

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for a rate ) DOCKET NO. 911030-WS  
increase in Brevard County by ) ORDER NO. PSC-92-0205-FOF-WS  
GENERAL DEVELOPMENT UTILITIES, ) ISSUED: 4/14/92  
INC. (Port Malabar Division) )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman  
SUSAN F. CLARK  
J. TERRY DEASON  
BETTY EASLEY

ORDER DENYING INTERVENOR'S PETITION TO REVIEW  
CHAIRMAN'S TEST YEAR DECISION, AND GRANTING  
GENERAL DEVELOPMENT UTILITIES, INC.'S MOTION TO STRIKE

BY THE COMMISSION:

BACKGROUND

General Development Utilities, Inc., Port Malabar Division (GDU or utility), is a Class A utility serving approximately 13,681 water customers and 5,963 wastewater customers in Brevard County. The water system had actual operating revenues of \$3,902,810, with net operating income of \$1,185,319 for the twelve months ended December 31, 1990. The wastewater system had actual operating revenues of \$1,822,638, with net operating income of \$296,836, for the same period.

On January 10, 1992, the City of Palm Bay (Palm Bay) filed a Petition to Review Chairman's Test Year Decision and a Petition for Leave to Intervene. By Order No. 25655, issued January 29, 1992, intervention was granted. On January 17, 1992, GDU filed a Response in Opposition To Palm Bay's Petition To Review Chairman's Test Year Decision. On January 29, 1992, Palm Bay filed a Reply to GDU's Response In Opposition To Petition To Review Chairman's Test Year Decision And Memorandum In Support Thereof. On January 31, 1992, GDU filed a Motion To Strike Palm Bay Reply, or, In The Alternative, For Leave To Respond Thereto (Motion to Strike).

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PSC-RECORDS/REPORTING

PETITION TO REVIEW CHAIRMAN'S TEST YEAR DECISION

In a letter dated October 15, 1991, Chairman Thomas M. Beard approved GDU's requested test years. Rule 25-30.430(1), Florida Administrative Code, provides that within 30 days of the Chairman's approval of a test year, an interested party may request Commission review of the Chairman's test year decision. On January 10, 1992, Palm Bay filed its petition to review the Chairman's test year decision. Palm Bay's petition was not filed within the required thirty-day period and was thus untimely under the above-referenced rule.

Palm Bay asserts that its petition must be considered timely because the administrative process was "triggered" by the filing of the Motion to Intervene. In other words, Palm Bay believes that Rule 25-30.430(1), Florida Administrative Code, must be interpreted in a manner allowing the thirty-day clock to begin running from the date of intervention. Palm Bay argued that the Chairman's decision is final agency action and, therefore, the notice the Commission must give to all affected persons of their right to request a Section 120.57, Florida Statutes, hearing is effectually given only when such person(s) intervene. We disagree. The principle case Palm Bay relies on is General Development Utilities, Inc., v. Florida Department of Environmental Regulation, 417 So.2d 1068 (Fla. 1st DCA 1982). In that case, the court ruled that a letter issued by the Department of Environmental Regulation (DER) to GDU was final agency action.

We disagree with Palm Bay's argument that GDU v. DER is applicable to the Chairman's test year decision. By the Chairman's approving the test year, the Commission has not made a final determination of the appropriate test year. Rather, the Commission has made an initial selection of a test year, subject to a final decision approving or disapproving the test year. Further, it should be noted that DER dismissed GDU's petition for a hearing outright in GDU v. DER. We also note that in GDU v. DER, the appellate court was primarily concerned with lack of a clear point of entry. In this case, the point of entry is clear and present, not remote. There is a point of entry to review the Chairman's decision within thirty days as provided for in the rule.

The Commission has previously determined that the Chairman's test year approval is an interim decision in Order No. 25484, issued December 17, 1991, (United Telephone rate case) and Order

No. 25292, issued November 4, 1991, (Florida Power Corp. rate case). The Chairman's approval of the utility's test year, is subject to a final decision in the rate case. Thus, there is another point of entry to address the appropriateness of the test year, by virtue of Palm Bay's ability to raise it as an issue in the rate case since it has intervened in the case. In consideration of the above, we hereby deny Palm Bay's Petition to Review the Chairman's Test Year Decision as untimely.

In addition, we note that at the Agenda Conference addressing this matter, Counsel for the City of North Port asserted that this Docket is proceeding in an accelerated fashion. As a point of clarification and as a matter of record, the scheduling of this case has not been accelerated.

MOTION TO STRIKE

In its Motion to Strike filed on January 31, 1992, GDU argues that permissible pleadings should end with GDU's Response: "Whether [Palm Bay's] initial pleading is characterized as a petition under Rule 25-22.036(4), or a motion under Rule 25-22.037(2), the Commission's rules contemplate only a single responsive pleading (*i.e.*, an answer under Rule 25-22.037(1) or a response under Rule 25-22.037(2)(b))." GDU, therefore, asks the Commission to strike Palm Bay's Reply or, alternatively, give it leave to respond.

We agree with GDU that the Commission's rules contemplate a single responsive pleading. In this instance, we believe that Palm Bay's reply was not necessary and has added nothing new to the original pleadings. Therefore, we find it appropriate to grant GDU's Motion to Strike, and Palm Bay's Reply shall be struck.

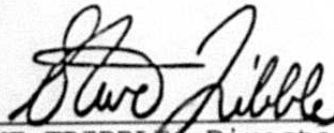
Based on the foregoing, it is therefore,

ORDERED by the Florida Public Service Commission that the City of Palm Bay's Petition to Review the Chairman's Test Year Decision is hereby denied. It is further

ORDERED that General Development Utilities, Inc.'s Motion to Strike is granted and the City of Palm Bay's Reply shall be struck. It is further

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By ORDER of the Florida Public Service Commission this 14th  
day of April, 1992.



STEVE TRIBBLE, Director  
Division of Records and Reporting

(S E A L)

LAJ/CB/KAC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.