

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: May 28, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Dziechciarz, Weisenfeld, Lherisson) *TLT*
Division of Accounting and Finance (Mouring, Sowards) *ALM BF*

RE: Docket No. 20190155-EI – Petition for establishment of regulatory assets for expenses not recovered during restoration for Hurricane Michael, by Florida Public Utilities Company.

Docket No. 20190156-EI – Petition for a limited proceeding to recover incremental storm restoration costs, capital costs, revenue reduction for permanently lost customers, and regulatory assets related to Hurricane Michael, by Florida Public Utilities Company.

AGENDA: 06/09/20 – Regular Agenda – Oral Argument Not Requested – Participation at Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On August 7, 2019, Florida Public Utilities Company (FPUC) filed a petition to establish regulatory assets for expenses incurred during restoration for Hurricane Michael in Docket No. 20190155-EI. On the same day, FPUC also filed a petition for a limited proceeding to recover incremental storm restoration costs, capital costs, revenue reduction for permanently lost customers, and regulatory assets related to Hurricane Michael. This petition was filed in Docket No. 20190156-EI. The Office of Public Counsel (OPC) filed notices of intervention in Docket

Docket Nos. 20190155-EI, 20190156-EI

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Nos. 20190155-EI and 20190156-EI on August 14, 2019, which were acknowledged by Order Nos. PSC-2019-0373-PCO-EI and PSC-2019-0374-PCO-EI, respectively.

By Order No. PSC-2019-0501-PCO-EI, issued in Docket No. 20190156-EI on November 22, 2019, the Commission approved FPUC and OPC's joint motion for approval of stipulation for implementation of an interim rate increase subject to refund. The Commission found that the interim rate increase would allow for FPUC to offset its projected reduction in fuel costs with the recovery of storm restoration costs, subject to refund, and would avoid rate shock for FPUC's customers. By Order No. PSC-2020-0060-PCO-EI, issued on February 24, 2020, Docket Nos. 20190155-EI and 20190156-EI were consolidated for purposes of administrative efficiency, including a hearing, should it be necessary. On March 11 and 12, 2020, FPUC filed revised petitions in Docket No. 20190156-EI to reflect several updates to the August 7, 2019 petitions, including the addition of Hurricane Dorian expenses to FPUC's recovery request.

On April 6, 2020, OPC filed a Motion for Partial Summary Final Order of the Request to Establish Regulatory Assets for Lost Revenue in Docket Nos. 20190155-EI and 20190156-EI (Motion). On April 13, 2020 FPUC filed its Response in Opposition to OPC's Motion for Partial Summary Final Order (Response).

The Commission has jurisdiction pursuant to Chapters 120 and 366, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission grant OPC's Motion for Partial Summary Final Order?

Recommendation: No. OPC's Motion for Partial Summary Final Order should be denied. (Dziechciarz, Weisenfeld, Lherisson)

Staff Analysis:

Standard of Review for Motion for Summary Final Order

Section 120.57(1)(h), F.S., requires that, in order to grant a motion for summary final order, it must be determined from “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.” The Commission has previously stated that “the standard for granting a summary final order is very high.”¹

In general, “a summary judgment should not be granted unless the facts are so crystalized that nothing remains but questions of law,” and “must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought.” *Moore v. Morris (Moore)*, 475 So. 2d 666, 668 (Fla. 1985); see also *City of Clermont, Fla. v. Lake City Util. Servs., Inc.*, 760 So. 2d 1123, 1124 (Fla. 5th DCA 2000), and *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977). If the record “raises even the slightest doubt” that an issue of material fact may exist, a summary final order would not be appropriate. *Albelo v. S. Bell (Albelo)*, 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996). Even if the parties agree as to the facts, “the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts.” *Albelo*, 682 So. 2d at 1129. The Commission has also previously found that “it is premature to decide whether a genuine issue of material fact exists when [a party] has not had the opportunity to complete discovery and file testimony.”²

In addition, the Commission has acknowledged that the purpose of summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts.³ The record is reviewed in the light most favorable toward FPUC, against whom the summary judgment is to be entered. OPC carries a heavy burden to present a showing that there is no genuine issue as to any material fact. Subsequently, the burden shifts to FPUC to demonstrate the falsity of the showing. If FPUC does not do so, summary judgment is proper and should be

¹ Order No. PSC-11-0244-FOF-GU, issued June 2, 2011, in Docket No. 090539-GU, *In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department*, p. 4.

