

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for approval of a regulatory asset to record costs incurred due to COVID-19, by Gulf Power Company.

DOCKET NO.: 20200151-EI

FILED: August 6, 2020

**CITIZENS' MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE, PETITION FOR EVIDENTIARY HEARING**

The Citizens of Florida, through the Office of Public Counsel (“Citizens” or “OPC”), pursuant to Rules 25-22.0376, 25-22.060, and 25-22.029, Florida Administrative Code, request the Public Service Commission (“PSC” or “Commission”) to reconsider its decision in Order No. PSC-2020-0262-PCO-EI, Docket No. 20200151-EI (FPSC July 27, 2019) (“Order”), and in the alternative, hereby petition the Commission schedule the docket for an evidentiary hearing. In support, Citizens state as follows:

1. Gulf Power Company, (“Gulf” or “the Utility”), filed its Petition for Approval of a Regulatory Asset on May 22, 2020.
2. OPC intervened in the docket on May 27, 2020.
3. The Commission originally scheduled the docket to proceed under a Proposed Agency Action (“PAA”) process, scheduled the Petition to be considered at the July 7, 2020 Agenda Conference, and scheduled a PAA Order to be issued by July 27, 2020. (PSC Docket Details webpage retrieved and dated June 1, 2020, attached hereto as Exhibit A).
4. The Commission subsequently and without notice or explanation, changed the Case Assignment and Scheduling Record (“CASR”) to reflect that a “Standard Order” would be issued by July 27, 2020, and the docket would be closed on the same date. However, the CASR retained dates for the Protest Period, Consummating Order, and Revised CASR, all

of which are, as of the date of this filing, scheduled to occur after July 27, 2020, according to the PSC's "Docket Details" on its website page for the instant docket.

5. The Commission considered this docket at the Agenda Conference on July 7, 2020, and issued the subject Order on July 27, 2020.
6. At no time in the Commission's public deliberations was the decision to change from a PAA course of action discussed.
7. In the "Notice of Further Proceedings or Judicial Review" attached to the Order, the Order is described as "preliminary, procedural or intermediate in nature," and the Notice states adversely affected parties may request reconsideration pursuant to Rule 25-22.0376,<sup>1</sup> which governs reconsideration of non-final orders. (Order, at 3-4).
8. Citizens are adversely affected parties who, as ratepayers, have substantial interests in ensuring the fairness of the ratemaking process.
9. OPC requests reconsideration because the PSC has overlooked a point of law regarding the Commission's attempt to delay consideration of a party's substantial interests.
10. In the alternative, if the PSC does not grant reconsideration, it should permit protest of the Order as a proposed agency action, and OPC requests a hearing.
11. Finally, if the PSC can demonstrate that the Order was not a proposed agency action, OPC nevertheless requests a full evidentiary hearing because Citizens have been prejudiced by this novel type of order that is contrary to the established policies of the Commission.

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<sup>1</sup> OPC notes that Rule 25-22.0376(5), F.A.C., provides the Commission will not entertain a motion for reconsideration of a notice of proposed agency action. However, in the attempt to comply with the Commission's Notice and CASR which suggest the Order is not a PAA Order, and in an abundance of caution, OPC is complying with both Rule 25-22.0376 and Rule 25-22.060 (which governs final orders) because the true nature of the order is unknown.

**The Commission Should Reconsider its Decision that a Substantially Affected Party's Point of Entry to Request an Evidentiary Hearing in this Docket is Adequately Afforded in a Future Proceeding Rather than Within 21 Days of the Order, as Required by Rule 25-22.029**

The standard of review on a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. *See e.g., In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Docket No. 20060001-EI, Order No. PSC-06-0949-FOF-EI, 06 Fla. Pub. Serv. Comm'n Rep. 11:119, at 1-2 (Fla. P.S.C. Nov. 13, 2006).

In its Order, the Commission determined Gulf should be allowed to establish a regulatory asset for recording costs incurred due to COVID-19. The Order further states, without explanation, that “a substantially affected party’s point of entry to request an evidentiary hearing before this Commission will be afforded in such a future proceeding addressing cost recovery of the regulatory asset.” *Id.*<sup>2</sup>

OPC submits the subject Order is the functional and legal equivalent of a PAA Order, regardless of the name or label attached, because the Order granted the relief sought by Gulf in full and concluded the matter under consideration, such that justice requires Citizens must be afforded the right to immediately request an evidentiary hearing on whether establishment of a regulatory asset is consistent with applicable standards, law and policy. *See, Prime Orlando Properties v. Dep't of Business Regulation, Div. of Land Sales, Condos. & Mobile Homes*, 502 So. 2d 456 (Fla. 1st DCA 1986) (holding an order was final, despite the reservation of the right to rule

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<sup>2</sup> The Order further states that establishing a regulatory asset “does not limit [the Commission’s] ability to review the amounts, recovery method, recovery period, and other related matters for reasonableness in a future proceeding ...” Order at 2. As such, the Order suggests Citizens will not be allowed in the future to litigate whether the regulatory asset was legal in the first place, but instead will only be allowed to litigate tangential issues, such as the dollar amounts Citizens will have to pay as a result of the regulatory asset, and the amount of time within which Citizens must pay.

on the actual amount at issue, which was to be determined later). Therefore, the Commission overlooked the requirements of Rule 25-22.029, F.A.C., and related precedent when it denied Citizens a point of entry to protest the instant Order and request an evidentiary hearing within the timelines set out in said Rule.

