

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: May 17, 2016

TO: Office of Commission Clerk (Stauffer)

FROM: Division of Accounting and Finance (Fletcher)
Office of the General Counsel (Brownless)

BS ALM
KH AM JSC

RE: Docket No. 160021-EI – Petition for rate increase by Florida Power & Light Company.

Docket No. 160061-EI – Petition for approval of 2016-2018 storm hardening plan, by Florida Power & Light Company.

Docket No. 160062-EI – 2016 depreciation and dismantlement study by Florida Power & Light Company.

Docket No. 160088-EI – Petition for limited proceeding to modify and continue incentive mechanism, by Florida Power & Light Company.

AGENDA: 05/23/16 – Special Agenda – Parties may participate at Commission’s discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: 05/31/16 – Intervenor testimony due date for Docket Nos. 160061-EI and 160088-EI

SPECIAL INSTRUCTIONS: None

Case Background

On March 15, 2016, Florida Power & Light Company (FPL) filed its Minimum Filing Requirements (MFRs) and testimony in support of rate increases in its base rates and charges to be effective January 1, 2017, January 1, 2018, and a step increase for the Okeechobee Energy Center effective on the commercial in-service date of the unit, currently projected to be June 1, 2019. The rate case was assigned Docket No. 160021-EI. Simultaneous with the rate case filing, FPL filed a petition requesting approval of its 2016 through 2018 Storm Hardening Plan (Docket No. 160061-EI), as required by Rule 25-6.0342, Florida Administrative Code (F.A.C.), and filed its 2016 Depreciation and Dismantlement Study (Docket No. 160062-EI), as required by Rules 25-6.0436 and 25-6.04364, F.A.C.

On March 25, 2016, Order No. PSC-16-0125-PCO-EI (Order Establishing Procedure/OEP) was issued establishing the filing dates and prehearing procedures to be followed in Docket No. 160021-EI. The OEP set the hearing dates as August 22 through September 2, 2016; the filing date for Intervenor testimony as July 14, 2016; the filing date for Commission staff's testimony as July 25, 2016; the filing date for Rebuttal testimony as August 8, 2016; the discovery deadline as August 12, 2016, the date of the Prehearing Conference; and the filing date for the Briefs as September 12, 2016. The Office of Public Counsel (OPC), Florida Retail Federation (FRF), American Association of Retired Persons (AARP), Florida Industrial Power Users Group (FIPUG), Wal-Mart Stores East, LP and Sam's East, Inc. (Walmart), Federal Executive Agencies (FEA) and South Florida Hospital and Healthcare Association (SFHHA) are parties to this docket.

On April 8, 2016, OPC filed an Unopposed Motion to Modify Key Activities Dates and Discovery Timeframes (Modification Motion) requesting that certain filing and discovery deadline dates established in the OEP be modified. FPL, FIPUG, and Walmart had no objections to OPC's Modification Motion.¹ The time to file written objections to OPC's Modification Motion ran on April 12, 2016. No written objection to the Modification Motion was filed.

On April 15, 2016, FPL filed a petition for limited proceeding to modify and continue its Incentive Mechanism (Petition). Accompanying the Petition was the direct testimony of Sam Forrest, FPL Vice President of Energy Marketing and Trading. The Incentive Mechanism was approved as a four-year pilot program ending in December of 2016, as part of FPL's 2012 rate case settlement agreement by Order No. PSC-13-0023-S-EI.² The purpose of the Incentive Mechanism is to allow FPL to retain a portion of any gains generated by its wholesale power transactions and other Incentive Mechanism activities, e.g., sale of natural gas storage and transportation rights, natural gas sales, and asset management agreements. [Petition at pps. 3-4]

FPL has proposed three changes to the pilot program currently in place: 1) elimination of the 514,000 MWh threshold for recovery of variable operation and maintenance (O&M) costs associated with the various wholesale transactions to be replaced with an approach that nets economy sales and purchases and recovers or credits variable O&M on only the net amount; 2)

¹ At the time of OPC's Modification Motion, these were the only official parties to the rate case.

