

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Proposed Adoption of Rule 25-6.030, F.A.C.,
Storm Protection Plan and Rule 25-6.031, F.A.C., Storm
Protection Plan Recovery Clause

Docket No.: 20190131-EU

Filed: October 31, 2019

**CITIZENS' MOTION TO SUSPEND HEARING ON PROPOSED RULES 25-6.030 AND
25-6.031, F.A.C. AND INITIATE FORMAL PROCEEDINGS**

Pursuant to sections 120.54(3)(c)2., 120.569, and 120.57, Florida Statutes (2019), and rules 28-103.005 and 28-106.201, Florida Administrative Code ("F.A.C."), the Citizens of the State of Florida ("Citizens"), through the Office of Public Counsel ("OPC"), file this request to suspend the hearing on proposed rules 25-6.030 and 25-6.031, F.A.C., relating to Storm Protection Plan (SPP) costs, scheduled for November 5, 2019, to conduct a formal evidentiary hearing concerning the proposed adoption of rules 25-6.030 and 25-6.031, F.A.C. In support of this request, the Citizens state as follows:

On October 3, 2019, at its regularly scheduled agenda meeting, the Florida Public Service Commission ("Commission") considered and proposed to adopt the above-styled rules after hearing comments from its Staff, OPC and other intervenors, and the five electric investor owned utilities ("IOUs").

On October 7, 2019, by Order No. PSC-2019-0403-NOR-EU, the Commission issued its Notice of Rulemaking proposing the adoption of Rules 25-60.030 and 25-60.031 in accordance with section 120.54(3)(a), Florida Statutes (2019).

On October 25, 2019, Citizens filed a petition for a hearing, providing objection to these proposed rules to the extent they exceed the statutory authority granted by the Legislature in section 366.96, Florida Statutes (2019), or are otherwise contrary to the public interest.

On October 29, 2019, in response to Citizens' petition for a hearing, the Commission caused to be published a notice of meeting, scheduling the public hearing on November 5, 2019, at the Agenda Conference scheduled to begin at 10:00 a.m.

The Citizens include all of the customers of all IOUs regulated by the Commission whose substantial interests will be affected by the Commission's proposed rules because the proposed rules will permit direct recovery of storm protection expenses outside the normal confines of a full rate case. The Citizens' substantial interests will not be adequately protected through the public hearing to be held on November 5, 2019, because a mere seven days'—four business days—notice is insufficient time to conduct the necessary discovery, prepare testimony, or otherwise establish material facts. The substantial interests of the Citizens require that these complex issues be presented and resolved after holding the rulemaking hearing in abeyance and conducting a formal proceeding to determine essential, but missing, facts utilizing sections 120.569 and 120.57, Florida Statutes, including an evidentiary hearing where experts for the utilities and the customers can, after conducting discovery, present their sworn testimony, subject to cross-examination, and file post-hearing briefs. *See Balino v. Dep't of Health & Rehab. Svcs.*, 362 So. 2d 21, 24 (Fla. 1st DCA 1978) (stating that petitioners have the right to present evidence and argument in rulemaking proceedings). The Commission should not finalize its rule concerning this important subject until after it has conducted such a formal evidentiary hearing and incorporated the resulting evidentiary findings into its decision making upon resumption of the rulemaking. *See Bert Rogers Schools of Real Estate v. Florida Real Estate Comm'n*, 339 So. 2d 226, 228 (Fla. 4th DCA 1976).

The proposed rules, as drafted, do not ensure that the ratepayers will not pay twice for storm protection and hardening as required by the statute. *Compare* § 366.96(8), Fla. Stat. (2019) ("The annual transmission and distribution storm protection plan costs may not include costs recovered through the public utility's base rates. . . .") *with* proposed rule 25-6.030(3), Fla. Admin. C. (permitting cost estimates to be included in the plan and not requiring a statement or proof that

such costs are not recovered through base rates). Even though proposed rule 25-6.031(6)(b) states that “costs recoverable through the clause shall not include costs recovered through the utility’s base rates. . . .”, the prohibition is meaningless and unenforceable without requiring project-level detail to be included in the plans and concurrent filing of the plans and recovery clauses.

