The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL:	CS/CS/CS/SB 796
INTRODUCER:	Appropriations Committee; Infrastructure and Security Committee; Innovation, Industry, and Technology Committee; and Senators Gruters, Bracy, Montford, and others
SUBJECT:	Public Utility Storm Protection Plans
DATE:	April 15, 2019 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Imhof	IT	**Fav/CS**
2.	Price	Miller	IS	**Fav/CS**
3.	Sanders	Kynoch	AP	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 796 creates a recovery clause[1] for storm protection costs instead of recovering these costs through base rates, as is done now; provides for recovery of a return on capital costs (profit) through the clause; and potentially requires the Public Service Commission (PSC) to approve cost recovery without consideration of the actual costs. The bill makes specific legislative findings that it is in the public interest to promote storm protection activities that will reduce restoration costs and outage times and increase reliability.

The bill applies to only public utilities, which are the investor-owned utilities (IOUs): Florida Power and Light, Duke Energy Florida, Gulf Power Company, Tampa Electric Company, and the Florida Public Utilities Corporation. Initially, the bill builds on the PSC's rule, requiring that, as part of the storm hardening plan required by the rule, each IOU must submit to the PSC, pursuant to PSC rule, for review and approval a transmission and distribution storm protection plan that covers the utility's immediate 10-year planning period.

[1] Most of an investor-owned utility's costs and profits are recovered through base rates, the per-kilowatt-hour charges on a customer's bill. Recovery clause charges are additional charges, usually in separate line item charges on the bill. A recovery clause is typically used to make an annual recovery of costs that are difficult to plan for, are a simple pass-through of actual costs, do not include capital costs or a return on those capital costs, and for which regulatory lag in recovering such costs would be problematic.

The bill requires the PSC to adopt rules to implement and administer its provisions, as soon as practicable after the effective date, but no later than October 31, 2019.

The bill appropriates for Fiscal Year 2019-2020, $261,270 in recurring funds and $15,020 in nonrecurring funds from the Regulatory Trust Fund and authorizes four positions with associated salary rate to implement the bill. Proceedings will also involve the Office of Public Counsel (OPC),[2] which may incur costs should there be an increase in evidentiary hearings; however, these costs are indeterminate.[3]

The bill takes effect upon becoming a law.

II. Present Situation:

Electric Utilities and the Public Service Commission

Chapter 366, F.S., provides for regulation of electric utilities in Florida. Section 366.02, F.S., provides definitions for these purposes.

- "Commission" means the Florida Public Service Commission.
- "Electric utility" means any municipal electric utility, investor-owned electric utility, or rural electric cooperative that owns, maintains, or operates an electric generation, transmission, or distribution system within the state.
- "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity … to or for the public within this state; but the term "public utility" does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof; …

The PSC has grid reliability authority over all Florida electric utilities.[4] It has full economic regulation authority over the public utilities, including setting rates, and ensuring service quality standards.[5] The public utilities are the investor-owned utilities: Florida Power and Light, Duke Energy Florida, Gulf Power Company, Tampa Electric Company, and the Florida Public Utilities Corporation.

Hurricane-Related Costs

Until recently, the subject of electric utility costs associated with a hurricane meant the costs of post-hurricane repair of the electric grid, the system of transmission and distribution lines and associated infrastructure. Then after the 2004-2005 hurricane seasons, there was an emphasis on storm hardening and the resulting costs. The IOUs now incur, and recover from their ratepayers (their customers), two types of costs associated with hurricanes and storms: after-the-fact repair costs and pre-storm hardening costs.[6]

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[2] The Office of Public Counsel represents utility customers in PSC proceedings (s. 350.0611, F.S.).
[3] Conversation with J.R. Kelly, Public Counsel, Office of Public Counsel (April 2, 2019).
[4] Sections 366.04(2)(c) and 366.05(8), F.S.
[5] Section 366.04(1), F.S.
[6] Florida Public Service Commission, *Review of Florida's Electric Utility Hurricane Preparedness and Restoration Actions 2018*, 5 (July 2018).

Storm hardening and cost recovery are governed by PSC rule.[7] The rule applies to all IOUs and is intended:

- To ensure safe, adequate, and reliable electric transmission and distribution service for both operational and emergency purposes;
- To require the cost-effective strengthening of critical electric infrastructure to increase the ability of transmission and distribution facilities to withstand extreme weather conditions; and
- To reduce restoration costs and outage times associated with extreme weather conditions.