² Order No. PSC-01-1554-FOF-WU, issued July 27, 2001, in Docket No. 991437-WU, *In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*, p. 2, citing *Brandauer v. Publix Super Markets, Inc.*, 657 So. 2d 932, 933-34 (Fla. 2d DCA 1995).

³ Order No. PSC-11-0291-PAA-TP, issued on July 6, 2011, in Docket No. 110071-TP, *In re: Emergency Complaint of Express Phone Service, Inc. against Bellsouth Telecommunications, Inc. d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement*, p. 5.

affirmed. Even if the facts are not disputed, a summary judgment is improper if different conclusions or inferences can be drawn from the facts.⁴

OPC's Motion

OPC argues that FPUC's request to recover normal operation and maintenance (O&M) expenses not recovered (in the amount of \$984,283, inclusive of interest), and its request to establish a regulatory asset for reduction in customer base for November and December 2018, and all of 2019 (in the amount of \$504,448, inclusive of interest), are both thinly veiled attempts at collecting for lost revenue, which OPC further argues is prohibited in this case by the doctrine of retroactive ratemaking and by Rule 25-6.0143(1)(f)(9), Florida Administrative Code (F.A.C.).⁵

OPC avers that even drawing every possible inference in favor of FPUC, the facts and circumstances in this case are so crystalized that nothing remains but questions of law. OPC argues that FPUC cannot produce counter-evidence sufficient to show that a genuine issue exists, and that FPUC cannot do so because the facts and law are indisputable. OPC argues that it is indisputable that FPUC is seeking to create two regulatory assets based on lost revenue for prior periods, and it is indisputable that the doctrine of retroactive ratemaking under Florida law, applicable case law, and Commission rules, prohibit the creation of these types of regulatory assets to charge future customers for lost revenue and profits. OPC argues that its Motion provides substantial and competent evidence to support its request for Partial Summary Final Order, and thus its Motion should be granted as a matter of law.

A. Retroactive Ratemaking

OPC argues that Section 366.03, F.S., provides that all rates and charges received by a public utility for any service rendered, or to be rendered, shall be fair and reasonable. OPC continues that it is manifestly unfair and unreasonable to charge customers for service that was not rendered in the past. OPC concludes that the Commission should deny FPUC's request for establishing a regulatory asset for lost revenue because it is prohibited by the doctrine of retroactive ratemaking, pursuant to Florida law and Rule 25-6.0143(1)(f)(9), F.A.C.

OPC argues that FPUC's request to recover unrecovered (or "lost") O&M expenses in the prior period is an example of "pure and simple" retroactive ratemaking. OPC argues that the unrecovered O&M expenses were already expensed in a prior period, and FPUC's request to allow it to collect the lost revenue in current and future periods is a classic example of retroactive ratemaking, which is prohibited by Chapter 366, F.S.

OPC notes that in Order No. PSC-98-1243-FOF-WS (UWF Order), issued on September 21, 1998, the Commission acknowledged that retroactive ratemaking occurs when an attempt is made to either recover past losses (under earnings) through prospective rates, or to recoup prior

⁴ See Trawick's Florida Practice and Procedure, Section 25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (2020).

⁵ Rule 25-6.0143(1)(f)(9), F.A.C., states that "the types of storm related costs prohibited from being charged to the reserve under the ICCA methodology include ... [u]tility lost revenues from services not provided."

period overearnings through a refund.⁶ In the UWF Order, the Commission further stated that past losses are interpreted to be prior period costs that a utility did not recover through its rates, including those which cause the utility to earn less than a fair rate of return.

