

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OCEAN PROPERTIES, LTD.,)
)
 Petitioner,)
)
 vs.) Case No. 04-2250RX
)
 PUBLIC SERVICE COMMISSION,)
)
 Respondent,)
)
 and)
)
 FLORIDA POWER & LIGHT COMPANY,)
)
 Intervenor.)
 _____)

SUMMARY FINAL ORDER

This cause came on for consideration without a formal hearing pursuant to Section 120.57(1)(h), Florida Statutes, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Florida Administrative Code Rule 25-6.109(4)(a), constitutes an invalid exercise of delegated legislative authority as defined in Sections 120.52(8)(b) and 120.52(8)(c), Florida Statutes.

PRELIMINARY STATEMENT

On June 25, 2004, Petitioner Ocean Properties, Ltd. (Ocean Properties) filed a Petition for Administrative Determination of Invalidity of Existing Rule Pursuant to Section 120.56(3), Florida Statutes, with the Division of Administrative Hearings (DOAH). The petition alleges that Florida Administrative Code Rule 25-6.109(4)(a) (interest rate rule), is an invalid exercise of delegated legislative authority.

Specifically, the petition alleges as follows: (a) the Florida Public Service Commission (PSC/Commission) exceeded its grant of rulemaking authority in adopting the interest rate

rule; and (b) that the interest rate rule enlarges, modifies, or contravenes the specific provisions of law it is alleged to implement.

In a Notice of Hearing dated July 1, 2004, the undersigned scheduled the hearing for July 14, 2004.

On July 6, 2004, Florida Power & Light Company (FPL) filed a Petition for Leave to Intervene.

On July 8, 2004, Ocean Properties, PSC, and FPL filed a Joint Motion to Hold Matter in Abeyance, noting that "[t]he issues of the amount of refunds, if any, owed by FPL to Ocean as a result of alleged overcharges due to meter error and of what interest rate applies to any such refunds are currently pending before the Commission" The parties requested that the instant rule challenge proceeding be held in abeyance until PSC could issue a final order pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

On July 9, 2004, the undersigned issued two orders: (a) Order Granting Continuance and Placing Case in Abeyance; and (b) Order Granting Florida Power and Light Company's Petition for Leave to Intervene.

The parties filed Status Reports on September 9, 2004, and January 13, 2005. Based on the Status Reports, the undersigned issued orders continuing the case in abeyance.

On March 1, 2005, Ocean Properties filed an unopposed Status Report and Request to Remove Case from Abeyance. The Status Report stated as follows in relevant part:

On February 1, 2005, the Florida Public Service Commission considered the issue of whether interest to be paid on monies due customers, including Petitioner, should be calculated pursuant to the statutory rate set forth in Section 678.01 (sic), Florida Statutes, or pursuant to Rule 25-6.109(4), Florida Administrative Code. The Commission decided to apply Rule 25-6.109(4), the rule that is the subject to Petitioner's pending, abated rule challenge, to Petitioner and other Customers. Accordingly, Petitioner desires to move forward with its rule challenge at this time.

The parties agree that the issues to be determined as framed by the Petitioner's rule challenge are legal matters, and that a hearing is not required. Thus, the parties would ask that a schedule be established to permit the filing of Proposed Final Orders addressing the issues raised in Petitioner's Rule Challenge Petition which provides them at least thirty (30) days to prepare and file their respective Proposed Final Orders.

The undersigned issued an Order Granting Request for Summary Proceeding on March 3, 2005. The order advised the parties that they had an opportunity to file Proposed Final Orders on April 11, 2005.

On March 17, 2005, Progress Energy Florida, Inc. (Progress), Tampa Electric Company (TECO), and Gulf Power Company (Gulf) filed a joint Petition for Leave to Intervene. The petition stated that Progress, TECO, and Gulf wished to file

one joint Proposed Final Order in conjunction with FPL. In an Order dated March 22, 2005, the undersigned granted the petition.

PSC filed a Request for Official Recognition of an FPL tariff on March 28, 2005. On March 31, 2005, Intervenors filed a Request for Official Recognition of four documents filed in the case pending before PSC under Sections 120.569 and 120.57(1), Florida Statutes. Subsequently, Ocean Properties filed objections to the recognition of the FPL tariff and to three of the four documents referenced by Intervenors.

After a telephone conference on April 6, 2005, the undersigned entered an Order, reserving ruling on the requests for official recognition. The Order provided the parties with an opportunity to file stipulated facts.

On April 11, 2005, the parties filed their Stipulated Preliminary Statement and Facts.

All citations hereinafter shall be to Florida Statutes (2004) unless otherwise specified.

