

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by certain) DOCKET NO. 941130-WU
customers for limited proceeding) ORDER NO. PSC-95-0479-FOF-WU
to set private fire protection) ISSUED: April 13, 1995
rate charged by JACKSONVILLE)
SUBURBAN UTILITIES CORPORATION)
in St. Johns County.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING PETITIONS FOR A LIMITED PROCEEDING TO CHANGE
PRIVATE FIRE PROTECTION RATE, AND DENYING MOTION TO DISMISS AND
ALTERNATIVE MOTION TO TREAT PETITIONS AS CUSTOMER COMPLAINTS

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein which denies the petitions for a limited proceeding requesting a change in the private fire protection rate is preliminary in nature and 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.

BACKGROUND

Jacksonville Suburban Utilities Corporation (Jacksonville Suburban or utility) is a Class A utility which provides water and wastewater service in Duval, Nassau, and St. Johns Counties. The utility currently serves about 25,700 water customers and 19,800 wastewater customers, according to its 1993 Consolidated Annual Report. For the twelve months ending December 31, 1993, the utility recorded operating revenues of \$5,818,900 and \$12,132,091 for water and wastewater, respectively. Jacksonville Suburban's entire service area lies within the St. John's River Water Management District, which has declared its entire district as a water use caution area. The utility's current rates and charges became effective on July 19, 1994, pursuant to a 1994 price index.

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FPSC-RECORDS/REPORTING

On October 24, 1994, seven customers of Jacksonville Suburban filed separate, but identical, Petitions for Limited Proceeding under Section 367.0822(1), Florida Statutes, to set the private fire protection rate charged by the utility in accordance with Commission rules. The petitioners are all presidents of various condominium associations. They allege that the fire protection rate charged by the utility violates Rules 25-30.465 and 25-30.437(6), Florida Administrative Code. On January 6, 1995, the Commission received a notification of withdrawal of a petition from one of the seven petitioners.

The six remaining petitioners were all formerly customers of Ponte Vedra Utilities (Ponte Vedra), which had no charge for private fire protection. By Order No. PSC-93-1480-FOF-WS, issued on October 11, 1993, in Docket No. 930204-WS, the Commission amended Jacksonville Suburban's Certificates Nos. 236-W and 179-S to incorporate the Ponte Vedra system, and approved Jacksonville Suburban's rates and charges for the former customers of Ponte Vedra.

On December 5, 1994, Jacksonville Suburban filed a Request for Oral Argument pursuant to Rule 25-22.058, Florida Administrative Code, as well as a Motion to Dismiss Petitions, and in the Alternative, Motion to Treat Petitions as Customer Complaints, pursuant to Rule 1.100(b), Florida Rules of Civil Procedure, and Rule 25-22.037(2), Florida Administrative Code.

On December 14, 1994, the Office of Public Counsel (OPC) filed a notice of intervention in this docket, pursuant to the provisions of Section 350.0611, Florida Statutes. The Commission acknowledged OPC's intervention by Order No. PSC-94-1601-PCO-WU, issued December 23, 1995. Also on December 14, 1994, OPC filed its Response to the utility's Motion to Dismiss, and, on behalf of the petitioners, a Motion for Additional Time to Respond to the Motion to Dismiss. On January 10, 1995, OPC filed a notice entitled Joinder in Citizens' Response to Motion, advising that the petitioners join in OPC's Response to the utility's Motion to Dismiss, adopt it as their own response, and authorize OPC to advise the Commission accordingly.

On December 22, 1994, the utility filed a Reply to OPC's Response to Motion to Dismiss and Motion for Additional Time. Also on December 22, 1994, our staff sent the utility a Staff Data Request, seeking information to assist us in evaluating the Petitions filed in this docket. On January 11, 1995, the utility filed its response to the Data Request.

REQUEST FOR ORAL ARGUMENT

On December 5, 1994, the utility filed a Request for Oral Argument on its Motion to Dismiss Petitions, and in the Alternative, Motion to Treat Petitions as Customer Complaints, which Motions will be discussed below. The utility stated that oral argument would aid us in comprehending and evaluating the issues raised by giving the utility an opportunity to respond to any questions that we might have had which required clarification or explanation.

