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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Florida Power & Light Company

Petitioner/Appellant,

v.

Case No. 1D99-4552
L.T. Case No.: 99-4264RX

Public Service Commission

Respondent/Appellee.

ON APPEAL FROM STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIEF OF AMICUS CURIAE
FLORIDA POWER CORPORATION

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STATEMENT OF AMICUS CURIAE

Amicus Curiae, Florida Power Corporation, ("FPC"), is a Florida public utility and electric utility as defined by section 366.02, Florida Statutes (1999). FPC, like Appellant, Florida Power & Light Company, ("FPL") was designated unilaterally by the Public Service Commission ("PSC") as an appropriate party in PSC docket number 981890-EU, entitled: "In re: Generic investigation into the aggregate electric utility reserve margins planned for Peninsular Florida" (hereinafter "Reserve Margin Docket"). FPC and other similarly situated Florida public utilities and electric utilities have a significant interest in the outcome of this appeal because FPC is subject to the PSC's regulation and participates in several different types of proceedings before the PSC every year, including both investigatory proceedings and adjudicatory proceedings. FPC has a substantial interest, as a regulated public utility and electric utility, in ensuring that the PSC initiates proceedings to determine substantial interests in accordance with the Administrative Procedure Act ("APA") and the Uniform Rules of Procedure.

Now, of all times, it is essential that regulated entities in Florida's electric power industry are assured that the Uniform Rules of Procedure will govern proceedings before the PSC. Very important developments are occurring in the industry

at this time. The Reserve Margin Docket is only one example, where the PSC undertook to take a far-ranging look at adequacy of power resources in Florida, considering *inter alia* the role of "merchant" suppliers of power. The PSC is being pressured by various interests to initiate proceedings regarding the restructuring of the electric utility industry in Florida. The issues decided in this appeal will profoundly affect how the PSC is able to initiate adjudicatory proceedings involving electric utilities like FPC and FPL. The PSC's persistence in perpetuating its rule governing initiation of proceedings to determine substantial interests, even after the legislative mandate that all Florida agencies comply with the Uniform Rules of Procedure, causes great concern to utilities like FPC and FPL who are frequently subject to such proceedings and impinges substantially on their interests in having fair notice of procedures that will be followed by the PSC and in ensuring the fairness and regularity of all such proceedings. The Uniform Rules were initiated precisely to protect such interests, and the PSC's perpetuation of the rule at issue in this case contravenes the Uniform Rules and undermines the purpose they are intended to achieve.

STATEMENT OF THE CASE AND FACTS

FPC adopts and incorporates the Statement of the Case and Facts contained within the Appellant's brief.

SUMMARY OF THE ARGUMENT

The administrative law judge erred by refusing to address FPL's substantive facial challenge to rule 25-22.036(3), Florida Administrative Code. Rule 25-22.036(3), is facially invalid because it was legislatively repealed by operation of law on July 1, 1998. Despite the statutory requirements of section 120.54(5)(a) and the Administration Commission's denial of an exception for rule 25-22.036(3), Florida Statutes, the PSC has impermissibly retained the rule. By retaining the rule, the PSC has acted contrary to the APA and the Uniform Rules of Procedure. Therefore, rule 25-22.036(3) is an invalid exercise of legislatively delegated rulemaking authority.

ARGUMENT

I. PSC RULE 25-22.036(3)¹ IS FACIALLY INVALID BECAUSE IT WAS LEGISLATIVELY REPEALED BY OPERATION OF LAW ON JULY 1, 1998

The administrative law judge erred below by dismissing FPL's rule challenge based upon the judge's conclusion that FPL was simply challenging the PSC's application of rule 25-22.036(3), Florida Administrative Code, in the Reserve Margin Docket. Despite the administrative law judge's characterization of FPL's petition, the "gravamen" of FPL's petition was the facial invalidity of PSC rule 25-22.036(3). As further discussed below, PSC rule 25-22.036(3) was legislatively repealed by operation of law, on July 1, 1998, because the PSC failed to act in accordance with section 120.54(5)(a), Florida Statutes (Supp.1996). Therefore, rule 25-22.036(3) is an invalid procedural rule without legal effect.

Before the Legislature required that each Florida agency comply with the Uniform Rules of Procedure, each administrative agency, including the PSC, created its own idiosyncratic rules of procedure. In order to understand a party's rights with regard to notice, hearings, discovery, and other procedural matters, persons and entities appearing before a particular

¹ Rule 25-22.036(6), Florida Administrative Code, was renumbered in 1999, without substantive changes, as rule 25-22.036(3). For consistency, all references herein are to rule 25-22.036(3).

agency were forced to scrutinize that agency's particular rules before proceeding. There existed no uniformity between rules of procedure for different administrative agencies.

