

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Rate Increase by
Duke Energy Florida, LLC

Docket No. 20240025-EI

Filed: May 28, 2024

**DUKE ENERGY FLORIDA’S RESPONSE IN OPPOSITION
TO OFFICE OF PUBLIC COUNSEL’S MOTION TO SEVER DUKE ENERGY
FLORIDA’S PETITION FOR RATE INCREASE RELATING TO THE SECOND AND
THIRD TEST YEARS AND REQUEST FOR ORAL ARGUMENT**

Pursuant to Rule 28-106.204(1), F.A.C., Duke Energy Florida, LLC (“DEF” or the “Company”) hereby files this Response in Opposition to the Office of Public Counsel’s (“OPC”) Motion to Sever DEF’s Petition for Rate Increase Relating to the Second and Third Test Years (“Motion”) and its Request for Oral Argument. OPC’s Motion regurgitates the same arguments this Commission has previously rejected regarding this docket’s schedule, improperly argues factual matters, misinterprets the MFR rule, and is an untimely motion to dismiss a portion of DEF’s Petition. For all these reasons, the Motion should be denied. In support of this Response, DEF states:

A. OPC’s Motion

Citing to Florida Rule of Civil Procedure 1.270(b), OPC notes that severance is a tool that can be used in furtherance of convenience or to avoid prejudice. OPC’s contention that it would be prejudiced if the 2026 and 2027 are not severed can be broken into the following arguments:

1. It does not have sufficient time to litigate this matter under the current schedule and considering Tampa Electric’s pending rate case;
2. The 2026 and 2027 test years are too speculative to base rates upon; and
3. The multiple test periods are inconsistent with the “regulatory framework” and would remove DEF from the “regulatory oversight provided by statute and rule” without a corresponding value to customers.

OPC then argues that severance would not prejudice DEF or other parties because:

1. DEF has other options for rate relief, including subsequent year adjustments, limited proceedings, or filing subsequent rate cases if warranted (including pursuing the requested rate relief “at the appropriate times”); and
2. Cost recovery clauses mitigates the risk of under-recovery of a “substantial portion” of DEF’s operating costs.

B. DEF’s Response

a. OPC has failed to show it will be prejudiced if its Motion is not granted.

OPC’s arguments should be rejected, and the case should move forward as filed. At the outset, OPC’s arguments regarding the schedule of this docket and the fact that it is occurring on a similar timeframe as Tampa Electric’s rate case have been heard and rejected by this Commission on multiple occasions since the commencement of this proceeding. *See* Order No. PSC-2024-0092-PCO-EI (fully considering and rejecting OPC’s proposed schedules included in its Supplement to its Motion for Expedited Joint Scheduling Conference); doc. no. 03412-2024 (vote sheet denying reconsideration of Order No. PSC-2024-0092-PCO-EI).¹ The fact that this case is proceeding alongside Tampa Electric’s is also no reason to sever a portion of this case – even the schedule OPC proposed in its Supplemental filing to its Motion for Expedited Joint Scheduling

¹ To the extent the Motion seeks further reconsideration of Order No. PSC-2024-0092-PCO-EI, or the yet to be issued order denying reconsideration of same, it too should be rejected. *See* Rule 25-22.0376(1), F.A.C.

Conference provided for both cases to proceed essentially simultaneously² even though OPC was put on notice that DEF would propose three test periods by DEF's Test-Year Notification Letter.³

Further, OPC's argument that the 2026 and 2027 projected test years are "too speculative" at this time to base rate adjustments for those years is an improper factual argument based on no record evidence. As the Chairman's March 1, 2024, letter to DEF indicated, the "appropriateness of the selected test periods may be an issue in this proceeding" – and rightfully so. DEF bears the burden of proof in this proceeding as the party seeking a rate change, and that includes the burden of proving by a preponderance of the evidence that the proposed test years are appropriate (e.g., not too speculative). OPC simply seeks to have the issue prejudged based on its conclusion that those periods must be too speculative (even though, according to OPC, it does not have sufficient time to analyze the information, making it dubious that its conclusion is based on any factual evidence as opposed to the same preconceived notion OPC held before DEF's Petition was even filed).⁴

Indeed, even the order OPC cited to support its claim that the 2026 and 2027 test periods are too speculative followed an evidentiary hearing in which the Commission rejected a second test period on both policy and factual bases after evaluating the evidentiary record before it in light of the circumstances existing at that time. *See* Order No. PSC-2010-0153-FOF-EI. Notably, the Commission affirmed that it had the legal authority to order a "subsequent year increase" based upon a "subsequent test year." *See id.* at pp. 7-8.

² *See OPC's Supplement to Expedited Motion for Joint Scheduling Order*, doc. no. 01589-2024 (Apr. 3, 2024).

³ *See DEF's Test Year Notification Letter*, doc. no. 00435-2024 (Jan. 31, 2024), indicating DEF's intent to file three proposed test years.

