ORIGINAL

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

FLORIDA POWER & LIGHT COMPANY,
Petitioner/Appellant

vs. DCA CASE NO. 1D99-4552

PUBLIC SERVICE COMMISSION,
Respondent/Appellee
_____/

REPLY BRIEF OF FLORIDA POWER & LIGHT COMPANY

On Appeal from State of Florida
Division of Administrative Hearings

Matthew M. Childs, P.A.
Florida Bar No. 122666
Donna E. Blanton, Esq.
Florida Bar No. 948500
Steel Hector & Davis LLP
215 S. Monroe Street, Suite 601
Tallahassee, Fla. 32301
(850) 222-2300 (phone)
(850) 222-7510 (facsimile)

Attorneys for Florida Power & Light Company

AFA
APP
CAF
CMU
CTR
EAG
LEG
MAS
OPC
RRR
SEC 1
WAW
OTH

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

FLORIDA STATUTES

FLORIDA ADMINISTRATIVE CODE

MISCELLANEOUS

ARGUMENT

I. THE PSC MAY NOT USE ITS PROCEDURAL RULE, WHICH WAS REPEALED BY OPERATION OF LAW, AS A BASIS TO IGNORE THE DUE PROCESS REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT AND THE UNIFORM RULES OF PROCEDURE.

Although Appellee Public Service Commission ("PSC") raises a number of arguments in its Answer Brief concerning the ability of Appellant Florida Power & Light Company ("FPL") to challenge rule 25-22.036(3), the PSC never directly addresses FPL's primary argument: Rule 25-22.036(3) expressly applies to matters governed by the Uniform Rules of Procedure, and the rule was superceded by those rules. By requiring adoption of uniform procedural rules, the Legislature intended to eliminate the confusing practice of each agency adopting its own rules and mandated that on July 1, 1998, the Uniform Rules "shall be the rules of procedure for each agency" subject to the APA. § 120.54(5)(a)1; Department of Corrections v. Saulter, 742 So. 2d 368 (Fla. 1st DCA 1999).

The Uniform Rules were designed to implement the due process protections guaranteed by the Florida Administrative Procedure Act (APA), and all agency procedural rules for which a specific exception was not granted by the Administration Commission - including rule 25-22.036(3) - were repealed "by operation of law" when the Uniform Rules became effective. § 120.54(5)(a)1; Saulter, 742 So. 2d at 369. The PSC, however, maintains that the Uniform Rules "are supplemental to, but do not supercede" the PSC's own procedural rules, including rule 25-22.036(3). (R. 17). Thus, the PSC argues that it can ignore the APA and use rule 25-22.036(3) to

commence a wide-ranging investigation into electric utility reserve margins - or any other subject within its statutory jurisdiction - that also is intended to determine FPL's substantial interests. (R. 16). Such an argument is contrary not only to section 120.54(5)(a), but to the entire thrust of the APA, which contemplates that an agency will investigate through free-form proceedings. Once the investigation is complete, the agency can then propose agency action and provide substantially affected persons with an opportunity to challenge that action. §§ 120.57(5); 120.569(2); rr. 28-106.101(2), 28-106.201(1), Fla. Admin. Code.

The express terms of rule 28-106.201 provide that "[u]nless otherwise provided by statute, initiation of proceedings shall be made by written petition to the agency responsible for rendering final agency action." Rule 25-22.036(3), which purports to allow the PSC to initiate a proceeding "on its own motion", directly conflicts with rule 28-106.201 and with these other statutorily mandated procedural protections.

II. FPL IS SUBSTANTIALLY AFFECTED BY RULE 25-22.036(3) AND APPROPRIATELY CHALLENGED IT AS AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY.

The PSC, through its various standing arguments, proposes a scenario that would prohibit anyone from ever challenging an existing rule. First the PSC argues that FPL does not have standing to challenge rule 25-22.036(3) because it is making an "as

applied" challenge, and rule challenges must address whether a rule is "valid on its face." (R. 175); Answer Brief at 37.

Next the PSC argues that because rule 25-22.036(3) is a procedural rule that "does not affect FPL in any way," a facial challenge cannot be mounted against the rule. Answer Brief at 10, 14-19. Finally the PSC argues that because the proceeding in which the PSC applied the rule has settled, FPL no longer has standing because the rule challenge is moot. Answer Brief at 11, 19-20.

