BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Variance from Rule 25-6.043(1)(a)1, Florida Administrative Code by Tampa Electric Company	)	DOCKET NO. 20230122-EI

FLORIDA RISING'S & FLORIDA LEAGUE OF UNITED LATIN AMERICAN CITIZENS' COMMENTS IN OPPOSITION FOR RULE VARIANCE

Florida Rising and the Florida League of United Latin American Citizens ("LULAC") file these comments regarding Tampa Electric Company's ("TECO's") Petition for Variance from Rule 25-6.043(1)(a), Florida Administrative Code. TECO proposes to waive the filing of a cost-of-service study that is somewhat tilted against residential customers in favor of one so egregiously lopsided that it will ensure that residential customers disproportionately bear the brunt of TECO's next rate hike. Incredibly, TECO's proposal comes while its residential customers are currently suffering some of the highest residential electric bills in the nation, with only one utility in the entirety of the United States with more than 10,000 residential customers reporting higher residential electric bills in September. TECO's entire grounds for seeking this waiver boil down to TECO purportedly having voluntarily agreed to waive the rule, and arguing that its voluntary agreement is sufficient. It is not, and the Commission has no legal basis to grant it. Furthermore, even if the Commission did have discretion, it should deny the petition unless the Commission wants to guarantee that TECO's customers will suffer even more unaffordable electric bills and wants its service territory to become known as the single most expensive place for residential customers to buy electricity in the nation.

BACKGROUND

On October 24, 2023, TECO filed the petition at issue here, seeking a waiver from filing the mandated 12CP and 1/13th AD methodology specified in Rule 25-6.043 ("MFR Rule") and *only* filing a 4CP and MDS methodology cost-of-service study. *In re: Petition for Variance from Rule 25-6.043(1)(a)1, Fla. Admin. Code by Tampa Electric Co.*, Petition for Variance from Rule 25-6.043(1)(a), Florida Administrative Code, Docket No. 20210122-EI (Fla. Pub. Serv. Comm'n Oct. 24, 2023), https://www.floridapsc.com/pscfiles/library/filings/2023/05791-2023/05791-2023.pdf (hereinafter "TECO Petition"). Florida Rising's and LULAC's issue is not with TECO filing its preferred cost-of-service study, but with TECO's attempt to avoid filing the mandated cost-of-service study, purportedly because doing so would "violate the terms of its approved 2021 rate case settlement agreement."[1] TECO Petition at 5. In other words, TECO appears to believe it may simply contract its way around the law and now seeks the Commission's ratification of this unlawful interpretation.

First, nothing in the approved 2021 settlement voids the minimum filing requirements for TECO's next rate case. Second, even if the 2021 settlement had purported to void the minimum filing requirements, it could not, as the Commission's approval of the 2021 settlement did not follow the procedures for granting a variance pursuant to section 120.542, Florida Statutes. As a matter of law, TECO's circular argument must fail, as its petition does not meet the standards for a variance under Florida law. TECO asserts that it is required to violate the law—without any citation to law to allow it to do so—and apparently intends to just wish away Florida's

[1] While Florida Rising and LULAC agree that the MFR Rule allows TECO to file *additional* cost-of-service studies, they vigorously dispute the appropriateness and need for filing a study using a 4CP with MDS methodology when the default study required by the MFR Rule is already tilted against residential customers.

administrative procedure act. This is not how the law works. That it may be expedient for TECO to ignore the rights of its residential customers does not make Florida's mandated procedures disappear. The Commission is required to deny the petition under Florida law.

