

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Rate Increase for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties by Southern States Utilities, Inc.)	DOCKET NO. 950495-WS
)	ORDER NO. PSC-95-1432-FOF-WS
)	ISSUED: November 27, 1995
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The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTIONS TO DISMISS

BY THE COMMISSION:

Background

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to service areas in 25 counties. On June 28, 1995, SSU filed an application with the Commission requesting increased water and wastewater rates for 141 services areas, pursuant to Section 367.081, Florida Statutes. SSU also requested an increase in service availability charges, pursuant to Section 367.101, Florida Statutes. On August 2, 1995, SSU completed the minimum filing requirements (MFRs) for a general rate increase, and that date was established as the official filing date for this proceeding.

On July 26, 1995, we issued Order No. PSC-95-0901-PCO-WS that acknowledged the intervention of the Office of the Public Counsel (OPC). The Sugarmill Woods Civic Association, Inc., the Spring Hill Civic Association, Inc., and the Marco Island Civic Association, Inc., were also granted intervenor status by Order No. PSC-95-1034-PCO-WS, issued August 21, 1995, and Order No. PSC-95-1143-PCO-WS, issued on September 14, 1995.

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ORDER NO. PSC-95-1432-FOF-WS
DOCKET NO. 950495-WS
PAGE 2

We recently reviewed the jurisdictional status of SSU's facilities throughout the state in Docket No. 930945-WS. In Order No. PSC-95-0894-FOF-WS, issued on July 21, 1995 (now on appeal), we determined that SSU's facilities and land constituted a single system and that we have jurisdiction over all SSU's facilities and land throughout the state pursuant to Section 367.171, Florida Statutes.

OPC filed four motions to dismiss the rate case: on August 29, 1995, September 8, 1995, September 14, 1995 and September 22, 1995. On September 8, 1995, OPC filed one request for oral argument regarding its Second Motion to Dismiss. By Order No. PSC-95-1352-FOF-WS, issued November 1, 1995, the Commission denied OPC's First Motion to Dismiss. On September 19, 1995, Sugarmill Woods Civic Association, Inc., Spring Hill Civic Association, Inc., and Marco Island Civic Association, hereinafter referred to as the "Associations", filed a joinder with and adoption of the Citizen's motions to dismiss, Citizen's Second Motion to Dismiss, and Citizen's Third Motion to Dismiss. The Associations' Notice of Joinder raised no additional argument. This Order addresses OPC's Second, Third and Fourth Motions to Dismiss.

Request for Oral Argument

Rule 25-22.058(1), Florida Administrative Code, requires a request for oral argument to accompany the pleading and to "...state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." OPC substantially complied with Rule 25-22.058(1), Florida Administrative Code. We, therefore, granted the request for oral argument on Citizen's Second Motion to Dismiss.

OPC did not file a motion for oral argument with either its Third Motion to Dismiss or its Fourth Motion to Dismiss. OPC did, however, file a motion requesting oral argument on all motions pending before the Commission. By Order No. PSC-95-1259-PCO-WS, issued October 13, 1995, we denied OPC's motion requesting oral argument on all pending motions. However, because this matter has not yet been to hearing, we allowed the parties to participate at the November 7, 1995, Agenda Conference where we considered these Motions to Dismiss. We also gave the parties the opportunity to address OPC's Third and Fourth Motions to Dismiss. We limited all oral argument to five minutes each side.

Second Motion to Dismiss

On September 8, 1995, OPC filed its Second Motion to Dismiss SSU's application for a rate increase. SSU responded to OPC's Second Motion to Dismiss on September 15, 1995.

Rule 25-22.0407, Florida Administrative Code, requires a company to provide a copy of its petition, MFRs and rate case synopsis to the chief executive officer of the governing body of each municipality and county within the service areas included in the rate request. In addition, a copy must be made available at the company headquarters, business offices and county libraries, or community centers when the company does not have an office in the service territory.

OPC argued that SSU did not provide proper notice of the rate case to the public. According to OPC, the rate case synopsis and other materials are not clear; therefore, customers or other interested individuals are unable to determine what SSU is requesting.

SSU responded that it disseminated sufficient information pursuant to Rule 25-22.0407, Florida Administrative Code. SSU argued that it has complied with the Order Finding Deficiency and Requiring Revised Filing, Order No. PSC-95-1043-FOF-WS, issued in this docket on August 21, 1995. In addition, SSU argued that OPC's Second Motion to Dismiss is inappropriate. SSU stated that if the information disseminated is deficient in some way, any harm to the customers is not irreparable and dismissal of SSU's entire petition is not warranted.

