

State of Florida



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** September 28, 2020

**TO:** Office of Commission Clerk (Teitzman)

**FROM:** Office of the General Counsel (Harper, Kahn) *SMC*  
Division of Accounting and Finance (Fletcher) *ALM*  
Division of Economics (Coston, Guffey) *JGH*

**RE:** Docket No. 20200211-EI – Petition for temporary variance from or waiver of Rule 25-6.097(3), F.A.C., temporary waiver of Section 6.3 of tariff, and request for expedited ruling, by Florida Power & Light Company.

**AGENDA:** 10/06/20 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Graham

**CRITICAL DATES:** 12/10/20 (Pursuant to Section 120.542(8), Florida Statutes, the Commission must grant or deny the petition by this date)

**SPECIAL INSTRUCTIONS:** None

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## Case Background

On September 11, 2020, Florida Power & Light Company (FPL) filed a petition for a temporary variance from or waiver of the requirements of Rule 25-6.097(3), Florida Administrative Code (F.A.C.), and from Section 6.3 of FPL's Tariff. Both Rule 25-6.097, F.A.C., and Section 6.3 of FPL's Tariff address the refund of customer deposits. By its petition, FPL requests that the temporary rule and tariff variance or waiver (variance)<sup>1</sup> be granted to allow FPL to provide a

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<sup>1</sup> Section 120.542, F.S., and FPL's petition refer to variances and waivers in the alternative. A waiver is a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Section 120.52(22), F.S. A variance is an agency decision to grant a modification to all or part of the literal requirements of an agency rule to a

one-time accelerated residential customer deposit refund for qualifying customers to mitigate financial impacts caused by the COVID-19 pandemic. In addition, FPL requests that the petition be considered on an expedited basis so that qualifying residential customers may benefit as soon as possible.

### **Legal Standard for Rule Variances/Waivers**

Section 120.542(1), Florida Statutes (F.S.), states that the purpose of a rule variance is to provide relief to persons subject to regulation in cases where strict application of rule requirements can lead to unreasonable, unfair, and unintended results in particular circumstances. Section 120.542(2), F.S., sets forth a two-pronged test for granting variances/waivers to rules. If the petitioner satisfies both prongs of the test, the agency must grant the variance.

First, the petitioner must show that “application of [the] rule would create a substantial hardship or would violate principles of fairness.” A “substantial hardship” is a “demonstrated economic, technological, legal, or other type of hardship.” 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.” Second, the petitioner must demonstrate that it will achieve the purpose of the underlying statutes by other means.

Each petitioner for rule variance has the burden of proving its entitlement to a variance under its particular circumstances. Thus, the Commission’s determination as to whether a petitioner should be granted a variance is based on whether the legal test has been met under the specific circumstances of each petitioner.

### ***Purpose of the Underlying Statutes***

FPL identifies Sections 366.03, 366.041(1), 366.05(1), and 366.06(1), F.S., as the implementing authority for Rule 25-6.097, F.A.C. The purpose of these sections is to ensure that investor-owned utilities charge fair, just, reasonable, nondiscriminatory, and compensatory rates that are subject to Commission approval and oversight. FPL alleges that the purposes of these underlying statutes will still be met if the temporary variance is granted. FPL further alleges that its petition should be approved because it is not specifically prohibited by any of the underlying statutes.

### ***Substantial Hardship***

FPL states that it believes that the “unique and extraordinary nature of the impact of the COVID-19 pandemic” permits the Commission to consider this issue from the perspective of FPL’s impacted qualifying residential customers. FPL observes that Florida has been in a state of public health emergency since early March<sup>2</sup> and that its qualifying residential customers are likely to have experienced adverse financial impacts caused by the COVID-19 pandemic.

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person who is subject to the rule. Section 120.52(21), F.S. The same legal test applies to the Commission’s decision to grant either a variance or a waiver. Section 120.524(2), F.S. To enhance readability, both variances and waivers will subsequently be referred to collectively as “variances.”

<sup>2</sup> See Executive Order 20-51 and Executive Order 20-52.

### **Legal Standard for Tariff Waivers**

Unlike rule variances and waivers, there is no set legal standard for tariff waivers.<sup>3</sup> Public utility tariffs are subject to review and approval by the Commission. Section 366.05(1)(e), F.S. The Commission has stated in past cases that the burden is on the utility to provide sufficient justification for a tariff modification.