The utility was free to attend the Agenda Conference in order to be available to answer any questions. The utility's Motion appears to contain sufficient argument for us to render a fair and complete evaluation of the merits without oral argument. Nevertheless, because this matter has not been to hearing, we granted the utility's Request for Oral Argument, but limited argument to five minutes for each party who wished to speak.

MOTION TO DISMISS

As noted above, on October 24, 1994, seven customers of Jacksonville Suburban filed separate, but identical, Petitions for Limited Proceeding under Section 367.0822(1), Florida Statutes, to set the private fire protection rate charged by the utility in accordance with Commission rules. On January 6, 1995, one of the seven petitioners, Ms. Evelyn A. Merrin, President of the Breakers I Condominium Association, filed a Notice of Withdrawal of her petition, which we hereby acknowledge.

The petitioners allege that the utility imposes a private fire protection charge of \$64.54 per month on the various condominiums in which they reside, which charge is based upon provision of service to a 6" line. They allege that this charge violates Rule 25-30.465, Florida Administrative Code, which requires the utility's rate for private fire protection to be one-twelfth the current base facility charge, or \$30.02 per month. They also allege that the utility's base facility charge violates Rule 25-30.437(6), Florida Administrative Code, because it is not based upon usage. The petitioners request that the Commission conduct a limited proceeding to cause the utility to conform its tariff, the private fire protection rate charged thereunder, and its base facility charges to conform to these rules.

Because the petitions do not indicate that the utility was served, our staff sent copies of the petitions to the utility on November 10, 1994. On December 5, 1994, the utility filed a Motion to Dismiss Petitions, and in the Alternative, Motion to Treat

Petitions as Customer Complaints, pursuant to Rule 1.100(b), Florida Rules of Civil Procedure, and Rule 25-22.037(2), Florida Administrative Code.

In its Motion to Dismiss, the utility argues, among other things, that the Petitions are non-conforming pleadings in that they do not conform with Rule 25-22.036(7), Florida Administrative Code, which sets forth certain requirements for filing an initial pleading. Moreover, because the utility is a party, the petitioners should have served the petitions on the utility. In its Response, OPC argues that the utility alleges no prejudice which would support a dismissal of the petitions on grounds that they are non-conforming pleadings. The utility was provided with timely notice of the petitions by our staff, and was thus able to fashion a responsive pleading.

In its Reply to OPC's response that the utility did not allege how it is prejudiced by the petitioners' pleading failures, the utility quotes from the case of Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), for the proposition that we should not look beyond the four corners of the petitions to determine their sufficiency. Neither should we consider any affirmative defenses raised, nor consider any evidence likely to be produced by either side. The utility takes the position that it is therefore not required to allege prejudice, as any such allegations should be ignored.

According to the Varnes court, "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action." Id. at 350. As partially noted by the utility in its Reply, the court goes on to observe the standards a trial court must follow in ruling on a motion to dismiss. "In determining the sufficiency of the complaint, [a] trial court may not look beyond the four corners of the complaint." Id. The court also points out, however, directly following the passage quoted by the utility, that "[s]ignificantly, all material factual allegations of the complaint must be taken as true." Id. The Commission follows these same standards in ruling on motions to dismiss.

To assume the allegations contained in the instant petitions are true is to assume that the utility is in violation of certain Commission rules by charging the petitioners a private fire protection charge of \$65.54 per month. The remaining arguments posed by the utility in its Motion to Dismiss go well beyond the four corners of the petitions by delving into the merits of whether the utility is indeed in violation of these rules. For example, the utility argues that the petitioners have failed to state a

cause of action, in that these rules do not become applicable until a utility files for a general rate increase. Taking the allegations contained in the petitions as true, we have jurisdiction to grant the relief sought by the petitioners under Chapter 367.0822, Florida Statutes. Therefore, we hereby deny the utility's Motion to Dismiss. The merits of the petitions will be addressed below.

