

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for establishment of regulatory assets for expenses not recovered during restoration for Hurricane Michael, by Florida Public Utilities

DOCKET NO.: 20190155-EI

In re: Petition for Limited Proceeding to Recover Incremental Storm Restoration Costs, Capital Costs, Revenue Reduction for Permanently Lost Customers, and Regulatory Assets related to Hurricane Michael by Florida Public Utilities Company.

DOCKET NO. 20190156-EI

FILED: April 6, 2020

Motion for Partial Summary Final Order of the Request to Establish Regulatory Assets for Lost Revenue in Docket Nos. 20190155-EI and 20190156-EI

Pursuant to Rule 28-106.204, F.A.C., Citizens, by and through the Office of Public Counsel, hereby file their Motion for Partial Summary Final Order for Florida Public Utilities Company's (FPUC's) Request to Establish Regulatory Assets for Lost Revenue in Hearing Docket Nos. 20190155-EI and 20190156-EI, and as grounds for states as follows:

BACKGROUND

On August 7, 2019, FPUC filed its Petition for Limited Proceeding to Recover Incremental Storm Restoration Costs, Capital Costs, Revenue Reduction for Permanently Lost Customers and Regulatory Assets related to Hurricane Michael (Original Storm Petition) subsequently assigned Docket No. 20190156-EI. In conjunction with its Storm Petition on August 7, 2019, FPUC filed its Petition for Establishment of Regulatory Assets for Expenses Not Recovered During Restoration for Hurricane Michael (Original Regulatory Asset Petition) subsequently assigned Docket No. 20190155-EI. On February 24, 2020, OPC's September 5, 2019 Motion to Consolidate Docket Nos. 20190155-EI and 20190156-EI was granted. As stated in Order No. PSC-2020-0060-PCO-EI, these dockets

involve similar issues of law or fact, and consolidation promotes the just, speed, and inexpensive resolution of these proceedings. *Id.* at p. 2.

Subsequently on March 11, 2020, FPUC submitted a Request for Leave to File Revised Petition and Revised Petition of Florida Public Utilities Company for Establishment of a Regulatory Assets in these consolidated dockets (Revised Petition). Intertwined in the Original Storm Petition, Original Regulatory Asset Petition, and the Revised Petition is FPUC's thinly veiled request to recover lost revenue which is the subject of this Motion for Partial Summary Final Order.

In its Petitions, FPUC asks the Commission to allow it to recover for Operation and Maintenance (O&M) expenses for October 2018 from all customers and for November 2018 from lighting customers, which FPUC terms as "unrecovered" O&M expenses due to Hurricane Michael in the amount of \$984,283 (inclusive of \$43,885 of interest). Original Storm Petition at p. 3, Original Regulatory Asset Petition at p. 4, and Revised Petition at pp. 4-5. What FPUC is couching as "unrecovered" O&M expenses is actually a claim for its "lost revenue" from October 2018 from all customers and from November 2018 from lighting customers. FPUC attempts to disguise its lost revenue claim by making the argument that "[w]hen bills are not issued and revenue is not received, these costs are not covered by the Company's base rates and charges as originally intended" and then leaps to the conclusion that normal O&M expenses have been "unrecovered." Revised Petition at p. 4. However, the important phrase that reveals the true nature of this request is "revenue is not received;" in other words, this is lost revenue. Hereinafter in this motion, "unrecovered O&M" will be referred to by its actual nature "lost revenue."

FPUC is also asking for a regulatory asset for its "lost revenue" for the last two months of 2018 and all of 2019 due to a reduction in the number of its customers (initially estimated to be 762 customers and later reduced to 546 customers) as of December 2019 that never returned to FPUC's system. FPUC

is requesting the regulatory asset be established in the amount of \$504,448 (\$492,563 of revenue and \$11,885 of interest) for this lost revenue due to a reduction in customer base. Revised Petition at p. 6.

STANDARD

Section 120.57(1)(h), F.S., provides that a party may move for a summary final order when there is no genuine issues as to any material fact. A summary final order shall be rendered if the Commission “determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.” See Section 120.57 (1)(h), F.S.

