

State of Florida



Public Service Commission

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

-M-E-M-O-R-A-N-D-U-M-

DATE: February 27, 2014

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Barrera, Crawford, Gilcher) *MFB*
Division of Economics (Draper, King) *EJD* *no* *I.W.D.* *J.D.* *PR*

RE: Docket No. 130188-EM – Complaint regarding electric rate structure for Gainesville Regional Utilities.

AGENDA: 03/13/2014 – Regular Agenda – Motion to Dismiss, Oral Argument Is Requested - Participation Limited To Interested Persons

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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FEB 27 AM 8:40
COMMISSION CLERK

Case Background

On July 16, 2013, Gainesville Regional Utilities (GRU) customers, Eye Associates of Gainesville, LLC and Deborah L. Martinez (Complainants), filed a Petition for Expedited Review of Electric Rate Structure for Gainesville Regional Utilities (Complaint), requesting a formal administrative hearing to review GRU’s electric rate structure. On August 2, 2013, GRU filed a motion to dismiss (Motion). Complainants filed a response in opposition to GRU’s Motion and a request for oral argument on August 12, 2013.

GRU is a municipal utility wholly owned by the City of Gainesville. GRU’s distribution system serves approximately 93,000 retail customers in both the incorporated and unincorporated areas of its service territory. GRU also provides wholesale electric service to the City of Alachua pursuant to the terms of a wholesale power contract that has been in place since 1988, and which was renewed on January 1, 2011, for a term of ten years.

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This recommendation addresses GRU's Motion to dismiss, the Complainants' response to the Motion and request for oral argument. The Commission has jurisdiction over this matter pursuant to Section 366.04(2), Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission grant Complainants' Request for Oral Argument on GRU's Motion to Dismiss?

Recommendation: Yes. The request for oral argument should be granted in order to assist the Commission to understand the parties' arguments and positions on the motion to dismiss. If the Commission grants oral argument, staff recommends granting each side five (5) minutes. (Barrera, Gilcher)

Staff Analysis: Oral Arguments are governed by Rule 25-22.0022(1), Florida Administrative Code (F.A.C.), which provides, in pertinent part:

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument. The request for oral argument shall state with particularity why oral argument would aid the Commissioners... in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

In their request for oral argument, Complainants suggest that oral argument will assist the Commission in understanding the stated cause of action upon which relief may be granted and why they believe the GRU Motion should be denied. Complainants further request that each side be granted five (5) minutes for oral argument at the Agenda Conference at which the Motion will be heard by the Commission. GRU did not file an objection to Complainants' request for oral argument.

Pursuant to Rule 25-22.0022(3), F.A.C., granting or denying a request for oral argument is within the sole discretion of the Commission. Complainants stated that they believe oral argument would assist the Commission. Staff recommends that the Commission grant the request for oral argument as it believes oral argument will assist with understanding and evaluating the issues to be decided. If the Commission grants oral argument, staff recommends granting each side five (5) minutes.

Issue 2: Should the Commission grant GRU's Motion to Dismiss?

Recommendation: Yes. The Commission should grant GRU's Motion to Dismiss and dismiss, with prejudice, the portions of the Complaint regarding GRU's rates and the wholesale contract. The portion of the Complaint challenging the rate structure in effect at the time the Complaint was filed should be dismissed without prejudice as moot. Complainants should be given leave to file an amended Complaint based on GRU's current rate structure within 15 days of the Commission's decision. The amended Complaint should state with specificity those sections of the rate structure Complainants challenge, the reasons therefor, and the specific relief requested. (Barrera, Gilcher)

Staff Analysis:

Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition. The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

Complainants' Complaint

The Complaint alleges that GRU's rate structure, both existing and proposed at the time the Complaint was filed, contain inequities between, or within, customer rate classes and such inequities are aggravating what Complainants believe to be a problem of high electric rates. The Complaint alleges that GRU's commercial class customers are unfairly subsidizing the Alachua wholesale contract to the benefit of GRU's residential class customers.

The Complaint references the findings of a cost of service and rate analysis conducted by Baker Tilly Virchow Krause, LLP, where alleged inequities between the rate-classes are shown, as well as the portions of the study Complainants believe indicate a subsidization of the Alachua wholesale contract to the benefit of the residential rate class customers. The Complaint alleges that the proposed modified, two-tiered rate structure is inequitable within the residential rate class to the extent that it shifts the majority of the proposed rate increase to customers using less than 1,000 kWh and large families using more than 1,000 kWh. The Complaint alleges, without further explanation, that Exhibits A and B to the Complaint, which constitute a "draft cost of service report" and a page from the Baker Tilly cost of service study, demonstrate the inequities of the rate structure. The alleged inequities among the classes in the challenged proposed rate structure are not stated.

