BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement concerning rights under Rule 25-6.115, F.A.C. by Town of Palm Beach, Town of Jupiter Island, and Town of Jupiter Inlet Colony.	DOCKET NO. 080035-EU ORDER NO. PSC-08-0218-DS-EU ISSUED: April 3, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

Background

On January 10, 2008, the towns of Palm Beach, Jupiter Island and Jupiter Inlet Colony (towns) filed a petition for declaratory statement pursuant to Section 120.565, Florida Statutes, and Chapter 28-105, Florida Administrative Code. Also on January 10, 2008, the towns filed a Request for Oral Argument and Alternative Motion for Leave to Address the Commission.

The towns note that they are actively planning to convert their existing overhead (OH) electrical distribution facilities to underground (UG). They petition for resolution of doubts concerning their rights under, inter alia, subsections (3) and (11) of Rule 25-6.115, F.A.C. Rule 25-6.115(3) states, in pertinent part:

> Nothing in the tariff shall [prevent] the applicant from constructing and installing all or a portion of the underground distribution facilities provided:
>
> . . . (c) Such agreement is not expected to cause the general body of ratepayers to incur additional costs.

Rule 25-6.115(11) states, in pertinent part:

> For purposes of computing the charges [to be paid to the utility for the conversion to underground facilities]
>
> . . . (b) If the applicant chooses to construct or install all or a part of the requested facilities, all utility costs, including overhead assignments, avoided by the utility due to the applicant assuming responsibility for construction shall be excluded from the costs charged to the customer, or if the full cost has already

DOCUMENT NUMBER-DATE
02566 APR-3 08
FPSC-COMMISSION CLERK

been paid, credited to the customer. At no time will the costs to the customer be less than zero.

Though the background facts of the petition generally concern the conversion of overhead facilities to underground,[1] the controversy centers on the credits due or not due the towns for choosing to perform the construction work themselves. These credits can be claimed as offsets to the contributions in aid of construction (CIAC) owed by the towns to the utility for the conversion of facilities from overhead to underground. The towns note that the Governmental Adjustment Factor (GAF), which provides a discount on the CIAC owed to the utility by governmental entities for their undergrounding projects, is currently scheduled to expire October 4, 2008. This adds to the towns' need for an expedited resolution of the CIAC calculation matters raised by the Petition.

On February 15, 2008, the utility involved in the towns' underground conversion projects, Florida Power & Light Company (FPL), filed a Petition to Intervene and a Response to Petition for Declaratory Statement concerning Rule 25-6.115, F.A.C. We have jurisdiction pursuant to Section 120.565, Florida Statutes.

Discussion

If we issued the declaratory statement requested by the towns, FPL would receive less contributions in aid of construction for the undergrounding projects at issue. This demonstrates that FPL is a substantially affected person. Any substantially affected person can intervene in a declaratory statement proceeding before the agency. Chiles v. Department of State, Div. of Elections, 711 So. 2d 151, 155 (Fla. 1st DCA 1997). No objection to FPL's intervention was filed. Thus, FPL's Petition to Intervene is granted.

We have the discretion to allow parties to participate at the agenda conference. Since FPL was granted intervention in this matter, the parties have been allowed to participate.

The towns' petition asks for a declaratory statement[2] as to four separate points, as further described below.[3] Though the reasons for our denial vary from issue to issue, they have in common our conclusion that controverted factual matters not amenable to resolution by declaratory statement are concerned. Such matters are more properly subjects for negotiation between the parties and, if needed, resolution in a complaint proceeding.

---

[1] The Petition provides a lengthy overview of the undergrounding conversion process which, while useful as context for the issues raised, is non-controversial and need not be restated here.

[2] Pursuant to Section 120.565(1), Florida Statutes, "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 an agency, as it applies to the petitioner's particular set of circumstances."

[3] New language for point 4 was submitted too late for consideration when the other three points were presented for us to vote on. Accordingly, consideration of point 4 has been deferred.

Requested Statement 1:

> Where a town, as a proper and eligible "Local Government Applicant" under FPL's tariffs, commits to perform all construction and installation of the underground facilities with its own staff and contractors, and where the Town pays FPL for preparing the Binding Cost Estimate for the UG project, FPL may not impose on or collect from the Town any corporate overhead costs or so-called "direct engineering, supervision, and support" costs, either directly or indirectly, except (a) such direct costs as the Town pays FPL for the Binding Cost Estimate, which includes engineering design work and preparing engineering drawings for a proposed UG conversion project, and (b) the Town's payments to FPL, pursuant to FPL's Tariff Section No. 12.2.11 d), at "FPL's current applicable hourly rate for specific engineering personnel time spent for (i) reviewing and inspecting the applicant's work done, and (ii) developing any separate cost estimate(s) that are either requested by the Applicant . . . or are required by FPL to reflect both the Applicant's and FPL's portions of the work for the purpose of a GAF waiver calculation . . . ."

In arguing for our issuance of this statement, the towns describe the Royal Poinciana Way (RPW) and Jupiter Island examples in which FPL's cost estimates demanded the same payment for corporate overheads associated with the UG projects whether or not the towns performed substantial amounts (or even all) of the construction work on those projects. The towns further note that they believed the rulemaking in Docket No. 060172-EU, which resulted in Rule 25-6.115(11), had been designed to eliminate outcomes similar to those examples.

As analyzed by the towns,

> FPL does not incur any corporate overhead costs in connection with the construction and installation work performed by the Towns and the Towns' contractors, and accordingly, FPL cannot fairly or reasonably propose to collect any such corporate overhead charges from the Towns. [emphasis supplied]

Petition, p. 18.