While “the standard for granting a summary final order is very high,”¹ and “in determining whether the moving party has met this burden, the fact finder must draw every possible inference in favor of the party against whom a summary judgment is sought.”² OPC asserts that this standard is met under the facts and circumstance in the instant case. Further, OPC avers that “the facts are so crystalized that nothing remains but questions of law.”³ FPUC would have the burden to produce counter-evidence sufficient to show that a genuine issue exists,⁴ which they cannot since the facts and law are indisputable. The Revised Petition and Admissions⁵ by FPUC as discussed in this Motion provide competent substantial evidence to support OPC’s request for Partial Summary Final Order based on the law.

¹ Order No. PSC-11-0244-FOF-GU, issued June 2, 2011, in Docket No. 090539-GU, *In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department*, at pg. 4.

² *Id.* at p. 4, citing *Christian v. Overstreet Paving Co.*, 679 So. 2d 839 (Fla. 2d DCA 1996); *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977).

³ *Id.* at p. 4, citing *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); see also *City of Clermont, Fla. v. Lake City Util. Servs., Inc.*, 760 So. 2d 1123, 1124 (5th DCA 2000).

⁴ *Id.* at p.4 citing *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979) and *Golden Hills Golf & Turf Club, Inc. v. Spitzer*, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

⁵ FPUC’s responses to OPC’s First Set of Admission is attached hereto.

NO GENUINE ISSUE OF MATERIAL FACT

In Paragraphs 6 and 9 of its Revised Petition, FPUC acknowledged that it is asking to recover estimated, lost revenue for the period of October 2018 for all customers and for November 2018 for lighting customers, in the amount of \$984,283 because it incurred normal O&M expenses. *Id.* at pp. 4-5. The Company used the historical, estimated O&M and estimated lost revenue including interest to determine the amount it is requesting to establish as the regulatory asset. *Id.* at p. 5.

In its responses to OPC's First Set of Admissions, FPUC affirmed the following facts regarding its requested regulatory asset. FPUC acknowledged it incurred O&M expenses in the October-November 2018 timeframe. *See* Admission No. 2. FPUC admitted it expensed non-storm, normal O&M in October and November 2018. *See* Admissions No. 3 and No. 4. FPUC admitted it is "seeking permission to establish a regulatory asset for unrecovered O&M costs that were not collected through base rates due to storm restoration and the Company's inability to recover these costs through revenues normally billed for these months." *See* Admission No. 1. FPUC admitted it did not collect revenue from its customers through its base rates which are designed to recoup O&M expenses typically recovered in the months of October and November 2018. *See* Admission No. 5. FPUC admitted it is seeking to create a regulatory asset for un-recovered O&M costs that would otherwise have been recovered through base rates had those base rates been billed in October and November 2018. *See* Admission No. 6. FPUC acknowledged it is requesting additional revenue in the form of a regulatory asset because it did not collect sufficient revenues from its customers for the portion of its base rates which are designed to recoup O&M expenses typically recovered in the months of October and November 2018. *See* Admission No. 8.

Moreover, in Paragraph 11 of its Revised Petition, FPUC stated it estimated an initial loss of 762 customer accounts in its Northwest Division and an ultimate loss of 546 customer accounts.

Revised Petition at p. 6. In Paragraph 12 of its Revised Petition, FPUC confirmed it is asking for lost revenue for the last two months of 2018 and all of 2019 in the amount of \$464,639 because these customers did not reconnect their service. *Id.* at p. 6. The total regulatory asset requested is for \$504,448 including interest. *Id.* at p. 7.

In its responses to OPC's First Set of Admissions, FPUC affirmed the following facts regarding the requested regulatory asset. FPUC admitted it is seeking to create a regulatory asset for the lost revenues, excluding any loss in lighting customers, for the last two months of 2018 and all of 2019. *See* Admission No. 9. FPUC acknowledged its calculation of the amount associated with the regulatory asset is based upon an analysis that these customers left FPUC's system for the period November 2018 through December 2019, and therefore would not have received electric service from FPUC during that period. *See* Admission No. 15.

