

State of Florida



Public Service Commission

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

DATE: January 20, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Breman, Lee)
Office of the General Counsel (C. Keating)

RE: Docket No. 041375-EI – Request to exclude April 11-12, 2004 and June 13, 24, and 26, 2004 outage events from annual distribution service reliability report by Tampa Electric Company.

AGENDA: 02/01/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: 03/07/04 (Petition for rule waiver is deemed granted if not addressed in 90 days.)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\GCO\WP\2004\041375.RCM.DOC

Case Background

On December 7, 2004, Tampa Electric Company (Tampa Electric) filed a request for exclusion of outages associated with severe weather systems on April 11 and 12, 2004, and on June 13, 24, and 26, 2004, pursuant to Rule 25-6.0455(3), Florida Administrative Code. In conjunction with its request for exclusion, Tampa Electric filed a petition seeking a variance or waiver from that portion of Rule 25-6.0455(3), which provides that a request must be filed within 30 days of the outage event for which an exclusion is requested.

Notice of Tampa Electric's rule waiver petition was published in the Florida Administrative Weekly on January 7, 2005. The 14-day comment period will expire January 21, 2004, one day after the date this recommendation is filed. No comments have been received as of the date of this recommendation. If any comments are timely received, staff will expeditiously provide copies of those comments to the Commissioners.

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This recommendation addresses Tampa Electric's rule waiver petition. The Commission has jurisdiction pursuant to Section 120.542, Florida Statutes, and Chapter 366, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Tampa Electric Company's petition for waiver or variance of the 30-day filing requirement in Rule 25-6.0455(3), Florida Administrative Code?

Recommendation: No. The Commission should deny Tampa Electric Company's petition because Tampa Electric has not demonstrated that application of the rule would create a substantial hardship or violate principles of fairness. If the Commission approves this recommendation, Tampa Electric Company's related outage exclusion request should be denied as untimely. (C. Keating, Bremen)

Staff Analysis:

Standard of Review

Section 120.542(l), Florida Statutes, provides a two-pronged test for determining when waivers and variances from agency rules shall be granted:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Tampa Electric's Arguments

Tampa Electric requests a one-time, temporary waiver of the provision in Rule 25-6.0455(3), Florida Administrative Code, that requires a utility's request to exclude an outage event to be filed within 30 days of the outage event. In its petition, Tampa Electric states that it experienced severe weather conditions across its entire service territory on April 11 and 12, 2004, and on June 13, 24, and 26, 2004, that caused extensive and widespread service interruptions to its customers. Tampa Electric asserts that when the weather events of April 11 and 12 occurred, it was not aware that these conditions were caused by a weather phenomenon known as a Mesoscale Convective System or Complex. Tampa Electric states that it became aware of the existence of this type of weather phenomenon after reviewing Florida Power & Light Company's (FPL) request to exclude outages related to such a system passing through FPL's service territory on April 13, 2004, and Progress Energy Florida's (Progress) similar request to exclude outages from such a system passing through Progress' service territory on April 11 and 12, 2004. Tampa Electric asserts that the occurrence of such a phenomenon in the deep southeastern region of the country is extremely rare and that it appears no previous occurrence in Florida has ever been recorded by the National Weather Service (NWS).

Tampa Electric asserts that upon reviewing the filings of FPL and Progress, it immediately began accumulating information regarding the system's impact on Tampa Electric's operations on April 11 and 12. Tampa Electric states that its analysis showed that it was affected by these same systems in much the same way that FPL and Progress were affected. In addition, Tampa Electric asserts that powerful wind and extreme lightning similarly impacted its system operations on June 13, 24, and 26.

Tampa Electric asserts that Rule 25-6.0455 in general, and subsection (3) in particular, implement a number of specific statutory provisions from Chapter 366 that collectively establish the Commission's broad authority over the reliability of service provided by electric utilities. Tampa Electric notes that the Commission, in approving staff's recommendation to adopt the current version of Rule 25-6.0455, recognized that "the information required by the revised rules will enable the Commission to better track reliability and quality of service and to better measure improvement." Further, with respect to subsection (3) of the rule, Tampa Electric notes the Commission's conclusion that "[t]he purpose of allowing the utility to exclude from its report an outage event over which it has no control and cannot reasonably prevent is to ensure that the reliability report fairly represents the quality of service the utility delivers to its customers." Tampa Electric contends that granting its requested rule waiver will achieve the statutory purpose of allowing the Commission to evaluate a utility's performance in providing reliable service by allowing the Commission to consider whether the outage events of April 11 and 12, 2004, and the outage events of June 13, 24, and 26 were beyond the control and reasonable ability of Tampa Electric to prevent.

Tampa Electric further contends that a rigid application of the 30-day filing period required by the rule would impose a hardship on Tampa Electric by denying it the opportunity to have this significant outage event considered on its merits. Tampa Electric also contends that application of the rule would be contrary to basic fairness because the additional time required to file the exclusion request has not and will not prejudice any potential party's interests nor adversely impact the Commission's ability to thoroughly consider the merits of the request. Tampa Electric asserts that an inflexible application of the rule would penalize Tampa Electric because of the time required to develop the information necessary to submit a proper filing concerning this unusual weather event.

