

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RECEIVED

JAN 21 1998
1:15
FPSC - Records/Reporting

M E M O R A N D U M

JANUARY 22, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (REYES, OTTINOT) *abc*
DIVISION OF WATER AND WASTEWATER (WILLIS, RENDELL, CHASE) *9/2/98*

RE: DOCKET NO. 920199-WS - APPLICATION FOR RATE INCREASE IN BREVARD, CHARLOTTE/LEE, CITRUS, CLAY, DUVAL, HIGHLANDS, LAKE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, PUTNAM, SEMINOLE, VOLUSIA, AND WASHINGTON COUNTIES BY SOUTHERN STATES UTILITIES, INC.; COLLIER COUNTY BY MARCO SHORES UTILITIES (DELTONA); HERNANDO COUNTY BY SPRING HILL UTILITIES (DELTONA); AND VOLUSIA COUNTY BY DELTONA LAKES UTILITIES (DELTONA).

AGENDA: FEBRUARY 3, 1998 -- REGULAR AGENDA -- PARTICIPATION IS DEPENDENT UPON VOTE IN ISSUE NO. 1

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE LOCATION: I:\PSC\LEG\WP\920199.RCM

CASE BACKGROUND

On December 15, 1997, the Commission held a Special Agenda Conference to address the remand of Southern States Utils. Inc. v. Public Service Comm'n, 22 Fla. L. Weekly D1492, Fla. 1st DCA, June 17, 1997. By Order No. PSC-97-1033-PCO-WS, issued August 27, 1997, the Commission allowed the parties to file briefs on the appropriate action the Commission should take in light of the Southern States decision. By Order No. PSC-97-1290-PCO-WS, issued October 17, 1997, the Commission established the deadline for filing briefs as November 5, 1997. On November 5, 1997, the parties timely filed their briefs. At the Special Agenda Conference, the Commission voted on all issues related to the remand of the Southern States decision.

On December 18, 1997, Sugarmill Woods Civic Association and Senator Ginney Brown-Waite, Morty Miller, Spring Hill Civic Association, Inc., Sugarmill Manor, Inc., Cypress Village Property Owners Association, Inc., Harbour Woods Civic Association, Inc.,

DOCUMENT NUMBER-DATE

Q1140 JAN 21 8
7736
FPSC-RECORDS/REPORTING

DOCKET NO. 920199-WS
JANUARY 22, 1998

Hidden Hills Country Club Homeowners Association, Inc., and Citrus County (Associations) filed a Motion to Strike FWSC's Pleadings Concerning Surcharge, To Disqualify Attorney Retained by FWSC, and for Sanctions. On December 19, 1997, Joseph J. DeRouin, Victoria M. DeRouin, Peter H. Heeschen, Elizabeth A. Riodan, Carvell Simpson and Edward Slezak (DeRouin, et al.) filed their Response in Opposition to Motion Disqualify Attorney Retained by FWSC. On December 22, 1997, Florida Water Services Corporation (FWSC or utility) filed its response.

This recommendation addresses the Association's Motion to Strike FWSC's Pleadings Concerning Surcharge, To Disqualify Attorney Retained by FWSC, and for Sanctions.

DOCKET NO. 920199-WS
JANUARY 22, 1998

ISSUE 1: Should parties be allowed to participate?

RECOMMENDATION: Yes. Participation should be limited to five minutes for each party. (REYES)

STAFF ANALYSIS: Typically, post-hearing recommendations have been noticed as "Parties May Not Participate," with participation limited to Commissioners and staff. However, in this case, the Commission has consistently allowed participation by the parties at the agenda conferences, stating that participation will aid the Commission in better understanding all of the complexities involved in this matter. Further, the Commission has interpreted the Southern States decision broadly to allow intervention and input by all substantially affected persons. See Order No. PSC-97-1094-PCO-WS, issued September 22, 1997. In addition, given the nature of the allegations which have been raised, staff believes that participation by the parties would be helpful to the Commission. Therefore, staff recommends that participation at the agenda conference be allowed, but limited to five minutes for each party.

ISSUE 2: Should the Associations' Motion to Strike FWSC's Pleadings Concerning Surcharge, To Disqualify Attorney Retained by FWSC, and for Sanctions be granted?

RECOMMENDATION: No, the motion should be denied as untimely and moot. In the event that the Commission deems it appropriate to consider the merits of the motion, the motion should be denied because the allegations raised in the motion are legally insufficient. (REYES, OTTINOT)

STAFF ANALYSIS: In its motion, the Associations argue that FWSC lacks standing to advocate either refunds or surcharges because it is a mere stakeholder with fiduciary responsibilities to return any erroneously collected revenues to the appropriate parties. The Associations state that FWSC has filed briefs advocating the "no refund/no surcharge" position and has even gone so far as to hire an attorney to represent customers advocating that position and to solicit participation and attendance at the PSC proceedings and Agenda Conference by customers advocating that position through offering free transportation, free food, and other amenities. Because of FWSC's conduct, the Associations believe that the rights of customers entitled to a refund have been unnecessarily prejudiced. In addition, the Associations allege that the attorney retained by and paid by FWSC cannot exercise independent judgment on behalf of the customers and has an inherent conflict of interest.

In its Response, DeRouin, et al. state that they, the customers, retained counsel to represent them in this proceeding and that MP Water Resources, Inc. agreed to pay for legal representation for them. Citing Rules 4-1.8 and Rule 4-5.4, Rules Regulating the Florida Bar, DeRouin, et al. argue that the aforementioned rules provide for the payment of attorney fees by a third-party. They further assert that potential conflicts of interest have been properly disclosed to all clients and MP Water Resources, Inc. and waivers of conflict of interest have been obtained from all clients and MP Water Resources, Inc.. In addition, counsel for DeRouin et al. states that he has exercised and will continue to exercise independent judgment on behalf of DeRouin et al.