² Order No. PSC-13-0023-S-EI, issued on January 14, 2013, in Docket No. 120015-EI, In re: Petition for increase in rates by Florida Power & Light Company.

Date: May 17, 2016

lower the annual threshold for sharing with FPL from \$46 million to \$36 million; and 3) lower the variable O&M cost per MWh from \$1.51/MWh to \$0.97/WWh. FPL contends that these changes are consistent with the assumptions and calculations made in the current 2017 and 2018 MFRs and more closely match the status of FPL's existing Unit Power Sales (UPS) contracts. Finally, FPL is requesting that this modified Incentive Mechanism program be continued for an additional four years, terminating at the end of December 2020, consistent with the timing of its proposed rate base increases in Docket No. 160021-EI.

On April 22, 2016, Commission staff filed a Motion to Consolidate Docket Nos. 160021-EI, 160061-EI, 160062-EI and 160088-EI (Consolidation Motion). FPL, FEA, Walmart, and SFHHA supported the motion; FIPUG and OPC took no position on the Consolidation Motion at the time of filing. The deadline for responding to the Consolidation Motion ran on April 29, 2016, without any written objections being filed.

On May 4, 2016, Order No. PSC-16-0182-PCO-EI³ was issued revising the OEP and granting the Commission staff's Consolidation Motion. Order No. PSC-16-0182-PCO-EI bifurcated the testimony filing schedules for the four dockets. For Docket Nos. 160021-EI (rate case) and 160062-EI (Depreciation Study) the filing schedule is as follows:

- | | | |
|-----|--|--------------------------------|
| (1) | Utility's testimony and exhibits | March 15, 2016 |
| (2) | Intervenors' testimony and exhibits | July 7, 2016 |
| (3) | Staff's testimony and exhibits, if any | July 18, 2016 |
| (4) | Rebuttal | August 1, 2016 |
| (5) | Prehearing Statements | August 5, 2016 |
| (6) | Prehearing Conference | August 12, 2016 |
| (7) | Discovery deadline for direct and intervenor testimony | August 12, 2016 |
| | Discovery deadline for rebuttal testimony | August 16, 2016 |
| (8) | Hearing | August 22 to September 2, 2016 |
| (9) | Briefs | September 16, 2016 |

For Docket Nos. 160061-EI (Storm Hardening) and 160088-EI (Incentive Mechanism), the filing schedule is as follows:

- | | | |
|-----|---|----------------|
| (1) | Utility's testimony and exhibits –Docket No. 160061-EI | March 15, 2016 |
| | Utility's testimony and exhibits - Docket No. 160088-EI | April 15, 2016 |
| (2) | Intervenors' testimony and exhibits | May 31, 2016 |
| (3) | Staff's testimony and exhibits, if any | June 21, 2016 |
| (4) | Rebuttal | July 5, 2016 |
| (5) | Prehearing Statements | August 5, 2016 |

³ Order No. PSC-16-0182-PCO-EI, issued on May 4, 2016, in Dockets Nos. 160021-EI, In re: Petition for rate increase by Florida Power & Light Company; 160061-EI, In re: Petition for approval of 2016-2018 storm hardening plan, by Florida Power & Light Company; 160062-EI, In re: 2016 depreciation and dismantlement study by Florida Power & Light Company; and 160088-EI, In re: Petition for limited proceeding to modify and continue incentive mechanism by Florida Power & Light Company.

