BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Proposed adoption of Rule 25-6.030, FAC, Storm Protection Plan and Rule 25-6.031, FAC, Storm Protection Plan Cost Recovery Clause, etc.	DOCKET NO. 20190131 - EU FILED: July 15, 2019

Comments of the Office of the Public Counsel

The Citizens of the State of Florida, through the Office of Public Counsel (OPC), hereby file their initial and preliminary comments on the draft proposed Rules 25-6.030 and 25-6.031.

A. General Comments

As an initial matter, the OPC understands that the provisions of Chapter 2019-158, Laws of Florida,[1] impose an obligation on the Commission to propose a rule implementing the statute no later than October 31, 2019. With that understanding, the OPC is committed to participating constructively in the rulemaking process, formally and informally, with the ultimate goal of making the rule faithful to the statute while providing the maximum protection to the customers who will bear the costs of the projects implemented pursuant to the rule.

Given the potential complexity of the engineering, economic, and logistical aspects of the Storm Protection Cost Issues, the Commission should proceed as cautiously as possible while adhering to the legislative mandate. The rules ultimately adopted in this process and the resulting

[1] Chapter 2019-158, Laws of Florida, is the session law that resulted from legislative passage and the governor's approval of Committee Substitute for Committee Substitute for Committee Substitute for Senate Bill No. 796, which will be codified at Section 366.96, Florida Statutes.

initial rounds of plan reviews and clause proceedings will have precedential impact on the trajectory of costs recovered on customers' bills for the foreseeable future. For this reason, the OPC advocates for both the Storm Protection Plan ("Plan" or "SPP") review hearings contemplated pursuant to Rule 25-6.030 and the Storm Protection Plan Cost Recovery Clause ("Clause" or "SPPCC") hearings contemplated pursuant to Rule 25-6.031 to be conducted separate and apart from the other clause hearings routinely conducted in the fall of each year. For the foreseeable future, the Commission, its Staff, and interested and affected parties will need to have a solid, fact-based working understanding of the scope and detail of the Plans and how the Clause mechanism will work.

The implementation of the Nuclear Cost Recovery Clause ("NCRC") provides precedent for offsetting a new and complex clause from the annual historical clauses (Fuel, Energy Conservation, and Environmental Cost Recovery, or the so-called "Traditional Clauses"). The NCRC was offset from the Traditional Clauses and the hearing was held in the month of August instead of in early November.[2]

The same conceptual treatment should be afforded the Clause here. Given that all five investor-owned utilities could be involved in the SPPCC hearing, the OPC asserts that even greater separation of this Clause and the Traditional Clauses is warranted.

These comments will not address any existing rules. At this time, the OPC believes it may be premature to consider the repeal of any other rules until the rules that are proposed here are final and adopted and all litigation and appellate windows related to Commission action under the auspices of such rules have expired.

[2] Currently, the Traditional Clauses are set for hearing over 2.5 days on November 5-7, 2019.

The stated purpose behind the Storm Protection Plan and Storm Protection Plan Cost Recovery law (new Section 366.96, F.S.) is to strengthen electric utility infrastructure, as set out in subsection 366.96(1)(c). Given this as the underlying goal of the new law, it should be the Commission's goal to hew closely to the purpose of the new law and be vigilant to avoid letting the clause process be used to recover costs which are already being recovered in base rates or to recover costs that do not serve the statutory purpose of strengthening the grid to withstand storms.

The OPC's comments on the two proposed rules are intended to reinforce this cautious approach. While Citizens believe the Staff's initial approach to the draft to implement the statute is well done, we suggest that there are refinements that should be made to ensure the intent of the law is faithfully implemented.

