

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of a regulatory asset to record costs incurred due to COVID-19, by Gulf Power Company.

Docket No: 20200151-EI

Date: August 13, 2020

**GULF POWER COMPANY’S RESPONSE IN OPPOSITION TO CITIZENS’
MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE,
PETITION FOR EVIDENTIARY HEARING**

Pursuant to Rule 25-22.0376(2), Florida Administrative Code (“F.A.C.”), Gulf Power Company (“Gulf Power” or the “Company”) hereby files this Response in opposition to the Office of Public Counsel’s (“OPC”) Motion for Reconsideration of Order No. PSC-2020-0262-PCO-EI (“Order 0262”) and, in the Alternative, Petition for Evidentiary Hearing (“Motion”). Order 0262 approved the Company’s request to establish a regulatory asset to record costs associated with COVID-19.

OPC’s Motion fails to meet the legal standard for reconsideration for a variety of reasons. The Motion should be denied out of hand because OPC is now attempting to make the case, for the first time, on reconsideration that the Florida Public Service Commission’s (“Commission”) order should have been issued as a proposed agency action (“PAA”) order entitling OPC to request an evidentiary hearing. However, the Commission has long held that such “eleventh hour” attempts by parties to raise new issues and arguments through a motion for reconsideration are inappropriate and fail to meet the standard for reconsideration.

Beyond that, and apart from OPC’s attempt to use a motion for reconsideration as a means to petition for an evidentiary hearing on a procedural order, the remainder of OPC’s Motion is a rehash of arguments raised by OPC and rejected by the Commission. Also, because OPC is not adversely affected by Order 0262, and there is no point of fact or law that the Commission overlooked or failed to consider in rendering Order 0262, the Motion should be denied. Further,

OPC's alternative proposal, that the Commission set an evidentiary hearing, is procedurally inappropriate given that Order 0262 is not a PAA order and an appropriate forum to challenge the recorded costs will be made available to OPC. In further support, Gulf Power states:

I. Background

1. On May 22, 2020, Gulf Power filed a petition with the Commission seeking the establishment of a regulatory asset to record and preserve incremental bad debt expense and safety-related costs attributable to the COVID-19 pandemic ("COVID Costs").

2. On May 27, 2020, OPC filed a notice of intervention in the case, which was acknowledged by the Commission in Order No. PSC-2020-0173-PCO-EI, issued on June 1, 2020.

3. On June 24, 2020, Staff filed its recommendation in the docket, expressly stating that "[t]he docket should be closed upon the issuance of the procedural order." June 24, 2020 Staff Recommendation at 2.

4. On June 25, 2020, the Commission issued its Notice of Commission Conference Agenda for the July 7, 2020 Agenda Conference, which, like the staff recommendation, indicated that "[t]he docket should be closed upon the issuance of the procedural order."

5. On July 7, 2020, the Commission considered Gulf Power's petition at its noticed Agenda Conference. At the Agenda Conference, OPC argued, among other things, that: (i) that Gulf Power did not demonstrate financial integrity issues; (ii) Gulf Power did not demonstrate it was in danger of falling below its earnings range; (iii) Gulf Power did not show that the costs being deferred were not included in its current earnings; and (iv) Gulf Power did not demonstrate its request was consistent with accounting standards. The Commission, after hearing and considering OPC's arguments, voted in favor of authorizing Gulf Power to establish a regulatory asset for the recording and preservation of COVID Costs. OPC did not assert at the Agenda Conference that

the order to be issued by the Commission should not be a procedural order as recommended by Staff, nor did OPC offer any argument that the order should be framed as a PAA order.

6. On July 27, 2020, the Commission issued Order 0262, authorizing Gulf Power to establish a regulatory asset to record and preserve the COVID Costs and requiring Gulf Power to file monthly reports identifying the amounts of the costs incurred, any assistance or benefits received, and any cost savings realized which have been recorded in the regulatory asset. The Order clarified that approval to establish a regulatory asset did not limit the Commission's ability to review the amounts, recovery method, recovery period, and other related matters for reasonableness in a future proceeding in which the regulatory asset is included. Order 0262 at 2. The Order also established that a substantially affected party's point of entry to request an evidentiary hearing before the Commission will be afforded in a future proceeding addressing cost recovery of the regulatory asset. *Id.*

II. Legal Argument

i. OPC's Motion Improperly Attempts to Introduce New Arguments and Issues on Reconsideration

