BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor	DOCKET NO. 20200001-EI
	FILED: November 9, 2020

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CONSUMER PARTIES' JOINT RESPONSE TO MOTION FOR STAY

The Citizens of the State of Florida, through the Office of Public Counsel, ("OPC"), The Florida Industrial Power Users Group ("FIPUG") and White Springs Agricultural Chemicals d/b/a PCS Phosphate ("PCS"), collectively the Consumer Parties ("Consumers"), submit this response in opposition for the Motion to Stay ("Motion") filed by Duke Energy Florida, LLC ("DEF" or "Duke" or "Company"). The Motion to withhold, for up to 6 years, $16.1 million of improvidently collected customer funds for damages caused by the imprudent operation of a Duke power plant should not be granted. Rule 25-22.061(1)(a), Florida Administrative Code ("Rule"), does not apply to the self-correcting true-up mechanism that embodies the fuel clause, and the Florida Supreme Court has effectively deemed it surplusage. Additionally, the Motion itself demonstrates that the fuel clause is self-correcting, and no stay is warranted. In support, the Consumers state as follows:

2017 outage replacement costs and the 2017 "over/under account" stipulation demonstrates the inapplicability of the Rule.

For purposes of this response, DEF's description of the effect of Commission Order No. PSC-2020-0368-FOF-EI ("Bartow Order") adopting the Division of Administrative Hearings ("DOAH") Judge's Recommended Order is accurate. That order found that the customers had incurred damages in the amount of $16.1 million in replacement power costs, which DEF has recovered from those customers in its adjusted and updated fuel factor charges collected in 2019 and 2020. Bartow Order at 18-21; 55-56. These damages are comprised of two elements. $11.1 million is attributable to the two-month period in 2017 when the entire Bartow unit was off-line. Another $5 million was attributable to the 40 MW de-rating of the unit that began in May 2017 and continued until mid- 2019 and was occasioned by the installation of a pressure plate that

limited the output of the unit pending a more permanent repair to Bartow's damaged steam generator. Bartow Order at 18-21; 55-56.

In the Spring of 2017, after DEF had experienced the two-month outage at its Bartow Unit 4 (Steam Turbine) and installed the power limiting pressure plate, the Commission approved a stipulation between DEF and customer representatives in which DEF agreed it would not seek to recover the then estimated $11 million in replacement power costs associated with the outage. Instead, DEF agreed to record the estimated replacement fuel costs in an "over/under account" for future recovery in the fuel clause. This recovery occurred throughout the year 2019. TR 356.[1] DEF witness Menendez conceded that the "over/under account" preserved the Company's opportunity to recover the costs in a future period. TR 356-357. DEF's fuel factor calculations accordingly were lower in 2018 than its actual/estimated costs by $10.9 million because the Company accounted for the unrecovered costs in the "over/under account" and not through its fuel clause recovery mechanism.

DEF witness Menendez testified in the fuel clause hearing this year that the Company was able to submit the 2017 outage replacement costs for clause recovery one year later because of the availability of the "over/under account." He described the true-up function of the account in this manner:

> The over/under account that is being referred to is otherwise known as the true-up balance, or the true-up variance.
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> It is a variance between the revenues collected an [sic] the expense occurred [sic] in the clause account.

TR 355. This mechanism conclusively demonstrates that the fuel clause is self-correcting and adequately provides a mechanism for restoring the *status quo ante* on the chance that the Court orders that DEF should recover the disputed replacement power costs addressed in the Bartow Order. Accordingly, there is no need to interject the surplus stay mechanism into the fuel clause.

[1] Transcript references are to the transcript of the November 2, 2020 hearing in Docket No. 20200001-EI.

De-rate replacement power costs have not been deemed reasonable or prudent and should not be stayed in any event.

As noted, the outage costs were not the only costs at issue in the Bartow order. In 2018, Duke began charging customers for replacement power costs attributable to the de-rating of the Bartow Unit 4 (steam turbine) that was determined by the Commission to have been caused by the 40 MW de-rating of the Steam Turbine. The de-rating of the Bartow unit occurred from May 2017 to September 2019. Order No. PSC-2020-0368A-EI ("Bartow Order") at 56; TR 358-361 (Bernier stipulation). There was no evidence that the replacement power costs required because of the de-rating were ever recorded in the "over/under account" since these costs were apparently never withheld from recovery or separately identified by DEF. Regardless, DEF collected the money with no Commission review until the conduct of the hearing that was referred to DOAH in 2019. These funds were ruled to be imprudently collected. Now DEF is seeking to retain for up to 2-3 more years funds that were never expressly approved or even considered by the Commission in a reasonableness or prudence determination until the vote on September 1, 2020 denying recovery. By itself, this portion of the overcollections should not be subject to a stay given the provenance of no Commission action in approving them as replacement power costs.

