

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida
Power & Light Company for
approval of Economic Development
Rider Rate Schedule and
Agreement.

DOCKET NO. 980294-EI
ORDER NO. PSC-98-0603-FOF-EI
ISSUED: April 28, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER APPROVING
FLORIDA POWER & LIGHT COMPANY'S ECONOMIC
DEVELOPMENT RIDER RATE SCHEDULE
AND PROPOSED EXPENSE RECOVERY MECHANISM

BY THE COMMISSION:

On February 26, 1998, Florida Power & Light Company (FPL) petitioned for approval of its Economic Development Rider Rate Schedule and Agreement (EDR, Rider or Tariff). The proposed Rider will allow FPL to offer commercial/industrial customers a fixed discount on the base energy and base demand charges. New customers or existing customers who expand their operation pursuant to certain criteria qualify for service under the Rider. Load applicable under the Rider must be at least 5,000 kW. In addition, the customer applying for the Rider must attest that the customer will create at least 375 full-time positions, within a specified time period. FPL requests that the Commission allow it to recover the revenue shortfall associated with the rate discount as an economic development expense, under Section 288.035, Florida Statutes, and Rule 25-6.0426, Florida Administrative Code.

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FPSC-RECORDS/REPORTING

Analysis

I. Florida Power & Light Rider

As previously indicated, the proposed Rider is available to new customers (new load) or to existing customers who expand their operations (incremental load). An applicant for the Rider has to meet two minimum requirements within the first year of service: (1) new and incremental load must be a minimum of 5,000 kW at a single delivery point; and (2) the applicant must employ an additional work force of at least 75 full-time employees per 1,000 kW of new or incremental load. This requirement guarantees that at least 375 new positions will be created. In the case of an existing customer who chooses to expand, the discount applies only to the incremental load. Existing customers who do not increase their load, will not qualify for the Rider. Also, load shifted from one delivery point on the FPL system to another delivery point does not qualify. However, a customer relocating from the territory of another Florida utility to FPL's territory qualifies.

The customer will be required to sign a 5-year Service Agreement (agreement) with FPL. Service under the Rider will terminate at the end of the fifth year. FPL does not intend to request confidential treatment of the agreement, unless a customer believes any of the information in the agreement is proprietary. The discount will be applied to the customers' base demand charge and base energy charges in the following manner: 20 percent in the first year; 15 percent in the second year; 10 percent in the third year; five percent in the fourth year; and in the fifth year, the customer pays the otherwise applicable rate. Customers will pay the otherwise applicable customer charge and all otherwise applicable cost recovery clauses. The latter requirement ensures that the general body of ratepayers is not being harmed by the Rider through the cost recovery clauses.

Before signing the agreement, the customer must attest to the fact that he intends to reach the load and employment criteria within one year. The customer must also provide written verification that the availability of the Rider is a significant factor in the customer's location/expansion decision. Types of documentation required may include a notarized letter or an affidavit. Compliance with the load requirement will be monitored through the customer's billing records. In addition, each customer will be assigned a FPL account manager who will work closely with the customer. The account manager will be responsible for

verifying that the customer fulfills the employment criterion within the first year. If the customer does not meet the employment and/or load requirement within the first year, FPL reserves the right to terminate the agreement. In the case of early termination, the customer will be required to return the discounts granted in the first year plus interest. We find that the procedures proposed by FPL for administering the tariff are adequate.

Eligible customers will be offered service under the Rider on a "first come first serve" basis. FPL will discontinue offering service under the Rider when economic development expenses for the Rider and other sources exceed \$3 million per year. We note that for the 12 months ending July 1997, FPL reported that it spent \$18,630 for economic development expenses. Rule 25-6.0426, Florida Administrative Code, states that a utility can not report in its surveillance report more than \$3 million per year. FPL estimates that approximately 15 customers can sign up for the Rider before the \$3 million cap is reached. We believe that the "first come first serve" policy for eligible applicants eliminates the potential for FPL to unduly discriminate between customers by offering one customer the Rider while rejecting a similarly situated customer.

Between rate cases, the general body of ratepayers could only be affected by this tariff if FPL's earnings exceeded its authorized rate of return. Increasing an expense will lower the over earnings amount and, therefore, lower the potential refund to all ratepayers. Notwithstanding, given FPL's approximate \$6 billion in total jurisdictional operating revenues, increasing economic development expenses to a potential \$3 million a year will have a minimal effect on FPL's earnings and overall rate of return. Between rate cases, FPL's base rates will not increase as a result of this proposal and the possibility of a rate case seems unlikely at this time. Moreover, FPL's ratepayers will not be affected through the adjustment clauses since EDR customers pay the otherwise applicable clauses.