Given the time constraints and the late filing of the transcript, the OPC will focus more on three high level concerns and observations. The OPC did not participate in the lobbying or the legislative advocacy related to the passage of SB 796 nor is it in possession of the plans of the IOUs. For this reason, the OPC will focus in this initial round of comments on our overall concerns in three broad categories: (1) the timing of cost recovery proceedings, (2) the lack of statutory authority for projected cost recovery as opposed to costs that have been incurred, and (3) the minimum information needed to make a project's cost recovery eligibility and prudence determination and separation of base rate recovery from incremental rule-compliant clause recovery.

Once all the utilities have identified their concerns in written comments — including more detail on how they propose to address the thorny issues associated with current base rate recovery and level of granularity in plans and cost detail — OPC will be in a better position to provide more detail on its additional concerns and to propose specific language. At this point, the OPC is still

trying to fully digest the ramifications of the new law and the Staff's formulation of the implementing rule. The initial observations and concerns expressed by OPC at the first workshop are still reserved at this point.

1. The SPPCC Hearing Should Be Held In The First 6 Months Of The Year.

At the first workshop, the OPC expressed a fundamental concern about the timing of any cost recovery clause hearing. We remain steadfast in our advocacy of holding the storm cost recovery clause hearing prior to July 1st of each year. As was evidenced by the comments on June 25th, the Storm Projection Plan Cost Recovery Rule ("SPPCR") will involve a significant number of unknowns. Base rate cost recovery will be a thorny issue. Rate case settlements have created a potential gap in understanding how much SPP costs are included in base rates and how such costs are to be determined. (See discussion below). This separation process was quite complex in the 1994 ECRC proceeding involving Gulf Power. Order No. PSC-94-004-FOF-EI ("Gulf Power 1994 Order").

Because of the difficulty parsing what is included in settled base rates, the SPPCC proceedings in the early years must be separated from the thicket of Traditional Clauses (Fuel (including the gas utilities' Purchased Gas Adjustment), ECRC, ECCR (for gas and electric utilities)) held in the fall of each the year. At this point there are other significant unknowns related to the scope and granularity of plans and the extent to which new facilities, equipment or technologies are within the scope of the new statute and rule. These issues will all require evidentiary proceedings in the SPPCC phase implementing Section 366.96, F.S.

For better or worse, the clause hearings held in the fall have taken on a largely routinized nature that focuses on stipulation and a significant effort to minimize hearing time. This is not an ideal environment into which to insert a deliberate and intensive five-company hearing on detailed

project-by-project cost recovery. The addition of the SPPCR hearings to the already constrained Traditional Clause hearing schedule would be unfair to customers with regard to the Traditional Clauses as it would increase pressure to further curtail hearing time on those significant costs. Any effort to shoehorn the complexities of the SPPCR for all five companies into the crowded hearing and prehearing allocation of time for other clauses would be unfair and a poor use of the time available in the rest of the year.

2. The Storm Protection Plan Statute Does Not Authorize Projected Costs For Clause Recovery.

The OPC questions the authority of the rule to authorize projected costs. Section 366.96, F.S., does not authorize the Commission to impose an SPPCC charge on customers for anything other than incurred costs. *See* § 366.96(7), Fla. Stat. (2019). Unlike in other similar statutes authorizing non-base rate clause recovery of costs, the SPP statute makes no mention of projected costs or of costs from projected periods. This absence of specific authorization is meaningful.

Even more telling of the absence of a legislative intent to authorize recovery of projected costs is that such an intent was expressly stated in an early draft of the bill. As filed, SB 796 originally would have required the Commission to use tax savings windfalls to fund storm costs and then, to the extent the windfall was inadequate to cover "projected full revenue requirements" of the SPP costs, the Commission was to allow recovery of these costs through a cost recovery factor. The early version of SB 796 read as follows:

> [T]he commission must establish a factor that, taking into account projected sales, is intended to recover the required cumulative annual revenue for transmission and distribution storm protection costs, net of the amount funded by the storm protection reserve account. ***The cost-recovery factor must be based on costs incurred by, as well as projections of, the transmission and distribution storm protection plan costs for the prospective recovery period.***

SB 796 (as filed on February 6, 2019) at lines 145-152 (emphasis supplied).