Proposed rule 25-6.031(3)(e)2 allows the IOUs to omit the project-level detail from plans and instead file program-level detail. The proposed allowance to file program-level estimated costs and lack of project detail will make it difficult, if not impossible, for the Commission to distinguish the non-recoverable (i.e. recovered through base rates) project costs from the additional recoverable costs. Because the statute provides that “proceeding with actions to implement the plan shall not constitute or be evidence of imprudence,” section 366.96(7), Florida Statutes (2019), the lack of detail in the plans required by the proposed rules forecloses nearly any prudence determination. Without any requirement for the IOUs to provide the project-level detail necessary to identify and separate new undergrounding project costs from existing project costs being recovered through base rates in the form of cost incurred in the execution of pre-existing Storm Hardening Plans (SHP), the proposed rule does not provide the protection required by section 366.96. Accordingly, there is an inadequate factual basis to protect the Citizen’s substantial interests. Therefore, the Commission cannot lawfully proceed with the proposed rules without the benefit of a full evidentiary hearing. By itself, and without the requirement for the IOUs to provide the detail necessary to identify and separate new undergrounding project costs from ongoing project costs already being recovered in base rates, the provision effectively and unlawfully shifts the burden of proof to the customers and the Commission staff. *See Florida Power Corp. v. Cresse*, 413 So.2d 1187, 1191 (1982)(“...the burden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates.” Effectively, the proposed rule will place the burden on customers and staff to uncover or dig out this information in subsequent cost recovery dockets. Thus, there is an inadequate factual

basis to protect the Citizen's substantial interests in this rules docket. Therefore, the Commission cannot lawfully proceed with the proposed rules that implement the statute without the benefit of a full evidentiary hearing to determine the essential factual predicate.

The necessary facts in the form of the impact of project-level detail on the ability to separate SHP costs (and any other costs being recovered through base rates) from SPP costs are known and knowable to the IOUs but unknown to the Commission and the Citizens. The proceeding requested herein is necessary to permit the Commission and Citizens an opportunity to ascertain these facts. To facilitate as efficient an evidentiary proceeding as possible, OPC served discovery on October 29, 2019, to discern necessary facts and at the same time noticed corporate representative depositions on the subject on a reasonable but expedited basis.

There are additional provisions of the proposed rules that depend on underlying facts that the Commission does not have and which need to be determined. For example, the IOUs advocated for the current language of the rule requiring detail only at the program level in years 2 and 3. The IOUs advocated for aggregation of undergrounding detail at the program level on the basis that the information was effectively unavailable in any year except the first year in the 10-year planning horizon. This is a factual matter that requires discovery and testimony to determine the veracity of the claim as well as the nature of the information available. The necessary facts in the form of the availability of project-level detail are known and knowable to the IOUs but unknown to the Commission and the Citizens. The proceeding requested herein is necessary to permit the Commission and Citizens an opportunity to ascertain these facts. To facilitate as efficient an evidentiary proceeding as possible, OPC served discovery on October 29, 2019, to discern necessary facts and at the same time noticed corporate representative depositions on the subject on a reasonable but expedited basis.

The Citizens further note that, given the claim by Florida Power and Light Company ("FPL") to investors that it will pass approximately \$35 billion of capital costs through the clause

in a ten-year period¹, there exists an IOU motivation to aggregate undergrounding projects at the “program” level. The Commission presently has no facts by which to understand whether allowing program-level detail in SPP plan filings will impose unnecessary costs on customers through the use of an Allowance for Funds Used During Construction (AFUDC) cost element that would be otherwise unavailable on an individual project basis. These bundled program costs that meet the threshold for AFUDC cost recovery if aggregated at a superficial “program” level harm the interests of customers, and without the requested evidentiary hearing, the Commission has no way of knowing if it is unwittingly requiring extra and unneeded costs to be paid by customers by allowing program-level bundling. The predicate, underlying facts which the Commission does not have are necessary for the Commission to implement the statute lawfully and to protect the interests of the customers. The necessary facts in the form of the impact of AFUDC of project-level detail as compared to program level detail are known and knowable to the IOUs but unknown to the Commission and the Citizens. The proceeding requested herein is necessary to permit the Commission and Citizens an opportunity to ascertain these facts. To facilitate as efficient an evidentiary proceeding as possible, OPC served discovery on October 29, 2019, to discern necessary facts and at the same time noticed corporate representative depositions on the subject on a reasonable but expedited basis.

Additionally, provisions of rule 25-6.030(2)(c) and (3)(j) are proposed in a way that could allow generating and revenue collection devices such as batteries and meters to be included in the cost recovery allowed under proposed rule 25-6.031. With respect to batteries, for example, the proposed definition of “Transmission and distribution facilities” in rule 25-6.031(2)(c) includes

¹ See, *Our power lines will be buried for storm safety. It could cost FPL up to \$35 billion.* South Florida Sun Sentinel, October 17, 2019. <https://www.sun-sentinel.com/business/fl-bz-storm-protection-costs-20191017-crfsevrmtzdmiligcx2bvuvuy-story.html>.