OPC further contends that FPUC's differentiation between "lost revenue" and "O&M costs not recovered," does not justify allowing the creation of the regulatory assets FPUC seeks. OPC asserts that the Commission acknowledged this distinction in Order No. PSC-2019-0114-FOF-EI (FPUC Storm Order), issued on March 26, 2019.⁷ OPC also contends that FPUC's claim that it should be held harmless because its earnings position was at the low end of its authorized earnings range for the prior period in question is contrary to the regulatory compact. OPC argues that the regulatory compact provides only the opportunity to earn a fair rate of return, and that it does not guarantee a certain level of profit. OPC concludes that if the Commission were to approve FPUC's request for lost earnings, it would turn the regulatory compact on its head.

In addition, OPC contends that according to the Financial Accounting Standards Board Accounting Standards Codification 606, a fundamental principle of Generally Accepted Accounting Principles (GAAP) is the principle of revenue recognition, which stipulates revenue is recognized when realized and earned, not necessarily when received. OPC states that "realizable" means that goods and/or services have been received, but payment for the product/service is expected later. OPC argues that the service FPUC's customers pay for is electricity, which in this case was never received. OPC continues that FPUC is making a specious argument that these regulatory assets are for unrecovered past O&M expenses, rather than lost revenue and profits, and is trying to cloud the clear prohibition against this type of retroactive ratemaking.

OPC further argues that in the UWF Order, the Commission already found that a request to establish a regulatory asset to capture past estimated revenue not billed is clearly prohibited. OPC argues that the utility in that proceeding sought to create a regulatory asset to defer and amortize unrecovered employee benefits costs that resulted from accounting changes. OPC notes that the utility argued that it was appropriate to deviate from the doctrine of retroactive ratemaking because of the extraordinary cost and fairness and equity exceptions to the doctrine. Ultimately, the Commission rejected application of these exceptions due to the clear prohibition against retroactive ratemaking, and noted that the exceptions raised by the utility were not based on Florida law. OPC contends that FPUC is seeking to create a regulatory asset for prior period costs that were not recovered in its base rates, and that its argument about the extraordinary circumstances resulting from Hurricane Michael is essentially the same as the utility's failed argument in the UWF Order.

OPC further contends that there is no basis in Florida law for such an exception to the doctrine of retroactive ratemaking, and that it would be unfair and unjust to create such an exception. OPC avers that FPUC's customers suffered equally, if not in some cases more than, FPUC through no

⁶ Order No. PSC-98-1243-FOF-WS, issued on September 21, 1998, in Docket No. 971596-WS, *In re: Petition for limited proceeding regarding other postretirement employee benefits and petition for variance from or waiver of Rule 25-14.012, F.A.C., by United Water Florida Inc.*

⁷ Order No. PSC-2019-0114-FOF-EI, issued on March 26, 2019, in Docket No. 20180061-EI, *In re: Petition for limited proceeding to recover incremental storm restoration costs, by Florida Public Utilities Company.*

fault of their own, and that it would be fundamentally unfair to allow FPUC to create a regulatory asset to collect money from customers for service that they did not receive, so that FPUC does not have to suffer any financial harm from Hurricane Michael.

B. Rule 25-6.0143, F.A.C.

OPC argues that FPUC has acknowledged that Rule 25-6.0143(1)(f)(9), F.A.C., prohibits it from charging unrecovered expenses to its storm reserve account, and that the Commission has determined that O&M expenses not recovered due to reduced revenue resulting from an outage are likewise not recoverable through a storm surcharge.⁸ OPC argues that while FPUC concedes that the O&M expenses are normal expenses, FPUC wants the Commission to ignore Rule 25-6.0143(1)(f)(9), F.A.C., which does not allow for recovery of normal base rate O&M expenses incurred during the storm period through a storm surcharge.

OPC argues that FPUC cannot legitimately charge rates to customers who received no service from the Company due to the effects of Hurricane Michael, whether because the customers could not receive service, or whether the customer did not re-establish service with FPUC. OPC further asserts that it would not be fair to charge FPUC's "other" customers for this lost revenue that relates to previous customers who did not receive service from the utility. OPC concludes that to allow FPUC to create a regulatory asset to make up for "lost revenue," based on no services being provided, leads to unjust compensation, and thus any potential inclusion in the establishment of new rates would also lead to unjust and unreasonable rates.