Date: May 17, 2016

- | | | |
|-----|--|----------------------------|
| (6) | Prehearing Conference | August 12, 2016 |
| (7) | Discovery deadline for direct and intervenor testimony | August 12, 2016 |
| | Discovery deadline for rebuttal testimony | August 16, 2016 |
| (8) | Hearing | August 22 to Sept. 2, 2016 |
| (9) | Briefs | September 16, 2016 |

On May 9, 2016, OPC filed a Motion for Reconsideration of Order No. PSC-16-0182-PCO-EI Before the Full Commission (Motion for Reconsideration) requesting that the testimony filing schedule for the rate case and Depreciation Study dockets also be applied to the Storm Hardening and Incentive Mechanism dockets. AARP, FRF, FIPUG and SFHHA support OPC's Motion for Reconsideration; FPL does not support the Motion for Reconsideration; Walmart has no objection; and counsel for FEA did not respond prior to filing. On May 10, 2016, OPC filed a Request for Oral Argument on its Motion for Reconsideration and has requested that each party be given 10 minutes to present its position on the motion.

This recommendation addresses OPC's Request for Oral Argument and Motion for Reconsideration. The Commission has jurisdiction over this matter pursuant to Section 366.06, Florida Statutes.

Discussion of Issues

Issue 1: Should the Office of Public Counsel's Request for Oral Argument on Motion for Reconsideration of Order No. PSC-16-0182-PCO-EI Before Full Commission be granted?

Recommendation: Yes, if the Commission determines that oral argument will assist it in understanding and evaluating OPC's Motion for Reconsideration of Order No. PSC-16-0182-PCO-EI, it should grant oral argument on its own motion. (Brownless)

Staff Analysis:

Law

Rule 25-22.0022(1), Florida Administrative Code (F.A.C.), allows a party to request oral argument before the Commission for any motion by separate written pleading filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order. Failure to timely file a request for oral argument constitutes a waiver thereof. Rule 25-22.0022(1), F.A.C. Granting or denying oral argument is within the sole discretion of the Commission. Rule 25-22.0022(3), F.A.C. Further, the Commission has the discretion and ability on its own motion to conduct oral argument on matters over which it presides. Rule 25-22.0022(2), F.A.C. Only parties to the docket(s) and the staff attorney may participate in the oral argument when conducted at an agenda conference. Rule 25-22.0022(7)(a), F.A.C. Parties should be prepared to proceed with oral argument on all issues pertaining to the motion being discussed, whether raised in the request for oral argument or not. Rule 25-22.0022(7)(c), F.A.C.

OPC Position

OPC states that oral argument on its Motion for Reconsideration will assist the Commission in understanding and evaluating the mistakes of law and fact overlooked in rendering Order No. PSC-16-0182-PCO-EI. Specifically, OPC contends that oral argument will assist the Commission in evaluating the adverse impact of bifurcating the filing schedules on its ability to conduct discovery and properly prepare its testimony with regard to the Storm Hardening and Incentive Mechanism dockets. Further, OPC believes that oral argument will be helpful to clarify the basis for OPC's understanding that there would be a unified testimony schedule for all of the proposed consolidated dockets.

Staff Analysis

OPC did not file its request for oral argument on May 9, 2016, the date it filed its Motion for Reconsideration. Rule 25-22.0022(1), F.A.C., states: "Failure to timely file a request for oral argument shall constitute waiver thereof." OPC filed its request for oral argument on May 10, 2016, one day after it filed its Motion for Reconsideration. Therefore, OPC's request for oral argument is not in compliance with Rule 25-22.0022(1), F.A.C., and OPC has waived its right to request oral argument. However, the Commission has the discretion to grant oral argument should it determine that it will assist it in understanding and evaluating OPC's Motion for

Reconsideration. If the Commission does determine that oral argument is desirable, staff suggests that each party be given five minutes to present their case.

Issue 2: Should the Office of Public Counsel's Motion for Reconsideration of Order No. PSC-16-0182-PCO-EI Before the Full Commission be granted?

