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ORIGINAL

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Sent: Tuesday, December 13, 2005 4:49 PM
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Subject: Electronic Filing for Docket No. 050891-EI FPL's Motion to Dismiss Kmart Corporation's Complaint

Attachments: FPL's M to Dismiss Kmart's Complaint.FINAL.doc

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Electronic Filing

a. Person responsible for this electronic filing:

Natalie F. Smith
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b. Docket No. 050891-EI

Complaint of Kmart Corporation against Florida Power & Light Company and motion to compel FPL to continue electric service and to cease and desist demands for deposit pending final decision regarding complaint.

c. Document being filed on behalf of Florida Power & Light Company.

d. There are a total of 11 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Motion to Dismiss Kmart Corporation's Complaint

(See attached file: FPL's M to Dismiss Kmart's Complaint.FINAL.doc)

Thank you for your attention and cooperation to this request.

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Kmart Corporation)
Against Florida Power & Light Company)
_____)

Docket No. 050891-EI

Filed: December 13, 2005

FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS
KMART CORPORATION'S COMPLAINT

Pursuant to Rules 28-106.201(4), 25-106.204(2), Florida Administrative Code, Florida Power & Light Company ("FPL") hereby files this Motion to Dismiss the Complaint of Kmart Corporation ("Kmart") Against Florida Power & Light Company ("Complaint") delivered to FPL on November 23, 2005, and in support states:

Legal Standard

1. A motion to dismiss raises as a question of law whether, accepting all allegations in the complaint as true and not looking beyond the complaint, the complaint alleges sufficient facts to state a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). A pleading should be dismissed unless all of the elements of a cause of action are properly alleged. See Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957).

Argument

2. Accepting all allegations in Kmart's Complaint as true, and drawing all reasonable inferences in favor of Kmart, Kmart's Complaint must be dismissed with prejudice as a matter of law because Kmart has provided no basis upon which the Commission can grant the requested relief. The relief sought by Kmart in this proceeding is that the Commission adopt a new and different interpretation to an existing Commission rule, which interpretation contradicts the plain and unambiguous language of the rule. Specifically, Kmart requests that the Commission interpret its rule on customer deposits to, among other things, "require advance

public disclosure of the criteria a utility uses for determination of satisfactory credit,” in contrast to the plain and unambiguous language of the rule. (Complaint ¶ 11). The Commission should reject Kmart’s argument on legal grounds because the Commission lacks legislative authority add new requirements to an existing rule without following the procedures established in the Florida Administrative Procedure Act, Chapter 120, Florida Statutes (the “APA”). See §§ 120.52(8), 120.54, Fla. Stat. (2005).

3. Alternatively, Kmart argues that the deposit rule constitutes an illegal delegation of authority. (Complaint ¶ 14). Again, the relief requested conflicts with the procedures outlined in the APA, and is not germane to this substantial interests proceeding. See § 120.56, Fla. Stat. (2005). Kmart cites no statute or rule that entitles it to the relief requested in the context of a substantial interest determination, and there is not one.

4. The Uniform Rules of Procedure that apply to Kmart’s Complaint require that petitions initiating proceedings specifically state the facts, rules and laws that warrant relief. See Rule 28-106.201(2), (e)-(g), Fla. Admin. Code (2005).¹ The sanction for failure to comply with

¹ In regard to initiation of agency proceedings, Rule 28-106.201(2), Florida Administrative Code provides in pertinent part as follows:

All petitions filed under these rules shall contain:

- (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency’s proposed action;
- (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency’s proposed action; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency’s proposed action.

See Rule 28-106.201(2)(e)-(g), Fla. Admin. Code (2005) (emphasis added).

this requirement is dismissal of the complaint. See id. 28-106.201(4), Fla. Admin. Code.

Further, “where it conclusively appears from the face of the petition that the defect cannot be cured,” dismissal should be with prejudice. See id. Dismissal of Kmart’s Complaint should be with prejudice because the defect in Kmart’s Complaint cannot be cured as there is no administrative remedy for Kmart’s alleged injury in the context of a substantial interests proceeding.

