

State of Florida



Public Service Commission

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

DATE: September 24, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Cibula, Crawford, Stiller) *JSC*
Division of Accounting and Finance (Mouring, Sowards) *ALM*

RE: Docket No. 20200151-EI – Petition for approval of a regulatory asset to record costs incurred due to COVID-19, by Gulf Power Company.

AGENDA: 10/06/20 – Regular Agenda – Motion for Reconsideration – Oral argument has not been requested; participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Please place this item on the Agenda to be followed in order by items for Docket Nos. 20200178-GU, 20200194-PU, and 20200189-WS

Case Background

On May 22, 2020, Gulf Power Company (Gulf or Company) filed a petition (Petition) for approval to establish a regulatory asset to record costs incurred due to Coronavirus Disease 2019 (COVID-19). Approval of the Petition would allow Gulf to place incremental bad debt expense and safety-related costs attributable to COVID-19 into the regulatory asset for deferred accounting treatment. The Office of Public Counsel (OPC or Citizens) intervened and became a party to this docket.¹ Vote Solar, the Southern Alliance for Clean Energy, AARP, and the CLEO Institute appeared in this docket as interested persons.

¹ Order No. PSC-2020-0173-PCO-EI, issued June 1, 2020.

Staff filed its recommendation regarding Gulf's Petition on June 24, 2020, recommending approval of the requested regulatory asset, noting that the approval would issue as a procedural order. The Commission considered the Petition at its July 7, 2020, Agenda Conference. OPC addressed the Commission at that Conference and raised several objections to the relief sought in the Petition. OPC did not provide specific argument at the Agenda Conference that the Commission's decision should issue as a proposed agency action (PAA) order, rather than as a procedural order. The Commission approved staff's recommendation and Gulf's Petition by Order PSC-2020-0262-PCO-EI (Order), issued July 27, 2020, which allowed Gulf to establish a regulatory asset to record costs incurred due to COVID-19. The Order was entered as a procedural order, not as PAA, and contained the following language:

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.

Order at 2.

The Notice of Further Proceedings or Judicial Review attached to the Order did not provide the opportunity for substantially affected persons to request a hearing. It did advise parties who are adversely affected by the Order of the opportunity to request reconsideration under Rule 25-22.0376, Florida Administrative Code (F.A.C.).

On August 6, 2020, OPC timely filed a Motion for Reconsideration (Motion) and, in the Alternative, Petition for Evidentiary Hearing (Petition). In the Motion, OPC avers that the Commission overlooked the requirements of Rule 25-22.029, F.A.C., and precedent and policy relating to deferred accounting methods when it entered the Order. OPC argues that the Commission's decision to approve the petition and allow Gulf to establish a regulatory asset affects the substantial interests of Citizens and, accordingly, the Order should have been issued as PAA with the opportunity for substantially affected persons to request a full evidentiary hearing.

Along with the Motion, as an alternative, OPC submitted the Petition requesting formal proceedings under Sections 120.569 and 120.57, Florida Statutes (F.S.). OPC filed the Petition on the alternative legal theory that the Order is PAA notwithstanding being labelled as procedural. In the Petition, OPC forwards its substantive arguments in opposition to establishment of the regulatory asset. OPC makes the policy argument that the Commission has in the past limited the recovery of analogous expenses to situations where the utility is not earning within its range. OPC also argues on the facts that the Order fails to sufficiently define and limit the cost categories that may be considered eligible for recovery. OPC requests the opportunity to conduct discovery and that the Commission conduct an evidentiary hearing.

Gulf timely filed a Response in Opposition to the Motion (Response) on August 13, 2020, and objected to the relief requested by OPC. Gulf also argues that because OPC is not adversely affected by the Order, the Commission need not reach the merits of the Motion. Gulf supports Commission confirmation of the Order as procedural, not PAA, and does not believe a hearing on the Petition is required or appropriate.

On August 26, 2020, OPC filed notice with the Commission that it had filed a Notice of Administrative Appeal of the Order to the Florida Supreme Court. The Court acknowledged the Notice and assigned a case number (SC20-2171), but has taken no further action.

Neither OPC nor Gulf requested oral argument regarding OPC's Motion for Reconsideration.² Pursuant to Rule 25-22-0022, F.A.C., the Commission may hear argument from the parties at its discretion.

The Commission has jurisdiction pursuant to Sections 366.04 and 366.06, F.S.

² Rule 25-22.0022(1), F.A.C., provides, in pertinent part, "[f]ailure to timely file a request for oral argument shall constitute waiver thereof." Staff notes that waiver does not limit the Commission's discretion to grant or deny oral argument. Rule 25-22.0022(3), F.A.C. If the Commission decides that oral argument would aid in its understanding and disposition of the underlying matter, staff recommends that the Commission allow three minutes per side.

