

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| FLORIDA POWER & LIGHT |) | |
| COMPANY, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | Case No. 99-4264RX |
| |) | |
| PUBLIC SERVICE COMMISSION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

FINAL ORDER

This cause came before the undersigned on a Motion to Dismiss filed on October 27, 1999, by Respondent, Public Service Commission (PSC). By its motion, the PSC moves for the dismissal of a rule challenge by Petitioner, Florida Power & Light Company (FPL), which seeks a determination that Rule 25-22.036(3), Florida Administrative Code, is invalid on numerous statutory grounds. A response in opposition to the motion was filed by FPL on October 29, 1999. Oral argument on the motion is unnecessary. Having considered the motion and response, the motion is granted for the following reasons.

For purposes of ruling on the motion, the relevant allegations in FPL's petition have been accepted as being true. They reflect that on December 15, 1998, as later clarified by Orders entered on April 20, May 21, July 1, and September 2, 1999, the PSC initiated an "adjudicatory proceeding" for the purpose of investigating "planned, aggregate electric utility

reserve margins in peninsular Florida"; that the proceeding "will be treated as a contested docket involving disputed issues of material fact and conducted pursuant to [S]ections 120.569 and 120.57, Florida Statutes, and rule chapter 28-106, Florida Administrative Code"; and that FPL's substantial interests will be affected by that proceeding.

In a preliminary ruling entered on July 1, 1999, a Commissioner serving as a Prehearing Officer cited as the source of authority for instituting the proceeding Rule 25-22.036(3), Florida Administrative Code, the rule under challenge. This ruling was confirmed by the full Commission by Order dated September 2, 1999. The challenged rule reads as follows:

Orders and Notices. Upon its own motion, the Commission may issue an order or notice initiating a proceeding. Such order or notice shall be served upon all persons named therein. The Commission may also transmit notice of its action to other persons requesting such notice, and may publish such notice in appropriate newspapers of general circulation and the Florida Administrative Weekly.

FPL contends that in order to initiate a formal proceeding under Sections 120.569 and 120.57(1), Florida Statutes, the PSC must rely on the Uniform Rules of Procedure as its source of authority, and specifically those found in Chapter 28-106, Florida Administrative Code. This is because pursuant to Section 120.54(5)(a)1., Florida Statutes, effective July 1, 1998, the Uniform Rules of Procedure replaced the PSC's prior procedural rules by operation of law, unless an exception had been granted

by the Administration Commission. Dep't of Corrections v. Saulter, 24 Fla. L. Weekly D1951 (Fla. 1st DCA, August 20, 1999) ("[b]y July 1, 1998, all agencies had to follow the Uniform Rules of Procedure, rather than procedural rules specific to any particular agency, unless an exception had been granted by the Governor and Cabinet, sitting as the Administration Commission"). The PSC's request for an exception for the challenged rule was denied by the Administration Commission on June 25, 1998. Therefore, FPL contends that the challenged rule may only be used to initiate "agency investigations preliminary to agency action," which are neither subject to the requirements of Sections 120.569 or 120.57, Florida Statutes, nor to the Uniform Rules of Procedure, and which may not culminate in an adjudication of FPL's rights. Because the PSC has unlawfully used the rule to initiate a formal proceeding under Sections 120.569 and 120.57(1), Florida Statutes, FPL asserts that the rule is invalid for numerous reasons.

In its Motion to Dismiss, the PSC argues that the rule challenge should be dismissed on various grounds, only one of which is pertinent to this discussion. As to that ground, the PSC contends that FPL is merely complaining that the PSC is incorrectly applying the rule, and that this type of claim can be properly lodged during the course of the formal proceeding now pending before the PSC, or in an appeal from any final agency action.

Although the petition challenges the validity of the rule on the grounds it violates Section 120.52(8), Florida Statutes, in seven respects, the gravamen of FPL's complaint is that the PSC has used the rule in an erroneous way. More specifically, the petition alleges that "the PSC is illegally relying on [the rule] to initiate and conduct an adjudicatory proceeding intended to affect [FPL's] substantial interests pursuant to [S]ections 120.569 and 120.57, Florida Statutes."

Since at least 1984, the courts have held that "the remedy for an erroneous application of [a rule] is a proceeding pursuant to Section 120.57." Hasper v. Dep't of Admin., 459 So. 2d 398, 400 (Fla. 1st DCA 1984). See also Beverly Health and Rehab. Servs., Inc. v. Agency for Health Care Admin., 708 So. 2d 606 (Fla. 1st DCA 1998) (where the substance of a rule challenge is to attack the application of a rule, dismissal of the petition is appropriate).

"The fact that an agency may wrongfully or erroneously apply [a rule] in any given situation does not invalidate the [r]ule." Hasper at 400. Thus, accepting as true FPL's allegation that the PSC has erroneously used the rule in lieu of the Uniform Rules of Procedure, this does not invalidate the regulation. Even under FPL's narrow interpretation of the rule, the PSC can still use it, in a legitimate way, to initiate "agency investigations preliminary to agency action" under Section 120.57(5), Florida Statutes.

Without saying so specifically in its response to the motion, but perhaps in an effort to distinguish the Hasper case, FPL points out that in at least two orders entered in the pending PSC case, the PSC has construed the rule as legal authority to initiate a formal proceeding on its own motion whenever it executes its statutory duties.

Whether the PSC will choose to rely upon the rule in this manner in any or all future cases is speculative at best. Such an interpretation is hardly surprising, however, since any other would be a clear admission by the PSC that the rule had been improperly applied. In any event, Hasper makes clear that FPL's "remedy for an erroneous application of Rule [25-22.036(3)]" is a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes, and if unsuccessful in that forum, an appeal to the Supreme Court once final agency action has been taken. Id. at 400.

For the reasons expressed above, the Motion to Dismiss should be granted. This ruling renders moot a pending Corrected Petition for Leave to Intervene filed by Florida Power Corporation and a response in opposition to that petition filed by the PSC. It is also unnecessary to decide whether the PSC acted properly in this instance, or whether its interpretation of Rule 25-22.036(3), Florida Administrative Code, is correct. Finally, the final hearing on the merits of the case is hereby cancelled. It is, therefore,

ORDERED that the Public Service Commission's Motion to Dismiss the Petition for Administrative Determination of the Invalidity of an Existing Rule filed by Florida Power & Light Company is granted, and the petition is dismissed, with prejudice.

DONE AND ORDERED this 3rd day of November, 1999, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with Clerk of the
Division of Administrative Hearings
this 3rd day of November, 1999.

COPIES FURNISHED:

Matthew M. Childs, Esquire
Donna E. Blanton, Esquire
Steel, Hector & Davis LLP
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301

Mary Anne Helton, Esquire
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Blanca Bayo, Director of Records
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

V. Carroll Webb, Executive Director
Joint Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliott Building
Tallahassee, Florida 32399-0250

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of the notice of appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the district court of appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.