These inconsistent and strained standing arguments make a mockery of section 120.56, Florida Statutes, which authorizes existing rule challenges. Section 120.56(1)(a) provides that "[a]ny person substantially affected by a rule . . . may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." Section 120.56(3)(a) provides that a rule may be challenged by a substantially affected person "at any time during the existence of the rule."

The "substantially affected person" standing requirement for rule challenge proceedings "was intended to create an opportunity for a citizen initiated check on rule making that exceeded delegated statutory authority." Department of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Ass'n, Inc., 612 So. 2d 646, 652 (Fla. 1st DCA 1993) quoting Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U.

L. Rev. 965, 1014 (1986). This Court noted with approval that Professor Dore believed that the standing requirements for a rule challenge proceeding are not as stringent as those applying in a court of law.[1] Id. at 652. As the PSC acknowledged below, the standing requirements in a rule challenge proceeding are not even as stringent in a section 120.57 proceeding. (R. 173).

The PSC has admitted that FPL is a public utility and an electric utility as defined by section 366.02, Florida Statutes. (R. 187). Public and electric utilities are subject to the jurisdiction of the PSC, including its procedural rules. E.g., §§ 366.04, 366.05, 350.127(2), Fla. Stat. The PSC has admitted that FPL was designated unilaterally by the PSC as a party in the reserve margin docket and that FPL would be affected by any orders resulting from that docket. (R. 187). FPL cannot understand how the PSC can argue that rule 25-22.036(3) has no affect on FPL, given that the PSC designated FPL as a "party" to a proceeding that allegedly was being conducted under the authority of that rule.

FPL easily meets the standing test established in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). The test requires (1) establishment of a

---

[1] Although the Court in the Dental Hygienist case was dealing with a proposed rule challenge, the standing requirements for existing rules are identical. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995); State Department of Health & Rehabilitative Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979).

real and sufficiently immediate injury in fact and (2) the alleged injury must be within the zone of interest protected by the statute being implemented by the rule. Rule 25-22.036(3), by allowing the PSC to conduct any investigation on any topic as a proceeding that determines FPL's substantial interests, directly impacts FPL's business in an infinite number of ways. See Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995) (first prong of test met when rule impacts a challenger's occupation). The "zone of interest" element is met when a party asserts that a rule encroaches upon an interest protected by a statute or by the constitution. Florida Medical Ass'n v. Department of Professional Regulation, 426 So. 2d 1112 (Fla. 1st DCA 1983); Lanoue v. Florida Department of Law Enforcement, 25 Fla. L. Weekly D76 (Fla. 1st DCA December 29, 1999). Rule 25-22.036(3) denies FPL the procedural protections guaranteed by the APA; FPL thus satisfies the second prong of the test.

A. FPL's Rule Challenge Is Not Moot.

FPL's challenge to rule 25-22.036(3) is not moot simply because the reserve margin docket, in which the PSC applied the rule to FPL and other public utilities, has settled. Rule 25-22.036(3) remains in effect and may be applied again by the PSC at any time to FPL if the rule is not declared invalid.

Even if this Court finds that FPL's standing was linked to application of the rule in the reserve margin docket, an exception

to the mootness doctrine applies when a claim is "capable of repetition yet evading review." See State Department of Health & Rehabilitative Services v. Alice P., 367 So. 2d 1045, 1053 (Fla. 1st DCA 1979). Courts apply this exception when a case "poses a question of general interest and importance in the administration of law, and is likely to recur." See Nichols v. Nichols, 519 So. 2d 620, 621 n.1 (Fla. 1988).

In Greynolds Park Manor, Inc. v. Department of Health and Rehabilitative Services, 491 So. 2d 1157 (Fla. 1986), this Court rejected a claim by an agency that a rule challenge became moot when the agency voluntarily discontinued use of the rule. The Court noted that the petitioner had been substantially affected by the rule through its past application and reasoned that the "substantially affected" standard in section 120.56 does "not depend on the availability of further relief." Id. at 1159. This Court distinguished Montgomery v. Department of Health and Rehabilitative Services, 468 So. 2d 1014 (Fla. 1st DCA 1985), which is relied on by the PSC in its Answer Brief, noting that the petitioner in Montgomery was not subject to the challenged rule at all. Greynolds, 491 So. 2d at 1159.