I. TECO's PETITION PLAINLY FAILS TO MEET THE STANDARD FOR A VARIANCE AND THE COMMISSION MUST DENY TECO'S PETITION

An agency may grant a variance only when two conditions are both met. The "person subject to the rule" must show that: 1) "the purpose of the underlying statute will be or has been achieved by other means by the person" *and* 2) "application of a rule would create a substantial hardship or would violate principles of fairness." § 120.542(2), Fla. Stat. This is a high standard. Furthermore, "substantial hardship" is defined as a "demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver." *Id.* Additionally, " 'principles of fairness' are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule." *Id.* In this case, while TECO correctly lays out the standard for granting a variance, TECO comes nowhere close to satisfying either condition, let alone both.

a. TECO's Proposed Cost-of-Service Methodology Does Not Demonstrate Compliance with the Purpose of the Underlying Statute

TECO correctly cites section 366.06, Florida Statutes, as one of the statutes being implemented by the minimum filing requirements that TECO seeks to waive, but fails to quote the language of that section most pertinent to class allocation—namely, "[i]n fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class . . .; the consumption and load characteristics of the various classes of customers." § 366.06(1), Fla. Stat. Florida Rising and LULAC contend that

TECO's proposed "cost-of-service" study does not meet these requirements and does not serve the purposes of the underlying statute. 4CP with MDS only looks at four coincident peaks in a year and creates a hypothetical minimum distribution system in order to disproportionately shift costs onto the residential class of customers.[2] Crucially, the hypothetical minimum distribution system does not reflect real world costs, and focusing on so few energy peaks to assign production costs does not reflect the reality of an energy system with a 31-33% reserve margin (depending on summer or winter) and solar coming into the system which provides more energy value than capacity value.[3] Thus, under this approach, TECO intends to ignore the actual cost of providing service to the class in favor of a theoretical minimum distribution system cost, while assigning a whole year's production costs based solely on usage at four snapshots in time. This does not meet the purpose of the statute, which is "to the extent practicable, consider the cost of providing service to the class." § 366.06(1), Fla. Stat.[4]

Furthermore, TECO itself provided ample evidence in its last rate case that the required 12CP and 1/13th AD required methodology was already drifting too far in favor of looking at peaking energy with insufficient weight to average demand (i.e., energy). As TECO testified in its last rate case, it "propose[d] to base its PV resource cost allocator on a 50 percent/50 percent

[2] TECO has been shifting to MDS in recent rate cases. Notably, Duke Energy Florida and Florida Power & Light do not shift costs onto residential customers in this fashion.
[3] TECO Ten-Year Site Plan, Schedule 7.1 and Schedule 7.2 at 58-59 (2023), https://www.floridapsc.com/pscfiles/website-files/PDF/Utilities/Electricgas/TenYearSitePlans//2023/Tampa%20Electric%20Company.pdf.
[4] Moreover, nowhere does TECO's petition argue that it would be impracticable to study the cost of serving its respective classes without a hypothetical minimum distribution system and while considering twelve coincident peaks—just as all of Florida's other investor owned electric utilities manage to do.

weight with respect to demand and energy."[5] This makes sense, as the more solar that is brought onto the system, the less it contributes to capacity and the more it contributes to energy. Since its last rate case, TECO has substantially increased the number of its solar power plants, roughly doubling the number in service,[6] only bolstering its *own* argument that 12CP and 1/13th AD is increasingly inappropriate for measuring the actual cost-of-service to its customers. That TECO already recognized that the 12CP and 1/13th AD method was diverging from the purposes of the underlying statute due to TECO's generation mix makes TECO's present wish to reverse course and entirely ignore the energy component of its solar and other power plants all the more striking. In proposing, via this waiver request, to move still further away from the purposes of the statute, TECO flunks the first criterion for a waiver.

If the Commission finds any merit in TECO's petition (which it should not), at a minimum, TECO's contentions require fact-finding and an evidentiary proceeding under chapter 120 to determine if TECO's proposed alternative meets the purposes of the statute being implemented (i.e., whether TECO's 4CP with MDS provides an adequate cost-of-service study, or whether, as LULAC and Florida Rising contend (and TECO from its 2021 rate-filing contend), it is completely off-base).

b. It Is Not a Substantial Hardship Nor Does It Violate Principles of Fairness for TECO to File the Minimum Filing Requirements with its Next Rate Case.

