

ORIGINAL

RECEIVED-FPSC

FLORIDA PUBLIC SERVICE COMMISSION

06 DEC 20 AM 9:36

In re Thomas H. Blakey

No.: 060813-EJ

COMMISSION
CLERK

**Petition for Declaratory Statement Before
Florida Public Service Commission**

This is a Petition for Declaratory Statement pursuant to FLA. STAT. § 120.565 and Fla. Admin. Code R. 28-105.001 filed by Petitioner, Thomas H. Blakey (hereinafter "Petitioner") with the Florida Public Service Commission (hereinafter the "PSC") through its Agency Clerk.

Parties

1. Petitioner is a resident of Florida. Petitioner's address is 11001 S.W. 88 Court, Miami, FL 33176; telephone number is (305) 271-5786. Petitioner is representing himself at this time.
2. Blanca S. Bayo, is the Agency Clerk of the PSC, and whose address is 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850.

PSC Rule/Order/Tariff Upon Which Declaratory Statement Is Sought

3. Petitioner is seeking a declaratory statement regarding Florida Power & Light (hereinafter "FPL") Tariff,¹ Sheet 6.020, subsections 2.8 and 2.9, as it applies to FPL entering upon Petitioner's property. These subsections state:

"2.8 Access to Premises. The duly authorized agents of the Company shall have safe access to the premises of the Customer at all reasonable hours for the purpose of installing, maintaining and inspecting or removing the Company's property, reading meters, and other purposes **incident to the performance under or termination of the Company's agreement with the Customer, and in such performance shall not be liable for trespass.**

2.9 Right of Way. The Customer shall grant or cause to be granted to the Company and without cost to the Company all rights, easements, permits and privileges which, in the opinion

¹/ Upon filing of the tariff, FPL is equally bound by its terms and "may not deviate from it." *Florida Power & Light v. Federal Energy Regulatory Commission*, 660 F.2d 668, 675 (5th Cir. 1981). Any ambiguity in a tariff is to be construed against the regulated entity. See *Bella Boutique Corp. v. Venezolana Internacional De Aviacion, S.A.*, 459 So.2d 440 (Fla. 3d DCA, 1984).

DOCUMENT NUMBER-DATE

11594 DEC 20 8

FPSC-COMMISSION CLERK

of the Company, are necessary for the rendering of service to the Customer." (Emphasis added).

Issue Presented

4. The issue which this Declaratory Statement is sought is whether the aforesaid Tariff grants the electric company (FPL) the unilateral right to come upon Owner A's private property (without A's consent) in order to service Owner B's property. Petitioner requests that the PSC answer this question in the negative based upon said Tariff.

Background Facts Particular to This Petition

5. Background facts relative to this Petition:

A. Petitioner is the owner of certain real property located at 11001 S.W. 88 Court, Miami, FL 33176 (hereinafter the "Subject Property"). The Subject Property is less than 5 acres and is used as a single family residence. The Subject Property is fully fenced around the entire perimeter. Access to the Subject Property is via one of three gates along S.W. 88 Court.

B. Petitioner enjoys his privacy when home and the quiet enjoyment of his residence. Consequently, Petitioner keeps the fence gates shut at all times, and has posted "No Trespassing" signs at each corner of the property and no less than every 75' along S.W. 88 Court fronting the Subject Property pursuant to FLA. STAT. § 810.011(5)(a) (although it is not necessary to post enclosed land of less than 5 acres containing a dwelling unit pursuant to subsection (5)(b)).

C. FPL is the electric service provider to the Subject Property. Petitioner is not aware of any other electric utility companies offering residential service in the vicinity of the Subject Property.

D. FPL maintains poles and electric lines along S.W. 88 Court which furnishes power from the street to those homes (or a majority of those homes upon belief) which front S.W. 88 Court. As to the Subject Property, an underground pipe (installed by the original developer of the property many years ago) runs perpendicular from the street (S.W. 88 Court) where FPL has poles, at almost mid-point along the western property line, to the house. There are no utility poles on the property; there are no transformers; there are no overhead electric wires; or any other equipment of any kind other than the electric meter which is affixed to the house

E. On at least two occasions in the latter half of 2005, Petitioner came home only to discover FPL electric line crews physically on his property working in order to service the adjoining residence to the north located at 10995 S.W. 88 Court, Miami, FL 33176 (hereinafter the "Adjoining Property"). The crews had to have manually opened the gates in order to have gained entry since the gates are not kept open. At no time material

to this Petition, has Petitioner ever granted FPL or any its subcontractors or employees permission to bring their trucks and/or crews onto the Subject Property.

