

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: November 20, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Brownless) *JSC*
Division of Accounting and Finance (Higgins, Cicchetti) *ALM MC*

RE: Docket No. 20200001-EI – Fuel and purchased power cost recovery clause with generating performance incentive factor.

AGENDA: December 1, 2020 – Regular Agenda – Request for stay pending appellate review- Parties may participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On November 8, 2019, due to the extensive confidential nature of the materials involved, two issues in this docket associated with the February 2017 forced outage at Duke Energy Florida, LLC's (DEF) Bartow Unit 4 power plant were referred to the Division of Administrative Hearings. On October 15, 2020, the Commission issued Order No. PSC-2020-0368-FOF-EI¹ establishing fuel cost recovery for DEF which denied DEF's filed exceptions on these issues and adopted the recommended order issued by the administrative law judge following an evidentiary hearing held on February 4-5, 2020. Order No. PSC-2020-0368-FOF-EI finds that DEF failed to demonstrate that it acted prudently in the operation of its Bartow Unit 4 plant and in restoring the unit to service after the February 2017 forced outage, and that DEF should refund a total of \$16,116,782 to its customers.

¹ Order No. PSC-2020-0368-FOF-EI, issued October 15, 2020, in Docket No. 20200001-EI, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.*

On October 29, 2020, Order No. PSC-2020-0368-FOF-EI was amended by Order No. PSC-2020-0368A-FOF-EI,² to include Attachment A containing the administrative law judge's recommended order and the parties' proposed recommended orders. In all other regards Order No. PSC-2020-0368A-FOF-EI is identical to Order No. PSC-2020-0368-FOF-EI. On November 2, 2020, DEF filed a Notice of Appeal of Order No. PSC-2020-0368-FOF-EI with the Florida Supreme Court, as well as a Motion for Stay Pending Judicial Review with the Commission.

On November 9, 2020, the Office of Public Counsel (OPC), the Florida Industrial Power Users Group (FIPUG), and White Springs Agricultural Chemicals d/b/a PCS Phosphate (PCS Phosphate), collectively referred to herein as Joint Movants, filed a timely Joint Response to the Motion.³

On November 19, 2020, DEF filed an Amended Notice of Appeal of Order No. PSC-2020-0368A-FOF-EI and an Amended Motion for Stay Pending Judicial Review. The Amended Motion for Stay Pending Judicial Review was filed in response to the issuance of amended Order No. PSC-2020-0368A-FOF-EI discussed above. The Motion for Stay Pending Judicial Review and the Amended Motion for Stay Pending Judicial Review are virtually identical and no new arguments are raised in the Amended Motion for Stay Pending Judicial Review that were not presented in the Motion for Stay Pending Judicial Review. For that reason, both the Motion and Amended Motion will be referred to collectively in this recommendation as "Motion."

This recommendation addresses DEF's Motion. The Commission has jurisdiction over this matter pursuant to Sections 366.04, 366.05, and 366.06, Florida Statutes (F.S.).

² Order No. PSC-2020-0368A-FOF-EI, issued October 29, 2020, in Docket No. 20200001-EI, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*.

³ Arguments regarding whether to grant a stay of Order No. PSC-2020-0368A-FOF-EI have also been presented in the post-hearing briefs filed by the parties on November 10, 2020.

Discussion of Issues

Issue 1: Should Duke Energy Florida, LLC's Motion for Stay Pending Judicial Review be granted?

Recommendation: Yes. DEF has complied with the requirements of Rule 25-22.061(1), F.A.C., and should be granted a stay of the provisions of Order No. PSC-2020-0368A-FOF-EI requiring a refund of \$16.1 million associated with the 2017 Bartow Unit 4 outage. As a condition of the stay, DEF should be required to provide adequate security in the form of a corporate undertaking in the amount of the refund plus interest as determined by Rule 25-6.109, F.A.C. (Brownless, Higgins)

Staff Analysis: Rule 25-22.061, F.A.C., states, in relevant part, as follows:

25-22.061 Stay Pending Judicial Review

(1) When the order being appealed *involves the refund of moneys* to customers or a decrease in rates charged to customers, the Commission *shall*, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The *stay shall be conditioned upon the posting of good and sufficient bond, the posting of a corporate undertaking, or such other conditions as the Commission finds appropriate* to secure the revenues collected by the utility subject to refund.

(2) Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review may file a motion with the Commission, which has authority to grant, modify, or deny such relief. A stay pending review granted pursuant to this subsection may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions relevant to the order being stayed, or both. In determining whether to grant a stay, the Commission may, among other things, consider:

- (a) Whether the petitioner has demonstrated a likelihood of success on the merits on appeal;
- (b) Whether the petitioner has demonstrated a likelihood of sustaining irreparable harm if the stay is not granted; and,
- (c) Whether the delay in implementing the order will likely cause substantial harm or be contrary to the public interest if the stay is granted.

