

1 P R O C E E D I N G S

2 CHAIRMAN CLARK: All right. Next item, Item
3 No. 6. Ms. Helton, you are back up.

4 MS. HELTON: I think this is my last one, Mr.
5 Chairman.

6 Item No. 6 is staff's recommendation to deny
7 OPC's Motion for Partial Summary Final Order. The
8 standard for granting a motion for summary final
9 order is that the Commission must determine from
10 the pleadings, depositions, answers to
11 interrogatories and admissions on file, together
12 with affidavits, if any, that no genuine issue as
13 to any material fact exists, and that the moving
14 party is entitled as a matter of law to the entry
15 of a final order.

16 Staff recommends that OPC has not met the high
17 burden of showing that there is no genuine issue as
18 to any material fact. Staff recommends that there
19 are general issues of fact, law and policy that
20 are -- that are inextricably linked in this case,
21 and it would be inappropriate to dismiss these
22 issues in a summary final order.

23 Staff recommends that OPC's motion be denied,
24 and staff is prepared to answer any questions you
25 may have.

1 In addition, Patty Christensen is on the line,
2 and has requested permission to address the
3 Commission on OPC's motion, and it's my
4 understanding that Beth Keating is also on -- on
5 the line.

6 CHAIRMAN CLARK: Thank you, Ms. Helton.

7 Ms. Christensen, when I was reviewing this
8 item and trying to understand, and not being an
9 attorney, this whole summary judgment issue, the
10 word high hurdle kept coming up. I guess you are
11 going to explain to me this -- how to get over this
12 high hurdle. You are recognized.

13 (Audio feedback.)

14 MS. CHRISTENSEN: Thank you --

15 CHAIRMAN CLARK: Ms. Christensen, we are
16 having -- we are having a serious echo with you.
17 You could have some speakers or something on, more
18 than one device. Could you check that for us,
19 please?

20 MS. CHRISTENSEN: I turned off the speaker to
21 my computer, so hopefully you are not getting it
22 now.

23 CHAIRMAN CLARK: Nope, we got you. You are
24 good now. Thank you.

25 MS. CHRISTENSEN: Okay. Good morning. My

1 name is Patty Christensen, appearing on behalf of
2 the citizens in support of our Motion for Partial
3 Summary Final Order to request the establishment
4 for lost revenue.

5 We strongly believe the motion is appropriate
6 in this matter and that there are no questions of
7 staff, and the Commission can rule on the issues --
8 (inaudible) -- the motion today.

9 To begin with, FPUC has requested two
10 regulatory assets be established that are basically
11 requests to collect from customers revenues not
12 collected in prior periods. In other words, lost
13 revenue.

14 The longstanding doctrine against retroactive
15 rate-making was dispelled by the Florida Supreme
16 Court in the City of Miami versus Florida DOC case
17 in 1968 and discussed by this commission in the
18 United Water Florida case in docket number -- or
19 Order Number 1998-1243-FOF-WS. This commission
20 interpreted retroactive rate-making to occur when
21 an attempt is made to either recover past losses
22 through prospective rates or to recoup prior period
23 overearnings through a refund. The losses include
24 prior period costs that a utility did not recover
25 through its rates, causing the utility to earn less

1 than a fair rate of return.

2 There is no dispute that Rule
3 25-6.0143(1)(f)9, Florida Administrative Code,
4 prohibits charging utility lost revenues from
5 services not provided to the storm reserve account.
6 There is also no dispute that normal O&M costs are
7 not recoverable under the incremental costs in
8 capitalization, ICCA methodology that the
9 Commission adopted as its policy regarding the type
10 of storm costs that are eligible for recovery from
11 a customer.

12 FPUC's attempts to claim these requests under
13 the guise -- or FPUC's attempts to claim these
14 requests under the guise that they are anything
15 other than asking for lost revenue is meritless.

16 In FPUC's response to mission number eight
17 regarding its request for regulatory assets for
18 unrecovered normal O&M, it acknowledged that it is
19 requesting revenues in the form of a regulatory
20 asset because it did not collect sufficient revenue
21 from its customers for the for the portion of its
22 base rates which are designed to recoup O&M
23 expenses typically covered from the months of
24 October and November 2018.

25 The Commission made clear that FPUC is asking

1 for lost revenues for a prior period, which is
2 prohibited under the doctrine of retroactive
3 rate-making by rule, irrespective of the rationale
4 given such as the claim that O&M expenses was
5 unrecovered.

