

I. Meeting Packet



State of Florida
Public Service Commission
INTERNAL AFFAIRS AGENDA
9:30 AM, Wednesday - January 11, 2012
Room 140 - Betty Easley Conference Center

REVISED

1. Approve December 6, 2011, Internal Affairs Meeting Minutes. (Attachment 1)
2. Update on FERC Activities on EPA Rulemakings and FPSC Involvement. (Attachment 2)
3. Briefing on FCC Order on expansion of Federal Universal Service Support to Broadband. Guidance is sought. (Attachment 3)
4. Legislative Update. (No Attachment)
5. Executive Director's Report. (No Attachment)
6. Other Matters.

BB/css

OUTSIDE PERSONS WISHING TO ADDRESS THE COMMISSION ON
ANY OF THE AGENDAED ITEMS SHOULD CONTACT THE
OFFICE OF THE EXECUTIVE DIRECTOR AT (850) 413-6463.

State of Florida
Public Service Commission
INTERNAL AFFAIRS MINUTES
Tuesday – December 6, 2011
11:25 am- 12:42 pm
Room 140 - Betty Easley Conference Center

COMMISSIONERS PRESENT: Chairman Graham
Commissioner Edgar
Commissioner Brisé
Commissioner Balbis
Commissioner Brown

STAFF PARTICIPATING: Baez, Hill, Kiser, Ballinger, Chase, Salak, Pennington, Futrell

1. Approve November 22, 2011, Internal Affairs Meeting Minutes.

The minutes were approved.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

2. Staff's Review of the 2011 Ten-Year Site Plan.

The Commissioners approved the 2011 Ten-Year Site Plan.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

3. Staff's Review of the 2011 Regulatory Assessment Fee Report.

The Commissioners approved the 2011 Regulatory Assessment Fee Report.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

4. Commission Liaison with the Legislature.

The Commissioners approved the Commission liaison with the Legislature APM with modification.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

Minutes of
Internal Affairs
December 6, 2011
Page Two

5. Legislative Update.

Ms. Pennington updated the Commissioners on Legislative matters of interest.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

6. Executive Director's Report.

Mr. Baez advised the Commissioners that the Governor's Budget recommendation will be available shortly.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

7. Other matters.

There were no other matters to be discussed.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

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 6, 2012

TO: Braulio L. Baez, Executive Director

FROM: Mark Futrell, Division of Regulatory Analysis *MF*
Cindy B. Miller, Office of the General Counsel *CM SMC. ALT*

RE: Revised Draft Comments to the Federal Energy Regulatory Commission – Item 2
on the January 11, 2012 Internal Affairs Meeting

On January 3, 2012, staff submitted its memorandum for the January 11, 2012 Internal Affairs meeting on Federal Energy Regulatory Commission (FERC) activities on U.S. Environmental Protection Agency (EPA) rulemakings (Item 2). Draft comments to the FERC were included in the memorandum. The draft comments express support for an ongoing dialogue between the FERC, the National Association of Regulatory Utility Commissioners (NARUC), and member state commissions focused on developing recommendations to the EPA regarding the reliability implications of EPA rules.

Subsequent to the filing of the memorandum, the FERC and NARUC announced on January 4, 2012 the establishment of a joint Forum on Reliability and the Environment. FERC and NARUC commissioners will meet at NARUC's three annual meetings to explore reliability issues stemming from new and pending environmental rules for electricity generation. Given the establishment of the Forum, staff has revised the draft comments to the FERC to express support for the Forum, while continuing to note the Commission's concerns with the potential impacts of the EPA's rules.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Service Commission of South Carolina and the South Carolina Office of Regulatory Staff))	Docket No. EL11-62-000
Reliability Technical Conference _____))	Docket No. AD12-1-000

**THE FLORIDA PUBLIC SERVICE COMMISSION'S NOTICE OF INTERVENTION
AND COMMENTS**

Pursuant to Rule 214(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC), the Florida Public Service Commission (FPSC) hereby files its Notice of Intervention and Comments in the above-captioned dockets.

I. INTERVENTION

The FPSC is a state commission with authority, pursuant to Section 366.04(5), Florida Statutes, over the planning, development, and maintenance of a coordinated electric power grid in Florida to assure an adequate and reliable source of energy for operational and emergency purposes. The FPSC has full regulatory authority pursuant to Chapter 366, Florida Statutes, over Florida's five investor-owned electric utilities, including reliability and aspects of rates, operations, and safety. The statutes also provide the FPSC with limited authority over Florida's 35 municipally-owned and 18 rural electric cooperatives, including authority over safety, rate structure, and operations and planning. Pursuant to Section 403.519, Florida Statutes, the FPSC is charged with determining need for all new steam electric generating facilities over 75 megawatts (MW).

Pursuant to Rule 214(a)(2), any state commission is a party to any proceeding upon filing a notice of intervention if the notice is filed within the period established under Rule 210(b). The FPSC hereby timely files its Notice of Intervention in the above-captioned dockets.