Though TECO's waiver request is due to be denied for failing the first criterion alone, it also fails the second criterion, as TECO does not—and could not— demonstrate it would suffer

[5] *In re: Petition for rate increase by Tampa Electric Company*, Docket No. 20210034-EI, Testimony of Larence J. Vogt at 518 (Fla. Pub. Serv. Comm'n Nov. 11, 2021), https://www.floridapsc.com/pscfiles/library/filings/2021/12498-2021/12498-2021.pdf.
[6] TECO Ten-Year Site Plan, Schedule 1 at 4, https://www.floridapsc.com/pscfiles/website-files/PDF/Utilities/Electricgas/TenYearSitePlans//2023/Tampa%20Electric%20Company.pdf.

any substantial hardship in complying with the rule as normal. Instead, TECO claims there would be a violation of principles of fairness as complying with the minimum filing requirements "would cause the company to violate the terms of its approved 2021 rate case settlement agreement." TECO Petition at 5. TECO argues that this principle applies because "application of the 12CP and 1/13th methodology in the MFR Rule affects Tampa Electric differently than other public utilities because filing the MFR E Schedules using the 12CP and 1/13th methodology would cause Tampa Electric to violate the terms of Paragraph 6" of its 2021 settlement agreement. TECO Petition at 7-8. In other words, the only thing that TECO can point to that shows it is different from the public and thus entitled, under "principles of fairness," to a waiver from the MFR Rule, is an agreement it voluntarily entered into. This attempted bootstrapping is not how "principles of fairness" works in the law. Were it otherwise, any entity could enter into a contract to say that it should not comply with a Florida rule, and then it would be exempt from doing so. This is what TECO argues and shows the absurdity of its argument. As the Florida Supreme Court has held, when the need for variance is "a direct result" of decisions made by the party petitioning for a variance, such party "has demonstrated neither a 'substantial hardship' nor a violation of 'principles of fairness.'" *Panda Energy Int'l v. Jacobs*, 813 So. 2d 46, 51 (Fla. 2002) (finding that intervenor was not entitled to waiver of deadlines found in Florida Public Service Commission rules when such waiver was necessitated by its own decision to delay intervening in a case). The same is true for TECO, which asserts the waiver is necessary as a direct result of the voluntary agreement it entered.

Additionally, nothing in the 2021 settlement that TECO points to requires it to violate the MFR Rule. Any such term would need to be explicitly stated, but does not exist. The best TECO can point to is a requirement to "file the cost-of-service MFRs using the 4CP and full

MDS methods for cost allocation." TECO was already free to do so under the existing MFR Rule, which allows companies to file additional cost-of-service studies beyond the required minimum. What is missing is the word "only" from the settlement agreement to support TECO's argument that it is not *allowed* to comply with the minimum filing requirements in its next rate case. The 2021 settlement specifically provides that "[i]f the 4CP or full MDS methodology is opposed in the next general base rate case by an entity other than a Precluded Party, the Parties . . . in response, may offer responsive information on alternative cost-of-service methodologies and revenue allocation methodologies." TECO Petition at 7. To be clear, Florida Rising and LULAC are not precluded parties, plan to intervene in the TECO general rate base, and certainly oppose both the 4CP methodology and the full MDS methodology. TECO's strained reading of the 2021 Settlement agreement is further undermined by the terms of the settlement itself, which states that "No party will assert in any proceeding before the Commission . . . that this 2021 Agreement or *any* of the terms in the 2021 Agreement shall have any precedential value." *In re: Petition for rate increase by Tampa Electric Company*, Docket No. 20210034-EI, Order No. PSC-2021-0423-S-EI, Final Order Approving Stipulation and Settlement Agreement Between Tampa Electric Company and All Intervenors at 50 (emphasis added) (settlement paragraph 16(b)) (hereinafter "TECO Settlement Order"). Yet, not only is TECO now claiming that the agreement is precedential, it is claiming that the agreement *precludes* TECO from complying with the minimum filing requirements. Such a strained reading flies against the plain meaning of the contract. Even if it did not, TECO cites no case or Florida law, nor could it, to support its extraordinary proposition that its voluntary agreement in a Commission approved settlement precludes it from complying with the Florida Administrative Code.

