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**PAUL RENNER**
*Speaker of the House of Representatives*

February 22, 2024

**VIA: ELECTRONIC FILING**

Adam Teitzman
Office of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Docket No. 20240025-EI – Petition for Rate Increase by Duke Energy Florida, LLC; Deficient Test Year Letter.**

Dear Mr. Teitzman:

In response to the January 31, 2024 letter from Melissa Seixas, Duke Energy Florida ("DEF") President, requesting acknowledgement and tacit approval of three separate test years, the Office of Public Counsel ("OPC"), on behalf of the Citizens of Florida and the customers of DEF, objects. The OPC requests that the Commission reject the request for the second and third test years on which DEF has indicated it will base its petition for a rate increase of $596 million in 2025, $95 million in 2026 and $127 million in 2027.

Simply stated, the Commission is without authority to grant rate increases for the years 2026 and 2027 by taking agency action pursuant to Chapters 120 and 366, Florida Statutes. Assuming *arguendo* such authority exists, DEF has failed to comply with the Commission's rule 25-6.0140, Florida Administrative Code ("F.A.C") ("Test Year Rule") relating to the selection of a test year. Additionally, DEF's letter would use provisions of a settlement agreement in direct violation of a Commission order to support its request for multiple test years in an effort to bypass the required showing that the projected test year(s) are more representative than an historic test year.

The Test Year Rule states in pertinent part:

> (1) At least 60 days prior to filing a petition for a general rate increase, a company shall notify the Commission in writing of its selected test year and filing date. This notification ***shall*** include:
>
> (a) An explanation for requesting the particular test period. If an historical test year is selected, there shall be an explanation of why the historical period is more representative of the company's operations than a projected period. ***If a projected test year is selected, there shall be an explanation of why the projected period is more representative than an historical period***….

(Emphasis added.) Regardless of whether DEF met the mandate of subsection (1) with regard to the first requested Test Year, without a doubt the company failed to provide the mandatory analysis called for by the rule. Under the Test Year Rule, the requested 2026 projected test year needed to have been compared to the historical year of 2023 with an explanation as to why it is more representative of the company's operations. Likewise, the proposed 2027 test year needed to have been compared to 2023 for the same reasons. Obviously, no such reasonable comparison can be made in an "explanation" of something that might happen three and four years beyond a historical period. Any such effort would be impossible, far-fetched and unreliable speculation for the purpose of setting rates; in short it would be nothing more than pure supposition. No one at DEF possesses the skill or expertise or prognostication skills superior to that of a random person on the street in order to meaningfully peer three or four years into the future for such a comparison. The Test Year Rule does not even contemplate multiple test years as the projected comparator (period) is phrased in the singular, not the plural.

In its letter, DEF asserts that three full test years are "consistent" with Florida Supreme Court and Commission precedent. There is no court precedent that expressly provides that two full additional test years are allowable. The OPC is unaware that either the Commission or the Supreme Court have even been presented with a request for a third full test year.

DEF further seeks to rely upon rule 25-6.0425, F.A.C., ("Subsequent Year Adjustment Rule") and by implication Section 366.076, Florida Statutes) ("Limited Proceeding Statute") as support for what it is attempting. This reliance is misplaced. This rule recognizes that ***subsequent year adjustments*** are authorized, but this rule does not support a full-blown test year. The concept that is encapsulated in this rule is grounded in the concept that a subsequent year adjustment should – for rate increase purposes – be based upon a discrete, known and measurable major cost item such as a power plant or discrete cost that can be included in rates as a part of a "step-adjustment." The Subsequent Year Adjustment Rule, which is based on the Limited Proceeding Statute cited above is a single sentence that reads:

> The Commission may in a full revenue requirements proceeding

> approve incremental adjustments in rates for periods subsequent to the initial period in which new rates will be in effect.

The notion of an "incremental adjustment" is a plain reference to such a discrete, specifically itemized cost element. Additonally, the Limited Proceeding Statute upon which the rule is based, authorizes "limited" proceedings and accordingly reads:

> **366.076 Limited proceedings; rules on subsequent adjustments.—**
>
> (1) Upon petition or its own motion, the commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction, including any matter the resolution of which requires a public utility to adjust its rates to consist with the provisions of this chapter. The commission shall determine the issues to be considered during such a proceeding and may grant or deny any request to expand the scope of the proceeding to include other matters.
>
> (2) The commission may adopt rules for the determination of rates in full revenue requirement proceedings which rules provide for adjustments of rates based on revenues and costs during the period new rates are to be in effect and for incremental adjustments in rates for subsequent periods.

