

IN THE SUPREME COURT OF FLORIDA

Kissimmee Utility Authority)
Appellee/Petitioner,)
v.)
Better Plastics, Inc.)
Appellant/Respondent.)

Case No. 71,073

ANSWER BRIEF OF
THE FLORIDA PUBLIC SERVICE COMMISSION

Mary Jane Lord
Associate General Counsel

William S. Bilenky
General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399
(904) 488-7464

TABLE OF CONTENTS

	<u>PAGE NO.</u>
Table of Citations	ii
Statement of the Case and of the Facts	1
Preliminary Statement	2
Summary of Argument	3
ARGUMENT: A REGULATED PUBLIC UTILITY IN FLORIDA IS LAIBLE TO ITS CUSTOMERS FOR INTEREST ON OVERCHARGE REFUNDS	4
Conclusion	7
Certificate of Service	8

TABLE OF CITATIONS

PAGE NO.

<u>Argonaut Insurance Co. v. May Plumbing Co.,</u> 474 So.2d 212 (Fla. 1985)	1
<u>Better Plastics, Inc. v. Kissimmee Utility</u> <u>Authority, 511 So.2d 403 (Fla. 2nd DCA 1987)</u>	1,2
<u>Citizens v. Florida Public Service Commission,</u> 435 So.2d 784 (Fla. 1983)	5
<u>Florida Power Corp. v. Zenith Industries Co.,</u> 377 So.2d 203 (Fla. 2nd DCA 1979) <u>cert. denied</u> 388 So.2d 1120 (Fla. 1980)	5
<u>Gulf Power Co. v. Florida Public Service</u> <u>Commission, 487 So.2d 1036 (Fla. 1986)</u>3,4,7
<u>State ex rel. Jaytex Realty Co. v. Green,</u> 105 So.2d 817 (Fla. 1st DCA 1958)	4

COMMISSION ORDERS

Order No. 134523,4,7
---------------------------	--------

COMMISSION RULES

Rule 25-6.102	1
-------------------------	---

FLORIDA STATUTES

Section 366.071(2)	5
------------------------------	---

OTHER AUTHORITIES

21 C.J.S. §222	4
--------------------------	---

STATEMENT OF THE CASE AND OF THE FACTS

This statement of the case and of the facts is taken from the decision of the District Court of Appeal, Second District, reported as Better Plastics, Inc. v. Kissimmee Utility Authority, 511 So.2d 403 (Fla. 2nd DCA 1987). The District Court summarized the facts as follows:

Appellee, an electric service public utility, owes appellant, a customer, a refund for overcharges. The customer claims it is entitled to prejudgment interest on the overcharge refund under section 687.01, Florida Statutes and Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985). The utility claims that as a regulated public utility it can lawfully do only what is authorized by the Public Service Commission, which, by Florida Administrative Code Rule 25-6.102(2), has authorized overcharge refunds but has not authorized the payment of interest on overcharge refunds.

The District Court held that "[i]n the absence of a clear and lawful limitation, a regulated public utility has all rights granted by, and duties imposed by, general law and, specifically, has the legal obligation to pay prejudgment interest on overcharge refunds."

The District Court then certified the following question:

Is a regulated public utility in Florida liable to customers for prejudgment interest on overcharge refunds?

PRELIMINARY STATEMENT

The Florida Public Service Commission submits this brief as an intervenor in this proceeding. The brief addresses the question certified in Better Plastics, Inc. v. Kissimmee Utility Authority, 511 So.2d 403 (Fla. 2nd DCA 1987) and relies on the summary of facts and proceedings as set forth in that decision. Thus, there are no references to the record. References to the Appendix to this brief are designated "A-___."

SUMMARY OF ARGUMENT

A regulated public utility in Florida is liable to customers for interest on overcharge refunds. The issue of whether a regulated public utility in Florida is liable to customers for interest on overcharge refunds has been argued before this Court previously in the case of Gulf Power Co. v. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986). This Court affirmed Order No. 13452 of the Florida Public Service Commission (see Appendix pp. 1-25, see esp. p. 17) imposing interest on overcharge refunds in fuel adjustment proceedings. The inclusion of interest in the refund of overcharges recognizes the time value of money. It also compensates the ratepayers while the utility had the use of customer money to which it was not entitled.