The standard we use in considering OPC's motions to dismiss is to view the facts set forth in the petition in the light most favorable to SSU, in order to determine if SSU's claim is cognizable under the provisions of Section 367.081, Florida Statutes. In Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Court went on to say that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, . . . nor consider any evidence likely to be produced by the other side." See also Holland v. Anheuser Busch, Inc., 643 So. 2d 621 (Fla. 2nd DCA 1994) (stating that it is improper to consider information extrinsic of the complaint).

In considering this motion to dismiss, we do not look beyond the four corners of the complaint, and make a determination on evidence that amounts to a granting of summary judgment. OPC seeks a sanction based upon a perceived failure to fulfill the notice requirement, as set forth in Rule 25-22.0407, Florida Administrative Code. We believe, however, that SSU adequately complied with Rule 25-22.0407, Florida Administrative Code. Dismissal based upon a perceived failure to fulfill the notice requirement would be an inappropriate and "drastic remedy," that goes beyond the four corners of the complaint. See Carr v. Dean Steel Buildings, Inc., 619 So. 2d 392 (Fla. 1st DCA 1993). See also Neal v. Neal, 636 So. 2d 810 (Fla. 1st DCA 1994) (stating that the severity of the sanction should match the violation); and Shahid v. Campbell, 552 So. 2d 321 (Fla. 1st DCA 1989). Furthermore, OPC cited no legal justification to dismiss the rate case based upon a perceived deficiency in the notice. We, therefore, deny Citizen's Second Motion to Dismiss SSU's petition.

Third Motion to Dismiss

On September 14, 1995, OPC filed a Third Motion to Dismiss SSU's petition. OPC argued that "the Citizens have no notice of and have no means to discover whether and/or to what extent their interests are affected by SSU's filing."

OPC also argued that four and one-half months have passed since SSU's filing and SSU has not provided proper notice to its customers. OPC contended that the notice SSU provided misleads its customers, because it does not inform customers of the extent to which their rates may be raised. Rule 25-22.0407(4)(c)1, Florida Administrative Code, requires a company to provide a summary of the MFRs showing a comparison of the present and proposed rates and charges. OPC argued that since the present or proposed rates are not known and the rates identified in the notice and rate case synopsis are incorrect, there is no way to determine the extent to which customers' interests will be affected.

SSU responded that OPC's allegations do not form the basis for a motion to dismiss. SSU stated that OPC has not addressed the sufficiency of SSU's Amended and Restated Application for Increased Water and Wastewater Rates, Allowance for Funds Prudently Invested and Service Availability Charges, nor its MFRs. Thus, SSU argued that OPC's motion lacks specificity. In addition, SSU argued that OPC's assertion that SSU has not met the notice requirement is an affirmative defense that does not form the basis for dismissal of SSU's petition.

We have applied the standard set forth in Varnes in analyzing OPC's Third Motion to Dismiss. Based upon the analysis by which we deny Citizen's Second Motion to Dismiss, we also find it appropriate to deny Citizen's Third Motion to Dismiss.

Fourth Motion to Dismiss

On September 22, 1995, OPC filed its Fourth Motion to Dismiss. Therein, OPC argued that SSU's filing should be dismissed because the MFRs filed with the application no longer support or show any alleged revenue deficiency.

OPC argued that SSU's MFRs contain incorrect information resulting from the Commission's implementation of a stand-alone, system-specific rate structure, rather than the uniform rate structure relied upon by SSU. As such, OPC complained that SSU's calculations of alleged revenue deficiencies are no longer correct. OPC asserted that we should, therefore, dismiss SSU's petition.

In its response filed on September 29, 1995, SSU argued that OPC's motion is "precipitous" because our decision to implement the stand-alone rate structure is not final, has not been reduced to writing, is subject to motions for reconsideration and appeal, and is subject to stay of implementation. In addition, SSU argued that the motion is unnecessary and remarkable in that interim rates are collected subject to refund.

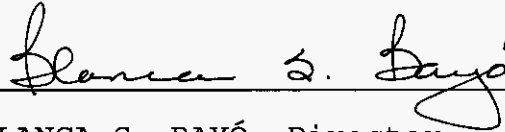
Again, we find that OPC provided no legal basis justifying this motion to dismiss. We also note that OPC's motion goes to the quality of the evidence in SSU's MFRs, which is inappropriate for a motion to dismiss. Citizen's Fourth Motion to Dismiss SSU's petition is, therefore, denied, based upon the analysis by which we deny Citizen's Second and Third Motions to Dismiss.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Second, Third and Fourth Motions to Dismiss Southern States Utilities, Inc.'s application are denied.

ORDER NO. PSC-95-1432-FOF-WS
DOCKET NO. 950495-WS
PAGE 6

By ORDER of the Florida Public Service Commission, this 27th
day of November, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

BC

DISSENT

Commissioner J. Terry Deason dissents from the decision on the
Office of Public Counsel's Third Motion to Dismiss.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.