The Legislature's adoption of the Uniform Rules of Procedure, statutorily enacted under section 120.54(5)(a)1, Florida Statutes, was intended, with limited exceptions, to eradicate administrative agencies' idiosyncratic procedural rules in favor a uniform system. As stated by this Court, "the requirement of uniformity is designed to reduce the number of procedural rules and 'to end the confusing practice of each agency adopting its own rules of procedure.'" Department of Corrections v. Saulter, 742 So. 2d 368, 370 (Fla. 1st DCA 1999) (quoting Donna E. Blanton & Robert M. Rhodes, Florida's Revised Administrative Procedure Act, 70 Fla. B.J. 30, 32 (July/Aug. 1996)). The intent behind legislatively requiring Uniform Rules of Procedure may have been best summed up by then-Governor Lawton Chiles, who wrote: "For the first time, procedures among the agencies will be consistent, and people appearing before an agency will not need to pore through an individual agency's rules to avoid unique procedural requirements." Lawton Chiles, On Rules Reduction & Rational Executive Branch Reform, 71 Fla. B.J. 17, 18 (March 1997). Unfortunately, Governor Chiles' vision has not yet been realized at the PSC, where the procedural rules still contain improper

vestiges of the old system of antiquated and idiosyncratic rules.

In order to achieve the intended system of uniform rules, the Legislature enacted section 120.54(5)(a)1, Florida Statutes (Supp.1996), which required all agencies to "comply with the uniform rules by July 1, 1998," unless the agencies affirmatively requested and were granted an exception by the Administration Commission. See also, Saulter, 742 So. 2d at 369. Despite this statutory requirement, the PSC has unlawfully retained and continued to enforce a rule that was extinguished by operation of law on July 1, 1998.

PSC rule 25-22.036(3) purports to allow the PSC to initiate adjudicatory proceedings determining substantial interests upon its own order or notice initiating such a proceeding. However, the Uniform Rules of Procedure contains a comparable rule in rule 28-106.201, Florida Administrative Code. As further discussed in Appellant's brief, there is no question that the PSC rule 25-22.036(3) conflicts with the petition requirements set out in Uniform rule 28-106.201. The PSC conceded, in its petition to the Administration Commission seeking an exception for rule 25-22.036(3), that Uniform rule 28-106.201 would not allow the PSC to initiate adjudicatory proceedings determining substantial interests on its own order or notice, but instead required that proceedings to determine substantial interests

could only be initiated by petitions meeting certain requirements. (R. 76) Due to this conflict, the PSC acknowledged that it was required by section 120.54(5)(a) to obtain an exception for its rule from the Administration Commission or eliminate its rule in deference to the Uniform Rule. However, the PSC did neither.

Instead, months later, the PSC argued to the Administration Commission that an exception to rule 25-22.036(3) was not necessary because the rule was outside the scope of the Uniform Rules of Procedure. (R. 126) In its Final Order, the Administration Commission denied the PSC an exception to rule 28-106.201 because the PSC persuaded the Commission that rule 25-22.036(3) was limited to: "applications, complaints, orders, or notices which do not involve, or which precede, proposed or final agency action determining substantial interests." (R. 131.) (emphasis added) However, after the Administration Commission's Final Order was entered, the PSC retained rule 25-22.036(3) without amendment, except for the redesignation of its rule number.

By retaining the rule without amendment, the PSC has acted beyond its designated legislative authority to enact rules. In accordance with the Administration Commission's Final Order, the PSC was required to repeal rule 25-22.036(3) or amend it to limit its scope. Otherwise, future parties appearing before the

PSC would have no notice that the Administration Commission intended for the scope of rule 25-22.036(3) to be limited to proceedings which do not involve, or which precede, proposed final agency action to determine substantial interests. Since the PSC was denied an exception for rule 25-22.036(3) and failed to amend or repeal the rule to limit its scope, rule 25-22.036(3) was legislatively repealed by operation of law on July 1, 1998. See §120.54(5)(a); Saulter, 742 So. 2d at 369.

This Court's opinion in Department of Corrections v. Saulter, 742 So. 2d 368 (Fla. 3d DCA 1999) is consistent with this analysis. In Saulter, PERC retained a rule of procedure pertaining to motions for reconsideration which were not referenced in the Uniform Rules of Procedure. Saulter, 742 So. 2d at 370. PERC never sought an exception for the rule and did not initiate a formal rulemaking proceeding to repeal or amend the rule so that it would be consistent with the Uniform Rules of Procedure. Id. at 369-70.