II. COMMUNICATIONS

Pursuant to Rule 203(b)(3) of the Rules of Practice and Procedure of the FERC, the following persons are designated to receive communications and service in this proceeding:

Benjamin Crawford
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6598
bcrawfor@psc.state.fl.us

Judy Harlow
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6842
jharlow@psc.state.fl.us

III. COMMENTS

The FPSC commends the FERC for holding its recent technical conference, which provided a forum to discuss the potential reliability and cost impacts of environmental rules on electric utilities and customers. The FPSC expresses its support for the establishment of the FERC-NARUC Forum on Reliability and the Environment (the Forum) ~~an ongoing dialogue between the FERC, the National Association of Regulatory Utility Commissioners (NARUC), and member state public utility commissions.~~ Furthermore, the FPSC suggests requests that the Forum ~~such a dialogue~~ focus on developing recommendations to the U.S. Environmental Protection Agency (EPA) regarding the reliability implications of EPA rulemaking affecting electrical generation. ~~The joint dialogue, for the purpose of developing these recommendations, should urge the EPA to develop economic impact statements to help better inform stakeholders of the effects of the regulations.~~

In any ongoing collaboration ~~If the FERC were to establish joint boards as requested by South Carolina and other states,~~ the FPSC notes the importance of continuing to recognize

~~aligning such joint boards with~~ the existing regional reliability entities, including those which have responsibility for electric reliability in Florida. These entities include the Florida Reliability Coordinating Council (FRCC), focusing on peninsular Florida, and the SERC Reliability Corporation (SERC), which includes the Florida Panhandle. The FPSC believes that Florida's unique characteristics in terms of weather, customer base, generation fuel types, energy use, geography, and ability to import power mandate treating peninsular Florida separately from the Florida Panhandle and the rest of the Southeast region, as was recognized by the FERC in the establishment of reliability regions.¹ ~~If the FERC were to establish a joint board, the FPSC would not cede any of its authority granted to it by state or federal law.~~

The FPSC has been monitoring the progress of EPA regulations relating to electrical power plants with increasing concern throughout the course of their development. On July 15, 2011, the FPSC filed comments with the EPA on the proposed Electric Utility Air Toxics Rule and Cooling Water Intake Structures Rule. In these comments, the FPSC stated that the proposed rules have the potential for significant rate and reliability impacts on Florida's energy consumers. The FPSC also commented that EPA's final rules should avoid compromising electric system reliability and allow the maximum compliance flexibility for electric utilities provided for under the law. Electric utilities should be given the flexibility to choose the most efficient, least-cost compliance option to meet public health and environmental goals. State environmental authorities are in the best position to review the compliance plans by electric utilities within their respective states, while public utility regulatory commissions will be responsible for reviewing implementation of these plans for reliability and cost impacts.

¹ FRCC's bylaws, Section 1.1(b)(i), note that FRCC was designated by FERC as the Regional Entity on May 2, 2007, Chairman Wellinghoff, in his September 14, 2011, appearance before the U.S. House Energy and Power Subcommittee of the Energy and Commerce Committee, said that regional organizations could provide the best information on the reliability implications of the EPA rules.

Florida has a total generating capacity of 58,420 MW (summer). Transmission capability to import energy into peninsular Florida from other states is approximately 3,600 MW. Given Florida's peninsular geography and this existing capacity of transmission interconnections to other states, the opportunity for Florida to import more cost-effective energy from generating units outside Florida for which compliance costs are low will be limited. Approximately 27 percent of Florida's electricity needs are currently met with coal- and oil-fired generation, the generation resources most subject to the proposed Utility Air Toxics Rule.² Additionally, the EPA's proposed Cooling Water Intake Structures rule will affect all existing electric generators that use water for cooling with an intake velocity of at least two million gallons per day.³ Most power plants, including nuclear, coal, natural gas, and oil-fired generators, meet this intake threshold and will be required, at a minimum, to meet the proposed impingement standards.

The FPSC is concerned about the impact of the substantial compliance costs of EPA rules on Florida's consumers, particularly in this time of economic distress and high unemployment. Increases to the cost of electricity are of particular concern in Florida due to the state's unique weather, customer base, and high reliance on electricity for cooling and heating. Florida has the highest number of cooling degree days of any state in the continental U.S., indicating the greatest need for air conditioning in the summer months. Our state's high proportion of residential customers comprises almost 89 percent of Florida's electricity customers, and includes a large portion of senior citizens on fixed incomes. Compared to other states, Florida's customers rely heavily on electricity to meet their energy needs, rather than the direct use of natural gas or other fuels for cooling and heating. Approximately 85 percent of Florida's residential customers'

² Proposed Air Toxics rule (National Emission Standards for Hazardous Air Pollutants), published in the Federal Register May 3, 2011, 76 Federal Register 24,976.

³ Proposed Cooling Water Intake Structures at Existing Facilities and Phase 1 Facilities, published in the Federal Register April 20, 2011, 76 Federal Register 22,174.

energy needs are met with electricity. Due to these factors, Florida has unique reliability concerns.

