

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate) DOCKET NO. 921261-WS
increase in Lee County by Harbor) ORDER NO. PSC-95-1576-FOF-WS
Utilities Company, Inc.) ISSUED: December 20, 1995
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
JOE GARCIA
JULIA L. JOHNSON

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

Harbor Utilities Company, Inc., (Harbor or utility) is a Class C utility located in Lee County serving 644 water customers and 439 wastewater customers. On June 14, 1993, Harbor filed an application for approval of interim and permanent rate increases pursuant to Sections 367.081 and 367.082, Florida Statutes. By proposed agency action Order No. PSC-94-0075-FOF-WS, issued January 21, 1994, we denied Harbor's request for an increase in final water and wastewater rates. On February 11, 1994, Harbor timely filed a protest to Order No. PSC-94-0075-FOF-WS. An administrative hearing for this docket was scheduled for September 21-23, 1994.

On September 12, 1994, Harbor filed a Notice of Voluntary Dismissal of Rate Case Application, pursuant to Rule 25-22.0375, Florida Administrative Code, and Rule 1.420(a)(1), Florida Rules of Civil Procedure. On September 13, 1994, the hearing was cancelled.

On October 21, 1994, Mr. James J. Ryan, President of Harbor, filed a notice of abandonment with us and the Florida Department of Environmental Protection. A hearing for the appointment of a receiver was held December 9, 1994, in the Circuit Court of Lee County, Florida. On December 22, 1994, the Circuit Court appointed Bonita Springs Utilities (BSU) receiver of Harbor. By Order No. PSC-94-1588-FOF-WS, issued December 22, 1994, we acknowledged the abandonment. On March 13, 1995, we issued Order No. PSC-95-0346-FOF-WS, acknowledging the appointment of BSU as receiver for Harbor. Further, we addressed the interim refunds by stating:

DOCUMENT NUMBER-DATE

12850 DEC 20 95

FPSC-RECORDS/REPORTING

In Order No. PSC-94-1316-FOF-WS, issued October 26, 1994, we required the utility to refund the interim rates collected in the docket. The utility shall continue to make the refunds as required in Order No. PSC-94-1316-FOF-WS, issued October 26, 1994. Pursuant to the foregoing, we find it appropriate to acknowledge BSU as the receiver of the utility.

On March 3, 1995, Capital City Bank issued a personal money order in the amount of \$43,521.20 to BSU. This was the amount, plus interest, Mr. Ryan was required to post in order to obtain the necessary letter of credit. On March 14, 1995, BSU sent a letter to us indicating that they were in the process of obtaining information in order to begin the interim rate refund process. On April 28, 1995, Harbor, with BSU as its receiver, filed an Interim Rate Refund Plan. The total amount subject to refund plus interest was \$58,466.49.

By Order No. PSC-95-0884-FOF-WS, issued July 19, 1995, we ordered Harbor, with BSU as its receiver, to refund all secured refunds to its customers and impute all unsecured refunds to contributions-in-aid-of-construction (CIAC). On July 19, 1995, Mr. Albert DeHavens (petitioner) timely filed a protest to Order No. PSC-95-0884-FOF-WS. An administrative hearing is scheduled for August 13-14, 1996.

MOTION TO DISMISS

On October 9, 1995, Harbor filed a Motion to Dismiss Mr. DeHavens' protest. Count I of Harbor's motion claimed that Mr. DeHavens does not have standing to protest Order No. PSC-95-0884-FOF-WS, as he "is not now, nor has ever been, a customer of record of Harbor Utilities Company or Bonita Springs Utilities." Further, Harbor stated in Count II that Mr. DeHavens failed to state a cause of action because he did not file a proper petition pursuant to Rule 25-22.036(7)(a) and (f), Florida Administrative Code. Mr. DeHavens timely filed a response on October 18, 1995. On November 29, 1995, Harbor withdrew Count I of its motion.

In Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Court went on to say that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint,

. . . nor consider any evidence likely to be produced by the other side." Id.

Pursuant 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. Harbor's motion is premised upon the fact that the petitioner 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 should 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.
- (f) When a petition is filed in response to proposed agency action the petition shall also contain a statement of when and how notice of the Commission's proposed agency action was received.

Harbor claimed that the petitioner did not comply with Section (a) subsections 2, 3, 4, 5, 6, and Section (f) of this Rule. Notwithstanding the allegations of Harbor, we believe the petitioner has complied with the provisions of Rule 25-22.036(7), Florida Administrative Code. The petitioner adequately explained how his substantial interests will be affected, alleged sufficient issues of material fact and ultimate facts, and included a

statement of how he received notice of Order No. PSC-95-0884-FOF-WS.

Rule 25-22.029(4), Florida Administrative Code, states that the proposed agency action process allows substantially affected persons to protest an order and request a Section 120.57(1) formal hearing. Within his protest, Mr. DeHavens did not state that he wanted us to convene a formal hearing to resolve the dispute. Our staff spoke to Mr. DeHavens and verified that he wants the Commission to conduct a formal hearing.

We believe that the petitioner alleged sufficient disputed issues of material facts, as the petition protests the findings of Order No. PSC-95-0884-FOF-WS. While the petition does not allege each specific disputed fact, it is clear that the petitioner has objected to the imputation of unsecured refunds to CIAC.

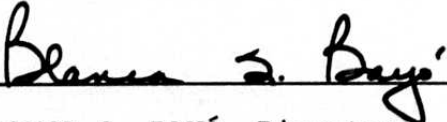
In considering a motion to dismiss, pursuant to Varnes, we cannot look beyond the four corners of the complaint and make a determination on evidence that amounts to a granting of summary judgment. In its motion, Harbor sought to dismiss Mr. DeHavens' petition based upon the fact that Mr. DeHavens' petition did not conform with Rule 25-22.036(7), Florida Administrative Code. However, we find that Mr. DeHavens' adequately complied with Rule 25-22.036(7), Florida Administrative Code. Therefore, Harbor's Motion to Dismiss is denied. Accordingly, this docket shall remain open.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Harbor Utilities Company, Inc.'s Motion to Dismiss is hereby denied. It is further

ORDERED that this docket should remain open.

By ORDER of the Florida Public Service Commission, this 20th day of December, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(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 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.