

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for limited) DOCKET NO. 930256-WS
proceeding to implement water) ORDER NO. PSC-94-0987-FOF-WS
conservation plan in Seminole) ISSUED: August 15, 1994
County by SANLANDO UTILITIES)
CORPORATION.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING MOTIONS TO DISMISS

BY THE COMMISSION:

BACKGROUND

Sanlando Utilities Corporation (Sanlando or utility) is a class A water and wastewater utility located in Altamonte Springs, Florida, which operates three water and two wastewater systems. Sanlando's service area lies within the St. Johns River Water Management District (STRWMD), which has declared its entire district as a critical use area.

This Commission last considered these systems within a full rate case in Docket No. 900338-WS. Order No. 23809, issued on November 27, 1990, required Sanlando to submit a plan detailing the actions it would take to implement water conservation initiatives and to file a brief economic study of the feasibility of implementing spray irrigation within 90 days of the effective date of the Order. The utility was also ordered to hold \$25,008 in annual revenues, referred to as "set-aside funds," for future expenses specifically related to water conservation. Sanlando submitted its water conservation plan on June 28, 1991.

By Order No. 24920, issued on August 16, 1991, this Commission approved in part and denied in part the water conservation plan submitted by Sanlando. At our October 22, 1991, Agenda Conference, we determined that the plan supplement was unsatisfactory. On September 21, 1992, the utility filed an addendum to its water conservation plan. The addendum presented Sanlando's plan for an effluent reuse program, an inclining block rate structure, and a

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report of the utility's conservation expenditures to date and requested information from the SJRWMD.

After reviewing this plan, this Commission found in Order No. PSC-92-1356-FOF-WS, issued November 23, 1992, that Sanlando had met the requirements set forth in Orders Nos. 23809 and 24920. Order No. PSC-92-1356-FOF-WS approved the addendum and incorporated it into the utility's existing water conservation plan. That Order stated that because we found that it would be more appropriate to address implementation of the reuse program through a limited proceeding, we closed Docket No. 900338-WS and ordered the utility to file a limited proceeding for the purpose of implementing the conservation program discussed in the body of the Order within nine months of the issuance date of this Order.

Sanlando complied with this mandate by filing a Petition for Limited Proceeding to Implement Water Conservation Plan on March 10, 1993, approximately 4 months after the issuance date of Order No. PSC-92-1356-FOF-WS. The St. Johns River Water Management District filed a Petition to Intervene in support of Sanlando Utilities Corporation's Petition for Limited Proceeding to Implement Water Conservation Plan on June 7, 1993. The Florida Audubon Association filed to become an interested party in the docket in July 1993. Our Staff conducted a customer meeting on July 8, 1993.

On December 10, 1993, we issued Order No. PSC-93-1771-FOF-WS as a proposed agency action. The order approved Sanlando's petition for a limited proceeding to implement the water conservation plan and required the utility to file a proposed charge for reclaimed water. The order authorized increased gallonage charges in order to generate revenue for the conservation plan and required the utility establish an escrow account to deposit those funds and any excess revenues.

On December 31, 1993, Jack R. Hiatt filed a timely petition protesting Order No. PSC-93-1771-FOF-WS. Mr. Hiatt stated that his substantial interests were affected by the Commission's decision because he will be charged the increased utility rates. He took issue with the manner in which the proposed rates will be implemented, because he claimed it will cause a "significant amount of taxes being paid by Sanlando's customers." Mr. Hiatt requested a formal hearing.

On January 3, 1994, Robert E. Swett and Tricia Madden, individually and as President of Wekiva Hunt Club Community Association, Inc., filed petitions protesting Order No. PSC-93-1771-FOF-WS. Although the petitions were not filed within the 21-

day deadline of December 31, 1993, Mr. Swett and Ms. Madden stated that they had not received a copy of the Order. According to Rule 25-22.029(4), if an individual is not served with a copy of the order and notice has been published, the deadline for filing the petition may be tolled until after notice is published. Their petitions alleged the same grounds and objections as Mr. Hiatt.