FINDINGS OF FACT

1. Ocean Properties is one of FPL's commercial retail electric customers.

2. FPL, Progress, TECO, and Gulf are public utilities and electric utilities within the meaning of Section 366.02, Florida Statutes. They are extensively regulated by PSC.

3. Ocean Properties has challenged Florida Administrative Code Rule 25-6.109(4)(a), which provides as follows:

(4) Interest.

(a) In the case of refunds which the Commission orders to be made with interest, the average monthly interest rate until the refund is posted to the customer's account shall be based on the thirty (30) day commercial paper rate for high grade, unsecured notes sold through dealers by major corporation in multiples of \$1,000 as regularly published in the Wall Street Journal.

PSC adopted Florida Administrative Code Rule 25-6.109(4) in 1983 and has never amended it.

4. At the time that Ocean Properties filed the petition at issue here, Ocean Properties was a party to a proceeding before PSC concerning alleged inaccuracies in certain thermal demand meters owned and installed by FPL. Ocean Properties and several of FPL's other customers filed complaints with PSC, alleging that that the meters over-registered their electric service demand and that they were overcharged for retail electric service. The customers asked PSC to order FPL to refund the overcharges.

5. On November 19, 2003, PSC issued a Proposed Agency Action Order, ordering refunds for the overcharges and stating that the interest rate rule would apply to determine the amount of interest to be paid by FPL to the customers. Ocean Properties, among others, challenged the Proposed Agency Action

Order in a Petition for Formal Administrative Hearing Pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

6. On June 25, 2004, Ocean Properties filed its rule challenge petition in the instant case.

7. In a letter dated July 6, 2004, PSC requested the Bureau of Administrative Code to add Section 366.05(1), Florida Statutes, as additional Specific Authority and Section 366.07, Florida Statutes, as additional Law Implemented for the interest rate rule.

8. On July 8, 2004, Ocean Properties, PSC, and FPL filed a motion to place the instant case in abeyance, stating as follows in relevant part:

In the event that Ocean chooses to proceed with this rule challenge following the issuance of a final order in Docket No. 030623-EI, and also files with the Commission a timely motion for reconsideration of that final order, the Commission will defer ruling on Ocean's motion for reconsideration until after the entry of a final order in this rule challenge proceeding and FPL will not object to such deferral. Without conceding its relevance or potential effect, FPL agrees that the Commission is entitled to consider the final order in the rule challenge case in resolving any such motion for reconsideration. The Commission staff agrees to address the potential effect of a final order in the rule challenge case in making its recommendation on the motion for reconsideration.

By joining in this motion, none of the parties waives any position or argument that

is otherwise available to it in this proceeding, in Docket No. 030623-EI, or on appeal of the final order in either proceeding; provided, however, that if the Commission's final order applies the challenged rule to Ocean, and the challenged rule is subsequently invalidated in [DOAH] Case No. 04-2250RX, neither the Commission nor FPL will assert on appeal that Ocean is nevertheless bound by the invalidated rule based on the fact that the determination of invalidity came after the Commission's final order as opposed to having been issued in July 2004.

9. On November 4, 2004, PSC conducted a formal administrative hearing. During the hearing, Ocean Properties argued, among other things, that Section 687.01, Florida Statutes, which governs rates of interest in commercial relationships when there is no contract, should apply to the refunds. Ocean Properties argued that the statutory interest rate should apply because Florida Administrative Code Rule 25-6.109(4)(a) is an invalid exercise of delegated legislative authority.

10. Additionally, Ocean Properties argued to the PSC that Kissimmee Utility Authority v. Better Plastics, Ins., 526 So. 2d 46 (Fla. 1988) should control. In that case, the Florida Supreme Court decided that Section 687.01, Florida Statutes, is applicable when calculating interest on utility overcharge refunds. See Kissimmee Utility Authority v. Better Plastics, Ins., 526 So. 2d at 47.

11. In a Final Order Resolving Complaints dated February 25, 2005, PSC ordered FPL to refund to its customers the overcharges that resulted from use of the thermal demand meters. PSC also ordered FPL to pay interest on the amount refunded based on the interest rate rule. PSC distinguished Kissimmee Utility Authority as involving a municipal utility that was not subject to PSC's broad ratemaking authority under Chapter 366, Florida Statutes.

12. On March 14, 2005, Ocean Properties and other customers filed a Motion for Reconsideration of PSC's Final Order Resolving Complaints. The motion references the instant case and asks the Commission to reconsider its decision concerning the proper interest to be applied to the refunds.

13. On March 21, 2005, FPL filed a Response in Opposition to Customers' Motion for Reconsideration with PSC. The response refers to FPL's current tariff that is titled "Florida Power & Light Company, General Rules and Regulations for Electric Service." The tariff referenced in the response is the official and effective tariff on file with PSC.