TECO claims that the issue of waiver has already been decided when the Commission approved the 2021 settlement agreement. TECO Petition at 9. To be clear, it did not. Even if the Commission approval order purported to explicitly waive the minimum filing requirement rules for TECO's next rate case (which it does not), it would have no legal effect. Nowhere in issuing Order No. PSC-2021-0423-S-EI did the Commission nor TECO follow the procedures outlined in section 120.542, Florida Statutes, to waive a rule. *See* TECO Settlement Order. Having not followed the procedure, even if the Commission explicitly waived the MFR Rule for TECO's next rate case—which, again, it *did not do*—such waiver would be ineffective as a matter of law. TECO cannot point to a case where neither the Commission nor TECO followed the statutory requirements of section 120.542, Florida Statutes, to say because of that decision, the requirements must now be waived by section 120.542, Florida Statutes. Such circular reasoning and bootstrapping is not permitted under Florida law. TECO must meet the standards laid out in section 120.542, showing that a waiver is consistent with the underlying statute *and* that compliance with the MFR Rule would violate the fundamental principles of fairness. This TECO cannot do, as merely pointing to a voluntary agreement TECO made (which Florida Rising and LULAC contend does not say what TECO says it says, i.e., that TECO is not allowed to comply with the minimum filing requirements) is not enough, especially since such agreement did not follow the procedure outlined in section 120.542, Florida Statutes. Having failed to meet the legal standard, TECO's petition must be denied. If the Commission finds any merit in TECO's petition, factual issues will preclude this matter being decided by preliminary agency action and an evidentiary hearing will be required.

II. AS A MATTER OF POLICY, THE COMMISSION SHOULD ALSO DENY THE PETITION

As TECO has started to move towards its preferred "cost-of-service" methodology, 4CP with MDS, TECO's residential customers have suffered in the form of ever higher electric bills. TECO, with a highly concentrated urban population, unlike the other investor-owned utilities ("IOUs") in Florida, should, all else being equal, have the lowest residential electric bills in the State, on-par with the larger municipal utilities.[7] Yet, it does not, having some of the highest electric bills in the State. In 2022, TECO residential customers had an average residential monthly electric bill of $157.76. Only the municipalities of Winter Park, Key West, Bartow, Kissimmee, and the IOU Duke Energy Florida ("Duke"), averaged higher monthly bills. Winter Park's high bills stem from recovering the significant buyout expense of becoming a municipal utility and Key West is at the remote end of a long island chain. Duke has a much more sprawling, rural territory than TECO, has been hit by multiple hurricanes, and is still paying for a broken nuclear power plant. What's TECO's excuse for this company? In contrast, the municipal utilities of JEA, Beaches Energy Services, Lakeland, Leesburg, Orlando, Gainesville, Fort Pierce, Homestead, Lake Worth Beach, Tallahassee, Ocala, New Smyrna Beach, and the IOUs Florida Power & Light Company and Florida Public Utilities Company all had lower bills, sometimes substantially so (*e.g.*, Tallahassee with an average residential bill of $110.74).[8]

