

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

NOVEMBER 6, 1997

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (PAUGH) *RUE For LJP*
DIVISION OF ELECTRIC AND GAS (BULECZA-BANKS, BOWSER,
DILLMORE, FLETCHER, FUFLFORD, GING, MAKIN, MILLS, WITMAN)
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (BOYER,
CAUSSEAU, JOHNSON, JONES, LEE, LESTER, MCNULTY, NERTA,
JBR REVELL, C. ROMIG, L. ROMIG, ^{SE}STALLCUP) *JS DM*
DIVISION OF RESEARCH AND REGULATORY REVIEW (BUCHANAN) *AS BWA*

RE: DOCKET NO. 960502-GU - APPLICATION FOR RATE INCREASE BY
CITY GAS COMPANY OF FLORIDA *JDJ*

AGENDA: 11/18/97 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\960502P.RCM

CASE BACKGROUND

On June 18, 1996, City Gas Company of Florida, an operating division of NUI Corporation (City Gas or Company) filed a petition for a permanent rate increase. On November 20, 1996, pursuant to Order No. PSC-96-1404-FOF-GU, the Commission granted City Gas a partial rate increase but required further consideration of two issues: (1) whether City Gas had proper controls in place to ensure that leak surveys and valve maintenance inspections were conducted in accordance with Rules 25-12.022 and 25-12.040, Florida Administrative Code; and (2) whether an adjustment should be made for the Medley contracts.

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City Gas responded to the first issue by developing an annual workload and staffing plan for its Distribution Department. In addition, the Company developed a system of internal controls and internal audits designed to ensure that leak surveys and valve maintenance were completed as required. With respect to the second issue, Commission staff investigated whether the lack of a competitive bidding process combined with a less than arms-length relationship with Medley Construction Company resulted in an excessive City Gas rate base. The contract prices were found to be reasonable. On August 25, 1997, Order No. PSC-97-1011-FOF-GU was issued approving the Company's implemented controls for the leak surveys and valve inspections and finding no adjustment to the rate base necessary due to the Medley contracts. The period to protest the order expired on September 15, 1997.

On September 16, 1997, People United To Lead The Struggle For Equality, Inc. (PULSE), filed a letter of objection to the docket closing. PULSE did not intervene in the docket. The letter was filed one day after the protest period had expired. On October 3, 1997, City Gas filed a letter of response to the PULSE objection. This recommendation addresses whether the PULSE letter of objection is a valid protest under Commission rules and precedent.

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DISCUSSION OF ISSUES

ISSUE 1: Is the letter filed by People United To Lead the Struggle For Equality, Inc. a valid protest of proposed agency action?

RECOMMENDATION: No. the letter of objection filed by People United To Lead the Struggle For Equality, Inc. is not a valid protest of a proposed agency action because it does not meet the substantive requirements for filing a protest, the letter was not timely filed and the letter fails to establish that PULSE's substantial interests are affected.

STAFF ANALYSIS: The positions of PULSE and City Gas are outlined below.

PULSE

The purpose of PULSE's objection is to the closing of the docket. In its letter PULSE states:

We are concerned that falsifying of City Gas reports and records go back as far as seven years or more. All individuals involved with falsifying company records have not been terminated. We have been told that Rick Wall is also Responsible(sic) for falsified reports to the P.S.C. This must be investigated, not by City Gas, but by the P.S.C.

Present and past staffing levels are inadequate. Present staff has told us that the company is falling behind in required leak surveys and valve maintenance in Miami. We question the quality of work being performed by City Gas.

The letter concludes by stating that PULSE is petitioning the Commission to allow the organization to produce additional facts to support their charges against City Gas. The letter does not request a hearing nor is there any request for a waiver of the Rule 25-22.029, Florida Administrative Code, requiring a protest to be filed within 21 days after the notice of proposed agency action is issued.

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City Gas

City Gas' response to the PULSE objection addresses five issues. First, City Gas states that the letter was filed after the close of the protest period and no good cause was shown for the untimely filing. City Gas asserts that PULSE received the notice of the proposed agency action but waived its right to request a hearing as a result of its untimely filing pursuant to the express terms of Rule 25-22.029, Florida Administrative Code. City Gas states that the objection was not timely filed, no hearing was requested in the objection and good cause was not shown for the untimely filing. As a result, the proposed agency action became final.

Second, City Gas takes issue with the fact that PULSE did not request a waiver of Rule 25-22.029, Florida Administrative Code. In addition, the Company states that requirements for rule waiver under Section 120.542, Florida Statutes, have not been met.

Third, City Gas states that the complainant lacks standing to challenge the Commission's proposed action because it is not a person whose substantial interests may or will be affected. City Gas cites Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (2d DCA 1981) which enunciates the test for determining substantial interests. The Company states that PULSE satisfies neither the injury in fact prong of the test nor the nexus prong of the test.

Fourth, City Gas alleges that the action requested in the PULSE letter has already been accomplished by the Commission. The Company states that the relief requested is duplicative because the identical request was made by PULSE at the Company's service hearings and that the Commission responded by conducting a painstaking investigation over the course of several months.

Fifth, the Company states that the PULSE letter cannot serve to raise issues that are not encompassed within the proposed agency action. The Company properly characterizes the proposed agency action as a proceeding to determine the sufficiency of City Gas' safety procedures pursuant to Commission rules. The primary subject of the PULSE letter, by contrast, is an employee discrimination issue arising from the discharge of an employee for falsification of the Company's safety records. That labor matter is currently pending before the EEOC.

