

IN THE SUPREME COURT OF FLORIDA

CITY OF HOMESTEAD)
)
 Respondent/Appellant,)
)
 v.)
)
 JULIA L. JOHNSON, etc. et. al)
)
 Appellees.)
)
)
)
)
)

CASE NO. 91,820

970022-

RESPONSE IN OPPOSITION TO MOTION TO REINSTATE
NOTICE OF ADMINISTRATIVE APPEAL

Appellee, the Florida Public Service Commission, whose members are Julia L. Johnson, J. Terry Deason, Susan F. Clark, Joe Garcia, and Diane K. Kiesling (the "Commission"), files its response to Appellant's, City of Homestead ("City" or "Homestead"), Motion to Reinstate Notice of Administrative Appeal. As ground therefore, Appellee states:

FACTUAL BACKGROUND

1. On January 6, 1997, Florida Power and Light Company (FPL) petitioned for enforcement of Order No. 4285, which approved a territorial agreement and established boundaries between the Company and the City of Homestead. Extensive pleadings were filed in this docket. Subsequent to the Petition for Enforcement filed by FPL, the City filed a Motion For Leave To Intervene which was granted. In addition, the City filed three motions to dismiss; one

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for lack of subject matter jurisdiction, one for failure to join indispensable parties, and one for failure to state a cause of action. The City also filed two motions to strike FPL's request for attorney's fees and a request for oral argument. All of the City's motions were denied by the Prehearing Officer except the motion to strike FPL's request for attorneys fees. In response to the favorable ruling on attorney's fees, FPL filed an Amended Petition for Enforcement of Order which was substantially the same as the original Petition but included more specific allegations with respect to its request for attorney's fees. Subsequently, the City filed a response to the Amended Petition and a Motion for Judgment on the Pleadings. FPL filed a Memorandum in Response to the City's Motion for Judgment on the Pleadings. The City's Motion for Judgment on the Pleading was denied. On September 29, 1997, the Proposed Agency Action Order was issued.

ARGUMENT

A. The Provision in the Commission's Order is not permissive.

2. Homestead argues that under the Notice of Further Proceedings or Judicial Review in Order No. PSC-97-1132-FOF-EU, its appeal was appropriately and timely filed. However, Homestead failed to consider the meaning of the following language from that Notice:

. . . 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. . . . (Emphasis supplied.)

Order PSC-97-1132-FOF-EU, p.11. This type of permissive language puts the parties on notice that further administrative remedies are available. A party that fails to avail himself of further administrative remedies below is foreclosed from appeal. General Elec. Credit Corp. of Georgia v. Metropolitan Dade County, 364 So. 2d 1049, 1053 (Fla. 3rd DCA 1977).

B. Failure to exhaust administrative remedies.

3. By failing to exhaust its administrative remedies, Homestead is undermining the purpose of Florida's Administrative Procedures Act. The First District Court of Appeals stated:

[A]ll review processes afforded by the executive branch must ordinarily be exhausted before the judicial branch will consider intervention. [This] . . . principle limits the availability of district court review of action by the executive branch under Chapter 120. In the APA context, the exhaustion requirement assures that the branch constitutionally responsible for implementing the statutory scheme has had a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue; and that requirement produces an authentic decision by the executive which then may be reviewed

Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 440 So. 2d 66, 69 (Fla. 1st DCA 1981) (citations omitted).¹ The reasons for exhausting administrative remedies are many:

¹ Even though the Commission is a legislative entity, the principle is the same.

to avoid premature or unnecessary judicial labor, to assure agency action by the authentic agency head, to encourage improvement in agency decision making processes, to afford remedies simpler and less expensive than court litigation, and to encourage a responsible autonomy in the executive branch of state government.

Id. At 73 (citation omitted).

4. As required by Chapter 120, Florida Statutes, and Rule 25-22.029, Florida Administrative Code, the Commission issued its proposed agency action order and gave Homestead an opportunity to challenge it and request a hearing. The agency was entitled to rely upon the conclusiveness of its proposed actions. Dickerson, Inc. v. Rose, 398 So. 2d 922, 924 (Fla 1st DCA 1981). The utility had in effect accepted the PAA orders as ending the controversy. Graham Contracting, Inc. v. Department of General Services, 363 So. 2d 810, 814-815 (Fla. 1st DCA 1978) (citing Capeletti Bros., Inc. v. State, Department of Transportation, 362 So. 2d 346 (Fla. 1st DCA 1978)).

5. In this case, Homestead gave up its rights to further agency review by failing to exhaust its administrative remedies. A party to an administrative proceeding cannot maintain an appeal without first exhausting available administrative remedies. Phillips v. Santa Fe Community College, 342 So. 2d 108, 110 (Fla. 1st DCA 1977); General Electric Credit Corporation of Georgia v. Metropolitan Dade County, 346 So. 2d 1049 (Fla. 3d DCA 1977). Because administrative remedies were not exhausted, this court does not have subject matter jurisdiction. Orange County, Florida v.

Game and Fresh Water Fish Commission, 397 So. 2d 411, 413 (Fla. 5th DCA 1981); Brooks v. School Board of Brevard County, 382 So. 2d 422 (Fla. 5th DCA 1980). Therefore, this appeal should be dismissed.

C. Waiver of right to appeal.

6. Homestead's appeal should be dismissed because it waived any right to appeal when it failed to request a Section 120.57(1) hearing. Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 935 (Fla. 1st DCA 1980) (the rights of substantially affected persons are waived unless they timely request a 120.57 hearing); Rice v. Department of Health and Rehabilitative Services, 386 So. 2d 844, 847 (Fla. 1st DCA 1980) (appeals from free-form agency action should be dismissed when appellant neglects a clear point of entry to 120.57 proceedings). Moreover, because no hearing was held, the utility preserved no issues for appeal. See Yachting Arcade, Inc. V. Riverwalk Condominium Ass'n, Inc., 500 So. 2d 202, 204 (Fla. 1st DCA 1986) (where appellant did not object to issues at the Section 120.57(1) hearing those issues were found to be unreviewable by the appellate court).

For the above stated reasons, the City of Homestead's Motion to Reinstate Notice of Administrative Appeal should be denied and the case should be dismissed.

Respectfully submitted,

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Dated: December 4, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to the following on this 4th day of December, 1997.

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