

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: February 24, 2005

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

FROM: Division of Economic Regulation (Slemkewicz, Willis)
Office of the General Counsel (C. Keating, Fleming)

RE: Docket No. 041291-EI – Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company.

AGENDA: 03/01/05 – Regular Agenda – Parties May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\GCO\WP\2004\041291\041291.RCM2.DOC

Case Background

On November 4, 2004, Florida Power & Light Company (“FPL”) filed a petition seeking authority to recover prudently incurred restoration costs, in excess of its storm reserve balance, related to the hurricanes that struck its service territory in 2004. In its petition, FPL asserted that as a result of Hurricanes Charley, Frances, and Jeanne, FPL estimated its extraordinary storm-related costs to be approximately \$710 million, net of insurance proceeds, which would result in a deficit of approximately \$354 million in its storm reserve fund at the end of December 2004. By its petition, FPL proposed to recover this estimated deficit through a monthly surcharge to apply to customer bills based on a 24-month recovery period.

A formal administrative hearing on FPL’s petition is scheduled for April 20-22, 2005. By Order No. PSC-04-1150-PCO-EI, issued November 18, 2004 (“Order Establishing Procedure”), controlling dates and procedures were established to govern this proceeding. Among other things, that order required that FPL’s direct testimony in support of its petition be filed by November 24, 2004; that intervenors’ direct testimony be filed by February 8, 2005; that

staff testimony, if any, be filed by February 22, 2005; and that rebuttal testimony be filed by March 8, 2005. To date, FPL has timely filed its direct testimony, and the Office of Public Counsel (OPC) and staff have timely filed direct testimony.

On February 4, 2005, FPL filed a motion for leave to amend its petition and file supplemental direct testimony to reflect an updated estimate of FPL's storm-related costs. Along with its motion, FPL filed its amended petition and supplemental testimony. On February 10, 2005, OPC filed a response in opposition to FPL's motion, along with a motion to hold this proceeding in abeyance or, in the alternative, reschedule the hearing.¹ On February 22, 2005, FPL filed a response in opposition to OPC's motion.

This recommendation addresses FPL's motion for leave to amend its original petition and file supplemental direct testimony and OPC's motion to hold the proceeding in abeyance or, alternatively, to reschedule the hearing. The Commission has jurisdiction pursuant to Chapters 120 and 366, Florida Statutes.

¹ On February 11, 2005, the Florida Industrial Power Users Group (FIPUG) filed a notice of adoption of OPC's response and motions.

Discussion of Issues

Issue 1: How should the Commission resolve FPL's motion for leave to file an amended petition and supplemental direct testimony and OPC's motion to hold this proceeding in abeyance or, alternatively, reschedule the hearing?

Recommendation: The Commission should grant FPL's motion for leave to file an amended petition and supplemental direct testimony, deny OPC's motion to hold the proceeding in abeyance or reschedule the hearing, and adopt the procedural terms set forth in staff's analysis to allow OPC the opportunity to conduct discovery related to FPL's amended petition and to file supplemental testimony while retaining the current hearing dates. (C. Keating)

Staff Analysis:

Arguments of the Parties

In its motion for leave to amend, FPL states that it now estimates its storm reserve deficit to be \$533 million (jurisdictional) and asks for leave to amend its original petition to reflect this new amount and to request recovery of this new amount for an additional 12-month period, for a total of 36 months or such shorter period as is necessary to recover the deficit. FPL asserts that this additional recovery period is proposed to allow FPL to recover the deficit over a reasonable period of time without increasing the amount of its proposed monthly surcharge. FPL further asserts that its amended petition does not alter the level of the proposed surcharge, the proposed allocation of the surcharge, or the methodology by which costs were booked to the storm reserve. Thus, FPL contends that its amended petition will not prejudice or affect the substantive rights of the parties to this docket.

In its response to FPL's motion, OPC asserts that granting FPL's motion would unduly prejudice OPC's ability to present its case. OPC states that the supplemental information provided in FPL's amended petition and supplemental testimony as support for its updated estimate consists solely of two tables, each on a single page, with total dollar figures broken down by broad categories. OPC contends that the Commission should deny FPL's motion because, based on the amount of supplemental information provided, it will be required to engage in extensive discovery to determine if the updated charges are even justified. OPC asks that the Commission hold this proceeding in abeyance until such time as FPL can demonstrate that it is requesting final, accurate numbers for the storm cost recovery it proposes to collect from customers. If FPL is permitted to amend its petition and supplement its testimony, OPC contends that due process requires, at a minimum, that OPC be provided the same amount of time it had to conduct discovery on the original petition (approximately three months) and be permitted to file supplemental testimony. To provide this opportunity, OPC asserts that the Commission must adjust the hearing schedule.