In addition, FPUC conceded that it was earning slightly below its authorized earnings range as indicated in its September 30, 2018 Earnings Surveillance Report ("ESR") just prior to Hurricane Michael's impact (to-wit, FPUC was earning 5.00% out of an allowed range of 5.06% to 5.84%). FPUC's September 2019 ESR indicated it was earning 2.47%. Thereafter, on November 22, 2019, the Commission approved FPUC and OPC's Joint Motion for Approval of Stipulation for Implementation of Rate Increase Subject to Refund for an interim storm surcharge effective January 2, 2020.⁶

Based on FPUC's admissions and the allegations in its Revised Petition, there is no genuine issue of material fact that FPUC is seeking recovery of "lost revenues" from future customers via the establishment of regulatory assets. The only issue to be resolved is whether FPUC is allowed to collect

⁶ Order No. PSC-2019-501-PCO-EI, issued November 22, 2019, in Docket No. 20190156-EI, *In Re: Petition for a Limited Proceeding to Recover Incremental Storm Restoration Costs, Capital Costs, Revenue Reduction for Permanently Lost Customers, and Regulatory Assets Related to Hurricane Michel, by Florida Public Utilities Company*, at pp. 2, 8.

“lost revenues” from future customers, as a matter of law, under Florida Statutes, Commission rule and the well-established Florida Supreme Court doctrine prohibiting retroactive ratemaking.

ARGUMENT

Section 366.03, Florida Statutes, provides that all rates and charges received by a public utility for any service rendered, or to be rendered by it, shall be fair and reasonable. It is manifestly unfair and unreasonable to charge customers for service that was not rendered, or to be rendered, in the past. This Commission should deny FPUC’s request for establishing a regulatory asset for lost revenue because it is prohibited by the doctrine of retroactive ratemaking pursuant to Florida law and Commission Rule 25-6.0143(1)(f)(9), F.A.C.

A. Retroactive Ratemaking

FPUC’s request to recover prior period unrecovered or “lost” O&M expenses is pure and simple retroactive ratemaking. These unrecovered O&M expenses have already been expensed in a prior period. A request to the Commission by FPUC to allow it to collect lost revenues in current and future periods to recover a prior period expense is classic retroactive ratemaking that is prohibited by Chapter 366, Florida Statutes. *See City of Miami v. Florida Public Service Com.*, 208 So. 2d 249, 260 (Fla. 1968). As the Commission noted in Order No. PSC-98-1243-FOF-WS,⁷ retroactive ratemaking occurs when new rates are applied to prior consumption. *Id.* at p. 13. The Commission noted that the courts have interpreted retroactive ratemaking to occur when an attempt is made to either recover past losses (under earning) through prospective rates or to recoup prior period overearnings through a refund. The Commission further stated that past losses are interpreted to be prior period costs that a utility did not recover through its rates, causing the utility to earn less than a fair rate of return. *Id.* In *City of Miami*,

⁷ Order No. PSC-98-1243-FOF-WS, issued September 21, 1998, in Docket No, 971596-WS, *In re: Petition for limited proceeding regarding other postretirement employee benefits and petition for variance from or waiver of Rule 25-14.012, F.A.C., by United Water Florida, Inc.*

the petitioner argued that rates should have been reduced for prior period overearnings and that the excess earnings should be refunded, which the Court rejected as retroactive ratemaking that was prohibited by statute. *City of Miami* at pp. 259-260.

In Order No. PSC-2019-0114-FOF-EI,⁸ FPUC's last storm recovery docket, the Commission stated that it agreed with the Company's differentiation between "lost revenue" and "O&M costs not recovered."⁹ To the extent FPUC now claims that these normal O&M expenses were not recovered during the previous time periods through the revenue it collected, sufficient to allow the Company to earn within its authorized range, this differentiation does not justify allowing the creation of these regulatory assets in violation of the doctrine of retroactive ratemaking. First, FPUC's claim that it should be held harmless by bringing its profits to the low end of its authorized earnings range for a prior period is contrary to the regulatory compact. The regulatory compact provides only the opportunity to earn a fair rate of return;¹⁰ it does not provide a guarantee of a certain level of profit. To approve FPUC's request would turn the regulatory compact on its head.