ARGUMENT

A REGULATED PUBLIC UTILITY IN FLORIDA IS LIABLE TO ITS CUSTOMERS FOR INTEREST ON OVERCHARGE REFUNDS.

The issue of liability of a Florida public utility for interest on overcharge refunds has been brought before this Court on at least one previous occasion. In Gulf Power Co. v. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986), the issue of interest on overcharge refunds was briefed as a subargument of the second point on appeal. In that case, the Commission in Order No. 13452 had ordered Gulf Power to refund over \$2,000,000, plus interest, to its ratepayers as the result of "managerial imprudence [which] caused Gulf to pay excessive fuel costs in the purchase of coal." Id. at 1036. See also A-17, A-22. This Court affirmed the Commission order without qualification. While this Court's opinion did not specifically address the interest question, that issue was briefed by all of the parties. Because the order was affirmed in its entirety, the decision approved the requirement that Gulf, a public utility, pay interest on the refunded amount. In the case of State ex rel. Jaytex Realty Co. v. Green, 105 So.2d 817, 819 (Fla. 1st DCA 1958) (opinion on petition for rehearing), Judge J. Wigginton noted that "it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered." "As an opinion does not always state everything that is decided, it should be read in light of what the judgment necessarily involves." 21 C.J.S. §222, p.413.

Of interest, although not determinative is the case of Citizens v. Florida Public Service Commission, 435 So.2d 784 (Fla. 1983). In discussing the statute regarding interim rates, this Court noted that "[a]ny revenues derived from an interim award are collected subject to refund and the Commission may authorize the payment of interest on the interim revenue ordered refunded. \$366.071(2)." Id. at 786.

Also of interest, although not determinative, in Florida Power Corp. v. Zenith Industries Co., 377 So.2d 203 (Fla. 2nd DCA 1979) cert. denied 388 So.2d 1120 (Fla. 1980), Zenith sought a refund for overcharges, together with unspecified general, special and exemplary damages. The overcharges allegedly were the result of the so called "Daisy Chain Scandal" in which Florida Power Corporation allegedly paid inflated prices for fuel oil and passed the cost on to its customers.

The primary flaw in the lower court's judgment, according to the court in Zenith, involved the jurisdiction of the circuit court to determine and award refunds. The court said that jurisdiction belonged initially to the Florida Public Service Commission. The right to any further damages would have to be determined in light of an initial determination as to the overcharge by the Commission. The Court also stated:

As applied to the facts of the present case, it is difficult to imagine that the damages directly, naturally and necessarily flowing from an overcharge could possibly be anything other than the amount of the overcharge itself and legal interest thereon. As we have noted, that will be recovered by Zenith, if at all, through the PSC. Id. at 205 (emphasis supplied).

The requirement that interest be paid on refunds of overcharges to customers recognizes that the utility has had the use of customer funds to which it was not entitled. In effect, the customers are the involuntary lenders of funds to the utility and repayment should include interest. The inclusion of interest on overcharge refunds recognizes the time-value of the funds involved.

CONCLUSION

The question whether a regulated public utility in Florida can be made to pay interest on overcharge refunds has been brought before this Court previously. In affirming Commission Order No. 13452, ordering Gulf Power to refund to its customers over \$2,000,000 plus interest, the interest issue having been briefed by the parties, this Court approved the requirement that the utility pay interest on the overcharge refund. Gulf Power Company v. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986). The question certified in this case should be answered in the affirmative.

Respectfully submitted,


Mary Jane Lord
Associate General Counsel

William S. Bilenky
General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399
(904) 488-7464

October 27, 1987

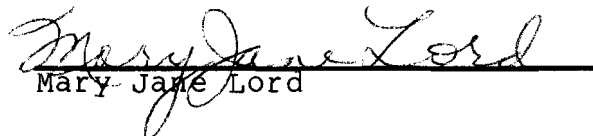
8767G

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 21th day of October, 1987 to the following:

Edward Brinson
Brinson, Smith & Smith
1201 W. Emmett Street
Post Office Box 1549
Kissimmee, Florida 32742-1549

Jeffery R. Jontz
Steven L. Brannock
Holland and Knight
Post Office Box 1288
Tampa, Florida 33601


Mary Jane Lord