The Commission failed to explain any reason for changing the description of the Order on its CASR; it never provided a legal justification, either at the Agenda Conference or in the subsequent Order, and those failures, by design, limit OPC's ability to fully demonstrate each point of fact or law the Commission overlooked or neglected to consider.<sup>3</sup> Still, regardless of the new label the PSC used to describe the Order on the CASR ("Standard Order" substituted for the original "PAA Order"), or the agency's unexplained description in the body of the Order as "preliminary," the Order is effectively a PAA Order which, pursuant to Rule 25-22.029, provides Citizens a point of entry and entitles Citizens to request an evidentiary hearing now. *See Chipola Nurseries, Inc. v. Division of Administration, State Dep't of Transp.*, 335 So. 2d 617, 618 (Fla. 1st DCA 1976) (stating the label on a judgment does not control whether the judgment is actually final or not, citing, *Bancroft v. Allen*, 190 So. 885 (Fla. 1939)). The First District Court of Appeal, in *Prime Orlando*, *supra*, stated the test to determine whether an order is final or interlocutory in nature is whether the case is disposed of by the order. *Id.*, at 7-8. Similar to the reasoning in *Prime Orlando*, the decision in this case to establish a regulatory asset was complete on the date the Order was issued — no further action on whether to allow the accounting scheme was required, so the sole determination requested by the Petition was finished. Gulf did not request to recover a

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<sup>3</sup> Moreover, the Commission's decision to omit its reasoning or any legal grounds for denying Citizens an evidentiary hearing also potentially deprives a reviewing court of the ability to determine whether the Commission's order complies with applicable legal standards, including Section 120.68(e), Fla. Stat.

particular amount, but instead its sole request was permission to engage in a particular accounting treatment. Gulf's request to establish the accounting scheme was granted, and the docket was closed; therefore, the Order is not truly preliminary, procedural, or intermediate, but instead is substantively dispositive of the issue Gulf requested the Commission to consider. As such, the Order triggered Citizens' the point of entry to protest the establishment of the accounting scheme; the protest period must follow within 21 days of the Order, pursuant to Rule 25-22.029, and is not subject to the indefinite delay the Commission attempted to impose in the Order.

By taking action in the manner outlined in the Order, the Commission rendered a decision to allow Gulf to accumulate costs for a future determination about their future recoverability, in violation of the prohibition against retroactive ratemaking. By sidestepping its obligation to give substantially affected customers a hearing on approval of an accounting treatment that provides probable assurance of future recovery as a condition for capitalization, the Commission is pre-determining that non-capital expenses (past losses) incurred since April 2020 can be recovered in future rates. *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.*, Order No. PSC-98-1243-FOF-WS; Docket No. 19971596-WS; 1998 Fla. PUC LEXIS 1859, 23-25; 98 FPSC 9:232 (Fla. P.S.C. September 21, 1998).

Because the Commission overlooked or failed to consider both the fact and consequences of docket closure, including the applicability and requirements of Rule 25-22.029, F.A.C., and related precedent when it denied Citizens an immediate point of entry to protest the nature of the instant Order, the Citizens' motion to reconsider must be granted.

After granting Gulf's request to establish a regulatory asset, the Commission stated it would defer consideration of recovery of said costs to a future proceeding. (Order, at 2). OPC

submits the Citizens will be unfairly prejudiced by such a delay. As such, if the Commission does not consider the Order a PAA Order and follow the Rules that afford the Citizens the right to an evidentiary hearing without delay on the decision to allow Gulf to establish a regulatory asset, the law requires the Commission to nonetheless grant Citizens an evidentiary hearing in this proceeding under the same timelines as those outlined in Rule 25-22.029.

**Citizens' Protest and Petition for an Evidentiary Hearing**

1. The name and address of the agency affected and the agency's file number:

Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850  
Docket No. 20200151-EI

2. The Citizens include the customers of Gulf whose substantial interests are affected by Order No. PSC-2020-0262-PCO-EI, ("the Order"), because the Order authorizes Gulf to establish a regulatory asset to record certain costs related to the COVID-19 pandemic.