In its response to OPC's motion, FPL argues that OPC would not be prejudiced if the Commission were to allow the amended petition under the existing procedural schedule. First, FPL argues that OPC cannot reasonably argue that it believed FPL's original cost estimate to be final. FPL asserts that the number was always an estimate and was labeled as such. Second,

FPL argues that OPC, as evidenced by its pleadings, discovery, and testimony in this docket, has approached the issues in this case on the basis of types or categories of costs charged to the storm reserve, accounting and regulatory principles, contract interpretation, and public policy. FPL asserts that nothing about the updated estimate or FPL's request to extend the recovery period prejudices either OPC's approach to this case or the positions OPC has taken.

In its response, FPL suggests that OPC's motion is an attempt to delay this proceeding. As support, FPL states that OPC has conducted no discovery concerning the updated estimates in the one month period since FPL informed OPC of the updated estimate.² FPL also states that on January 28, 2005, after being informed of the updated estimate by FPL, OPC deposed the FPL employee who prepared the estimate of storm damage costs but asked no questions about the facts underlying the updated estimate. FPL contends that these facts undermine OPC's argument that it needs an additional three months to conduct extensive discovery. FPL notes that the discovery deadline established for this docket is April 8, 2005, and that parties thus have six weeks remaining to conduct discovery. FPL further asserts that any discovery responses it has provided OPC and the parties since January 21, 2005, have been based on the updated estimate. Additionally, FPL states that, on its own initiative, it undertook to determine which of its previous discovery responses required updating based on the updated estimate. As a result, FPL states that on February 18, 2005, it provided all parties with updated responses to nine interrogatories and made available to parties an updated response to an OPC request for all work papers and documents used by FPL to develop its estimates for storm recovery.

FPL contends that where OPC has opposed FPL's recovery of storm costs, it has done so based on regulatory principle and policy. Therefore, FPL argues, its amended petition only changes the amount of money in the categories that OPC argues should not be eligible for recovery. FPL asserts that OPC's contention that it must conduct extensive discovery on the updated estimate has merit only if its litigation positions will be different with respect to the updated estimate than it was with respect to the original estimate.

To address OPC's concern that FPL's updated estimate is still an estimate and may not represent the final amount for which FPL will seek recovery, FPL states in its response that it will agree to limit recovery of storm restoration costs through the proposed surcharge to the amount of its updated estimate of its storm reserve deficit. Further, although FPL believes it is not required by due process under these circumstances, FPL states that OPC could be afforded the opportunity to file testimony addressing the points in FPL's supplement testimony without delaying the hearing scheduled for April 20-22, 2005. FPL states that if OPC's motion is denied, it will commit to respond within 10 days to discovery that addresses the points in the amended petition, as opposed to the 20 day response time provided in the Order Establishing Procedure. FPL suggests that if OPC is given the opportunity to file supplemental direct testimony, such testimony should be due by March 14, 2005, with any additional rebuttal testimony from FPL due by March 25, 2005. If this schedule is approved, FPL also suggests that the due date for Prehearing Statements be moved from March 22 to March 31.

² Although its amended petition and supplemental testimony were not filed until February 4, 2005, FPL states that it notified OPC of the updated estimate on January 20, 2005.

Staff Analysis

Pursuant to Rule 28-106.202, Florida Administrative Code, “[t]he petitioner may amend [its] petition after the designation of the presiding officer only upon order of the presiding officer.” Until hearing, the “presiding officer” in Commission proceedings is the Prehearing Officer. Given the significance of the issues presented in the parties’ pleadings, the Prehearing Officer in this docket asked that this matter be addressed by the full Commission.