In this instance, FPL has proposed a temporary tariff waiver/variance. FPL states that it will process deposit refunds for qualifying residential customers within the week after an order approving the petition becomes final. After processing the deposit refund, FPL proposes to immediately resume normal application under Section 6.3 of its Tariff.

### **Procedural Matters**

Pursuant to Section 120.542(6), F.S., notice of FPL's petition was published in the September 14, 2020 edition of the Florida Administrative Register, Vol. 46, No. 180. On September 18, 2020, staff requested additional information from FPL regarding its petition. FPL provided its response to staff's request for additional information on September 22, 2020. As of the date of the filing of this recommendation, no comments have been submitted on the petition.

Pursuant to Section 120.542(8), F.S., a petition for variance must be granted or denied within 90 days of receipt by the agency or the petition is deemed approved. Accordingly, the Commission must approve or deny FPL's petition by December 10, 2020. Although the petition has not been filed as an emergency rule variance, FPL requests the Commission consider the petition on an expedited basis.

This recommendation addresses whether the Commission should grant FPL's petition. The Commission has jurisdiction under Sections 120.542, 366.03, 366.041(1), 366.05(1), and 366.06(1), F.S.

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<sup>3</sup>See Order No. PSC-2012-0173-PAA-EI, issued April 12, 2012, in Docket No. 20120012-EI, *In Re: Petition for variance & waiver of certain contractual requirements in Rule 25-6.065, F.A.C., by Progress Energy Florida., Inc.*

## Discussion of Issues

**Issue 1:** Should FPL's petition for temporary variance from or waiver of Rule 25-6.097(3), F.A.C., and Section 6.3 of FPL's Tariff be granted?

**Recommendation:** A rule waiver or variance is unnecessary under the plain language of Rule 25-6.097, F.A.C. The Commission should grant FPL's petition for a temporary variance from or waiver of Section 6.3 of FPL's Tariff. If FPL's petition is approved, the Commission should require FPL to file a notice in this docket when it begins and concludes implementing the deposit refund. (Harper, Kahn, Coston, Guffey, Fletcher)

**Staff Analysis:** FPL is asking the Commission for a temporary variance from or waiver of Rule 25-6.097(3), F.A.C., and Section 6.3 of the FPL Tariff, so that it can provide an accelerated refund of cash deposits to qualifying residential customers who may be experiencing economic hardships due to the ongoing COVID-19 pandemic and the associated economic impacts.

### Rule Waiver or Variance is Unnecessary

Rule 25-6.097(2), F.A.C., gives investor-owned electric utilities the discretion to require any applicant for service to satisfactorily establish credit. Rule 25-6.097(2)(b), F.A.C., states that credit will be deemed so established if the applicant pays a cash deposit.

Rule 25-6.097(3), F.A.C., provides, in pertinent part, that after a customer has established a satisfactory payment record after continuous service for a period of 23 months, the utility must refund the residential customer's deposits, provided the customer has not in the preceding 12 months:

- (a) Made more than one late payment of a bill (after expiration of 20 days from the date of mailing or delivery by the utility).
- (b) Paid with a check refused by a bank.
- (c) Been disconnected for nonpayment, or at any time.
- (d) Tampered with the electric meter, or
- (e) Used service in a fraudulent or unauthorized manner.

The rule, therefore, contemplates a two element test for when an electrical utility *must* refund a deposit to a qualifying residential customer:

- (1) the residential customer must have maintained continuous service for 23 months; and
- (2) the residential customer has demonstrated what FPL characterizes as a "good payment history" by complying with paragraphs (3)(a)-(e) of Rule 25-6.097, F.A.C., for the preceding 12 months.

Nonetheless, Rule 25-6.097(5)(b), F.A.C., states that "[n]othing in this rule shall prohibit a utility from refunding at any time a deposit with any accrued interest."

FPL requests a temporary variance of the provisions of Rule 25-6.907(3), F.A.C., to allow the 23-month service period be abbreviated to a 12-month period, with no change to the provision requiring that the residential customer maintain a 12-month good payment history. Staff believes that it is unnecessary to determine whether FPL has carried its burdens under Section 120.542(2), F.S., for a temporary rule waiver or variance because the plain language of Rule 25-6.097(5)(b), F.A.C., expressly provides that a utility may refund cash deposits to residential customers at any time. Moreover, while Rule 25-6.097(3), F.A.C., requires that the utility must refund a customer's deposit after the customer has established a satisfactory payment record and has had continuous service for a period of 23 months, nothing in Rule 25-6.097(3), F.A.C., prohibits the utility from refunding a deposit prior to the 23-month time period in the rule.

