

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Petition for limited proceeding to approve)
2021 settlement agreement, including general rate base) DOCKET NO. 20210016-EI
increases, by Duke Energy Florida, LLC) FILED: April 22, 2021
)

PETITION FOR RECONSIDERATION OF CHARGEPOINT, INC.

Through counsel and pursuant to Florida Administrative Code Rule 25-22.0376, ChargePoint, Inc. (“ChargePoint”) hereby respectfully petitions the Florida Public Service Commission (the “Commission”) for reconsideration of Order No. PSC-2021-0126-PCO-EI (“Preliminary Order”). This is a preliminary, procedural or intermediate order titled “Order Denying ChargePoint, Inc’s Petition to Intervene” in the above-captioned proceeding (as consolidated with Dockets 20190110-EI and 20190222-EI). This petition is timely filed.¹

Summary

Respectfully, ChargePoint argues that the Preliminary Order incorrectly applied the relevant law to the particulars of both the petition to intervene and the underlying rate case, and did not address a solution that ChargePoint proposed in its petition – namely limited intervention rights – that would alleviate the Commission’s understandable concern about opening up its various and varied proceedings to an untenable number of parties.

In short, a close reading of the *Agrico* decision supports the petition to intervene, not the Preliminary Order. Indeed, if the Preliminary Order were upheld based on this state of facts, monopoly electric utilities could effectively be allowed to use ratepayer funds to compete against

¹ Unfortunately, due to an apparent technical/clerical error, ChargePoint was not served with a copy of Order No. PSC-2021-0126-PCO-EI until yesterday (April 21, 2021). Since the Commission website states the Preliminary Order was filed on April 12, 2021, ChargePoint nevertheless expedited the drafting and filing of this petition for reconsideration, which is timely filed within ten days of the issuance of the order.

private enterprise in the unregulated electric vehicle (“EV”) charging market – without those private companies being able to investigate or challenge such activity. This would undermine the legislature’s intent for the Commission to ensure that participation by monopoly utilities in the EV charging market does not interfere with the development of a free and fair EV charging market in the State of Florida.

Argument

ChargePoint will not repeat herein the factual assertions and arguments it made in its petition to intervene, the terms of which are incorporated herein. Instead, ChargePoint will get directly to the point.

1. Applying *Agrico* to this case

The Preliminary Order relies in substantial part on the decision in *Agrico Chemical Company v. Department of Environmental Regulation* (“*Agrico*”), 406 S. 2d 478 (Fla. 2d DCA 1981). The *Agrico* decision concerned whether two business competitors could intervene into the environmental licensing proceeding of another business competitor, Agrico, which was planning to build a new phosphate project. Two of Agrico’s business competitors intervened in the licensing proceeding claiming that the impact of the new business on their existing businesses should be considered before any new construction permit was issued. *Id.* at 480. The competitors pointed out that a new rule required that the “social and economic impact” of a new project should first be taken into account. *Id.* at 481-82. The *Agrico* court found that considering the entirety of the new rule, the specific rule on “social and economic impact” was “concerned with the economic effect of the application of new environmental technology on businesses which are or will be required to conform their technology to current standards” and “not against possible economic losses” that might be suffered by “a business competitor” if a new project were

licensed. *Id.* at 482-83. Thus, the existing business competitors had no standing to complain in the licensing proceeding “solely” that a new project of a competitor could harm their existing businesses simply by the project being constructed. *Id.* at 483. On the other hand, the court indicated that the existing businesses would have standing to complain about the impact that new technology under consideration in their competitor’s licensing proceeding could have on their businesses when the new technology was later applied to their existing businesses – because that was the interest the new rule was designed to protect. *Id.* at 482-83. This is an important distinction.

Correctly applying *Agrico* to the Petition to Intervene and the current EV charging proposal of Duke Energy Florida, LLC (“DEF”) shows that the *Agrico* decision does not support the conclusions of the Preliminary Order but instead, supports ChargePoint’s petition to intervene.

First, unlike *Agrico*, the current 2021-0016EI proceeding does not involve a simple request by DEF for a construction permit that would put DEF on a level playing field with business competitors in the EV charging marketplace. Rather, it involves a request to use \$65 million of ratepayer funds to broaden the regulated company’s (DEF) incursion into the unregulated EV charging market.

