State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: January 25, 2022

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Accounting and Finance (Higgins) *ALM*
Division of Engineering (Ellis, Phillips, Wooten) *TB*
Office of the General Counsel (Brownless) *JSC*

RE: Docket No. 20220001-EI – Fuel and purchased power cost recovery clause with generating performance incentive factor.

AGENDA: 02/01/22 – Regular Agenda – Motion for Reconsideration – Oral Argument Requested – Participation is Dependent on the Commission's Vote on Issue 1

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: La Rosa

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

As part of the continuing fuel and purchased power adjustment and generating performance incentive factor clause proceedings, an administrative hearing was held on November 2, 2021. At the hearing, certain stipulated issues for Duke Energy Florida, LLC (DEF or Company), Florida Power & Light Company (FPL), Florida Public Utilities Company (FPUC), Gulf Power Company (Gulf), and Tampa Electric Company (TECO), were approved by bench decision. The Commission approved stipulations on all but one of the issues before it concerning each of the investor-owned utilities (IOUs) actual and projected fuel and capacity costs. The only issue left outstanding was Issue 1C, the recoverability of replacement power costs associated with the January 2021 through April 2021 forced outage of Crystal River Unit No. 4 (CR4). At the hearing Joseph Simpson testified on behalf of DEF regarding the CR4 outage and was cross-examined by the parties. On November 15, 2021, DEF, the Florida Industrial Power Users

Group (FIPUG), the Florida Retail Federation (FRF), the Office of Public Counsel (OPC), and White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (PCS Phosphate) filed briefs addressing Issue 1C.

By Order No. PSC-2021-0466-FOF-EI, issued December 21, 2021, the Commission found that the replacement power costs for the CR4 outage of $14.4 million should be shared equally by DEF's retail customers and DEF. On January 5, 2022, OPC timely filed a Motion for Reconsideration (Motion) of this order and the next day filed a Request for Oral Argument on its Motion for Reconsideration. DEF timely filed its Response in Opposition to OPC's Motion for Reconsideration and Response in Opposition to OPC's Request for Oral Argument on January 12, 2022.

The Commission is vested with jurisdiction over the subject matter of this proceeding by the provisions of Chapter 366, Florida Statutes (F.S.), including Sections 366.04, 366.05, and 366.06, F.S.

Discussion of Issues

Issue 1: Should the Commission grant the Office of Public Counsel's Request for Oral Argument on its Motion for Reconsideration?

Recommendation: Yes. The Commission should grant OPC's Request for Oral Argument on its Motion for Reconsideration and each side should be given five minutes to present their oral argument. (Brownless, Wooten)

Staff Analysis: OPC filed its Request for Oral Argument on its Motion for Reconsideration on January 6, 2022, one day after it filed its Motion. OPC states that oral argument would "provide an opportunity for Citizens to answer any questions that Commissioners may have" and "further elaborate on the arguments made within the motion." OPC concedes that it did not file its request concurrently with its Motion as required by Rule 25-22.0022(1), Florida Administrative Code (F.A.C.), but argues that it would be unfair to deny its oral argument request based on just a one day delay in filing. OPC has requested that each side be allowed to speak for 10 minutes.

DEF counters that OPC's request for oral argument should be denied for two reasons. First, it is untimely since it was filed one day after OPC's Motion and subject to the mandatory waiver language of Rule 25-22.0022(1), F.A.C. Second, OPC's Motion does not state with particularity the reasons that oral argument would assist the Commissioners in understanding and evaluating whether its decision on CR4's replacement power costs should be modified. The ability to answer questions and further elaborate on arguments do not, according to DEF, specifically identify why oral argument would benefit the Commissioners. DEF further argues that if oral argument is granted that it be limited to 3 minutes, not the 10 minutes OPC has requested.

Rule 25-22.0022(1), (F.A.C.), states, in part, as follows:

> (1) Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order are filed. *Failure to timely file a request for oral argument shall constitute waiver thereof. . . .* The *request for oral argument shall state with particularity why oral argument would aid the Commissioners,* the Prehearing Officer, or the Commissioner appointed by the Chair to conduct a hearing in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.
> [Emphasis added.]

