BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Lehigh Acres Fire Control and Rescue District against LEHIGH UTILITIES, INC. regarding fire hydrant charges in Lee County	DOCKET NO. 910689-WS ORDER NO. 25158 ISSUED: 10/04/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
MICHAEL McK. WILSON

ORDER DENYING MOTION TO DISMISS AND DENYING MOTION FOR SUMMARY ORDER

BY THE COMMISSION:

CASE BACKGROUND

Lehigh Utilities, Inc., (Lehigh or utility) is a class "C" water and wastewater utility located in Lee County. Lehigh Acres Fire Control And Rescue District (the Fire District) is an independent special taxing district and public corporation in Lee County, Florida. The Fire District collects a tax from property owners in the Lehigh community and uses part of those revenues to pay for fire hydrant services which are provided by Lehigh. On June 18, 1991, the Fire District filed a two count complaint against Lehigh.

According to the complaint, since 1983, Lehigh has been charging the Fire District $55.00 per hydrant per year for the fire hydrant service. This charge, while approved by the Commission in Order No. 9777, issued February 6, 1981, is not listed as the approved charge in the utility's tariff. The only authorized charge in the utility's tariff is the pre-1981 charge of $25.00 per hydrant per year. Thus, the Fire District argues in count I of its complaint, the utility has been charging an unauthorized rate since 1983. It asks that the Commission order Lehigh to refund the difference between the rate approved in Order No. 9777 and the rate that appears in the utility's tariff. The Fire District calculates the amount of the refund to be some $91,380.00 through the year 1990.

In count II of its complaint, the Fire District asserts that even if the Commission finds that the $55.00 charge was lawfully collected, the charge is unreasonable. It claims that the charge is not reasonably related to costs incurred by the utility to maintain the hydrants. Besides, the Fire District argues, since the fire hydrants themselves are not private property, but are public domain, the Fire District should be allowed to maintain the fire hydrants.

On July 10, 1991, Lehigh filed a motion to dismiss the Fire District's complaint. That motion addresses only count I. On July 22, 1991, the Fire District filed a "Brief In Opposition To Motion To Dismiss" as its response to the motion. Then, on August 1, 1991, Lehigh filed a motion for a summary order dismissing count II of the Fire District's complaint. On August 19, 1991, the Fire District filed a response to that motion. Although the Fire District's response to Lehigh's second motion was not timely filed under Rule 25-22.037(2)(b), Florida Administrative Code, Lehigh has not asked that the response be stricken, and we see no harm in considering it.

MOTION TO DISMISS COUNT I

The utility's motion to dismiss count I is in the nature of a motion to dismiss for failure to state a cause of action. The utility has conceded, for purposes of this motion, that all of the facts alleged in the complaint are deemed to be true.

In its motion, the utility asserts that the authority for its assessing the fire hydrant charge comes from the Commission through Order No. 9777, and not through a stamped tariff. The stamping of the tariffs, Lehigh argues, is nothing more than a ministerial act; to conclude otherwise would be to ascribe more authority to the tariff than to the Commission's order. By analogy, the utility argues, if the Commission had erroneously stamped tariffs containing rates higher than what the Commission had approved in an order, the Commission would assert that the rate in the Commission order, not that contained in the tariff, was the lawful rate.

In its response, the Fire District cites, as it did in its complaint, a December 3, 1981, letter from the utility to staff apparently stating that the utility consciously did not submit the fire hydrant tariff. In addition, the Fire District argues that Florida law recognizes the importance of having approved tariffs.

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In its response, the Fire District cites, as it did in its complaint, a December 3, 1981, letter from the utility to staff apparently stating that the utility consciously did not submit the fire hydrant tariff. In addition, the Fire District argues that Florida law recognizes the importance of having approved tariffs.

Section 367.091, Florida Statutes, Rule 25-30.135, Florida Administrative Code, and Rule 25-9.004, Florida Administrative Code, all require that utility rates and/or charges be contained in stamped, approved tariffs. The Fire District states, "The law does not prohibit the [C]ommission staff giving the 'stamp of approval' pursuant to a Commission order. The law does prohibit the imposition of increased rates without the 'stamp of approval.'"