The Office of Public Counsel (OPC) filed a notice of intervention in this docket on February 4, 1994. On January 26, 1994, the St. John's Water Management District's Petition for Intervention was granted. This matter is currently set for a formal hearing in Seminole County on September 26-27, 1994.

On January 24, 1994, Sanlando filed Motion to Dismiss and Answer to Petitions. On February 16, 1994, the Florida Audubon Society, Inc. (Audubon) and Friends of the Wekiva River, Inc. (Friends) filed a Petition to Intervene in support of Sanlando's conservation plan. On that same date, Audubon and Friends filed a Motion to Dismiss and Response to Motion to Amend of Tricia Madden. On April 25, 1994, Audubon and Friends were granted intervention in this docket. On June 16, 1994, Sanlando and Audubon and Friends filed a Notice of Supplemental Authority in support of their motions.

Sanlando's Motion to Dismiss Denied

In its Motion to Dismiss and Answer to Petitions, Sanlando denied all of the allegations of fact presented by the Petitioners who filed objections to Order No. PSC-93-1771-FOF-WS. In support of its Motion the utility stated that the Petitioners did not allege any disputed issues of fact, did not allege any ultimate facts, and did not make any demand for relief. Sanlando also asserted that because the Petitioners did not allege any disputed issues of fact, the Commission should convert the case to an informal proceeding.

In its Citizen's Response to Motion to Dismiss and Answer to Petitions, OPC stated that the Petitioners who protested the Order have a substantial interest, as they are rate-payers who will pay higher rates if the utility's conservation plan is approved. OPC noted that "the Commission has always held that a ratepayer who is subject to a rate increase has a substantial interest in the outcome of the rate increase proceeding." In response to the utility's argument that the Petitioners have not stated the ultimate facts or alleged any disputed issues of fact, OPC stated that there are numerous factual arguments and lists several of them. OPC also argued that they were unable to state the ultimate facts in the case until they have had the opportunity to engage in

discovery. Finally, OPC pointed out that the Petitioners made a demand for relief, in that they requested a formal hearing in order to present testimony to oppose the proposed water conservation plan.

In her Amended Response to Motion to Dismiss and Answer to Petitions and Alternative Motion to Amend, Tricia Madden asserted that the Petitioners have complied with Commission rules concerning the filing of petitions. She stated that the Petitioners have alleged that their substantial interests will be affected because as customers they will be paying the higher rates. She further noted that Paragraph 5 of her original petition alleges the facts which are in dispute, and stated that until the Petitioners engage in discovery, they will be unable to determine all of the specific issues and ultimate facts. Finally, Ms. Madden claimed that the Petitioners have made an appropriate demand for relief, as they have opposed Order No. PSC-93-1771-FOF-WS and requested a formal hearing to present testimony in opposition to the conservation program.

According to Rule 25-22.029, Florida Administrative Code, an individual who opposes a Proposed Agency Action order may file a petition in the form provided for in Rule 25-22.036. Sanlando's Motion was premised upon the fact that the Petitioners did not comply with the provisions of Rule 25-22.036(7), Florida Administrative Code. That rule states in relevant part:

(7) Form and Content

- (a) Generally except for orders or notices issued by the Commission, each initial pleading shall contain:
1. The name of the Commission and the Commission's docket number, if known;
 2. The name and address of the applicant, complainant or petitioners, and an explanation for how his or her substantial interests will be or are affected by the Commission determination;
 3. A statement of all known disputed issues of material fact. If there are none, the petition must so indicate;
 4. A concise statement of the ultimate facts alleged as well as the rules and statutes which entitle the petitioner to relief;
 5. A demand for relief; and
 6. Other information which the applicant, complainant or petitioner contends is material.