Under the rule, each IOU filed an initial plan for the PSC's review and approval, after which each utility's plan must be updated every three years. In a proceeding to approve a utility's plan, the PSC is to consider whether the utility's plan meets the desired objectives of enhancing reliability and reducing restoration costs and outage times in a prudent, practical, and cost-effective manner to the affected parties.

The rule requires each utility storm-hardening plan to contain a detailed description of the construction standards, policies, practices, and procedures to be employed to enhance the reliability of overhead and underground electrical transmission and distribution facilities. Each filing must, at a minimum, address the extent to which the utility's storm hardening plan:

- Complies with a specified national safety code;
- Adopts specified extreme wind loading standards;
- Is designed to mitigate damage to underground and supporting overhead transmission and distribution facilities due to flooding and storm surges; and
- Provides for the placement of new and replacement distribution facilities to facilitate safe and efficient access for installation and maintenance.

Each storm hardening plan must explain the systematic approach the utility will follow to achieve the desired objectives of enhancing reliability and reducing restoration costs and outage times associated with extreme weather events. The explanation of the deployment strategy must include, but is not limited to, the following:

- A description of the facilities affected, including technical design specifications, construction standards, and construction methodologies employed;
- The communities and areas within the utility's service area where the electric infrastructure improvements are to be made;
- The extent to which the electric infrastructure improvements involve joint-use facilities on which third-party attachments exist;
- An estimate of the costs and benefits to the utility of making the improvements, including the effect on reducing storm restoration costs and customer outages; and
- An estimate of the costs and benefits to third-party attachers affected by the electric infrastructure improvements, including the effect on reducing storm restoration costs and customer outages realized by the third-party attachers.

[7] Fla. Admin. Code R. 25-6.0342 (2007).

Approval of an IOU's storm-hardening plan does not guarantee the IOU the recovery of all costs incurred to implement the plan. After the IOU takes steps to implement the plan, the IOU must seek cost recovery during its next general rate case proceeding, where the PSC reviews the costs and determines whether they were prudently incurred before adding the approved costs to the IOU's base rates.[8] This helps to protect the IOU's ratepayers.

Each IOU has a rate-case settlement in place with a provision freezing the IOU's base rates and they cannot get an increase to recover these costs until the settlement expires and they initiate another rate case.

Recovery Clauses

The vast majority of an IOU's general costs of providing service, including the IOU's profit, or allowed range of rates of return, is recovered through base rates. Base rates are set in a rate case, where all of an IOU's projected costs of doing business are reviewed and individual costs or categories of costs can be reviewed separately for a determination of accuracy and prudency. All approved costs are added together, an allowed range of rates of return is set, and a "revenue requirement" is established, the total revenue necessary to recover all these costs and the profit. The rates for different customer classes are then set that will provide recovery of this revenue requirement. The process protects the interests of both the IOU and its ratepayers.

There are, however, some exceptions where costs are recovered through a recovery clause, an additional charge usually in a separate line item charge on the bill. The primary recovery clause is the fuel-cost recovery clause charge. Fuel costs can vary, sometimes significantly, from year to year and are recovered through the fuel-cost recovery clause. A recovery clause is used when the costs at issue are volatile, unusual, or short-term and are therefore difficult to plan for, and when regulatory lag in recovering such costs would be problematic. Recovery clause proceedings are typically conducted on an annual basis and provide only for a pass-through of actual costs. As capital expenditures are typically made based on long-term plans, recovery clauses typically do not include capital costs or a return on those capital costs. An IOU cannot use a recovery clause to recover capital expenses and a rate of return on those expenses when there is an existing, applicable rate-settlement agreement containing a rate freeze.[9]

Undergrounding Lines

The construction of underground electrical distribution systems is more expensive than overhead systems, and the ratepayers served by the underground line are responsible for the difference in the costs between underground and overhead. The costs and benefits of storm hardening are factored into the cost difference calculation for new construction or conversion to underground facilities.[10]

[8] Florida Public Service Commission, *Review of Florida's Electric Utility Hurricane Preparedness and Restoration Actions 2018*, 12 (July 2018).
[9] *See*, e.g., *Citizens of the State v. Graham*, 213 So. 3d 703, 715-717 (Fla. 2017).
[10] Florida Public Service Commission, *Review of Florida's Electric Utility Hurricane Preparedness and Restoration Actions 2018*, 12 (July 2018).

