



Public Service Commission

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RECORDS AND REPORTING

DATE: APRIL 15, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (HELTON) *MAH by JES*
 DIVISION OF LEGAL SERVICES (GERVASI) *res*
 DIVISION OF WATER AND WASTEWATER (WILLIS) *W*

RE: DOCKET NO. 971596-WS - PETITION FOR LIMITED PROCEEDING REGARDING OTHER POSTRETIREMENT EMPLOYEE BENEFITS AND PETITION FOR VARIANCE FROM OR WAIVER OF RULE 25-14.012, F.A.C., BY UNITED WATER FLORIDA INC.

AGENDA: 04/20/99 - REGULAR AGENDA - PARTIES MAY PARTICIPATE

CRITICAL DATES: May 3, 1999

SPECIAL INSTRUCTIONS: RECOMMENDATION FILED ON EMERGENCY BASIS BECAUSE APPELLATE COURT RELINQUISHED JURISDICTION FOR 20 DAYS (THROUGH MAY 3, 1999) FOR COMMISSION TO ENTER FINAL ORDER

FILE NAME AND LOCATION: S:\PSC\LEG\WP\971596.RCM

CASE BACKGROUND

By Proposed Agency Action (PAA) Order No. PSC-98-1243-FOF-WS, issued September 21, 1998, in this docket, the Commission proposed to deny United Water Florida Inc.'s (UWF or utility) petitions for limited proceeding and for variance from or waiver of Rule 25-14.012, Florida Administrative Code. In the Notice of Further Proceedings or Judicial Review attached to the PAA order, the Commission gave its customary notice that the PAA order would become final and effective on a date certain if a petition for a formal proceeding were not timely filed by a date certain. The notice further provided that if the order were to become final and effective, any substantially affected party could request judicial review by filing a notice of appeal within thirty days of the

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effective date of the order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.

Because there were no protests to the PAA, the order became final and effective on October 13, 1998. Although UWF did not file a protest, on November 10, 1998, it did file a notice of appeal of the order to the First District Court of Appeal (Court).

After receiving the notice of appeal, the Court issued a show cause order to the utility asking why the appeal should not be dismissed because the notice of appeal was untimely. After receiving the utility's response, the Court issued a show cause order to the Commission inquiring why jurisdiction should not be relinquished to the Commission with directions to enter a final order. After receiving the Commission's response to the second show cause order, on April 13, 1999, the Court ordered that the Commission has jurisdiction through May 3, 1999, to enter a final order in this cause. This recommendation addresses the court's directive in this regard.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission issue a final order in this docket?

RECOMMENDATION: Yes, to comply with the Court's directive, the Commission should issue a final order in this docket by May 3, 1999. Moreover, the Commission should reinstate its prior practice of issuing "consummating orders" to declare that PAA decisions which have not been protested have become final on the effective (issuance) date of the "consummating order". (GERVASI, HELTON)

STAFF ANALYSIS: On January 8, 1999, the Court ordered the Commission to show cause why jurisdiction should not be relinquished with directions to enter a final order in this docket. In so doing, the Court stated that it appeared that the procedure employed by the Commission in this cause impermissibly combined a notice of proposed agency action and a final order, and that a final order must be rendered by filing with the agency clerk on the effective date of that order, pursuant to Section 120.52(7), Florida Statutes, and Rules 9.020(h) and 9.110(c), Florida Rules of Appellate Procedure.

As indicated by appeals' memorandum dated April 15, 1999, attached hereto as Attachment A, in response to that show cause

order, the Commission argued that its PAA procedure is consistent with Florida law and is in substantial compliance with the requirements concerning the rendition of a final order that are found in the Florida Rules of Appellate Procedure and the Administrative Procedures Act. The Commission also argued that the agency has not encountered any problems from its decision to stop issuing consummating orders over nine years ago. In addition, the Commission argued that requiring the agency to change its current automated, streamlined procedure would be cumbersome and costly. Finally, the Commission argued that the matter at issue in this appeal is an anomaly because UWF failed to exhaust its administrative remedies by not requesting a formal hearing.

The Court was not persuaded by the Commission's arguments and has deemed it necessary for the Commission to enter a final order in this cause. By order of the Court, the Commission has jurisdiction through May 3, 1999, to enter a separate final order in this docket. A copy of the Court's order is attached hereto as attachment B.

The Court found that the entry of such an order is appropriate in this docket.

Section 120.52(7), Florida Statutes, clearly contemplates that a written final order be filed with the clerk of the agency at a particular date and such a document filing is necessary to compute the time for filing of the appeal. Appellate jurisdiction is invoked by the filing of a notice of appeal within 30 days of rendition of the order and "[a]n order is rendered when a signed, written order is filed with the clerk of the lower tribunal." Fla. R. App. P. 9.020(h).

Court Order at 2-3.

Staff recommends that a final order should be issued in this docket by May 3, 1999, to comply with the Court's directive. Moreover, because nothing distinguishes this case from any other case in which Commission practice would be to combine a notice of proposed agency action and a final order, staff recommends that in order to comport with judicial intent, the Commission should reinstate its prior practice of issuing "consummating orders" to declare that PAA decisions which have not been protested have become final on the effective (issuance) date of the "consummating order."

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending the final outcome on appeal. (GERVASI, HELTON)

STAFF ANALYSIS: This docket should remain open pending the final outcome on appeal.



Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

DATE: APRIL 15, 1999

TO: JOE GARCIA, CHAIRMAN
J. TERRY DEASON, COMMISSIONER
SUSAN F. CLARK, COMMISSIONER
JULIA JOHNSON, COMMISSIONER
E. LEON JACOBS, COMMISSIONER
WILLIAM TALBOTT, EXECUTIVE DIRECTOR
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MARY BANE, DEPUTY EXECUTIVE DIRECTOR/TECH.
ROB VANDIVER, GENERAL COUNSEL
DAVID SMITH, DIRECTOR OF APPEALS
NOREEN DAVIS, DIRECTOR OF LEGAL SERVICES
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BLANCA BAYÓ, DIRECTOR OF RECORDS & REPORTING
CHUCK HILL, DIRECTOR OF WATER AND WASTEWATER

FROM: MARY ANNE HELTON, DIVISION OF APPEALS

RE: UNITED WATER FLORIDA, INC. V. FLORIDA PUBLIC SERVICE COMMISSION, FIRST DCA CASE NO. 98-4164, PSC DOCKET NO. 971596-WS

On April 13, 1999, the First District Court of Appeal relinquished jurisdiction to the Commission to issue a final order in the above cause.

In this case, United Water Florida, Inc. (United Water) had appealed a proposed agency action order that became final by operation of law because no hearing was requested. After receiving the notice of appeal, the court issued a show cause order to United Water asking why the appeal should not be dismissed because the notice of appeal was untimely. After receiving United Water's response, the court issued a show cause order to the Commission inquiring why jurisdiction should not be relinquished to the Commission with directions to enter a final order.

MEMORANDUM
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APRIL 15, 1999

In its response to the second show cause order, the Commission argued that the Commission's PAA procedure is consistent with Florida law and is in substantial compliance with the requirements concerning the rendition of a final order that are found in the Florida Rules of Appellate Procedure and the Administrative Procedures Act. The Commission also argued that the agency has not encountered any problems from its decision to stop issuing consummating orders over nine years ago. In addition, the Commission argued that requiring the agency to change its current automated, streamlined procedure would be cumbersome and costly. Finally, the Commission argued that the matter at issue in this appeal is an anomaly because United Water did not exhaust its administrative remedies since the utility never requested a formal hearing.

The court was not persuaded by the Commission's arguments and has deemed it necessary for the Commission to enter a final order in this cause. By order of the court, the Commission has jurisdiction until May 3, 1999, to enter a final order. A copy of the court's order is attached.

MAH
Attachment

cc: All Attorneys
Jan Kyle
Trish Merchant

UNITOPN.MAH

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

UNITED WATER FLORIDA, INC.,

Appellant,

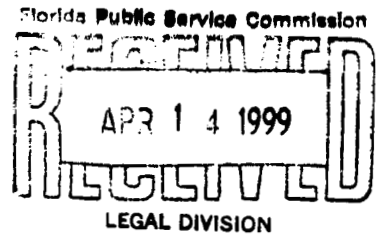
NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
DISPOSITION THEREOF IF FILED.

v.

CASE NO. 98-4164

FLORIDA PUBLIC SERVICE
COMMISSION,

Appellee.



Opinion filed April 13, 1999.

An appeal from an order of the Public Service Commission.

James L. Ade, Esquire, of Martin, Ade, Birchfield & Mickler,
Jacksonville, for appellant.

Robert D. Vandiver, General Counsel and Mary Anne Helton, Associate
General Counsel, Florida Public Service Commission, Tallahassee,
for appellee.

ORDER RELINQUISHING JURISDICTION

PER CURIAM.

Appellant United Water Florida, Inc. (UWF) petitioned the
Public Service Commission for variance from a rule and rate relief.
On September 21, 1998, the commission entered a notice of proposed
agency action that the requested relief would be denied. The order

further provided that a substantially affected party may petition for a formal proceeding. The order went on to provide that, in the absence of a request for such a proceeding, the order would become final on October 13, 1998. UWF did not petition for a hearing but filed a notice of appeal on November 10, 1998.

Finding the question of its jurisdiction unclear, this court issued an order directing appellant to show cause why the appeal should not be dismissed because the notice of appeal was untimely. The appellant responded and explained the above described circumstances. Upon consideration of appellant's arguments, the commission was asked to address the jurisdictional issues presented and directed to show cause why jurisdiction should not be relinquished for entry of a final order.

In its response the commission states that the circumstances presented here, an appeal from an order where no hearing was requested, is virtually unknown in proceedings before it. According to appellee, entry of a second order to announce that a proposed agency action has become final where no hearing has been requested is an administrative inconvenience and almost always unnecessary. We find, however, that entry of such an order is appropriate in the instant case. Section 120.52(7), Florida Statutes, clearly contemplates that a written final order be filed

with the clerk of the agency at a particular date and such a document filing is necessary to compute the time for filing of the appeal. Appellate jurisdiction is invoked by the filing of a notice of appeal within 30 days of rendition of the order and "[a]n order is rendered when a signed, written order is filed with the clerk of the lower tribunal." Fla. R. App. P. 9.020(h). In the context of civil litigation arising from circuit court this court questioned the finality of an order which purported to become final at a later date without further judicial action. See Department of Transportation v. Post, Buckley, Schuh & Jernigan, 557 So. 2d 145 (Fla. 1st DCA 1990).

For the foregoing reasons, we deem it necessary that the Public Service Commission enter a final order in this cause and jurisdiction is relinquished to the agency for 20 days from the date of this order with directions to enter such an order. Thereafter this court will assume jurisdiction of the proceeding in this case number. See Fla. R. App. P. 9.110(m).

ERVIN, BOOTH and PADOVANO, JJ., concur.