The Rule is not applicable to the self-correcting true-up mechanism of the fuel clause and is not mandatory and is in fact mere surplusage.

DEF asks the Commission to treat the provisions of Rule 25-22.061(10)(a), Florida Administrative Code, as mandatory and cites an inapposite water and sewer rate case as an example where a refund of moneys was ordered and stayed in accordance with the Rule.[2] This rule has never been applied to a case where the self-correcting provisions of the fuel clause were available. There is a good reason for this. The Rule is not necessary or designed to be used in conjunction with the fuel clause. As noted above, implementing the requirements of the Bartow Order simply requires an update to DEF's fuel factor calculations, which is an unremarkable, common occurrence throughout the fuel clause proceedings. TR 379. DEF provides a return of any court-mandated refund of moneys by the crediting of the fuel factor mechanism and the use of the "over/under account" in the same fashion that it already has demonstrated adequately protects its

[2] *In re Aloha Utilities, Inc*, 2005 WL 405335 (Fla. P.S.C. Feb. 7, 2005).

interests. Moreover, the Florida Supreme Court has stated that the stay contemplated by the Rule does not function to protect the rights of a utility to recover its costs for which it has been improperly denied recovery. A regulated telecommunications company, upon appealing a Commission order, did not request a stay when it filed the appeal. Upon remand, after losing the appeal of its order denying affiliate transactions cost recovery and because no stay was sought, the Commission erroneously denied the company full recovery of the costs beginning with the effective date of the original Commission order. The Court stated:

> Both the Florida Statutes and the Florida Administrative Code have provisions by which GTE could have obtained a stay. However, neither of those mechanisms is mandatory. We view utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner.
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> It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order. The rule providing for stays does not indicate that a stay is a prerequisite to the recovery of an overcharge or the imposition of a surcharge. The rule says nothing about a waiver, and the failure to request a stay is not, under these circumstances, dispositive.

GTE v Clark (Fla 1996), 668 So. 2d 971, 972-973. The essence of the *GTE* decision is that, even in a rate case scenario where there is no self-correcting true-up mechanism like there is here, the Stay Rule is an anachronism that serves no purpose to protect the rights of a utility to recover its lawful costs when prevailing on appeal. In any event, there is no evidence that the Commission intended the Rule to apply to the specialized true-up mechanism subsumed in the fuel clause.

DEF's request for relief from the bond or corporate undertaking provisions demonstrate the Rule does not apply to the fuel clause.

Despite invoking the purported mandatory nature of the Rule in granting the stay, the Company asks the Commission to ignore what can only be read as an equally mandatory imposition of conditions of bond or corporate undertaking (or the functional equivalent thereof) that requires that the "stay ***shall*** be conditioned…." (Emphasis added.) Amazingly, DEF urges the Commission to ignore this mandatory provision precisely because of the self-correcting nature of the fuel clause thusly:

> Given the circumstances of this case and the on-going nature of the fuel docket, DEF should not be required to post a bond, corporate undertaking, or any other conditions to secure the revenues collected by DEF that may ultimately be subject to refund if the order under appeal is upheld; that is, because such a refund would take the form of a reduction in DEF's fuel collections for the refund period, no bond, undertaking or other assurances are necessary or appropriate.

This internally inconsistent effort to evade the otherwise non-discretionary nature of the assurance provision bolsters the Consumers' position that the Rule was not intended to apply to collections in the fuel clause.[3]

The Commission has no basis to grant a stay pursuant to the "discretionary" provisions of the Rule.

The Company purports to seek to make a showing that it is entitled to discretionary relief by referencing its case that was rejected by the Commission as a demonstration that it is likely to prevail on the merits. This colorable claim based on a previously advanced and twice rejected argument is insufficient on its face and does not amount to a "demonstration." At a minimum, DEF must advance an argument that shows that good reasons for anticipating that result (success on the merits) are demonstrated. It is not enough that a merely colorable claim is advanced. *City of Jacksonville v. Naegele Outdoor Advertising Co*., 634 So. 2d 750, (Fla 1st DCA 1994). (Court applied the standard to the threshold of demonstrating the likelihood of prevailing on the merits in an injunctive relief context.)

