

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: January 20, 2022

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (DuVal) *SMC*
Division of Economics (Coston, Draper) *JGH*

RE: Docket No. 20220012-EI – Petition for temporary waiver of Rule 25-6.078(3), F.A.C. by Florida Power & Light Company.

AGENDA: 02/01/22 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

CRITICAL DATES: 4/07/22 (Petition for Temporary Waiver Deemed Approved if Not Granted or Denied by this Date pursuant to Section 120.542(8), F.S.)

SPECIAL INSTRUCTIONS: None

Case Background

On January 7, 2022, Florida Power & Light Company (FPL) filed a petition for a temporary waiver of Rule 25-6.078(3), Florida Administrative Code (F.A.C.) (Petition). FPL asks the Commission to grant a temporary waiver of Rule 25-6.078(3), F.A.C., that would allow a deferred filing of certain information due to be filed by April 1, 2022, as described within the Petition.

Rule 25-6.078(3), F.A.C.

Rule 25-6.078, F.A.C., addresses any potential contribution-in-aid-of-construction for the installation of electric underground facilities in new residential subdivisions. Subsection (1) of Rule 25-6.078, F.A.C., requires utilities to file a written policy with the Commission that

becomes part of the utility's tariff rules and regulations on the installation of underground facilities in new subdivisions, including any estimated average cost differentials. Subsection (3) of the rule sets forth the timelines for submission of a utility's written policy and requires that:

On or before October 15 of each year, each utility shall file with the Commission Clerk, using current material and labor costs, Form PSC 1031 (08/20), entitled "Overhead/Underground Residential Differential Cost Data," which is incorporated by reference into this rule and is available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-12425>. If the cost differential as calculated in Form PSC 1031 (08/20) varies from the Commission-approved differential by plus or minus 10 percent or more, the utility shall file a written policy and supporting data and analyses as prescribed in subsections (1), (4) and (5) of this rule on or before April 1 of the following year; *however, each utility shall file a written policy and supporting data and analyses at least once every 3 years.*

(Emphasis added). This requirement implements the pertinent provisions of Sections 366.03, 366.04, and 366.06, Florida Statutes (F.S.), which set forth the general duties of a public utility, the Commission's authority to regulate the rates and service of a public utility, and the Commission's statutory obligation to approve rates that are fair, just, and reasonable.

Section 366.03, F.S., states that:

Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission. No public utility shall be required to furnish electricity or gas for resale except that a public utility may be required to furnish gas for containerized resale. All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

Section 366.04, F.S., states in pertinent part:

(1) In addition to its existing functions, the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service; assumption by it of liabilities or obligations as guarantor, endorser, or surety; and the issuance and sale of its securities....

(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:

- (f) To prescribe and require the filing of periodic reports and other data as may be reasonably available and as necessary to exercise its jurisdiction hereunder.

Section 366.06(1), F.S., states that:

A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

Petition

In its Petition, FPL recognizes its obligation to comply with the filing requirements of Rule 25-6.078(3), F.A.C., but points out its unique situation resulting from its recent merger with Gulf Power Company (Gulf). As a result of the Commission-approved settlement agreement in Docket No. 20210015-EI,¹ FPL and Gulf were consolidated for ratemaking purposes, effective January 2022.

FPL filed revised tariffs, including a new written policy, addressing the installation of underground facilities in new residential subdivisions, based on 2020 estimated average cost differentials for FPL and Gulf, as part of that approved settlement agreement. However, FPL states that the supporting data and analyses were not included in the rate case filings. The differential was zero prior to the rate case and continued to be zero in the settlement agreement tariffs, for both FPL and Gulf. FPL provides that Gulf's most recent written policy and supporting data and analyses were filed and approved in 2020 and that FPL's were filed and approved in 2019. FPL further provides that both FPL and Gulf filed their Form PSC 1031 (08/20), entitled "Overhead/Underground Residential Differential Cost Data," with the Commission on October 15, 2021, as required by Rule 25-6.078(3), F.A.C., and that both FPL and Gulf indicated that their estimated average cost differentials continue to be zero. As a result, FPL must file a written policy and supporting data and analyses by April 1, 2022, to meet the

¹ Order No. PSC-2021-0446-S-EI, filed on December 2, 2021.

component of Rule 25-6.078(3), F.A.C., that requires a utility to make such a filing “at least once every 3 years.”

FPL highlights that a filing by April 1, 2022, would be based upon 2021 costs, which would be calculated using supporting data and analyses from FPL and Gulf operating separately from a cost and rate perspective. FPL further states that deferring the filing until April 2023 would actually allow the Commission to review the more meaningful 2022 combined operational cost data and analyses sooner than would be the case if FPL were to follow its current reporting schedule. Therefore, FPL asks the Commission for a temporary waiver of the Rule 25-6.078(3), F.A.C., requirement to file its written policy and supporting data and analyses at least once every three years, to allow FPL to defer its April 1, 2022 filing to April 1, 2023.

Procedural Matters

Pursuant to Section 120.542(6), F.S., a Notice of Variance or Waiver was published in the January 11, 2022 edition of the Florida Administrative Register. The time for filing comments, provided by Rule 28-104.003, F.A.C., expires on January 25, 2022.

