

M E M O R A N D U M

NOVEMBER 23, 1998

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TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (C. KEATING) *WCK RUC*

RE: DOCKET NO. 981167-EG - PETITION BY FLORIDA POWER CORPORATION FOR WAIVER OF RULE 25-17.015(1), F.A.C., TO ALLOW CALENDAR YEAR ENERGY CONSERVATION COST RECOVERY FILING FOR PERIOD 1/1/99 - 12/31/99.

98-1558-EG-EG

Attached is a NOTICE OF PROPOSED AGENCY ACTION - ORDER GRANTING PETITION FOR RULE WAIVER to be issued in the above-referenced docket. (Number of pages in order - 6)

WCK/js
Attachment
cc: Division of Electric and Gas (Colson)
I:981167or.wck

WCK

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION.

In re: Petition by Florida Power Corporation for waiver of Rule 25-17.015(1), F.A.C., to allow calendar year Energy Conservation Cost Recovery filing for period 1/1/99 - 12/31/99.

DOCKET NO. 981167-EG
ORDER NO. PSC-98-1558-FOF-EG
ISSUED: November 23, 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 Administrative Code.

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 an annual, 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 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. By Order No. PSC-98-1084-FOF-PU,

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PSC-98-0691-FOF-PU HEARING

issued August 10, 1998, we modified our previous order to amend the transition schedule for the ECCR Clause.

On September 17, 1998, Florida Power Corporation (FPC) filed a petition for waiver of Rule 25-17.015(1), Florida Administrative Code. FPC 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 FPC's petition was submitted to the Secretary of State for publication in the October 9, 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, expires on October 23, 1998.

FPC seeks a waiver of the hearing and filing timetable set forth in Rule 25-17.015(1), Florida Administrative Code. Before FPC filed this rule waiver petition, Florida Power & Light Company (FPL) filed a petition for waiver of Rule 25-17.015(1), Florida Administrative Code, in Docket No. 980740-EI. In its petition, FPC states that its petition is identical in all material respects to FPL's waiver petition. Thus, FPC requests the same relief that FPL requested, specifically:

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." FPC 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." FPC seeks permission to use a final true-up period of October 1997 through March 1998. (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, FPC is required to file its estimated/actual true-up data for the period April 1998 through March 1999. FPC 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, FPC is required to file projected data for the period April 1999 through March 2000. FPC 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, FPC is required to file a petition with proposed ECCR factors for the period April 1999 through March 2000. FPC 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 FPC file a form PSC/EAG/44 for the first six months of the reporting period in paragraph (1)(a) of the rule. FPC seeks permission to file this form for the six months ending June 1998.

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

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it affects other similarly situated persons who are subject to the rule.

Section 120.542(2), Florida Statutes.

FPC argues that application of the rule creates a substantial hardship on FPC. FPC further argues that the purpose of the underlying statute will be achieved if FPC's petition is granted. In its arguments, FPC raises essentially the same points raised by FPL in support of its petition for waiver of this rule.

By Order No. PSC-98-1211-FOF-EI, issued September 14, 1998, we granted FPL's petition for waiver of this rule. In that Order, we found that the purpose of the underlying statute would continue to be achieved under the terms of the requested rule waiver. Further, citing the purpose of Section 120.542, Florida Statutes, and the benefits that would be foregone by FPL customers absent the waiver, we found that FPL had demonstrated that application of the rule created a substantial hardship. Applying the same rationale, we granted an identical rule waiver for Gulf Power Company (Gulf) in Order No. PSC-98-1360-FOF-EG, issued October 12, 1998.

In terms of the requested rule waiver, FPC is in a position identical to that of FPL and Gulf. Thus, in light of our findings in Orders Nos. PSC-98-1211-FOF-EI and PSC-98-1360-FOF-EG, we find that FPC has demonstrated that application of the rule creates a substantial hardship and that the purpose of the statute underlying the rule will be achieved by the means suggested in FPC's petition. Therefore, we find that FPC's petition for waiver of Rule 25-17.015(1), Florida Administrative Code, should be granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power Corporation's petition for waiver 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

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

By ORDER of the Florida Public Service Commission this 23rd day of November, 1998.



KAY FLYNN, Chief
Bureau of Records

(S E A L)

WCK

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 December 14, 1998.

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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.