Second, according to the Financial Accounting Standards Board (FASB) Accounting Standards Codification 606, a fundamental principle of Generally Accepted Accounting Principles (GAAP) is the principle of revenue recognition that stipulates revenues are recognized when realized and earned, not necessarily when received. "Realizable" means that goods and/or services have been received, but payment for the product/service is expected later. The service that these customers pay for is electricity, which in this case was never received. Even though these revenues have never been earned by FPUC because the customers never received service, the Company still wants its customers to pay. By making

⁸ Order No. PSC-2019-0114-FOF-EI, issued March 26, 2019, in Docket No. 20180061-EI, *In Re: Petition for Limited Proceeding to Recover Incremental Storm Restoration Costs, by Florida Public Utilities Company*, at p. 25.

⁹ The Commission stated that "[t]he O&M costs were determined from the calculated lost revenue. While we acknowledge that the O&M costs are a distinct cost, we find that they are also a portion of lost revenue not eligible to be charged to the reserve. Although we agree with the Company's differentiation between lost revenues and 'O&M cost not recovered,' the Rule clearly prohibits any base rate recoverable costs from being charged to the reserve." *Id.* at p. 25.

¹⁰ *Federal Power Commission v. Hope Natural Gas Co.*, (*Hope*), 320 U.S. 591 (1944), and *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia*, (*Bluefield*), 262 U.S. 679 (1923).

this specious argument that these regulatory assets are for unrecovered past O&M expenses rather than lost revenue and profits, FPUC is trying to cloud the clear prohibition against this type of retroactive ratemaking.

As the Commission has found in the past, a request to establish a regulatory asset to capture past estimated revenues not billed is clearly prohibited. In Order No. PSC-98-1243-FOF-WS, United Water Florida, Inc. sought to create a regulatory asset to defer and amortize unrecovered Other Post-Employment Benefits due to accounting changes. *Id.* at pp. 12-14. The Commission found that this request is precisely what the Courts determined to be retroactive ratemaking by increasing future rates to make up for prior losses (or reducing rates for prior overearnings). *Id.* at p. 14. The utility attempted to argue an extraordinary cost exception and a fairness and equity exception to the retroactive ratemaking principle (similar to FPUC's extraordinary circumstances argument in this docket); however, the Commission rejected application of these exceptions due to the clear prohibition against retroactive ratemaking and noted these exceptions were not based on Florida law. *Id.* at p. 14.

In the instant case, FPUC is also seeking to create a regulatory asset for prior period costs that were not recovered in base rates. This is clearly a prohibited retroactive ratemaking activity. Furthermore, there is no basis under Florida law for such an exception, and it would be unfair and unjust to create such an exception to retroactive ratemaking. The customers suffered equally as, if not in some cases more than, the utility due to no fault of their own from Hurricane Michael. It would be fundamentally unfair to allow the utility to create a regulatory asset to collect money from customers for service they did not receive, so that the utility suffers no financial harm from Hurricane Michael. Moreover, the Company will recover all its reasonable and prudent storm restoration costs from these same suffering customers. Based on the foregoing, it is clear that FPUC's request for the creation of regulatory assets for (1) lost revenue due to unrecovered costs expensed in the prior periods of October and November 2018, and (2) reduced or lost revenues resulting from fewer customers receiving service

from FPUC in October and December 2018 and all of 2019, is prohibited by Florida Statutes, Commission rule and the doctrine of retroactive ratemaking. Thus, FPUC's request should be denied.

B. Commission Rule 25-6.0143(1)(f)(9), F.A.C.

FPUC acknowledges that Rule 25-6.0143(1)(f)(9), F.A.C., prohibits charging unrecovered expenses to the Company's storm reserve account. Revised Petition at p. 4. FPUC also acknowledges that the Commission has determined O&M expenses not recovered due to reduced revenues resulting from an outage are likewise not recoverable through a storm surcharge. Revised Petition at p. 4. The Company concedes that these O&M expenses are its normal expenses. However, FPUC wants the Commission to ignore its own, clear rule which does not allow for recovery of normal base rate O&M expenses incurred during the storm period through a storm surcharge. FPUC ignores the import of Rule 25-6.0143(1)(f)(9), F.A.C., which prohibits charging the storm reserve for this lost revenue. This lost revenue that FPUC is seeking results from customers receiving no service from the Company due to the effects of Hurricane Michael, either because the Company could not provide service for a time, these customers could not take service thereafter, or these customers did not re-establish service from FPUC. Either way, it makes no difference. The bottom line is that, since these customers did not receive electric service, there is no service rendered for which FPUC could legitimately charge rates. Moreover, why would it be fair to charge FPUC's "other" customers for these lost revenues that relate to previous customers who did not receive service from the Utility? To allow FPUC to create a regulatory asset to make up for "lost revenues," based on no services being provided, leads to unjust compensation and any potential inclusion in the establishment of new rates would also lead to unjust and unreasonable rates.