Analysis

Staff recommends that the Commission deny Tampa Electric's rule waiver petition. While staff believes that the purpose of the statutes underlying Rule 25-6.0455 will be achieved if the waiver is granted, Tampa Electric has not demonstrated that application of the rule would create a substantial hardship or violate principles of fairness.

Purpose of the Underlying Statutes

Rule 25-6.0455, which requires the submission of annual distribution service reliability reports from each investor-owned utility in the state, was promulgated under the authority of Section 366.05(1), Florida Statutes. This section provides the Commission the power, among other things, to prescribe standards of quality and measurement. The information gathered through these reports is used by the Commission in exercising its jurisdiction under Section

366.04(5), Florida Statutes, over the maintenance of a coordinated electric power grid throughout Florida to assure a reliable source of energy for Florida. This information is also used by the Commission to help determine adequacy and value of service in the context of rate-setting pursuant to Section 366.06, Florida Statutes.

The provisions of Rule 25-6.0455 are intended to ensure that utilities' distribution service reliability is fairly measured by allowing for the exclusion of certain outage events beyond the utilities' control and outside of their ability to reasonably prevent. Staff believes that Tampa Electric's requested rule waiver would achieve this end and the purpose of the statutes noted above by allowing the Commission to consider whether exclusion of the April 11 and 12 outage events and the June 13, 24, and 26 outage events experienced by Tampa Electric will fairly and accurately reflect the quality of service provided by Tampa Electric.

Substantial Hardship /Principles of Fairness

Staff does not agree with Tampa Electric's contention that application of the 30-day filing period to Tampa Electric will violate principles of fairness. For purposes of a rule waiver or variance, principles of fairness are violated when the literal application of the rule affects a particular person in a manner significantly different from the way it affects similarly situated persons who are subject to the rule. Tampa Electric has not explained how application of the rule will affect Tampa Electric in a manner significantly different from the way it affects any other utility subject to the rule.

Further, staff does not agree with Tampa Electric's contention that application of the 30-day filing period to Tampa Electric will create a substantial hardship. Tampa Electric appears to rely heavily upon the findings in Order No. PSC-04-1268-PAA-EI, issued December 22, 2004, in which the Commission approved a petition by Progress for waiver of the 30-day filing requirement in Rule 25-6.0455(3) in conjunction with its request to exclude the outage events of April 11 and 12. In finding that application of the 30-day filing period to Progress would create a substantial hardship, the Commission stated:

Strict application of the 30-day filing period specified in Rule 25-6.0455(3) would preclude Progress from having the opportunity to ask this Commission for permission to exclude certain outage events from its reliability reports in a manner that Progress believes would fairly and accurately reflect its quality of service.

Had the analysis stopped there, the Commission would have set a standard that would eviscerate the rule's 30-day filing requirement by allowing waiver of that requirement anytime a utility asked for one. Instead, in reaching its conclusion, the Commission gave weight to the actions Progress took to diligently investigate the nature of the weather event that affected its system:

We note that FPL was able to identify this weather phenomenon that affected its service territory on April 13, 2004, and file a timely request to exclude the related outages. Accepting Progress' assertions that it could not get a response from the NWS concerning the nature of the weather event that affected its system, we believe the delay in Progress' request was not unreasonable. It appears that

Progress took reasonable steps to investigate the nature of the weather phenomenon that affected its system on April 11 and 12.

Unlike Progress' rule waiver petition, which explained in detail the series of actions that Progress took to inquire into the nature of the weather phenomenon that affected its system on April 11 and 12, Tampa Electric simply asserts that it began accumulating information concerning the weather phenomenon after reviewing the filings by FPL and Progress. Progress' outage exclusion request was filed July 27, 2004, two and a half months after it claimed to have learned of the type of weather phenomenon that affected its system upon review of FPL's request. Tampa Electric does not explain what actions it took to inquire into the nature of the weather system that affected its system on April 11 and 12, nor does Tampa Electric explain why it required almost seven months to gather the data necessary to support its outage exclusion request.¹ From Tampa Electric's pleadings, staff has no basis to conclude that Tampa Electric was diligent in gathering the data to support its outage exclusion request for the events of April 11 and 12.

Further, Tampa Electric provides no explanation as to why it could not satisfy the 30-day filing requirement with respect to the outages that occurred on June 13, 24, and 26. Tampa Electric does not allege that these outages were related to the type of weather phenomenon that Tampa Electric asserts it was previously unaware of and that caused the outage events of April 11 and 22.

Conclusion

Staff recommends that the Commission deny Tampa Electric's petition for a one-time, temporary waiver of the 30-day filing requirement in Rule 25-6.0455(3), Florida Administrative Code. Tampa Electric has not demonstrated that application of the rule would create a substantial hardship or violate principles of fairness. If the Commission approves this recommendation, Tampa Electric Company's related outage exclusion request should be denied as untimely.

¹ Notably, the data offered in support of Tampa Electric's request to exclude the outage events of April 11 and 12 consists exclusively of lightning strike data, even though extreme wind was the primary basis for the outage exclusion requests by FPL and Progress that Tampa Electric claims resulted from the same weather system.

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Issue 2: Should this docket be closed?

Recommendation: 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.

Staff Analysis: At the conclusion of the protest period, if no protest is filed this docket should be closed upon the issuance of a consummating order.