Second, the petition to intervene does not involve one business competitor (ChargePoint) trying to intervene to gain or preserve a competitive edge against another mere business competitor (DEF). ChargePoint is not engaged in supplying electricity and under FL. STAT. § 27-366.94 is not a public utility. Nor is DEF a simple business competitor seeking a license; it is a business that has monopoly privileges as a public utility to operate within the specific bounds of that monopoly grant (to supply electricity to its ratepayers). Further, the Commission is the

entity that regulates not one activity (like project licensing as in *Agrico*) but the entire regulated business of DEF. Thus, closely monitoring the use of ratepayer funds for activities beyond the monopoly mandate is a core concern and responsibility of the Commission and the input of businesses operating in the affected area is both appropriate and beneficial.

Third, the current DEF EV charging proposal no longer is simply a pilot project with limited impact on the marketplace like the one considered in Docket No. 20170183-EI, but instead is a broad on-going project that will utilize \$65 million in regulated funding for activities outside of the electric supply monopoly function, which will directly impact the competitive market for charging solutions in DEF's service territory and those businesses, like ChargePoint, that operate in that market. Thus, ChargePoint actually is in the position that the *Agrico* court indicated would have provided the business competitors with standing in that *Agrico* case. Those business competitors had a right to intervene and be heard where technology or processes would be applied to the market in which those business competitors operated, even if those businesses could not at the time quantify such impact. This was the bottom-line type of impact known now as *Agrico* prong one. And the new law (rule) being considered in *Agrico* (requiring that the economic impact of new technology on businesses be considered in a licensing proceeding) would satisfy in the *Agrico* case what is known now as *Agrico* prong two. Similarly, businesses operating in the EV charging market, including ChargePoint, will be faced with not only new technology and processes approved in this proceeding but even more, with regulated monopoly funding that underwrites such technology and processes. And because such interest is what SB7018 identified as an interest the Commission should consider AND because such interest also is within the Commission's general jurisdiction of ensuring that ratepayer funds are used for activities within the specific bounds of the monopoly grant, both prongs of *Agrico* are satisfied.

2. DEF choosing the forum for its EV charging proposal does not eliminate intervention rights

The Preliminary Order states:

[T]he 2021 Settlement Agreement was filed pursuant to Section 366.076, F.S., and nothing in that statute evidences a legislative intent to protect the type of interests asserted in ChargePoint's Petition. *Agrico* provides that competitive economic injury may only qualify as an injury if the applicable governing statute is designed to protect against such an interest, and this rate case proceeding was not designed to protect ChargePoint's alleged interests.

Thus, the Preliminary Order indicates that this is the wrong type of proceeding for which ChargePoint can intervene. In other words, on the same set of substantive facts, a potential intervenor might have standing to intervene if the regulated utility filed one type of proceeding, but not another type of proceeding. This cannot be correct. DEF chose to file the broad EV charging proposal in the context of a rate case proceeding, and a limited rate case proceeding at that. The Commission should not accept the ability for a utility to tuck a \$65 million EV charging proposal into a "limited rate proceeding," as opposed to some other type of proceeding, as justification to limit intervention to issues only applicable to settlement rates. If the commission denies all interventions in rate proceedings (or limited rate proceedings) where the utility creates with ratepayer funds new business segments that are outside the traditional role of the regulated monopoly, then the utility's ability to expand infinitely into the realm of the business sector is potentially unfettered.

In the same vein, a prospective intervenor's rights with respect to certain subject matter (and due process rights) cannot be eliminated simply by a utility choosing the forum in which it presents the substantive proposal. Could DEF in the next limited rate proceeding propose a \$500 million EV charging program or a \$5 billion EV charging program with impacted unregulated businesses still not being able to intervene and challenge such proposal? *Agrico* would indicate

to the contrary. Further, who better than companies with expertise in the EV charging market to seek discovery of, and weigh in on, massive EV proposals that will certainly alter the market?

3. The lack of specificity in DEF’s EV charging proposal does not eliminate intervention rights

Nor does ChargePoint’s petition to intervene fail because ChargePoint “acknowledges that while some of DEF’s proposals in the 2021 Settlement Agreement could harm market growth, others could encourage it.” Preliminary Order p.3. If such a statement disqualifies a petition to intervene, no petition to intervene should be granted. The fact is, cases (including rate cases) before the Commission are complex with some utility proposal components favoring a particular business or group while others may disfavor the same business or group. The point is that parties get to investigate through discovery and the administrative process and weigh in on those proposals, whether advantageous at the outset or disadvantageous. And the similar point in ChargePoint’s petition to intervene is that DEF’s EV charging proposals are simply sketched out in one settlement paragraph and an exhibit – broad-based principles where “the devil is in the details.” It is for the development of those proposals that ChargePoint seeks to intervene and add its expertise. This fact also weighs on ChargePoint’s ability to point to specific proposals that cause direct and immediate harm to ChargePoint’s business (or the market) and quantify such impact. Again, the vague initial-stage nature of DEF’s proposals make it difficult to do so with any clarity. But certainly, there are at least 65 million reasons why the EV charging market (and ChargePoint’s business) will be impacted.