Given the PSC's strident defense of rule 25-22.036(3), the agency unquestionably believes it has authority for the rule and intends to apply it again. See Answer Brief at 21-27. The PSC could apply this rule in a variety of proceedings that could affect

FPL, a public utility and an electric utility as defined by section 366.02, Florida Statutes. Thus, FPL's challenge is not moot.

B. FPL Stated a Cause of Action in its Petition.

FPL's rule challenge petition satisfies section 120.56(1)(b), which requires that a petition "must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it . . . ." The petition devotes five pages to the rule's conflict with the APA and the Uniform Rules, the PSC's attempts to seek an exemption from the Administration Commission for the rule, the ultimate rejection of that request, and the PSC's decision - despite the Administration Commission's rejection - to keep the rule in place and apply it. (R. 4-8). This discussion constitutes "facts or grounds for the alleged invalidity." Nearly three pages of the petition are devoted to explaining how FPL's substantial interests are affected by the rule (R. 2-4), which satisfies the requirement that the petitioner must state "facts sufficient to show that the person challenging a rule is substantially affected by it . . . ."

The PSC objects because FPL did not elaborate in its petition on the myriad of reasons why rule 25-22.036(3) violates the stated provisions of section 120.52(8), Florida Statutes. Answer Brief at 20. Nothing in section 120.56 or in rule 28-106.201(2), Florida

Administrative Code, which governs the content of petitions, requires that FPL lay out its entire case in its initial pleading. FPL scrupulously followed the requirements of rule 28-106.201(2)(a)-(g) in drafting its petition, and the PSC's argument that the petition is somehow lacking is meritless.

The PSC also wrongly states that FPL "waited until this appeal to more fully explicate" its reasons why rule 25-22.036(3) violates specific provisions of section 120.52(8). Answer Brief at 11. That argument ignores Petitioner's Response to Respondent's Motion to Dismiss (R. 194-206), which devotes four pages to the specific reasons why rule 25-22.036(3) violates certain provisions of section 120.52(8). Any suggestion that FPL is raising new issues on appeal that were not included in FPL's initial petition and in its response to the Motion to Dismiss is simply false.

III. THE PSC IS SUBJECT TO THE APA AND CANNOT SELECTIVELY IGNORE ITS PROVISIONS BECAUSE OTHER PROCEDURES ARE MORE "EXPEDIENT" OR "EFFICIENT."

The PSC spends much of its Answer Brief explaining why it cannot take the time to comply with the requirements of the APA. For example, the PSC states: "The Commission's ability to act would be greatly restricted if it had to wait for a petition to be filed before initiating a proceeding . . . ." Answer Brief at 32. Elsewhere, the PSC notes that combining agency investigations with adjudicatory proceedings in sections 120.569 and 120.57 is "expedient" and "efficient." Answer Brief at 36.

The problem with the PSC's expediency and efficiency is that the procedures it employs are contrary to the APA, and the PSC may not selectively ignore an Act that was created for the purpose of "prescribing due process minima for the operation of Florida administrative agencies." Department of Highway Safety v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1997) quoting 3 Arthur J. England, Jr. & L. Harold Levinson, Florida Administrative Practice Manual, "Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida," March 9, 1974 (1995-97), at 3.

The PSC is subject to the APA. ASI, Inc. v. Florida Public Service Comm'n, 334 So. 2d 594, 595 (Fla. 1976) ("[T]he administrative procedure act, Section 120.50 et seq., Florida Statutes (1975) applies to proceedings before the Public Service Commission, except where specifically provided otherwise.") (emphasis supplied); Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So. 2d 982, 988 n.9 (Fla. 1996) (same). Because the PSC is an agency subject to the APA, it may only act in accordance with the procedures set forth in the APA. Prime Orlando Properties, Inc. v. Department of Business Regulation, 502 So. 2d 456, 458 (Fla. 1st DCA 1986).