...

[Emphasis added.]

DEF's Motion for Stay

In its Motion, DEF argues that it is entitled to an automatic stay pursuant to the plain language of Rule 25-22.061(1), Florida Administrative Code (F.A.C.). In support of this position, DEF cites Order No. PSC-05-0144-PCO-WU, issued February 7, 2005, in Docket No. 010503-WU, *In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc. (Aloha)*. In *Aloha*, the utility's request for a rate increase was denied and a hearing

was held on Proposed Agency Action Order No. PSC-04-0122-PAA-WU⁴, which addressed the amount of revenue collected under interim rates to be refunded to customers. By Order No. PSC-04-1050-FOF-WU⁵, the Commission ordered a refund to the utility's customers in the amount of \$276,066, with interest. Aloha appealed this order and filed a motion for stay pending judicial review under Rule 25-22.061(1)(a), F.A.C., the predecessor to Rule 25-22.061(1), F.A.C.⁶ In granting Aloha's motion for stay, DEF argues that the Commission quoted the language of Rule 25-22.061(1)(a), F.A.C., and interpreted it as automatically requiring that the Commission grant a stay when a refund was at issue, as is the case here.

Alternatively, DEF argues that even if it is not entitled to an automatic stay under Rule 25-22.061(1), F.A.C., it meets the criteria to be granted a discretionary stay under the provisions of Rule 25-22.061(2), F.A.C. DEF states that it is likely to prevail on the merits of its appeal for the reasons stated in its Proposed Recommended Order filed with DOAH on March 20, 2020⁷, and its Exceptions to the Recommended Order filed with the Commission on May 12, 2020⁸. [Motion at ¶ 7] Further, staying the implementation of the refund, in DEF's opinion, would not cause substantial harm or be contrary to the public interest. [Motion at ¶ 6] Finally, DEF argues that the public interest favors rate stability and if it wins on appeal, it would be entitled to recover the improperly refunded revenue from its customers creating a situation where there would be a refund followed by recoupments. That is a situation, which according to DEF, the automatic stay provision of Rule 25-22.061(1), F.A.C., was designed to prevent. [Motion at ¶ 7]

Joint Movants' Response

In opposition to DEF's Motion, Joint Movants argue that Rule 25-22.061, F.A.C., does not apply to charges approved by the Commission in this docket, a docket that has a "self-correcting true-up mechanism." [Response at p. 1] Joint Movants state that the "over/under account", also referred to as the "true-up balance" or "true-up variance", allows for DEF to record the \$11.1 million in Bartow Unit 4 replacement fuel costs for future recovery should its appeal be successful. [Response at p. 2] For that reason, according to Joint Movants, the automatic stay is unnecessary, as this true-up mechanism protects the utility and maintains the *status quo* during the pendency of the appeal. [*Id.*]

Joint Movants further argue that Rule 25-22.061, F.A.C., has never been applied to a case where there was a self-correcting true-up mechanism in place, i.e., never applied to the fuel clause docket. [Response at p. 3] Therefore, in Joint Movant's opinion, DEF's reliance on the *Aloha Utilities* case to support imposition of a mandatory stay is misplaced since that case did not involve any type of self-correcting true-up mechanism. Further, Joint Movants cite *GTE Florida Incorporated v. Clark (GTE)*, 668 So. 2d. 971, 972-73 (Fla. 1996), for the proposition that a

⁴ Order No. PSC-04-0122-PAA-WU, issued February 5, 2004, in Docket No. 010503-WU, *In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.*

⁵ Order No. PSC-04-1050-FOF-WU, issued October 26, 2004, in Docket No. 010503-WU, *In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.*

⁶ The only difference between Rule 25-22.061(1)(a) and Rule 25-22.061(1), F.A.C., is the letter (a). All of the text is identical in both rules.

⁷ DN 01546-2020.

⁸ DN 02889-2020.

utility can recover its lawful expenses through the imposition of a surcharge after winning an appeal of a Commission order denying those expenses without having to file for a stay either at the appellate court or the Commission. [Response at p. 4]

Joint Movants also question the mandatory nature of the application of Rule 25-22.061(1), F.A.C., stay provisions to prohibit the return of money to customers if, as DEF argues, the mandatory “shall” language in the rule requiring the posting a bond or corporate undertaking if a stay is granted can be ignored due to the self-correcting nature of the fuel clause. [Response at p. 4] Joint Movants regard this argument by DEF as an admission that Rule 25-22.061, F.A.C., should not be applied to the fuel clause.

