

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida
Cities Water Company for limited
proceeding to recover
environmental litigation costs
for North and South Ft. Myers
Divisions in Lee County and
Barefoot Bay Division in Brevard
County.

DOCKET NO. 971663-WS
ORDER NO. PSC-98-1160-PCO-WS
ISSUED: August 25, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

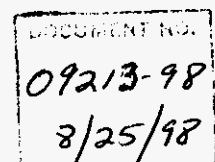
ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

Florida Cities Water Company (FCWC or utility) is a Class A utility which operates under the Commission's jurisdiction in Lee and Brevard Counties. FCWC also operates as a water and wastewater utility in Collier, Sarasota, and Hillsborough Counties, which are not subject to the jurisdiction of this Commission.

On December 29, 1997, the utility filed a petition for limited proceeding pursuant to Section 367.0822, Florida Statutes, seeking approval to recover environmental litigation costs incurred in its defense of a legal action brought by the United States relating to violations of the Clean Water Act. Recovery is sought in a monthly surcharge, applicable to the utility's water and wastewater customers in South Ft. Myers, North Ft. Myers (Lee County) and Barefoot Bay (Brevard County). The utility states that upon approval of a surcharge as sought in this proceeding, FCWC will seek approval by Collier, Hillsborough, and Sarasota Counties of a surcharge to be applicable to its customers in those counties, as



well. On March 20, 1998, the Office of Public Counsel (OPC) filed a notice of its intervention in this proceeding. We acknowledged OPC's intervention by Order No. PSC-98-0430-PCO-WS, issued March 26, 1998. This case is scheduled for an August 12-14, 1998, administrative hearing.

On July 10, 1998, OPC filed a motion to dismiss FCWC's petition. On July 17, 1998, FCWC filed a motion for extension of time to file a response thereto, to and including July 29, 1998. FCWC's motion for extension of time was granted at the July 20, 1998, prehearing conference, by Order No. PSC-98-1046-PHO-WS, issued August 3, 1998. On July 29, 1998, FCWC filed its response to OPC's motion to dismiss. Also on July 29, 1998, OPC filed a memorandum of law in support of its motion to dismiss.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 25-22.058, Florida Administrative Code, concurrent with its response to OPC's motion to dismiss filed on July 29, 1998, FCWC filed a request for oral argument on the matter. Although FCWC stated that oral argument would assist us in evaluating the issues addressed in its motion, with counsel available to answer any questions we may have, it did not state with particularity why it would aid us in comprehending and evaluating the issues before us, which is a requirement under the Rule. Therefore, we denied the utility's request for oral argument. However, because this matter had not yet been to hearing, we allowed the parties to participate at the August 4, 1998, agenda conference, but limited participation to five minutes for each party.

MOTION TO DISMISS

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine

the elements which must be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957).

The substantive law upon which we derive our authority to grant relief by a limited proceeding is Section 367.0822, Florida Statutes, which provides, in relevant part, that

the [C]ommission may conduct limited proceedings to consider, and act upon, any matter within its jurisdiction, including any matter the resolution of which requires a utility to adjust its rates. The [C]ommission shall determine the issues to be considered during such a proceeding.... However, unless the issue of rate of return is specifically addressed in the limited proceeding, the [C]ommission shall not adjust rates if the effect of the adjustment would be to change the last authorized rate of return."

OPC argues two grounds upon which FCWC fails to state a cause of action, the first of which is that FCWC's petition fails to allege that any expenses FCWC has or is incurring places the utility's earnings outside of its last authorized range of return. OPC contends that the Commission cannot provide relief to any utility which omits this issue from its pleadings. OPC asserts that it is Florida law and this Commission's practice to require a utility to prove that it is underearning before the Commission will grant rate relief.

OPC argues that FCWC's petition does not allege that FCWC's existing rates are not providing the utility with a fair rate of return, and Section 386.081, Florida Statutes, requires the Commission to establish rates which provide a fair rate of return on the utility's investment. OPC asserts that Section 367.0822, Florida Statutes, does not state any exception to the requirement that the utility show that it is earning outside the range of its last rate of return. Moreover, OPC cites to Order No. PSC-004-FOF-EI, issued January 12, 1994, in Docket No. 930613-EI, In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.0825, Florida Statutes by Gulf Power Company, by which the Commission accepted the ratemaking principle that rate relief must be predicated on the utility's earning

outside its authorized range, in the absence of a special statutory route.

OPC further points to the provision under Section 367.0822, Florida Statutes, which provides that unless the issue of rate of return is specifically addressed, the Commission shall not adjust rates if the effect of the adjustment would be to change the last rate of return. OPC argues that no party in this proceeding can provide any assurance as to whether the rates sought by the utility would not have the effect of increasing its last rate of return.