Discussion of Issues

Issue 1: Should the Motion for Reconsideration be granted?

Recommendation: Yes, the Motion should be granted. OPC has demonstrated that a point of law was overlooked regarding the point of entry for a substantially affected person to challenge the establishment of a regulatory asset. Order No. PSC-2020-0262-PCO-EI should be vacated and reissued as proposed agency action (PAA). (Stiller, Crawford)

Staff Analysis: The authority for a party to request reconsideration is found in two Commission rules: Rule 25-22.0376(1), F.A.C., regarding reconsideration of non-final orders, and Rule 25-22.060, F.A.C., regarding reconsideration of final orders. OPC filed the Motion alternatively under both rules, contending that “the true nature of the order is unknown.” However, the standard for review under either rule is the same.

Standard of Review

The appropriate standard of review in a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that the Commission failed to consider in rendering its Order. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that the Commission has already considered. *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959), citing *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958).

OPC Motion for Reconsideration

OPC’s argument for reconsideration begins with the premise that the Order “is the functional and legal equivalent of a PAA Order.” Motion at 3. OPC contends that because it bears the hallmarks of a PAA, yet was issued as a procedural order, the Order improperly provided no opportunity for substantially affected persons to request an evidentiary hearing. As the basis for reconsideration on this issue, OPC asserts that the Commission overlooked the point of law in Rule 25-22.029, F.A.C., regarding when it is appropriate to enter a PAA Order and, specifically, the requirement to afford persons the right to request an evidentiary hearing when a decision may affect their substantial interests.

OPC argues that the establishment of the regulatory asset affects the substantial interests of Citizens because it provides for the immediate accounting treatment of certain expenses and the related accrual of carrying costs. OPC argues that it should have the present opportunity to challenge the establishment of this accounting treatment and the definition of its terms. To the extent expenses are deemed eligible and are allowed to be placed in the regulatory asset consistent with this initial approval, OPC argues that applicable accounting standards makes future recovery “probable,” which is further defined as “likely to occur,” and such treatment underscores the impact to substantial interests realized by this initial approval.

OPC argues that although these interests are immediately affected and Citizens have numerous facts and legal arguments to present,³ the establishment of the regulatory asset essentially became dispositive and final upon entry of the Order with no prior hearing and no right to request one to present these matters and create a record for full consideration. Motion at 4. OPC notes that the Commission docket was closed upon entry of the Order. OPC further notes the notice of rights attached to the Order advised of only appellate review of final agency action, and not the right to file a petition and request an evidentiary hearing.

Gulf Response to Motion

Gulf first argues that the OPC Motion improperly presents arguments on the PAA issue for the first time in seeking reconsideration. Gulf argues that Commission precedent expressly disallows this practice and that the Motion should be summarily denied on this basis.

Gulf next argues that OPC has not demonstrated that it is “adversely affected” as is required under Rule 25-22.0376, F.A.C., for a party to request reconsideration. Gulf takes the position that the following language in the Order belies any claim that OPC is immediately affected:

This approval to establish a regulatory asset, for accounting purposes, does not limit our ability to review the amounts, recovery method, recovery period, and other related matters for reasonableness in a future proceeding in which the regulatory asset is included. 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.

Order at 2. Gulf also asserts that the Commission is not bound by the accounting principles upon which OPC relies to make its arguments regarding recovery of the regulatory asset being “probable” or “likely to occur.” Finally, Gulf argues that the regulatory asset will have no rate impact until reviewed and approved by the Commission in a rate proceeding, and that OPC will be afforded its full opportunity to examine the regulatory asset costs during that proceeding.

Analysis

Gulf is correct that the specific issue of the Order being treated as PAA or procedural was not raised by OPC in its oral comments to the Commission at the July 7, 2020, Agenda Conference. However, the very factors that are pivotal in making such a determination were the subject of robust discussion among the Commissioners and counsel. For example, counsel for OPC noted in her opening remarks that establishment of a regulatory asset “virtually assures recovery from customers.”⁴ One commissioner asked staff about “the cost impacts from any action today that would arise to the customer.”⁵ Another commissioner followed with a question to staff about whether the requested approval “is not really a preliminary step.”⁶ Staff responded, as OPC has quoted in its Motion, that the requested Commission action was “closer to approval than disapproval, [in] the creation of a regulatory asset, but by no means constitutes a guarantee [of

³ OPC sets forth these preliminary arguments in the Petition.

⁴ TR. at 7, lns. 23-24.

⁵ *Id.* at 24, lns. 20-21.

⁶ *Id.* at 26, ln. 12.

recovery].”⁷ While it was not couched in literal terms of a procedural versus PAA order, this discussion makes clear to staff that the appropriate classification of the Order was discussed at the Agenda Conference, and is not being raised for the first time in the Motion.

