

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for limited proceeding for recovery of incremental storm restoration costs related to Hurricane Michael and approval of second implementation stipulation, by Duke Energy Florida, LLC.

DOCKET NO. 20190110-EI

In re: Petition for limited proceeding for recovery of incremental storm restoration costs related to Hurricane Dorian and Tropical Storm Nestor, by Duke Energy Florida, LLC.

DOCKET NO 20190222-EI

In re: Petition for limited proceeding to approve 2021 settlement agreement, including general base rate increases, by Duke Energy Florida, LLC.

DOCKET NO 20210016-EI  
ORDER NO. PSC-2021-0126-PCO-EI  
ISSUED: April 12, 2021

ORDER DENYING CHARGEPOINT, INC.'S PETITION TO INTERVENE

On January 14, 2021, Duke Energy Florida, LLC (DEF) filed a Petition for Limited Proceeding asking this Commission to approve the 2021 Settlement Agreement between DEF, the Office of Public Counsel (OPC), the Florida Industrial Power Uses Group (FIPUG), White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate (PCS Phosphate), and Nucor Steel Florida, Inc. (NUCOR) (collectively, Signatories). The 2021 Settlement Agreement includes general base rate increases, resolves all issues in Docket Nos. 20190110-EI and 20190222-EI, clarifies certain cost allocation and rate design matters pertaining to DEF's Storm Protection Plan Cost Recovery Clause, and authorizes a new EV Program.

As a result of the approval of the 2017 Second Revised and Restated Settlement Agreement (2017 Settlement Agreement) by Order No. PSC-2017-0451-AS-EU,<sup>1</sup> DEF was authorized to implement an EV Charging Station Pilot Program (2017 EV Pilot). In the 2021 Settlement Agreement, the Signatories agreed that DEF should be authorized to continue operation and recovery of costs of the charging stations that were installed pursuant to the 2017 EV Pilot, and to implement three new EV programs, as further described in Paragraphs 17(a) through (c) of the 2021 Settlement Agreement.

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<sup>1</sup> Order No. PSC-2017-0451-AS-EU, issued November 20, 2017, in Docket Nos. 20170183-EI, 20100437-EI, 20150171-EI, 20170001-EI, 20170002-EG, and 20170009-EI, *In re: Application for limited proceeding to approve 2017 second revised and restated settlement agreement, including certain rate adjustments, by Duke Energy Florida, LLC.*, *In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.*, *In re: Petition for issuance of nuclear asset-recovery financing order, by Duke Energy Florida, Inc., d/b/a Duke Energy*, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, *In re: Energy conservation cost recovery clause*, and *In re: Nuclear cost recovery clause*.

On March 17, 2021, ChargePoint, Inc. (ChargePoint) petitioned for intervention in this consolidated proceeding. On March 23, 2021, DEF timely filed a response in opposition.

### Petition for Intervention

ChargePoint is an electric vehicle charging network with independently owned and operated Level 2 and DC fast charging spots, and is headquartered in Campbell, California. ChargePoint states that its primary business model consists of selling its smart charging solutions directly to businesses and organizations, which include electric utilities, while offering tools that empower site hosts and station owners to deploy charging designed for their individual application and use.

ChargePoint asserts that DEF's new EV Program is very different from the 2017 EV Pilot proposed by DEF in Docket No. 20170183-EI. According to ChargePoint, its petition to intervene in Docket No. 20170183-EI was denied on the basis that "ChargePoint has failed to allege any facts that can support its claim that the pilot program would impact ChargePoint's current market share or customers, or interfere with 'the very existence of a competitive market.'"<sup>2</sup> ChargePoint claims that the 2017 order denying intervention found that "ChargePoint's alleged injury to its economic interests and the free market are not what the governing statutes of this proceeding were meant to protect."<sup>3</sup> *Id.*

ChargePoint argues that by owning and operating EV charging infrastructure, DEF thereby competes with non-regulated market providers of EV charging infrastructure. According to ChargePoint, this constitutes a direct threat to ChargePoint's ability to sell its products in DEF's service territory. ChargePoint further notes that since the 2017 order denying ChargePoint's intervention was issued, the Florida legislature has added substantially to the Commission's jurisdiction and responsibilities by directing the Commission to oversee the participation of electric utilities in the development of the EV charging market in Florida under Section 339.287(2)(c)4., Florida Statutes (F.S.).<sup>4</sup>

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<sup>2</sup> Order No. PSC-2017-0397-PCO-EI, issued October 20, 2017, in Docket No. 20170183-EI, *In re: Petition for limited proceeding to approve 2017 second revised and restated settlement agreement, including certain rate adjustments by Duke Energy Florida, LLC.*

<sup>3</sup> ChargePoint failed to point out that in the 2017 order denying ChargePoint's intervention the Commission made clear that "[c]ompetitive economic injury may only qualify as an injury if the applicable governing statute is designed to protect against such an interest." *Id.*

<sup>4</sup> Section 339.287(2), F.S., provides that the Commission, in consultation with the Florida Department of Transportation, the Office of Energy within the Department of Agriculture and Consumer Services, and any other public or private entities as necessary or appropriate, shall be primarily responsible for certain goals and objectives in developing a master plan for current and future development of electric vehicle charging infrastructure along the State Highway System. As set out in Section 339.287(2)(c)4., F.S., the Commission's responsibilities include "[i]dentifying the type of regulatory structure necessary for the delivery of electricity to electric vehicles and charging station infrastructure, including competitive neutral policies and the participation of public utilities in the marketplace." *Id.*