Recommendation: No, the Office of Public Counsel has failed to allege with specificity sufficient facts or law that were overlooked or not considered in rendering Order No. PSC-16-0182-PCO-EI. (Brownless, Fletcher)

Staff Analysis:

Law

Rule 25-22.0376, F.A.C., applies to requests for reconsideration of non-final orders, and states:

- (1) Any party who is adversely affected by a non-final order may seek reconsideration by the Commission panel assigned to the proceeding by filing a motion in support thereof within 10 days after issuance of the order. The Commission shall not entertain a motion for reconsideration of an order disposing of a motion for reconsideration.
- (2) A party may file a response to a motion for reconsideration within 7 days after service of the motion for reconsideration.
- (3) Failure to timely file a motion for reconsideration or a response shall constitute a waiver of the right to do so.
- (4) Any motion or response filed pursuant to this rule shall contain a concise statement of the grounds therefore and the signature of counsel or other person filing the motion.
- (5) The Commission will not entertain a motion for reconsideration of a notice of proposed agency action.

The legal standard for reconsideration of an order is to bring to the attention of the administrative agency some point of fact or law that it overlooked or failed to consider when it rendered its order. Diamond Cab Company of Miami v. King, 140 So.2d 889, 891 (Fla. 1962); Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981).

OPC's Position

OPC sets out a series of facts presumably to show that it will experience hardship under Order No. PSC-16-0182-PCO-EI. OPC states that Order No. PSC-16-0182-PCO-EI was issued on May 4, 2016, 27 days before the order requires Intervenors to file their testimony on Storm Hardening and Incentive Mechanism issues. [Motion for Reconsideration at pp. 4-6] Under the schedule for the rate case and Depreciation Study dockets, OPC would have approximately three months to file testimony. OPC notes that FPL's testimony for the Storm Hardening docket was filed simultaneously with FPL's testimony and MFRs on March 15, 2016, and FPL's testimony

for the Incentive Mechanism docket was filed on April 15, 2016. The time FPL has to respond to its direct testimony discovery is 25 days.⁴ Utilizing the July 7 Intervenor filing date would have allowed OPC to issue and review discovery on the Storm Hardening and Incentive Mechanism issues prior to filing its testimony.

OPC served discovery on FPL regarding Storm Hardening issues on March 17, March 30, April 5, and May 6, 2016.⁵ OPC also filed discovery on FPL regarding the Incentive Mechanism on April 6 and April 27, 2016.⁶ OPC has received responses to its March 17, March 30, and April 5 Storm Hardening discovery. OPC has not received responses to its May 6 Storm Hardening discovery which is due on May 31, 2016, the date OPC is currently required to file its Incentive Mechanism testimony. OPC has also not received responses to its April 27 Incentive Mechanism discovery which are due at the earliest on May 23, 2016, 8 days before its testimony is due to be filed.⁷

OPC further argues that the basis for the consolidation of the dockets was the recognition that the issues and information in the Depreciation and Storm Hardening dockets were so embedded in the rate case MFR calculations that these dockets were rationally included in the rate case. [Reconsideration Motion at p. 5] OPC states that because the information contained in the Storm Hardening docket is so embedded in the rate case MFRs, and Order No. PSC-16-0182-PCO-EI, does not specifically identify which issues are to be addressed in its Storm Hardening and Incentive Mechanism filings due on May 31, it is impossible for its experts to determine what issues should be addressed at that time. Essentially, OPC argues that the testimony in all four dockets is so interrelated that determining what to address in its May 31 testimony to meet Order No. PSC-16-0182-PCO-EI's requirements is virtually impossible. [Reconsideration Motion at 6] Finally, OPC argues that no party, including Commission staff in its Consolidation Motion, requested a bifurcated filing schedule, and that "Commission Staff in its Motion for Consolidation appears to have relied on all these dockets having the same testimony filing dates as a basis for the Consolidation not being prejudicial." [Reconsideration Motion at p. 6 at ¶ 10] OPC simply assumed that once consolidated, all of the dockets would proceed on the agreed upon filing schedule presented in its Modification Motion.

⁴ Order No. PSC-16-0125-PCO-EI, issued on March 25, 2016, in Docket No. 160021-EI, In re: Petition for rate increase by Florida Power & Light Company, at p. 3.