While it is true that failure to file a request for oral argument contemporaneously with a request for reconsideration waives a party's right to request oral argument on its motion, the Commission has the independent authority to grant oral argument on its own motion should it deem argument appropriate. Due to the detailed nature of the facts in this case, and the importance of the facts in supporting the Commission's action, staff believes that oral argument will aid the Commission in understanding and evaluating OPC's Motion. For that reason, the staff recommends that oral argument be granted for a period of 5 minutes for each side.

Issue 2: Should the Commission grant the Office of Public Counsel's Motion for Reconsideration of Order No. PSC-2021-0466-FOF-EI?

Recommendation: No. Office of Public Counsel's (OPC) Motion for Reconsideration should be denied because it does not meet the required standard for a motion for reconsideration. OPC has failed to identify any point of fact or law that was overlooked or that the Commission failed to consider in rendering Order No. PSC-2021-0466-FOF-EI, Order Approving Crystal River Unit 4 Replacement Power Costs for Duke Energy Florida, LLC. (Brownless, Wooten)

Staff Analysis:

Standard of Review

The appropriate standard of review of 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 Final 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 have already been 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's Motion for Reconsideration

OPC agrees that the legal standard stated above is the appropriate standard by which to evaluate a final order of the Commission. OPC argues that when evaluating whether replacement power associated with an outage should be assessed to ratepayers, as is the case here, the standard to be applied in making that prudence determination is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, at the time the decision was made."[1] OPC states that DEF has the burden to prove by a preponderance of the evidence that it has met this standard.[2] Looking at these requirements, OPC argues that a prudence determination is binary, either "yes" or "no." Which in this case means that either DEF recovers none of the $14.4 million replacement power costs or all of the replacement power costs. According to OPC, there is no room for the Commission to "mitigate," i.e., to evaluate the actions taken by DEF and apportion these costs based on its assessment of the prudence of these individual actions. Finally, OPC contends that there is no "quantifiable evidence, data, or case law" to support an allocation of replacement power costs between DEF and its customers.

DEF'S Response

While DEF does not agree with the Commission's decision to allocate $7.2 million in replacement power costs to DEF, DEF counters that OPC has raised no point of law or any record fact that this Commission overlooked or failed to take into consideration in reaching its decision. DEF characterizes OPC's argument as an attempt to constrain the Commission's broad authority and discretion to set fair and reasonable rates and charges.[3] Nor does DEF agree with

[1] *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).
[2] *Department of Transportation v. J.W.C. Company*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981).
[3] Section 366.05(1)(a), F.S.; *Citizens of Florida v. Public Service Commission*, 425 So. 2d 534, 540 (Fla. 1982)(This Court has consistently recognized the broad legislative grant of authority which these statutes [Section 366.05(1)

OPC's contention that there is no Commission precedent for "mitigation" in a prudence determination citing *In re: Petition on Behalf of Citizens of the State of Florida to Require Progress Energy Florida, Inc. to Refund Customers $143 million (*Progress Energy).[4] In *Progress Energy,* the Commission found that the utility was imprudent in purchasing from its affiliated companies only higher cost bituminous coal and synfuel for its Crystal River Units 4 and 5 (CR4 and CR5) from 2001 to 2005 and excluding the purchase of Powder River Basin (PRB) to be used in a 50/50 blend with bituminous coal. However, due to the fact that it would have taken Progress Energy 14 months to obtain a Title V permit amendment to burn PRB blended coal in CR4 and CR5, the Commission limited the replacement fuel cost refund to the period from 2003 until 2005. Given these facts, DEF argues that it is clear that the Commission has modified fuel cost recovery prudence determination amounts when justified by the evidence of record.

Finally, DEF argues that OPC has not raised any law or fact that was overlooked by the Commission in reaching its finding. Nor has OPC cited any statute, rule, or precedent prohibiting an allocation of replacement power costs once a determination of imprudence is made. On the contrary, DEF contends that OPC simply disagrees with the conclusion reached by the Commission and wants the Commission to reweigh the evidence presented to it at hearing and reach a different conclusion.

Analysis

In this case all parties agree that the standard to be applied in evaluating whether reconsideration should be granted is whether the motion for reconsideration identifies a point of fact or law that was overlooked or that the Commission failed to consider in rendering its Final Order. The parties' disagreement centers on whether mitigating factors can be taken into account once a finding of imprudence is made. OPC argues that either the facts support a finding of imprudence, in which case 100 percent of replacement power costs are charged to the utility, or the utility acted prudently, in which case 100 percent of the replacement power costs are charged to the ratepayers. Staff disagrees.

