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 ORDER NO. PSC-2020-0405-PCO-EI ISSUED: October 27, 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

ORDER VACATING ORDER NO. PSC-2020-O262-PCO-EI

BY THE COMMISSION:

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.

Commission 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. We considered the Petition at our July 7, 2020, Agenda Conference. We approved staff's recommendation and Gulf's Petition by Order No. 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.

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

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 and, in the Alternative, Petition for Evidentiary Hearing (Motion). Gulf timely filed a Response in Opposition to the Motion.

For the reasons set forth below, we find it appropriate to grant reconsideration of Order No. PSC-2020-0262-PCO-EI on our own motion, to vacate that Order, and to separately reenter it as proposed agency action. These actions render the Motion filed by OPC moot.

We have jurisdiction pursuant to Sections 366.04 and 366.06, Florida Statutes (F.S.).

Decision

The doctrine of administrative finality provides that there must be a terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein. A decision, once final, may only be modified if there is a significant change in circumstances or if modification is required in the public interest. *Florida Power Corp. v. Garcia,* 780 So. 2d 34 (Fla. 2001); *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966).

However, the Florida Supreme Court has found that we have the inherent power and the statutory duty to correct errors in our orders to protect the interests of the public. *Reedy Creek Utilities Co. v. FPSC,* 418 So. 2d 249 (Fla. 1982). For example, in *Reedy Creek*, the Court affirmed that we correctly amended an erroneous order, two and half months after its issuance, where the appellant did not change its position during the lapse of time between orders, and suffered no prejudice as a consequence. *Reedy Creek,* 418 So.2d at 253; *see also Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966) ("We have no doubt that such powers [to regulate public utilities] may, in proper instances, be exercised on the initiative of the commission."). We find it appropriate in this instance to exercise that authority and to grant reconsideration on our own initiative.

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). The specific legal issue that was overlooked is the appropriate characterization of the Order.

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 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, we have addressed them by entering PAA orders.[2] 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.[3] 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 the precedent of treating approval as PAA applies equally.

The phrase in the Order here 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") and 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"). In previous PAA orders establishing regulatory assets, parties were not foreclosed from challenging the creation of the regulatory asset itself, as was the case in this Order.

Importantly, 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:

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[2] *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.*

[3] 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.").

> 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.*

The establishment of a regulatory asset may affect a person's substantial interests because it provides for the immediate accounting treatment of certain expenses and the related accrual of carrying costs. A person adversely affected by such a decision should have the present opportunity to challenge the establishment of this accounting treatment and the definition of its terms. Being able to address the subsequent cost recovery requested pursuant to an established regulatory asset does not afford an adequate opportunity to address the appropriateness of the regulatory asset itself. By issuing as a procedural, rather than PAA, order, we inadvertently overlooked a point of law in making our decision: to afford an opportunity for an adversely affected person the opportunity to request an administrative hearing regarding the creation of the Gulf regulatory asset, consistent with the requirements of Section 120.569, F.S., *Decisions which affect substantial interests.*

The appropriate action for us take on reconsideration is to vacate the procedural Order and separately reenter it as PAA. *See Sclease 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"). Prior to the Order being reentered as PAA, the phrase on page two allowing a future challenge by a substantially affected person will be stricken and the proper Notice of Further Proceedings or Judicial Review will be attached.

Because the Order is hereby vacated and will be reentered as PAA, the Motion and Alternative Petition for an Evidentiary Hearing filed by OPC is moot. *See Curless v. Clay Cty.*, 395 So. 2d 255, 258 (Fla. 1st DCA 1981) (challenge to government action rendered moot when that action is repealed or replaced).

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Order No. PSC-2020-0262-PCO-EI is vacated. It is further

ORDERED that Order No. PSC-2020-0262-PCO-EI shall be reentered as proposed agency action. It is further

ORDERED that the Motion for Reconsideration and, in the Alternative, Petition for Evidentiary Hearing filed by the Office of Public Counsel is denied as moot. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 27th day of October, 2020.

ADAM J. TEITZMAN
Commission Clerk
Florida Public Service Commission
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Tallahassee, Florida 32399
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

SPS

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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review 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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code.

Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.