The staff of the Senate Committee on Innovation, Industry, and Technology noted this in the March 4, 2019 Bill Analysis and Fiscal Impact Statement when it stated:

> If there is an actual or projected surplus in the reserve account at the end of a calendar year, it must be returned to customers through the storm protection cost recovery clause. If, on the other hand, the utility projects that the balance of its reserve will be insufficient to cover the projected full revenue requirements in any calendar year, the commission must establish a factor that, taking into account projected sales, is intended to recover the required cumulative annual revenue for transmission and distribution storm protection costs, net of the amount funded by the storm protection reserve account.
>
> The cost recovery factor must be based on costs incurred by, as well as projections of, the transmission and distribution storm protection plan costs for the prospective recovery period.

Senate Committee on Innovation, Industry, and Technology Staff Bill Analysis and Fiscal Impact Statement for SB 796 at 7.

On March 5, 2019, the bill was substantially changed with two committee amendments. All reference to projected costs, revenue requirements or period was removed. The subsequent committee amendments on March 21, 2019, (Infrastructure and Security) and April 10, 2019 (Appropriations) and the strike-all amendment adopted on the floor of the House of Representatives on April 29, 2019 — which became the final bill language that is now the statute — did not restore such references.

The Commission lacks authority to engraft onto the statute via a rule a provision that was specifically stricken from the bill that ultimately became law. Clearly, the legislature knows how to authorize projected period cost recovery in a statute.

The authorization for the "NCRC"— Section 366.93, F.S. — expressly authorizes a utility to recover "the carrying costs on the utility's projected construction cost balance." This language confirms the Legislature's intent that the carrying costs were to be recovered and would be projected.

Likewise, in the Environmental Cost Recovery Clause ("ECRC") statute — Section 366.8255(3), F.S. — the Legislature also used highly specific, express language:

> The environmental compliance cost-recovery factor must be set periodically, but at least annually, based on projections of the utility's environmental compliance costs during the forthcoming recovery period. This language is unequivocal and is strikingly similar to the language that was removed from the original SB 796.

Finally, Section 366.82(11), F.S. (ECRC), provides that:

> Each utility over which the commission has ratesetting authority shall estimate its costs and revenues for audits, conservation programs, and implementation of its plan for the immediately following 6-month period. Reasonable and prudent unreimbursed costs projected to be incurred, or any portion of such costs, may be added to the rates which would otherwise be charged by a utility upon approval by the commission.

Here again, the legislature expressly authorized cost recovery of ***projected*** costs including "reasonable and prudent unreimbursed costs projected to be incurred."

Such express language evincing legislative intent to allow customers to be charged for projected instead of actual incurred SPP costs is glaringly absent in the final, amended version of SB 796 that became law. For these reasons, the OPC challenges the notion that a Commission rule should provide an assist to utilities to get advance recovery of costs yet to be incurred in an area where the legislature intentionally removed such authorization in developing the law — when it clearly had the expertise to expressly authorize such advance recovery and even considered it. Any *ultra vires* rulemaking to legislate by the Commission will subject the rule to appeal and unwarranted delay.

3. The Commission Should Ensure the Prevention of Double Recovery By Requiring Detailed Project and Spending Information.

The third area of concern for the OPC is how the Commission will ensure that customers are not paying twice for Plan costs — once in base rates and again through Clause Recovery. New

Section 366.96(8), F.S., states that: "The annual transmission and distribution storm protection plan costs may not include costs recovered through the public utility's base rates. . . ."

In contrast, Section 366.8255(5), F.S., provides that for the ECRC ". . . any costs recovered in base rates may not also be recovered in the environmental cost recovery clause." The directive to prevent double recovery is unequivocal in both clause-authorizing statutes. Though worded differently, each mandates that the clause shall not provide for recovery of costs ***if*** customers are already paying for those costs in base rates.