The purpose of reconsideration is to bring to the Commission’s attention a specific point that, had it been considered when presented in the first instance, would have required a different decision. *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (Wigginton, J., concurring); *Sherwood v. State*, 111 So. 2d 96 (Fla. 3rd DCA 1959). Because the Commission’s discussion of and questions regarding the nature of approval of a regulatory asset focused generally on whether that approval was preliminary, staff believes that the kind of order issuing from the Commission’s decision might have been different, if the specific PAA vs. procedural issue had been squarely presented.

Staff does not read the holdings in the orders cited by Gulf for the blanket proposition that an issue not specifically raised by a party may never be raised on reconsideration. The most recent order cited by Gulf involves an unusual situation where a non-party filed an untimely motion to intervene and for reconsideration of a Commission order dismissing a request to intervene filed by a completely unrelated entity.⁸ The Commission summarily denied the motion on the ground that the non-party’s attempt to cure the deficiencies in another entity’s pleading by injecting entirely new issues into the proceeding was beyond the scope of reconsideration.⁹ The relevant holding in the second most recent of those orders is very similar and summed up in the following sentence: “A motion for reconsideration is not the appropriate vehicle for bolstering allegations and making new arguments to cure an earlier, deficient pleading.”¹⁰ The two other orders cited by Gulf are slight fact variations of the same theme with the same outcome.

OPC has not been a party or putative party to a proceeding, unsuccessfully filed a pleading or motion, and then sought reconsideration by injecting a new issue, all of which are common facts in the orders cited by Gulf. The general principle in those orders – that reconsideration may not be used as a vehicle to resurrect or save a prior pleading by raising an entirely new issue – remains accurate but does not preclude the Commission from considering OPC’s Motion. As discussed more fully above, the transcript demonstrates that Commissioners and counsel discussed the relevant facts but overlooked the threshold point of procedural law.

That question of whether the Order is PAA or procedural depends on the nature of the action taken by the Commission. “[A]n agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57.” *Capelletti Bros., Inc. v. Dept. of Transp.*, 362 So.2d 346, 348 (Fla. 1st DCA 1978). This point of entry is case and agency specific. “An agency normally has some discretion in determining at what point ‘the necessary or convenient

⁷ *Id.* at 26, Ins. 18-20.

⁸ Order PSC-2017-0430-FOF-DI, issued November 9, 2017, in Docket No. 20170122-EI, *In re: Petition for exemption under Rule 25-22.082(18), F.A.C., from issuing a request for proposals (RFPs) for modernization of the Lauderdale Plant, by Florida Power & Light Company.*

⁹ *Id.*

¹⁰ Order PSC-2011-0097-FOF-WS, issued February 2, 2011, in Docket No. 100318-WS, *In re: Petition for order to show cause against Service Management Systems, Inc. in Brevard County for failure to properly operate and manage water and wastewater system.*

procedures, unknown to the APA, by which an agency transacts its day-to-day business’ crystallize into ‘agency action’ and so necessitate the offering of a point of entry.” *Global Tel Link Corp. v. Dept. of Corrections*, 2013 WL 5955693, *13 (DOAH Recommended Order Nov. 1, 2013) (citing and quoting *Capeletti Bros.*, 362 So. 2d at 348)).

When previously presented with petitions seeking approval of regulatory assets, the Commission has addressed them by entering PAA orders.¹¹ These prior regulatory asset orders are similar in many respects to the Order. All of them contain an express reservation of the right for future Commission review of the reasonableness of expenses similar to the one included in the Order.¹² While those prior orders were considered on more detailed requests than the one made in the limited petition that commenced this docket, the underlying request to establish a regulatory asset is the same and staff believes the precedent of treating approval as PAA applies equally.

The phrase in the Order here under reconsideration that expressly allows a future challenge by a substantially affected person (“A 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”) is substantively different from prior Commission orders on regulatory assets (“Approval of a regulatory asset does not prohibit the Commission from reviewing the amount for reasonableness in future rate proceedings”). Gulf contends that OPC is not adversely affected because of this phrase and because the Commission is expressly allowing substantially affected persons to challenge any future cost recovery request made by Gulf associated with the regulatory asset. Gulf argues that OPC is, therefore, ineligible to file for reconsideration.¹³ However, litigation in the future over amounts, recovery method, or the scope, period, types, or subsets of allowable expenses does not address the appropriateness of the creation of the regulatory asset in the first instance, which is the subject of this proceeding.

