

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint regarding electric rate
structure for Gainesville Regional Utilities.

DOCKET NO. 130188-EM
ORDER NO. PSC-14-0137-FOF-EM
ISSUED: March 19, 2014

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER ON MOTION TO DISMISS

BY THE COMMISSION:

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.

This Order addresses GRU's Motion to dismiss, and the Complainants' response to the Motion. On March 13, 2014, at Agenda Conference, we heard oral argument from the parties. We have jurisdiction pursuant to Section 366.04(2), Florida Statutes (F.S.).

Legal standard

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).

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.

Motion to Dismiss

GRU's Motion asserts the portions of the Complaint regarding GRU's rates are beyond our jurisdiction. GRU contends that our 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 our 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 also beyond our jurisdiction. GRU states the Florida Supreme Court in Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 300-301 (Fla. 2002), cautioned that our jurisdiction under Section 366.04(2)(b), F.S., is limited to the retail rate structure of electric utilities and does not give us 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 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 us 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.

Response

In their response to the Motion, Complainants argue the Motion should be denied because the Complaint sets forth a prima facie showing of existing and proposed retail rate

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

structure inequities between the GRU customer rate classes upon which requested relief is being sought. Complainants further assert the Complaint is sufficiently ripe for consideration 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. Complainants assert the alternate proposed three-tiered rate structure submitted for our review 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, Florida Administrative Code, to submit to us 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 is 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 and ruling

We have 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 we have 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. Our jurisdiction over municipal utilities is limited; specifically, we do 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 shall be dismissed with prejudice.

We recognize we have no 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 shall be dismissed with prejudice. The Complaint also alleges that the city failed to seek input from affected customers. We have 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 shall 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 Section 120.57, F.S. formal 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 Section 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).

We find that 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). To the extent the Complaint requests a Section 120.57, F.S., formal hearing challenging the proposed rate structure based upon a future vote of the City Commission, the allegations are speculative. Thus, we find those portions of the Complaint fail the first prong of the test set forth in Agrico and shall be dismissed with prejudice.

The Motion and response also state allegations concerning actions taken by the City Commission after the filing of the Complaint.² This new information may substantially affect the outcome of these proceedings. Without specific allegations regarding the current status of the GRU rate structure, we find a review would be inefficient and ineffectual.

For the above stated reasons, we 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 is dismissed without prejudice as moot. Complainants shall be given leave to file an amended Complaint within 15 days of the Commission's decision. We note that Rule 25-22.036(3)(b)2., F.A.C., governing initiation of formal proceedings, requires that a complaint specify the actions that constitute the violation. The amended complaint shall specify the factual basis for a challenge to the current rate structure, the specific violation of a statute, rule or Commission order, and the relief requested.

² For example, Complainants, in their 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.

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). We have 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, Complainants' request for hearing shall be denied as premature.

Based on the foregoing, it is

ORDERED that Gainesville Regional Utilities' Motion to Dismiss the Complaint of Eye Associates of Gainesville, LLC and Deborah L. Martinez is granted as set forth in the body of this Order. It is further

ORDERED that the Complaint filed by Eye Associates of Gainesville, LLC and Deborah L. Martinez is dismissed as set forth herein. It is further

ORDERED that Eye Associates of Gainesville, LLC and Deborah L. Martinez have leave to file an amended complaint no later than 15 days from our decision on March 13, 2014. The amended complaint is due no later than March 28, 2014. It is further

ORDERED that the docket shall 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 shall be closed administratively.

By ORDER of the Florida Public Service Commission this 19th day of March, 2014.



HONGWANG

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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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 the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or
- 2) 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 and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.