The law is clear that leave to amend pleadings should be freely granted in order to allow disputes to be resolved on their merits. Although this policy diminishes as the case progresses to trial, in exercising its discretion to allow the amendment, the tribunal should weigh the amendment in terms of the prejudice to the opposing party in the preparation for trial.³ Given that FPL’s motion and amended petition were filed only two business days prior to the deadline for intervenor testimony in this docket, staff believes that OPC would be unduly prejudiced if it was not provided a reasonable opportunity to conduct discovery concerning FPL’s amended petition and supplemental testimony and the opportunity to supplement its prefiled direct testimony.⁴

Staff believes that OPC can be provided this opportunity within the time remaining prior to the hearing scheduled for April 20-22 in this docket. Staff believes that, conceptually, the terms suggested by FPL are reasonable for this purpose. In particular, staff recommends that the Commission approve the following provisions to govern this proceeding with respect to FPL’s amended petition and supplemental direct testimony:

1. FPL should be granted leave to amend its original petition in this docket and to file supplemental direct testimony in support of its amended petition.
2. Any discovery conducted by OPC, other intervenors, or staff that addresses the substance of FPL’s amended petition or supplemental direct testimony should be conducted in accordance with the procedures set forth in Section VI of the Order Establishing Procedure, except that responses should be served within 10 calendar days of receipt of the discovery request.
3. OPC should have the opportunity to continue the depositions held January 28, 2005, for the limited purpose of inquiring into the new matters raised in FPL’s amended petition and supplemental direct testimony.

³ Newman v. State Farm Mutual Auto Insurance Co., 858 So. 2d 1205 (Fla. 4th DCA 2003).

⁴ While staff recognizes that FPL may have provided its updated estimate to OPC on January 20, 2005, FPL did not formally seek recovery for the storm reserve deficit resulting from the updated estimate until February 4, 2005, when it filed its amended petition and supplemental testimony. Staff believes that OPC should not be held responsible to respond to a case that has not yet been presented. Further, even if OPC had served written discovery concerning the amended petition and supplemental testimony on January 21, 2005, it would not have received responses prior to the depositions held January 28 or its testimony due date of February 8. Finally, while FPL’s initiative to update its discovery responses should not go unnoticed, the updated discovery responses were not provided until February 18.

4. OPC should be permitted to file supplemental testimony by March 18, 2005, related to the new matters raised in FPL's amended petition and supplemental direct testimony and to update its testimony to address FPL's updated estimate.
5. Other intervenors should be permitted to file testimony by March 18, 2005, for the limited purpose of addressing the new matters raised in FPL's amended petition and supplemental direct testimony.
6. Staff should be permitted to file supplemental testimony by March 18, 2005, related to the new matters raised in FPL's amended petition and supplemental direct testimony and to update its testimony to address FPL's updated estimate.
7. Any FPL testimony offered to rebut the previously filed testimony of OPC and Staff should be filed by March 8, 2005, as set forth in the Order Establishing Procedure. FPL should be permitted to file supplemental rebuttal testimony by March 28, 2005, in response to any supplemental testimony filed by OPC or Staff (as permitted by items 4 and 6, above) or any testimony filed by other intervenors (as permitted by item 5, above).
8. Prehearing Statements should be filed by all parties by March 28, 2005.

Although FPL has indicated that OPC has conducted no discovery to date concerning the particulars of FPL's amended petition and supplemental testimony, OPC would be able to conduct such discovery under the above terms with the knowledge that it will be permitted the opportunity to supplement its testimony. Given the opportunity for OPC to have conducted discovery since the filing of FPL's amended petition and supplemental testimony and given FPL's efforts to date to provide updated responses to prior discovery, staff believes that the above procedures will provide OPC a reasonable opportunity to conduct discovery related to the substance of FPL's amended petition and supplemental direct testimony and to amend its testimony as it deems necessary. As FPL asserts, the bulk of OPC's case appears to be based on arguments that certain types of costs should not be charged to the storm reserve and that the stipulation resolving FPL's last rate proceeding precludes FPL from recovering any amounts unless FPL's return on equity has fallen below ten percent. It appears, therefore, that the primary effect of FPL's amended petition on OPC's case is to change the amount of money in the categories that OPC believes should not be charged to the storm reserve. Thus, while staff believes that the opportunity to conduct additional discovery is merited, staff does not believe that an additional three months of discovery is necessary.

As a result of FPL's agreement to limit recovery of storm restoration costs through the proposed surcharge to the amount of its updated estimate of its storm reserve deficit, the basis for OPC's motion to hold this proceeding in abeyance no longer exists.

Based on the foregoing, staff recommends that the Commission grant FPL's motion for leave to file an amended petition and supplemental direct testimony, and deny OPC's motion to hold this proceeding in abeyance or, alternatively, to reschedule the hearing. Further, staff recommends that the procedural terms set forth above should be adopted.

Docket No. 041291-EI
Date: February 24, 2005

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open. (C. Keating)

Staff Analysis: This docket should remain open to take final action on FPL's petition as amended.