With respect to its alleged actual injury, ChargePoint asserts that DEF's ownership and operation of DC fast charging stations would directly compete with ChargePoint's customers that own and operate commercial charging stations. ChargePoint argues that DEF's new EV charging offerings could interfere with a competitive marketplace and hinder ChargePoint's ability to sell its products in DEF's service territory. ChargePoint states that this actual direct impact is precisely the harm the new legislative mandate requires the Commission to consider and protect. However, ChargePoint also acknowledges that while some of DEF's proposals in the 2021 Settlement Agreement could harm market growth, others could encourage it.

#### Duke Energy Florida, LLC's Response

In its Response in Opposition, DEF contends that ChargePoint's assertion that DEF's EV Program "would directly compete with ChargePoint's customers that own and operate commercial charging stations" does not demonstrate a substantial interest in the outcome of this proceeding, or a sufficient demonstration of an injury-in-fact. Further, DEF contends that ChargePoint's claimed injury is not of the type or nature that the proceeding is designed to protect. DEF also notes that as Florida's largest vendor of EV charging stations, ChargePoint's admission that "[s]ome DEF proposals could encourage market growth while others could harm it" fails the requirement that the injury cannot be too remote, speculative, or indirect. Finally, DEF argues that ChargePoint's assertions that its participation would be "consistent with the legislature's clear endorsement of free-market solutions," as captured in Section 339.287(2)(c)4., F.S., is not supported by that statutory section. DEF asserts that since ChargePoint fails to meet either prong of the two-prong standing test set forth in *Agrico Chemical Company v. Department of Environmental Regulation* (Agrico), 406 So. 2d 478, 482 (Fla. 2d DCA 1981), its Petition for Intervention must be denied.

#### Standard for Intervention

Pursuant to Rule 28-106.205, Florida Administrative Code (F.A.C.), persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding and who desire to become parties may move for leave to intervene. Motions for leave to intervene must be filed at least twenty (20) days before the final hearing, must comply with Rule 28-106.204(3), F.A.C., and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

To have standing, the intervenor must meet the two-prong standing test set forth in *Agrico*. The intervenor must show that (1) he will suffer injury in fact that is of sufficient immediacy to entitle him to a Section 120.57, F.S., hearing, and (2) the substantial injury is of a type or nature that the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. *International Jai-Alai Players Assn. v.*

*Florida Pari-Mutuel Commission*, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also *Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation*, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), *rev. den.*, 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

### Analysis & Ruling

Upon review of ChargePoint's Petition, I find that ChargePoint does not satisfy the two-prong test established by *Agrico*. ChargePoint has not shown that it is in immediate danger of direct injury as a result of the outcome in this proceeding. Rather, ChargePoint alleges that direct harm will result to the value of its services and customer networks personally, and to the free market generally. ChargePoint's alleged harm is abstract and speculative, and is not directly affected by the outcome of this proceeding. The First District Court of Appeal stated in *Village Park Mobile Home Assn.*, that the "petitioner must allege that [it] has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct." *Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987). Thus, ChargePoint fails the first prong of the *Agrico* test.

ChargePoint also does not satisfy the second prong of the *Agrico* test, because the injury it alleges is not of a type or nature that this proceeding is designed to protect. In particular, I find ChargePoint's reliance upon Section 339.287(2)(c)4., F.S., unpersuasive because the statute does not confer standing on ChargePoint in a rate proceeding. In fact, that statute does not confer jurisdiction on the Commission; the statute addresses the Commission and the roles of other agencies and their involvement in the planning process. Additionally, the 2021 Settlement Agreement was filed pursuant to Section 366.076, F.S., and nothing in that statute evidences a legislative intent to protect the type of interests asserted in ChargePoint's Petition. *Agrico* provides that competitive economic injury may only qualify as an injury if the applicable governing statute is designed to protect against such an interest, and this rate case proceeding was not designed to protect ChargePoint's alleged interests. See *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981); see also *Florida Society of Ophthalmology v. State Board of Optometry*, 532 So. 2d 1279, 1284 (Fla. 1st DCA 1988) ("Although one need not have his rights determined to become a party to a licensing proceeding, party status will be accorded only to those persons who will suffer an injury to their substantial interests in a manner sought to be prevented by the statutory scheme.").

The Commission will hear public comment at the hearing where it will consider the 2021 Settlement Agreement. ChargePoint may address the Commission at the hearing. However, as noted in DEF's Response in Opposition, the mere desire to be heard on an issue that interests a putative intervenor does not confer standing to intervene.

For the reasons stated above, ChargePoint has failed to meet the legal standard for intervention; therefore, its Petition to Intervene is denied.

Based on the foregoing, it is hereby

ORDERED by Commissioner Mike La Rosa, as Prehearing Officer, that the Petition to Intervene filed by ChargePoint, Inc., is hereby denied.

By ORDER of Commissioner Mike La Rosa, as Prehearing Officer, this 12th day of April, 2021.



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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

WLT/AJW

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code.

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Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.