The SPPCR language refers to ". . . costs recovered through base rates. . ." while ECRC language references ". . . any costs recovered in base rates." The use of different terminology may create an issue if there was an intent to convey a meaning that currently recovered SPPCC costs should be looked at differently than costs that were currently being recovered in base rates at the time of passage of the ECRC statute in 1993 (and in the 1994 implementation). This does not appear to be the case; however, the difference in nomenclature should be addressed now so that interpretational issues do not arise years later. As such, the OPC suggests that the term "through" should be read more broadly such that costs are presumed to be recovered as long as the company is earning within its authorized earnings range as revenues provide for recovery of the costs that the companies represent that they are incurring in the storm hardening plans.

The OPC advocates for the Commission to limit clause recoverable costs, both capital and expense, to projects that meet the strict intent of the statute. That intent is to strengthen the existing network and grid. This means that the Commission must ensure that costs included in base rates must continue to reflect the activities that were committed to at the time rates were established, or base rates should be reduced to reflect that the storm protection activities are no longer being conducted.

Given that all five IOUs are each operating under a settlement agreement, the normally difficult task of determining the "baseline" of expenditures included in base rates will be made more difficult. However, that difficulty cannot be resolved by erring on the side of a utility-centric interpretation of what their budgets alone show. The Commission must ensure that it requires detailed company documents demonstrating current expenditures such that the baseline can be developed and incremental activities and costs can be readily determined. The burden of proof should be heavily on the utilities to demonstrate these categories of costs or to forsake recovery through a clause.

The status of the five IOUs and applicable rate settlements is summarized below:

- Duke Energy Florida ("Duke") has been operating under a base rate settlement agreement since 2010 and the connection of current spending to test year (2009) minimum filing requirements ("MFRs") is unknown. In the ensuing ten years, the company has undergone a merger (Progress Energy and Duke Energy) and a significant service company transformation.
- Florida Power & Light ('FPL") has operated under a settlement agreement since 2011. Although MFRs were filed for various test years (2009, 2013, and 2017 (with limited subsequent year MFRs)), each case was settled on a "black box" basis with no direct tie of storm protection costs to MFRs.
- Gulf Power Company ("Gulf") has operated under a settlement agreement since 2013 with its most recent (2017) settlement based on a case with a "black box" revenue requirement based on a split test year of 2017-2018 (beginning July 1).
- Tampa Electric Company ("TECO") has been operating under a settlement agreement since January 1, 2018. The current agreement is an extension of the 2013 agreement which

became effective January 1, 2014. Both agreements contained "black box" revenue requirement determinations.

- Florida Public Utilities Company ("FPUC") is operating under a 2017 agreement that is somewhat different from the other four IOUs. The agreement covers 2018 and 2019 and included a negotiated revenue increase to address certain reliability and storm protection costs. The agreement contains a list of capital projects tied to the revenue increase; however, it does not identify O&M expense amounts or indicate that the listed projects are the full extent of the storm projection costs it is currently incurring.

The point of this summary of agreements is that there is very little in the public record that details the level of storm protection costs being recovered through base rates on an annual, current basis. The Commission will need to develop good data to understand this with precision in order to avoid causing customers to pay twice for the same costs.

On July 9, 2019, the Commission voted to approve storm hardening plans for the five IOUs for 2019-2021. These plans should be a starting point for the baseline determination about what is included in and recovered through current base rates. The difficulty in placing full reliance on these plans may be that the level of detail on an annual basis is not specific by year. See pp. 52-71 of Staff's Recommendation dated June 26, 2019 in Docket Nos. 20180144-EI, 20180145-EI, 20180146-EI 20180147-EI, and 20180148-EI.

For this reason, the Commission must provide a mechanism to determine what activities have been carried out over recent years in order to determine what storm protection activities and costs are embedded in current base rates.