As a result, the FPSC supports the establishment of the Forum ~~a dialogue~~ whereby the FERC and affected state commissions can regularly discuss the effects of EPA rules on the reliability and affordability of electrical power. The FPSC requests that the Forum ~~joint dialogue~~ focus on developing recommendations to the EPA regarding the reliability implications of EPA rulemaking affecting electrical generation. The establishment of the Forum ~~a joint dialogue~~ will ~~could~~ serve as an important tool to facilitate better federal-state understanding and cooperation on this topic.

IV. CONCLUSION

The FPSC hereby timely files its Notice of Intervention in the above-captioned dockets and commends ~~requests that the FERC in the establishment of the Forum and looks forward to participating take the action requested, establishing a joint dialogue to discuss and develop recommendations on EPA rules.~~

Respectfully submitted,

/s/

Cindy B. Miller
Office of the General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6082
cmiller@psc.state.fl.us

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 3, 2012

TO: Braulio L. Baez, Executive Director

FROM: Mark Futrell, Division of Regulatory Analysis *MF*
Benjamin J. Crawford, Division of Regulatory Analysis *BC*
Judy G. Harlow, Division of Regulatory Analysis *JGH* *RH*
Cindy B. Miller, Office of the General Counsel *CM* *S.M.C.*

RE: Update on FERC Activities on EPA Rulemakings and FPSC Involvement

Critical Information: Please place this item on the January 11, 2012 Internal Affairs Agenda – Commission guidance is sought.

At the October 19, 2011 Internal Affairs meeting, the Commission approved the submission of comments to the Federal Energy Regulatory Commission (FERC) requesting the creation of a federal-state joint board to study the impact on electric reliability of the U.S. Environmental Protection Agency's (EPA) rules affecting the electric utility industry. Subsequent to the Commission's direction, significant activity has occurred at state and federal organizations and agencies. The purpose of this memorandum is to update the Commission on that activity and seek guidance on whether the Commission wishes to clarify its comments to the FERC.

Background – EPA Rules

During 2011, the EPA finalized and proposed rules to limit electric power plant air emissions and to limit the impact of electricity generation on aquatic life. These initiatives may particularly affect coal- and oil-fired generation, which together meet approximately 27 percent of Florida's electric load. The Commission submitted comments to the EPA regarding the proposed Air Toxics or Mercury and Air Toxics Standards (MATS) rule, and the Cooling Water Intake Structures rule. The comments sought to ensure that the proposed timelines were sufficiently flexible to install equipment necessary to comply with the rules, in order to avoid compromising system reliability. The Commission also urged the EPA to allow generators to install any equipment necessary to meet the standards of the rules without risking reliability or taking on excessive costs in a rush to meet deadlines. Finally, the Commission asked the EPA to recognize the differing needs of the various regions and to allow sufficient flexibility in the rules to account for this regional variation.

Requests for Federal-State Joint Boards

On September 1, 2011, the South Carolina Public Service Commission (SCPSC) and the South Carolina Office of Regulatory staff petitioned the FERC for the establishment of a joint federal-state board for the Southeast region. In its request, South Carolina asked that the FERC establish a joint board between the SCPSC and the FERC to study the effects of EPA regulations on the reliability and affordability of electric power in the state of South Carolina. The petition also asked the FERC to request that the EPA work with the joint board to coordinate promulgating its regulations. Subsequent to the South Carolina petition, the following states also requested the creation of a joint board: South Dakota, West Virginia, North Carolina, Louisiana, Texas, and Wyoming.

The Federal Power Act allows the FERC to designate a joint board from each of the states affected by a particular action requiring closer scrutiny or for more general coordination. While joint boards are relatively rare, they are occasionally established. For example, in 2005, the FERC established a board on "Security Constrained Economic Dispatch" for the Western region, which was required by the Energy Policy Act of 2005. To date, the FERC has not taken any action regarding the requests by South Carolina and the other states, including requesting formal comments on the proposals.

FERC Reliability Technical Conference

On November 29-30, 2011, the FERC Commissioners led a technical conference on compliance and enforcement of bulk transmission reliability standards, and the current state of processes for identifying reliability issues in response to final EPA regulations. The FERC was asked by panelists representing state commissions, consumers, utilities, transmission operators, and reliability authorities to advocate with the EPA for necessary flexibility to ensure reliability. FERC Commissioner Moeller expressed concerns about the EPA MATS rule, and the impact on reliability of potential early power plant retirements due to the rule. However, it is not clear if the FERC sees a formalized role for itself in the EPA rulemaking proceedings. Also, the FERC does not plan to ask the EPA to delay issuing its various rules. The FERC Commissioners stated that they may examine whether transmission tariffs could be amended to require generators to provide additional notices of retirements which may be caused by EPA rules. Also, FERC Commissioner Moeller stated that utilities should be protected from double-jeopardy, that is a choice of either operating a power plant in noncompliance with the MATS rule or halting operations and thereby potentially impacting electric reliability. However, this concern may be mitigated given that the EPA provided a pathway for additional time to comply with the MATS rule.