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Staff Analysis

The PULSE letter of objection is not a valid protest because it does not meet the requirements for filing a petition on proposed agency action, the complaint was not timely filed, and PULSE has not demonstrated that its substantial interests will be affected by the Commission's action in this docket.

The requirements for filing a petition on proposed agency action are established by Rules 25-22.029 and 25-22.036, Florida Administrative Code. Rule 25-22.029, Florida Administrative Code provides the point of entry into proposed agency action. Pursuant to the rule: "[o]ne whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a \$120.57 hearing...." within 21 days after issuance of the notice. §25-22.029(2)&(4) F.A.C. In addition, "[a]ny person who receives notice and who fails to file a timely request for a \$120.57 hearing *shall have waived* his or her right to request a hearing on the decision." §25-22.029(5) F.A.C. (emphasis added) In the absence of a timely request, the proposed action becomes effective unless otherwise provided by Commission order. §25-22.029(6)F.A.C. The order in this docket did not provide an exception to its effective date following the passage of the 21 day filing period.

Section 25-22.036, Florida Administrative Code, sets forth the specific requirements for the initiation of formal proceedings. The PULSE letter does not meet the rule's substantive requirements for the initial protest pleading. Among the substantive requirements not addressed in the PULSE letter are: (1)an explanation of how his or her substantial interests will be affected; (2) a statement of all known disputed issues of material fact; (3) a statement of the ultimate facts alleged and the rules and statutes which entitle the petitioner to relief; (4) a demand for relief; and (5) a statement of when and how notice of the Commission's proposed agency action was received. §25-22.036(7)(a)&((f), F.A.C. The PULSE letter does not explain how its substantial interest are affected. In addition, the letter does not address all known disputed issues of material fact nor is there a statement of the ultimate facts alleged and the rules which entitle it to relief. There are only vague allegations regarding an employment issue and staffing levels. Finally, PULSE does not enunciate a demand for relief or mention notice. The PULSE letter fails to meet the substantive requirements of Rule 25-22.036, Florida Administrative Code.

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Rule 25-22.036, Florida Administrative Code, also sets forth the standard of review for protest filings. The Rule states that "[w]here a petition on proposed agency action has been filed the commission may: 1. Deny the petition if it does not adequately state a substantial interest in the Commission determination or if it is untimely." §25-22.036(9)(b)F.A.C. In the instant case, the letter was neither timely nor did it state a substantial interest.

A limited exception to the filing deadline requirement has been carved out by Commission precedent. The Commission has held that upon a showing of good cause why the petition is untimely, it may nonetheless be accepted as a valid protest. In In Re: Application for a staff-assisted rate case in Highlands County by Sebring Ridge Utilities, Inc., Docket No. 950966-WS, Order No. PSC-96-1184-FOF-WS, issued September 20, 1996, the Commission granted a letter of protest that was filed two days late. In that case, a customer of a water and wastewater utility did not receive the notice of proposed rate increase until four days before the protest period expired. The Commission found that the complainant had a substantial interest because he was a customer of the utility and that good cause for untimely filing arose from the circumstances of the 4 day notice. The Commission found:

As previously noted, the customer's request for formal hearing was untimely filed two days beyond the filing deadline. We note that Rule 25-22.036(9)(b), Florida Administrative Code, also permits, but does not require, us to deny a petition on proposed agency action if it is untimely filed. Whether to grant or deny an untimely petition is within our discretion. This Commission has granted such petitions in rare cases upon a showing of good cause why the petition is untimely.

Another docket in which an untimely petition for formal proceeding was granted involved a petition received via facsimile on the last day of the protest period. Upon being advised by Commission staff that facsimile filings are not permitted under Rule 25-22.028, Florida Administrative Code, the complainant immediately forwarded the original via U.S. mail. The Commission found a good faith effort of compliance and that "a reasonable person could assume that a petition may be filed by facsimile" In addition, the complainants prompt effort to correct the error was probative. In Re: Complaint of Mr. Eddy Grosse against Florida Power & Light Company concerning billing for electric use at

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customer's rental property, Docket No. 960726-EI, Order No. PSC-96-1355-FOF-EI, issued November 18, 1996.

The instant case is distinguishable from the above-referenced dockets on its facts. PULSE makes no allegation in its letter that notice was not timely received. Likewise, PULSE provided no explanation as to why the letter was not timely filed, nor does there appear to have been an attempt on PULSE' part to correct the error. On the facts, the PULSE letter of objection to the docket closing does not fall within the Commission's exception to the filing rule.

In addition to the timeliness defect, the PULSE letter fails to establish substantial interest in the proposed agency action. The test for determining substantial interest is set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So 2d 478, 482 (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.

The PULSE letter does not satisfy either of the prongs of the Agrico test. PULSE makes no allegation that it will suffer injury in fact and PULSE does not state that its injury is of a type which the proceeding is designed to protect.

In sum, staff recommends that the letter of objection filed by PULSE is not a valid protest of proposed agency action and should be denied. The letter fails to meet the substantive requirements of the rule on initiation of formal proceedings. The letter was not timely filed, good cause for the untimeliness was not demonstrated and good cause cannot be implied from the facts and circumstances of the case. Finally, PULSE makes no showing that it has a substantial interest in the proposed agency action.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: If no motion for reconsideration or notice of appeal is timely filed, no further action will be required. Therefore, the docket should be closed.