

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Amend-) DOCKET NO. 930204-WS
ment of Certificates Nos. 236-W) ORDER_NO. PSC-94-0947-FOF-WS
and 179-S and for a Limited) ISSUED: August 2, 1994
Proceeding in St. Johns County)
by Jacksonville Suburban)
Utilities Corporation)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
DIANE K. KIESLING

ORDER GRANTING MOTION TO STRIKE

BY THE COMMISSION:

By Order No. 24335, issued April 8, 1991, this Commission found that the operations of Jacksonville Suburban Utilities Corporation (JSUC) consisted of "a combination of functionally related facilities and land" and that JSUC's utility operations therefore constituted a "system", as defined under Section 367.021(11), Florida Statutes. Accordingly, we determined that, since these operations constituted a system, JSUC was a utility system "whose service transverses county boundaries" and, pursuant to Section 367.171(7), Florida Statutes, exercised exclusive jurisdiction over JSUC's operations in St. Johns County.

On March 1, 1993, JSUC filed an application for amendment of Certificates Nos. 236-W and 179-S, to reflect its acquisition of Ponte Vedra Utilities (Ponte Vedra), and for a limited proceeding to implement its uniform rates in St. Johns County. The Ponte Vedra Community Association (PVCA) initially filed an objection to JSUC's application. However, after meeting with representatives of JSUC, PVCA withdrew its objection, based upon assurances that any subsequent action regarding rates, rate base, or any acquisition adjustment would be processed under this Commission's proposed agency action procedure, and that they would have an opportunity to protest. L'Atrium Homeowners Association also filed an objection but withdrew its objection, as well, pending our disposition of the issue of rates.

On July 28, 1993, a customer meeting was held in Ponte Vedra, regarding the proposed transfer and limited proceeding. Approximately fifty people attended. Eight customers of the

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

utility, St. Johns County Commissioner Linda Balsavage, and Philip Heil, Vice President of JSUC, made sworn presentations. The customers in attendance did not object to the application for amendment filed by JSUC; however, several expressed concern over the change in rates and rate structure and one customer spoke in opposition to a positive acquisition adjustment in establishing rate base.

By Order No. PSC-93-1480-FOF-WS, issued October 11, 1993, this Commission approved, as a final action, JSUC's application for amendment of Certificates Nos. 236-W and 179-S and, as proposed agency action, approved JSUC's request to implement its uniform rates. Order No. PSC-93-1480-FOF-WS also expressly deferred action on the issues of rate base and JSUC's requested positive acquisition adjustment pending the receipt of further information.

No timely protests were filed regarding the proposed agency action portion of Order No. PSC-93-1480-FOF-WS and these portions became final and effective on November 2, 1993. By Amendatory Order No. PSC-93-1480A-FOF-WS, issued December 14, 1993, we corrected a schedule which depicted JSUC's meter installation charges, which was appended to Order No. PSC-93-1480-FOF-WS at page 4 of Schedule No. 1.

By proposed agency action Order No. PSC-93-1819-FOF-WS, issued December 22, 1993, this Commission established rate base for the Ponte Vedra system, granted JSUC's request for a positive acquisition adjustment, and denied JSUC's request to capitalize, as organizational costs, the costs of its acquisition of the Ponte Vedra system. By Amendatory Order No. PSC-93-1819A-FOF-WS, issued December 30, 1993, we corrected a typographical error in our determination of the net book value of the Ponte Vedra water system, as reflected in the first ordering paragraph of Order No. PSC-93-1819-FOF-WS.

On January 12, 1994, Joanne Cody, President of PVCA, Margaret and Weldon Johnson, and Edward Barrett, customers of the Ponte Vedra system, filed a protest to Order No. PSC-93-1819-FOF-WS. The petitioners also protested Amendatory Order No. PSC-93-1819A-FOF-WS and purported to protest Order No. PSC-93-1480-FOF-WS. According to the petitioners, their protest of Order No. PSC-93-1480-FOF-WS should be considered timely, notwithstanding that Order No. PSC-93-1480-FOF-WS was final and effective for 72 days by the time the protest was filed, because the cumulative effect of the three orders could not be ascertained until all three were issued. In other words, petitioners argue that, by bifurcating the issues in this case, we effectively denied them a meaningful point of entry into the administrative process.

ORDER NO. PSC-94-0947-FOF-WS
DOCKET NO. 930204-WS
PAGE 3

On June 15, 1994, JSUC served, via facsimile transmission, a motion to strike those portions of the protest by which petitioners professed to protest Order No. PSC-93-1480-FOF-WS. JSUC filed its motion to strike on June 17, 1994. On June 23, 1994, the Office of Public Counsel (OPC) filed a response to JSUC's motion to strike on behalf of the petitioners and of the citizens of the State of Florida.