With regard to DEF’s contention that it is entitled to relief under the discretionary provisions of Rule 25-22.061(2), F.A.C., Joint Movants argue that DEF has not demonstrated that it is likely to prevail on the merits. DEF has simply reiterated the same facts argued before both the administrative law judge and the Commission. [Response at p. 5] Further, OPC states that DEF has not shown that it will suffer any harm if the stay is not granted. Again, OPC argues that no harm would be suffered by DEF due to the self-correcting operation of the fuel clause.

Finally, with regard to the \$5 million replacement power costs associated with the installation of pressure plates on the Bartow Unit 4 steam turbine in September 2017, Joint Movants argue that this fuel cost was never explicitly approved as prudent by the Commission. The replacement power costs were never recorded in the “over/under account” and were simply included in 2019 fuel costs and passed along to customers. [Response at p. 3] Now that these costs have been specifically found by the administrative law judge and the Commission to be imprudent, Joint Movants contend that they should not be subject to either an automatic or discretionary stay. [Id.]

Analysis and Conclusion

Section 120.52(16), F.S., defines a “rule” as “each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency” An agency is “obligated to follow its own rules.”⁹ In applying or interpreting rules, the starting point is the plain language of the rule.¹⁰ Courts will not imply a meaning or limitation that the plain language of the rule does not supply.¹¹

Staff agrees with DEF that the plain language of Rule 25-22.061(1), F.A.C., unambiguously states that if the order being appealed requires the utility to make a refund, the Commission *shall*

⁹ *Vantage Healthcare Corp. v. Agency for Healthcare Administration*, 687 So. 2d 306, 308 (Fla. 1st DCA 1997); *Collier County Board of County Commissioners v. Fish & Wildlife Commissioners*, 993 So. 2d 69, 72 (Fla. 2d DCA 2008).

¹⁰ *Arbor Health Care Co. v. State of Florida, et al.*, 654 So. 2d 1020, 1021 (Fla. 1st DCA 1995); *Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County*, 642 So. 2d 1081, 1083 (Fla. 1994)(rejecting agency’s interpretation of rule that “conflict[ed] with the plain meaning of the regulation.”); *Woodley v. Department of Health and Rehabilitative Services*, 505 So. 2d 676, 678 (Fla. 1st DCA 1987)(agency construction of rule that contradicts unambiguous language is erroneous and cannot stand.); *Citizens of State of Florida v. Wilson*, 568 So. 2d 1267, 1271 (Fla. 1990).

¹¹ *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906 (Fla. 2002).

grant a motion for stay pending appeal. Joint Movants do not question that the administrative law judge ordered that DEF *refund* \$16,116,782 without interest.¹² Nor are the Joint Movants asking the Commission to interpret a term used in the rule as the Commission has done in previous cases.¹³ Joint Movants are asking that the Commission find that the rule does not apply because of the nature of this docket, i.e., that the self-correcting nature of the fuel clause provides the same protection to the utility as a stay. In essence, Joint Movants want the Commission to limit the application of the rule to instances in which no “self-correcting true-up mechanism” is at operation. However, there is no such limitation of application stated in the rule itself. DEF has met the requirements for an automatic stay under the provisions of Rule 25-22.061(1); it has been ordered to refund moneys; it has filed an appeal of the order requiring it to do so; and has filed a motion requesting a stay pending judicial proceedings.

Joint Movants’ reliance on the *GTE* decision to justify limitation of the rule is misplaced. The fact that the Commission has the authority to allow surcharges to recoup revenues associated with a successful utility appeal does not extinguish DEF’s ability to request and receive a stay under the provisions of Rule 25-22.061(1), F.S. Rule 25-22.061, F.A.C., was enacted in October 1981 and contained identical language in paragraph (1)(a) to that found in paragraph (1) cited above. Had the Commission interpreted the *GTE* decision as rendering the rule to be redundant, it has had ample opportunity over the last 24 years to modify the rule to reflect that understanding. No such modification has been proposed by either the Commission or the Joint Movants to date. Likewise, staff does not find it persuasive that the rule has not been applied to the fuel clause in the past. Utilities have the right to decide on a case by case basis what remedy is the most appropriate for a particular set of circumstances. Failure to request a remedy does not mean that that remedy is not available.

Staff views the Joint Motion’s request as a request to modify the provisions of Rule 25-22.061(1), F.A.C. Modification of a rule requires compliance with the provisions of Section 120.54(3), F.S., and Rules 28-103.001-.006, F.A.C., e.g., agency notice of intended action; statement of estimated regulatory costs; a hearing, if requested by a substantially affected party; and filing with the Secretary of State of the adopted rule. The Commission cannot unilaterally rewrite its rules without following these procedures.