Complainants also allege that GRU's alternative plan to use the existing three-tiered rate structure will substantially increase the monthly customer charge while revising the base rate energy charges within each tier. The Complaint alleges that GRU's electric rates are among the highest in the state of Florida and that its rate structure is part of the cause; that GRU overcharged its customers for fuel in "an attempt to hide the impact that GRU's contract with the Gainesville Renewable Energy Center (GREC) has on its rates;" and the projected balance of these overcharges is expected to reach \$26.2 million on September 30, 2013. The Complaint further alleges that GRU is the only utility in the state that did not pass on millions of dollars of fuel savings on to their customers during the last three years. Finally, the Complaint alleges that GRU failed to seek input from affected commercial and residential customer class stakeholders prior to proposing changes to the existing rate structure.

Complainants' disputed issues of material facts are: whether the existing and proposed GRU electric rate structures are fair, just, and reasonable; whether the existing and proposed GRU electric rate structures are nondiscriminatory; whether the existing and proposed GRU electric rate structures allocate the recovery of costs appropriately between the customer classes; and whether the existing and proposed GRU electric rate structures allocate the recovery of costs equitably between the members of a customer class. The relief sought is an expedited review of the existing and proposed GRU electric rate structure¹ and a formal hearing to address disputed issues of fact.

GRU's Motion to Dismiss

GRU's Motion asserts that the portions of the Complaint regarding GRU's rates are beyond the jurisdiction of the Commission. GRU contends that the Commission's jurisdiction over municipal utilities is limited to rate structure, pursuant to Section 366.04(2)(b), F.S. In support, GRU cites City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981), where the Florida Supreme Court held municipal electric utility rates are set by the City Commission of the city owner of the utility, not the Public Service Commission. GRU also cites Lewis v. Florida Public Service Commission, 463 So. 2d 277 (Fla. 1985), where the Florida Supreme Court held that the Public Service Commission's jurisdiction over rate structure does not include jurisdiction over actual rates charged by a municipal utility.

Additionally, GRU asserts, the portions of the Complaint concerning wholesale contracts and wholesale power agreements are beyond the jurisdiction of the Commission. GRU states the Florida Supreme Court in Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 300-301 (Fla. 2002), cautioned that the Public Service Commission's jurisdiction under Section 366.04(2)(b), F.S., is limited to the retail rate structure of electric utilities and does not give the Public Service Commission authority to regulate wholesale rate structure or wholesale power contracts that may impact the electric utility's wholesale rate structure.

The Motion alleges facts that, although outside the four corners of the Complaint, provide the current status of the challenged proposed and existing rate structure and City Commission action. These allegations include information regarding Complainants' participation in public

¹ The existing and proposed rate structure referenced are those at the time the Complaint was filed.

hearings conducted by the Gainesville City Commission on July 16, 22, and 25, 2013 regarding GRU's rates and rate structure; the subsequent vote by the City Commission to tentatively maintain GRU's current three-tiered rate structure; the City Commission action voting down the challenged proposed two-tiered electric retail rate structure; the scheduling of additional public hearings (held September 9 and 19, 2013) to consider approval and adoption of the budget resolutions and rate ordinances based on the existing three-tiered rate structure and a new tentatively approved revenue requirement.

The motion contends that the portion of the Complaint regarding rate structure is potentially moot and not ripe for consideration as the ordinance adopting rate structure has not been finalized. GRU further asserts, to the extent Complainants seek to have the Commission investigate GRU's two-tiered rate structure, the Complaint is potentially moot and not ripe for consideration because the City Commission voted not to adopt the two-tiered rate structure and instead voted to retain GRU's previously adopted three-tiered rate structure.

Complainants' Response in Opposition to the Motion to Dismiss

Complainants assert their Complaint sets forth a prima facie showing of existing and proposed retail rate structure inequities between the GRU customer rate classes upon which requested relief is being sought, and therefore, the Motion should be denied. Complainants further assert the Complaint is sufficiently ripe for consideration by the Commission because disputed issues of material fact exist with respect to the portion of the Complaint seeking review of the inequities associated with the existing GRU electric retail rate structure.

Complainants agree that GRU voted not to adopt the proposed two-tiered rate structure, but state there are still disputed issues of material fact remaining as to the inequities associated within the proposed residential and commercial retail electric rate structure because the alternate proposed three-tiered rate structure submitted to the Commission by GRU is not, as GRU claims, a continuation of the current three-tiered rate structure. Complainants state in a footnote that they are willing to amend their Complaint to strike references to the proposed two-tiered rate structure. Complainants contend that because GRU would be required by Rule 25-9.052, F.A.C., to submit to the Commission documentation regarding proposed changes to the electric retail rate structure on, or before, August 21, 2013, the Complaint challenging GRU's changes to the electric retail rate structure are also sufficiently ripe. Complainants conclude by renewing their request for formal hearing asserting that they have a statutory right to an evidentiary hearing on disputed issues of material fact related to GRU's electric retail rate structure.

Analysis

The Commission has jurisdiction over the electric rate structure of a municipal utility pursuant to Sections 366.02(2) and 366.04(2)(b), F.S. Those statutes respectively provide that "Electric utility" means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state, and that the Commission has power over municipal electric utilities solely for the purpose of providing a rate structure for all electric utilities.

