

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida.

DOCKET NO. 160101-WS
ORDER NO. PSC-17-0150-PCO-WS
ISSUED: May 4, 2017

ORDER GRANTING INTERVENTION TO
SUMMERTREE WATER ALLIANCE, WITH LIMITATIONS

By petition, dated April 19, 2017, Summertree Water Alliance (Summertree) requested permission to intervene in this proceeding. Utilities, Inc. of Florida (Utilities, Inc. or UIF) filed its response in opposition to Summertree's intervention on April 25, 2017.

Petition for Intervention

In its petition, Summertree states that its members are water and wastewater customers of Utilities, Inc. and that this proceeding will determine the future rates these customers will be required to pay to Utilities, Inc. for its services. Summertree, citing *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981), contends that its substantial interests will be affected by this proceeding because its members will suffer an injury in fact as they will be actually and immediately affected by changes to Utilities, Inc.'s rates. Furthermore, Summertree contends that its members' interest in receiving water and wastewater services at fair, just, reasonable, and non-discriminatory rates is of the type or nature that this rate proceeding is designed to protect. Given these facts, Summertree concludes that it is entitled to participate in this proceeding and requests permission to intervene.

Utilities, Inc.'s Response in Opposition

Utilities, Inc. objects to Summertree's intervention, asserting that Summertree's petition lacks any allegations that the three prong test for associational standing, as set forth in *Florida Home Builders v. Dept. of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982), is met. Specifically, Utilities, Inc. argues that: (i) Summertree has failed to present evidence showing that a substantial number of its members' substantial interests potentially could be injured; (ii) none of the prefiled testimony in this proceeding proves that a substantial number of Summertree's members will be substantially affected; and (iii) there is no evidence that the subject matter of this proceeding is within Summertree's general scope of interest and activity and Summertree has no mechanism with which to prove this fact through the introduction of evidence. Utilities, Inc. further contends that allowing Summertree to intervene will likely lengthen the final hearing beyond that which was planned for.

In addition, Utilities, Inc. requests that should Summertree be granted intervention, Summertree should be held to the same standards and subject to the same restrictions as other parties, noting that no one should be allowed to testify on behalf of Summertree since Summertree has not filed any prefiled testimony.

Order Requesting Additional Comments

By Order No. PSC-17-0143-PCO-WS, issued April 27, 2017, the Prehearing Officer issued an Order Requesting Additional Comments Concerning Petition for Intervention by Summertree Water Alliance. The Order requested written comments from the Summertree Water Alliance and any other party specifically concerning whether the Summertree Water Alliance meets the three prong associational standing test set out in *Florida Home Builders*. Specifically, the order requested comments concerning whether Summertree Water Alliance can demonstrate: (1) a substantial number of its members may be substantially affected by the Commission's decision; (2) the subject matter of the proceeding is within Summertree's general scope of interest and activity; and (3) the relief requested is of a type appropriate for Summertree Water Alliance to receive on behalf of its members.

Amended Petition of Intervention

On April 27, 2017, the Summertree Water Alliance filed an Amended Petition to Intervene of the Summertree Water Alliance and Ann Marie Ryan, An Individual Customer of Utilities, Inc. In its Amended Petition, Summertree asserts that as customers of UIF, the interests of the members of the Summertree Alliance will be actually and immediately affected by changes to UIF's rates. Additionally, Summertree states that the Summertree Alliance has participated in this and other Utilities, Inc. proceedings informally as a person in interest together with various individual members of the Summertree Alliance, as well as customers served by other systems owned and operated by Utilities, Inc. The Summertree Alliance recognizes that it takes the proceedings as it finds it as of the date of the formal petition to intervene, thus it alleges no party is prejudiced by this intervention.

The petition for intervention for Ann Marie Ryan as an individual customer of Utilities, Inc. is distinct from this analysis and shall be addressed in a separate order.

Summertree Response to Commission Order Requesting Additional Comments

On April 28, 2017, Summertree filed the Response of the Summertree Water Alliance and Ann Marie Ryan, An Individual Customer of Utilities, Inc. to the Commission's Request for Elaboration of Standing. In its response, Summertree contends the Commission routinely grants intervention to unincorporated organizations such as the Alliance and cites Order No. PSC-96-0089-PCO-WS,¹ where the Commission granted intervention to the Concerned Citizens of

¹ Issued January 17, 1996, in Docket No. 950495-WS, *In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.*

Lehigh Acres whose members consisted of several individuals and households who would be impacted by increased water and wastewater rates. Summertree states the Alliance represents 1,120 residents of the Summertree community and has been formed singularly to represent the interest of its members, who are customers of Utilities, Inc. served by the Summertree system, and its leaders and members have repeatedly participated in meetings, customer service hearings, letter writing and other activities designed to protect their interests. Given this, Summertree alleges its substantial interests will be affected by this proceeding and requests the Commission issue a similar order as the Lehigh Acres order granting intervention.

