

92 01 99

ORIGINAL
FILE COPY

BEFORE THE STATE OF FLORIDA FIRST DISTRICT COURT OF APPEAL

BURNT STORE MARINA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 96-3489
)	
SOUTHERN STATES UTILITIES, INC. and)	
THE FLORIDA PUBLIC SERVICES COMMISSION,)	
)	
Defendant.)	

BURNT STORE MARINA'S MOTION TO CONSOLIDATE AND AMENDED
MOTION FOR EXPEDITED REVIEW OF PARTY STATUS AND
FOR TOLLING OF TIME FOR ADDITIONAL APPELLATE PROCEEDINGS

Pursuant to Rule 9.300, Florida Rules of Appellate Procedure, Appellants, BURNT STORE MARINA ("Burnt Store") moves for an order consolidating this case with Southern States Utilities, Inc. v. Florida Public Service Commission, Case No. 96-3334, and for an order establishing an expedited briefing schedule in the consolidated cases on the issue of Burnt Store's party status and tolling the time for the remaining appellate proceedings until that issue has been resolved. In support of its motion, Burn Store states:

ACK _____

AFA _____

APP 1

CAF _____

CMU _____

CTR _____

EAG _____

LEG 1

LIN 5

OPC _____

RCH _____

SEC 1

WAS 1

OTH _____

Introduction

1. Order NO. PSC-96-1046-FOF-WS was issued by the Florida Public Service Commission (Commission) on August 14, 1996. The order pertains to a request for a rate increase submitted to the Commission by Southern States Utilities, Inc. (SSU). On September 13, 1996, Burnt Store filed its Notice of Appeal of the order. At appeal, Burnt Store Marina v. Southern States Utilities, Inc. Commission, has been assigned Case

DOCUMENT NUMBER-DATE
11460 OCT 29 1996 003877
FPSC-RECORDS/REPORTING

No. 96-3489. Burnt Store, who are SSU customers, contest the portion of the Commission's Order on Appeal that denied Burnt Store party status in the SSU rate case.

2. SSU filed a notice of appeal of the same Commission order on September 3, 1996. That appeal, Southern States Utilities, Inc. v. Florida Public Service Commission, has been assigned Case No. 96-3334. The Order on Appeal requires SSU to make a refund to certain customers. Based on the position SSU took below, Burnt Store believes that SSU will argue to the Court that if it must make a refund to certain customers, then it is entitled to impose a surcharge on other customers, including Burnt Store.

3. Burnt Store sought party status below in order to oppose the surcharge demanded by SSU. Had its petition to intervene been granted below, the procedural posture of the case would allow Burnt Store to participate as appellees in defense of the order rejecting a surcharge. Because the Commission denied the petition to intervene, Burnt Store must obtain appellate review of that decision before acquiring the party status necessary to participate in the surcharge issue. For the reasons that follow, Burnt Store submits that the most orderly way to proceed is to consolidate Case NO. 96-3334 and Case No. 96-3454 and to bifurcate the matters to be briefed.

4. Because the Court will review the same Commission order and have the same parties before it in Case No. 96-3334 and Case No. 96-3454, consolidation will promote judicial economy and efficiency. Additionally, because the issue of Burnt Store's party

status is crucial to Burnt Store's ability to participate as a party in SSU's appeal, Burnt Store requests the Court to set an expedited brief schedule in the consolidated case to resolve the issue of Burnt Store's party status, and to conduct the remainder of the appellate proceeding in the consolidated case after that issue has been resolved.

Background

5. On May 11, 1992, SSU filed a petition for authority to increase its rates and charges. On March 22, 1993, the Commission approved an increase for SSU and prescribed a uniform rate structure to be applied to its many systems. Order No. PSC-93-0423-FOF-WS. Several parties appealed the order to this Court.

6. In Citrus County v. Southern States Utilities, Inc., 656 So.2d 1307 (Fla 1st DCA 1995), this Court reversed the Commission's decision setting uniform statewide rates for SSU. The Court found that the Commission could not lawfully adopt uniform rates for SSU without first making an explicit factual finding that SSU's service areas are functionally related.¹

7. To comply with the Court's decision in Citrus County, the Commission issued Order No. PSC-95-1292-FOF-WS on October 19, 1995. In that order, the Commission directed SSU to implement a "modified stand-alone" rate structure, to develop certain benchmarks, and to make a refund to those customers who had paid more than the initial uniform rate structure that was overturned by the court than under

¹At the time of filing of its rate case, SSU had 127 water and wastewater service areas.

the modified rate structure ultimately prescribed by the Commission on remand. SSU sought reconsideration of this order. The Commission voted to deny SSU's motion on February 20, 1996.

8. On February 29, 1996, before the Commission's decision to deny SSU's motion for reconsideration was memorialized in a written order, the Florida Supreme Court issued its opinion in GTE Florida, Inc. v. Clark, 668 So.2d 972 (Fla. 1996). This decision involved the ability of GTE to recover certain disallowed expenses through a customer surcharge under the facts of that case.

