

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Florida) DOCKET NO. 930705-GU
Division of Chesapeake Utilities) ORDER NO. PSC-93-1548-FOF-GU
Corporation for Declaratory) ISSUED: October 21, 1993
Statement Disclaiming)
Jurisdiction Over Issuance and)
Sale of Securities, or)
Alternatively, for Approval of)
Issuance and Sale of Securities)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
LUIS J. LAUREDO

BY THE COMMISSION:

ORDER DENYING PETITION FOR DECLARATORY STATEMENT
DISCLAIMING JURISDICTION AND GRANTING
PETITION FOR DECLARATORY STATEMENT APPROVING
ISSUANCE AND SALE OF SECURITIES

BACKGROUND

On July 16, 1993, Florida Division of Chesapeake Utilities Corporation (Chesapeake) filed its Petition For Declaratory Statement Disclaiming Jurisdiction, Or, Alternatively, For Approval Of Issuance And Sale Of Securities (Petition).

As explained in the petition, p. 2, Chesapeake seeks approval to issue up to 100,000 new shares of its common stock for the purpose of administering its retirement (401K) savings plan. Whereas the plan's trustee currently purchases shares of Chesapeake common stock on the open market, Chesapeake desires to enhance its method of funding the plan to include issuance of new shares of stock as well.

Chesapeake is a Delaware corporation which provides natural gas distribution service in that state, the State of Maryland and the State of Florida. Chesapeake began operating as a public utility in Florida in 1985, when it purchased Central Florida Gas Company. It merged with Plant City Natural Gas Company in 1988.

DOCUMENT NUMBER-DATE

11310 OCT 21 93

FLORIDA PUBLIC SERVICE COMMISSION

Since 1985, Chesapeake has sought and obtained our approval for securities issuance in three instances in which assets of the Florida Division of Chesapeake Utilities Corporation were encumbered. In other instances of issuance of securities, where assets of the Florida Division of Chesapeake Utilities Corporation were not encumbered, Chesapeake has informed staff of the security issue and, where requested, its effect on expected capitalization ratios before and after the issuance. Where the issuance of notes was in jeopardy in one circumstance, because lenders refused to proceed without Commission or staff written clearance, the staff provided a letter stating that

No enforcement action would be brought against the company on account of such issuance requiring approval of the Commission. This is based on past Commission practice of not requiring prior Commission approval of such Note issues when Florida property is not used as security.

Petition, p. 13.

In attempting to move beyond the uncertainty of whether §366.04(1) provides us with jurisdiction to approve or disapprove a securities issuance by a non-Florida corporation doing business in interstate commerce where no Florida assets are encumbered, Chesapeake has filed a petition asking us to disclaim such jurisdiction.

DISCUSSION

We deny, first of all, the petition to disclaim jurisdiction. Chesapeake's argument in support of its petition for declaratory statement disclaiming jurisdiction, petition, p. 14-19, is succinctly summarized in ¶20, p. 19:

Section 366.04(1), Florida Statutes and Chapter 25-8, Florida Administrative Code, insofar as they are applied to require advance FPSC approval of issues of Chesapeake's securities which do not create encumbrances or liens on Florida Division assets, are unconstitutional, in that they create an unreasonable burden on interstate commerce.
[e.s.]

ORDER NO. PSC-93-1548-FOF-GU
DOCKET NO. 930705-GU
PAGE 3

In Key Haven v. Bd. of Trustees of Internal Imp., 427 So.2d 153, 158 (Fla. 1982), the Court held that challenges alleging unconstitutional administrative applications of a statute or agency rule should be resolved by district courts sitting in their review capacity. Since, in this case, staff has resolved to approve Chesapeake's application to issue securities, infra, the question of constitutionality appears to be academic at this time. The facial constitutionality of a statute cannot be decided in an administrative proceeding. Key Haven, supra, at 157.

Second, we grant the alternative petition for approval of issuance and sale of securities by Chesapeake. The petition for approval meets the requirements of applications required pursuant to Chapter 25-8, Florida Administrative Code. Staff noted that Florida Division of Chesapeake Utilities Corporation seeks authority to issue up to 100,000 new shares of Chesapeake common stock for the purpose of administering Chesapeake's Retirement Savings Plan. Chesapeake desires to enhance its current funding method of buying Chesapeake stock on the open market to include issuing new shares of stock. Chesapeake will gradually issue the new common stock to enable the company to balance the composition of its capital between common stock and long-term debt.

Finally, this docket should remain open for the purpose of receiving consummation reports in compliance with Chapter 25-8.009, F.A.C.

In view of the above, it is hereby

ORDERED by the Florida Public Service Commission that the Petition For Declaratory Statement Disclaiming Jurisdiction of Florida Division of Chesapeake Utilities Corporation, is denied. It is further

ORDERED that the Petition For Declaratory Statement approving issuance and sale of securities by Florida Division of Chesapeake Utilities Corporation, is granted. It is further

ORDERED that this docket remain open.

ORDER NO. PSC-93-1548-FOF-GU
DOCKET NO. 930705-GU
PAGE 4

By ORDER of the Florida Public Service Commission this 21st
day of October, 1993.

A handwritten signature in cursive script, reading "Steve Tribble", written over a horizontal line.

STEVE TRIBBLE, Director
Division of Records and Reporting

RCB

(S E A L)

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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting 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 or sewer 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 after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.