Rate setting for electric utilities is a legislative function delegated to the Commission pursuant to the provisions of Chapters 350 and 366, F.S.[5] The delegation of legislative and judicial power to agencies and commissions is recognized by both case law and Section 1, Article V of the 1968 Constitution.[6] The Commission's orders must be based on competent, substantial evidence. The ability to weigh the evidence in the record and craft an appropriate remedy is solely within the Commission's discretion.

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and 366.06(2), F.S.] confer and the considerable license the Commission enjoys as a result of this delegation."); S*torey v. Mayo,* 217 So. 2d 304, 307 (Fla. 1968)("The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law.")

[4] Order No. PSC-2007-0816-FOF-EI, issued October 10, 2007, in Docket No. 20060658-EI.

[5] *In re: Advisory Opinion to the Governor*, 223 So. 2d 35, 38 (Fla. 1969); *United Telephone Company of Florida v. Mayo*, 345 So. 2d 648, 654 (Fla. 1977)("The fixing of rates is not a judicial function; hence our right to review the conclusion of the legislature or of an administrative body acting upon authority delegated by the legislature is limited.")

[6] *Id.* at pp. 38-39.

There is evidence of record to support an apportionment of replacement power costs in this case. DEF did not follow the Standard Operating Procedure (SOP) for synchronizing CR4 to the grid using either automatic or manual methods. Upon the failure of the automatic synchronization three times, the operator attempted to reset the synchronization circuit to permit automatic synchronization, a process that was not contained in the SOP but that he had successfully done several times before. This reset process relied upon the Beckwith Manual Sync Check Relay (relay) being operational. The operator believed the relay to be operational based on his past experience, his training, and the fact that the relay had been tested repeatedly over the last several years. Unfortunately, the relay did not work and the unit was damaged. However, the operator had no way of knowing that the relay would not work. Had it done so, there would have been no damage to the unit. Under these circumstances, DEF acted both unreasonably in failing to follow either an automatic or manual synchronization SOP, and reasonably in using a method that had successfully been used before under similar circumstances to reset the synchronization circuit under the assumption the relay was operational. The Commission recognized these circumstances and adjusted the replacement power costs accordingly. Just as the Commission recognized that Progress Energy could not have burned PRB blended coal without a permit change, and reduced the replacement power cost period to a two year period, the Commission here has recognized that the employee's expectation that the relay was operational was reasonable and made appropriate adjustments.[7]

Finally, OPC does not identify a point of fact or law that was overlooked or failed to be considered by the Commission in reaching its final decision. OPC simply would have reached a different conclusion given the facts in the record. As stated above, motions for reconsideration are not vehicles to reargue your case in order to obtain a more favorable decision.[8]

Conclusion

Staff recommends that the Office of Public Counsel's Motion for Reconsideration be denied because it does not meet the required standard for a motion for reconsideration. OPC has failed to identify any point of fact or law that was overlooked or that the Commission failed to consider in rendering Order No. PSC-2021-0466-FOF-EI, Order Approving Crystal River Unit 4 Replacement Power Costs for Duke Energy Florida, LLC.

[7] The Commission's ability to craft a reasonable alternative based on the evidence of record was also recognized by the Court in *Gulf Power Company v. Florida Public Service Commission (Gulf),* 453 So. 2d 799 (Fla 1984). In *Gulf*, the Commission rejected both Gulf's calculations of coal inventory based on Gulf's 60-day nameplate capacity and Commission staff's calculations based on 90-day projected burn level as both being without sufficient empirical support. Faced with this scenario, the Commission used the facts in the record to "reduce the Company's proposed 60-day nameplate value by one-half of the difference between it and the Staff's proposed 90-day projected burn value, $8,994,424." *Gulf,* 453 So. 2d at 805. The Commission reduced Gulf's requested amount "to a level that we believe to be within a zone of reasonableness" because "we cannot permit the Company to benefit from its failure to carry its burden of proof." *Id.* The Court upheld the Commission's action finding that the Commission was "within its discretionary authority on this issue." *Id.*

[8] *Diamond Cab Company v. King,* 146 So. 2d 889, 891 (Fla. 1964).

Issue 3: Should this docket be closed?

Recommendation: No, this docket is a continuing docket and should remain open. (Brownless)

Staff Analysis: No, this docket is a continuing docket and should remain open.