9. The Commission was concerned with the possible impact of GTE on its SSU decision. On its own motion, it voted to reconsider its entire decision on remand and to request parties to brief the question of the effect of the GTE decision on the SSU case. Order No. PSC-96-0406-FOF-WS.

10. Earlier in the case, the Office of Public Counsel (OPC), which represents the customers before the Commission, informed the Commission that it could not represent the interests of all customers on certain issues, such as refund and rate design, because groups of customers have different and conflicting interests. Thereafter, OPC engaged separate counsel to represent the interests of Burnt Store who as customers, are advocates and beneficiaries of uniform rates and who would be harmed by the imposition of a surcharge designed to fund a refund to others.

11. On May 15, 1996, Burnt Store, represented by their newly retained counsel, filed a petition to intervene in the proceeding before the Commission for the purpose of briefing the applicability

of the GTE case during the proceedings on reconsideration. The Commission denied the petition to intervene in the Order on Appeal. In the same order, the Commission distinguished the GTE decision and rejected SSU's claim for authority to recover the refund ordered by the Commission through a surcharge on certain customers.

Basis for Burnt Store's Motion to Consolidate

12. The Court will review the same Commission decision, embodied in Order No. PSC-96-1046-FOF-WS, in Case No. 96-3334 and in Case No. 96-3489. In the order, the Commission denied Burnt Store's petition to intervene, required SSU to make a refund and denied SSU's request to surcharge customers. In both cases, the same parties will be before the Court. They will brief and argue the same issues. In proceedings below, SSU resisted Burnt Store's petition to intervene; and the purpose of Burnt Store's attempt to intervene was to oppose the surcharge sought by SSU. Consolidation will promote economy and efficiency for the Court as well as all parties.

13. Further, in order to participate in Case No. 96-3334, in which the surcharge issue will be considered, Burnt Store must have party status. Rule 9.020(f), Florida Rules of Appellate Procedure.² However, the issue of the party status is the very subject of Burnt Store's appeal in Case No. 96-3489. If the cases are not consolidated and Burnt Store prevails on the issue of party status, its victory will be meaningless, as it will have lost the

²The exception to this rule is participation as amicus curiae. Rule 9.370

ability to participate on the surcharge issue due to the parallel tracks of two separate appeals.

14. As this Court has noted:

Generally, the administration of justice is best served by consolidation of actions between the same parties involving common questions of law and fact. Consolidation is favored in such situations in the interest of judicial economy, and to avoid the possibility of inconsistent verdicts. U-Haul of Northern Florida, Inc. v. White, 503 So.2d 332 (Fla. 1st DCA 1986); Johnson v. Johnson, 454 So.2d 797 (Fla. 4th DCA 1984); Wilson v. Wahl, 383 So.2d 311 (Fla. 2d DCA 1980).

City of Palm Bay v. Department of Transportation, 588 So.2d 624, 628 (Fla. 1st DCA 1991).

15. In this instance, judicial economy and efficiency will be served if the two cases, which deal with the same Commission order, are consolidated so that all issues and all the parties are before this Court in one proceeding.

Basis of Burnt Store's Request for
Expedited Review and Tolling of Time

16. As discussed above, for reasons of judicial economy and efficiency, this case should be consolidated with Case No. 96-3334. Further, assuming the motion to consolidate is granted, the issue of Burnt Store's party status should be resolved prior to resolution of SSU's claim on appeal. If this is not done, Burnt Store, who asserts it is a proper appellee, will be in the anomalous position of briefing and arguing the issue of party status to the Court as an appellant at the same time that appellant SSU is briefing and arguing the issue of the surcharge that SSU wishes to impose on Burnt Store (and other customers). A decision

that Burnt Store is entitled to participate as a party will be meaningless unless it results in an opportunity to oppose SSU on the surcharge question in Case No. 96-3334. Absent bifurcation, Burnt Store would be compelled to file an initial brief as appellants, and lodge an answer brief as appellees prior to resolution of their party status -- a clumsy procedure that would be further complicated by the issue of their role during oral argument. For these reasons, the Court should resolve the party issue before it considers the issue raised by SSU.

17. No harm will arise if the party status question is addressed first. SSU has filed a motion for a stay of the Order on Appeal with the Commission. The Commission has the authority to require SSU to post adequate security for the stay. SSU has requested authority to post a corporate undertaking to secure the refund. (Appdx. at A. 66-93). Thus, the customers will be protected.

18. To minimize any delay occasioned by the bifurcation, Burnt Store requests that an expedited briefing schedule be established. Burnt Store respectfully suggest that the Court direct Burnt Store to file their brief on the intervention issue within 20 days of the date of the order granting this motion,³ that answer briefs on the party issue be filed within 15 days of Burnt Store's initial brief, and that Burnt Store's reply brief be filed within 15 days of the answer briefs.