Nothing in the APA authorizes an agency to initiate a proceeding on its own motion that is designed to determine substantial interests. See § 120.569(2), Fla. Stat.; R. 28-106.201(1), Fla. Admin. Code. Rather, the APA and the Uniform

Rules contemplate that proceedings will be initiated by a party substantially affected by proposed agency action. Id. Furthermore, a primary statute in the APA governing proceedings that determine substantial interests - section 120.57 - specifically does not apply to agency investigations. § 120.57(5), Fla. Stat. Instead, the APA contemplates that an agency will conduct an investigation "preliminary to agency action." Id. At the conclusion of its investigation, an agency may choose to then propose agency action and provide a clear point of entry for substantially affected persons to challenge that action. Publix Supermarkets, Inc. v. Florida Commission on Human Relations, 470 So. 2d 754 (Fla. 1st DCA 1985).[2]

---

[2] The PSC's reliance in its Answer Brief at pages 35-36 on Commission on Human Relations v. Bentley, 422 So. 2d 964 (Fla. 1st DCA 1982) as authority for proceedings that serve as both investigations and as determinations of substantial interests is misplaced. This Court, in Publix Supermarkets, Inc. v. Florida Commission on Human Relations, 470 So. 2d 754 (Fla. 1st DCA 1985), explained Bentley as follows:

> Bentley involved the very narrow issue of whether the commission could demand a Division of Administrative Hearings hearing officer to conduct section 120.57(1) proceedings to redetermine the executive director's finding of no reasonable cause to believe that an unlawful employment practice had occurred. We held that the proceedings envisioned by the commission were merely investigatory and preliminary to agency action. Consequently, under section 120.57(4), section 120.57 would not apply.

(Emphasis supplied). Section 120.57(4), cited by the Court, is now denominated as section 120.57(5).

Contrary to the assertions of the PSC, FPL has not challenged the PSC's statutory authority to conduct investigations or to regulate public utilities such as FPL. Rather, FPL challenged the validity of rule 25-22.036(3), which permits the PSC to initiate proceedings on its own motion that determine substantial interests. The rule is contrary to the APA and the Uniform Rules and is an invalid exercise of delegated legislative authority for the reasons stated in FPL's Initial Brief.

The PSC wrongly argues on page 18 of its Answer Brief that FPL's due process rights are not violated through the PSC's conduct of an investigation and a determination of FPL's substantial interests all in one proceeding. As the Third District Court of Appeal has noted: "It is well-settled that while the questions of the enactment and content of a particular administrative rule are ordinarily matters of agency discretion, this principle gives way in the face of a legislative requirement to the contrary." Guerra v. State Department of Labor & Employment Security, 427 So. 2d 1098 (Fla. 3d DCA 1983) (citations omitted). Rule 25-22.036(3) is directly contrary to section 120.54(5)(a)1, Florida Statutes, and the Uniform Rules.

The PSC repeatedly cites several Florida statutes -- sections 350.123, 364.058, 366.076(1), and 367.0822(1) -- as independent authority for the agency to initiate a proceeding. The PSC says these statutes supercede the APA and the Uniform Rules and

essentially allow the PSC to conduct any type of proceeding it desires at any time without regard to the APA or its due process protections. Answer Brief at 24-25.

There are two problems with this argument. First, none of the cited statutes states or even suggests that it is an exception to the APA.[3] See ASI, Inc.; Legal Environmental Assistance Foundation, Inc. Second, and most importantly, none of the statutes is listed as specific authority for rule 25-22.036(3), the challenged rule at issue in this case.

The only statutes listed as specific authority for rule 25-22.036(3) are section 350.127(2), Florida Statutes, which is a general grant of rulemaking authority, and section 350.01(7), Florida Statutes, which does not authorize the PSC to initiate a proceeding on its own motion. Despite the PSC's protestations to the contrary in its Answer Brief at pages 28-29, section 120.52, Florida Statutes, is clear that "[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule . . . ." (Emphasis supplied). Additionally, "[a]n agency may adopt only rules that implement or interpret the specific powers

---

[3] Section 350.123 authorizes the PSC to administer oaths, take depositions, and issue protective orders and subpoenas. This section specifically references the APA. The other three sections all authorize the commission to conduct "limited" proceedings. None of these statutes purports to supercede the APA or its procedures for conducting proceedings that determine substantial interests as described in sections 120.569 and 120.57, Florida Statutes.

and duties granted by the enabling statute." (Emphasis supplied). Neither of the statutes listed as authority for rule 25-22.036(3) even remotely suggests that the PSC may initiate a proceeding on its own motion, much less a proceeding that is designed to determine substantial interests.

