

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Citizens) DOCKET NO. 920754-WU
for overcharging for water) ORDER NO. PSC-93-0028-FOF-WS
service by the Woods Division) ISSUED: 01/06/93
of Homosassa Utilities, Inc.)
in Sumter County.)

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING OPC'S MOTION TO JOIN INDISPENSABLE PARTY,
DENYING OPC'S MOTION TO STRIKE AND MOTION FOR DEFAULT JUDGMENT,
AND DENYING UTILITY'S MOTIONS TO DISMISS

AND

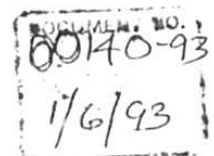
NOTICE OF PROPOSED AGENCY ACTION ORDER
DENYING RELIEF REQUESTED IN OPC COMPLAINT

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein with regard to denying the relief requested in OPC's complaint is preliminary in nature and, as such, will become final unless a person whose interests are substantially affected files a petition for a formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code.

CASE BACKGROUND

On July 24, 1992, the Office of Public Counsel (OPC) filed a complaint against Homosassa Utilities, Inc., Woods Division, (HUI or utility) and alleges that the utility is charging water rates higher than those authorized by the Commission in the utility's recent staff-assisted rate case. Specifically, OPC alleges that in Order No. 25139, issued September 30, 1991, in Docket No. 900966-WS, the Commission established a \$2.33 per 1,000 gallons consumption charge for all water consumed over the minimum gallons allowance (5,000 gallons for most residential customers) and that the utility has been assessing the consumption charge for water consumed under the minimum gallons allowance. OPC requests that



the Commission order the utility to cease collecting the overcharges and order the utility to refund all overcharges already collected. OPC did not request a hearing.

On August 11, 1992, the utility filed a letter from its accounting consultant responding to OPC's complaint. In this letter, the utility argued that OPC's interpretation of the Order was incorrect and asked the Commission to dismiss the complaint. OPC expressed its opposition to the utility's request for dismissal by a response filed on August 19, 1992. On September 1, 1992, the utility filed documents purporting to be an answer to and a motion to dismiss OPC's complaint; both of these documents were filed and signed by counsel. On September 14, 1992, OPC responded to the answer, moved to strike same, and moved for a default judgment. Finally, on October 22, 1992, OPC moved to join USA Utilities Unit 2, Inc., (USA) as an indispensable party to the proceeding. In that motion, OPC asserts that USA must be joined as a party to this case because by Order No. PSC-92-1113-FOF-WS, issued October 4, 1992, in Docket No. 920176-WS, this Commission approved the transfer of HUI's certificates to and implementation of HUI's rates by USA. No responses to any of the latter OPC motions were filed.

This Order disposes of the outstanding motions and OPC's complaint.

MOTION TO JOIN INDISPENSABLE PARTY

As stated above, by Order No. PSC-92-1113-FOF-WS, issued October 4, 1992, in Docket No. 920176-WS, this Commission approved the transfer of HUI's certificates to and implementation of HUI's rates by USA.

We are aware that some of USA's principals are HUI principals -91% of HUI is owned by a Mr. and Mrs. Sullivan, who now own 50% of USA. Nonetheless, USA is a different corporate entity and should be treated as such. By virtue of the transfer, we believe that USA has become an indispensable party. Therefore, the Division of Records and Reporting should serve a copy of OPC's complaint on USA, and USA should be allowed to file an answer within the time prescribed by Rule 25-22.037, Florida Administrative Code.

DOCUMENT NUMBER-DATE

00140 JAN-68

FPSC-RECORDS/REPORTING

OPC'S MOTION TO STRIKE AND MOTION FOR DEFAULT JUDGMENT

In its motion filed September 14, 1992, OPC argues that HUI's first response (the one filed by HUI's accounting consultant) should not be considered as either an answer or a motion to dismiss under the Commission's rules because HUI subsequently filed a motion to dismiss and an answer signed by an attorney. OPC argues, "As Homosassa clearly knows how to file a formal motion to dismiss [and answer], its letter from [the accounting consultant] can no longer be given the benefit of the doubt as a formal motion to dismiss or an answer." OPC asks that we not accept HUI's initial response and moves that we strike the answer and motion filed by HUI's attorney as being untimely. In addition, since the answer filed by HUI's counsel was not timely, OPC argues that it is entitled to a default judgment under Rule 25-22.037(4), Florida Administrative Code.

This Commission's rules appear to have no formal pleading requirements for answers. Rule 25-22.036(7), Florida Administrative Code, which addresses form and content, applies to initial pleadings, e.g., petitions and complaints; and Rule 25-22.037, Florida Administrative Code, is silent as to an answer's form and content. Further, Rule 25-22.037(2), Florida Administrative Code, establishes filing requirements for motions, but, as to form and content, the rule requires only that motions be made in writing and that they fully state the action requested and the grounds relied upon. Notably, OPC does not specifically identify why HUI's initial response does not meet the rules' requirements.

We note that in an effort to make the administrative process more accessible, we have not in all cases in the past strictly enforced formal pleading requirements. In this case, the response filed by HUI's accounting consultant--who OPC acknowledges is a class "B" practitioner--adequately addresses the issues raised in OPC's complaint. Moreover, OPC treated the utility's first response as a formal pleading because OPC filed a response to it. We do not think OPC can claim to be prejudiced by our accepting HUI's initial filing.

In consideration of the above, we deny OPC's motion to strike and motion for a default judgment. Further, we note that although the utility's second filed answer is not sanctioned by our rules,

we do not see that OPC is harmed by its presence when OPC responded to that answer in writing.