An even greater failure is shown in the complete absence of a showing by DEF that it will sustain irreparable harm if the stay is not granted. This argument is internally inconsistent with, and self-defeated by, the request to not require DEF to implement the mandatory posting of a bond or corporate undertaking or other conditions – i.e. because of the availability of the self-correcting

[3] In 1992-1993, the Commission delayed the implementation of the brand-new Capacity Cost Recovery Clause ("CCRC") as to Gulf Power in a dispute over whether to offset revenues from sales to another utility with certain costs that were being recovered in base rates. Order No. PSC-1992-1361-FOF-EI at 2. The Commission cited the Rule but, as to Gulf Power Co., ended up delaying implementation of the inaugural CCRC. This action did not involve a "refund of moneys," as is alleged to be the situation here. In the *Gulf* case, the Commission would have otherwise implemented a rate reduction in the inaugural CCRC, and thus would not have reduced an *existing* rate charged to customers. Order No. PSC-1992-1001-FOF-EI at 18. That dispute was resolved on reconsideration and the appeal was dismissed and any notion of a stay – if ever implemented – was moot. Likewise, there was no action taken to lift a stay. Order No. PSC-1993-0047-FOF-EI. It is not even clear to what extent a stay was ordered under the Rule or if there was any consideration at that time that the CCRC operates as a true-up mechanism like the fuel clause. Regardless, the 1992-1993 CCRC case was not a fuel clause case and it predated the Supreme Court's holding in *GTE* that effectively neutered the import of the Rule in any event.

true-up mechanism in the fuel clause. On its face, the irreparable harm standard cannot be met or even countenanced. This "throw away" request for alternate discretionary relief merely serves to illustrate that the Rule is not intended or designed to provide relief from a Commission order in the context of the self-contained fuel clause mechanism.

Conclusion.

At the end of the day, the Consumers submit that the Commission should decline to order a stay of the requirement to credit $16.1 million to DEF's fuel factor for 2021.[4] Collections of the replacement power costs began in 2017 and largely ended in 2019. Witness Menendez acknowledged that if the credit is not made in the 2021 cycle and a stay is granted, customers would likely not begin to see their money returned until 2023 at the earliest and their money would not be fully returned until the end of 2023 in the likely event DEF fails to convince the Supreme Court that its version of the conclusions of law can be supported by the 102 contrary findings of facts to which the Company agreed. To some extent, if a stay is granted, these customer dollars will not be restored until 5-6 years after the customers originally began paying for the imprudently incurred costs. TR. 373 - 374. Of particular note is that 31% of the funds (related to de-rate costs) that the DEF asks the Commission to let it hold for another 2-3 years, were never even approved by the Commission as reasonable or prudent for recovery as replacement power costs. This fact further mitigates against application of the mistakenly characterized non-discretionary nature of the Rule.

In summary, the Consumers urge the Commission to deny the stay. Customers have over-paid these replacement power costs for years now and are entitled to a return of the funds. The Rule is incompatible with the operation of the rate setting mechanism of the fuel clause and should not be applied to allow DEF to keep its customers' money through the end of 2023. The Consumers

[4] DEF has not sought to invoke the Rule on the second prong of the test ("…decrease in rates charged to customers…") because the relief ordered by the Commission in the Bartow Order does not involve a decrease in the rates charged to customers. DEF already had proposed a decrease in the current rate. TR 345. DEF witness Menendez speculated without factual predicate that crediting the $16.1 million in replacement power costs years in the future would reduce customer rates, and this was not grounded in fact. TR 394 - 395. He offered no evidence of what rates would be in two years or what the starting point would be. Logic supports that there would be a reduction in *collections*, but that is what happens in the true-up process. TR 379. How customer rates currently being paid will be affected, if at all, is unknowable.

submit that the 2017 stipulation that resulted in the forbearance of outage replacement power costs in 2018, can be utilized in concert with the "over/under account" to protect DEF in the unlikely event that it prevails on appeal.

The Consumers are willing to stipulate, if necessary (which we think it is not given the self-correcting true-up nature of the fuel clause) that DEF would be able to credit the clause with the $16.1 million (plus interest) for 2021 fuel factor purposes and debit the "over/under account" so that if DEF prevails on appeal, the process can be reversed and the "over/under account" would be credited and the fuel factor would be debited by the amount ordered collected from customers. This is how the fuel clause operates ordinarily and independently of the stay provisions of the Rule. The GTE decision confirms that this type of equity and fairness works regardless of the invocation of the Rule. DEF's Motion should be denied.

Respectfully submitted by Consumers,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **CONSUMER PARTIES' JOINT RESPONSE TO MOTION FOR STAY** has been furnished by electronic mail on this 9th day of November, 2020, to the following:

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