

State of Florida



Public Service Commission
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COMMISSION
CLERK

DATE: July 14, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Cowdery) *EJD S.M.C.*
Division of Economic Regulation (Draper, Kummer) *DL*

RE: Docket No. 110085-EI – Petition for Declaratory Statement by Mediterranean Manors, Inc., regarding applicability of Progress Energy tariff provisions.

AGENDA: 07/26/11 – Regular Agenda – Decision on Declaratory Statement – Participation is at the Discretion of the Commission

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: 07/28/11 (Final order must be issued by this date pursuant to Section 120.565(3), Florida Statutes)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\110085.RCM.DOC

Case Background

On March 28, 2011, Mediterranean Manors Association, Inc. (Mediterranean Manors) filed with the Commission a Complaint and Initiation of Formal Proceedings. Upon inquiry by Commission staff, Mediterranean Manors informed staff that it had intended the filing to be treated as a request for a declaratory statement. On April 29, 2011, Mediterranean Manors filed an Amended Petition for Declaratory Statement before the Florida Public Service Commission (Amended Petition) regarding the appropriate application of Progress Energy Florida, Inc.'s (Progress) tariff provisions and Rules 25-6.033(1) and 25-6.037, Florida Administrative Code, to maintenance and notification responsibilities associated with underground electrical cables running from a pad-mount transformer to Mediterranean Manors' service entrance.

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FPSC-COMMISSION CLERK

Docket No. 110085-EI

Date: July 14, 2011

Notice of the Amended Petition was published in the May 13, 2011, edition of the Florida Administrative Weekly, informing interested persons of the Amended Petition. On May 19, 2011, Progress filed a Petition for Leave to Intervene and Response to Petition for Declaratory Statement (Response). Progress' petition to intervene was granted by Order No. PSC-11-0242-PCO-EI, issued June 1, 2011.

Pursuant to Section 120.565, F.S., and Rule 28-105.003, F.A.C., an agency must issue a declaratory statement or deny the petition within 90 days after the filing of the petition. Thus, the Commission must issue an order on the Amended Petition by July 28, 2011

The Commission has jurisdiction pursuant to Section 120.565, and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should Mediterranean Manors' Amended Petition for Declaratory Statement be granted?

Recommendation: The Commission should grant in part Mediterranean Manors' Amended Petition and issue a declaratory statement regarding the applicability of Progress' Tariff to Mediterranean Manors' particular set of circumstances. The Commission should deny the Amended Petition to the extent that it requests a determination of the conduct of Progress. The Commission should declare that, based on the facts set forth in the Amended Petition as applied to Progress' Tariff: (a) Mediterranean Manors is a multi-occupancy residential building and therefore Section 11.06 of Progress Tariff Sheet No. 4.166 is the applicable tariff; (b) the appropriate point of delivery with respect to Mediterranean Manors' buildings is the utility designated point of delivery, which is the transformer; (c) Mediterranean Manors is responsible for maintenance of the underground electrical cables running from the pad-mount transformer to its service entrance; and (d) the issue of whether Mediterranean Manors had the right to receive notice that Progress would no longer be responsible for cable maintenance is moot, based on staff's recommendation on Question (c), and, furthermore, Mediterranean Manors has not identified any tariff provision which would give it a right to receive such notice. (Cowdery, Kummer, Draper)

Staff Analysis:

Section 120.565, F.S., governs the issuance of a declaratory statement by an agency. In pertinent part it provides that:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.¹

Once the Commission accepts a tariff, the tariff has the force and effect of law. *BellSouth Telecommunications, Inc. v. Jacobs*, 834 So. 2d 855, 859 (Fla. 2002). Thus, the Commission may issue a declaratory statement interpreting tariff provisions.