FERC-NARUC Collaborative

Following the FERC technical conference, Commissioners LaFleur and Moeller expressed their interest in establishing a collaborative with the National Association of Regulatory Utility Commissioners (NARUC) to discuss the impact of EPA rules on reliability. The collaborative would provide a forum for regular dialogue between FERC Commissioners

and State Commissioners during the NARUC committee meetings. FERC and NARUC have established collaboratives in recent years on demand response, competitive procurement and smart response to discuss and coordinate their approaches to these policies and practices.¹

South Carolina Vice-Chairman David Wright advocated, in written comments to the FERC prior to the technical conference, a process in which state and federal agencies with responsibility over reliability can work together to determine how the grid and customers will be affected by EPA rules. Commissioner Wright further stated:

While I continue to believe a joint board is appropriate, the key is a federal/state process that examines real or potential reliability issues, as well as costs and rate impacts. I am not wedded to the joint board concept – I could support any mechanism by which those with expertise and responsibility for grid reliability, included state commissions and FERC, conduct an open and comprehensive process to assess the extent of the problem and identify solutions.²

Final EPA MATS Rule

On December 21, 2011, the EPA announced its final MATS rule. The EPA did not modify the health standards in the proposed rule, but did provide for additional time to comply with the standards. The effective date of the final rule is expected to be in March 2012. The Clean Air Act provides that an affected power plant must come into compliance within three years of the effective date of the rule. The EPA has encouraged state environmental permitting agencies to make a fourth year for compliance broadly available for technology installations. Also, the EPA has announced its intention to allow for a fifth year for compliance with respect to power plants in the event that they must operate in noncompliance with the MATS to address a specific and documented reliability concern. Finally, if power plants cannot come into compliance within five years, the EPA intends to address individual noncompliance circumstances on a case-by-case basis. FPSC staff will analyze the final MATS rule, prepare a summary and continue to compile information on the impact of the final rule on Florida's utilities.

Conclusion

It appears at this time that the FERC does not wish to pursue a formal process to address the impact of the EPA's rules on reliability, given the FERC's limited authority. Also, the FERC has not yet requested comments on the requests by South Carolina and other states for the establishment of joint boards. It is not clear whether the FERC will take any action on the joint board requests.

¹ The FERC-NARUC Collaborative on Smart Response provides a forum for Federal and State Regulators to discuss smart grid and demand response policies.

² Prepared Statement of South Carolina Commissioner David A. Wright; November 30, 2011; Federal Energy Regulatory Commission Docket Nos. AD12-1-000, RC11-6-000, and EL11-62-000.

If the Commission wishes to clarify the comments approved at the October 19, 2011 Internal Affairs, it could amend those comments to support the efforts of the FERC and NARUC to establish a regular dialogue to discuss the reliability and cost impacts of the EPA rules. Attached is a draft for the Commission's discussion and consideration. (Attachment A).

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Public Service Commission of South Carolina and the South Carolina Office of Regulatory Staff))	Docket No. EL11-62-000
Reliability Technical Conference))	Docket No. AD12-1-000

**THE FLORIDA PUBLIC SERVICE COMMISSION'S NOTICE OF INTERVENTION
AND COMMENTS**

Pursuant to Rule 214(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC), the Florida Public Service Commission (FPSC) hereby files its Notice of Intervention and Comments in the above-captioned dockets.

I. INTERVENTION

The FPSC is a state commission with authority, pursuant to Section 366.04(5), Florida Statutes, over the planning, development, and maintenance of a coordinated electric power grid in Florida to assure an adequate and reliable source of energy for operational and emergency purposes. The FPSC has full regulatory authority pursuant to Chapter 366, Florida Statutes, over Florida's five investor-owned electric utilities, including reliability and aspects of rates, operations, and safety. The statutes also provide the FPSC with limited authority over Florida's 35 municipally-owned and 18 rural electric cooperatives, including authority over safety, rate structure, and operations and planning. Pursuant to Section 403.519, Florida Statutes, the FPSC is charged with determining need for all new steam electric generating facilities over 75 megawatts (MW).

Pursuant to Rule 214(a)(2), any state commission is a party to any proceeding upon filing a notice of intervention if the notice is filed within the period established under Rule 210(b). The FPSC hereby timely files its Notice of Intervention in the above-captioned dockets.

II. COMMUNICATIONS

Pursuant to Rule 203(b)(3) of the Rules of Practice and Procedure of the FERC, the following persons are designated to receive communications and service in this proceeding:

Benjamin Crawford
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6598
bcrawfor@psc.state.fl.us

Judy Harlow
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6842
jharlow@psc.state.fl.us

III. COMMENTS

The FPSC commends the FERC for holding its recent technical conference, which provided a forum to discuss the potential reliability and cost impacts of environmental rules on electric utilities and customers. The FPSC expresses its support for the establishment of an ongoing dialogue between the FERC, the National Association of Regulatory Utility Commissioners (NARUC), and member state public utility commissions. Furthermore, the FPSC requests that such a dialogue focus on developing recommendations to the U.S. Environmental Protection Agency (EPA) regarding the reliability implications of EPA rulemaking affecting electrical generation. The joint dialogue, for the purpose of developing

these recommendations, should urge the EPA to develop economic impact statements to help better inform stakeholders of the effects of the regulations.