In addition, OPC contends that the customers of FPUC suffered great losses as a result of Hurricane Michael, and that these customers should not have to pay for electric service that they did not, and in some instances, could not, receive. OPC further argues that the permanent loss of 546 accounts in FPUC's Northwest Division attests to the suffering of FPUC's customers in that territory, and that the remaining customers should not have to pay for FPUC's loss of profits from the reduction in its customer base. OPC notes that electric utilities lose customers every day for a myriad of reasons, such as when customers move outside of the utility's service area, or install their own renewable systems.

OPC argues that Rule 25-6.0143, F.A.C., establishes that the Commission's policy for the types of storm costs that are recoverable from customers, and that the Incremental Cost and Capitalization Approach (ICCA) methodology propounded in the Rule must be followed, irrespective of how a utility chooses to recover storm-related costs from customers (surcharge or regulatory asset). OPC further states that the Commission disallowed a similar request from FPUC for lost revenue due to Hurricane Irma.⁹ In that case, the Commission found that lost revenue from service not provided due to a storm is prohibited from being charged to the reserve under the ICCA methodology.¹⁰ OPC argues that FPUC is merely renaming its previous request from a storm-reserve charge to a regulatory asset, and that in either case FPUC is prohibited from recovering lost revenue from its customers. OPC concludes that FPUC is prohibited from

⁸ See FPUC Storm Order, p. 25.

⁹ *Id.*

¹⁰ *Id.*

such recovery under the doctrine of retroactive ratemaking, which is the basis for the prohibition on charging lost revenue from service not provided found in Rule 25-6.0143(1)(f)(9), F.A.C.

FPUC's Response

FPUC argues that the Commission has consistently recognized that the standard for granting a request for Summary Final Order is very high, and that OPC has not met this standard with its Motion. FPUC argues that OPC has failed to conclusively demonstrate that no issues of material fact exist, nor has it demonstrated that it is entitled to judgment as a matter of law. FPUC also argues that granting OPC's Motion would be premature, and is unlikely to avoid a hearing in this matter. Accordingly, FPUC requests that the Commission deny the Motion.

A. Facts Remain in Dispute

1. Whether Unrecovered O&M Expenses Equate to Lost Revenue

FPUC argues that OPC's Motion reflects that there is at least one key issue of fact that remains in dispute; namely, whether the unrecovered O&M expenses for which FPUC seeks recovery are equivalent to "lost revenue." FPUC further argues that the Commission has acknowledged FPUC's differentiation between lost revenue and O&M costs not recovered in the FPUC Storm Order. FPUC acknowledges that in that case, the Commission found that it was not appropriate to charge these costs to its storm reserve account. FPUC argues that since FPUC is not seeking to recover these costs through the storm reserve in this proceeding, the appropriateness of FPUC's request remains a live issue in dispute.

FPUC also argues that OPC's Motion fails to indicate that FPUC did not recover the O&M expenses because it sought a waiver to rendering monthly bills in its Northwestern Division in light of the devastation caused by Hurricane Michael, which the Commission approved by Order No. PSC-2018-0529-PAA-EI, issued on November 8, 2018. FPUC states that it did not reinstate billing in the Northwest Division until early December 2018, but that service was restored to 97 percent of the Northwest Division's customers by November 1, 2018. FPUC argues that to allow OPC to recast the unrecovered O&M expenses as simply lost revenue, and its assertion that such expenses should remain unrecovered, would unfairly penalize FPUC for taking the humane action of not billing its customers for a period following a cataclysmic event.

FPUC also notes that because the Northeast Division continued to function and incur normal O&M expense throughout the period, only this half of FPUC's customer base was billed the rates designed to recover normal O&M expense across two divisions, despite normal O&M expenses continuing to be incurred in the Northeast Division for the entire period, and in the Northwest Division for a portion of the period.

2. Whether Electric Service Was Received

FPUC further contends that an additional fact remains in dispute – whether or not some customers received electricity for which they were not eventually billed. FPUC disagrees with OPC's assertion that FPUC's request for recovery amounts to seeking payment from customers

for electric service that was never received. FPUC argues that it has not been established that none of FPUC's customers received service during October through November 2018. FPUC notes that to the contrary, by November 1, 2018, FPUC restored its system to the extent that 97 percent of its customers could receive electric service on their premises. FPUC contends that it can be expected that a lower percentage of restored service was available prior to November 1, yet FPUC did not reinstate billing in the Northwest Division until December 2018.