Having recommended that DEF has met the requirements for an automatic stay pending appeal, the next question concerns compliance with the second sentence of Rule 25-22.061(1), F.A.C.: “The stay *shall* be conditioned upon the posting of good and sufficient bond, the posting of a corporate undertaking, or such other conditions as the Commission finds appropriate to secure the revenues collected by the utility subject to refund.”(Emphasis added.) DEF argues that unlike the first sentence, the last section of the second sentence “provides the Commission with a

¹² Order No. PSC-2020-0368A-FOF-EI at p. 20; Administrative Law Judge’s Conclusion of Law No. 125 (“The total amount to be *refunded* to customers as a result of the imprudence of DEF’s operation of the steam turbine in Period 1 is \$16,116,782, without interest.”)(Emphasis added.)

¹³ Order No. PSC-03-0896-PCO-TP, issued August 5, 2003, in Docket No. 990649-TP, *In re: Investigation into pricing of unbundled network elements (Sprint/VerizonTrack)*(whether the term “customer” included Competitive Local Exchange Companies (CLECs).

range of options to secure the revenues necessary to make the refund if upheld on appeal.”¹⁴ In this case, DEF argues that the method in which a refund would be implemented in this docket, a reduction in fuel costs in the refund year, makes posting a bond or corporate undertaking unnecessary.¹⁵ Joint Movants take the position that if the mandatory language of the first sentence must be applied to the fuel clause, the mandatory language of the second sentence must be applied as well.

The Commission has historically required either the posting of a bond or corporate undertaking when granting a stay pending appeal whether granted under the automatic provisions of Rule 25-22.061(1) or discretionary provisions of Rule 25-22.062(2), F.A.C. Therefore, staff recommends that DEF be required to provide adequate security in the form of a corporate undertaking as a condition of the stay. The amount to be secured is \$16.1 million plus interest as determined by Rule 25-6.109, F.A.C. Duke Energy Corporation, the parent of DEF, and DEF both have Standard & Poor’s bond ratings of “A-.” In addition, the amount of the potential refund is extremely modest relative to the financial resources available to DEF. Therefore, staff recommends that DEF has sufficient financial capability to support a corporate undertaking of the amount required in this case.

As stated above, staff has recommended that a stay be granted pursuant to the mandatory language used in Rule 25-22.061(1), F.A.C., when refunds are at issue. However, DEF has also alleged that it could also secure a stay under the discretionary provisions of Rule 25-22.061(2), F.A.C. In regard to this assertion, the staff agrees with the Joint Movants that DEF’s reliance on the same arguments in its appeal that were previously rejected by both the administrative law judge and the Commission do not support the conclusion that there is a likelihood of success at the appellate level. Nor has DEF demonstrated that it will sustain irreparable harm if the stay is not granted. Based on these facts, the staff would recommend that a stay pursuant to the discretionary provisions of Rule 25-22.061(2), F.A.C., be denied.

Finally, the fact that the Commission did not specifically vote to allow the de-rating replacement power costs associated with the Bartow Unit 4 outage incurred from May 2017 until September 2019 is irrelevant. The testimony of witness Menendez is clear that DEF requested, and has recovered, all fuel and replacement power costs incurred during this time period including those associated with the de-rating of Bartow Unit 4. [T. 345-55] Contrary to the Joint Movant’s assertion, the Commission has, in fact, voted to allow the Bartow Unit 4 derating costs in the 2018 and 2019 fuel clause dockets.

For these reasons, staff recommends that the Commission find that DEF has complied with the requirements of Rule 25-22.061(1), F.A.C., and should be granted a stay of the provisions of Order No. PSC-2020-0368A-FOF-EI requiring a refund of \$16.1 million associated with the 2017 Bartow Unit 4 outage subject to the posting of a corporate undertaking in the amount of \$16.1 million plus interest as determined by Rule 25-6.109, F.A.C.

¹⁴ DEF’s Post-Hearing Brief at p. 4-5.

¹⁵ *Id.*

Issue 2: Should this docket be closed?

Recommendation: No. At this time there are outstanding issues for DEF to be voted on in this docket at the Special Agenda Conference set for December 15, 2020, which are contingent upon the Commission’s vote on the Motion for Stay Pending Judicial Appeal at issue here. (Brownless)

Staff Analysis: All of DEF’s issues identified in the Prehearing Order, Order No. PSC-2020-0415-PHO-EI, are still outstanding and will be voted on at the Special Agenda Conference to be held on December 15, 2020.¹⁶ The Commission’s decision whether to grant or deny DEF’s Motion will impact its decision on outstanding Issue 1A: “What action should be taken in response to Commission Order No. PSC-2020-0368[A] regarding the Bartow Unit 4 February 2017 outage.” However, a vote will still be required at the Special Agenda Conference on Issue 1A as well as the other outstanding issues. Thus, staff recommends that this docket remain open to resolve those issues.

¹⁶ Issues 1A, 6-11, 16-22, 23A-23D, 27-33, 34-36.