This conclusion is restated in various ways throughout the towns' analysis. Clearly, the requested declaratory statement as to this point is intended to establish that, as a matter of law, the utility's corporate overhead costs on work performed by the towns is zero:

> It is self-evident that FPL should not be permitted to apply corporate overhead costs on work that it does not perform.

Petition, p. 19. As to the assertion by FPL of "direct engineering, supervision, and support" costs, the towns state that if they engage contractors to do all of the work,

> no additional engineering costs, direct or otherwise, will be incurred by FPL . . . . FPL will not provide any supervision of the Towns' contractors . . . . FPL will

> provide no support for the Towns' work or the Towns' contractors' work. [emphasis supplied]

Petition, p. 21.

For its part, however, FPL contravenes the towns' assertions on this point. FPL notes initially that it follows Rule 25-6.115(11):

> [T]he rule takes as a starting point the cost for the utility to perform the underground work itself, and then reduces that amount by the identifiable cost savings resulting from the applicant doing the work. Under [the Towns'] approach, an applicant that performs some of the conversion work would only be charged for specific enumerated utility costs even if there are other utility costs that are not avoided and that, therefore, the general body of ratepayers would have to bear. [emphasis supplied]

FPL Response, p. 2.

FPL further describes some of the costs not avoided even if the towns did all of the direct work:

> FPL needs to be actively involved in the engineering, inspection and approval of any work that is to become part of its electric distribution system, for obvious safety and reliability reasons . . . it may be especially true if others perform the work because FPL needs to take particular care to ensure that such work meets FPL's standards. . .. Thus, it is simply unrealistic to expect that FPL would not incur DSS [Direct engineering supervision and support] expenses, and hence would not need to charge for DSS, in circumstances where an applicant performs all direct work.

FPL Response, pp. 3-4.

FPL also notes that, contrary to petitioners, its general overhead, unrelated to whether UG projects are performed at all, is not at issue:

> FPL presently employs four distribution engineers who are working full time on underground conversions. Unless FPL collects the costs for these engineers and their associated support and overhead through CIAC, those costs will fall unfairly upon FPL's general body of customers.[4]

FPL Response, p. 5.

In view of the foregoing, we deny the declaratory statement requested on this point because it cannot be known in advance that DSS expenses to the utility will always (or ever) be

---

[4] See, Rule 25-6.115(3)(c), F.A.C., limiting approval of undergrounding work by applicants to circumstances in which ratepayers do not incur additional costs.

zero, as a matter of law, whenever applicants commit to doing all of the direct work. Instead, the existence of and charges for such expenses are necessarily factual issues, and to be viewed as such, rather than as appropriate subjects for a legal declaration.

Requested Statement 2:

> Where a Town proposes to perform all construction and installation of the underground facilities itself, FPL must allow the local Government Applicant to perform work involved in removing the existing OH facilities.

On this point, the towns argue that removal of the existing OH facilities is naturally and functionally a part of the UG conversion work and that our rule should be so interpreted. Petition, pp. 19; 24.

FPL responds that Rule 25-6.115(3) contemplates an applicant "constructing and installing all or a portion of the underground facilities . . ," but does not address removal of overhead facilities.

We agree with FPL that Rule 25-6.115(3) does not address the removal of overhead facilities, and, thus, we believe the rule does not require FPL to allow the towns to perform work involved in removing the existing OH facilities.

We believe that issuing the requested statement would, in effect, amend the rule without affording all potential participants access to the process. Accordingly, we deny the declaratory statement on this point, while noting that FPL is discussing the issue with the towns, though disagreeing that the towns can perform this task as of right pursuant to the current rule.

Requested Statement 3:

> Where a town proposes to perform all construction and installation of the underground facilities itself, FPL must offer to provide the necessary materials to the Town at a reasonable cost, which the towns believe would be the cost of such materials stated by FPL in its Binding Cost Estimate.

The towns argue that it is "obvious common sense" that FPL furnish the materials for the towns' UG projects. Issuance of the statement is sought to confirm that the charge to the towns will be fair, just and reasonable. Petition, p. 25.

FPL responds that Rule 25-6.115 is silent on the subject and that the requested statement would improperly amend the rule. Beyond that, FPL believes that it is in agreement with the towns as to the basis on which materials for the projects will be charged. FPL Response, pp. 5-6.

We agree with FPL that Rule 25-6.115 does not address whether FPL must offer to provide the necessary materials to the towns to perform all construction and installation of the underground facilities, and, thus, we believe there is no such requirement under the rule.

We deny the requested statement because, as is the case with Requested Statement 2, granting Requested Statement 3 would, in effect, amend the rule without affording potential participants access to the process.

Conclusion

In view of the above, we deny the Petition for Declaratory Statement as to each of the three requested statements considered herein.

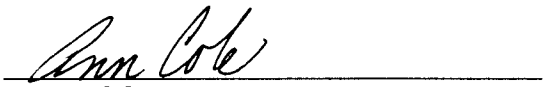
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's Petition to Intervene is granted. It is further

ORDERED that the Petition for Declaratory Statement filed by the Town of Palm Beach, Town of Jupiter Island, and Town of Jupiter Inlet Colony is denied as to Requested Statements 1-3. It is further

ORDERED that this docket remain open to address Requested Statement 4.

By ORDER of the Florida Public Service Commission this 3rd day of April, 2008.



ANN COLE
Commission Clerk

(SEAL)

RCB

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.