

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost
Recovery Clause and Generating
Performance Incentive Factor

Docket No. 20200001-EI
Filed: November 10, 2020

**DUKE ENERGY FLORIDA, LLC'S
POST-HEARING STATEMENT AND BRIEF**

Duke Energy Florida, LLC (“DEF”) hereby submits its Post-Hearing Statement of Issues, Positions, and Brief in this matter and states as follows:

I. Introduction

This Commission should approve DEF’s requested fuel and capacity costs and DEF’s proposed 2021 fuel and capacity cost recovery factors as filed. The sole remaining contested, substantive issue for the Commission’s determination is Issue 1A: “What action should be taken in response to Commission Order No. PSC-2020-0368-FOF-EI-A¹ regarding the Bartow Unit 4 February 2017 outage?”² In DEF’s Prehearing Statement, DEF took the position that no Commission action is appropriate at this time because any such action would be premature given that the Bartow Order was not rendered until October 15, 2020, approximately five weeks after DEF made its 2021 fuel and capacity cost projection filing. Subsequent to filing its Prehearing

¹ After the Issues were determined, but before the Prehearing Order issued in this docket, Order No. 2020-0368-FOF-EI was amended to include “Attachment A” – the ALJ’s Recommended Order. Herein, the Order, as amended, will be referred to as the “Bartow Order.”

² The Office of Public Counsel (“OPC”), Florida Industrial Power Users Group (“FIPUG”), and White Springs Agricultural Chemicals d/b/a PCS Phosphate (“PCS Phosphate”), have also contested fallout issues pertaining to Issue 1A, Issues 10, 11, 18, 20, and 22. The resolution of Issue 1A will determine the resolution of those remaining issues, thus they will be discussed together and collectively referred to as the “Bartow Issue.”

Statement, DEF filed its Notice of Appeal and Motion for Stay Pending Judicial Review of the Bartow Order.³

II. The Commission should Approve Recovery of DEF’s Projected 2021 Fuel and Capacity Costs and Associated Fuel and Capacity Cost Recovery Factors

As more thoroughly discussed in DEF’s Motion for Stay Pending Judicial Review of the Bartow Order (the “Motion”),⁴ which is hereby incorporated herein by reference, because the Bartow Order involves a refund to customers, DEF is entitled as a matter of law to a stay of the effectiveness of the Order pending judicial review. Rule 25-22.061(1), F.A.C. The Commission will consider the Motion and the response filed by the intervenor parties at its December 1, 2020, Agenda Conference.

Rule 25-22.061(1), F.A.C. (the “Rule”), clearly and unambiguously controls in this situation. This statement of Commission policy⁵ provides that “[w]hen the order being appealed involves the *refund of moneys to customers or a decrease in rates charged to customers*, the Commission *shall*, upon motion filed by the utility or company affected, *grant a stay* pending judicial proceedings.” (emphasis supplied). This Rule could not be clearer nor more on point.

While DEF respectfully disagrees with the ALJ’s and Commission’s determination that DEF was imprudent in its operation of the Bartow Plant, the Bartow Order unambiguously “involves the refund of moneys to customers” – indeed, Paragraph 125 of the ALJ’s Recommended

³ As mentioned in footnote 2, the Bartow Order has been amended, and DEF will amend its Notice of Appeal and Motion to Stay accordingly.

⁴ See Document No. 11692-2020, Docket No. 20200001-EI, filed Nov. 2, 2020.

⁵ See § 120.52(16), Fla. Stat. (“‘Rule’ means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. . .”).

Order, adopted by this Commission without modification,⁶ states: “The total amount to be refunded to customers . . . is \$16,116,782, without interest.” Moreover, as DEF witness Mr. Menendez testified at hearing, if ultimately upheld on appeal, the refund would be delivered to customers as a decrease in the fuel rates charged to customers during the refund period. *See Tr. Vol. II, p. 394, l. 24 – p. 395, l. 1.* Thus, although one element of the Rule’s requirement is phrased in the disjunctive (i.e., the Rule applies when the order under appeal involves *either* a refund of moneys *or* a decrease in rates), in this situation *both* are true. If upheld on appeal, the Bartow Order: 1.) involves a refund of moneys; and 2.) results in a decrease in rates. Clearly, whether the Bartow Order is construed to require a refund or a decrease in rates, the Rule applies, and the stay should be granted.

Simply put, the Commission is not permitted to make a case-by-case determination of when to apply the Rule, rather it “is obligated to follow its own rules.” *See Vantage Healthcare Corp. v. Agency for Healthcare Admin.*, 687 So. 2d 306, 308 (Fla. 1st DCA 1997). The Intervenors attempt to read in a limitation that does not exist in the text of the Rule. The Intervenors argue “there is no evidence that the Commission intended the Rule to apply to the specialized true-up mechanism subsumed in the fuel clause.” Of course, the opposite is true; there is no evidence the Commission *did not* intend the Rule to apply the cost recovery clauses. To the contrary, the absence of the limitation the Intervenors are seeking to graft onto the Rule is clear evidence that the Commission did not intend such a limitation to apply. Indeed, the Rule was amended in both 2010 and 2014. During those years, the Commission administered the Fuel and Capacity, Energy Conservation, Environmental, and Nuclear Cost Recovery Clauses. If the Commission had agreed

⁶ Order No. PSC-2020-0368-FOF-EI, at p. 21 (“As set forth above, we deny all exceptions filed by DEF, approve all of the ALJ’s findings of fact and conclusions of law without modification, and hereby adopt the ALJ’s Recommended Order, found in Attachment A, as our Final Order.”).

with the limitation now being offered, it could have taken action at that time to limit the applicability of the Rule to non-clause related Orders.