14. In a letter dated March 24, 2005, PSC requested the Bureau of Administrative Code to add Section 366.04(1), Florida Statutes, as additional Law Implemented for the interest rate rule.

15. FPL's General Rules and Regulations for Electric Service state as follows in pertinent part:

INTRODUCTION

These General Rules and Regulations are a part of the Company's Tariff, covering the terms and conditions under which Electric Service is supplied by the Company to the Customer. They are supplementary to the "Rules and Regulations Governing Electric Service by Electric Utilities" issued by the Florida Public Service Commission.

* * *

8.4 Meter Tests. The Company employs every practicable means to maintain the commercial accuracy of its meters. Meter tests, and billing adjustments for inaccurate meters, are in accordance with the methods and procedure prescribed by the Florida Public Service Commission.

16. Section 7 of FPL's General Rules and Regulations for Electric Service relates to billing. It contains information regarding the following: (a) billing periods; (b) residential budget billing; and (c) non-residential (Pilot) budget billing. The billing provisions make no reference to "interest" of any kind.

17. At the beginning of each individual rate schedule in the tariff, the following language appears:

Service under this schedule is subject to orders of governmental bodies having jurisdiction and to the currently effective "General Rules and Regulations for Electric Service" on file with the Florida Public Service Commission. In case of conflict

between any provision of this schedule and said "General Rules and Regulations for Electric service" the provision of this schedule shall apply.

18. PSC's interest rate rule lists Sections 350.127(2) and 366.05(1), Florida Statutes, as specific authority, and the following statutes as the laws implemented: Sections 366.03, 366.04(1), 366.04(2)(f), 366.06(3), 366.07, and 366.071, Florida Statutes.

19. As of the date that this Final Order was issued, Ocean Properties' Motion for Reconsideration was still pending before PSC.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over this case pursuant to Sections 120.56(1) and 120.56(3), Florida Statutes.

21. Petitioner has the burden to establish by a preponderance of the evidence that the interest rate rule is an invalid exercise of delegated legislative authority.

See § 120.56(3)(a), Fla. Stat.

22. The first issue to be determined is whether Petitioner has standing to challenge the validity of the interest rate rule. Petitioner's burden in this regard is to show that it is substantially affected by the interest rate rule.

See § 120.56(1). Fla. Stat. Petitioner must establish the following: (a) a real and sufficiently immediate injury-in-fact; and (b) that the alleged interest is arguably within the zone of interest to be protected or regulated. Lanoue v. Florida Department of Law Enforcement, 751, So. 2d 94, 96-97 (Fla. 1st DCA 1999).

23. PSC and FPL do not argue that Ocean Properties' "substantial interest" is not within the zone of interest to be protected or regulated. Instead, they assert that Ocean Properties has failed to show "injury-in-fact."

24. Ocean Properties alleges in its petition that it will suffer a direct, immediate injury-in-fact as follows: (a) PSC applied the interest rate rule to determine the amount of interest FPL will pay on the refund due Petitioner; and (b) interest calculated under the interest rate rule is less than Petitioner would receive under Section 687.01, Florida Statutes.

25. Section 687.01, Florida Statutes, states as follows:

687.01 Rate of interest in absence of contract.--In all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03.

26. Section 55.03, Florida Statutes, provides for the determination of the interest rate on judgments and decrees based on the average federal discount rate plus 500 basis points for the preceding year.

27. Ocean Properties also relies upon Kissimmee Utility Authority v. Better Plastics, Inc., 526 So. 2d 46 (Fla. 1988) for the proposition that Section 687.01, Florida Statutes, applies to determine the interest rate due to retail electric utility customers on refunds of overcharges. In that case, the Court stated as follows in pertinent part:

Even though rule 25-6.106(2) does not specifically authorize the payment of prejudgment interest as part of the overcharge refund due a customer, we agree with the district court that a regulated public utility has the legal obligation to pay interest on overcharge refunds. In light of our decision in Argonaut, it is unnecessary for the Public Service Commission to specifically refer to prejudgment interest in its rules to assure utility customers are fully compensated in the event of an overbilling.

* * *

. . . . Once liability has been determined and the amount of damages set, it is merely a ministerial duty to add the appropriate amount of interest to the principal amount of damages awarded. . . . Whether an award of prejudgment interest is appropriate in this case does not turn on the Authority's status as a regulated public utility. In Florida once damages are liquidated, prejudgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the loss.

. . . The amount of prejudgment interest to be paid absent a controlling contractual provision has been set by the legislature.⁴

FN4. Section 687.01, Florida Statutes, contains the statutory interest rate set by the legislature that controls prejudgment interest. . . .