The purpose and use of a declaratory statement is set forth in Rule 28-105.001, F.A.C., as follows:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules or

¹ In addition, Rule 28-105.002, F.A.C., states that the petitioner seeking a declaratory statement must provide the "[s]tatutory provision(s), agency rule(s), or agency order(s) on which the declaratory statement is sought."

orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

I. Mediterranean Manors' Amended Petition for Declaratory Statement

A. Summary of the Facts as Alleged by Mediterranean Manors in its Amended Petition

Mediterranean Manors states that it is comprised of eleven condominiums located in Dunedin, Florida, with a total of 27 buildings that house four hundred units. Progress provides electric utility service to Mediterranean Manors. To Mediterranean Manors' best knowledge and belief, the construction permit for electrical facilities was first issued for Mediterranean Manors around September 1974.

In and around January 2006, Progress undertook to repair a set of underground electrical cables running from a pad-mount transformer to the service entrance on buildings five and six of Mediterranean Condominium IX, which collectively house seventy-two units. These underground electric cables were initially installed by Florida Power Corporation², now known as Progress Energy Florida. During the course of the 2006 repair, Progress spliced and repaired the cable.

At the time of the 2006 repair, Progress did not disclaim responsibility for maintaining or repairing the underground cables, and, subsequent to the 2006 repair, Progress has not provided any indication to Mediterranean Manors that it was not responsible for the underground cables. Progress continued to provide uninterrupted utility service to Mediterranean Manors after the 2006 repair.

On or about August 26, 2009, an electrical explosion occurred at the exact location of the 2006 repair. Progress shut the power off to the affected cable at the request of the Dunedin Fire Department. On or about August 26, 2009, Mediterranean Manors and Progress examined the cables, and at that time, Progress informed Mediterranean Manors that Progress was no longer responsible for the damaged cables. As a result of Progress disclaiming responsibility for its previous repair, Mediterranean Manors paid \$70,057 to a third party to make necessary repairs.

Mediterranean Manors' Amended Petition includes copies of electric bills from Progress to Mediterranean Manors for January 2006, August 2009, and February 2011. Mediterranean Manors' Amended Petition also includes copies of correspondence, which Mediterranean Manors alleges shows that Progress first categorized Mediterranean Manors as a commercial entity for purposes of interpreting the Tariff, and later classified Mediterranean Manors as a multiple-occupancy residential building.

² With regard to this statement of fact, Mediterranean Manors' Amended Petition incorrectly identified Florida Power Corporation as Florida Power & Light.

B. Statutory Provisions, Agency Rules, and Agency Orders on Which the Declaratory Statement is Sought

Mediterranean Manors seeks a declaratory statement concerning Progress' responsibilities under the Florida Administrative Code and its Tariff. In this regard, Mediterranean Manors cites to Rules 25-6.033(1) and 25-6.037, F.A.C. Rule 25-6.033(1) states:

Each utility may adopt such additional non-discriminatory rules and regulations governing its relations with customers as are necessary and which are not inconsistent with these rules or orders of the Commission. Such rules and regulations shall constitute an integral part of the utility's tariffs and shall be filed with them.

Rule 25-6.037, F.A.C., states:

Each utility, unless specifically relieved in any case by the Commission from such obligations, shall operate and maintain in safe, efficient, and proper condition, pursuant to the standards referenced herein, all of the facilities and equipment used in connection with the production, transmission, distribution, regulation, and delivery of electricity to any customer up to the point of delivery. The utility is also responsible for the safe, efficient measurement of electrical consumption consistent with test procedures and accuracies prescribed by the Commission.

In addition, Mediterranean Manors cites to Progress' Tariff Sections 11.06 and 11.01, concerning the proper characterization of Mediterranean Manors as a multi-occupancy residential building and Progress' responsibility for maintenance of the underground electrical cables.

C. Mediterranean Manors Request for Declaratory Statement

Mediterranean Manors requests that the Commission issue a declaratory statement addressing the following questions:

- (a) How should Mediterranean Manors be classified under Progress' Tariff?
- (b) Under Progress' Tariff, what is the appropriate point of delivery, with respect to the Mediterranean Manors' buildings at issue in the Amended Petition?
- (c) Is Progress responsible for maintenance of the underground electrical cables running from the pad-mount transformer to Mediterranean Manors' service entrance? Specifically, assuming that Mediterranean Manors is classified as a multiple-occupancy residential building under Tariff Section 11.06, would not the application of Section 11.06(4)(a)(iv), particularly when read in conjunction with Section 11.01(6), hold Progress responsible for all of its facilities, including the underground cables at issue?
- (d) Considering that Progress undertook repairs to the cables in 2006, what duty did Progress have to notify Mediterranean Manors that it would no longer be responsible for maintenance of the cables?