Sanlando claimed that the Petitioners did not comply with subsections 2, 3, 4, and 5 of the Rule. These concerns are discussed below.

a) Substantial interest

In order to have a substantial interest in a proceeding, an individual must show that he or she will suffer injury in fact, and that the injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). As ratepayers and customers of Sanlando, the Petitioners' rates will increase if the conservation plan is implemented. In other words, there is a direct nexus between the Commission's decision to implement the conservation rates, and the Petitioner's payment of those increased rates. Agrico's second requirement has also been met, in that the Commission is charged by Section 367.121(1)(a), Florida Statutes, to prescribe fair and reasonable rates. The Petitioners' alleged injury of paying higher rates is of a type intended to be addressed in this proceeding. Therefore, we find that the Petitioners have adequately explained their substantial interests.

b) Disputed issues of Material Facts and Ultimate Facts

We find that the Petitioners have all alleged sufficient disputed issues of material facts. Each petition protests the findings of Order No. PSC-93-1771-FOF-WS, and takes issue with "among other things, the manner in which the proposed increased rates will be implemented." While the petitions do not allege each specific disputed fact, it is clear that the Petitioners have objected to the PAA Order's findings and the implementation of the rates upon Sanlando's customers. Furthermore, at the point at which a protest is filed to a PAA order, parties have generally not conducted discovery. This Commission has implemented pre-hearing procedures in order to develop issues prior to the hearing.

c) Demand for Relief

The proposed agency action process allows substantially affected persons to protest the order and request a Section 120.57(1) formal hearing. (See Rule 25-22.029(4), Florida Administrative Code). Each of the Petitioners has objected to the PAA Order and requested that the Commission convene a formal hearing to resolve the dispute. The Petitioners have therefore stated a demand for relief in compliance with the Commission's procedure.

Therefore, we find that the Petitioners have complied with the provisions of Rule 25-22.036(7), Florida Administrative Code. The Petitioners have adequately explained how their substantial interests will be affected, alleged sufficient issues of material fact and ultimate facts, and made a demand for relief.

We also find it appropriate to deny Sanlando's request to convert the proceedings into an informal proceeding. An informal proceeding pursuant to Section 120.57(2), Florida Statutes, is appropriate when there are no disputed issues of material fact. The petitioners have specifically objected to the implementation of rates. As noted in Order No. PSC-93-0028-FOF-WS in Docket No. 920754-WU, the question of approved rates is a combined question of fact and law. Thus, the Petitioners have raised disputed issues of material facts by protesting Order No. PSC-93-1771-FOF-WS.

d) Notice of Supplemental Authority Rejected

During its 1994 session, the Florida Legislature enacted a law addressing water reuse projects. Chapter 94-243 of the Laws of Florida made substantial amendments to Chapters 367, 373, and 403, Florida Statutes. More specific to this docket, the legislation created Section 367.0817, Florida Statutes, which established procedures to address reuse projects. Section 367.0817 sets forth the requirements for submitting a reuse plan, requires the Commission to review the plan and issue a proposed agency action order, allows the costs of the reuse project to be recovered in rates, allows rates to be approved based upon projected costs, and sets forth procedures for the implementation of the rates. Governor Lawton Chiles signed the bill into law on May 25, 1994.

On June 16, 1994, Sanlando and Audubon and Friends filed a Notice of Supplemental Authority, intended to support the parties' Motions to Dismiss. The Notice drew attention to Section 1 of Chapter 94-243 of the Laws of Florida, and argued that the provisions of Section 367.0817 obviate the need for a formal hearing. Sanlando and Audubon and Friends claimed that because the new reuse statute addresses all of the objections raised by the protestors, the objections should be dismissed. These parties stated that "the Legislature has essentially written the elements of Sanlando's proposal that were in dispute into law, and has obviated the usefulness of a formal proceeding." (Notice, pg. 6) The Notice also pointed out that this proceeding would have to be substantially expedited because the new statute requires a final decision to be rendered within eight months of the filing of a protest.

In its Citizens Response to Notice of Supplemental Authority, filed on June 28, 1994, OPC argued that the Notice of Supplemental Authority is in fact an amended motion to dismiss. OPC conceded that Section 367.0817 may address one of the issues raised by the objectors, but states that it does not dispose of all of the issues. OPC also pointed out that the new statute expressly requires the Commission to use the PAA process wherein parties may object to the implementation of a reuse plan. Finally, OPC raised objection to Sanlando and Audubon and Friends' attempt to apply Section 367.0817 retroactively.