In its motion to strike, JSUC argues that Order No. PSC-93-1480-FOF-WS must be considered final and effective. JSUC cites several rules of law to support its claim, including the doctrine of administrative finality. The doctrine of administrative finality holds that

orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966).

JSUC also argues that Order No. PSC-93-1480-FOF-WS is final and effective under the doctrines of administrative res judicata, Hayes v. Florida Dept. of Business Regulation, 418 So. 2d 331, 332 (Fla. 3rd DCA 1982), and collateral estoppel, Jet Air Freight v. Jet Air Freight Delivery, Inc., 261 So.2d 35 (Fla. 3rd DCA 1972), cert.den., 267 So.2d 833 (Fla. 1972).

According to JSUC, petitioners failed to file a timely protest to Order No. PSC-93-1480-FOF-WS and, under the above rules of law, in the absence of a timely protest, Order No. PSC-93-1480-FOF-WS became final and effective on November 2, 1993. JSUC argues that petitioners were made fully aware of the time constraints for filing a protest both in the ordering paragraphs of the order and the Notice of Further Proceedings or Judicial Review attached thereto.

JSUC argues further that it implemented its rates and charges in reliance on the finality of Order No. PSC-93-1480-FOF-WS and that it would be adversely and prejudicially affected if the protest of that order is allowed to go forward. JSUC, therefore, requests that this Commission strike those portions of petitioners protest which deal with the issues decided in Order No. PSC-93-1480-FOF-WS.

In its response to JSUC's motion, OPC argues that "Order No. PSC-93-1480-FOF-WS is the first of a triumvirate of orders each of which addresses a piece part of the transfer of the Ponte Vedra system". According to OPC, the opportunity to protest one of the three orders, by one whose interests are affected by the cumulative effect of all three, "is meaningless and woefully inadequate." OPC maintains that, as soon as the petitioners realized the extent to which their interests were affected, they lodged "timely" protests to the orders.

OPC also argues that the three orders are inextricably tied to the central question concerning the transfer and that the doctrine of administrative finality does not attach since we "materially altered" the import of Order No. PSC-93-1480-FOF-WS. Finally, OPC argues that JSUC did not and cannot support its claim of prejudice, because there would be no prejudice if the protest of that order is allowed to go forward.

Initially, we note that the "triumvirate" of orders to which OPC refers actually consists of only two: Orders Nos. PSC-93-1480-FOF-WS and PSC-93-1819-FOF-WS. The third order to which it refers, Order No. PSC-93-1819A-FOF-WS, is a one page amendatory order to correct a typographical error, albeit a \$1 million dollar error, but a typographical error nonetheless. As for the other two orders, we note that this Commission usually bifurcates transfer cases such as this in order to resolve the simpler transfer and rate issues first and, only after we have had more time to examine them, the rate base and related issues.

As for OPC's argument that we "materially altered" the import of Order No. PSC-93-1480-FOF-WS, the only subsequent orders that made any alteration to that order were Order No. PSC-93-1480A-FOF-WS, by which we corrected the schedule of meter installation fees, and Order No. PSC-93-1819-FOF-WS, which modified language concerning the effective date of the rates approved by Order No. PSC-93-1480-FOF-WS. It is hard to imagine this as a material alteration of the actual rate issue.

We agree with JSUC that the doctrine of administrative finality must attach. It appears that petitioners were fully apprised of their respective rights and points of entry and that they chose not to protest our decision regarding the rates. A party simply cannot sit on the right to protest a proposed agency action order for 93 days and then expect to exercise that right after others have relied upon the finality of that order for a full 72 days. If we allow petitioners to "bootstrap" in the issue of rates, it will impart a significant and untenable degree of confusion and uncertainty as to the finality of all orders of this Commission. Accordingly, JSUC's motion is granted.

ORDER NO. PSC-94-0947-FOF-WS
DOCKET NO. 930204-WS
PAGE 5

It is, therefore,

ORDERED by the Florida Public Service Commission that Jacksonville Suburban Utilities Corporation's Motion to Strike those portions of petitioners' protest which purport to protest Order No. PSC-93-1480-FOF-WS is granted.

By ORDER of the Florida Public Service Commission, this 2nd day of August, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay J. J. J.
Chief, Bureau of Records

(S E A L)
RJP

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.