The only question we need answer in this case at this point is whether the Fire District has stated a valid cause of action in count I of its complaint. We think that count I raises at least one legitimate legal question: Whether the utility violated Order No. 9777 by implementing the increased hydrant charge prior to approval of the tariff. (The Fire District states in its response, but not in its complaint, that there is a question as to whether the utility has violated Section 367.091, Florida Statutes, Rule 25-30.135, Florida Administrative Code, and Rule 25-9.004, Florida Administrative Code, by assessing a charge not contained in its approved tariff. We note that since this question was not raised in the complaint, we need not consider it for purposes of this motion.)

On July 26, 1991, Lehigh transmitted the tariff in question with the disclaimer that it was a replacement. In addition, at the September 10, 1991, Agenda Conference, it was brought to our attention that the original tariff was recently found and that it was sent to the Commission in 1981; however, for some reason, the tariff was never approved.

Order No. 9777 states, "ORDERED that the revised tariff pages shall not become effective until filed and approved by the Commission." Lehigh argues that this means that it is the "tariff pages" themselves, not the rates and charges contained therein, which do not become "effective" (or officially sanctioned) until filed and stamped.

In Commission orders for water or wastewater utility cases, the effective date of revised rates and/or charges is after or upon the stamped approval date on the revised tariff pages. In its orders, the Commission requires the utility to submit revised tariff pages, directs staff to stamp and approve the tariff pages if the tariff pages conform with the order, and establishes the effective date to be on or after approval of the tariff pages. In Order No. 9777, the Commission did not deviate from this scheme.

Lehigh seems to think that the only question here is the authority to charge. We agree; however, the Commission attaches conditions to that authority. When to charge is as much a part of the grant of authority as how much to charge.

The primary remedy sought by the Fire District for the utility's alleged violation of the Commission's order is a refund of some $91,000. We do not believe that Lehigh, or any other utility for that matter, can legitimately argue that this Commission does not have the legal authority to order a refund of rates or charges which were collected under procedurally flawed circumstances, such as those apparently present in this case. However, the appropriate remedy, whether a refund or fine, is a matter for the Commission's discretion once a cause of action is established. Taking all the facts alleged in count I to be true, as the Commission should for purposes of Lehigh's motion, we think that count I states a valid cause of action. The utility's motion to dismiss count I is therefore denied.

MOTION FOR SUMMARY ORDER ON COUNT II

As stated in the Case Background, in count II of its complaint, the Fire District claims that the hydrant charge approved by the Commission in Order No. 9777 is unreasonable and not related to any service or maintenance provided by Lehigh. Furthermore, the Fire District asks to be allowed to maintain the hydrants.

In its motion for summary order on count II, Lehigh asserts that count II is, in essence, an attack on the Commission's findings in Order No. 9777. Lehigh argues that reducing the fire hydrant rate, reduces the revenue requirement; and if the revenue requirement is reduced, all of the utility's rates would have to be reevaluated. The complaint, Lehigh maintains, is not the proper vehicle for initiating what would be a full rate proceeding.

In its response, the Fire District contends that what it is asking for is more in the nature of a petition for a limited proceeding under Section 367.0822, Florida Statutes. The justification it offers for the Commission to modify the current hydrant rate is a significant change in circumstances and the public interest. The Fire District argues that since 1981, when the Commission approved the increased charge, growth in the Lehigh area has been such that the number of fire hydrants needed has

doubled. Growth, the Fire District claims, is the significant change in circumstances which should compel the Commission to revise the charge.

We do not agree that reevaluating just the fire hydrant charge will absolutely necessitate a full rate proceeding. However, if we summarily deny the complaint, the Fire District's only opportunity to air its grievance may be in a full rate proceeding, whenever Lehigh files for one. The Fire District should be given at least the opportunity to disprove the reasonableness of the fire hydrant charge in a complaint proceeding. The motion for summary order is therefore denied.

It is therefore,

ORDERED by the Florida Public Service Commission that the motion to dismiss filed by Lehigh Utilities, Inc., is denied. It is further

ORDERED that the motion for summary order filed by Lehigh Utilities, Inc., is denied. It is further

ORDERED that the docket shall remain open for further proceedings on the complaint.

By ORDER of the Florida Public Service Commission, this 4th day of OCTOBER, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MJF

Chairman Beard dissents to the decision in part; he would grant the motion to dismiss count I.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.