This recommendation addresses FPL’s Petition. Pursuant to Section 120.542(8), F.S., the Commission must grant or deny a request for waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner’s written request to finish processing the petition. As such, the statutory deadline for this proceeding is April 7, 2022.

The Commission has jurisdiction under Section 120.542, F.S., and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should the Commission grant FPL’s Petition for a temporary waiver of Rule 25-6.078(3), F.A.C.?

Recommendation: Yes, the Commission should grant FPL’s Petition for a temporary waiver of Rule 25-6.078(3), F.A.C. (DuVal, Coston)

Staff Analysis: FPL requests that the Commission grant it a one-year waiver of Rule 25-6.078(3), F.A.C., to file its consolidated written policy on the installation of underground facilities in new residential subdivisions, along with supporting data and analyses, on April 1, 2023. The rule requires that a utility file a written policy and supporting data and analyses at least once every three years. FPL is currently due to file its revised tariffs addressing the installation of underground facilities, including its written policy and supporting data and analyses, by April 1, 2022. However, FPL asserts that a delayed filing containing 2022 consolidated operational cost data would achieve the purpose of the underlying statutes implemented by Rule 25-6.078(3), F.A.C., and that not permitting FPL’s proposed approach would create a substantial hardship to the company.

Law Governing Petitions for Variance or Waiver

Section 120.542(2), F.S., directs agencies to grant variances or waivers from agency rules when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means and application of the rule would cause the person substantial hardship or violate the principles of fairness. As defined by Section 120.542(2), F.S., “substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship.

Purpose of the Underlying Statutes

FPL identifies Sections 366.03, 366.04, and 366.06, F.S., as the underlying statutes for Rule 25-6.078, F.A.C.

The purpose of Section 366.03, F.S., is to set forth the general duties of a public utility; including the requirement to furnish sufficient, adequate, and efficient service, subject to the Commission’s requirements, to each person who applies for service. The purpose of Section 366.04(1), F.S., is to grant the Commission with jurisdiction to regulate and supervise public utilities’ rates and service, assumptions of liabilities or obligations, and issuance and sale of their securities. The purpose of Section 366.04(2)(f), F.S., is to grant the Commission power to require electric utilities to file periodic reports and other data as necessary to exercise its jurisdiction. The purpose of Section 366.06(1), F.S., is to ensure that investor-owned electric utilities only charge or receive rates that have been approved by the Commission; to ensure that the Commission only approves rates that are fair, just, and reasonable for each customer class; and to set a procedure for fixing and changing rates.

If its request for a one-year waiver of the Rule 25-6.078(3), F.A.C., is granted, FPL will file its written policy and supporting data and analyses on April 1, 2023, based on its consolidated 2022 operations data. FPL states that its proposed approach will provide the Commission with more meaningful combined cost data and analyses sooner than would be the case if FPL were to

follow its current reporting schedule² and will ultimately enhance the quality of the filing. For these reasons, FPL asserts that its deferred filing would achieve the purpose of the underlying statutes.

FPL's deferred filing will allow the Commission to ensure that FPL is complying with its statutory duties regarding rates and service, to obtain FPL's most up-to-date reporting information, and to fulfill its statutory obligation to approve rates that are fair, just, and reasonable. Based on FPL's claim that the estimated cost differential is not likely to change and because FPL will still be subject to the requirement to file Form PSC 1031 (08/20) by October 15, 2022, staff believes there should be no adverse impacts to FPL's customers by granting the request. Additionally, permitting FPL's deferred filing will effectively harmonize FPL and Gulf's reporting schedules for purposes of Rule 25-6.078(3), F.A.C., thereby creating enhanced administrative efficiency going forward. Therefore, staff recommends that the purpose of the underlying statutes will be achieved by allowing FPL to defer the filing of its written policy and supporting data and analyses to April 1, 2023.

Substantial Hardship

FPL argues that application of Rule 25-6.078(3), F.A.C., would create a substantial hardship and would be contrary to the intent and purpose of the rule because FPL would be required to develop cost data and analyses for a time period prior to FPL and Gulf being consolidated for cost and ratemaking purposes. FPL further asserts that this expenditure of resources would be directed at providing the Commission with unnecessary information and would delay the Commission's receipt of the more meaningful combined data.

Staff believes that a strict application of Rule 25-6.078(3), F.A.C., would create a substantial hardship for FPL based on the expenditure of resources needed to determine the supporting underlying costs for a time period prior to the consolidation of FPL and Gulf for cost and ratemaking purposes. Therefore, staff recommends that FPL has demonstrated that a strict application of the rule would create a substantial hardship under the circumstances described in its Petition.

Conclusion

Based on the above, staff recommends that the Commission grant FPL's petition for a temporary waiver of Rule 25-6.078(3), F.A.C., to allow FPL to file its new written policy and supporting data and analyses by April 1, 2023. If granted, FPL's three-year filing cycle would effectively be reset such that its next filing would be due by April 1, 2026, instead of by April 1, 2025. However, as always, FPL would need to file a new written policy and supporting data and analyses if its cost differential varies from the Commission-approved differential by plus or minus 10 percent, in which case a new three-year cycle would be initiated from the date of that filing.

² Without the temporary rule waiver of the upcoming April 2022 filing, the Commission would likely not receive FPL's combined cost data and analyses until April 1, 2025.

Issue 2: Should this docket be closed?

Recommendation: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. (DuVal)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.