4. SB 7018 specifically focuses the Commission’s general utility review to include the EV charging market in particular

The Preliminary Order (p4) further states that FL. STAT. Section 339.287(2)(c)(4) “does not confer jurisdiction on the Commission.” That section provides

Identifying the type of regulatory structure necessary for the delivery of electricity to electric vehicles and charging station infrastructure, including competitive neutral policies and the participation of public utilities in the marketplace.

The Commission is being asked in this proceeding to determine the appropriate regulatory structure that should apply to an as-yet loosely defined \$65 million EV charging program to be implemented by the regulated utility. The Commission even before SB7018 had the responsibility to ensure that regulated monopoly activities do not undermine free enterprise outside of the electric supply monopoly mandate. SB7018 and other related EV charging laws simply focused that responsibility directly on the EV charging market in particular. The Commission did not previously have this specific focus. It does now. Put another way, any jurisdiction the Commission previously had was expanded or at least focused by the concerns addressed in SB7018 and the above subsection in particular. Similarly, in the *Agrico* proceeding, the new law/rule under consideration did not broadly expand the licensing agency's jurisdiction. It did, however, focus, direct and expand the interest the agency needed to consider and it provided standing for third-party businesses within that sphere of interest. Consistent with *Agrico* then, SB7018 brings the interest of ChargePoint squarely within the Commission's review in this proceeding.

5. Granting intervention limited to specific issues is a proven way for utility commissions to gain relevant input while preserving the efficiency of proceedings

Finally, ChargePoint seeks reconsideration because the Preliminary Order did not address one of ChargePoint's main proposals, that the Commission could limit ChargePoint's intervention rights to issues directly related to EV charging. As mentioned in the petition to intervene, a number of state utility commissions employ this limited participation approach in rate cases, thereby gaining the benefit of an intervener's expertise on a given subject matter without bogging down the proceeding. Further, in the unusual context of new legislation

expanding and/or focusing the Commission’s jurisdiction on the specific issue of the regulated utility’s impact on the EV charging market, ChargePoint respectfully proffers that this approach would address the Commission’s understandable concern about “opening the floodgates” to broad participation from a potentially large number of interested parties in the many types of proceedings that come before the Commission. Thus, where a statute directs the Commission to watch for and protect against regulated utility involvement in a specific market, the Commission could grant limited intervention rights to businesses in that specific market, which would allow the Commission to gain from solid business expertise and allow those businesses to have a say in protecting their businesses and the marketplace from the harms the legislature is trying to avoid. Meanwhile, where no specific statute applies, the standard intervention practices could apply.

Therefore, ChargePoint not only meets the standard for intervention, its participation in this case would advance the goals of the legislature of ensuring that participation by both regulated utilities and market participants create a robust market and supportive regulatory structure that would benefit all Floridians for generations to come. ChargePoint’s participation in this proceeding will not unduly broaden the issues in the proceeding, unduly prejudice other parties, or unduly delay the proceeding, and is consistent with the public interest.

Conclusion

WHEREFORE, for all the reasons stated in its petition to intervene and this petition for reconsideration, ChargePoint respectfully requests that the Commission reconsider the Preliminary Order and grant ChargePoint intervenor status as a full party of record or, in the alternative, the components of the proceedings involving electric vehicle charging.

Respectfully submitted, this 22nd day of April, 2021.

/s/ Alan R. Jenkins

Alan R. Jenkins
Florida Bar No. 0110376
JENKINS AT LAW, LLC
2950 Yellowtail Ave.
Marathon, FL 33050
Phone: (404) 729-2037
Email: aj@jenkinsatlaw.com

ATTORNEYS FOR INTERVENOR,
CHARGEPOINT, INC.

CERTIFICATE OF SERVICE

I certify that a copy of the Petition For Reconsideration in Docket No. 20210016-EI has been served on each party of record by electronic mail (e-mail), hand delivery, or by depositing a copy in the United States mail, postage prepaid.

This 22nd day of April, 2021.

/s/ Alan R. Jenkins

Alan R. Jenkins
Florida Bar No. 0110376
JENKINS AT LAW, LLC
2950 Yellowtail Ave.
Marathon, FL 33050
Phone: (404) 729-2037
Email: aj@jenkinsatlaw.com

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CHARGEPOINT, INC.