This Court held that PERC's failure to initiate formal rulemaking proceedings to remove the rule from the Florida Administrative Code did not "negate the legislative repeal that section 120.54(5)(a) effected." Id. at 370. Instead, since PERC did not obtain an exception to the Uniform Rules, "[b]y operation of law, the Uniform Rules of Procedure had replaced PERC's prior procedural rules, so that they were no longer in

effect at any pertinent time." Id. at 369. (citation omitted) (emphasis added)

Here, the PSC was denied an exception to the Uniform Rules of Procedure based on an understanding with the Administration Commission, which was formalized in the Administration Commission's Final Order, that the scope of the PSC's rule would not include initiation of proceedings to determine substantial interests. After July 1, 1998, rule 25-22.036(3) lost any legal effect that it previously had relating to how proceedings to determine substantial interests are initiated by the PSC. PSC's failure to initiate a formal rulemaking proceeding to amend or remove the rule "does not negate the legislative repeal that section 120.54(5)(a) effected." Id. at 370.

The Third District Court of Appeal has certified conflict with this Court's opinion in Saulter. Crawford v. Department of Children and Families, 25 Fla. L. Weekly D158 (Fla. 3d DCA 2000). In Crawford, the Third District Court of Appeal determined that PERC's rule did not require any exception from the Administration Commission because the Uniform Rules of Procedure "nowhere address motions for rehearing." Id. The Court continued by stating: "...motions for rehearing do not fall within the subject matter or scope of the rules." Id. Therefore, the Court held that the PERC's rule remained viable

after the July 1, 1998 deadline for agencies to be compliant with the Uniform Rules. Id.

Crawford is easily distinguished from the instant case. Rule 25-22.036(3) is clearly within the scope and subject matter of the Uniform Rules of Procedure because it purports to state how proceedings to determine substantial interests are initiated.² As discussed above and further discussed in Appellant's brief, Uniform Rule 28-106.201 also directly addresses initiation of proceedings to determine substantial interests. Although the Administration Commission was convinced that PSC rule 25-22.036(3) would not govern initiation of proceedings to determine substantial interests, the PSC never initiated a formal rulemaking proceeding reflecting the limitation contained in the Administration Commission's Final Order. Clearly, the PSC's rule remains facially inconsistent with the Uniform Rule of Procedure governing the initiation of proceedings to determine substantial interests. Since the PSC failed to amend or repeal rule 25-22.036(3) in accordance with the Administration Commission's Final Order, the rule did not escape the legislative repeal of rules inconsistent with the Uniform Rules of Procedure, by operation of law, on July 1,

² This proposition is further supported by the fact that the PSC's rule is contained in Part IV of Chapter 25-22, Florida Administrative Code, entitled "Decisions Determining Substantial Interests."

1998. See Saulter, 742 So. 2d at 369-70. Therefore, it is no longer viable as a rule.

PSC's retention of rule 25-22.036(3) without amendment forces FPC to consider what other Uniform Rules the PSC will refuse to follow because the PSC somehow believes its rules are outside the scope of the Uniform Rules of Procedure. Regulated utilities, like FPC, cannot be sure what procedures will be followed by the PSC when it initiates a proceeding to determine substantial interests. Despite the vision and intent behind the legislative requirement of uniform procedural rules for Florida agencies, FPC and other similarly situated utilities cannot be assured regularity, uniformity, and fairness in proceedings initiated by operation PSC Rule 25-22.036(3).

The mere existence of rule 25-22.036(3) creates the very uncertainty that the Uniform Rules of Procedure were designed to eliminate. The rule on its face provides no notice of the PSC's representations to the Administration Commission regarding the limited scope of the rule. The PSC's retention of this rule is an act of raw misuse of its rulemaking power and should be voided summarily. As set forth above, both the Legislature and Governor Chiles envisioned that each agency would be bound to uniform rules of procedure, with certain limited exceptions. The PSC must not be allowed to benefit from representing to the Administration Commission that rule 25-22.036(3) would be

limited in scope, while fully intending to perpetuate the rule
as is, providing an apparent but illicit basis for the PSC to
initiate proceedings to determine substantial interests in ways
contrary to the corresponding uniform rule of procedure.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the administrative law judge and find that rule 25-22.036(3) is an invalid exercise of the PSC's delegated rulemaking authority.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Brief of Amicus Curiae Florida Power Corporation was served by U.S. Mail this 11th day of February, 2000, to the following:

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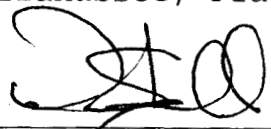
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I HEREBY CERTIFY that the text and all footnotes of the Brief of Amicus Curiae Florida Power Corporation was typed using 12 point Courier New font and was fully justified. A three-and-a-half inch disk with a copy of the Brief of Amicus Curiae Florida Power Corporation has been furnished to the First District Court of Appeal.



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