Moreover, the utility's argument that the petitions should be dismissed because they are initial pleadings which do not conform to Rule 25-22.036(7), Florida Administrative Code, lacks merit. This Rule is inapplicable to the instant petitions, as it applies to the initiation of proceedings filed pursuant to Section 120.57, Florida Statutes. Further, it is of no consequence that the petitioners evidently failed to serve the petitions upon the utility. As OPC points out, because our staff provided the utility with timely notice of the petitions, the utility was able to, and did, fashion a responsive pleading.

Along with its Response, OPC filed a Motion for Additional Time for the petitioners to individually respond to the utility's Motion to Dismiss. However, on January 10, 1995, OPC filed a notice entitled Joinder in Citizens' Response to Motion, advising that the petitioners join in OPC's Response to the utility's Motion to Dismiss, adopt it as their own response, and authorize OPC to advise the Commission accordingly. In its Reply, the utility states it has no objection to the granting of OPC's Motion for Additional Time for the petitioners to fashion individual responses to the utility's Motion to Dismiss. However, we need not rule on the Motion for Additional Time, as it was rendered moot by OPC's subsequent filing of a notice of Joinder in the Citizens' Response to the Motion.

MOTION TO TREAT PETITIONS AS CUSTOMER COMPLAINTS

In its alternative Motion to Treat the Petitions as Customer Complaints, the utility argues that the petitioners should have used the customer complaint procedure under Rule 25-22.032, Florida Administrative Code, to air their complaints. The utility points out that this Rule provides for a procedure which directly deals with customer disputes, and may result in lowered costs and reduced consumption of Commission resources.

Further, in its Motion to Dismiss, the utility asserts that Section 367.0822, Florida Statutes, is intended to be used as a procedure only by the Commission and by utilities. The utility also argues that the relief sought by the petitioners is inappropriate for a limited proceeding because it would cause the

utility to suffer a loss of revenue and a reduction in its rate of return. Moreover, the utility argues that the petitioners have failed to pay filing fees, which are required for requests for limited proceedings under Section 367.0822(2), Florida Statutes.

In its Response, OPC contends that the customers do not have a complaint. They seek a limited proceeding to cause the utility's tariffs on the subject of private fire protection to conform to Commission rules. Pursuant to Section 367.0822, Florida Statutes, the petitions seek Commission action on a matter within its jurisdiction, the resolution of which would require the utility to change its rates. OPC argues that there is no language in Section 367.0822, Florida Statutes, which restricts the availability of this Section to a utility.

OPC further argues that if we order a reduction of the private fire protection rate, the utility will not be entitled to general rate relief unless it shows that the achieved rate of return is less than that approved in its last rate adjustment docket.

Finally, OPC argues that the petitioners are not required to pay filing fees. Section 367.0822, Florida Statutes, provides for a fee as provided in Section 367.145, Florida Statutes. Section 367.145(2), Florida Statutes, establishes that filing fees for petitions filed under Section 367.0822, Florida Statutes, are required of utilities only.

In its Reply, the utility asserts that the statutory requirement for a filing fee for a limited proceeding leads to only two logical possibilities. Either all entities, other than the Commission, which seek to use a limited proceeding pursuant to Section 367.0822, Florida Statutes, must pay a filing fee, or only those entities required to pay a filing fee are entitled to use this provision. Because the petitioners have not paid a filing fee, and because, according to OPC, the petitioners are not one of the entities required to pay a filing fee, the petitioners are not entitled to use Section 367.0822, Florida Statutes.

As pointed out by OPC, these petitioners seek a limited proceeding to cause the utility's tariffs on the subject of private fire protection to conform to current Commission rules, which is a matter within the Commission's jurisdiction. We find that the petitions thus fit squarely within the purview of Section 367.0822, Florida Statutes.

We agree with OPC's position that there is no language in Section 367.0822, Florida Statutes, which restricts the availability of this Section to a utility. Section 367.0822(2),

Florida Statutes, provides that "[a]n application for a limited proceeding must be accompanied by a fee as provided by [Section] 367.145." (Emphasis added.) Section 367.145(2), Florida Statutes, provides that "[e]ach utility shall pay an application fee . . . for . . . a proceeding pursuant to [Section] 367.0822." (Emphasis added.) This Section does not require the petitioners to pay a filing fee because the petitioners are not a utility.