II. Progress Energy's Response

Progress states that it provided its Response to clarify the background of this matter and to make clear that there are certain disputed issues of material fact in the Amended Petition.

Progress objects to Mediterranean Manors' factual allegations that Progress originally installed the underground electrical cable at issue, and that it improperly repaired the cable running from the pad-mounted transformer to some of Mediterranean Manors' buildings in 2006 and refused to replace the damaged cable in 2009. Progress further states that there are numerous disputed issues of material fact in Mediterranean Manors' Amended Petition. Finally, in addition to listing alleged disputed issues of material fact, Progress lists three ultimate facts which it believes are necessary for the Commission to make a declaratory statement regarding Mediterranean Manor's questions (a) and (b). These ultimate facts are that: i) Mediterranean Manors is a current customer and was a customer of Progress in 2006 and 2009; ii) Mediterranean Manor is a multiple-occupancy building subject to Tariff Section 11; and iii) pursuant to the Tariff, Progress shall designate the point of delivery, and consistent with its policies, Progress designated the point of delivery as the pad-mounted transformer or secondary pedestal.

Progress states that on or about December 6, 2010, Mediterranean Manors filed suit against Progress in circuit court, alleging that Progress had damaged an underground electric cable, and seeking a declaratory judgment that, pursuant to Section 1.02 of Progress' Tariff, Progress had an obligation to maintain, repair, or replace the damaged cable running from the pad-mounted transformer to Mediterranean Manors' buildings. Progress further states that it filed a motion to dismiss the complaint or to stay proceedings on the basis that the Public Service Commission has primary jurisdiction to address the Tariff interpretation issues raised by Mediterranean Manors, and that Section 11.06, not Section 1.02, was the applicable Tariff section. Progress states that the circuit court issued an order granting Progress' motion and abated the court proceeding to allow the Commission to make a determination as to what Tariff section applies in this matter and for a determination of Progress' service obligations to Mediterranean Manors under the Tariff.

Progress states that Mediterranean Manors in its Amended Petition has abandoned its claims that Section 1.02 of the Tariff controls, and now seeks a declaratory statement under Section 11.06 of the Tariff, based on disputed facts regarding the alleged attempted repair and replacement of the damaged underground cable.

As its requested relief, Progress states that the Commission should issue a declaratory statement resolving Mediterranean Manors' questions (a) and (b). Progress states that Mediterranean Manors and Progress agree that Mediterranean Manors should be classified as a multiple-occupancy building customer and that, consequently, Tariff Section 11.06 applies. Progress states that Section 11 provides that Progress will provide electrical distribution service to the point of delivery and that, pursuant to the company's policies and rules, Progress has designated the point of delivery for Mediterranean Manor as the secondary side of the pad-mounted transformer. Progress' position is that the point of delivery is not the Mediterranean Manors buildings, and that Progress is not responsible for replacing underground electrical

cables for multiple-occupancy buildings that run from the pad-mount transformer to the service entrance on the customer's side of the point of delivery.

As further relief, Progress states that the Commission should decline to resolve questions (c) and (d) as inappropriate for a declaratory statement because these questions: 1) request a determination of the conduct of Progress, contrary to Rule 28-105.001, F.A.C., and 2) contain material issues of disputed fact.³ Progress states that, alternatively, the Commission should refer questions (c) and (d) to a formal proceeding for investigation and adjudication. Progress states that if Mediterranean Manors would like an answer to questions (c) and (d), the appropriate procedure would be a petition for initiation of formal proceeding where the Commission may take evidence and resolve questions that involve disputed issues of material fact.