3. Pursuant to Section 350.0611, Florida Statutes, the Citizens who file this Petition are represented by the Office of Public Counsel with the following address and telephone number:

Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, Florida 32399-1400  
Telephone No. (850) 488-9330

4. The Citizens obtained a copy of the subject Order via email on or about July 27, 2020.
5. At this time, the disputed legal issues and disputed issues of material fact, including a concise statement of the ultimate facts alleged, and those specific facts which Citizens contend warrant modification of the Order, are discussed below.

Below is a preliminary list of issues identified by Citizens as being ripe for hearing in this protest. The ultimate facts from each of the issues discussed herein will vary depending upon the testimony and discovery brought forth in the hearing; however, the result should be that customers should not bear the risk of having their rates impacted by creation of a regulatory asset where certain categories of costs should not be deferred to said regulatory asset, but instead should properly be borne by the utility's shareholders.

### **Statement of Disputed Facts and Issues**

The establishment of a regulatory asset is premature, in that Gulf did not demonstrate financial integrity issues to justify creation of a regulatory asset. Gulf did not demonstrate that it was in danger of following below the earnings range previously granted by the Commission. Further, Gulf did not show that the costs it proposes to defer to a regulatory asset are not already being covered in its current earnings. Finally, Gulf did not demonstrate that its request was consistent with applicable legal and accounting standards, including but not limited to, ASC980-340-25-1.

The Order at issue carries the effect of a substantive decision, rather than being merely "procedural" or "preliminary," due to the effect of the applicable accounting rules and the fact that the related carrying costs accrue each day. An unspecified future proceeding does not afford Citizens an adequate opportunity to protest the legality of the regulatory asset treatment in this case; therefore OPC is entitled to have an evidentiary hearing scheduled in this docket.

Commission Staff conceded that under a regulatory asset, a cost is "closer to approval than disapproval ..." (Tr. at 26). The applicable accounting standard, ASC 980-340-25-1, requires that future recovery of costs placed in regulatory assets must be "probable," which the standard defines

as “likely to occur.” (Tr. at 43-44). In prior decisions under the predecessor accounting standard SFAS -71, the Commission has noted that deferral and capitalization of the expense is allowed if:

9. Rate actions of a regulator can provide reasonable assurance of the existence of an asset. An enterprise shall capitalize all or part of an incurred cost that would otherwise be charged to expense if both of the following criteria are met:
  - a. It is probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes.
  - b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate-adjustment clause, this criterion requires that the regulator's intent clearly be to permit recovery of the previously incurred cost.

*United Water of Florida*, at 18-20.

**Fact Issues:**

The ultimate facts from each of the issues discussed herein will vary depending upon the testimony and discovery brought forth in this hearing; however, Citizens submit the following:

- Issue 1. Did Gulf demonstrate financial integrity issues that would necessitate establishment of a regulatory asset?
- Issue 2. Are the categories of costs Gulf proposed to place in a regulatory asset sufficiently defined?
- Issue 3. What specific types of costs, if any, should be included in each of the cost categories Gulf proposed for its regulatory asset, i.e., “Bad Debt Expense,” “Safety-Related Costs,” “COVID Costs”?

### **Legal and Policy Issues:**

- Issue 1. Should the Commission approve a regulatory asset to record costs incurred due to COVID-19?
- Issue 2. Does Gulf's request to establish a regulatory asset comply with applicable accounting standards, particularly ASC 980-340-25-1?
- Issue 3. Is Order No. PSC-2020-0262-PCO-EI "preliminary, procedural, or intermediate" in nature?

The disputed issues of law and policy delineated in and by Citizens' protest should be interpreted broadly in order to effectuate full discovery on the disputed issues, thereby allowing the parties to adequately determine the scope of the issues for consideration and determination. Citizens' protest encompasses any additional issues logically arising from the specifically identified areas, including related issues that may arise during the process of discovery issued in this case.

Citizens are entitled to a *de novo* proceeding on the disputed issues of material fact raised in any protest of the Order. Citizens maintain that Gulf has the burden of proof in all aspects of the requested evidentiary hearing pursuant to section 120.57(1), Florida Statutes, and if the burden of proof is not satisfied, the disputed issues of material fact must be resolved in favor of the Utility's ratepayers.

Pursuant to Rule 25-22.029, protests of a PAA Order shall be filed with the Office of Commission Clerk within 21 days after the Order, thus no later than the close of business on August 17, 2020. This Petition has, therefore, been timely filed.

Sections 366.05 and 366.06, Florida Statutes, are the specific statutes that require modification of the Order.

Citizens request that the Commission take the following actions with respect to this protest to the Order No. PSC-2020-0262-PCO-EI: a) establish a hearing schedule to resolve the disputed issues

described above, including any additional issues raised by a party's protest or cross-protest and on any issues which come to light during the pendency of this docket; b) deny the request for a Regulatory Asset, or in the alternative, limit the Regulatory Asset to incremental bad debt directly related to the COVID-19 pandemic, and which causes Gulf's achieved jurisdictional retail earnings to fall below the bottom of its authorized range.