The second ground upon which OPC argues that FCWC has failed to state a cause of action upon which relief can be granted is that FCWC's petition seeks retroactive ratemaking. To support this contention, OPC cites to Order No. PSC-95-1376-FOF-WS, issued November 6, 1995, in Docket No. 940847-WS, In re: Application for a rate increase in Duval County by Ortega Utility Company, by which the Commission determined that it would be retroactive ratemaking to allow the utility to recover depreciation expenses that occurred well before the test year approved in its rate case. OPC argues that the prohibition against retroactive ratemaking observed in Ortega should apply with even more force here, as Ortega unsuccessfully tried to recover sums which the Commission recognized as losses, whereas FCWC is attempting to recover past expenses. OPC argues that FCWC has not alleged that the utility has suffered any loss. According to OPC, FCWC's approach is a bare attempt to recover expenses which reach back in time for years.

Moreover, OPC cites to GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), which reversed a Commission order on remand. On remand, the Commission approved rates which would recover the expense at issue only prospectively, upon finding that the imposition of a surcharge would constitute retroactive ratemaking. The GTE Court rejected that finding, and sanctioned the implementation of a surcharge to allow GTE to recover costs already expended only because those costs should have been lawfully recoverable in the Commission's first order. Id. at 973. OPC argues that GTE did no violence to the prohibition against retroactive ratemaking. Rather, the Court gave the prohibition implicit approval by distinguishing it. OPC argues that here, there is no reversal of a Commission order and no remand. Here there is only a reach back for expenses previously and allegedly incurred. OPC concludes that this case should be dismissed because the prohibition against retroactive ratemaking bars the sort of recovery sought by FCWC.

Finally, OPC argues that because the utility has provided no assurance that the current rates fail to recover the rate case expense in this proceeding, the petition should be dismissed, including the portions addressing rate case expense.

In its response in opposition to OPC's motion to dismiss, FCWC argues that it could not have known whether to file for recovery of the legal expenses sought in this limited proceeding until the federal enforcement action during which the costs were incurred was completed. The enforcement action commenced in 1992 and was not completed until August 6, 1997, with the dismissal of the appeal, after which time FCWC began preparing its petition and supporting testimony and evidence, all of which was filed with the Commission on December 29, 1997.

FCWC further argues that OPC's motion to dismiss should be denied or stricken because it was untimely filed. Rule 28-106.204(2), Florida Administrative Code, states that "[u]nless otherwise provided by law, motions to dismiss the petition shall be filed no later than 20 days after service of the petition on the party." OPC filed its motion seven months after the filing of the petition, five months after the issuance of the order establishing procedure issued in the docket, and four months after OPC intervened. According to FCWC, OPC's delay in filing its motion has prejudiced FCWC, which has incurred considerable expense since the filing of its petition, in responding to discovery, depositions, filing testimony, and participating in other activities leading up to the hearing, including two customer service hearings and a prehearing. And FCWC cites to Hamilton County Bd. Of County Comm'rs v. FDER, 537 So. 2d 1378 (Fla. 1st DCA 1991), in arguing that the motion must be stricken because OPC has failed to make any showing of mistake, inadvertence, or excusable neglect on its part which could justify its failure to file the motion on a timely basis under the Rule.

FCWC also argues that OPC's motion should be denied because the grounds alleged do not support a motion to dismiss. According to the utility, the facts alleged state a proper request for relief pursuant to Section 367.0822, Florida Statutes.

According to FCWC, OPC's argument that FCWC has failed to allege underearnings should be denied because such a showing is not required by, and defeats the plain intent of, the limited proceeding statute. Furthermore, FCWC argues that OPC's position would mean that during every year from 1992 through 1998, FCWC

should have filed an underearning rate case to recover the litigation expenses at issue. This would be an absurd result and the Commission would likely have required the utility to defer the expenses until the court's decision on the merits was rendered and the actual amount of litigation expenses was known. FCWC cites to Dorsey v. State, 402 So. 2d 1178 (Fla. 1981), in arguing that it is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result.

Moreover, the utility recognizes that Section 367.0822, Florida Statutes, prohibits an adjustment in rates if the effect would be to change the last rate of return. FCWC argues that it is not proposing a change in rates that will effect its rate of return, but a temporary surcharge to recover extraordinary non-recurring costs, a fact alleged in its petition and which must be taken as true for purposes of a motion to dismiss. Additionally, when the Commission believes that overearnings has occurred upon review of a utility's annual report, it promptly enters an order subjecting such overearnings to refund.