The data collected after Hurricane Irma showed that underground lines suffered minimal outages during storms. It should be noted, while underground facilities fared particularly well during Hurricane Irma, they still are susceptible to damage caused by uprooted trees and flooding, and these repairs typically take longer to complete.[11]

In response to data requests from PSC staff, the three largest IOUs[12] stated that approximately 40 percent of all distribution lines are underground and that the majority of recent underground projects were for new construction, rather than the conversion of overhead to underground. Since 2006, the installed underground facilities have increased by approximately 5,300 miles for the IOUs. The total amount of installed underground facilities during the past five years was approximately 2,200 miles for an average rate of 440 miles/year.[13]

In an effort to further the deployment of underground facilities, Duke Energy Florida and Florida Power and Light have initiated targeted undergrounding programs that: began in 2018, focused on historically poor performing lateral circuits[14] to replace several hundred miles of overhead lines, and were funded through current base rates. Duke Energy Florida's pilot program is scheduled over a period of ten years and Florida Power and Light's for three years. The goal for each program is to test different construction techniques and identify impediments to converting these targeted overhead facilities to underground.[15]

III. Effect of Proposed Changes:

The bill creates s. 366.96, F.S., to require a recovery clause for storm protection costs, provide for recovery of a return on capital costs (profit) through the clause, and potentially require the PSC's approval of recovery without consideration of the cost.

The bill makes legislative findings that it is in the public interest to promote storm protection activities that will reduce restoration costs and outage times and increase reliability. It creates the following definitions:

- "Public utility" or "utility" has the same meaning as in s. 366.02(1), F.S.,[16] except that the bill provides the new section of law does not apply to a gas utility.
- "Transmission and distribution storm protection plan" or "plan" means a plan for the overhead hardening of electric transmission and distribution facilities, undergrounding of electric distribution facilities, and vegetation management.
- "Transmission and distribution storm protection plan costs" means the reasonable and prudent costs to implement an approved transmission and distribution storm protection plan.

[11] *Id*., 30.
[12] Florida Power and Light, Duke Energy Florida, and Tampa Electric Company.
[13] Florida Public Service Commission, *Review of Florida's Electric Utility Hurricane Preparedness and Restoration Actions 2018*, 11-12 (July 2018).
[14] An IOU's distribution grid consists of feeder and lateral circuits. Feeders run outward from substations and can serve thousands of customers. Laterals branch out from feeders and are the final portion of the electric delivery system, serving smaller numbers of customers and typically associated with residential areas. Florida Public Service Commission, *Review of Florida's Electric Utility Hurricane Preparedness and Restoration Actions 2018*, 9-10 (July 2018).
[15] *Id*., 12.
[16] Section 366.02(1), F.S., defines "public utility" to mean "every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state." The definition also contains a list of exclusions from the definition.

- "Vegetation management" means the actions a public utility takes to prevent or curtail vegetation from interfering with public utility infrastructure. The term includes the mowing of vegetation, application of herbicides, trimming of trees, and removal of trees or brush near and around electric transmission and distribution facilities.

The bill requires each public utility to file, pursuant to the PSC rule and for the PSC review, a transmission and distribution storm protection plan that covers the utility's immediate 10-year planning period. The PSC must approve or modify the plan within six months after the public utility files the plan with the PSC. In doing so, the PSC must give due consideration to all of the following:

- Whether the plan enhances reliability, strengthens infrastructure, and reduces restoration costs and outage times in a prudent, practical and cost-efficient manner, including whether the plan prioritizes areas of lower reliability performance.
- Whether storm protection of transmission and distribution infrastructure is feasible, reasonable, or practical in certain areas of the utility's service territory, including in flood zones and rural areas.
- The estimated rate impact that will result from the implementation of the public utility's proposed transmission and distribution storm protection plan during the first three years addressed in the plan.

Each public utility must submit an updated transmission and distribution storm protection plan at least every three years after the PSC's approval of its most recent plan. The PSC must approve or modify the plan using the same considerations as applied to the original plan.

After a storm protection plan has been approved, proceeding with actions to implement the plan does not constitute and is not evidence of imprudence. The bill requires the PSC to conduct an annual proceeding to allow a public utility to recover prudently incurred transmission and distribution storm protection plan costs through a storm protection cost recovery clause. Once the PSC determines that the costs were prudently incurred, the costs are not subject to disallowance or further prudence review, except for situations involving fraud, perjury, or the intentional withholding of key information by the public utility.

The annual transmission and distribution storm protection plan costs that are recoverable through the storm protection cost recovery clause do not include costs recoverable through the public utility's base rates and must be allocated to customer classes pursuant to the rate design most recently approved by the PSC.

