

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO. 20200001-EI

Filed on November 19, 2020

**DUKE ENERGY FLORIDA, LLC'S AMENDED
MOTION FOR STAY PENDING JUDICIAL REVIEW**

Duke Energy Florida, LLC (“DEF”), pursuant to Rule 25-22.061, Florida Administrative Code, and Rule 9.190(e)(2)(A), Florida Rules of Appellate Procedure, moves to stay the final order of the Commission pending appeal and states:

1. On October 15, 2020, the Commission entered its final order establishing fuel cost recovery for DEF (“Final Order”) which denied DEF’s filed exceptions and adopted the recommended order issued by the administrative law judge following an evidentiary hearing. *See* Docket No. 20200001-EI, Order No. PSC-2020-0368-FOF-EI. The Final Order concludes DEF (1) failed to act prudently in the operation of its Bartow Power Plant (“Bartow Plant”) relating to the February 2017 forced outage, and (2) failed to make prudent adjustment to account for replacement power costs associated with derating of the Bartow Plant and must refund charges to customers in relation to DEF’s fuel replacement power and other costs associated with the outages at its Bartow Plant. Specifically, the Final Order determines DEF should refund \$16,166,782.00 to its customers.

2. On October 29, 2020, the Commission amended the Final Order (“Amended Final Order”). *See* Docket No. 20200001-EI, Order No. PSC-2020-0368A-FOF-EI. The Amended Final Order remedies a deficiency in the Final Order, which omitted the recommended order of the Administrative Law Judge.

3. Pursuant to Rule 9.030(a)(1)(B)(ii), Florida Rules of Appellate Procedure, DEF timely filed its Notice of Appeal of the Final Order on November 2, 2020. Thereafter, DEF amended its Notice of Appeal to indicate review of the Amended Final Order on November 19, 2020.

4. Rule 25-22.061(1)(a), Florida Administrative Code, provides that when an appealed order involves the refund of money to customers, the Commission **shall** grant a stay pending judicial proceedings upon motion of the utility or company affected. *See In re Aloha Utilities, Inc*, 2005 WL 405335 (Fla. P.S.C. Feb. 7, 2005). While the remaining subsection of Rule 25-22.061 affords the Commission discretion in determining a stay motion, subsection(1)(a) is mandatory when the order appealed “involves the refund of moneys to customers.”

5. Because DEF is an investor-owned electric utility and the order on appeal involves the refund of moneys to customers, Rule 25-22.061(1)(a) requires the Commission to grant the requested stay pending appeal.

6. 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. *See* 25-22.061(1), (3), Florida Administrative Code.

7. DEF meets the prerequisites for a mandatory stay under the plain language of Rule 25-22.061(1)(a). But even if DEF were not entitled to a mandatory stay, the Commission should grant a discretionary stay in the alternative based upon a consideration of the non-

exclusive factors outlined in Rule 25-22.061(2), Florida Administrative Code. Specifically, DEF is likely to prevail on the merits of the appeal and a stay on implementation of the Final Order during the pendency of the appeal would not cause substantial harm or be contrary to the public interest.

8. DEF has demonstrated a likelihood of success on the merits of its appeal for the reasons described in DEF's Proposed Recommended Order at DOAH and in its exceptions to the Recommended Order filed with the Commission, both of which are incorporated by reference herein. If the Amended Final Order is not stayed, and DEF is successful on appeal, DEF would be entitled to recover the improperly refunded revenues from its customers. The public interest favors stability in electric utility rates rather than refunds followed by recoupments. The mandatory stay provided by Rule 25-22.061(1)(a) is consistent with this sound public policy, and the same considerations would counsel in favor of a discretionary stay pending appeal.

9. Pursuant to Rule 28-106.204(3), Florida Administrative Code, the undersigned counsel contacted counsel for each party in this docket to determine whether they object to the requested relief in this motion. DEF is authorized to represent that the Office of Public Counsel opposes the motion and will file a response; that PSC Phosphate and the Florida Industrial Power Users Group oppose the motion, and that Commission Staff, Florida Power & Light, Gulf Power, TECO, and Florida Public Utilities Company take no position on the motion.

CONCLUSION

WHEREFORE, DEF respectfully requests that the Commission enter an order granting a mandatory stay of the Amended Final Order pending appeal. In the alternative, DEF respectfully requests that the Commission enter an order granting a discretionary stay of the Amended Final Order pending appeal.

Respectfully submitted,

SHUTTS & BOWEN LLP

Attorneys for Duke Energy Florida, LLC
215 South Monroe Street, Suite 804
Tallahassee, FL 32301
Telephone: (850) 241-1717

and

4301 West Boy Scout Boulevard, Suite 300
Tampa, FL 33607
Telephone: (813) 227-8149

By: /s Daniel E. Nordby
Daniel E. Nordby
Florida Bar No. 14588
Email: dnordby@shutts.com
Daniel Hernandez
Florida Bar No. 176834
Email: dhernandez@shutts.com
Alyssa L. Cory
Florida Bar No. 118150
Email: acory@shutts.com

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 19th day of November 2020, a true and accurate copy of the foregoing was e-filed with the Public Service Commission's online filing system and a true and correct copy has been furnished via electronic mail to the following counsel of record:

Beth Keating
Gunster, Yoakley & Stewart, P.A.
215 South Monroe Street, Suite 601
Tallahassee, FL 32301
bkeating@gunster.com

Mike Cassell
Florida Public Utilities Company
208 Wildlight Avenue
Yulee, FL 32097
mcassel@fpuc.com

James W. Brew,
Laura Wynn Baker
Stone Law Firm
Eighth Floor, West Tower
1025 Thomas Jefferson Street Northwest
Washington, DC 20007
(202) 342-0800
jbrew@smxblaw.com
law@smxblaw.com

Patty Christensen
Stephanie Morse
The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399
(850) 488-9330
christensen.patty@leg.state.fl.us
morse.stephanie@leg.state.fl.us

Jon C. Moyle, Jr.
Karen Ann Putnal
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, FL 32301

Charles John Rehwinkle
Thomas Ansley David
J.R. Kelly
Florida Office of Public Counsel
1111 West Madison Street, Room 812
Tallahassee, FL 32399
850-488-9330
Rehwinkel.charles@leg.state.fl.us
David.tad@leg.state.fl.us
kelly.jr@leg.state.fl.us

Suzanne Smith Brownless
Keith Hetrick
Office of General Counsel
FL Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 323990850
(850) 413-6218
sbrownle@psc.state.fl.us
khetrick@psc.state.fl.us

James D. Beasley
J. Jeffrey Whalen
Malcom N. Means
Ausley McMullen
P.O. Box 391
Tallahassee, FL
jbeasley@ausley.com
jwhalen@ausley.com
mmeans@ausley.com

Maria Moncada
David Lee
Florida Power & Light Company
700 Universe Blvd. (LAW/JB)
Juno Beach, FL 33408

(850) 681-3828
jmoyle@moylelaw.com
kputnal@moylelaw.com

Kenneth A. Hoffman
Florida Power & Light Company
134 W. Jefferson Street
Tallahassee, FL 32301
Ken.hoffman@fpl.com

Maria.moncada@fpl.com
David.lee@fpl.com

Paula K. Brown
Regulatory Affairs
Tampa Electric Company
P.O. Box 111
Tampa, FL 33601
regdept@tecoenergy.com