If the FERC were to establish joint boards as requested by South Carolina and other states, the FPSC notes the importance of aligning such joint boards with the existing regional reliability entities, including those which have responsibility for electric reliability in Florida. These entities include the Florida Reliability Coordinating Council (FRCC), focusing on peninsular Florida, and the SERC Reliability Corporation (SERC), which includes the Florida Panhandle. The FPSC believes that Florida's unique characteristics in terms of weather, customer base, generation fuel types, energy use, geography, and ability to import power mandate treating peninsular Florida separately from the Florida Panhandle and the rest of the Southeast region, as was recognized by the FERC in the establishment of reliability regions.¹ If the FERC were to establish a joint board, the FPSC would not cede any of its authority granted to it by state or federal law.

The FPSC has been monitoring the progress of EPA regulations relating to electrical power plants with increasing concern throughout the course of their development. On July 15, 2011, the FPSC filed comments with the EPA on the proposed Electric Utility Air Toxics Rule and Cooling Water Intake Structures Rule. In these comments, the FPSC stated that the proposed rules have the potential for significant rate and reliability impacts on Florida's energy consumers. The FPSC also commented that EPA's final rules should avoid compromising electric system reliability and allow the maximum compliance flexibility for electric utilities provided for under the law. Electric utilities should be given the flexibility to choose the most

¹ FRCC's bylaws, Section 1.1(b)(i), note that FRCC was designated by FERC as the Regional Entity on May 2, 2007. Chairman Wellinghoff, in his September 14, 2011 appearance before the U.S. House Energy and Power Subcommittee of the Energy and Commerce Committee, said that regional organizations could provide the best information on the reliability implications of the EPA rules.

efficient, least-cost compliance option to meet public health and environmental goals. State environmental authorities are in the best position to review the compliance plans by electric utilities within their respective states, while public utility regulatory commissions will be responsible for reviewing implementation of these plans for reliability and cost impacts.

Florida has a total generating capacity of 58,420 MW (summer). Transmission capability to import energy into peninsular Florida from other states is approximately 3,600 MW. Given Florida's peninsular geography and this existing capacity of transmission interconnections to other states, the opportunity for Florida to import more cost-effective energy from generating units outside Florida for which compliance costs are low will be limited. Approximately 27 percent of Florida's electricity needs are currently met with coal- and oil-fired generation, the generation resources most subject to the proposed Utility Air Toxics Rule.² Additionally, the EPA's proposed Cooling Water Intake Structures rule will affect all existing electric generators that use water for cooling with an intake velocity of at least two million gallons per day.³ Most power plants, including nuclear, coal, natural gas, and oil-fired generators, meet this intake threshold and will be required, at a minimum, to meet the proposed impingement standards.

The FPSC is concerned about the impact of the substantial compliance costs of EPA rules on Florida's consumers, particularly in this time of economic distress and high unemployment. Increases to the cost of electricity are of particular concern in Florida due to the state's unique weather, customer base, and high reliance on electricity for cooling and heating. Florida has the highest number of cooling degree days of any state in the continental U.S., indicating the greatest need for air conditioning in the summer months. Our state's high proportion of residential

² Proposed Air Toxics rule (National Emission Standards for Hazardous Air Pollutants), published in the Federal Register May 3, 2011, 76 Federal Register 24,976.

³ Proposed Cooling Water Intake Structures at Existing Facilities and Phase 1 Facilities, published in the Federal Register April 20, 2011, 76 Federal Register 22,174.

customers comprises almost 89 percent of Florida’s electricity customers, and includes a large portion of senior citizens on fixed incomes. Compared to other states, Florida’s customers rely heavily on electricity to meet their energy needs, rather than the direct use of natural gas or other fuels for cooling and heating. Approximately 85 percent of Florida’s residential customers’ energy needs are met with electricity. Due to these factors, Florida has unique reliability concerns.

As a result, the FPSC supports the establishment of a dialogue whereby the FERC and affected state commissions can regularly discuss the effects of EPA rules on the reliability and affordability of electrical power. The FPSC requests that the joint dialogue focus on developing recommendations to the EPA regarding the reliability implications of EPA rulemaking affecting electrical generation. The establishment of a joint dialogue could serve as an important tool to facilitate better federal-state understanding and cooperation on this topic.

IV. CONCLUSION

The FPSC hereby timely files its Notice of Intervention in the above-captioned dockets and requests that the FERC take the action requested, establishing a joint dialogue to discuss and develop recommendations on EPA rules.

Respectfully submitted,

/s/

Cindy B. Miller
Office of the General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6082
cmiller@psc.state.fl.us



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 3, 2012

TO: Braulio L. Baez, Executive Director

FROM: Division of Regulatory Analysis (Fogleman, Shafer, Futrell) *2708 MF*
Office of the General Counsel (Miller) *CM SML. RIT*

RE: Briefing on FCC Order regarding expansion of Federal Universal Service Support to Broadband

Critical Information: Please place on the January 11th Internal Affairs. Guidance is sought regarding possible action.