6 In FPUC's response to mission number nine,
7 regarding creating regulatory assets for lost
8 customers, it also acknowledged that it was seeking
9 permission to create a regulatory asset for lost
10 revenues excluding -- and -- excluding lighting
11 customers for the last few months of 2018 and 2019
12 because the customers had been off the system.

13 Again, this Commission makes clear they are
14 asking for lost revenue for a prior period, which
15 is prohibited under the doctrine of retroactive
16 rate-making and by rule, irrespective of the
17 rationale given.

18 As FPUC explains, that there is a dispute from
19 staff on whether the electric service was received,
20 this is a red herring. FPUC has sought a waiver
21 for billing its customers, and that was granted,
22 and that waiver was temporarily suspending issuing
23 bills by Order PSC-2019-0529-PAA, issued
24 November 8th, 2018 in Docket No. 20180195.

25 In that order, FPUC stated it would reinstate

1 billing upon completion of restoration efforts in
2 the affected counties. FPUC further stated it
3 would waive late fees to customers, provide usage
4 information in the suspended billing period and
5 work with the customers to set up payment
6 arrangements, if needed, after billing resumed.
7 Therefore, when FPUC resumed its billing in
8 December for usage in November, the previously
9 unbilled usage for September and October should
10 have been included.

11 And by FPUC's own admission, its request for
12 regulatory asset relates to loss of revenue
13 associated with customers who are no longer on
14 FPUC's system due to Hurricane Michael rendering
15 their premises unable to take electric service.
16 This not disputed factually or otherwise.

17 FPUC's claim that lost revenue was allowed in
18 the previous 2004-05 FPL storm case ignores the
19 fact the Commission specifically repudiated that
20 when it adopted the prohibition against allowing
21 the utility to charge the storm reserve account
22 when the utility lost revenue from service not
23 provided in Rule 25-6.0143(1)(f)9 that became
24 effective June 11th, 2007.

25 Changing the method of collection from

1 customers either through storm account or
2 regulatory assets should not be allowed to create
3 an artificial distinction in the application of the
4 Commission's policy against collection of lost
5 revenue for services not rendered.

6 While the Commission's decision in favor of
7 this partial motion for summary final order will
8 not make a hearing moot, it will certainly reduce
9 the issues, the testimony, cross-examination and
10 post-hearing briefing matters the Commission will
11 ultimately have to resolve at the hearing. And we
12 believe, therefore, that this motion should be
13 granted, and we respectfully request that you grant
14 the motion.

15 And specifically to address Commissioner
16 Clark's question of whether or not we have met the
17 high hurdle, we believe that we have, in fact, met
18 that high hurdle, because there really is no
19 factual dispute that there is a request for lost
20 revenue, and that a request for any collection of
21 lost revenues is strictly prohibited under the
22 doctrine of retroactive rate-making and Commission
23 rule, and that should be granted as the personal
24 motion for summary final order.

25 Thank you.

1 CHAIRMAN CLARK: Thank you, Ms. Christensen.
2 Ms. Keating, do you have a response?

3 MS. KEATING: Good morning, Mr. Chairman,
4 Commissioners. Beth Keating for FPUC.

5 We had originally not intended to speak on
6 this item, but -- but, yes, if you would indulge me
7 just a couple of minutes to respond, I would
8 appreciate it.

9 CHAIRMAN CLARK: Certainly.

10 MS. KEATING: Commissioners, as your staff has
11 indicated, the standard for granting a motion for
12 summary final order is very high. It should not be
13 granted unless the facts are, as the courts have
14 said so crystallized, that nothing remains but
15 questions of law. That's simply not the case here.

16 At a minimum, OPC's assertions indicate that
17 there is a mixed question of facts and policy as to
18 whether unrecovered O&M costs directly correlate to
19 lost revenue, although, we would argue that the
20 Commission has already determined that there is a
21 distinction between the two.

22 The parties also differ as to the scope what
23 it means for a utility to provide service to its
24 customers, and whether, or to what extent FPUC
25 provide utility service for which recovery by some

1 means should be allowed. This alone is enough to
2 reject OPC's motion as it relates to the requested
3 regulatory assets to address unrecovered O&M
4 expense.

5 On the law, OPC is likewise incorrect. First,
6 FPUC is not seeking relief under Rule 25-6.0143
7 recovered through the storm reserve. The arguments
8 under that rule simply don't apply.