FPUC argues that OPC narrowly construes service as the flow of electricity into a customer's house; however, much more is involved in providing service to customers. FPUC argues that rates are designed to cover not the electrons themselves, but the construction, wires, and maintenance necessary to get the "product" (ex. the ability to turn on a light) to the customer's premise. As of November 1, 2018, FPUC had provided this aspect of its service to 97 percent of its customers' premises, and after this period, the customers that could not receive the product was due to their premises being unable to receive electricity. FPUC notes that it is not arguing that it should be allowed to bill for electricity that the customer never received, but disputes OPC's contention that FPUC is seeking recovery for revenue that was not earned.

B. OPC Misinterprets the Law

1. Relief FPUC Requests is Not Prohibited

FPUC argues that its request for unrecovered O&M expenses, as well as the loss associated with its reduction in customers, does not equate to retroactive ratemaking as OPC contends, and that OPC disregards Commission precedent under which similar relief was provided to another Florida utility. FPUC notes that OPC is correct in stating that the Commission has determined that retroactive ratemaking occurs when an attempt is made to recover either past losses or over earnings in prospective rates, as iterated in the UWF Order. However, FPUC argues that in the UWF Order, the Commission stated that it does "not believe that the Court decisions literally mean that retroactive ratemaking would occur from reaching back to past consumption and back-billing for over or under collections during those periods."

In the UWF Order, the Commission also acknowledged the Florida Supreme Court's statements on retroactive ratemaking in its decision, *GTE Florida Inc. v. Clark (GTE)*, in which the Court stated that it views "ratemaking as a matter of fairness" and that "[e]quity requires that both ratepayers and utilities be treated in a similar manner."¹¹ The Court in *GTE* allowed the utility to implement a surcharge for prior expenses that had erroneously been disallowed, and distinguished the utility's request from being characterized as a new rate being applied retroactively, which is prohibited. FPUC argues that its request for unrecovered O&M expenses and lost customer revenue is precisely what the utility in *GTE* was granted.

FPUC incurred normal O&M expenses both prior to and after the storm that were never recovered because FPUC determined it would not be equitable to bill its customers in the Northwest Division immediately in the aftermath of Hurricane Michael. FPUC argues that considering the damage, billing its customers would be like pouring salt in a wound.

¹¹ See UWF Order, p. 16, citing *GTE Florida Inc. v. Clark*, 668 So. 2d 971, 972 (Fla. 1996).

FPUC further argues that the UWF Order is distinguishable from the case at hand. In the UWF Order, the Commission addressed a situation where a change in accounting treatment resulted in a loss to the utility. In rejecting the utility's request for recovery, the Commission noted the substantial amount of time that had passed between the effective date of the accounting change and the utility's filing for a rate case. The Commission further noted that the utility could have secured recovery of a substantial portion of the costs if it had filed for a rate case or limited proceeding sooner.

FPUC argues that it took action in a timely manner to address its losses, unlike the utility in the UWF Order. FPUC notes that in this case, no one could have predicted the level of devastation that resulted from Hurricane Michael, and that in the early days following Hurricane Michael search and rescue, followed by service restoration, took precedence over regulatory ratemaking and revenue issues. In addition, FPUC notified the Commission on October 24, 2019, that its losses would exceed \$10 million pursuant to Rule 25-6.0143, F.A.C. FPUC also undertook actions to mitigate the impact of the storm on its customers, including several discussions with OPC and Commission staff. FPUC submitted its petition in this proceeding just short of ten months following the storm, on August 7, 2019.

FPUC also argues that the Commission has allowed recovery of these types of expenses under very similar circumstances in a prior case, and thus if recovery was not prohibited as retroactive ratemaking then, it is not prohibited as retroactive ratemaking now. In Order No. PSC-05-0937-FOF-EI, issued on September 21, 2005, the Commission found that normal O&M expenses not recovered in base rates were eligible for recovery in Florida Power & Light Company's storm recovery mechanism.