On December 16, 2011, staff circulated a memo regarding reforms to the federal universal service high-cost elements addressed in the Federal Communications Commission (FCC) October Order.¹ While there are several elements that represent desirable outcomes for net contributor states such as Florida, there are other aspects that are troubling. Specifically, areas of concern are the establishment of a budget as opposed to a hard cap on the size of the federal high-cost fund and the legal basis by which FCC has expanded support to fund broadband.

Florida Statutes provides guidance regarding the “promotion of broadband adoption.” Specifically, Section 364.0135(1) of Florida Statutes states the following:

The Legislature finds that the sustainable adoption of broadband Internet service is critical to the economic and business development of the state and is beneficial for libraries, schools, colleges and universities, health care providers, and community organizations. The term “sustainable adoption” means the ability for communications service providers to offer broadband services in all areas of the state by encouraging adoption and utilization levels that allow for these services to be offered in the free market absent the need for governmental subsidy.

Commission guidance is sought whether to take action on how the FCC has expanded support. Options include: (1) appeal the Order, (2) send a letter to the Congressional delegation, or (3) take no additional action.

¹ FCC Report and Order And Further Notice of Proposed Rulemaking (“The Order”), FCC 11-161, WC Docket Nos. 10-90, 07-135, 05-337, CC Docket Nos. 01-92, 96-45, Adopted October 27, 2011, Released November 18, 2011.

Budget² versus Cap

In comments before the FCC, the Florida Public Service Commission (FPSC) had conditioned its support to expanding the definition of supported service to include broadband only if there was no additional growth to the size of the fund.³ The FPSC specifically supported the recommendations of the Federal-State Universal Service Joint Board (Joint Board) to establish a cap of \$4.5 billion for the high-cost fund. The FCC did not adopt a cap, but instead a “budget.” While the FCC has established a budget at “no *more* than \$4.5 billion” per year over the next six years, it has also directed the Universal Service Administrative Company to forecast total high-cost demand at “no *less* than \$1.125 billion” per quarter.⁴ (emphasis added). Any excess contributions will be credited to a new Connect America Fund reserve account, as opposed to lowering consumers’ contribution factor in a subsequent quarter.⁵

If the budget is threatened to be exceeded, an automatic review will be triggered.⁶ While the Order states that this budget will ensure that individual consumers will not pay more in contributions, the Order does not establish a hard cap as was imposed for both the Schools and Library Program or the Rural Healthcare Program. The FCC states that this budgetary target will remain in place until changed by a vote of the FCC which could happen at any time even though the Order states that the budget will be in place for six years.⁷

There are expected to be legal challenges that the fund will not be “sufficient”⁸ due to the addition of broadband. Also, there are waiver opportunities provided for in the Order.⁹ Thus, further increases in the size of the fund are possible. Staff does not believe that the FCC will reconsider the establishment of a hard cap and there is no specific statutory requirement to force the FCC to do so.

Legal Authority¹⁰

In prior comments, the FPSC has asserted that the FCC must consider the conditions found in Section 254(c)(1) of the Communications Act before expanding the designation of

² The Order, ¶¶121-126 and ¶¶545-567.

³ Comments, WC Docket No. 05-337, April 14, 2011; Reply Comments, August 11, 2010; Ex Parte Comments, December 15, 2009; Reply Comments, December 2, 2008; Comments, March 24, 2008.

⁴ The Order, ¶560.

⁵ The FPSC urged the FCC to reduce the burden on consumers by lowering the assessment factor, even if the lower rate would only be temporary. Reply Comments, WC Docket No. 05-337, October 21, 2010.

⁶ Immediately upon receiving information from the Universal Service Administrative Company regarding actual quarterly demand, the Wireline Competition Bureau will notify each Commissioner and publish a Public Notice indicating that program demand has exceeded \$4.5 billion over the last four quarters. Then, within 75 days of the Public Notice being published, the Bureau will develop options and provide to the Commissioners a recommendation and specific action plan to immediately bring expenditures back to no more than \$4.5 billion. The Order, ¶563.

⁷ The Order, ¶125.

⁸ The Telecommunications Act states that “There should be a specific, predictable, and *sufficient* Federal and State mechanism to preserve and advance universal service.” §254(b)(5).

⁹ The waiver process would permit any carrier negatively affected by the universal service reforms to be exempt from some or all of the reforms. The FCC does state that it would look at both regulated and unregulated revenues, when evaluating carriers waiver petitions. The Order, ¶¶ 539-544.

¹⁰ The Order, ¶¶60-73.

supported services.¹¹ The FCC did not do this, and staff is concerned the legal analysis used by the FCC to support broadband could be used in the future to include even more services and equipment. Section 254(c)(1) states the following:

In General.— Universal is an evolving level of *telecommunications services* that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of services that are supported by Federal universal service support mechanisms shall consider the extent to which such *telecommunications services* –

- (A) are essential to education, public health, or public safety;
- (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
- (C) are being deployed in public telecommunications networks by telecommunications carriers; and
- (D) are consistent with the public interest, convenience, and necessity.

(emphasis added).