In her Response to Notice of Supplemental Authority, filed June 27, 1994, Tricia Madden raised similar arguments to those made by OPC. Ms. Madden also objected to the attempt to apply the new statute retroactively to the issues and timeline in this case.

On July 5, 1994, SJRWMD filed a response to the Notice of Supplemental Authority. In its response, SJRWMD argued that the new statute gives the Commission the authority to approve the method of implementation proposed by Sanlando, and that the remaining issues in this case should be whether the costs are prudent and whether the proposed rates are reasonable and in the public interest. Because the Notice was filed on June 15, 1994, parties should have filed any response to the Notice by June 28, 1994 (allowing seven days for a response, plus an additional five days for mailing, pursuant to Rule 25-22.037(2)(b), Florida Administrative Code). Even though SJRWMD's response may be considered untimely, we have considered SJRWMD's motion to the extent that it concurs with the Notice filed by Sanlando and Audubon and Friends.

Pursuant to Rule 25-22.037(2), Florida Administrative Code, parties may file motions in opposition to a Commission proceeding or for other purposes. However, the Commission does not have a specific mechanism for the filing of a notice of supplemental authority. Such a notice is generally filed in the course of an appellate proceeding after a brief has been served. Rule 9.210 of the Rules of Appellate Procedure states that a notice may be filed to call attention to authorities which have been discovered after the last brief has been filed. The notice may identify briefly the points on appeal, but should not contain argument. Although the Commission does not have a specific procedure for filing a notice of supplemental authority, on certain occasions it may be appropriate to permit a party to file a notice if conditions similar to Rule 9.210(g), Fla.R.App.P. were met.

However, the Notice of Supplemental Authority filed by Sanlando and Audubon and Friends does not comport with the

rationale for allowing notices of this type to be filed. The Notice does not simply draw our attention to a statute. Sanlando and Audubon and Friends are essentially attempting to amend their original motions to dismiss by raising an entirely new argument. A supplemental notice should not be used to raise an argument for the first time. In Bing v. A.G. Edwards & Sons, Inc., 498 So.2d 1279 (Fla. 4th DCA), the appellate court declined to consider arguments raised for the first time in a party's notice of supplemental authority. Furthermore, a notice of supplemental authority should not contain argument of any kind. It is simply intended to draw a court's attention to a previously overlooked case, statute or authority. The Notice filed by Sanlando and Audubon and Friends contains argument as to the application of the new statute to these proceedings. On these grounds, we find it appropriate to reject the Notice of Supplemental Authority.

For the reasons set forth herein, Sanlando's Motion to Dismiss is denied.

Audubon and Friends' Motion to Dismiss Denied

In their motion to dismiss, Audubon and Friends joined in support of Sanlando's motion to dismiss and raised additional grounds to support their own motion to dismiss.

Audobon and Friends raised three arguments in opposition to the Petitioners' protests. First, they argued that to the extent that the Petitioners and OPC have attempted to address the appropriateness of water conservation, they should have filed a rule challenge to the administrative rules which address water conservation. Secondly, they argued that to they extent that the Petitioners and OPC have challenged the legislative directive which allows utilities to recover the cost of reuse projects through rate structure, the proper forum for such a challenge is a circuit court. Finally, Audubon and Friends pointed out that the Petitioners and Public Counsel did not respond to any of the published notices concerning Department of Environmental Protections (DEP) permits. They argued that a hearing on the Petitioner's protests is barred by the doctrine of res judicata and laches, to the extent that they are attempting to reopen long-decided issues relating to the need for a water reuse facility.