Moreover, the utility's argument with respect to the significance of the payment or non-payment of filing fees conflicts with Section 350.0611, Florida Statutes. This section grants OPC the power "[t]o recommend to the [C]ommission, by petition, the commencement of any proceeding or action or to appear, in the name of the state or its citizens, in any proceeding or action before the [C]ommission and urge therein any position which he deems to be in the public interest." This Section does not require OPC to pay filing fees in order to commence a proceeding before the Commission. For the foregoing reasons, we hereby deny the utility's Motion to Treat the Petitions as Customer Complaints.

PETITIONS FOR A LIMITED PROCEEDING

Under Section 367.0822(1), Florida Statutes, the petitioners request that we set the private fire protection rate charged by Jacksonville Suburban in accordance with current Commission rules.

The petitioners contend that the utility is in violation of Rule 25-30.465, Florida Administrative Code. This Rule provides that "[t]he rate for private fire protection service shall be a charge based on the size of the connection rather than the number of fixtures connected. The rate shall be one-twelfth the current base facility charge of the utility's meter sizes, unless otherwise supported by the utility."

The petitioners further contend that Jacksonville Suburban is in violation of Rule 25-30.437(6), Florida Administrative Code. This Rule provides that

[i]n proposing rates, the utility shall use the base facility and usage charge rate structure, unless an alternative rate structure is adequately supported by the applicant. . . . The rates are first established with the 5/8" X 3/4" meter as the foundation. For meter sizes larger than 5/8", the base facility charge shall be based on the usage characteristics.

In its Motion to Dismiss, the utility argues that the fire protection rules at issue do not become applicable until a utility

files for a general rate increase. The utility points out that the petitioners have failed to allege that Rule 25-30.465, Florida Administrative Code, requires utilities to immediately reduce their private fire protection charges, or that the Rule requires all utilities to immediately file a rate case to change their private fire protection rates. Such changes can be routinely resolved as rate cases are periodically filed. As further grounds for its Motion to Dismiss, the utility argues that its base facility charge is based upon usage as Rule 25-30.437(6), Florida Administrative Code, requires. The utility concludes that it is not in violation of its tariff or of Commission rules.

OPC responds that nothing in the petitions suggests that the utility was required to change its rates with the advent of the new rules on the subject of private fire protection rates. The petitions suggest that we should now cause the utility's tariffs to conform to the existing rules on the subject.

The Commission imposed a base facility and gallonage rate structure on the utility in Order No. 9533, issued September 12, 1980, in Dockets Nos. 790316-WS and 790317-WS. The currently approved base facility charge for a 6" meter for the utility is \$368.46, as contained in the utility's tariff. The utility charges each of the petitioners \$65.54 per month for private fire protection for their respective condominiums. This charge is based on a 6" line to the condominiums. Unless otherwise supported by the utility, Rule 25-30.465, Florida Administrative Code, permits a charge of one-twelfth of the base facility charge, or \$30.71 per month.

Prior to 1993, Rule 25-30.465, Florida Administrative Code, allowed a charge of one-third of the base facility charge of the utility's meter sizes, unless otherwise supported by the utility. The private fire protection charges listed in the utility's tariff do not strictly adhere to this former allowance of one-third of the base facility charge. However, we find that because the Commission found that the utility had otherwise supported these charges, the charges do not violate the Rule.

Jacksonville Suburban supported its base facility and private fire protection charges in Docket No. 810071-WS. Pursuant to Order No. 10531, issued January 20, 1982, in that docket, Jacksonville Suburban and Southern Utilities Corporation were merged under the name of Jacksonville Suburban Utilities Corporation. The Commission found it reasonable and appropriate to allow uniform rates, and authorized the rates of these two utilities to be uniformly charged throughout Jacksonville Suburban's service area. The revenue increase was apportioned almost equally between

Jacksonville Suburban and Southern Utilities Corporation. Further, Jacksonville Suburban also supported its base facility and private fire protection charges in previous dockets. These rates were approved in Order No. 10007, issued May 12, 1981, in Dockets Nos. 790316-WS and 790317-WS, as well as in Order No. 10531. Therefore, we find that Jacksonville Suburban's base facility and private fire protection charges accord with Section 367.091(3), Florida Statutes, which requires all rates and charges to be approved by the Commission.