In its Response, FWSC argues that the Association's motion is untimely and the allegations raised in the motion are moot since the Commission voted on all issues concerning potential refunds and surcharges following the remand from the decision in Southern States. FWSC also states that the Associations have failed to even allege the requisite allegations for disqualification of FWSC's

counsel. FWSC further states that, prior to the Commission's December 15, 1997 decision, its substantial interests were affected by any mechanism which could have been ordered by the Commission for the payments of refunds or any mechanism which could have been ordered for the collection of surcharges and that the Associations by waiting over four years to object to FWSC's position have waived any right to object to FWSC's standing to participate on refund and surcharge issues.

1. Timeliness and Mootness

On September 15, 1997, DeRouin et al. requested intervention in this proceeding through a motion filed on their behalf by their counsel, Mr. Charles Forman, and on October 6, 1997, this Commission granted intervention. During the October 7, 1997 Agenda Conference, the payment of Mr. Forman's fees by the shareholders of FWSC's parent company in connection with services rendered to DeRouin et al. was disclosed on the record by counsel for the Associations, and a discussion ensued between the Commission and FWSC regarding this arrangement.

The transcript of the October 7, 1997 Agenda Conference reveals no objection to this arrangement by any of the parties nor any suggestion at that time that Mr. Forman should be disqualified. The motion for disqualification was filed on December 18, 1997, 72 days after the disclosure and 3 days after this Commission voted on all issues concerning potential refunds and surcharges in light of the Southern States decision, a decision notably at odds with the Associations' positions on the merits of this case.

"A motion to disqualify should be made with reasonable promptness after the party discovers the facts which lead to the motion." Transmark, U.S.A., Inc. v. State, Dept. of Insurance, 631 So. 2d 1112, 1116 (Fla. 1st DCA 1994) (citing Balda v. Sorchych, 616 So.2d 1114, 1116 (Fla. 5th DCA 1993) (delay of three years in raising conflict deemed waiver). "The rationale behind this rule is to prevent a litigant from using the motion as a tool to deprive his opponent of counsel of his choice after completing substantial preparation of the case." Id. (emphasis added); See also, Cox v. American Cast Iron Pipe Co., 847 F.2d 725 (11th Cir. 1988) (delay of nineteen months deemed waiver); Glover v. Libman, 578 F.Supp. 748 (N.D.Ga.1983) (delay of one year deemed waiver); Jackson v. J.C. Penney Co., Inc., 521 F.Supp. 1032, 1034 (N.D.Ga.1981) (delay of fifteen months deemed waiver).

Because the Association's motion was filed 72 days after the disclosure of the facts which lead to the motion and 3 days after

the Commission's decision in this matter, staff believes that the motion as filed is untimely. By the time the Association's motion was filed, Mr. Foreman had completed his entire preparation of the case and the Commission had reached a decision on all outstanding issues. Therefore, staff believes that the Associations effectively waived their right to seek disqualification in failing to timely file their motion, and staff recommends that the motion be denied.

Staff also believes that the allegations raised in the Association's motion are now moot. As stated previously, the motion was not filed until 3 days after the Commission's decision where the Commission voted on all issues concerning the potential refunds and surcharges. Therefore, staff recommends that the motion be denied as both untimely and moot.

2. Merits of Motion

However, in the event the Commission believes it appropriate to consider the merits of the motion, staff believes the motion should be denied because the Associations' allegations are legally insufficient.

a. Standing

First, the Associations attack FWSC's standing to participate on the refund and surcharge issues. In its Motion, the Associations do not cite any statutory or case law to support its allegation that FWSC lacks standing to advocate either refunds or surcharges. The Associations do not argue that FWSC does not have a substantial interest in the matter, but instead argue that FWSC lacks standing to advocate the no refund and no surcharge position. A party's advocacy for a certain position simply does not quash that party's standing in a proceeding. Furthermore, as FWSC has stated, FWSC would have been substantially affected by any mechanism which could have been ordered by the Commission for the payments of refunds or any mechanism which could have been ordered for the collection of surcharges for which FWSC ultimately would have been responsible for administering. Therefore, staff believes that the Association's allegations regarding standing have no merit.

b. Disqualification of Counsel

Second, Rule 4-1.8(f), Rules Regulating the Florida Bar, specifically provides that an attorney may not accept compensation

for representing a client from a third party unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of the client is protected as required by Rule 4-1.6. In addition, Rule 4-1.7(b), Rules Regulating the Florida Bar, provides that a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

The Associations allege that the attorney retained by and paid by FWSC, Mr. Forman, cannot exercise independent judgment on behalf of the customers and has an inherent conflict of interest. Initially, staff notes that FWSC has stated that payment for Mr. Forman's services will be rendered by the shareholders of its parent corporation. This is consistent with the information contained in the October 22, 1997 customer notice which the Associations appended to their motion.

In addition, FWSC has stated both in its response and at the October 7, 1997 Agenda Conference that there has been full disclosure, that the appropriate waivers or consent have been obtained, that FWSC has no control over the law firm and that it will not exercise any control over any attorneys representing the potential surcharge customers. Furthermore, Mr. Forman, in DeRouin et al.'s response, reiterates these assertions and also states that he has exercised and will continue to exercise independent judgment on behalf of his clients.

Based on the foregoing, staff recommends that if the Commission decides to consider the merits of the motion, it should be denied.

DOCKET NO. 920199-WS
JANUARY 22, 1998

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open until the disposition of the remand is complete. (REYES)

STAFF ANALYSIS: No, this docket should remain open until the disposition of the remand is complete.