### **Temporary Variance from or Waiver of Section 6.3 of FPL's Tariff**

FPL also asks for a temporary variance from or waiver of the provisions in Section 6.3 of its Tariff. Section 6.3 of FPL's Tariff states, in pertinent part, that "[a]fter a residential [c]ustomer has established a prompt payment record and has had continuous service for a period of not less than 23 months, the Company will no longer require a [s]ecurity [d]eposit or guaranty for that account, provided the [c]ustomer has not, in the preceding twelve (12) months" violated any of the provisions in Rule 25-6.097(3)(a)-(e), F.A.C., as recited above. Once these conditions have been met, the Tariff further states that the deposit "will be refunded."

Under the terms of Section 6.1(1)(a)-(c) of FPL's Tariff, all "applicants" are required to provide a security deposit or guaranty or to satisfy FPL's application requirements to be exempted from the deposit requirement before FPL will begin to render service. The Tariff does not explicitly incorporate a provision analogous to Rule 25-6.097(5)(b), F.A.C., that would give FPL the discretion to return a residential customer's deposit prior to the customer's satisfaction of the aforementioned 23 month/12 month durational requirements. Consequentially, staff believes the Tariff provisions are mandatory, rather than permissive, in nature and that Commission approval of a tariff variance is required for FPL to issue the refund as set forth in its petition.

While there is no legal standard for tariff modifications analogous to the one included in Section 120.542, F.S., for rule variances and waivers, staff believes that FPL has provided sufficient justification for the Commission to approve FPL's request for a temporary variance of Section 6.3 of its Tariff. If the Commission approves the temporary variance, FPL estimates that approximately \$9 million to \$11 million worth of deposit funds plus statutory interest could be returned to approximately 50 to 60 thousand qualifying residential customers, or approximately 1 percent of FPL's total residential customer base.

In general, customer deposits are designed to minimize the exposure of bad debt expense for the utility, and ultimately, for the general body of ratepayers. However, FPL alleges that it will incur only a negligible effect on FPL's financial status if the tariff provision is temporarily changed. FPL estimates that once the deposit refund is processed, it may cause FPL's weighted average cost rate of customer deposits to decrease by less than one basis point, or approximately 0.0005 percent.<sup>4</sup> With respect to its total weighted average cost of capital, FPL estimates an increase of

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<sup>4</sup>See FPL's Response to Staff's First Data Request at Request No. 1 (referencing Schedule 4, Page 1 of 2 of FPL's July 2020 earnings surveillance report.)

less than one basis point, or approximately 0.001 percent.<sup>5</sup> Further, FPL estimates that its cost of implementing the deposit refund will have zero associated program costs other than non-incremental analytical time and that any potential risks relating to a customer related default will be modest and contained due to the limited nature of its request.

FPL plans to implement the deposit refund by identifying all qualifying residential customers “as of a single date within the week following an order approving the petition becoming final.” Once that happens, FPL states that those residential customers’ accounts will be flagged as having qualified for the deposit refund. FPL’s existing Customer Information System will then automatically calculate the applicable statutory interest rate and credit that amount to the customer’s electric account. FPL expects the entire process to take no more than a week. Once the one-time accelerated deposit refund has been fully issued, the temporary tariff variance would expire and FPL would then revert back to the 23-month continuous service period specified in Section 6.3 of its Tariff.

### **Conclusion**

Based on the above, staff believes that a temporary rule waiver or variance is unnecessary under the plain language of Rule 25-6.097, F.A.C. In addition, staff believes a temporary variance of or waiver of Section 6.3 of FPL’s Tariff is justified. Therefore, staff recommends that the Commission grant FPL’s petition for a temporary variance from or waiver of Section 6.3 of FPL’s Tariff. If FPL’s petition is approved, staff recommends that the Commission require FPL to file a notice in this docket when it begins and concludes implementing the deposit refund.

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<sup>5</sup> *Id.*

**Issue 2:** Should this docket be closed?

**Recommendation:** Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued and this docket should be closed. (Harper, Kahn)

**Staff Analysis:** If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued and this docket should be closed.