For example, in *General Development Utilities, Inc. v. Department of Environmental Regulation*, the First District considered whether a letter that informed its recipient of an agency “decision” to establish a zero waste load allocation provided a point of entry even though the letter stated that a challenge could be brought to this issue in a later permit proceeding. 417 So. 2d 1068 (Fla. 1st DCA 1982). The court wrote as follows:

¹¹ See, e.g., Order PSC-13-0381-PAA-EI, issued August 15, 2013, in Docket No. 130091-EI, *In re: Petition of Progress Energy Florida, Inc. to approve establishment of a regulatory asset and associated three-year amortization schedule for costs associated with PEFs previously approved thermal discharge compliance project*; Order PSC-12-0600-PAA-EI, issued November 5, 2012, in Docket No. 120227-EI, *In re: Petition for approval of recognition of a regulatory asset and associated amortization schedule by Florida Public Utilities Company*; and Order PSC-08-1616-PAA-GU, issued November 23, 2008, in Docket No. 080152, *In Re: Petition for Approval of Recognition of a Regulatory Asset under Provisions of Statement of Financial Accounting Standard (SFAS) No. 71, by Florida City Gas*.

¹² Order PSC-13-0381-PAA-EI (“The approval to record the regulatory asset for accounting purposes does not limit our ability to review the amounts for reasonableness in the ECRC.”); Order PSC-12-0600-PAA-EI (“Further, we find that the approval to record the regulatory asset for accounting purposes does not limit our ability to review the amounts for reasonableness in future proceedings in which the regulatory asset is included.”); Order PSC-08-1616-PAA-GU (“Finally, we find that the approval to record the regulatory asset for accounting purposes does not limit the our ability to review the amount for reasonableness in future rate proceedings.”).

¹³ “Any party who is adversely affected by a non-final order may seek reconsideration” Rule 25-22.0376, F.A.C.

We pointed out in *Capeletti Brothers, Inc. v. State Department of Transportation*, 362 So. 2d 346, 348, (Fla. 1st DCA 1978) that “an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under section 120.57.” Now we find it necessary to add a postscript: simply providing a point of entry is not enough if the point of entry is so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in a 120.57 hearing. The opportunity afforded GDU in this instance does not meet this standard.

Id. at 1070. Because the letter stated that “the Department has conducted water quality studies and adopted the results of those studies,” the court found the agency had “taken a position, reduced it to writing, and disseminated it to the affected party who must now submit a proposed schedule for compliance, or hazard nonrenewal of its permits.” *Id.* Staff finds the facts of this case and its holding persuasive in recommending that the Commission not accept Gulf’s argument.

Conclusion

Staff recommends that OPC’s Motion for Reconsideration should be granted because it identifies a point of law the Commission overlooked or failed to consider by issuing Order No. PSC-2020-0262-PCO-EI as a procedural, rather than PAA, order. Staff agrees that the decision, to allow Gulf to create and book certain costs in a regulatory asset for the purposes of potential future cost recovery, is a decision which affects substantial interests pursuant to Section 120.569, F.S. The ability to participate in a future cost recovery proceeding for costs booked in the regulatory asset would not afford an adequate point of entry to contest the appropriateness of the regulatory asset itself.

As relief for the alleged error in overlooking the PAA requirements in Rule 25-22.029, F.A.C., OPC requests that the Commission “verify the proposed agency action nature of [the] Order.” Motion at 10. Staff recommends that the Commission afford this relief by vacating the Order and reentering it as PAA. *See Sclase v. Constr. Indus. Licensing Bd.*, 881 So. 2d 98, 98 (Fla. 1st DCA 2004) (“an agency has authority to vacate and reenter otherwise final orders in order to avoid due process problems”). Staff believes that vacating and reentering the Order as PAA will require only two, non-substantive modifications to the Order. First, the appropriate PAA Notice of Further Proceedings or Judicial Review should be substituted for the Notice applicable to procedural orders that was attached to the Order. Second, the phrase on page 2 regarding the ability for substantially affected persons to bring a later administrative challenge¹⁴ should be omitted.

If the Commission vacates the Order, the OPC’s Alternative Petition for an Evidentiary Hearing will be rendered moot. *See Curlless v. Clay Cty.*, 395 So. 2d 255, 258 (Fla. 1st DCA 1981)

¹⁴ “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.” Order at 2.

(challenge to government action rendered moot when that action is repealed or replaced). The Petition will not serve as a placeholder challenge to a not-yet-issued PAA. *See S. Fla. Cargo Carriers Ass'n, Inc. v. State Bd. of Pilot Comm'rs*, 627 So. 2d 597, 599 (Fla. 1st DCA 1993) (a petition filed prior to the agency formulating preliminary agency action and giving notice of the point of entry is premature).

Issue 2: Should this docket be closed?

Recommendation: If no protest is filed by a person whose substantial interests are affected within 21 days of the issuance of the Order, a Consummating Order should be issued and the docket should remain open for the purpose of filing monthly status reports. (Stiller)

Staff Analysis: If no protest is filed by a person whose substantial interests are affected within 21 days of the issuance of the Order, a Consummating Order should be issued. The docket should remain open for the Company to file its monthly reports.