The customers of FPUC also suffered great losses from Hurricane Michael (including, but not limited to, loss of homes, businesses, and property). These same customers should not have to pay for electric service that they did not, and in many instances, could not, receive. FPUC states that 546 of FPUC's Northwest Division accounts have been permanently lost due to the Hurricane Michael. This

certainly attests to the suffering of FPUC's customers in that territory. Yet, all electric utilities lose customers every day for a myriad of reasons, such as people move, install their own renewable systems or become deceased. Notwithstanding, it is unconscionable that FPUC is now asking its remaining customers to pay for its loss of profits from reduced revenues caused by Hurricane Michael.

Moreover, Rule 25-6.0143, F.A.C., is not limited in its application only to the "incremental" costs chargeable to Account No. 228.1. Rule 25-6.0143, F.A.C., establishes the Commission's policy for the types of storm costs that are recoverable from customers: "[i]n determining the costs to be charged to cover storm-related damages, the utility shall use an Incremental Cost and Capitalization Approach methodology (ICCA)." Therefore, irrespective of how the Company chooses to recover storm-related costs from customers (i.e. surcharge or regulatory asset), the principles of the ICCA methodology applies.

The Commission addressed a similar request from FPUC for lost revenue due to Hurricane Irma wherein the Commission stated that: "under Rule 25-6.0143(1)(f)(9), F.A.C., lost revenues from service not provided due to a storm are prohibited from being charged to the reserve under the ICCA methodology." Order No. PSC-2019-0114-FOF-EI at p. 25. Merely renaming its request from a storm reserve charge to a regulatory asset does not change the fundamental nature of the request. FPUC's request for permission from this Commission to recover from its customers lost revenue, either through a surcharge or through base rates, is prohibited under the doctrine of retroactive ratemaking which is the fundamental basis for the prohibition in Rule 25-6.0143(1)(f)(9), F.A.C. Neither of these regulatory asset requests should be allowed, and FPUC's request should be denied.

CONCLUSION

In summary, there are no genuine issues of fact to require a hearing to establish that FPUC is seeking to create two regulatory assets based on lost revenues for prior periods. It is equally indisputable that the doctrine of retroactive ratemaking under Florida law, applicable case law and Commission Rules prohibit the creation of these types of regulatory assets to charge future customers for lost revenues and profits. Thus, based on the foregoing, OPC asserts that the standard for granting this Motion for Partial Summary Final Order has been met, and thus, this Motion should be granted at a matter of law.

Wherefore, Citizens, by and through the Public Counsel, hereby request that the Commission grant its Motion for Partial Summary Final Order to Dismiss Florida Public Utilities Company's (FPUC) Request to Establish Regulatory Asset for "Lost Revenue" in Docket Nos. 20190155-EI and 20190156-EI.

Respectfully Submitted,

J.R. Kelly
Public Counsel

/s/Patricia A. Christensen
Patricia A. Christensen
Associate Public Counsel
christensen.patty@leg.state.fl.us
Bar No. 989789

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

CERTIFICATE OF SERVICE

Docket No.: 20190155-EI

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 6th day of April 2020, to the following:

Mr. Mike Cassel
Florida Public Utilities Company
1750 S.W. 14th Street, Suite 200
Fernandina Beach FL 32034-3052
mcassel@fpuc.com

Ashley Weisenfeld
Rachael Dzichciarz
Office of General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
awisenf@psc.state.fl.us
rdziehc@psc.state.fl.us

Beth Keating/Gregory Munson
Gunster Law Firm
215 South Monroe Street, Suite 601
Tallahassee FL 32301
bkeating@gunster.com
gmunson@gunster.com

/s/Patricia A. Christensen
Patricia A. Christensen
Associate Public Counsel