FCWC further argues that OPC's argument that granting the relief requested in the utility's petition would result in retroactive ratemaking is not a proper ground for a motion to dismiss and is contrary to law. Whether a charge would constitute retroactive ratemaking goes to the merits of the case. It has been raised by OPC as an issue in the prehearing order, and has been addressed by the parties' testimony.

FCWC argues that the GTE Court held that a surcharge for recovery of costs expended is not retroactive ratemaking, as it does not involve a new rate which is applied retroactively. According to the utility, the GTE Court clearly approved the use of a surcharge as a method to recover expenses.

FCWC also argues that OPC's reliance on the Ortega order has no application in this proceeding. FCWC is not basing its proposed surcharge on consumption, nor are the expenses it seeks to recover related to consumption. Also, Ortega sought recovery for ordinary measurable period expenses which caused losses in those periods. A loss differs from an expense in that losses relate to earnings levels rather than explicit costs. FCWC argues that it is seeking recovery of extraordinary costs imposed in earlier periods; costs that were neither predictable nor subject to estimation at the time incurred. FCWC requests that it be allowed to offer proof at hearing that the expenses it seeks to recover were prudently

incurred, reasonable, and should be recovered through a temporary surcharge.

With respect to OPC's argument that the petition should be dismissed, including the rate case expense portion, FCWC argues that even if we were to dismiss the petition, the utility would be entitled to rate case expenses because the filing of the petition is prudent and reasonable.

Finally, FCWC points out that if we were inclined to grant OPC's motion to dismiss, Rule 28-106.201(4), Florida Administrative Code, requires that dismissal of a petition shall, at least once, be without prejudice to the petitioner's filing of a timely amended petition curing the defect unless it conclusively appears from the face of the petition that the defect cannot be cured.

We agree with FCWC that OPC's motion to dismiss should be denied because it was untimely filed. As previously noted, Rule 28-106.204(2), Florida Administrative Code, requires that motions to dismiss a petition shall be filed no later than 20 days after service of the petition unless otherwise provided by law, and the law does not provide otherwise.

Even if the motion had been filed on a timely basis, we agree with FCWC that the grounds alleged do not support a motion to dismiss. By its petition, the utility seeks to recover a portion of its legal expenses incurred in defense of a legal action, plus rate case expenses, through a monthly customer surcharge applicable to its water and wastewater customers in Commission jurisdictional counties. As such, FCWC's petition states a cause of action upon which relief can be granted under Section 367.0822, Florida Statutes.

Section 367.0822, Florida Statutes, does not require a utility to allege in a petition for limited proceeding that any expenses it has or is incurring places the utility's earnings outside the last authorized range of rate of return. Moreover, although Section 367.0822 prohibits an adjustment in rates if the effect of the adjustment would be to change the last authorized rate of return unless the issue of rate of return is specifically addressed in the limited proceeding, by its petition, FCWC does not propose a change in rates that it alleges will affect its rate of return. Whether FCWC must allege and prove, as a prerequisite to the relief it seeks, that present rates cause it to earn below its last authorized rate of return, goes to the merits of the case, has been

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identified as an issue in the case, and goes beyond the four corners of the petition. Viewing the petition in the light most favorable to FCWC and taking all allegations in the petition as true, consistent with Varnes, we find that OPC's motion to dismiss fails on this ground.

Similarly, the issue of whether approval of FCWC's petition would constitute retroactive ratemaking goes to the merits of the case, has been identified as an issue in the case, and goes beyond the four corners of the petition. Moreover, it is not required under Section 367.0822, Florida Statutes, for a utility to allege that the relief it requests does not constitute retroactive ratemaking. Therefore, looking only at the four corners of the petition, if the petition is viewed in the light most favorable to FCWC and all allegations in the petition are considered to be true, we find that OPC's motion to dismiss fails on this ground, as well.

For the foregoing reasons, we hereby deny OPC's motion to dismiss as untimely. Even if the motion had been filed on a timely basis pursuant to Rule 28-106.204(2), Florida Administrative Code, the grounds alleged do not support a motion to dismiss.

This docket shall remain open in order to proceed to hearing on the utility's petition and until such time as all issues identified by the prehearing order are resolved.

Based on the foregoing, it is


ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion to Dismiss Florida Cities Water Company's Petition for Limited Proceeding is hereby denied. It is further

ORDERED that this docket shall remain open.

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By ORDER of the Florida Public Service Commission this 25th
day of August, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting



Kay Flynn, Chief
Bureau of Records

(S E A L)

RG

Chairman Julia L. Johnson and Commissioner J. Terry Deason
dissent from this opinion.

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, 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.