⁴ *See OPC's Response to DEF's Test Year Notification Letter*, doc. no. 00879-2024, at p. 2 (Feb. 22, 2024).

Finally, the argument that the 2026 and 2027 test periods should be severed because they are improper under the “regulatory framework” and would remove DEF from the regulatory oversight of the Commission should be flatly rejected. First, as discussed above, the Commission has held that it has the legal authority to order the very relief DEF is seeking, thereby recognizing that the “regulatory framework” supports multiple test periods. *See id.* Second, DEF will in no way be beyond the Commission’s regulatory oversight. It will still be required to file monthly surveillance reports and if it is earning outside of its Commission-approved ROE either the Commission on its own motion or an intervening party, including OPC, may petition the Commission to adjust DEF’s rates accordingly – just like they could if only one test period was used in this proceeding. This argument is a red herring.

OPC has failed to show that it would be prejudiced if DEF’s case is allowed to proceed with the three proposed test year included in DEF’s petition, and therefore the Motion should be denied.

b. OPC has failed to show that granting the Motion would not prejudice DEF

OPC’s arguments that DEF would not be prejudiced if the Motion was granted are wrong. To start, OPC’s argument that DEF can simply seek an alternate form of rate relief (e.g., a subsequent year adjustment, a limited proceeding, or filing another rate case when rates are no longer sufficient, *see* Motion, at pp. 4-5) indicates that OPC is actually seeking a *dismissal* of a portion of DEF’s Petition, otherwise DEF would not need to file for separate relief with the 2026 and 2027 test periods still pending. *See Impact Computers & Elecs., Inc. v. Bank of Am., N.A.*, 852 So. 2d 946, 948-49 (Fla. 3d DCA 2003) (“the law is clear that ‘the true nature of a motion must be determined by its content and not by the label the moving party has used to describe it.’”) (quoting *Fire & Cas. Ins. Co. of Conn. v. Sealey*, 810 So. 2d 988, 992 (Fla. 1st DCA 2002)).

Properly construed as a motion to dismiss, OPC's Motion must be denied as untimely. Rule 28-106.204(2), F.A.C.⁵

However, even if construed as a motion to sever, OPC completely discounts the prejudice to DEF (not to mention Commission Staff) of having the two additional test years severed and held in abeyance until some undefined point in the future. First, DEF went through considerable time and effort to prepare those additional test years. Second, presumably OPC believes each test year should only proceed in the calendar year immediately preceding it,⁶ notwithstanding the Commission's acknowledged authority to entertain multiple test periods in a single docket. *See* Order No. PSC-2010-0153-FOF-EI. Indeed, such a result would prejudice DEF by requiring it, any intervening parties, and Commission to Staff to endure rate cases in three consecutive years and incur the additional rate case expense of the repetitive litigation.

OPC's argument also ignores DEF's right to have its properly pled Petition ruled upon. As the Florida Supreme Court has stated:

When factual matters affecting the fairness of utility rates are being considered by a regulatory commission the rudiments of fair play and due process require that the Company must be afforded a fair hearing and an opportunity to explain or rebut those matters. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to avoid delay, when the minimal requirement of a fair hearing has been neglected or ignored.

Fla. Gas Co. v. Hawkins, 372 So. 2d 1118, 1121 (Fla. 1979) (finding a denial of due process and reversing dismissal of an application for a rate increase without affording the utility a hearing to explain why it was not over-earning). As noted above, the appropriateness of the test years

⁵ Rule 28-106.204(2) requires a motion to dismiss to be filed within 20 days of the assignment of a presiding officer. According to the Commission's website, the Prehearing Officer was assigned before DEF's petition was filed, so DEF has calculated the 20 days from the filing of the Petition.

⁶ *See* Motion, at p. 5 (asserting DEF could still pursue the requested relief at the "appropriate times") & p. 3 (asserting that the Commission's "regulatory framework" contemplates "a single test year rate case proceeding").

proposed is an issue in this proceeding – a factual issue which DEF has properly pled and therefore has the right to have adjudicated in a timely fashion.

And finally, the fact that DEF receives a portion of its revenue from cost recovery clauses is irrelevant to the issue raised in DEF’s Petition, *i.e.*, that without the requested *base rate* increases DEF would not be receiving a fair rate of return on its investments made to provide safe and reliable service to its customers.

C. Request for Oral Argument

OPC requested oral argument on its Motion, claiming that it would aid the Commission in understanding and evaluating the issues. However, the issues are fully explained in the Motion and this Response, in particular because many of the arguments have been previously raised in other OPC filings and already rejected by the Commission. Accordingly, DEF believes that oral argument is unnecessary. If, however, the Commission would like to hear argument on the matter, DEF reserves the right to participate.

WHEREFORE, for the reasons discussed above, DEF respectfully requests the Commission deny OPC’s Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the following this 28th day of May, 2024

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