, 1998, the Commission granted South Florida Natural Gas' petition for waiver of a rule although the petition was filed approximately 33 days after the time required by the rule for filing a depreciation study. In that Order, the Commission found that the waiver should not be denied for its untimeliness because, by rule, so long as the study was filed within approximately 6 months of the time required by the rule, the implementation date of the resulting depreciation factors would remain the same and the Commission's ability to perform its duties would not be affected. In this case, however, staff believes that FPC's rule waiver request was not made within a reasonable time; FPC's request was made approximately 18 months after compliance was required. Further, FPC's actions left it without the ability to even minimally comply with the rule regardless of the Commission's decision.

2. Satisfaction of Statutory Criteria

Even considering the arguments set forth by FPC, staff recommends that the Commission deny the petition. FPC has not demonstrated that the purpose of the underlying statutes will be achieved if the waiver is granted and has not demonstrated that application of the rule will create a substantial hardship.

Staff agrees with FPC as to the purpose of the statutes underlying Rule 25-6.0437, Florida Administrative Code. It is clear that this rule was promulgated to allow the Commission to satisfy its obligation under Sections 366.05(1) and 366.06(1), Florida Statutes, to fix fair and reasonable rates and, in so doing, to consider the consumption and load characteristics of each customer class. Load research data obtained pursuant to the rule is used not only to allocate costs by customer class in rate cases, but also to allocate costs in the Commission's ongoing proceedings for capacity cost recovery, conservation cost recovery, and environmental cost recovery.

As stated above, FPC asserts that its currently available load research data will provide a reasonably accurate measure of the coincident peak demand for each customer class until results from a new study are available. In addition, FPC asserts that load research data from its last four load research studies have remained relatively stable. However, it is not clear that the purpose of Sections 366.05(1) and 366.06(1), Florida Statutes, can be fully achieved using outdated load research data. Timely load research data is essential to allocating costs equitably among rate classes in setting fair and reasonable rates and cost recovery factors. While FPC's currently available load research data *might*

provide the Commission with a workable estimate, timely data would ensure that the Commission could allocate costs by rate class in the most equitable manner. Thus, staff believes FPC has not demonstrated that the purpose of the underlying statutes will be achieved if the waiver is granted.

As stated above, FPC asserts that it faced two specific problems that delayed commencement of its load research study. First, FPC's new Customer Service System (CSS) was unable to generate a statistically valid sample of customers for the study, resulting in a delay of approximately eight months. Second, FPC encountered a problem involving the implementation of a protocol for the retrieval of data from a new type of recording meter used for a number of large-demand customers. This problem was not resolved for approximately one year. FPC argues that if it is required to comply with the rule under these circumstances, it will face the legal hardship of being forced to violate other portions of Rule 25-6.0437, Florida Administrative Code, concerning the use of an approved sampling plan and a specific accuracy standard. Further, FPC argues that it will face the economic hardship of being required to expend the time and resources to conduct a study that will not produce accurate or valid results.

Staff believes that both the legal and economic hardships asserted by FPC are created not by application of the rule, but by FPC's failure to properly manage its resources to comply with the rule. Since 1983, all investor-owned electric utilities, including FPC, have successfully met the rule requirements. It was only FPC's internal procedures which changed, not the rule requirements. Further, staff believes that FPC's argument is flawed by its circular logic. FPC apparently violated a rule and now seeks a waiver of that rule based, in part, on the fact that if it is not granted a waiver, it will face two hardships: (1) it will be required to violate the rule; and (2) it will be forced to expend the resources necessary to comply with the rule. The fact is that FPC apparently violated the rule and cannot comply with the rule, regardless of the Commission's decision. Thus, staff believes FPC has not demonstrated that application of the rule creates a substantial hardship on FPC.

3. Conclusion

FPC knew it was experiencing difficulties in meeting the rule requirements from the very earliest stages of the study but failed to request a rule waiver at that time, or even to notify the Commission that it might not be able to meet rule requirements. FPC did not request a rule waiver until nearly 18 months after the

fact, when the due date for the report was missed and called to FPC's attention by staff. FPC had every opportunity to request a waiver at any time during the period it was experiencing difficulties but did not do so. Further, whether the Commission grants or denies the petition, FPC will neither be able to gather load research data for the period April 1997 through March 1998 nor submit it to the Commission. The Commission cannot require FPC to even minimally comply with the rule, because it is too late for compliance.

In summary, staff recommends that FPC's rule waiver petition be denied because it was untimely filed and does not satisfy the statutory criteria for a rule waiver. Staff recognizes that this recommendation necessarily raises the issue of whether show cause proceedings should be initiated against FPC for violating the rule. Staff is not prepared at this time to make a recommendation on that issue. Staff is evaluating FPC's actions in this matter in order to determine whether show cause proceedings should be initiated in a separate docket.

In its petition, FPC states that it intends to perform a load research study for the period October 1998 through September 1999 and submit the study's results to the Commission in December 1999. FPC also offers to submit quarterly status reports on the progress of the study, including any preliminary results and trend analyses that become available during the course of the study. Because FPC is unable to provide any more recent load research data, staff recommends that the Commission require FPC (1) to perform a load research study for the period October 1998 through September 1999, (2) to submit the study results to the Commission in December 1999, and (3) to notify the Commission immediately if problems arise in data collection that would preclude the timely filing of valid load research results which meet the requirements of the rule.

DOCKET NO. 981214-11
DATE: NOVEMBER 19, 1998

ISSUE 2: Should this docket be closed?

RECOMMENDATION: This docket should be closed if no person whose substantial interests are affected by the proposed action files a protest within the 21-day protest period. (KEATING)

STAFF ANALYSIS: At the conclusion of the protest period, if no protest is filed, this docket should be closed.