Rule 25-9.051(3), F.A.C., defines rates as the price or charge for utility services. Rate structure is defined as the classification system used in justifying different rates and, more specifically, to the rate relationship between various customer classes, as well as the rate relationship between members of a customer class. Rule 25-9.051(7), F.A.C. The Commission's jurisdiction over municipal utilities is limited, specifically, the Commission does not have authority over the price charged by GRU. City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). Thus, to the extent the Complaint's allegations include GRU's rates, those portions of the Complaint should be dismissed with prejudice.

The Commission does not have authority over wholesale power agreements and contracts. Lee County Elec. Coop., Inc. v. Jacobs, 800 So. 2d. at 300-301. To the extent the Complaint seeks relief regarding alleged inequities between classes derived from wholesale power contracts, those portions of the Complaint should be dismissed with prejudice. The Complaint also alleges that the city failed to seek input from affected customers. The Commission has no jurisdiction over city commission deliberations, regardless of the subject matter. Thus, to the extent the Complaint seeks relief regarding the city's conduct on citizen input, the those portions of the Complaint should be dismissed with prejudice.

Complainants request that a hearing be held and allege disputed issues of material fact upon which the hearing should be based. To the extent the Complaint seeks a 120.57, F.S. hearing for relief regarding GRU's proposed action, the Complaint fails to show an injury in fact has occurred as to the proposed rate structure. Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a hearing under 120.569, F.S. and 2) that the substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

The allegations challenging the proposed rate structure are too speculative to show injury in fact. See Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) (threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy to warrant a Section 120.57, F.S. hearing); Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988) (some degree of loss due to economic competition is not of sufficient immediacy to establish standing). See also Order No. PSC-96-0755-FOF-EU; citing Order No. PSC-95-0348-FOF-GU, March 13, 1995; International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, at 1225-1226 (Fla. 3rd DCA 1990); and Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So.2d 1063 (Fla. 1987) (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process). Thus, to the extent the Complaint requests a 120.57, F.S., hearing challenging the proposed rate structure based upon regarding a future vote of the City Commission, the allegations are speculative, thus, those portions of the Complaint fail the first prong of the test set forth in Agrico and should be dismissed with prejudice.

As to the allegations concerning the rate structure in effect at the time the Complaint the Motion and response state allegations concerning the actions of the City Commission that took place subsequent to the filing of the Complaint, regarding the rate structure. This new information may substantially affect the outcome of these proceedings.² Without specific allegations regarding the current status of the GRU rate structure proceedings before the City Commission, it is staff's opinion that a review of the rate structure would be inefficient and ineffectual.

Thus, as to the allegations concerning the rate structure in effect at the time the Complaint was filed, the Complaint should be dismissed without prejudice to allow Complainants to file an amended complaint that specifies the factual basis for a challenge to the existing rate structure. Staff recommends Complainants be given leave to file an amended Complaint within 15 days of the Commission's decision.

For the above stated reasons, the Commission should grant GRU's Motion to Dismiss and dismiss, with prejudice, the portions of the Complaint regarding GRU's rates and the wholesale contract. The portion of the Complaint challenging the rate structure in effect at the time the Complaint was filed should be dismissed without prejudice as moot. Complainants should be given leave to file an amended Complaint based on GRU's current rate structure within 15 days of the Commission's decision. The amended Complaint should state with specificity those sections of the rate structure Complainants challenge, the reasons therefor, and the specific relief requested.

² For example, Complainants, in the response, stated that they no longer seek relief regarding the proposed two-tiered section of the rate structure as it was voted down by the City Commission.

Issue 3: Should the Commission grant a hearing in this matter?

Recommendation: Complainants are not entitled to a hearing as there is no proposed agency action upon which a hearing can be granted under Section 120.569, F.S. (Barrera, Gilcher)

Staff Analysis: The Complaint requests a hearing on alleged disputed issues of material fact. Section 120.569, F.S., grants hearing rights in proceedings in which the substantial interests of a party are determined by an agency. Agency action is defined as "the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order." Section 120.52(2), F.S. Only when an agency binds itself to a course of action in such a way as to prevent affected parties from protecting their interests at a later date, has final agency action taken place. Save our Creeks and Environmental Confederation of Southwest Florida v. Fish And Wildlife Conservation Commission, 112 So. 3d 128, 130 (Fla. 1st DCA 2013). The Commission has not made any determination or issued an order on proposed agency action to give rise to the request for hearing. Further, the Complaint seeks an investigation into GRU's actions. There is no right to a hearing to agency investigations preliminary to agency action. Section 120.57(5), F.S. Thus, staff recommends that the Commission deny Complainants' request for hearing as premature.

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Issue 4: Should this docket be closed?

Recommendation: If the Motion to Dismiss is denied, the docket should remain open to address the Complaint. If granted, the docket should remain open to allow Complainants to file an amended Complaint within the 15 day deadline. If no amended Complaint is filed within the deadline, the docket should be closed administratively. (Barrera, Gilcher)

Staff Analysis: If the Motion to Dismiss is denied, the docket should remain open to address the Complaint. If granted, the docket should remain open to allow Complainants to file an amended Complaint within the 15 day deadline. If no amended Complaint is filed within the deadline, the docket should be closed administratively.