“substation and related facilities.” This, combined with the vague and undefined “any other factors” standard in proposed rule 25-9.030(3)(j) could give rise to a presumptively lawful request for items like batteries or meters that have little or no direct role or purpose in storm restoration or resiliency related to extreme weather events. The facts related to the capabilities and purposes of these assets including facts underlying the purposes for installing meters and batteries and their function, if any, in the network for storm restoration and resiliency in the face of extreme weather events, are essential, but unknown to the Commission. The necessary facts in the form of the uses, functionality and purposes of meters and batteries are known and knowable to the IOUs but unknown to the Commission and the Citizens. The proceeding requested herein is necessary to permit the Commission and Citizens an opportunity to ascertain these facts. To facilitate as efficient an evidentiary proceeding as possible, OPC served discovery on October 29, 2019, to discern necessary facts and at the same time noticed corporate representative depositions on the subject on a reasonable but expedited basis.

The Citizens expect that the hearing process and pending discovery will reveal additional predicate facts, the determination of which are essential to protecting the interests of the IOU customers and to the adoption of a lawful rule. Thus, Citizens reserve their rights to raise such facts and seek a determination of them to the full extent allowed under law.

WHEREFORE, pursuant to section 120.54(3)(c)2., Florida Statutes (2019), Citizens request that the Commission suspend the rulemaking proceeding and convene a separate proceeding under the provisions of sections 120.569 and 120.57, Florida Statutes, to provide affected persons the opportunity to conduct discovery and prepare testimony and to consider the sworn testimony of experts sponsored by the customers and the utilities. The Citizens ask that the Commission provide an opportunity to be heard on this request for an evidentiary hearing, prior to commencement of

the rule hearing noticed in the Florida Administrative Register for November 5, 2019.

Respectfully Submitted,

J.R. Kelly
Public Counsel

/s/ Charles J. Rehwinkel
Charles J. Rehwinkel
Deputy Public Counsel
rehwinkel.charles@leg.state.fl.us
Bar No. 0527599

Thomas A. (Tad) David
Associate Public Counsel
Bar No. 706868

A. Mireille Fall-Fry
Associate Public Counsel
Bar No. 758841

Office of the Public Counsel
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400
(850) 488-9330

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished
by electronic mail to the following parties on this day of October 31, 2019

Adria Harper
Andrew King
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL32399-0850
aharper@psc.state.fl.us
aking@psc.state.fl.us

Cindy Miller
Cindy Miller LLC
1544 Cristobal Drive
Tallahassee FL 32303
milcindy@gmail.com

James D. Beasley
J. Jeffrey Wahlen
Malcolm N. Means
Tampa Electric Company
Post Office Box 391
Tallahassee, Florida 32302
jbeasley@ausley.com
jwahlen@ausley.com
mmeans@ausley.com

Joint Administrative Procedures Committee
Ken Plante, Coordinator
680 Pepper Building
111 W. Madison Street
Tallahassee, FL 32399
joint.admin.procedures@leg.state.fl.us

Tampa Electric Company
Ms. Paula K. Brown
Regulatory Affairs
P. O. Box 111
Tampa, FL 33601-0111
regdept@tecoenergy.com

Kenneth A. Hoffman
Florida Power & Light Company
134 West Jefferson Street
Tallahassee, FL 32301-1713
Ken.Hoffman@fpl.com

Dianne Triplett
Matthew R. Bernier
Duke Energy Florida
106 East College Avenue, Suite 800
Tallahassee, FL 32301
Dianne.triplett@duke-energy.com
matthew.bernier@duke-energy.com

Russell Badders
Holly Henderson
Gulf Power Company
215 S. Monroe St., Suite 618
Tallahassee, FL 32301
Holly.henderson@nexteraenergy.com
Russell.badders@nexteraenergy.com

Robert Scheffel Wright
Gardner Law Firm
1300 Thomaswood Drive
Tallahassee FL 32308
schef@gbwlegal.com

Jon C. Moyle, Jr.
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, FL 32301
jmoyle@moylelaw.com

Samantha Cibula
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
scibula@psc.state.fl.us

James W. Brew
1025 Thomas Jefferson Street, NW
Eight Floor, West Tower
Washington, DC 20007
jbrew@smxblaw.com

Beth Keating
Gunster, Yoakley & Stewart, P.A.
215 South Monroe Street, Suite 601
Tallahassee, FL 32301
bkeating@gunster.com

Kenneth M. Rubin/Kevin Donaldson
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, Florida 33408-0420
ken.rubin@fpl.com

/s/ Charles J. Rehwinkel
Charles J. Rehwinkel