F. As a consequence to the above unconsented entry by FPL, Petitioner wrote to PSC in 2006 and was assigned Complaint No. 694843E. In connection with the PSC's preliminary investigation, FPL **admitted** that it came onto the Petitioner's property not to service Petitioner's property but instead to "restore power to [Petitioner's] neighbor's house after Hurricane Wilma, because there was no other way to restore power quickly." Letter from PSC to Petitioner dated September 5, 2006 (attached as Exhibit "A" hereto and made a part hereof).

Argument

6. FPL is a regulated utility enjoying only those rights and powers specifically granted under Florida general law.

7. PSC is a state agency authorized to issue a Declaratory Statement pursuant to FLA. STAT. Chapter 120 based upon the particular facts of this matter. *See, e.g., PPI, Inc. v. Florida Dept. of Business & Professional Regulation, Division of Pari-Mutual Wagering*, 917 So.2d 1020 (Fla. 1st DCA 2006).

8. Section 2.8 of Tariff states that "[t]he duly authorized agents of the Company shall have safe access to the premises of the Customer at all reasonable hours for the purpose of installing, maintaining and inspecting or removing the Company's property, reading meters, and other purposes incident^[2] to the performance under or termination of the Company's agreement with the Customer, and in such performance shall not be liable for trespass." (Emphasis added). By the plain reading of this Tariff, a two-part test must be met in order for the electric utility to enter upon private property without committing trespass: (1) the electric utility must have its equipment on the property in question; and (2) the electric utility's purpose for entering upon the private property is "incident" to the provision of electric service to the customer, or the termination of the customer's service. In sum, there must be a **nexus** between FPL installing, servicing, repairing or removing its equipment on the customer's property **and** the furnishing or termination of that electric service to the customer. Conversely, nowhere in this Tariff does it give the electric company (FPL) the unilateral right to come upon Owner A's private property without A's consent in order to service Owner B's property.

^{2/} The term "incident" is defined in *Black's Law Dictionary* (5th Ed.): "Used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. Used as a noun, it denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the 'principal'. ..."

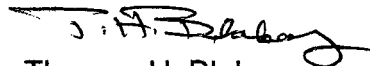
9. In sum, the only piece of equipment on the Subject Property belonging to FPL was their meter. At all material times in question, the Subject Property was receiving power and the electric bill was paid up to date. Nonetheless, FPL entered upon Petitioner's residence (which included manually opening a gate that was shut and physically entering an enclosed fenced area that was duly posted with "No Trespassing" signs) without Petitioner's prior consent so that FPL could use their bucket trucks to access the Adjoining Property. Accordingly, FPL appeared to have exceeded the scope of its Tariff in entering upon Petitioner's property based upon the facts set forth herein.

Relief Sought

10. Wherefore, it is respectfully requested that:
- A. The PSC enter a Declaratory Statement pursuant to F LA. STAT. § 120.565 and Fla. Admin. Code R. 28-105.001 delineating the breadth and scope of the FPL Tariff cited herein; and
 - B. Determine that the applicable Tariff or Tariffs governing FPL do not grant FPL (the regulated electric utility) the unilateral right to enter upon a customer's private property for purposes not related to providing electric service to that customer, e.g. such as servicing an adjacent landowner.

Dated this 13 day of December, 2006.