5. While Kmart generally complains that FPL’s action in requiring an additional customer deposit due to creditworthiness concerns violates the “express terms and clear purpose of FAC 25-6.097” (the “deposit rule”) (Complaint ¶ 7), Kmart’s Complaint is devoid of any “specific” statement of facts, rules, or statutes that warrant reversal or modification of the agency’s proposed action. See Rule 28-106.201(2), Fla. Admin. Code (2005). Neither Section 366.03, .04, or .05 cited by Kmart warrants the requested relief of adding language to an unambiguous rule. Rather, these sections and the cases and rules construing them, including the deposit rule itself, support upholding the plain language of the deposit rule. See, e.g., Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 718 (Fla. 1983).

6. Indeed, the facts and laws cited by Kmart in its Complaint demonstrate that FPL’s actions comply with the very rule cited in the Complaint. (Complaint ¶¶ 8-9). Subsection (3) of Rule 25-6.097, addressed by Kmart on pages 8 through 10 of its Complaint, provides the following clear directive regarding additional deposits:

New or additional deposits. A utility may require, upon reasonable written notice of not less than thirty (30) days, a new deposit, where previously waived or returned, or additional deposit, in order to secure payment of current bills. Such request shall be separate and apart from any bill for service and shall explain the reason for such new or additional deposit, provided, however, that the total amount of the required deposit shall not exceed an amount equal to twice the

average charges for actual usage of electric service for the twelve month period immediately prior to the date of notice. In the event the customer has had service less than twelve months, then the utility shall base its new or additional deposit upon the average actual monthly usage available.

See Rule 25-6.097(3), Fla. Admin. Code (2005). Consistent with the rule provisions, Section 6.1(2) of the General Rules and Regulations of FPL's Tariff (Sheet 6.040) provides that "[t]he Company may require a subsequent Security Deposit from a Customer, including one whose initial Security Deposit was refunded/released." There is no facial allegation by Kmart which, if accepted, would allege a violation of this Rule or Tariff provision.

7. Kmart's Complaint conspicuously avoids quoting subsection (3) of the deposit rule, addressed above, and proceeds directly to the legislative and decisional history of that provision. Rules of construction are inapplicable, however, where, as here, the language of the rule is plain and unambiguous. See, e.g., Eager v. Florida Keys Aqueduct Auth., 580 So. 2d 771, 772 (Fla. 3d DCA 1991) (reversing agency decision as clearly erroneous because the agency's definition of "unit" was unambiguous and the agency could not interpret that definition to include something new and different from the rule language); Woodley v. Department of Health and Rehabilitative Servs., 505 So. 2d 676, 678 (Fla. 1st DCA 1987) (reversing agency's construction of its own rule that clearly contradicted the unambiguous language of the rule). Therefore, it is inappropriate to resort to canons of statutory construction and "interpretation" of the rule, as suggested by Kmart.

8. Even if it was appropriate to resort to canons of statutory construction, the legislative history of the additional deposit provision, including the portions cited by Kmart, supports the instant application of the rule. As Kmart points out in its Complaint, the deposit rule has been in existence since 1969 and has been amended several times over the years. The provision related to additional deposits has been in place since 1976, and has not been amended

since its enactment. (Complaint ¶ 25) During the course of rulemaking, as noted by Kmart, the Commission said it recognized that “circumstances may dictate the necessity of requiring new or additional deposits from a customer.” See Order No. 5778, Docket No. 73322 (issued June 18, 1973). The Commission proceeded to state that “[e]xamples of such circumstances would be excessive slow payment, or a marked increase in consumption together with a slow payment record.” See *id.* This was clearly not an exhaustive list and the list was not included in the language of the rule, presumably to afford the utility flexibility in determining when an additional deposit is needed.

9. Courts have acknowledged the purpose served by subsection (3) of the deposit rule. Holding in part that the deposit policy articulated in subsection (3) of the deposit rule was “reasonable and non-discriminatory” on its face, the wisdom of the provision was explained by the Florida Supreme Court in Pan American World Airways, Inc. v. Florida Public Serv. Comm’n, 427 So. 2d 716, 718-19 (Fla. 1983) (“Pan Am”), also cited by Kmart. According to the Pan Am Court:

The primary concern reflected in the PSC’s regulation of public utility security deposits appears to be protecting the masses of utility customers from increased rates resulting from large commercial customers defaulting on their payments.