With respect to FPUC's loss in customer base, FPUC does not deny that the amount associated with this regulatory asset does equate to lost revenue. However, FPUC argues that OPC fails to recognize that the revenue FPUC is receiving from its remaining customers no longer covers the cost of running the system with any opportunity to achieve a fair return. FPUC contends that its request to establish and recover the amortization on a regulatory asset to address this loss of revenue is not retroactive ratemaking. Rather, it is a reallocation of the Company's approved revenue requirement over a reduced customer base. FPUC argues that this adjustment is not uncommon in the context of a rate case; however, FPUC has requested it in the context of a limited proceeding.

FPUC argues that Commission-established rates and earnings ranges provide an opportunity for a utility to earn a fair return, but that the ratemaking process does not and could not address the significant issues at play following Hurricane Michael. FPUC argues that while the regulatory compact provides only an opportunity for a utility to earn a fair return, and does not guarantee a certain level of profit, as OPC suggests, Hurricane Michael demolished that opportunity for FPUC. FPUC concludes that if anything, Hurricane Michael has turned the regulatory compact on its head.

2. Arguments under Rule 25-6.0143(1)(f)(9), F.A.C. are Misplaced

FPUC argues that it does not deny that Rule 25-6.0143(1)(f)(9), F.A.C., prohibits FPUC from charging the expenses associated with FPUC's proposed regulatory assets to the storm reserve. However, FPUC does not agree with OPC's extrapolation that because the Commission's Rule prohibits charging these costs to the storm reserve, that the Commission clearly intended that these costs not be recoverable at all. FPUC notes that it cannot find one instance in which the Commission expressly stated that that costs represented by FPUC's proposed regulatory assets are not recoverable at all by any other mechanism.

FPUC further contends that it did not seek relief under Rule 25-6.0143, F.A.C., given the scope of the relief that FPUC required. Rather, FPUC argues that it chose to request to establish a series of regulatory assets because the storm surcharge recovery mechanism would not accommodate the recovery FPUC required without unjustly burdening FPUC's customers with an "outrageous" storm surcharge. FPUC argues that the Commission should be wary of OPC's rush to limit its consideration of the merits of FPUC's request based upon a Rule that does not apply to its request.

3. Granting Motion Will Not Avoid Delay and Cost of Hearing

FPUC notes that the Commission has recognized that one of the key reasons for issuing a summary final order is to avoid the expense and delay of trial.¹² FPUC argues that granting OPC's Motion will not do that, accordingly, its Motion should be denied.

Analysis

Staff recommends that this dispute clearly presents a number of mixed questions of fact and law, and that OPC has not met its high burden to present a showing that there is no genuine issue as to any material fact. In the case at hand, the testimony and admissions surrounding FPUC's expenses could permit different reasonable inferences. Here, FPUC submits that the evidence supports a characterization of "unrecovered O&M expenses," while OPC submits that the evidence supports characterizing those expenses as "lost revenue." These conflicting interpretations convey that a genuine issue of material fact exists. Like in *Moore*, there is nothing about these facts that leads conclusively and inescapably to only one conclusion.¹³ Therefore, since OPC's Motion must be viewed in the light most favorable to FPUC, staff recommends that OPC's Motion be denied.

In addition, staff recommends that FPUC has demonstrated that another issue of fact regarding its request to recover O&M expense remains in dispute, that is, whether or not electric service was actually received. OPC argues that FPUC is attempting to recover O&M expenses for electric service that was not earned in a prior period, which is contrary to the doctrine of retroactive ratemaking. FPUC argues that the extent to which electric service was received by the

¹² Order No. PSC-01-1554-FOF-WU, issued July 27, 2001, in Docket No. 991437-WU, *In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*

¹³ *Moore*, 475 So. 2d at 668.

majority of its customers, and thus earned, in a prior period, has not been established, and thus remains in dispute. As indicated above, if the record raises even the slightest doubt that an issue of material fact may exist, then granting of summary judgment is not appropriate, and thus OPC's Motion should be denied.¹⁴