III. Staff's Analysis and Recommendation

Pursuant to Rule 28-105.003, F.A.C., an agency may rely on the statement of facts contained in the petition for declaratory statement without taking a position on the validity of the facts when making a determination on the petition. In rendering this recommendation, staff relies on the statement of facts set forth in Mediterranean Manors' Amended Petition and does not take any position with regard to the validity of those facts. Accordingly, the staff recommendation is based solely on information provided by Mediterranean Manors. The declaratory statement will be controlling as to those alleged facts, and not as to other, different facts. Staff's recommendation on Mediterranean Manors' Questions (a) – (d) is set forth below.

Question (a): How should Mediterranean Manors be classified under Progress' Tariff?

Mediterranean Manors should be classified as a residential multi-occupancy building pursuant to Tariff Section 11.06. Progress' Tariff Section No. 11.01, which contains the definitions for Progress' underground residential distribution policy, defines multiple-occupancy building as: "A structure erected and framed of component structural parts and designed to contain five (5) or more individual dwelling units." Progress' Tariff makes a distinction between residential buildings with an occupancy of less than five individual dwelling units, and multiple-occupancy buildings. Mediterranean Manors describes itself as a multiple-occupancy building, stating that it is comprised of 27 buildings housing 400 units. In addition, Mediterranean Manors provided copies of electric bills in Exhibit A attached to the Amended Petition. These electric bills show that Mediterranean Manors is billed under Progress' residential (RS) and General Service Non-Demand (GS) Tariff, which indicates that Mediterranean Manors is a residential customer.

Mediterranean Manors receives electric service from Progress through underground cables running from the pad-mount transformer to the service entrance. Since Mediterranean Manors receives underground service and is a multiple-occupancy building as discussed in the above paragraph, Progress' Tariff Section 11.06, *Underground Distribution Facilities to Multiple-Occupancy Residential Buildings*, is the applicable Tariff.

³ *In re Tampa Elec. Co.*, 2004 WL 239416 (Fla. P.S.C. January 22, 2004).

Question (b): Under Progress' Tariff, what is the appropriate point of delivery with respect to the Mediterranean Manors buildings at issue in this Amended Petition?

Mediterranean Manors states that a set of underground cables runs from a pad-mount transformer to the service entrance. Tariff Section 11.06(3)(c) lays out the responsibility of the applicant, in this case Mediterranean Manors, when the transformer is located outside the building. Specifically, Section 11.06(3)(c)ii states that the applicant shall provide "[t]he service entrance conductors and raceway from the Applicant's service equipment to the point of delivery designated by the Company at or near the building." Tariff Section 11.01(4) defines "Company" as Progress Energy Florida, Inc., and thus Progress designates the point of delivery. In Exhibit B attached to the Amended Petition, Mediterranean Manors provided a letter from Progress, dated February 5, 2010, in which Progress states that it has determined that its point of delivery is the transformer. Thus, the transformer is the applicable point of delivery.

Question (c): Is Progress responsible for maintenance of the underground electrical cables running from the pad-mount transformer to Mediterranean Manors' service entrance? Specifically, assuming that Mediterranean Manors is classified as a multiple-occupancy residential building under Tariff Section 11.06, would not the application of Section 11.06(4)(a)(iv), particularly when read in conjunction with Section 11.01(6), hold Progress responsible for all of its facilities, including the underground cables at issue?

Rule 28-105.001, F.A.C., specifically states that "[a] declaratory statement is not the appropriate means for determining the conduct of another person." Mediterranean Manors' request, as set forth in Question (c), does not conform to Rule 28-105.001, F.A.C., in that it is asking the Commission to determine the responsibilities, or appropriate conduct, of Progress. Staff believes that any declaratory statement issued by the Commission should pertain to Mediterranean Manors, not Progress. With this in mind, staff believes that Question (c) of the Amended Petition should be reframed as raising the following question:

(c) Is Mediterranean Manors responsible for maintenance of the underground electrical cables running from the pad-mount transformer to its service entrance?