II. Meeting the statutory definition

FPL identified Section 288.035, Florida Statutes, and subsections (1)(h) and (3)(f) of Rule 8E-15.003, Florida Administrative Code, as the specific authority that allows the Commission the discretion to approve the expenses requested within its petition.

Section 288.035(1), Florida Statutes, reads as follows:

The Florida Public Service Commission may authorize public utilities to recover reasonable economic development expenses. For purposes of this section, recoverable "economic development expenses" are those expenses described in subsection (2) which are consistent with criteria to be established by rules adopted by the Department of Commerce as of June 30, 1996, or as those criteria are later modified by the Office of Tourism, Trade and Economic Development.

Section 288.035(2), Florida Statutes, reads as follows:

- (2) Such rules shall provide that authorized economic development expenses shall be limited to the following:
- (a) Expenditures for operational assistance,
 - (b) Expenditures for assisting the state and local governments in the design of strategic plans for economic development activities.
 - (c) Expenditures for marketing and research services, including assisting local governments in marketing specific sites for business and industry development . .

Rule 25-6.0426(1), Florida Administrative Code, provides:

(1) Pursuant to Section 288.035, Florida Statutes, the Commission shall allow a public utility to recover reasonable economic development expenses subject to the limitations contained in subsection (2) and (3), provided that such expenses are prudently incurred and are consistent with the criteria established by Rules 8E-15.001, 8E-15.002, and 8E-15.003, Florida Administrative Code, adopted by the Department of Commerce.

Subsection (2), of the above rule, places a cap on the amounts of economic development expenses which can be reported for surveillance reports and earnings review calculations. Subsection (3), of the above rule, provides that the Commission shall determine the level of sharing of prudent economic development costs and the future treatment of these expenses for surveillance purposes.

As provided in Rule 25-6.0426(1), Florida Administrative Code, the terms of Section 288.035, Florida Statutes, are defined in Rule 8E-15.003(1)(h) & (3)(f), Florida Administrative Code.

Subsection (1)(h) defines "expenditures for operational assistance" to include:

supporting state and local efforts to promote business retention and expansion activities.

Likewise, subsection (3)(f) defines "expenditures for marketing and research services" to include:

participating in cooperative marketing efforts with state and local development organizations.

We find that FPL's proposal meets the definitional parameters of subsection (1)(h) of Rule 8E-15.003, Florida Administrative Code, but not subsection (3)(f) of the same rule. We reached this conclusion by employing the principles of statutory interpretation.

In determining the meaning of a phrase, the reader must first refer to the statute to see if the legislature specifically defined that phrase. *Weber v. Dobbins*, 616 So.2d 956, 958 (Fla. 1993); *Dampier v. Department of Banking and Finance, Div. Of Finance*, 593 So.2d 1101, 1107 (Fla. 1st DCA 1992). If the statute does not define the phrase, the reader must then refer to the Florida Administrative Code. *State of Florida, Department of Administration, Division of Retirement v. Moore*, 524 So.2d 704, 707 (Fla. 1st DCA 1988); *Amisub (North Ridge General Hospital, Inc., v. Department of Health and Rehabilitative Services*, 577 So.2d 648, 650 (Fla. 1st DCA 1991). If the phrase is specifically defined in either statute or rule, then such term is not ambiguous. "Courts may resort to legislative history, administrative construction of a statute, and rules of statutory construction only to determine the legislative intent of an ambiguous statute." *State v. Egan*, 287 So.2d 1 (Fla. 1973); *Florida State Racing Comm'n v. McLaughlin*, 102 So.2d 574, 576 (Fla. 1958).

In this case, the Legislature indicated its intent, in Section 288.035, Florida Statutes, by stating that the Department of Commerce was to establish the parameters for recoverable economic development expenses. The Department of Commerce did establish the parameters for what are recoverable economic development expenses under Rule 8E-15.003, Florida Administrative Code. Therefore,

because the statutory phrases of Section 288.035, Florida Statutes, are specifically defined under the rules of the Department of Commerce, there is no need to resort to any of the rules of statutory construction with respect to those phrases. As such, the statutory phrases are to be given the meanings as defined under Rule 8E-15.003, Florida Administrative Code.

The subject matter and purpose of Section 288.035, Florida Statutes, is economic development. The creation of jobs is most certainly economic development. In this case, the new rates are directly tied to specific new jobs. Conceptually, this means new customers, which would help spread the cost for existing customers. This, in turn, would result in either lower rates or further rate stability. In either case, this program would benefit FPL rate payers.