See *id.* at 718. As further explained by the Commission in Pantry Pride Enterprises, Inc. v. Florida Power & Light Co., Order No. 10856, Docket No. 820026-EU (issued June 4, 1982) (“Pantry Pride”):

Pantry Pride suggested that the Commission establish a separate deposit policy for very large customers. We decline to do so for two reasons. First, requiring anything less than a full two month’s deposit would leave other ratepayers unprotected because FPL cannot discontinue service until a monthly bill has remained unpaid for two months. With size comes concomitant risk of default; Pantry Pride’s deposit requirement is so large precisely because its consumption is so large. Second, it would be difficult to establish defensible criteria that would allow the company to require some commercial customers to post a full two

months' deposit and to allow others to post something less than a full deposit. Since the amount of the deposit depends on the amount of consumption, size alone does not justify departure from the uniform deposit requirement.

See id. Order No. 10856 at pp. 8-9.

10. As referenced in Exhibit A of the Complaint, FPL by letter, dated September 28, 2005 requested an additional deposit \$299,320.00 from Kmart (at that time Kmart had previously provided FPL a deposit in the amount of \$1,399,320.00). Conditions had changed since Kmart's deposit requirement had last been reviewed. Consequently, FPL must request an additional deposit in accordance with the language of the deposit rule, as well as its intent and purpose, because FPL's annual review of creditworthiness Kmart and its parent company Sears Holdings Corporation indicated that FPL should be concerned about the creditworthiness of Kmart, a very large customer.² The triggering mechanisms for the additional deposit requirement were the predictive scoring – financial stress scores and predictive scoring – standard credit scores of Dun & Bradstreet (“D&B”) and the Standard and Poor's credit rating of Kmart's parent company (BB+, Negative Outlook) that raised concerns on FPL's part regarding Kmart's payment history and financial stress classification. Consistent with Section 366.03, FPL wishes to protect the entire body of customers from potential default or bankruptcy by Kmart. There is no allegation by Kmart which, if accepted, would show that FPL is singling Kmart out or in any way applying the rule in a discriminatory fashion.

11. FPL is responsible for managing its own debt and seeking additional deposits from customers as needed. The Commission recognized in Order No. PSC-95-0500-FOF-EI,

² According to the most recently filed Form 10-Q, Sears Holdings Corporation is a Delaware corporation formed for the purpose of consummating the business combination of Kmart Holding Corporation and Sears, Roebuck and Co., which was completed on March 24, 2005.

relating to the deposit waiver provision in a Florida Power Corporation (“FPC” now “Progress Energy Florida”) tariff that “[t]he deposit requirement is discretionary to a utility, but the utility is responsible for managing bad debt.” See Order No. PSC-95-0500-FOF-EI, Docket No. 950195-EI (issued April 24, 1995) (addressing, in part, the deposit waiver provision of the FPC tariff). In the act of managing bad debt, it is FPL’s responsibility to take the action of requiring an additional deposit where, as here, the amount of the deposit does not exceed the exposure the Company would have if Kmart filed for bankruptcy. If Kmart disputes the D&B credit-rating agency reports and predictive scorings, it has the right to challenge the evaluation independently of the utility’s right to seek an additional deposit. See *id.* at p. 5 (“The credit rating agency will inform FPC whether the deposit can be waived or not. In the case of a negative evaluation, like with any application process for a credit card, the customer has the right to challenge the credit evaluation.”) If the creditworthiness concerns subside, then the deposit may be refunded with interest.

12. Kmart’ arguments that subsection (3) applies only to “new customers” and customers that do not have a “satisfactory payment record” are not supported by the language of the rule. (Complaint ¶¶ 33-42). The plain language of the rule provides that FPL may require “a new deposit . . . or additional deposit,”³ and there is no waiver of the additional deposit requirement for customers with a “satisfactory payment record.” See Rule 25-6.097(3), Fla. Admin. Code (2005). Again, Kmart would have this Commission apply a different interpretation to the plain language of the rule and add such requirements as specific advance notice and a

³ Both Pan Am and Pantry Pride addressed application of the “new deposit” language of subsection (3) of the deposit rule, but not the “additional deposit” language, which is also permitted. As the Pan Am court acknowledged, no rule of the PSC gave any customer – new or old – “an enforceable right to continued deposit-free service from FPL.” See Pan Am, 427 So. 2d at 718.