The OPC also notes that, while DEF has not yet filed any minimum filing requirement schedules ("MFRs"), the Commission has a rule that provides the mandatory form for a utility to use in providing the minimum financial information needed in its effort to meet its burden of proof. Rule 25-6.043(1)(a) ("MFR Rule") incorporates a form[1] that does not provide for a subsequent year. DEF has not sought a waiver from the requirements of this form.

These provisions (Subsequent Year Adjustment Rule, MFR Rule, and Limited Proceeding Statute) taken together, and when read *in pari materia* with the Test Year Letter Rule, make it clear that a complete projected test year, when required to be measured against an historical period, is not the same thing as a rule and statute recognizing that a subsequent year adjustment can be authorized. The Subsequent Year Adjustment Rule is not an "end run" around the requirement that any projected test year be measured against the historical period. A subsequent year adjustment is not interchangeable with a projected test year. Only a single projected test year is authorized by the agency's practices and policies.

While the OPC and other customer representatives have entered into global settlement agreements that are the product of months of intense give-and-take negotiations, DEF's reference

[1] http://www.flrules.org/Gateway/reference.asp?No=Ref-12642.

to them as precedent here is in direct violation of a Commission order. In the most recent and currently effective 2021 DEF Stipulation and Settlement agreement entered into between DEF, the OPC, the Florida Industrial Power Users Group, PCS Phosphate, and Nucor Steel, Paragraph 35 provides in relevant part and without any exception or contingency that:

> No Party[2] will assert in any proceeding before the Commission that this 2021 Settlement Agreement or any of the terms in the 2021 Settlement Agreement shall have any precedential value.

DEF has violated this provision and the order approving it by citing it as precedent for the relief the company requests here.[3] This is not the first instance of a utility violating this type of provision; it is only the latest effort to convince the Commission that an individual provision contained in a global settlement agreement and negotiated with significant give-and-take should be treated as if the individual provision was stand-alone agency action resulting from a contested proceeding under sections 120.569 and 57, Florida Statutes and is without merit. The Florida Supreme Court so far has allowed the Commission to by-pass the requirement that agency action be based on competent substantial evidence ("CSE") when it considers a global settlement. Cherry-picked settlement agreement provisions are not likely to withstand review in an appellate context when they lack CSE and legal support.

The OPC requests that the Commission – through the Chairman – indicate that the additional (and especially the third) test years requested by the company are at best disfavored and at worst without express legal support, are not supported as required by the Test Year Rule, are inconsistent with the MFR Rule, and have been presented as justified by language that is offered in direct violation of a Commission order. The OPC is considering how and if it should resort to appellate review in order to avoid the harm and cost of litigating three separate rate cases under a single petition and eight-month clock. Rejection of the proposed DEF approach will be consistent with the public interest and avoid needless and protracted appellate proceedings, thereby achieving judicial economy as well.

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[2] The term "Party" is defined in the third WHEREAS clause on page 1 of the 2021 Settlement Agreement to encompass DEF and the customer signatories.

[3] The agreement also provided in the first sentence of Paragraph 35 that "[t]he provisions of this 2021 Settlement Agreement are contingent on approval of this 2021 Settlement Agreement in its entirety by the Commission." The Commission approved the 2021 Settlement Agreement in Order No. PSC-2021-0202-AS-EI, issued June 4, 2021 in Docket No. 20210016-EI. Accordingly, the effort to utilize any of the provisions of the settlement agreement as precedent violates Commission order PSC-2021-0202-AS-EI (as amended by Order No. PSC-2021-0202A-AS-EI), adopting all of Paragraph 35.

Thank you for your consideration.

Respectfully,

*/s/ Walt Trierweiler*
Walt Trierweiler
Public Counsel

CC: Parties of Record

**CERTIFICATE OF SERVICE**
**DOCKET NO. 20240025-EI**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail on this 22nd day of February 2024, to the following:

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