We find that the cost incurred by FPL is an expenditure within the context of the statute and its accompanying rules. There is a recognized rule of statutory construction that when the legislature amends a statute by omitting or including words, it is to be presumed that the legislature intended the statute to have a different meaning than that accorded it before the amendment. *Aetna Casualty and Surety Company, v. Buck*, 594 So.2d 280, 283 (Fla. 1992); *Capella v. City of Gainesville*, 377 So.2d 658 (Fla. 1979).

In this case, Section 288.035(1), Florida Statutes, was amended in the 1996 Florida legislative Session. Prior to the amendment, the last sentence of Section 288.035(1), Florida Statutes, read as follows:

Expenses associated with activities for which the department is not authorized to expend public funds shall not be recoverable economic expenses.

Prior to the amendment, it is apparent that FPL would have been limited to recovering only those expenditures which are similar to those type of expenditures that "a governmental agency" would be authorized to expend. However, subsection (1) of Section 288.035, Florida Statutes, (1997) no longer contains this language. This raised the question of why the above quoted language was deleted. A review of the legislative staff analysis ("as passed by the legislature" - Ch. 96-320, Laws of Florida), associated with the statutory amendment, offers the following statement:

Section 35 amends s. 288.035, F.S., relating to economic development expenses of public utilities. Removes prohibition against allowing recovery of expenses by public utilities for which the FDC is not authorized to expend public funds.

We believe it is reasonable to conclude that this language was deleted because the Legislature intended to remove a substantive limitation from those expenditures that are recoverable under this statute.

Accordingly, without this substantive limitation, the parameters of Rule 8E-15.003, Florida Administrative Code, are now only bound by the choice of vocabulary found in the rule. Each subsection of Rule 8E-15.003, F.A.C., provides many definitions with respect to expenditures. The definitions are disjunctive. FPL need only demonstrate that its efforts are within the parameters of only one of the definitions. We find that FPL's effort best fits within the parameters of subsection (1)(h), of Rule 8E-15.003, Florida Administrative Code. The offering of FPL's program is an act which is done to "support" state and local "efforts." But, more importantly, in accordance with the phrase "to promote business retention and expansion activities," FPL's proposal is directly tied and dependent upon the creation of new jobs that can be specifically quantified. Therefore, because FPL's tariff meets the definitional parameters of subsection (1)(h) of Rule 8E-15.003, Florida Administrative Code, and the tariff will result in a minimum of 375 full-time positions, we find that FPL may utilize the expense recovery mechanism authorized under Section 288.035, Florida Statutes.

FPL's proposal is primarily based upon the theorem of "economic expansion." Under the theorem of "economic expansion," new jobs would result in new customers, thereby spreading the cost for existing customers. This, in turn, would lower rates or further rate stability. In short, given the public nature of the criteria and rate as well as the tangible economic benefits that will directly result as a consequence of FPL's efforts, we find that FPL's Rider will not be unduly discriminatory.

We, therefore, find that the revenue shortfall, associated with offering customers a rate discount, is an economic development expense within the context of Section 288.035, Florida Statutes, and is eligible for recovery pursuant to Rule 25-22.0426, Florida Administrative Code. With respect to the accounting treatment,

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however, of this revenue shortfall, we direct FPL to adjust Net Operating Income (NOI) for surveillance purposes to reflect the portion of the discount that is not recoverable under Rule 25-6.0426, Florida Administrative Code.

Finally, while this tariff must be offered to every customer who meets the eligibility requirements, it is our expectation that the tariff will also be part of the marketing effort that would be done by the appropriate economic development organization and that the tariff would be a part of the information given to existing and prospective companies.

Given the foregoing, we find that FPL has adequately demonstrated that its proposed tariff falls within the parameters of Section 288.035, Florida Statutes and its accompanying rules. Therefore, for the reasons stated above, we find that FPL's proposed Economic Development Rider Rate Schedule and expense recovery mechanism should be granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's Economic Development Rider Rate Schedule and the proposed expense recovery mechanism is approved. It is further

ORDERED that with respect to the accounting treatment of this revenue shortfall, FPL shall adjust Net Operating Income (NOI) for surveillance purposes to reflect the portion of the discount that is not recoverable under Rule 25-6.0426, Florida Administrative Code. It is further

ORDERED that this tariff should become effective on June 1, 1998. If a protest is filed within 21 days of the issuance of this Order, this tariff should remain in effect with any revenue impact held subject to refund pending resolution of the protest. If no timely protest is filed, this docket should be closed.

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By ORDER of the Florida Public Service Commission this 28th
day of April, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

JCB

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The Commission's decision on this tariff is interim in nature and will become final, unless a person whose substantial interests are affected by the action proposed files a petition for a formal proceeding, as provided by Rule 25-22.036(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a)(d) and (e), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 19, 1998.

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In the absence of such a petition, this Order shall become final on the day subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this Order becomes final on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting 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 of the date this Order becomes final, 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.