28. PSC and FPL argue that the Kissimmee Utility Authority case is distinguishable because it involved a civil proceeding and a municipal utility that was not subject to PSC's broad ratemaking authority. PSC and FPL also argue that Section 687.01, Florida Statutes, cannot provide Ocean Properties with grounds to allege an "injury-in-fact" because there is a contract between Ocean Properties and FPL that establishes the applicable interest rate.

29. In support of their latter argument, PSC and FPL point to Section 8.4 of the FPL tariff, which states that "billing adjustments for inaccurate meters are in accordance with the methods and procedure prescribed by the Florida Public Service Commission." PSC and FPL rely on BellSouth Telecommunications v. Jacobs, 834 So. 2d 855, 859 (Fla. 2002), for the proposition that a validly filed tariff constitutes a "contract of carriage" between Ocean Properties and FPL.

30. PSC's and FPL's arguments regarding Ocean Properties' lack of standing are without merit for two reasons. First, if the interest rate rule is facially invalid, there is no contract pursuant to FPL's tariff that would prohibit the application of Section 687.01, Florida Statutes.

31. Second, if the interest rate rule is invalid, Ocean Properties would be entitled to interest pursuant Kissimmee Utility Authority, 526 So. 2d at 47. It does not matter whether the utility paying the interest on an overcharge is a municipal utility involved in civil litigation or a public utility involved in an administrative proceeding. In either circumstance, Section 687.01, Florida Statutes, applies if there is no contract between the parties and if there is no valid administrative rule providing otherwise. Accordingly, Petitioner has standing to challenge the interest rate rule.

32. The next issue is whether the petition should be dismissed because Ocean Properties is attempting to bring an "as applied" challenge to the interest rate rule. According to PSC and FPL, the petition should be dismissed pursuant to Hasper v. Department of Administration, 459 So. 2d 400 (Fla. 1st DCA 1984)(the remedy for an alleged erroneous application of a rule is a proceeding pursuant to Section 120.57, Florida Statutes, not a rule challenge proceeding); and Beverly Health & Rehab. Servs., Inc. v. Agency for Health Care Admin., 708 So. 2d 616 (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).

33. Petitioner alleges that PSC has no statutory authority "to establish an interest rate, or to 'pick and choose' which

interest rate - including that adopted in Rule 25-6.109(4)(a), F.A.C., - it will apply to determine the amount of interest due on electric utility service overcharges." (Emphasis included)

At the same time, Petitioner admits in a footnote to its petition and in its Proposed Final Order that statutory authority exists for the interest rate rule pursuant to Sections 366.06(3) and 366.071(2)(a), Florida Statutes. Specifically, the footnote in the petition states as follows:

At most, the statutes can be read to provide authority to the PSC for interest rates involved in rate refunds where rates have gone into effect prior to a Commission order [Section 366.06(3), F.S.], or interim rates are involved [Section 366.071(2)(a), F.S.]. Other than these limited circumstances, the statutes cited do not provide specific statute authority to the PSC to establish interest rates.

The interest rate rule lists Sections 366.06(3) and 366.071(2)(a), Florida Statutes, as laws implemented.

34. Section 366.06(3), Florida Statutes, states as follows in relevant part:

(3) Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. . . . The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such

public utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such public utility to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. (Emphasis added)

35. Section 366.071(2)(a), Florida Statutes, states as follows in pertinent part:

(2)(a) In a proceeding for an interim increase in rates, the commission shall authorize, within 60 days of the filing for such relief, the collection of rates sufficient to earn the minimum of the range of rate of return calculated in accordance with subparagraph (5)(b)2. The difference between the interim rates and the previously authorized rates shall be collected under bond or corporate undertaking subject to refund with interest at a rate ordered by the commission. (Emphasis added)

36. In Florida Power & Light Company v. Public Serv. Comm'n, DOAH Case No. 99-4264RX (Final Order, November 3, 1999), Administrative Law Judge Donald R. Alexander stated as follows:

. . . 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.

37. In this case, Petitioner alleges and argues that PSC has no statutory authority to apply the interest rate rule under the narrow facts of this case, i.e. to the refund that FPL owes Ocean Properties as a result of defective electric meters. The gravamen of Petitioner's complaint is that PSC has used the interest rate rule, which is authorized under limited circumstances, in an erroneous way. This complaint is more appropriately resolved in the Section 120.57(1), case pending before PSC.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

That the Petition for Administrative Determination of Invalidity of Existing Rule Pursuant to Section 120.56(3), Florida Statutes, is dismissed.

DONE AND ORDERED this 20th day of May, 2005, in
Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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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 the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a 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.