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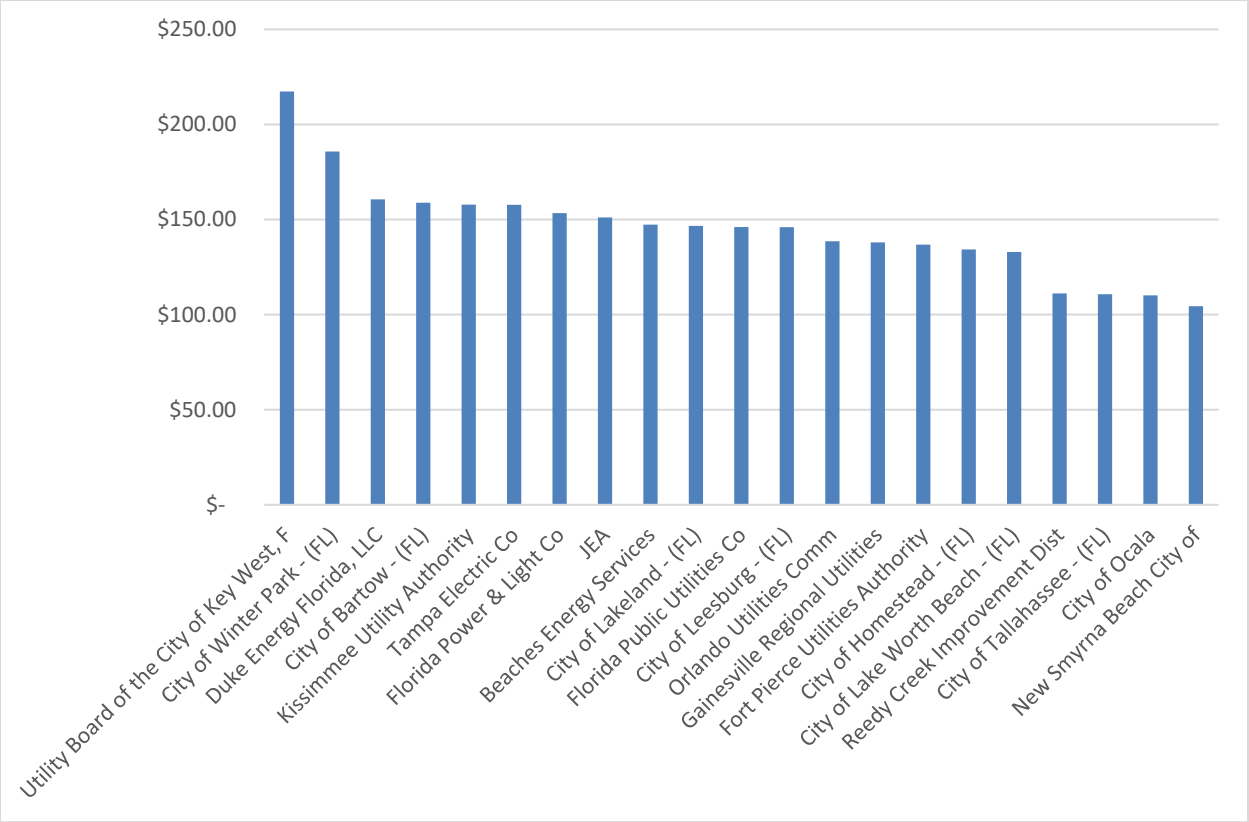
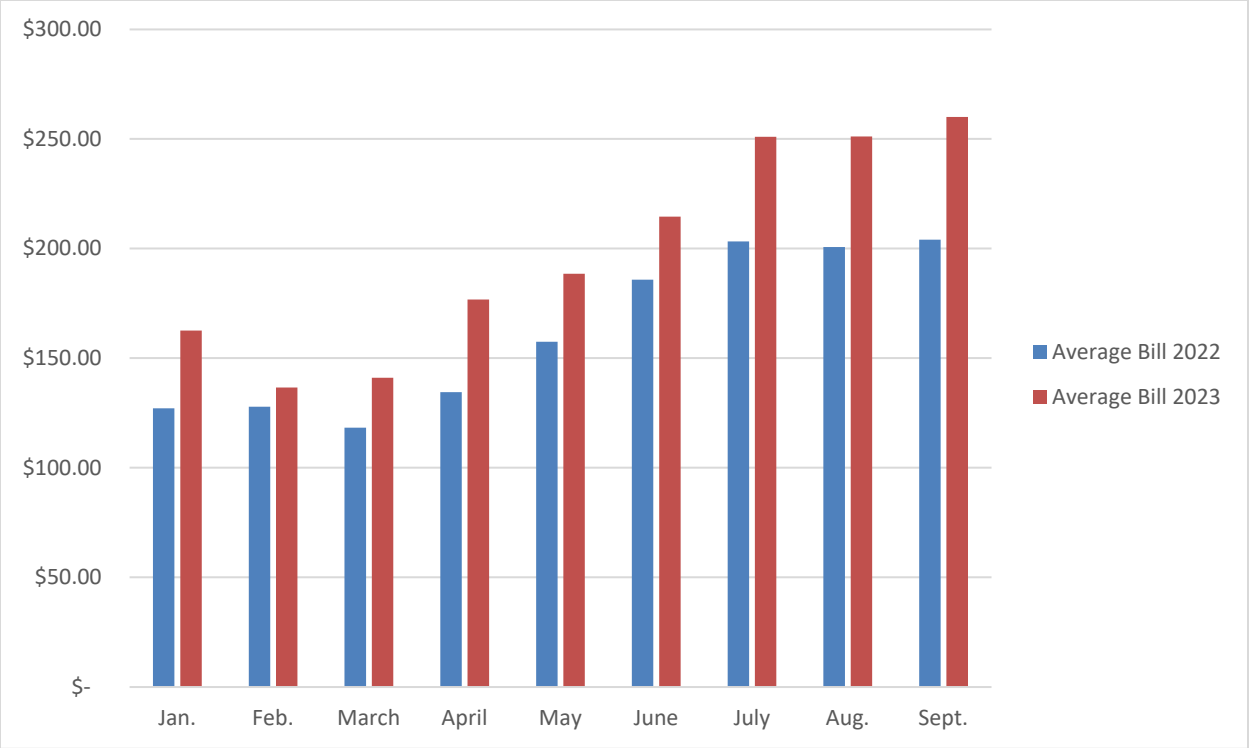
[7] This would be due to lower transmission and distribution costs and cost efficiencies of a more compact grid.