⁵ OPC's First Interrogatories Nos. 1-87; OPC's First Request for Production of Documents Nos. 1-47; OPC's Third Set of Interrogatories Nos. 106-107; OPC's Second Request for Production of Documents Nos. 48-85; OPC's Fourth Set of Interrogatories Nos. 108-165; and OPC's Eleventh Set of Interrogatories Nos. 257-297.

⁶ OPC's Eleventh Set of Interrogatories Nos. 257-297; OPC's Eleventh Request for Production of Documents Nos. 125-131, filed in Docket No. 160021-EI; OPC's Admission Nos. 1-5; OPC's First Set of Interrogatories Nos. 1-17; and OPC's First Set of Production of Documents No. 1, filed in Docket No. 160088-EI.

⁷ Because OPC's April 27 Incentive Mechanism discovery to FPL was filed on April 27 before the Consolidation Order was issued, FPL could take the position that the Rules of Civil Procedure apply and its response is not due until May 27, 30 days after service.

Staff Analysis

FPL's testimony supporting the 2016-2018 Storm Hardening Plan was filed simultaneously with the rate case MFRs on March 15, 2016. OPC has served, and has received, responses to three sets of discovery regarding Storm Hardening to date. While it is true that OPC has served and not yet received all of its responses to its discovery regarding the Incentive Mechanism, if the rate case schedule for discovery is adhered to, OPC will have responses to its April 27 testimony on May 23, 8 days prior to the currently scheduled testimony filing date. The interconnectedness of the Storm Hardening Plan and Incentive Mechanism data with the data contained in FPL's MFRs and supporting calculations is not a new development or one which should have taken OPC by surprise. Neither OPC nor any other party filed a request for one unified filing schedule in response to the Motion for Consolidation.

Reviewing the Motion for Reconsideration in its entirety, OPC has generally alleged that consolidation of these dockets under bifurcated filing schedules will prevent it from being able to competently prepare its testimony for Docket Nos. 160061-EI and 160088-EI. This appears to be a hardship argument. And, it is true that OPC will not be able to file testimony which incorporates FPL's responses to its May 6 discovery because FPL's responses are not due until May 31, the date Intervenor testimony is due under the schedule established in Order No. PSC-16-0182-PCO-EI, the subject of OPC's Motion for Reconsideration. However, OPC has not clearly identified any specific mistakes of fact or law sufficient to support reconsideration of the filing schedule for Docket Nos. 160061-EI and 160088-EI found in Order No. PSC-16-0182-PCO-EI. Without a specific mistake of fact or law, a motion for reconsideration must be denied, even when there is a "feeling that a mistake may have been made"⁸ or when the reviewing body would have reached a different decision. Based on the above, staff recommends that OPC's Motion for Reconsideration be denied.

Should the Commission determine that although the legal requirements for reconsideration of Order No. PSC-16-0182-PCO-EI have not been met, that based on the totality of the facts and circumstances, OPC has alleged facts sufficient to grant an extension of time in which to file its testimony in Docket Nos. 160061-EI and 160088-EI, the Commission has the discretion and authority to grant such relief on its own motion.⁹

⁸ Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

⁹ Order No. 23247, issued on July 23, 1990, in Docket No. 900004-EU, In re: Planning Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities; and Order No. PSC-96-1148-FOF-TP, issued on September 12, 1996, in Docket No. 950985-TP, In re: Interconnection Involving Local Exchange Companies and Alternative Local Exchange Companies.

Issue 3: Should these dockets be closed?

Recommendation: No, these dockets should remain open pending final resolution of FPL's requests for a permanent base rate increase, for approval of its 2016 Depreciation Study, for approval of its 2016-2018 Storm Hardening Plan, and for approval of its Incentive Mechanism. (Brownless)

Staff Analysis: No, these dockets should remain open pending final resolution of FPL's requests for a permanent base rate increase, for approval of its 2016 Depreciation Study, for approval of its 2016-2018 Storm Hardening Plan, and for approval of its Incentive Mechanism.