In her Response to Motion to Dismiss of Florida Audubon Society and Friends of the Wekiva River, Inc., and Response to Motion to Amend of Tricia A. Madden and the Citizens Response to Public Counsel, Tricia Madden rebutted the arguments made by Audobon and Friends. Ms. Madden noted that issues such as the methods of water conservation are not before the Commission in this

proceeding. This docket and her protest concern the proper method of funding the proposed conservation project. She and the other Protestors have not sought to challenge the validity of the rule, but have requested a Section 120.57(1) hearing as they are permitted to do in the Commission's PAA process. Ms. Madden also argued that her petition is not barred by the doctrine of res judicata and laches because this is a new cause of action resulting from Order No. PSC-93-1771-FOF-WS. She also noted that as intervenors, Audubon and Friends must take the case as they find it.

OPC raises similar arguments in its Response to Motion to Dismiss Filed by Florida Audubon Society and Friends of the Wekiva river, Inc. OPC stated that it has not challenged the provisions of any rules, but that it has challenged the method of funding the conservation program. OPC further stated that it has not challenged the legislative directive of 403.064(6), Florida Statutes, but has instead taken issue with the method by which Sanlando is attempting to recover the cost of the facilities. Finally, OPC argued that its protest is not barred by res judicata. Neither OPC nor the Protestors were parties in the previous proceedings. Furthermore, OPC and Protestors have exercised their right according to Commission procedure to protest the PAA order.

a) Rule challenge

We agree with OPC and the Petitioners that they have not challenged the provisions of Chapter 17-40 and Chapter 42-2, Florida Administrative Code, which address specific conservation methods. A rule challenge under Section 120.56, Florida Statutes, is not the appropriate mechanism to address this matter. As both OPC and Ms. Madden stated, they have not raised issues concerning water conservation methods or other technical issues. Instead, they are concerned with how the conservation plan will be funded.

Furthermore, this Commission has considered the appropriateness of a water conservation in earlier dockets. Orders Nos. 23089, 24920 and PSC-92-1356-FOF-WS addressed the conservation plan itself. The Order at issue in this docket, Order No. PSC-93-1771-FOF-WS addresses the implementation of a rate structure designed to allow the utility to recover the cost of the conservation plan. The protests filed to that Order are specifically directed to the findings of that Order.

Audubon and Friends have also acknowledged elsewhere in their motion that the Commission has jurisdiction under Section 403.064(6) to address recovery for a reuse project. In the scope of its jurisdiction and pursuant to a petition for a limited proceeding filed by Sanlando the Commission issued a proposed

agency action order. The Protestors have the opportunity and right to file a petition in opposition to the Commission's PAA order.

b) Challenge to legislative directive

We disagree with Audubon and Friends' contention that the Protestors are actually challenging the language of the Section 403.064(6), Florida Statutes, and that they should test its validity in a circuit court. Audubon and Friends have cited Section 403.064(6) for the proposition that:

Pursuant to Chapter 367, the Florida Public Service Commission shall allow entities which implement reuse projects to recover the full cost of such facilities through their rate structure. (emphasis added)

Even though they have not stated so, it appears that Audubon and Friends argue that because the statute states that "the Commission shall allow" utilities to recover the cost of the projects, other parties may not challenge the method of recovery. Clearly, this is not the case. OPC and the Petitioners have not challenged the PSC's authority under Section 403.064(6), Florida Statutes. They have challenged the Commission's decision in how the recovery for the project should be implemented.

c) Res judicata and the doctrine of laches

The doctrine of res judicata bars the relitigation of causes of action between the same parties or their privies, if there is a final judgment on the merits. Albrecht v. State, 444 So.2d 8 (Fla. 1984). The parties and the cause of action must be identical. Audubon and Friends' claim of res judicata fails on both counts. While the issue of the water conservation project has been raised in a previous docket before the Commission, and several consumptive use permits have been issued to Sanlando in the past, this docket is the first opportunity to address the issue of rate structure and recovery.

For the reasons set forth herein, Audubon and Friends' Motion to Dismiss is denied.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the Motion to Dismiss filed by Sanlando Utilities Corporation is hereby denied. It is further

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ORDERED that the Motion to Dismiss filed by the Florida Audubon Society, Inc. and Friends of the Wekiva River, Inc. is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 15th day of August, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

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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.