Therefore, pursuant to section 120.80(13)(b), Florida Statutes, Citizens object to and protest the Order. Further, Citizens protest any reasonably and necessarily related legal, policy and fact issues resulting from the specifically identified areas of protest. Citizens reserve the right to fully participate in the hearing process, take positions, address, and file testimony on any additional issues raised by any other party's protest or cross-petition, and resolve any issues that come to light during the pendency of this docket.

OPC conferred with counsel for the other party to this proceeding. Gulf's counsel requested that OPC show Gulf as objecting to the Motion for Reconsideration, and advised he will wait to take a position on the Petition until he has had a chance to review it.

WHEREFORE, the Citizens hereby request the Commission grant this Motion for Reconsideration of Order No. PSC-2020-0262-PCO-EI, and Citizens request the Commission verify the proposed agency action nature of Order No. PSC-2020-0262-PCO-EI, or in the alternative, otherwise accept Citizens' above-referenced protest and objection to Order No. PSC-2020-0262-PCO-EI, whereby Citizens respectfully petition the Commission to conduct a formal evidentiary hearing under the provisions of Section 120.57, Florida Statutes, at a convenient time

within or as close as practical to the Utility's certificated service area.

Respectfully Submitted,

J.R. Kelly  
Public Counsel

/s/Stephanie A. Morse  
Stephanie A. Morse  
Associate Public Counsel  
Florida Bar No. 0068713

Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, FL 32399-1400

Attorneys for the Citizens  
of the State of Florida

## Exhibit A

# Docket Details

This information displays the latest update to records on file with the Office of Commission Clerk.  
**Docket 20200151 (OPEN) -- Petition for approval of a regulatory asset to record costs incurred due to COVID-19, by Gulf Power Company.**

## Document Filings Index

**WARNING: THIS TIME SCHEDULE IS TENTATIVE AND SUBJECT TO REVISION**

Time Schedule (CASR) for Docket 20200151

Description	Due Date	Completion Date
Staff Recommendation	06/24/2020	None
Commission Conference (Agenda)	07/07/2020	None
PAA Order	07/27/2020	None
Protest Period Expires	08/17/2020	None
Consummating Order if No Protest	08/20/2020	None
Revised CASR Due	09/30/2020	None

## Utilities Involved in Docket 20200151

Utility Companies (1)	Select Company
Gulf Power Company (EI804)	EI804

## Parties of Record and Interested Parties in Docket 20200151

Parties of Record (4)	Interested Persons (2)
<b>Florida Power &amp; Light Company (20d Juno)</b> Joel T. Baker 700 Universe Boulevard Juno Beach FL 33408-0420 (561) 691-7255 (561) 691-7135 joel.baker@fpl.com <b>Represents:</b> Gulf Power Company	<b>AARP Florida (20)</b> Zayne Smith 360 Central Ave., Suite 1750 Saint Petersburg FL 33701 (850) 228-4243 zsmith@aarp.org
<b>Florida Power &amp; Light Company (20d Tall)</b> Kenneth A. Hoffman 134 W. Jefferson Street Tallahassee FL 32301-1713 (850) 521-3919 (850) 521-3939 ken.hoffman@fpl.com <b>Represents:</b> Gulf Power Company	<b>Vote Solar</b> Katie Chiles Ottenweller 151 Estoria Street SE Atlanta GA 30316 (706) 224-8017 katie@votesolar.org
<b>Gulf Power Company (20c Pensacola)</b> Russell A. Badders One Energy Place Pensacola FL 32520-0100 (850) 444-6550 (850) 444-6744 Russell.Badders@nexteraenergy.com <b>Represented By:</b> Florida Power & Light Company	
<b>Office of Public Counsel (20h)</b> J.R. Kelly/Stephanie Morse c/o The Florida Legislature 111 W. Madison Street, Room 812 Tallahassee FL 32399 (850) 488-9330 kelly.jr@leg.state.fl.us morse.stephanie@leg.state.fl.us	

**Staff Assigned to Docket 20200151 A Pre-Hearing Officer was assigned on: 6/1/2020**

<b>PSC Staff</b>
<b>Commission Suite</b> All Commissioners -- Hearing Officer(s) Julie Brown -- Pre-Hearing Officer
<b>Division of Accounting &amp; Finance</b> Cheryl Bulecza-Banks Curtis Mouring Justin Sowards Stephen Fletcher
<b>Office of the General Counsel</b> Jennifer Crawford Shaw Stiller

**CERTIFICATE OF SERVICE**  
**DOCKET NO. 20200151-EI**

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

Florida Power & Light Company  
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/s/ Stephanie A. Morse  
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