[8] All annual data from EIA-861 for year 2022, from spreadsheet "Sales_Ult_Cust_2022," https://www.eia.gov/electricity/data/eia861/#:~:text=Form%20EIA%2D861%2C%20Annual%20Electric,all%20United%20States%20electric%20utilities. Average monthly residential bill data is derived by dividing revenue from residential customers by the number of residential customers by 12.



So far, in 2023, TECO's bills are far higher than they were in 2022. In September, 2023, TECO had an average residential electric bill of $260.06, the highest in the nation of any investor-owned utility with more than 10,000 customers (and thus higher than all other Florida EIA-861M reporting utilities). Only one utility with more than 10,000 residential customers, the Imperial Irrigation District in California, had a higher average residential electric bill.[9] Below is a month-by-month comparison of the available data so far for TECO's average residential bills.

[9] All monthly data from EIA-861M for year 2022 and 2023 from spreadsheet "Sales_Ult_Cust," https://www.eia.gov/electricity/data/eia861m/. Average monthly residential bill data is derived by dividing revenue from residential customers for each month by the number of residential customers.



CONCLUSION

TECO's residential customers are already suffering from the 2021 settlement. Baking in another disproportionate cost shift to residential customers for TECO's next rate case, in violation of the minimum filing requirements, will only exacerbate an already bad situation. TECO may file and advocate for whatever cost-of-service study it feels is appropriate. What it may not do is waive the requirement to file the 12CP and 1/13th AD methodology based on a voluntary agreement which does not even waive the minimum filing requirements, nor could it.

Respectfully submitted this 30th day of November, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served on this 30th day of November, 2023, via electronic mail on:

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DATED this 30th day of November, 2023.

/s/ Bradley Marshall, Attorney