At a minimum, year-by-year project and cost detail should be required on a basis that allows the Commission and customers to determine what costs, activities and projects are being

recovered in base rates at the time SPPCC recovery is sought. Given the public interest in protecting against storm damage, all utilities should have specific plans with detailed cost-tracking that comports with representations made to the Commission and all stakeholders regarding what they have done, are continuing to do and will do to continue storm protection efforts. As a part of this, the Commission should also require each utility to submit information for the last three years detailing all storm hardening projects that have been included in the utilities construction budgets including status of completion.

The OPC recommends that cost detail by year and project with monthly variance reports also be required for the plan filings made under Rule 25-6.030. This will give the Commission and the public visibility into what costs are truly incremental from base rate recovery. OPC notes that it ***may*** be possible to ultimately relax or eliminate this detail ***after*** base rates are re-set in future proceedings if there is sufficient detail and assurance that storm projection costs are no longer being recovered in base rates.[3] Moreover, this would require express language and assurances in any future settlement or stipulation.

With respect to vegetation management costs, the OPC submits that there should be no SPPCC recovery until the first year after base rates have been reset for each IOU and there is an affirmative demonstration that no such costs are being included in rates. At this time, it cannot be reasonably demonstrated what level of vegetation management costs are being recovered through base rates. The plans approved in the July 9, 2019 vote for the 2019-2021 storm hardening plans

[3] Such a relaxation of record support could be addressed in the future with a rule amendment or waiver and need not be part of any speculation in the rule today.

indicate increasing levels of vegetation management for FPL, Duke, and TECO while Gulf's shows a slight decline.[4]

To the extent that the IOUs nevertheless file for O&M cost recovery before base rates are reset, as a part of its plan review and cost recovery determinations, the Commission will need to be vigilant about changes in scope in (O&M) projects that are currently recovered through base rates. This issue was also addressed in the Gulf Power 1994 Order as follows:

> A problem arises if a new environmental regulation requires the utility to increase the scope of an activity which was considered in the last rate case. Regulatory theory indicates that the utility is already being compensated for such changes in scope. But the legislative intent is to allow utilities to recover increased costs due to new environmental requirements. We find that the cost of the scope change shall be allowed for recovery through the environmental cost recovery clause, because we consider the scope change to be a new activity.

Gulf Power 1994 Order at 5.

This is another reason that the Commission needs to make sure that detailed costs of each individual project is required by rule. Without this detail of information, it could be difficult to distinguish the original project costs from the additional costs due to a scope change. This detail was properly required when the environmental cost recovery clause was implemented as it should be for the implementation of this clause. Indeed, in the 1994 Gulf Power Order, the Commission both analyzed Gulf's overall request ***and*** made their findings on a project-by-project basis. See, 1994 Gulf Power Order at 8 -12.

B. Conclusion

[4] Gulf recently was impacted by Hurricane Michael which may have significantly reduced the non-hurricane surcharge recoverable vegetation management costs for the foreseeable future. FPUC may have a similar situation.

In summary, these three broad issues (1-3) are going to undoubtedly occupy significant discussion from all participants as the process proceeds. In the next round, OPC will engage in a more reactive role to specific proposals that the IOUs bring forward. We are generally pleased with the approach that the Staff has taken to ensure an adequate basis of project detail and granularity to determine eligibility and to exercise Commission authority to make modifications in the public interest and to moderate bill impacts. At this point, the biggest apparent area of disagreement between OPC and the Staff language is the proposal to authorize advanced recovery of projected costs. As explained, *supra*, the Storm Protection Plan statute does not authorize recovery of SPP costs unless those costs are incurred after Plan approval and before recovery is requested.

The OPC looks forward to the next round in the rulemaking process and will also be available to meet with the utilities and other interested parties to attempt to gain a better understanding of the process and solutions to differences going forward.

Respectfully submitted,

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Docket No. 20190131-EU

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