satisfactory payment record in an attempt to circumvent FPL's request for an additional deposit. Kmart's Complaint amounts to an out-of-time motion for reconsideration of Commission rulemaking proceedings that have long been closed. To apply a new and different interpretation to a clear and unambiguous rule in the context of a substantial interests determination would violate the APA, which requires that all agency action defined as a rule be adopted in accordance with its rulemaking procedures. See §§ 120.52(8)(a), 120.54, Fla. Stat. (2005). Unless and until the Commission changes the rule in accordance with the APA, it is obligated to follow the rule. See, e.g., Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306, 308 (Fla. 1st DCA 1997) (holding that agency was obligated to follow its own rule expressly providing that filing due date for certificate of need applications "shall not be expended."); Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193, 196-97 (Fla. 1st DCA 1991) (finding that a letter that prescribed law or policy and imposed requirements or information not specifically required by statute or existing rule constituted a rule within the meaning of the law and must be adopted in accordance with Section 120.54, Florida Statutes). The Commission should reject Kmart's invitation to use this substantial interests proceeding to effect an amendment to an unambiguous existing rule.

13. Further, Kmart's argument that FPL's request for an additional deposit is "illegally based on consideration of" the financial status of the holding company is also without merit. Nothing in subsection (3) specifies that only the financial viability of the customer, and not its parent company, may be considered in determining whether to require an additional deposit. Subsection (1)(a) of Rule 25-6.097, related to establishment of credit, was amended several years ago to add the provision that "[f]or non-residential customers, a satisfactory guarantor need not be a customer of the utility." See Rule 25-6.097(1)(a), Fla. Admin. Code

(2005). The reason for the change was to acknowledge that “the credit-worthiness of a nationally recognized parent organization of a Florida-based business may be sufficient protection for payment of utility bills.” See Order No. PSC-98-0926-PCO-EI, Docket No. 980658-EI (issued July 7, 1998). The converse is also true. The credit-worthiness of a nationally recognized parent organization, such as Kmart, may not afford sufficient protection against default, and an additional deposit would be, and is, required.

14. Kmart’s arguments that the rule and FPL’s tariff provisions do not afford it adequate due process are red herrings designed to distract the Commission from Kmart’s true intent, which is to effect a rule amendment. For example, Kmart’s argument that the Commission’s non-rule policy of asking utilities to be consistent in application of their deposit requirements in order to obtain consistent application does not portend the “interpretation” of Rule 25-6.097 suggested by Kmart, which is to add the requirement of advance public disclosure of the criteria a utility uses for determination of satisfactory credit. (Complaint ¶ 11). Further, Rule 25-6.097 contains an exclusive statement of the requirements for requesting additional deposits, and there is no rule requirement that this information be repeated in the Tariff. See Pan Am, 427 So. 2d at 719-20. Indeed, the rule requirements that the request for additional deposit must be provided “upon reasonable written notice of not less than thirty (30) days” and “shall be separate and apart from any bill for service and shall explain the reason for such new or additional deposit” are intended to effect adequate notice of the criteria used by the utility. Due Process does not require more, and the cases cited by Kmart do not dictate otherwise.

Conclusion

15. In sum, accepting all allegations in Kmart’s Complaint as true, there is no basis upon which the Commission can grant the requested relief. Kmart’s Complaint amounts to an

assault on a PSC rule that was promulgated years ago in accordance with the provisions of the APA. FPL's action in requesting an additional deposit from Kmart due to default risk complies with the provisions of the deposit rule and the intent and purpose of the rule, which is to protect FPL's other customers from the potential default of this large customer. Unless and until the deposit rule is modified in accordance with the APA, the Commission is bound to apply the language of its clear and unambiguous rule. The Commission should reject Kmart's invitation to effect a rule amendment or rule challenge in the context of a substantial interests determination, and dismiss Kmart's complaint with prejudice.

WHEREFORE, for the above and foregoing reasons, FPL respectfully requests that the Commission dismiss Kmart's Complaint with prejudice.

Respectfully submitted,

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By: s/Natalie F. Smith
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FPL's Motion to Dismiss was served by electronic mail (*) and U.S. Mail this 13th day of December, 2005, to the following:

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