

MEMORANDUM

OCTOBER 13, 1997

TO: DIVISION OF RECORDS AND REPORTING (FLYNN)  
FROM: DIVISION OF LEGAL SERVICES (ELIAS) **RVE**  
RE: LETTER FROM MR. JOSEPH MCGLOTHLIN, DATED OCTOBER 3, 1997,  
REGARDING DOCKET NO. **960502-GU**

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As we discussed, the attached letter should be assigned a document number and added to the docket file in Docket No. 960502-GU.

RVE/js

Attachment

cc: Division of Electric and Gas (Banks)

Division of Auditing and Financial Analysis (Howard)

I:citymemo.rve

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APP \_\_\_\_\_  
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FPSC-RECORDS/REPORTING

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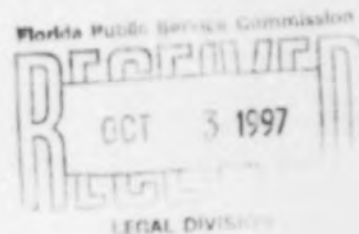
CABLE GRANDLAW

PLEASE REPLY TO:  
TALLAHASSEE

October 3, 1997

TALLAHASSEE OFFICE  
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Robert Elias, Esquire  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399



Dear Mr. Elias:

Thank you for providing a fax of the letter from Nathaniel Wilcox, received by the Commission after the close of the protest period in Docket No. 960502-GU. As outlined below, the untimely letter does not constitute an appropriate petition for formal proceeding as provided by Rule 25-22.029, Florida Administrative Code. Nor, in view of the terms of finality and closure in the Commission's Order, does the letter present the occasion for a formal pleading from City Gas Company. Nonetheless, at your request, we provide this response to Mr. Wilcox's letter.

1. **The letter was filed after the close of the protest period and no good cause is stated for untimely filing.**

Order No. PSC-97-1001-FOF-GU, issued August 25, 1997, provides that the Order shall become final, and the Docket closed, unless an appropriate petition is filed within the protest period. Mr. Wilcox was provided with a copy of Order No. PSC-97-1001-FOF-GU, by the Division of Records and Reporting of the Florida Public Service Commission.

Rule 25-22.029, Florida Administrative Code provides that any person who receives notice and who fails to file a timely request for a Section 120.57 hearing shall have waived his or her right to request a hearing on the decision. The Rule also provides that in the absence of a timely request for a hearing, the proposed order shall become effective upon the expiration of the time within which to request a hearing.

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Here no timely request for a hearing was filed; equally important, no hearing was requested at all. Further, no good cause is stated by Mr. Wilcox for the untimely filing of his letter. Therefore, the PAA became final and effective. Environmental Resources Associates of Florida, Inc., v. Department of General Services, 624 So.2d 330 (Fla App., 1st DCA, 1993), rev. den. 634 So.2d 624 (Fla. 1994); Vantage Health Care v. Agency for Health Care Administration, 687 So.2d 306 (Fla. App., 1st DCA, 1997).

2. **No waiver of Rule 25-22.029, Florida Administrative Code has been requested, and threshold proof and notice provisions for waiver of administrative rules have not been met.**

Section 120.542, Florida Statutes, mandates threshold proof and notice provisions for variances and waivers from agency rules. Subsection (2) of the statute states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statutes will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purpose of this section, "substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. For purpose of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Section 120.542(2), Florida Statutes.

In addition to establishing "substantial hardship" and that the "principles of fairness" would be violated, a petition for a waiver must specify: (1) the rule from which a waiver is requested; (2) the type of action requested; (3) the specific facts that would justify a waiver; and (4) the reason why the waiver requested would serve the purposes of the underlying statute. Section 120.542(5) (a) - (d), Florida Statutes. The Statute also requires published notice in the Florida Administrative Weekly and a means for interested persons to provide comment.

None of these prerequisites to rule waiver have been met. In the absence of a waiver of Rule 25-22.029, Florida Administrative Code, Mr. Wilcox has waived his right to request a hearing, and the Commission's proposed Order became effective upon expiration of the protest period.



3. The complainant's substantial interests are not affected by the Commission's proposed action.

Rule 25.22.029(4), Florida Administrative Code, "Point of Entry into Proposed Agency Action Proceedings", provides that a person may file a petition for a formal hearing pursuant to section 120.57, Florida Statutes if that person's substantial interests may or will be affected by the Commission's proposed action. As the Court stated in Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. App., 2d DCA 1981):

[B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Both requirements must be met to establish standing to protest an agency action. Mr. Wilcox's untimely letter fails to meet either prong of this test for substantial interest.

4. The requested action has already been accomplished by the Public Service Commission.

In his untimely letter Mr. Wilcox has not requested a hearing, but an investigation, "not by City Gas, but by the P.S.C." This exact request has already been carried out by the Florida Public Service Commission.

At the Service Hearings in Docket No. 960502-GU, Mr. Wilcox requested the exact investigation he is now, again, requesting. Over the course of several months, a painstaking investigation was conducted by the Commission's Division of Research and Regulatory Review. At the conclusion of the investigation a report was issued, in which the exact issues regarding purported management involvement in falsification, staffing, and timeliness of inspections now being raised by Mr. Wilcox are thoroughly and exhaustively addressed.

City Gas is unaware whether Mr. Wilcox received a copy of this report. The fact remains that the measures now being requested have already been completed by the Commission.

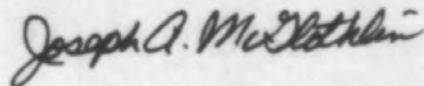
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5. The letter cannot serve to raise issues currently pending before the EEOC that are not encompassed within the PAA.

It is axiomatic that a "protest" -- even a timely one that requests a hearing -- cannot inject additional issues into a PAA that are not encompassed within the order. Mr. Wilcox's letter primarily addresses a labor matter stemming from the discharge of an employee for falsification of safety records. This is not a subject of the PAA, which treats the sufficiency of City Gas' safety procedures to comply with the requirements of the Commission's rules. A forum for relief is available to the complainant; and the complainant is availing herself of that forum. A complaint on this very matter is currently pending before the EEOC. See Evelyn M. McKinney v City Gas of Florida, MDEOB Charge No. 96 0909 1310; EEOC Charge No. 15C 96 0143. The Public Service Commission has no jurisdiction to adjudicate a claim of employee discrimination. It is not a proper second forum for a labor matter that is currently pending before the EEOC.

For the above stated reasons, it would appear that the letter you have faxed to me, received by the Commission after the close of the protest period in Docket No. 960502-GU, does not constitute an appropriate petition for formal relief as required by Rule 25-22.029, Florida Administrative Code. Consequently, the PAA order became effective, and no further action by the Commission is warranted.

Yours truly,



Joseph A. McGlothlin

JAM/sjm