Moreover, the "law implemented" section at the end of rule 25-22.036(3) includes just two of the statutes the PSC cites in its Answer Brief as authority for the rule. These statutes, sections 366.076 and 367.0822, authorize the PSC to conduct a "limited proceeding." On page 30, the PSC asks the Court to consider it as "harmless error" that the other statutes were not listed in the law implemented section. The inclusion of these statutes in the list of laws implemented would do nothing to save rule 25-22.036(3). As discussed in FPL's Initial Brief, there is no specific statutory authority for the rule, the rule is an invalid exercise of delegated legislative authority as defined in section 120.52(8), and the rule conflicts with section 120.54(5) and the Uniform Rules. It is for those reasons that the rule is invalid.

IV. RULE 25-22.036(3) IS NOT "OUTSIDE THE SCOPE" OF THE UNIFORM RULES AS DESCRIBED BY THE PSC.

The PSC states that no exception to the Uniform Rules was required for rule 25-22.036(3) because the Administration Commission found that the rule is "outside the scope" of the Uniform Rules. Answer Brief at 4. In denying the PSC's requested exception for the rule, the Administration Commission stated in its

Final Order that the rule "appl[ies] to applications, complaints, orders, or notices which do not involve, or which precede, proposed or final agency action determining substantial interests." (R. 131) (emphasis supplied). That statement was based on a letter from the PSC to the Administration Commission advising that an exception to the rule would be unnecessary, as it is among several rules that "are outside the scope of the uniform rules . . . ." (R. 126). The PSC did not explain to the Administration Commission why the rule was "outside the scope" of the Uniform Rules.

Contrary to the suggestion of the PSC in its Answer Brief, nothing in the record suggests that the Administration Commission found that the rule was outside the scope of the Uniform Rules because it allows the PSC to initiate a proceeding on its own motion. Rather, the Administration Commission found that, in order to be outside of the scope of the Uniform Rules, the rule had to involve agency action that is preliminary in nature and that does not involve the determination of substantial interests. (R. 131).

Despite the Administration Commission's characterization of the rule as one involving actions "which do not involve, or which precede, proposed or final agency action determining substantial interests," the PSC retained rule 25-22.036(3) without substantive amendment and kept it in part IV of chapter 25-22, Florida Administrative Code, which is entitled "Decisions Determining Substantial Interests." The PSC has since insisted that the rule

provides independent authority for the PSC to initiate a proceeding on its own motion to determine substantial interests. Answer Brief at 21-27. Thus, the PSC has essentially thumbed its nose at the Administration Commission.

Rule 25-22.036(3) is undoubtedly within the "scope" of the Uniform Rules. As noted in FPL's Initial Brief, rule 25-22.036(3) expressly applies to matters governed exclusively by the Uniform Rules, and an exception for the rule was denied by the Administration Commission. Thus, rule 25-22.036(3) was repealed "by operation of law" on July 1, 1998, when the PSC's prior procedural rules were replaced by the Uniform Rules. § 120.54(5)(a)1., Fla. Stat.; Saulter, 742 So. 2d at 369. This Court should find that rule 25-22.036(3) is an invalid exercise of delegated legislative authority.

Respectfully submitted,

Matthew M. Childs, P.A.
Florida Bar No. 122666
Donna E. Blanton, Esq.
Florida Bar No. 948500
Steel Hector & Davis LLP
215 S. Monroe Street, Suite 601
Tallahassee, Fla. 32301
(850) 222-2300 (phone)
(850) 222-7510 (facsimile)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Reply Brief was served by U.S. Mail this 31st day of March, 2000, to the following:

Catherine Bedell, Esq.
General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Room 301
Tallahassee, FL 32399

Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Room 110
Tallahassee, FL 32399

Robert V. Elias, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Room 370
Tallahassee, FL 32399

Mary Anne Helton, Esq.
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

James A. McGee, Esq.
Senior Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, FL 33733

Gary L. Sasso, Esq.
Carlton, Fields, Ward, Emmanuel, Smith & Cutler
P.O. Box 2861
St. Petersburg, FL 33731

Donna E. Blanton