7. Despite having had the opportunity at the July 7, 2020 Agenda Conference to raise its argument that the Commission's order in the case should be a PAA order, OPC now improperly seeks to raise this argument for the first time on reconsideration, after the order has already issued. Introducing this new argument on reconsideration, as OPC has done, contravenes the long-held and well established precedent that arguments and issues that a party failed to raise during the proceeding cannot be raised on reconsideration. *See, e.g.*, Commission Order Nos. PSC-2017-0430-FOF-EI, PSC-11-0097-FOF-WS, PSC-09-0156-FOF-TP, PSC-94-0656-PCO-EG. The Commission Staff's recommendation (filed June 24, 2020) and the Commission's Notice of Commission Conference Agenda (issued June 25, 2020), both made available in advance of the

July 7, 2020 Agenda Conference, put parties on notice that a procedural order – not a PAA order – was recommended to be issued. Thus, OPC had a forum and opportunity at the July 7, 2020 Agenda Conference to raise the argument that Order 0262 should take the form of a PAA order, but failed to do so. Therefore, OPC’s argument that Order 0262 should not have been issued as a procedural order is now improper to raise on reconsideration.

ii. OPC’s Request for Reconsideration Fails to Show that OPC is Adversely Affected by Order 0262

8. Under Rule 25-22.0376, F.A.C., only a party who is “adversely affected” may file a motion for reconsideration of a non-final order.

9. Nothing in OPC’s Motion shows that OPC is adversely affected, and therefore, its Motion fails to meet Rule 25-22.0376’s minimum threshold for reconsideration. OPC’s principal argument in support of reconsideration is that it is adversely affected by the Commission’s determination that a party’s point of entry to request an evidentiary hearing will be afforded in a future proceeding addressing cost recovery of the regulatory asset. Motion at 3. OPC also asserts that the Commission has predetermined that the COVID Costs can be recovered in future rates. Motion at 5. However, for the reasons detailed below, neither of these assertions are true.

10. There are two principal reasons why OPC is not adversely affected by Order 0262. First, Order 0262 included clear and express language specifying that the Order authorizes only the tracking and recording of the Company’s COVID Costs; and, importantly, the Order provided express assurance that there will be review and consideration of the recorded COVID Costs prior to their inclusion in customer rates. Specifically, the Commission stated in Order 0262 that, “This approval to establish a regulatory asset, for accounting purposes, does not limit our ability to review the amounts, recovery method, recovery period, and other related matters for

reasonableness in a future proceeding in which the regulatory asset is included.” Order 0262 at 2. Therefore, OPC’s argument that the COVID Costs are predetermined to be recoverable is defective in light of the Order’s express language. Also OPC’s implication that the Commission is now handcuffed into accepting the COVID Costs into rates due to applicable accounting standards (specifically ASC 980-340-21-1) is similarly misguided. The accounting standards noted in OPC’s Motion require approval from the regulator in order to establish a regulatory asset, but the regulator is in no way prohibited from placing appropriate conditions or parameters around the regulatory asset, as it has done in Order 0262.¹

11. In addition, the *United Water of Florida* Order (Order No. PSC-98-1243-FOF-WS) noted in OPC’s Motion on page 8, which OPC points to as an indicator that the COVID Costs are predetermined to be recoverable, is not supportive of OPC’s position. OPC’s quote from the *United Water of Florida* Order conveniently cuts off the immediately following portion of the accounting standard cited in the Order, which states, “Rate actions of a regulator can reduce or eliminate the value of an asset.” Order No. PSC-98-1243-FOF-WS at 11. Thus, even within the accounting standards framework, the Commission is fully able to later review and include or exclude costs accrued in the regulatory asset from being recovered in rates.

12. The second reason OPC is not adversely affected is that the establishment of a regulatory asset for the COVID Costs has no rate impact until reviewed by the Commission and any intervening parties at a later rate proceeding. OPC cannot be adversely affected by the tracking, recording, and reporting of certain costs, which are the sole actions that Order 0262

¹ The Commission has found on multiple occasions that it is not bound by the express terms of the Uniform System of Accounts (“USOA”) and other financial accounting standards. *See, e.g., In Re: Petition of Florida Power and Light Company for an Increase in Rates*, Docket No. 810002-EU, Order No. 10467 (December 21, 1981) (“[W]e note that the Commission is not bound by the USOA for ratemaking purposes.”); and *In Re: Application of Century Utilities, Inc., for an Increase in Water and Sewer Rates in Palm Beach County, Florida*, Docket No. 861564-WS, Order No. 19161 (April 18, 1988) (“[I]t is true that the Commission may depart from Financial Accounting Standards Board guidelines”).

authorized. Only if OPC were denied the opportunity to challenge the eventual recorded COVID Costs could OPC be considered to have been adversely affected. However, OPC will have a free and full opportunity to review, seek discovery on, and provide evidence regarding the COVID Costs prior to their entry into customer rates.

13. Thus, OPC cannot maintain that it was adversely affected by Order 0262, and the Motion should also be denied on this basis.

iii. OPC's Motion Attempts to Re-litigate Issues Previously Raised and Considered by the Commission

14. The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962). The alleged overlooked fact or law must be such that if it had been considered, the Commission would have reached a different decision than the decision in the order. *Id.* In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959); *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, it is not necessary for the Commission's order to respond to every argument and fact raised by each party. *Id.* at 18. An opinion should "never be prepared merely to refute the arguments advanced by the unsuccessful litigant." *Id.*

15. Contrary to the established standard, OPC's Motion seeks to raise arguments that were previously considered and rejected at the Commission's July 7, 2020 Agenda Conference. For example, OPC's Motion makes the following arguments in support of reconsideration: (i) that Gulf did not demonstrate financial integrity issues (Motion at 7); (ii) Gulf did not demonstrate it was in danger of falling below its earnings range (Motion at 7); (iii) Gulf did not show that the

costs being deferred were not included in its current earnings (Motion at 7); and (iv) Gulf did not demonstrate its request was consistent with accounting standards (Motion at 7). Each of these arguments, however, were presented to the Commission for its consideration at the July 7, 2020 Agenda Conference.² Thus, since OPC is attempting to re-litigate issues previously considered by the Commission, it is inappropriate for them to be raised for reconsideration. Not only that, given that OPC's arguments are repackaged and reproduced, OPC is far distant from establishing that any overlooked fact or law, if it had been considered, would have caused the Commission to reach a different decision than the decision reflected in Order 0262.

iv. *OPC's Request for Evidentiary Hearing is Inappropriate as OPC Continues to Have an Appropriate Opportunity and Forum to Challenge the Recorded COVID Costs*

16. OPC's alternative request for an evidentiary hearing pursuant to Rule 25-22.029, F.A.C., is based on the faulty premise that the Commission is somehow forbade from approving the tracking and recording of the COVID Costs by way of a procedural ruling. There is no such prohibition. Order 0262 ensures that OPC will have a point of entry and opportunity to review and challenge the costs included within the regulatory asset when the Company seeks rate recovery of the costs included therein. Thus, Rule 25-22.029, F.A.C., is not invoked by Order 0262 as OPC claims. The language of the Rule limits its application to PAA proceedings—which this is not—and cannot be so resurrected through OPC's Motion.

17. Finally, in its Motion, OPC relies on the fact that a Case Assignment and Scheduling Record ("CASR") was initially issued that indicated the case was on a PAA track. A CASR does not have the weight of a Commission Order, such as an Order Establishing Procedure. Not only that, as previously noted, the Commission Staff's recommendation and the Commission's

² See July 7, 2020 Agenda Conference Transcript (Item No. 6) at 5-16.

Notice of Commission Conference Agenda, both made publicly available in advance of the July 7, 2020 Agenda Conference, put parties on notice that a procedural order – not a PAA order – was recommended to be issued. Thus, parties were aware in advance of the recommended action.

18. Also, the fact that a CASR indicated that a proceeding would proceed along a PAA track does not mean that it cannot be changed or altered as the proceeding progresses. Such discretion is clearly in the hands of the Commission. To this point, the Commission has previously found that:

The decision to render an issue as final or proposed agency action is largely a matter of procedural discretion, dependent upon whether a point of entry has been afforded to affected persons and whether additional investigation or analysis is required for us to render our decision.

In Re: Review of GridFlorida Regional Transmission Organization (RTO) Proposal, Docket No. 020233-EI, Order No. PSC-03-1006-FOF-EI (Sept. 8, 2003). And, here, the Commission has specifically afforded parties a point of entry to review and challenge costs being deferred into the regulatory asset being created. Thus, there is nothing improper about the form of Order 0262.

WHEREFORE, for the reasons stated above, Gulf Power respectfully requests that the Commission deny OPC's Motion.

Respectfully submitted this 13th day of August 2020.

Respectfully submitted,

/s/ Russell A. Badders

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail this 13th day of August, 2020 to the following:

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