Furthermore, the Intervenors argue that the Rule is “surplusage” and an “anachronism that serves no purpose.” Again, if the Commission agreed, it could have repealed the Rule in either 2010 or 2014, or at any other point since the Court rendered its decision in *GTE* in 1996.⁷ The fact that it has opted not to do so clearly evinces the Commission’s determination that its Rule still has merit and embodies sound regulatory policy.

Finally, the Intervenors’ argument that DEF is picking and choosing by treating the stay provision and not the bond or corporate undertaking provisions of the Rule as mandatory is without merit and continues to ignore the Rule’s plain language, which states:

(1) When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, the posting of a corporate undertaking, **or such other conditions as the Commission finds appropriate** to secure the revenues collected by the utility subject to refund.

Rule 25-22.061(1), F.A.C. (e.s.). The first sentence has three elements: 1.) an order being appealed; 2.) involving the refund of monies to customers or a decrease in rates charged to customers; and 3.) a motion to stay filed by the utility affected. Once the three elements are met, as they are here, the Rule is clear that the stay is mandatory. *Id.* (“the Commission **shall . . . grant a stay pending judicial proceedings.**”) (e.s.).⁸ The second sentence of subsection (1) is different. It provides the Commission a range of options to secure the revenues necessary to make the refund if upheld on appeal. DEF is merely arguing that, given the nature of the fuel clause and the method

⁷ See *GTE, Fla. v. Clark*, 668 So. 2d 971 (Fla. 1996).

⁸ If the Commission had intended to provide itself discretion regarding granting or denying the stay when the elements of subsection (1) are met, it easily could have done so.

such a refund would take (a reduction in fuel rates in the refund year), no bond or undertaking is necessary to secure those funds. Such a determination is clearly within the Commission's discretion. *See id.* (“... **or such other conditions as the Commission finds appropriate . . .**”) (e.s.).

If the Commission grants DEF's motion as required by Rule, *see Vantage*, and rules in DEF's favor on Issue 1A, because DEF has otherwise demonstrated the reasonableness of its proposed fuel and capacity costs and resulting recovery factors, the Commission should approve DEF's 2021 projected fuel recovery (Issue 11), DEF's 2021 fuel cost recovery factors (Issue 22), and all other remaining DEF issues (Issues 6-10, 16-21, 23A-D, and 27-36) as filed by DEF.

III. Post-Hearing Statement of Issues and Positions

As discussed at the Final Hearing, OPC, PCS Phosphate, and FIPUG, took “no position” on all Issues pertaining to DEF other than Issues 1A, 10, 11, 18, 20, and 22. Therefore, they have waived their right to contest DEF's positions on, or to brief, these Issues. Rather than reiterate DEF's position on each of the remaining Issues, DEF hereby adopts and Incorporates by Reference its positions on those Issues⁹ as provided in the Pre-Hearing Order.¹⁰

Issue 1A: What action should be taken in response to Commission Order No. PSC-2020-0368-FOF-EI-A regarding the Bartow Unit 4 February 2017 outage?

No action should be taken at this time. The Commission should grant DEF's Motion for Stay Pending Judicial Review. Pursuant to Rule 25-22.061(1), F.A.C., upon motion by an affected utility, the Commission shall stay the effectiveness of any ordered refund or decrease in rates pending judicial review of the order.

⁹ For clarity, the remaining DEF Issues are: 6-9, 16-17, 19, 21, 23A-D, and 27-36.

¹⁰ Order No. PSC-2020-0415-PHO-EI.

Issue 10: What are the appropriate total fuel adjustment true-up amounts to be collected/refunded from January 2021 through December 2021?

\$61,083,424 over-recovery.

Issue 11: What are the appropriate projected total fuel and purchased power cost recovery amounts for the period January 2021 through December 2021?

\$1,279,043,741, which is adjusted for line losses and excludes prior period true-up amounts, revenue taxes and GPIF amounts.

Issue 18: What are the appropriate projected net fuel and purchased power cost recovery and Generating Performance Incentive amounts to be included in the recovery factor for the period January 2021 through December 2021?

\$1,223,244,961.

Issue 20: What are the appropriate levelized fuel cost recovery factors for the period January 2021 through December 2021?

3.090 cents/kWh (adjusted for jurisdictional losses).

Issue 22: What are the appropriate fuel cost recovery factors for each rate class/delivery voltage level class adjusted for line losses?

Fuel Cost Factors (cents/kWh)						
Group	Delivery Voltage Level	First Tier Factor	Second Tier Factors	Levelized Factors	Time of Use	
					On-Peak	Off-Peak
A	Transmission	--	--	3.032	3.793	2.689
B	Distribution Primary	--	--	3.063	3.832	2.717

C	Distribution Secondary	2.811	3.811	3.094	3.871	2.744
D	Lighting Secondary	--	--	2.955	--	--

RESPECTFULLY SUBMITTED this 10th day of November, 2020.

/s/ Matthew R. Bernier

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CERTIFICATE OF SERVICE

Docket No. 20200001-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the following this 10th day of November, 2020.

/s/ Matthew R. Bernier

Attorney

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