

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-2021-0151-PCO-EI
ISSUED: April 22, 2021

ORDER GRANTING IN PART AND DENYING IN PART
EVGO SERVICES LLC'S PETITION FOR INTERVENTION

On January 14, 2021, Duke Energy Florida, LLC (DEF) filed a petition for a 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 by Order No. PSC-2017-0451-AS-EU,¹ 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

¹ 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*.

Agreement. Consideration of the 2021 Settlement Agreement is currently scheduled for hearing on May 4, 2021.

On April 14, 2021, EVgo Services LLC (EVgo) filed a Petition for Intervention requesting permission to intervene in this proceeding. DEF and OPC have indicated that they oppose EVgo's Petition, and NUCOR and PCS Phosphate have taken no position. FIPUG has not provided a response. On April 20, 2021, DEF timely filed a Response in Opposition. No other written response has been filed and the time for doing so has expired.

Petition for Intervention

EVgo represents that it is a commercial retail customer of DEF, taking service at DEF's commercial class rates, and is subject to any rate impacts contained within the 2021 Settlement Agreement. EVgo asserts it has a substantial, specific, and direct business interest in the proceeding and seeks clarification of certain aspects of DEF's proposals so it may better understand the rate impact that approval of the 2021 Settlement Agreement would have with respect to EVgo's current and planned DC fast charging stations.

EVgo states that it supports DEF's proposed commercial EV tariff, which would apply a non-demand volumetric rate to commercial charging stations with time-of-use (TOU) elements. EVgo urges the Commission to approve a non-demand rate in this docket, which would be in line with approvals in numerous other jurisdictions both in Florida and across the country. EVgo states that it seeks to better understand DEF's proposed rate structure and to assist DEF and the Commission in shaping rates that are effective.

EVgo urges caution when utilities exercise ownership of fast charging stations, asserting that DEF's expanded ownership and operation of fast charging stations, as proposed in the 2021 Settlement Agreement, would directly impact the size and scope of EVgo's current network, as well as EVgo's planned expansion in Florida. EVgo is concerned that DEF may consume the usage that the competitive market relies on to sustain its economics. EVgo further speculates that if a third-party operator like EVgo does not see adequate usage to sustain its network, the lower usage may discourage future private sector investments.

Duke Energy Florida, LLC's Response

In its Response in Opposition, DEF does not object to EVgo's standing as a retail customer of DEF. However, DEF takes exception to EVgo's assertion of intervenor status based upon its statement that the proposal to establish a permanent electric vehicle charging program contained in the 2021 Settlement Agreement "would directly impact the size and scope of EVgo's current network as well as EVgo's planned expansion in Florida." DEF contends that EVgo's arguments related to market competition and impacts to EVgo's business interests are beyond the scope of this proceeding.² DEF argues that the 2021 Settlement was filed under

² 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* (a proposed intervenor's "alleged injury to its economic interests and the

Section 366.076, Florida Statutes (F.S.), and nothing in that statute evidences a legislative intent to protect the business and economic interests asserted in EVgo's Petition. DEF requests that if EVgo's Petition to Intervene is granted, EVgo's intervention should be limited to its interests as a DEF customer, and EVgo should be precluded from raising arguments based on its business interests or its interests as a market competitor.

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 EVgo's Petition and DEF's Response, I find that as a commercial retail customer of DEF, EVgo's interests may be substantially affected by this proceeding, and that its Petition meets the two-prong test set forth in *Agrico*. EVgo is subject to DEF's commercial class rates and is affected by rate impacts due to the approval of new rates and rate designs, which satisfies prong one. The hearing on the proposed 2021 Settlement Agreement will address base rate increases and a new EV Program, which affect EVgo's interests as a customer, adequately addressing prong two. Therefore, EVgo's Petition shall be granted with respect to its intervention in this proceeding as a commercial retail customer of DEF.

free market are not what the governing statutes of this proceeding were meant to protect"), Order No. PSC-2009-0280-PCO-EI, issued April 29, 2009, in Docket No. 20080677-EI, *In re: Petition for increase in rates by Florida Power & Light Company* (granting intervention to an individual customer, stating that intervention should not be construed to permit him to raise arguments outside the scope of the issues the Commission determines to address in this rate proceeding, specifically including issues related to his competitive economic or business interests.).

However, I find EVgo's argument that it should also be granted intervenor status under a "broad industry competition" theory unpersuasive. As a commercial competitor, EVgo has not shown that it is in immediate danger of direct injury as a result of the outcome in this proceeding. Rather, EVgo alleges that DEF's expanded ownership and operation of fast charging stations, as contained in the 2021 Settlement Agreement, would directly impact the size and scope of EVgo's current network as well as EVgo's planned expansion in Florida. EVgo's alleged harm is abstract and speculative, and EVgo's status as a potential competitor will not be directly affected by 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, EVgo's competition-based arguments fail the first prong of the *Agrico* test.

EVgo's broad economic competition-based arguments for standing also do 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. *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. The proceeding to resolve the 2021 Settlement Agreement was filed pursuant to Sections 366.076, 120.57(2), and 366.06(3), F.S. Those statutes, and this proceeding, are not designed to protect EVgo's alleged interests concerning competition. *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.").

Pursuant to Order No. PSC-2021-0101-PCO-EI, the purpose of the May 4, 2021, hearing is to consider whether it is in the public interest to approve the 2021 Settlement Agreement. The decision to grant EVgo intervention as a commercial retail customer should not be construed to permit the Company to raise arguments concerning its business interests or interests as a market competitor. EVgo's Petition to Intervene in its capacity as a commercial retail customer shall be granted. EVgo's allegations based upon broad concepts of competitive business interests are beyond the scope of this proceeding, and intervention on that basis is denied.

Pursuant to Rule 28-106.205, F.A.C., EVgo takes the case as it finds it.

Based on the above representations, it is

ORDERED by Commissioner Mike La Rosa, as Prehearing Officer, that the Petition to Intervene is hereby granted in part and denied in part, as set forth in the body of this Order. It is further

ORDERED that EVgo Services LLC takes the case as it finds it. It is further

ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings, and other documents which may hereinafter be filed in this proceeding to:

Carine Dumit, Director
Market Development & Public Policy - East
EVgo Services LLC
11835 W. Olympic Boulevard, Suite 900E
Los Angeles, CA 90064
(877) 494-3833
Carine.dumit@evgo.com

By ORDER of Commissioner Mike La Rosa, as Prehearing Officer, this 22nd day of April, 2021.



Mike La Rosa
Commissioner and Prehearing Officer
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

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

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. 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.