MOTIONS TO DISMISS

OPC correctly points out in its responses that in contemplating a motion to dismiss, this Commission can look only to the facts alleged in the complaint, all of which the Commission must accept as true. (OPC and HUI apparently agree that HUI's motions to dismiss is properly treated as a motion to dismiss for failure to state a viable cause of action.) In the complaint, OPC alleges that Order No. 25139 established a consumption charge for gallons consumed over the minimum gallons and that HUI is charging more than that. However, in arguing against the motion to dismiss, OPC does not specifically identify which of its allegations are disputed factual issues. Indeed, it is unclear from OPC's complaint, motions, or any of its responses exactly what it believes the disputed factual issue(s) to be.

In its August 19 response to HUI's initial request for dismissal, OPC did little to clarify its position in this regard. OPC asserts that neither the staff's opinion (as contained in a letter to the utility after the tariff sheets were approved) nor the utility's opinion "can change the essential facts"; yet, OPC later states that staff's letter "does not carry the weight of law" and that "an issue exists as to whether the rates being charged . . . are lawful." Also, in its September 14 response and motion, OPC states, "Setting rates is a matter of law, not fact."

If OPC's position is that the question of which rates were approved is a legal issue, the only disputed factual issue directly raised by the complaint concerns the rates HUI is currently charging, and this Commission's accepting the truth of OPC's allegation that the utility is currently charging for consumption below the minimum gallons leaves us an insufficient basis for evaluating the dispute at hand.

Obviously, the salient question here concerns the rates we approved in Order No. 25139. We believe that the question of what rates were approved is a combined question of fact and law. The proper interpretation of the language in the Order may be looked upon as a legal question; and the question of whether or not the rates established are fair, just, reasonable, and not unduly discriminatory is certainly a legal question. However, one cannot

ignore that as a predicate to approving rates, this Commission makes numerous factual and policy determinations in arriving at the appropriate revenue requirement. OPC's complaint should therefore be interpreted to raise these underlying factual determinations as disputed issues of material fact. Assuming that these underlying factual determinations favor OPC's interpretation of the Order, we do not think it would be appropriate to grant the utility's motions to dismiss.

RESOLUTION OF OPC'S COMPLAINT

As stated above, OPC alleges that the utility is charging water rates higher than those authorized by the Commission and requests a refund with interest of all overcharges. According to OPC, in Order No. 25139, the Commission established a \$2.33 per 1,000 gallons consumption charge for all water consumed over the minimum gallons allowance, and the utility has been assessing the consumption charge for water consumed under the minimum gallons allowance. OPC argues that the Order clearly indicates that the base charge includes a minimum gallons allowance, that the customers have relied on the plain meaning of the language in the Order, and that if the Commission had intended to remove the minimum gallons allowance, it could have done so in terms a layperson could understand.

The utility points out that on the same page of the Order which OPC refers to, the Commission states that it is changing the utility's existing rate structure, which included a minimum gallons allowance. The utility also argues that a base facility charge, by definition, does not include a minimum gallons allowance. Further, in its September 1 answer, the utility asserts two affirmative defenses. First, it maintains that the Commission is estopped from granting OPC's requested relief because a Commission staff member wrote HUI a letter of clarification regarding this very matter and because the Commission approved HUI's existing tariff. Secondly, HUI contends that the Commission can correct clerical errors like the one at issue here and have the correction relate back to the date of the Order.

In OPC's September 14 response to HUI's September 1 answer, OPC argues quite extensively against the application of equitable estoppel and also expresses disagreement with the idea that the Commission can modify its Order now without any sort of formal proceeding.

We have reviewed Order No. 25139, the predicate recommendation, and the workpapers, including the billing analysis, used in processing HUI's the staff-assisted case and conclude that the rates in HUI's (now USA's) approved tariff are correct.

As a matter of practice, the Commission does not include a minimum gallons allowance in a base facility charge, and Order No. 25139 clearly states that the existing rate structure is being changed. We concede that there is an apparent ambiguity in a portion of the Order; however, we are concerned that the customers waited until after the expiration of the protest and reconsideration periods to resolve the ambiguity. The protest period expired October 21, 1991; the tariff sheets became effective October 28, 1991; and OPC filed the instant complaint July 24, 1992.

Using the information in the Order and workpapers, we calculated what HUI's water revenues would be under OPC's interpretation of the Order and compared that amount to the water revenue requirement approved in the Order, \$15,833. Under OPC's interpretation, water revenues would be approximately \$13,325; under the approved tariff, water revenues would be approximately \$15,552.

Relying on the above rationale, we do not think it necessary at this point to analyze the equitable estoppel and clerical mistake arguments made by the utility. In consideration of the above, we hereby deny the relief requested by OPC and clarify Order No. 25139.

DOCKET CLOSING

If there are no protests to our proposed action denying OPC's requested relief, no further action in the docket will be required, so the docket may be closed. Only if a timely protest is received do we believe that any claims and allegations made in an answer by USA have an affect on the proceeding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Division of Records and Reporting shall serve a copy of the docketed complaint on USA Utilities Unit 2, Inc., which shall be

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allowed to file an answer within the time prescribed by Rule 25-22.037, Florida Administrative Code. It is further

ORDERED that the Office of Public Counsel's motion to strike and motion for a default judgment are denied. It is further

ORDERED that the provision of this Order denying the relief requested in OPC's complaint is proposed agency action and shall become final, unless an appropriate petition in the form provided by Rule 25-22.029, Florida Administrative Code, is received by the Director of the Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the date set forth in the Notice of Further Proceedings below. It is further

ORDERED that this docket will be closed if no timely protest is received from a substantially affected person.

By ORDER of the Florida Public Service Commission this 6th day of January, 1993.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MJF

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.

As identified in the body of this order, our action denying the relief requested in OPC's complaint is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on January 27, 1993. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

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 the relevant portion of this order becomes final and effective 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 effective date 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.

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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 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 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.