

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for rate
increase by City Gas Company of
Florida.

DOCKET NO. 960502-GU
ORDER NO. PSC-98-0029-PCO-GU
ISSUED: January 5, 1998

The following Commissioners participated in the disposition
of this matter:

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

ORDER DENYING PROTEST

BY THE COMMISSION:

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.

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

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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 order addresses whether the PULSE letter of objection is a valid protest under Commission rules and precedent.

DECISION

We find that the PULSE letter of objection is not a valid protest for the following reasons: (1) it did not meet the requirements for filing a petition on a proposed agency action, (2) the complaint was not timely filed, and (3) PULSE failed to demonstrate that its substantial interests would 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 were: (1) an explanation of how his or her substantial interests would 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 did not explain how its substantial interest were affected. In addition, the letter did not address all known disputed issues of material fact nor was there a statement of the ultimate facts alleged and the rules which entitle it to relief. There were only vague allegations regarding an employment issue and staffing levels. Finally, PULSE did not enunciate a demand for relief or mention notice. In short, the PULSE letter failed to meet the substantive requirements of Rule 25-22.036, Florida Administrative Code.

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

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In sum, 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 had a substantial interest in the proposed agency action.

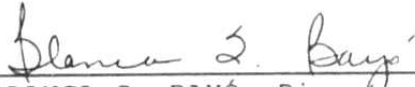
Accordingly, upon consideration the Commission finds that the letter of objection filed by PULSE is not a valid protest of proposed agency action and is therefore denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Letter filed on September 16, 1997, by the People United To Lead The Struggle For Equality, Inc. (PULSE), objecting to the closing of docket number 960502-GU, is not a valid protest and is therefore denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 5th day of January, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

LJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.