Section 254(c)(2) specifies that “the Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.” The Joint Board, in following the requirements of Section 254(c)(1), recommended the FCC expand the definition of supported services to include broadband. It explicitly considered each of the conditions in Section 254(c)(1) to explain why the definition should be expanded.¹² Yet the FCC neither considered these requirements, nor did it find that broadband was a *telecommunications service*.

FCC’s Stated Authority Under Section 254(b) and (e)

The FCC relies primarily on Sections 254(b) and 254(e) of the Telecommunications Act to assert authority to fund broadband. Section 254(b) specifies six specific principles that the Joint Board and the FCC are required to “base policies for preservation and advancement of universal service.” Among these principles are that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation” and that “[c]onsumers in all regions of the Nation . . . should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas” and at reasonably comparable rates.¹³

In addition, Section 254(b)(7) allows the Joint Board to recommend and the FCC to adopt additional principles that are determined to be “necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.” The FCC,

¹¹ The FPSC also noted that any newly supported service need not meet all of these conditions. Comments to the FCC, WC Docket No. 05-337, April 14, 2011.

¹² Federal-State Universal Service Joint Board Recommended Decision, FCC 07J-4, WC Docket No. 05-337, CC Docket No. 96-45, November 20, 2007, ¶¶ 55-62.

¹³ 47 U.S.C. § 254(b)(2)-(3).

acting on the recommendation of the Joint Board,¹⁴ added the new principle that “Universal Service support should be directed where possible to networks that provide advanced services, as well as voice services.”

The FCC argues that Section 254(e) grants it the authority to support not only “voice telephone service,”¹⁵ but also the facilities over which it is offered. Section 254(e) states the following:

Universal Service Support.— After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

The FCC believes that by referring to “facilities” and “services” as distinct items for which federal universal service funds may be used, Congress granted it flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b) and any other universal service principle that the Commission may adopt under section 254(b)(7).¹⁶

The FCC also cites its longstanding “no barriers” policy, that has allowed rural carriers receiving high-cost support “to invest in infrastructure capable of providing access to advanced services” as well as supported voice services.¹⁷ While this policy was enunciated in an Order adopting rule changes for rural incumbent carriers, the FCC now argues by its terms it is not limited to rural carriers.¹⁸ According to the FCC, Section 254(e) thus contemplates that carriers may receive federal support to enable the deployment of broadband facilities used to provide supported telecommunications services as well as other services.

¹⁴ Federal-State Universal Service Joint Board Recommended Decision, FCC 10J-3, CC Docket No. 96-45, WC Docket No. 03-109, November 4, 2010.

¹⁵ “Voice telephony service” is a new construct that the FCC has created to redefine the what was once considered supported services (The Order, ¶¶62 and ¶¶76-85). These functionalities of eligible voice telephony services include voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; toll limitation to qualifying low-income consumers; and access to the emergency service 911 and enhanced 911 services. Services that were previously supported, but are no longer under this new construct include operator services and directory assistance.

¹⁶ In establishing the rules governing the designation and responsibilities of ETCs pursuant to section 214(e), the FCC has defined the term “facilities” to mean “any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support.” 47 C.F.R. § 54.201(e).

¹⁷ See *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 96-45, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, ¶200 (2001).

¹⁸ The Order, ¶64.

Yet the FCC goes beyond expanding the “no barriers” policy for all ETCs. It concludes that its authority under Section 254 allows it to *require* carriers receiving federal universal service support to invest in modern broadband-capable networks.¹⁹ The FCC states that it has a “mandatory duty” to adopt universal service policies that advance the principles outlined in section 254(b), and it has the authority to “create some inducement” to ensure that those principles are achieved.²⁰ It concluded that this approach is sufficient to ensure access to voice and broadband services and, therefore, it does not need, at this time, to add broadband to the list of supported services, as some have urged.²¹ While the “no barriers” policy allowed carriers to upgrade their networks to be broadband capable, the new policy is a requirement that not only mandates broadband networks, but specifies broadband characteristics carriers must meet.²²

FCC’s Stated Authority Under Section 706

The FCC also asserts that it has independent authority under Section 706 of the Telecommunications Act to fund the deployment of broadband networks. It relies specifically on Section 706(b) as an alternative basis to Section 254. The FCC limited reliance on 706(b) only to the extent necessary to ensure that the federal universal service program covers services and networks that could be used to offer information services as well as telecommunications services. Section 706(b) states:

Inquiry.— The Commission shall, within 30 months after the date of enactment of this Act, and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capabilities to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capabilities is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by *removing barriers to infrastructure investment* and *promoting competition in the telecommunications market*. (emphasis added).

The FCC concluded in 2010 and 2011 that broadband had not been reasonable and timely deployed to all Americans.²³ This finding, the FCC argues, provides supplemental authority to use the federal Universal Service Fund to provide support under the auspices of “removing barriers to infrastructure investment.” The FCC states that “extending federal support to carriers

¹⁹ *USF/ICC Transformation NPRM*, ¶71.

²⁰ *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200, 1204 (10th Cir. 2001) (*Qwest I*).