If a capital expenditure cost is recoverable through a storm protection cost recovery clause, the public utility may recover the annual depreciation on such cost, calculated at the public utility's current approved depreciation rates. The IOU may also recover a return on the depreciated balance of the costs calculated at the public utility's weighted average cost of capital using the return on equity last approved by the PSC in a rate case or settlement order.

The bill requires the PSC to adopt rules to implement and administer its provisions as soon as practicable after the effective date, but no later than October 31, 2019.

Furthermore, the bill requires the Division of Law Revision to replace the phrase "the effective date of this act" where it occurs in this act with the date this act becomes law.

In order to implement provisions within the act, the bill provides an appropriation for Fiscal Year 2019-2020 of $261,270 in recurring funds and $15,020 in nonrecurring funds from the Regulatory Trust Fund and authorizes four positions with associated salary rate.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Each IOU may have to wait until its currently applicable rate settlement agreement expires to use the storm protection cost recovery clause provisions of the bill. Both the federal and state constitutions prohibit passage or implementation of a law impairing the obligation of contracts.[17] A settlement agreement is a contract, and this prohibition would be applicable. The question, then, is whether the state's "significant and legitimate public purpose" outweighs the intrusion into the parties' bargain.[18] Allowing an IOU to recover capital expenses and a rate of return despite a rate freeze provision in a settlement agreement may violate the constitution's prohibition against impairment of contract.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[17] U.S. CONST. Art. I, s. 10 and FLA. CONST. Art. I, s.10.
[18] *See*, e.g., *Searcy, Denney, Scarola, Barnhart & Shipley, Etc., et al. v. State of Florida*, 209 So. 3d 1181 (Fla. 2017), 1192

B. Private Sector Impact:

Public utilities will incur unknown costs to develop and implement the transmission and distribution storm protection plans, which will be passed on to their customers. Customers will get the benefits of the energy grid improvements, but these benefits cannot be quantified with any certainty because they depend on many variables, such as what improvements are made and the details of future storms and outages.

C. Government Sector Impact:

The bill appropriates, for Fiscal Year 2019-2020, $261,269 in recurring costs and $15,020 in nonrecurring costs from the Regulatory Trust Fund, four positions and associated rate to implement the storm protection cost recovery clause within the bill.

The bill requires the PSC to adopt rules to implement and administer its provisions. The PSC will incur costs to adopt the required rules and to hold hearings to develop the disaster preparation and energy grid improvement plans. There will be additional costs to continue to monitor and periodically modify the plans.

The hearings held by the PSC will also involve the Office of Public Counsel (OPC),[19] which may incur costs should there be an increase in evidentiary hearings; however, these costs are indeterminate.[20]

VI. Technical Deficiencies:

Lines 58-62 and 66-71 define "transmission and distribution storm protection plan" to include the costs of "vegetation management" in a broadly inclusive manner. Existing storm hardening plans include vegetation management[21] and the resulting costs are included in existing base rate charges,[22] so it is unclear how future vegetation management costs would be recovered.

VII. Related Issues:

In their analysis on the bill, the Public Service Commission staff raised several concerns.[23]

Approval of a Storm Protection Plan versus a Storm Hardening Plan

The bill does not appear to require changes to the PSC's current review of storm hardening plans or the method of cost recovery for their implementation. The activities and costs incurred for storm hardening remain a consideration during rate cases.

[19] The Office of Public Counsel represents utility customers in PSC proceedings (s. 350.0611, F.S.).
[20] Conversation with J.R. Kelly, Public Counsel, Office of Public Counsel (April 2, 2019).
[21] Florida Public Service Commission, *Review of Florida's Electric Utility Hurricane Preparedness and Restoration Actions 2018*, 5 (July 2018).
[22] *Id.*, 12.
[23] Public Service Commission, *Senate Bill 796 2019 Agency Legislative Bill Analysis* (March 4, 2019) (on file with Senate Committee on Innovation, Industry, and Technology).

However, the PSC must address storm protection plans differently because implementation of the storm protection plan activities and associated costs will become subject to an annual clause. The PSC orders on storm protection plans may need to address in detail each activity, level of activity, management oversight, and other similar aspects in addition to the specific factors set forth in the bill.

Separating Storm Protection Plan Cost Recovery from Base Rate Revenues

According to the PSC, revenues from base rates are currently addressing the utility's costs for targeted undergrounding and all storm hardening activities. Utility activities and costs fluctuate year-to-year based in part on the utility's management decisions and external factors such as extreme weather events. Year-to-year fluctuation of costs that are addressed by base rate revenues is normal.