With respect to reframed Question (c), according to Tariff Section 11.06(3), Mediterranean Manors, as applicant, is responsible for providing the service entrance conductors and raceway from its service equipment to the point of delivery designated by Progress. Because Mediterranean Manors is responsible for providing the equipment, staff concludes that Mediterranean Manors is also responsible for maintaining its equipment. Thus, based on the facts provided by Mediterranean Manors, staff concludes that Mediterranean Manors is responsible for maintenance of the underground electrical cables running from the pad-mount transformer to its service entrance.

Question (d): Considering that Progress undertook repairs to the cables in 2006, what duty did Progress have to notify Mediterranean Manors that it would no longer be responsible for maintenance of the cables?

Rule 28-105.001, F.A.C., specifically states that "[a] declaratory statement is not the appropriate means for determining the conduct of another person." Mediterranean Manors'

request as set forth in question (d), does not conform to Rule 28-105.001, F.A.C., in that it is asking the Commission to determine the responsibilities, or appropriate conduct, of Progress. As previously expressed, any declaratory statement issued by the Commission should pertain to Mediterranean Manor, not Progress. With this in mind, staff believes that question (d) of the Amended Petition should be reframed as raising the following question:

(d) Under the Progress Tariff, did Mediterranean Manors have the right to receive notice that Progress would no longer be responsible for cable maintenance?

With respect to reframed Question (d), staff believes this question is moot, since staff concludes in Question (c) that Mediterranean Manors is responsible for the cable maintenance. Furthermore, Mediterranean Manor in its Amended Petition did not point to a tariff provision that would give Mediterranean Manors a right to receive notice that Progress would no longer be responsible for cable maintenance

Rules 25-6.033(1) and 25-6.037, F.A.C. In addition to seeking a declaratory statement on application of Progress' Tariff to Mediterranean Manors, the Amended Petition specifically seeks a declaratory statement concerning Progress' responsibilities under Rules 25-6.033(1) and 25-6.037, F.A.C. As previously explained, Rule 28-105.001, F.A.C., specifically states that a declaratory statement is not the appropriate means for determining the conduct of another person. For this reason, staff recommends that the Amended Petition be denied to the extent that it improperly requests the Commission to determine the conduct of Progress pursuant to these rules.

Furthermore, even if Mediterranean Manors had sought a declaratory statement concerning application of Rules 25-6.033(1) and 25-6.037, F.A.C., to Mediterranean Manors' particular set of circumstances, which it did not, staff's recommendation concerning Questions (a) – (d) would not change. This is because Rules 25-6.033(1) and 25-6.037 are not relevant to an analysis of the facts and circumstances alleged or Questions (a) – (d) raised in the Amended Petition.

IV. Conclusion

In conclusion, Staff recommends that the Commission grant in part Mediterranean Manors' Amended Petition and issue a declaratory statement regarding the applicability of Progress' Tariff to Mediterranean Manors' particular set of circumstances. Furthermore, staff recommends that the Commission deny the Amended Petition to the extent that it improperly requests the Commission to determine the conduct of Progress pursuant to Rules 25-6.033(1) and 25-6.037, F.A.C., and Progress Tariff provisions. Staff recommends that the Commission declare that, based on the facts set forth in the Amended Petition:

(a) Mediterranean Manors is a multi-occupancy residential building and therefore Progress Tariff Sheet No. 4.116, Section 11.06 is the applicable tariff.

(b) Under Progress' Tariff, the appropriate point of delivery with respect to the Mediterranean Manors' buildings at issue in this Amended Petition is the utility designated point of delivery, which is the transformer.

(c) Mediterranean Manors is responsible for maintenance of the underground electrical cables running from the pad-mount transformer to its service entrance.

(d) The issue of whether Mediterranean Manors had the right to receive notice that Progress would no longer be responsible for cable maintenance is moot, based on staff's recommended declaration concerning Question (c), and, furthermore, Mediterranean Manors has not identified any Tariff provision which would give Mediterranean Manors a right to receive such notice.

Docket No. 110085-EI
Date: July 14, 2011

Issue 2: Should this docket be closed?

Recommendation: Yes, the docket should be closed. (Cowdery)

Staff Analysis: No further action is necessary. Thus, the docket should be closed.