Respectfully submitted,



Thomas H. Blakey
11001 S.W. 88 Court
Miami, FL 33176
(305) 271-5786

Exhibit "A" attached

COMMISSIONERS:
LISA POLAK EDGAR, CHAIRMAN
J. TERRY DEASON
ISILIO ARRIAGA
MATTHEW M. CARTER II
KATRINA J. TEW

STATE OF FLORIDA



OFFICE OF THE GENERAL COUNSEL
MICHAEL G. COOKE
GENERAL COUNSEL
(850) 413-6199

Public Service Commission

September 5, 2006

Mr. Thomas H. Blakey
11001 S.W. 88 Court
Miami, Florida 33176-3742

Re: Complaint No. 694843E vs. Florida Power & Light Company

Dear Mr. Blakey:

This letter is in response to your letters dated April 25, July 10, and August 14, 2006, regarding your complaint against Florida Power & Light Company (FPL) for entering your property without your permission. You state that on at least two occasions last year FPL entered your property to service your neighbor's house or for other reasons not related to providing service to your house. You contend that FPL trespassed on your property and violated the provisions of sections 2.8 and 2.9 of its Tariff Sheet 6.020 by accessing your property for purposes other than to provide electric service to you. You have asked the Commission to direct FPL to cease and desist from entering your property for any purpose other than to read the electric meter at your house. In the alternative you ask the Commission to enter a Declaratory Statement under section 120.565, Florida Statutes, that FPL has failed to comply with its tariffs.

FPL has responded to your complaint by explaining that it entered your property in an emergency to restore power to your neighbor's house after Hurricane Wilma, because there was no other way to restore power quickly. Thereafter, the second time it entered your property after Hurricane Wilma was to remove FPL equipment damaged by the storm. FPL also indicates that its customer service representatives attempted to contact you by phone, but you did not return their calls. FPL then sent you a letter explaining the reasons its service personnel entered your property.

Your complaint is fundamentally a claim of trespass, and the Commission does not have jurisdiction to adjudicate trespass claims. The cases you cited in your complaint clearly demonstrate this. Such claims are properly litigated in Circuit Court. The tariff provisions you mention limit FPL's liability for trespass in the normal conduct of its business providing electric service to customers. The Circuit Court would need to decide whether, under the facts of your case, FPL's tariffs limit its liability.

For the reasons stated above, it is my opinion that the Commission cannot grant you the relief you request because it does not have jurisdiction to resolve trespass claims, and, therefore, Customer

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD • TALLAHASSEE, FL 32399-0850

An Affirmative Action / Equal Opportunity Employer

PAC Website: <http://www.floridapsc.com>

Internet E-mail: contact@psc.state.fl.us

COPY


Exhibit 1

Letter - Mr. Thomas H. Blakey
September 5, 2006
Page 2

Complaint No. 694843E should be closed.¹ Let me emphasize that this is my legal opinion. It does not represent the official opinion of the Commission. If you wish to pursue your complaints against FPL further before the Commission, I believe you need to file a formal petition for relief against FPL with the Director, Division of the Commission Clerk and Administrative Services, 2540, Shumard Oak Boulevard, Tallahassee, Florida 32399-0850. The formal petition must be filed pursuant to the provisions of Chapter 120, Florida Statutes, the Uniform Rules of Administrative Procedure found in Chapter 28-106, Florida Administrative Code, and the Commission's procedural rules found in Chapter 25-22, Florida Administrative Code. FPL would have the opportunity to respond to your petition, and the Commission would review your formal complaint pursuant to the provisions of Chapter 120.

If you would like to discuss this matter further, please feel free to call me at (850) 413-6187. My e-mail address is mbrown@psc.state.fl.us. I look forward to hearing from you.

Sincerely,


Martha Carter Brown
Senior Attorney

Cc: Division of Regulatory Compliance & Consumer Assistance (R. Hicks, D. Hoppe)
Roseanne Lucas - Florida Power & Light Company, 9250 West Flagler. Miami, FL 33174

¹ See, e.g., Order No. PSC-06-0306-DS-TL, issued April 19, 2006, In Docket No. 060049-TL, In re: Petition by Board of County Commissioners of Broward County for declaratory statement regarding applicability of BellSouth Telecommunications tariff provisions to rent and relocation obligations associated with BellSouth switching equipment building ("Maxihut") located at Fort Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County's Aviation Department, (holding that a declaratory statement is not an appropriate means for determining a third party's interests or for answering questions, such as liability for trespass, over which the Commission does not have authority).

COPY