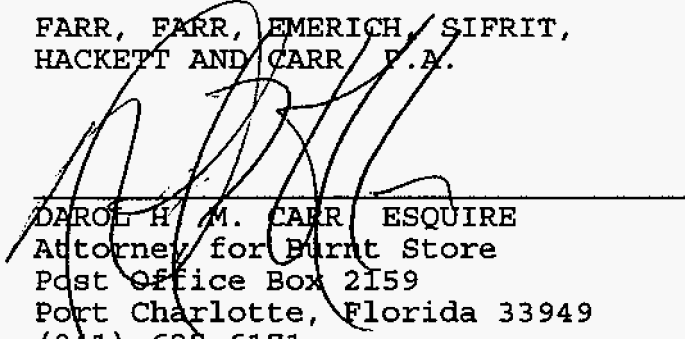
³Under the "unbifurcated" briefing schedule, Appellant SSU's initial brief would be due on November 12. Appellant Burnt Store's initial brief would be due on November 21.

19. In addition, Burnt Store believes that it is not necessary for the clerk to prepare and transmit the record for purposes of the party status question.⁴ Burnt Store will include an appendix with their brief containing the relevant documents. Burnt Store suggests that the time for preparation of the record run from the Court's order on the party status issue.

WHEREFORE, Burnt Store requests the Court to enter an order consolidating Case No. 96-3334 and Case No. 96-3489, establishing an expedited briefing schedule for the party status issue as contained in the body of this motion, and holding all other appellate proceedings in abeyance until a decision is issued regarding Burnt Store's party status.

FARR, FARR, EMERICH, SIFRIT,
HACKETT AND CARR, P.A.

BY:


DAROL H. M. CARR ESQUIRE
Attorney for Burnt Store
Post Office Box 2159
Port Charlotte, Florida 33949
(941) 625-6171
Florida Bar No. 371203

78338_1

⁴Burnt Store will submit its Directions to the Clerk in accordance with Rule 9.300 in Case No. 96-3454; however, if the Court grants its motion, Burnt Store will withdraw those directions.

BEFORE THE STATE OF FLORIDA FIRST DISTRICT COURT OF APPEAL

BURNT STORE MARINA,)
)
Plaintiff,)
)
vs.)
)
SOUTHERN STATES UTILITIES, INC. and)
THE FLORIDA PUBLIC SERVICES COMMISSION,)
)
Defendants.)

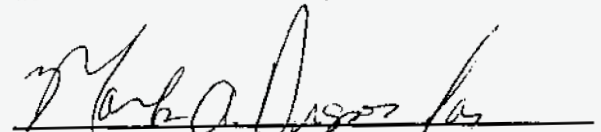
Docket No. 920199-WS
Case No. 96-3489

SUPPLEMENTAL CERTIFICATE OF SERVICE

PURSUANT to this Court's Order dated October 17, 1996, I hereby certify that a true and correct copy of Burnt Store Marina's Motion to Consolidate and Amended Motion for Expedited Review of Party Status and For Tolling of Time For Additional Appellate Proceedings was furnished by U.S. Mail to all parties on the attached list Exhibit A on the 10th day of October, 1996. I further certify that a true and correct copy of Burnt Store Marina's Motion to Consolidate and Amended Motion for Expedited Review of Party Status and For Tolling of Time For Additional Appellate Proceedings and Directions to the Clerk was furnished to Richard C. Bellak, Esquire, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Fl 32399-0850 and to Blanca Bayo, Clerk, Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32301 this 23rd day of October, 1996.

FARR, FARR, EMERICH, SIFRIT,
HACKETT AND CARR, P.A.

By:


 DAVID A. HOLMES, ESQUIRE
 Attorney for Burnt Store Marina
 115 West Olympia Avenue
 P. O. Drawer 1447
 Punta Gorda, FL 33951
 (941) 639-1158
 Florida Bar No. 0983136

96 OCT 23 11 00 AM '96
 96 OCT 23 09 13 AM '96
 96

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to the following on the 10th day of October, 1996:

Kenneth A. Hoffman
Rutledge, Ecenia, Underwood
Purnell & Hoffman, P.A.
215 South Monroe Street, Ste 420
Tallahassee, Florida 32302

Arthur J. England, Jr.
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131

Brian P. Armstrong
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703

Lila Jaber
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd., Room 370
Tallahassee, Florida 32399-0850

Michael A. Gross
Assistant Attorney General
Department of Legal Affairs
The Capitol, Room PL-01
Tallahassee, Florida 32399-1050

Susan Fox
MacFarlane, Ausley, Ferguson
& McMullen
111 Madison Street, Ste. 2300
Post Office Box 1531
Tampa, Florida 33601

Charles Beck
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400

Harry C. Jones
Cypress & Oak Villages Association
91 Cypress Boulevard, West
Homosassa, Florida 32646

Larry M. Haag
County Attorney
111 West Main Street, #B
Inverness, Florida 33450-4882

Michael B. Twomey
Route 28, Box 1264
Tallahassee, Florida 31310

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301

Michael S. Mullin
26-5th Street
Post Office Box 1563
Fernandina Beach, FL 32304


DAROL H. M. CARR

EXHIBIT "A"

003886