Moreover, staff concurs with FPUC that this Commission has recognized that policy considerations should be taken into account in ruling on a motion for summary final order.¹⁵ Because the Commission has a duty to regulate in the public interest, the rights of not only the parties must be considered but also the potential impact to others, and the decision cannot be made in a vacuum. Policy considerations must be taken into account in granting a summary judgment.¹⁶ Most notably, the Commission has recognized that:

[t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.¹⁷

Staff recommends that the primary question of fact at issue here (whether unrecovered O&M expenses equate to lost revenue), is directly related to the questions of law and policy that OPC and FPUC lay out extensively in their filings; namely, whether prior Commission decisions (in 2004 and in the FPUC Storm Order), the doctrine of retroactive ratemaking, or Rule 25-6.0143, F.A.C., preclude FPUC from seeking recovery of these expenses. Staff also recommends that whether FPUC can recover the lost revenue from its reduction in customer base as a result of Hurricane Michael by establishing a regulatory asset in a limited proceeding, as opposed to addressing this issue in a rate case, is a policy consideration that is not appropriate to dismiss in a partial summary final order.

Furthermore, the extent to which, if at all, FPUC can recover the O&M expenses and lost revenue from reduction in its customer base, in the manner in which FPUC has requested (to establish regulatory assets), appears to be a question of first impression before the Commission, and staff believes it is therefore inappropriate to be dealt with by partial summary final order. Staff recommends that it is not appropriate at this time to make a determination on the legal or factual issues to be addressed at a future evidentiary hearing. Rather, staff recommends only that the high standard for granting a summary final order has not been met.

¹⁴ See Trawick's Florida Practice and Procedure, Section 25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (2020).

¹⁵ Order No. PSC-98-1538-PCO-WS, issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, *In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc. and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation*, p. 8.

¹⁶ *Id.*

¹⁷ *Id.*

In addition, staff does not believe that granting OPC's Motion would avoid the expense and delay of a trial, which the Commission has acknowledged as the purpose of a summary final order. Staff believes that even if OPC's Motion were granted, similar questions of fact, law, and policy are expected to be addressed at the hearing to determine the remainder of FPUC's requests to recover storm costs, which is currently set for September 8-10, 2020. Staff recommends that it is more appropriate to address such nuanced issues of fact, law, and policy before the Commission in the context of FPUC's full request related to Hurricane Michael, especially given the storm's level of impact on both FPUC and its customer base.

Staff also notes that OPC states that its Motion was filed pursuant to Rule 28-106.204, F.A.C. Subsection (3) of that Rule requires that "[m]otions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion." OPC included no such statement in its Motion, and should have informed the Commission in its Motion whether any parties objected, after conferring with them, or it should have provided a statement that it attempted but was unable to confer with the parties.

Conclusion

For the reasons stated above, staff does not believe that the facts of this case are "so crystalized" that it is clear that no genuine issue as to any material fact exists. Whether normal unrecovered O&M expenses are equal to lost revenue, whether FPUC is seeking to charge its customers for service not rendered, whether FPUC can create a regulatory asset for its lost revenue as a result of its reduction in customers, and whether the expenses are permissible for FPUC to recover, are genuine issues of fact, law, and policy that are inextricably linked in this case. Furthermore, staff believes that granting OPC's Motion would not avoid the expense and delay of a hearing, and additional facts may be developed at hearing that would help the Commission decide these matters. Accordingly, staff recommends that it is not appropriate at this time to make a determination on the legal or factual issues to be addressed at a future evidentiary hearing.

Staff recommends that OPC has not conclusively demonstrated, at this point, that no issues of genuine fact remain with the issues presented, and that the high standard for granting a summary final order has not been met. Staff also recommends that OPC has not met its high burden of showing that partial summary judgment is appropriate given the policy considerations that would be implicated by such a decision. Therefore, staff recommends that the granting of a partial summary final order is premature at this time, and that OPC's Motion should be denied.

Issue 2: Should these dockets be closed?

Recommendation: No. These dockets should remain open for an evidentiary hearing on these matters. (Dziechciarz, Weisenfeld, Lherisson)

Staff Analysis:

These dockets should remain open for an evidentiary hearing on these matters.