The PSC indicated that the intent of the bill appears to promote an incremental increase of the same types of activities and costs that are already described by the existing storm hardening plans. However, there is no direct mechanism to measure or establish exactly what level of activities and associated costs are included in current base rates because fluctuations are normal. Consequently, there could be tension in assessing the level of activity and ultimately the costs that may qualify for recovery through the clause.

Administrative Timeline

The PSC indicated that allowing only six months for the PSC to complete its review of a public utility's transmission and distribution storm protection plans, hold hearings, and make a determination of approval or modification is aggressive. The bill language is unclear whether the six month period includes the additional time after the PSC vote that may be necessary for issuance of a final order. It is unlikely that six months is reasonably sufficient for an intervening party to perform a rigorous review assessing the factors required by the bill and validating that the costs identified by the utility are not included in base rates. In March 2016, all five public utilities filed storm hardening plans and the PSC voted on the plans in December, reflecting an administrative timeline of nine months.

VIII. Statutes Affected:

This bill creates section 366.96 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS/CS by Appropriations on April 11, 2019:
The committee substitute:

- States that a utility is to file a petition for storm protection plan review and approval pursuant to commission rule.

- Deletes the current provision: "After a storm protection plan has been approved, costs to implement the plan are not subject to challenge unless the commission finds that certain costs were imprudently incurred".
- Adds to the existing requirement that the commission adopt rules to implement and administer the new law a requirement that the commission propose a rule for adoption as soon as practicable after the effective date, but no later than October 31, 2019.
- Requires the Division of Law Revision to replace the phrase "the effective date of this act" wherever it occurs in this act with the date this act becomes a law.
- Adds an appropriation, for the 2019-2020 fiscal year, of $261,270 in recurring funds and $15,020 in nonrecurring funds from the Regulatory Trust Fund to the Public Service Commission, and authorizes four positions with an associated salary rate of 180,583 for the purpose of implementing this act.
- Replaces the current effective date of July 1, 2019, with upon becoming a law.

CS/CS by Infrastructure and Security on March 20, 2019:
The committee substitute:

- Defines "public utility" or "utility" to have the same meaning as in 2. 366.02(1), F.S., except that the new section of law created by the bill does not apply to a gas utility.
- Removes the word "increased" before "vegetation management" in the definition of "transmission and distribution storm protection plan" or "plan."
- Removes the requirement that each public utility transmission and distribution storm protection plan be filed for the PSC's review as part of its storm hardening plan required by the PSC under s. 366.04(2)(c), F.S.
- Requires each public utility to file for the PSC's review, a transmission and distribution storm protection plan that covers the utility's immediate 10-year planning period, instead of a plan that covers 30 years.
- Revises the due consideration the PSC must give in approving or modifying a plan to include:
  - Whether the plan prioritizes areas of lower reliability performance, and
  - The estimated rate impact that will result from the implementation of the public utility's proposed transmission and distribution storm protection plan during the first three years addressed in the plan.
- Provides that after a storm protection plan has been approved, costs to implement the plan are not subject to challenge unless the PSC finds that certain costs were imprudently incurred, and proceeding with actions to implement the plan does not constitute and is not evidence of imprudence.
- Provides that costs that are recoverable through the storm protection cost recovery clause do not include costs recoverable through the public utility's base rates.
- Revises a reference to an authorized return on a "depreciated balance" to reference an authorized return on an "undepreciated balance."

CS by Innovation, Industry, and Technology on March 6, 2019:
The committee substitute:

- Requires each transmission and distribution storm protection plan to cover 30 years of planned improvements;

- Provides each plan should prioritize areas in order to generate the highest impact on system resiliency and efficiency and should focus on areas with large numbers of customers, high frequency outages, and lengthy outages;
- Deletes from the bill all provisions relating to federal corporate income tax benefits;
- Deletes from the bill the restriction on undergrounding (burying) of lines to no more than four percent of a utility's lateral distribution lines per year;
- Deletes from the bill the reference to ch. 120, F.S., in the provisions on Public Service Commission approval of a plan;
- Revises the provisions on updates plans to require that they address at least a 30-year period, require that the Public Service Commission approve or modify each updated plan, and require that it do so using the criteria used for approving or modifying the original plan; and
- Deletes the definitions of the terms commission and public utility, as those terms are already defined within ch. 366, F.S.

B. Amendments:

None.