

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 20200211-EI
ORDER NO. PSC-2020-0399-PAA-EI
ISSUED: October 26, 2020

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman
ART GRAHAM
JULIE I. BROWN
DONALD J. POLMANN
ANDREW GILES FAY

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING PETITION FOR TEMPORARY VARIANCE FROM OR
WAIVER OF TARIFF PROVISION

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

I. 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), 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)¹ be granted to allow FPL to provide a one-time accelerated residential customer deposit refund for qualifying customers to mitigate financial impacts caused

¹ 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 person who is subject to the rule. Section 120.52(21), F.S. The same legal test applies to our 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."

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.

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. No comments were submitted on the petition.

On September 18, 2020, our staff requested additional information from FPL regarding the petition. FPL provided its response to the request for additional information on September 22, 2020.

We have jurisdiction under Sections 120.542, 366.03, 366.041(1), 366.05(1), and 366.06(1), F.S.

II. Legal Standard for Rule Variances or 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 a rule variance. If the petitioner satisfies both prongs of the test, we 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, our 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.

A. 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 our 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.

B. Substantial Hardship

FPL states that it believes that the “unique and extraordinary nature of the impact of the COVID-19 pandemic” permits us 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 March² and that its qualifying residential customers are likely to have experienced adverse financial impacts caused by the COVID-19 pandemic.

III. Legal Standard for Tariff Waivers or Variances

Unlike rule waivers and variances, there is no set legal standard for tariff waivers or variances. Public utility tariffs are subject to our review and approval. Section 366.05(1)(e), F.S. We have stated in past cases that the burden is on the utility to provide sufficient justification for a tariff modification.³

In this instance, FPL is asking us for a temporary variance from or waiver of Section 6.3 of its 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. 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.

IV. Analysis

A. 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.

²See Executive Order 20-51 and Executive Order 20-52.

³See 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.*

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.

We find 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.

B. 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, the Tariff provisions are mandatory, rather than permissive, in nature, and our 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, we find that FPL has provided sufficient justification to approve FPL's request for a temporary variance of Section 6.3 of its Tariff. 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, under the requested tariff variance.

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.⁴ With respect to its total weighted average cost of capital, FPL estimates an increase of less than one basis point, or approximately 0.001 percent.⁵ 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.

V. Conclusion

Based on the above, we find that a temporary rule waiver or variance is unnecessary under the plain language of Rule 25-6.097, F.A.C. In addition, we find a temporary variance of or waiver of Section 6.3 of FPL's Tariff is justified. Therefore, we hereby grant FPL's petition for a temporary variance from or waiver of Section 6.3 of FPL's Tariff. FPL shall file a notice in this docket when it begins and concludes implementing the deposit refund.

⁴See 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.)

⁵ *Id.*

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's petition for temporary variance from or waiver of Section 6.3 of its Tariff is granted. A temporary variance from or waiver of Rule 25-6.097, F.A.C., is unnecessary. It is further

ORDERED that Florida Power & Light Company shall file a notice in this docket when it begins and concludes implementing the deposit refund. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if no timely protest is received to the proposed agency action, a Consummating Order shall be issued upon the expiration of the protest period, and this docket shall be closed.

By ORDER of the Florida Public Service Commission this 26th day of October, 2020.



ADAM J. TEITZMAN
Commission Clerk
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.

AEH

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 that is available under Section 120.57, 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 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.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 16, 2020.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.