Utilities, Inc.'s Response to Amended Petition to Intervene

On April 28, 2017, Utilities, Inc. filed its Response to Summertree Water Alliance's Amended Petition to Intervene. UIF alleges that the Amended Petition fails to make allegations sufficient to establish standing. UIF, citing *Palm Beach Environmental Coalition v. Department of Environmental Protection*, 14 So. 3d 1076 (Fla. 4th DCA 2009), contends that the criteria for establishing standing not only has to be alleged but the association has the burden to prove that fact through evidence adduced at hearing. UIF alleges that all prefiled testimony has been filed and there is none that proves that a "substantial" number of Summertree's members will be substantially affected. Additionally, UIF asserts there is no evidence of Summertree's "general scope of interest and activity," which is required to meet the second prong of the test, and there is no mechanism with which to prove through introduction of evidence that critical fact. UIF contends the prior examples of association intervention in other dockets is unlikely to include intervention after the close of discovery and that its due process right will be violated if standing is granted to Summertree. If the Commission does allow Summertree to intervene, UIF requests the Commission must make clear that Summertree will be held to the same standards and subject to the same restrictions as the other parties. For example, no one should be allowed to testify on behalf of Summertree since Summertree has not filed any prefiled testimony.

Standard for Intervention

Pursuant to Rule 25-22.039, Florida Administrative Code (F.A.C.), persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding and who desire to become parties may petition for leave to intervene. Petitions for leave to intervene must be filed at least five days before the final hearing, must conform with Rule 28-106.201(2), F.A.C., and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

To have standing, the intervenor must meet the two-prong standing test as set forth in *Agrico*, 406 So. 2d at 482. The intervenor must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, Florida Statutes, hearing, and (2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural.

International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also *Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation*, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), *rev. den.*, 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

The test for associational standing was established in *Florida Home Builders*, 412 So. 2d at 353-354, and *Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services*, 417 So. 2d 753, 754 (Fla. 1st DCA 1982), and is based on the basic standing principles established in *Agrico*. Associational standing may be found where: (1) the association demonstrates that a substantial number of an association's members may be substantially affected by the Commission's decision in a docket; (2) the subject matter of the proceeding is within the association's general scope of interest and activity; and (3) the relief requested is of a type appropriate for the association to receive on behalf of its members. See *id.*

Analysis & Ruling

The purpose of this proceeding is to determine the just, reasonable, compensatory, and not unfairly discriminatory water and wastewater rates to be charged by Utilities, Inc. The substantial interests of Summertree's members, as alleged, are affected by this proceeding since increases in the cost of water and wastewater services directly affect their members' monthly water and wastewater bills.²

Summertree also asserts that it represents some 1,120 members who are customers of Utilities, Inc., are charged Utilities, Inc.'s rates, and will be actually and immediately affected by changes to those rates. UIF disputes that Summertree has provided evidence that a substantial number of its members' substantial interests potentially could be injured and asserts that none of the prefiled testimony proves that a substantial number of Summertree's members will be substantially affected. Under Florida law, neither a specific number, nor percentage of association members is required for standing. *Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So. 2d 587, 589 (Fla. 2d DCA 1992)(court found standing where 37 of 2,766 members were affected because a substantial number of the members residing in the county at issue were affected). Here, Summertree asserts that its members' substantial interests will be actually and immediately affected by this Commission's determination in this rate proceeding.

Summertree further contends it was formed for the sole reason of representing the interests of its members and its leaders and members have participated in meetings, customer service hearings, and other activities such as letter writing designed to protect these interests. It appears that Summertree is an association that advocates for its members' interests in receiving water and wastewater services at fair, just, reasonable, and non-discriminatory rates.

Finally, Summertree seeks intervention in this docket to represent the interests of its members before the Commission in this proceeding. An association has standing to participate

² Lehigh Acres, Order No. PSC-96-0089-PCO-WS.

in an administrative proceeding, even though it is acting solely as the representative of its members. *Florida Home Builders*, 412 So. 2d at 353.

Because the substantial interests of Summertree's members may be affected by this proceeding, Summertree's petition for intervention shall be granted. Because under Rule 25-22.039, F.A.C., Summertree takes the case as it finds it, the following limitations are imposed. Summertree has waived its right to present testimony in the technical hearing because of the timing of its intervention, and because Summertree is now a party to the case, no representative of the association may provide additional testimony on behalf of Summertree at the customer service hearing scheduled for May 8, 2017. Summertree members may speak at the customer service hearing if they are speaking for themselves as an individual.

Therefore, it is,

ORDERED by Commissioner Ronald A. Brisé, as Prehearing Officer, that the Petition to Intervene filed by Summertree Water Alliance is hereby granted subject to the limitations discussed above. It is further

ORDERED that pursuant to Rule 25-22.039, F.A.C., Summertree takes the case as it finds it. It is further

ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings and other documents which may hereinafter be filed in this proceeding, to:

Summertree Water Alliance
c/o Brian P. Armstrong, Esq.
Law Office of Brian Armstrong, PLLC
P.O. Box 5055
Tallahassee, FL 32314-5055

By ORDER of Commissioner Ronald A. Brisé, as Prehearing Officer, this 4th day of May, 2017.



RONALD A. BRISÉ
Commissioner and Prehearing Officer
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

JSC/MAD/WDT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, 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. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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

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appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.