State of Florida

ORIGINAL
FILE COPY

Public Service Commission

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

DATE: JUNE 23, 1997

TO: CHAIRMAN JULIA L. JOHNSON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER J. TERRY DEASON
COMMISSIONER DIANE K. KIESLING
COMMISSIONER JOE GARCIA
BILL TALBOTT, EXECUTIVE DIRECTOR
MARY A. BANE, DEPUTY EXECUTIVE DIRECTOR/TECH.
JAMES A. WARD, DEPUTY EXECUTIVE DIRECTOR/ADM.
CHUCK HILL, DIRECTOR OF WATER & WASTEWATER
ROB VANDIVER, GENERAL COUNSEL
DAVID SMITH, DIRECTOR OF APPEALS
NOREEN DAVIS, DIRECTOR OF LEGAL SERVICES
BEVERLEE DEMELLO, DIRECTOR OF CONSUMER AFFAIRS

FROM: CHRISTIANA T. MOORE, ASSOCIATE GENERAL COUNSEL CTM

RE: SOUTHERN STATES UTILITIES, INC. V. FLORIDA PUBLIC SERVICE COMMISSION, FIRST DCA CASE NOS. 96-3334, 96-3454 & 96-3489, FPSC DOCKET NO. 920199-WS (UNIFORM RATE REMAND ORDER)

The First District Court of Appeal issued an opinion on June 17, 1997, reversing the Commission's order implementing the remand of Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995), the uniform rate order. In Citrus County, the court reversed the uniform rate structure part of the Commission's order on the ground that the Commission exceeded its statutory authority based on the evidence produced. On remand, the Commission approved a modified stand-alone rate structure, ordered Southern States Utilities, