

**BEFORE THE PUBLIC SERVICE COMMISSION**

---

In Re: Fuel and purchased power cost recovery  
clause with generating performance incentive  
factor.

---

DOCKET NO. 20200001-EI

Filed on November 2, 2020

**DUKE ENERGY FLORIDA, LLC'S MOTION FOR  
STAY PENDING JUDICIAL REVIEW**

Duke Energy Florida, LLC ("DEF"), pursuant to Rule 25-22.061, Florida Administrative Code, and Rule 9.190(e)(2)(A), Florida Rules of Appellate Procedure, moves to stay the final order of the Commission pending appeal and states:

1. On October 15, 2020, the Commission entered its final order establishing fuel cost recovery for DEF ("Final Order") which denied DEF's filed exceptions and adopted the recommended order issued by the administrative law judge following an evidentiary hearing. *See* Docket No. 20200001-EI, Order No. PSC-2020-0368-FOF-EI. The Final Order concludes DEF (1) failed to act prudently in the operation of its Bartow Power Plant ("Bartow Plant") relating to the February 2017 forced outage, and (2) failed to make prudent adjustment to account for replacement power costs associated with derating of the Bartow Plant and must refund charges to customers in relation to DEF's fuel replacement power and other costs associated with the outages at its Bartow Plant. Specifically, the Final Order determines DEF should refund \$16,166,782.00 to its customers.

2. Pursuant to Rule 9.030(a)(1)(B)(ii), Florida Rules of Appellate Procedure, DEF timely filed its Notice of Appeal of the Final Order on November 2, 2020.

3. Rule 25-22.061(1)(a), Florida Administrative Code, provides that when an appealed order involves the refund of money to customers, the Commission **shall** grant a stay

pending judicial proceedings upon motion of the utility or company affected. *See In re Aloha Utilities, Inc*, 2005 WL 405335 (Fla. P.S.C. Feb. 7, 2005). While the remaining subsection of Rule 25-22.061 affords the Commission discretion in determining a stay motion, subsection(1)(a) is mandatory when the order appealed “involves the refund of moneys to customers.”

4. Because DEF is an investor-owned electric utility and the order on appeal involves the refund of moneys to customers, Rule 25-22.061(1)(a) requires the Commission to grant the requested stay pending appeal.

5. Given the circumstances of this case and the on-going nature of the fuel docket, DEF should not be required to post a bond, corporate undertaking, or any other conditions to secure the revenues collected by DEF that may ultimately be subject to refund if the order under appeal is upheld; that is, because such a refund would take the form of a reduction in DEF’s fuel collections for the refund period, no bond, undertaking or other assurances are necessary or appropriate. *See* 25-22.061(1), (3), Florida Administrative Code.

6. DEF meets the prerequisites for a mandatory stay under the plain language of Rule 25-22.061(1)(a). But even if DEF were not entitled to a mandatory stay, the Commission should grant a discretionary stay in the alternative based upon a consideration of the non-exclusive factors outlined in Rule 25-22.061(2), Florida Administrative Code. Specifically, DEF is likely to prevail on the merits of the appeal and a stay on implementation of the Final Order during the pendency of the appeal would not cause substantial harm or be contrary to the public interest.

7. DEF has demonstrated a likelihood of success on the merits of its appeal for the reasons described in DEF’s Proposed Recommended Order at DOAH and in its exceptions to the

Recommended Order filed with the Commission, both of which are incorporated by reference herein. If the Final Order is not stayed, and DEF is successful on appeal, DEF would be entitled to recover the improperly refunded revenues from its customers. The public interest favors stability in electric utility rates rather than refunds followed by recoupments. The mandatory stay provided by Rule 25-22.061(1)(a) is consistent with this sound public policy, and the same considerations would counsel in favor of a discretionary stay pending appeal.

8. Pursuant to Rule 28-106.204(3), Florida Administrative Code, the undersigned counsel contacted counsel for each party in this docket to determine whether they object to the requested relief in this motion. DEF is authorized to represent that the Office of Public Counsel opposes the motion and will file a response; that PSC Phosphate and the Florida Industrial Power Users Group oppose the motion, and that Commission Staff, Florida Power & Light, Gulf Power, TECO, and Florida Public Utilities Company take no position on the motion.

### **CONCLUSION**

**WHEREFORE**, DEF respectfully requests that the Commission enter an order granting a mandatory stay of the Final Order pending appeal. In the alternative, DEF respectfully requests that the Commission enter an order granting a discretionary stay of the Final Order pending appeal.

Respectfully submitted,

**SHUTTS & BOWEN LLP**  
*Attorneys for Duke Energy Florida, LLC*  
215 South Monroe Street, Suite 804  
Tallahassee, FL 32301  
Telephone: (850) 241-1717

and

4301 West Boy Scout Boulevard, Suite 300  
Tampa, FL 33607

Telephone: (813) 227-8149

By: /s/ Daniel E. Nordby

Daniel E. Nordby

Florida Bar No. 14588

Email: [dnordby@shutts.com](mailto:dnordby@shutts.com)

Daniel Hernandez

Florida Bar No. 176834

Email: [dhernandez@shutts.com](mailto:dhernandez@shutts.com)

Alyssa L. Cory

Florida Bar No. 118150

Email: [acory@shutts.com](mailto:acory@shutts.com)

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 2nd day of November 2020, a true and accurate copy of the foregoing was e-filed with the Public Service Commission's online filing system and a true and correct copy has been furnished via electronic mail to the following counsel of record:

**Beth Keating**

**Gunster, Yoakley & Stewart, P.A.**

215 South Monroe Street, Suite 601

Tallahassee, FL 32301

bkeating@gunster.com

**Mike Cassell**

Florida Public Utilities Company

208 Wildlight Avenue

Yulee, FL 32097

mcassel@fpuc.com

**James W. Brew,**

**Laura Wynn Baker**

**Stone Law Firm**

Eighth Floor, West Tower

1025 Thomas Jefferson Street Northwest

Washington, DC 20007

(202) 342-0800

jbrew@smxblaw.com

law@smxblaw.com

**Charles John Rehwinkle**

**Thomas Ansley David**

**J.R. Kelly**

**Florida Office of Public Counsel**

1111 West Madison Street, Room 812

Tallahassee, FL 32399

850-488-9330

Rehwinkel.charles@leg.state.fl.us

David.tad@leg.state.fl.us

kelly.jr@leg.state.fl.us

**Suzanne Smith Brownless**

**Keith Hetrick**

**Office of General Counsel**

**FL Public Service Commission**

2540 Shumard Oak Boulevard

Tallahassee, FL 323990850

(850) 413-6218

sbrownle@psc.state.fl.us

khetrick@psc.state.fl.us □

**Patty Christensen**  
**Stephanie Morse**  
**The Florida Legislature**  
111 West Madison Street, Room 812  
Tallahassee, FL 32399  
(850) 488-9330  
christensen.patty@leg.state.fl.us  
morse.stephanie@leg.state.fl.us

**Jon C. Moyle, Jr.**  
**Karen Ann Putnal**  
**Moyle Law Firm, P.A.**  
118 North Gadsden Street  
Tallahassee, FL 32301  
(850) 681-3828  
jmoyle@moylelaw.com  
kputnal@moylelaw.com

**Kenneth A. Hoffman**  
**Florida Power & Light Company**  
134 W. Jefferson Street  
Tallahassee, FL 32301  
Ken.hoffman@fpl.com

**James D. Beasley**  
**J. Jeffry Whalen**  
**Malcom N. Means**  
**Ausley McMullen**  
P.O. Box 391  
Tallahassee, FL  
jbeasley@ausley.com  
jwhalen@ausley.com  
mmeans@ausley.com

**Maria Moncada**  
**David Lee**  
**Florida Power & Light Company**  
700 Universe Blvd. (LAW/JB)  
Juno Beach, FL 33408  
Maria.moncada@fpl.com  
David.lee@fpl.com

**Paula K. Brown**  
**Regulatory Affairs**  
**Tampa Electric Company**  
P.O. Box 111  
Tampa, FL 33601  
regdept@tecoenergy.com