²¹ See, e.g., Florida Public Service Commission NPRM Comments at 3; Communications Workers of America *USF/ICC Transformation NPRM* Comments at 5-6; National Association of Telecommunications Officers and Advisors *USF/ICC Transformation NPRM* Comments at 3; State Members *USF/ICC Transformation NPRM* Comments at 2; Vonage *USF/ICC Transformation NPRM* Comments at 6-8.

²² For example, access to affordable broadband service offering actual download speeds of at least 4 Mbps and actual upload speeds of at least 1 Mbps (The Order, ¶93). The FCC also requires ETCs to offer sufficiently low latency to enable use of real-time applications, such as VoIP (The Order, ¶96).

²³ FCC’s Sixth Broadband Deployment Report, FCC 10-129, Released July 20, 2010 and FCC’s Seventh Broadband Progress Report and Order on Reconsideration, FCC 11-78, Released May, 20 2011.

deploying broadband networks in high-cost areas will thus eliminate a significant barrier to infrastructure investment and accelerate broadband deployment to unserved and underserved areas of the Nation.”²⁴ At issue is whether this is a reasonable interpretation. Congress, in Section 254(c)(1), addresses “the definition of the services that are *supported* by the Federal universal service support mechanisms,” and addresses circumstances under which these services can be expanded. (emphasis added) Staff believes that Section 254(c)(1) is the only way for the FCC to fund additional services. Section 706(b) is instead aimed at removing barriers to private sector infrastructure investment and promoting competition.

Conclusion

In general, staff believes that the FCC did not comply with the legal requirements to expand the use of federal universal service support to broadband. The FCC’s approach establishes a precedent for future expansion of how universal service support is used, and potentially increase the size and cost of the program.

Regarding the use of a budget as opposed to a cap, there is no explicit requirement within the Telecommunications Act to establish a cap of the high-cost fund. While there is a requirement within the Act that the fund be “sufficient,”²⁵ it has been interpreted that there are limits to such support. As the United States Court of Appeals for the Fifth Circuit found in *Alenco*, “excessive funding may itself violate the sufficiency requirements.”²⁶ Also, the United States Court of Appeals for the Tenth Circuit has stated that “excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in [section] 254(b)(1).”²⁷ Despite the fact that the FPSC and the Joint Board had recommended the use of a hard cap, staff believes that there may be some difficulty in challenging the FCC’s use of a budget as opposed to a cap.

Staff seeks guidance on what action, if any, the FPSC would like to take regarding how the FCC has expanded support.

Option 1

Appeal the Order: The FPSC could file an appeal in the Tenth Circuit Court of Appeals, where the case will be heard. If the FPSC appeals the Order, staff recommends the appeal be focused on the issue of the FCC applying the wrong legal basis to support broadband. If a Court declares a rule invalid or unenforceable, the FCC has stated that it intends for the remaining rules that are upheld to remain in full force and effect.²⁸ Thus, rules that the FPSC would find favorable may not be affected by a successful appeal. The FCC could however, take a different position and start the process over. There will be costs associated with an appeal, such as court admission and filing fees. In addition, it may involve travel to Denver, Colorado for oral argument on the case. At this time, there are three state commissions that have appealed the Order (Pennsylvania, Ohio, and Vermont commissions). Overall, there are approximately ten

²⁴ The Order, ¶67.

²⁵ 47 U.S.C. § 254(b)(5).

²⁶ *Alenco*, 201 F.3d at 620.

²⁷ *Qwest II*, 398 F.3d at 1234.

²⁸ The Order, ¶1405

appeals of the Order. If the FPSC decides to challenge the Order, it must file a short "Petition for Review" with the Court by January 29, 2012. The Office of the General Counsel would then make all the necessary filings in the appellate proceeding.

Option 2

Send a letter to the Florida Congressional Delegation: Another option is for the FPSC to send a letter to the Florida Congressional delegation that provides information about how the FCC has erroneously taken steps to subsidize broadband without following the process Congress set out in the Federal Telecommunications Act of 1996. Congress has the ability to call the FCC in for questioning in committee hearings, to re-write the Telecommunications Act to allow or expressly prohibit such a subsidy, or to re-vamp the entire program. Currently, there is a bill, H.R. 3309, which is aimed at providing for greater transparency and efficiency in the FCC. It is possible it could be used as a vehicle for additional concerns with the FCC's process. If the Commission wishes to send a letter to Congress, staff will prepare a draft and bring it to a future Internal Affairs for consideration.

Option 3

Take no additional action: The Order requires a number of changes to the federal universal service mechanism that may limit future growth of the fund. Those changes include the elimination of the identical support rule, and the attempt to limit growth in the size of the fund through a budget. The FPSC has consistently supported these types of changes. In addition, the FCC will be limiting support to areas where there are no unsubsidized providers in such areas.

cc: Charles H. Hill
S. Curtis Kiser

II. Outside Persons Who Wish to Address the Commission at Internal Affairs

NOTE: The records reflect that no outside persons addressed the Commission at this Internal Affairs meeting.

III. Supplemental Materials Provided During Internal Affairs

NOTE: The records reflect that there were no supplemental materials provided to the Commission during this Internal Affairs meeting.