Further, we agree with the utility's argument that Order No. 10007 established the utility's rates based on usage characteristics. In Order No. 10007, the Commission noted that:

The utilities allege that while the AWWA's [American Water Works Association] factors may be appropriate in most cases, it is not appropriate for this case. The utilities recommend the use of actual flow by meter classification to allocate base facilities costs to appropriate meter sizes. . . . We note that the actual flows from the billing analysis for the larger meter classification differ drastically from the AWWA factors. For example, the meter equivalency factor for an 8" meter, according to AWWA factors is 80, while the factor calculated using the company's actual flows for the test year is 1,088.

In Order No. 10007, the Commission found that actual demand should be utilized to allocate the utility's base facilities costs. Therefore, Jacksonville Suburban's tariffs accord with its approved base facility and private fire protection charges. Its base facility charges are based on usage characteristics. The utility took exception to the use of the AWWA manual factors and made a determination of base facility factors based upon actual meter usage, assigning the factor of 1 to 5/8" meters. Each meter size is then related to the 5/8" meter factor of 1.

Currently, Jacksonville Suburban has 166 private fire protection customers, including former customers of Ponte Vedra. Not including the six remaining petitioners in this docket, the utility has seven additional fire protection customers who were former customers of Ponte Vedra. Upon review of the utility's response to the Staff Data Request filed in this docket, we find that lowering the private fire protection charge in accordance with Rules 25-30.467(6) and 25-30.465, Florida Administrative Code, would, based on current rates, reduce the utility's annual revenue by \$96,876. Moreover, the utility states that its earnings are below the fair rate of return allowed in its last rate case. If

1994 preliminary revenue is reduced by \$96,876, it would further depress the utility's rate of return on rate base equity by about 40 basis points. Jacksonville Suburban does not anticipate filing a rate proceeding within the next six months. However, the utility states that the loss of \$96,876 in revenue would certainly be a contributing factor in deciding whether to file an earlier rate proceeding.

We concur with the utility's argument that Rules 25-30.437(6) and 25-30.465, Florida Administrative Code, are in the rate adjustment rules and are intended to govern requests by utility companies for rate adjustments. We also concur with the utility that the intent of these rules is not to require all utility companies to immediately reduce their fire protection charges, nor to file rate cases to change their charges. Furthermore, we conclude that Rules 25-30.437(6) and 25-30.465, Florida Administrative Code, should be addressed in the utility's next rate proceeding. For the foregoing reasons, we hereby deny the relief requested by the Petitions for Limited Proceedings filed in this docket. If there are no timely protests to this proposed action, no further action will be required and this docket shall be closed.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Jacksonville Suburban Utilities Corporation's Request for Oral Argument on its Motion to Dismiss the Petitions for a Limited Proceeding is hereby granted. It is further

ORDERED that the Notice of Withdrawal of Ms. Evelyn A. Merrin's Petition for a Limited Proceeding is hereby acknowledged. It is further

ORDERED that Jacksonville Suburban Utilities Corporation's Motion to Dismiss the Petitions for a Limited Proceeding is hereby denied. It is further

ORDERED that the Office of Public Counsel's Motion for Additional Time is moot. It is further

ORDERED that Jacksonville Suburban Utilities Corporation's Motion to Treat the Petitions for a Limited Proceeding as Customer Complaints is hereby denied. It is further

ORDERED that the Petitions for a Limited Proceeding to change the private fire protection rate charged by Jacksonville Suburban Utilities Corporation is hereby denied. It is further

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ORDERED that the provisions of this Order which are issued as proposed agency action shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that if no timely protest is received, no further action will be required and this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 13th day of April, 1995.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

RGC

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 the Petitions for a Limited Proceeding 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, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on May 4, 1995. 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.

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

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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.