9 The Commission should also reject OPC's novel
10 argument that FPUC's request to recovery of these
11 two regulatory assets constitutes retroactive
12 rate-making and, therefore, that they are entitled
13 to summary judgment as a matter of law.

14 It's not at all clear under the law that
15 FPUC's requests are prohibited. To the contrary,
16 as it relates to the asset pertaining to
17 unrecovered O&M expenses, the Commission has
18 granted the very same such relief to another
19 utility in a prior case.

20 Clearly recovery, while no longer allowed
21 through the reserve, is not prohibited entirely as
22 a matter of law.

23 And as an aside, I also note that OPC notably
24 failed to provide any reference for its assertion
25 in its motion that retroactive rate-making is the

1 fundamental basis for the prohibition that was
2 included in the rule.

3 As for the lost customers, the company's
4 request is really not remarkably different than a
5 request for a rate restructuring, in that the
6 company is seeking an adjustment to reflect the
7 loss of a substantial number of customer accounts
8 that would otherwise, through application of a cost
9 of service study, bear a properly allocated portion
10 of the company's costs.

11 While the procedure utilized by FPUC in this
12 case differs from prior requests, the request
13 itself really isn't novel. St. Joe Gas was allowed
14 to restructure in 2016 when it lost its largest
15 industrial customer. Similarly, the former West
16 Florida Natural Gas was allowed to restructure due
17 to a revenue shortfall from its inter--
18 interruptible industrial customers.

19 The main difference here with FPUC's request
20 is that rather than a permanent restructuring, FPUC
21 is suggesting what amounts to a temporary
22 restructuring in anticipation that customers will
23 eventually return.

24 At a bare minimum, the law, like the facts, is
25 not so clear as to merit summary final order.

1 Commissioners, we agree with your staff that a
2 determination on these legal and factual questions
3 should be made after a full evidentiary hearing,
4 and OPC just hadn't met the high standard required
5 for summary final order as it relates to either
6 requested regulatory assets. So we would
7 respectfully ask that you approve staff's
8 recommendation.

9 Thank you.

10 CHAIRMAN CLARK: Thank you, Ms. Keating.

11 Commissioners, any questions?

12 Commissioner Polmann. Commissioner Polmann,
13 you are recognized.

14 COMMISSIONER POLMANN: Thank you, Mr.
15 Chairman.

16 A couple of points. I want to thank Ms.
17 Christensen for her OPC comments, however, I find
18 no new information in her comments added to the
19 record. I believe the comments that she offered
20 are essentially similar to the very end there, they
21 are in the material that was provided, I believe
22 the case background and the analysis has been
23 provided in our agenda material is very thorough,
24 and I -- I find it to be sufficient for the
25 Commission's consideration today.

1 I -- in my reading, I -- I found the approach
2 in their argument, in the OPC argument seeking
3 partial summary order, nowhere I want to applaud
4 the concept of their request in -- in the context
5 of efficiency. That is one of the items reducing
6 costs in a time-saving and efficient way to resolve
7 the issues.

8 So I do want to recognize and acknowledge
9 that, albeit a partial item, I do think that is an
10 important effort on their part, so -- so I -- I do
11 want to make note of it.

12 I think the arguments that would support the
13 staff analysis in the written material that we have
14 before us found that argument not to be persuasive.
15 I do support the staff recommendation.

16 And those are my comments, Mr. Chairman. I
17 really don't have any questions. The briefing I
18 had with staff was very helpful, and I think my
19 questions in that regard on this item were
20 answered.

21 Thank you, Mr. Chairman.

22 CHAIRMAN CLARK: Thank you, Commissioner
23 Polmann.

24 Any other Commissioners any comments?

25 All right, I will entertain a motion.

1 COMMISSIONER POLMANN: Mr. Chairman, I -- I
2 would move staff recommendation on all issues on
3 this item.

4 COMMISSIONER FAY: Second.

5 CHAIRMAN CLARK: I have a motion and a second
6 to approve staff recommendations on all items under
7 No. 6.

8 Any discussion?

9 On the motion, all in favor, say aye.

10 (Chorus of ayes.)

11 CHAIRMAN CLARK: Opposed?

12 (No response.)

13 CHAIRMAN CLARK: The motion carries.

14 (Agenda item concluded.)

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STATE OF FLORIDA)
COUNTY OF LEON)

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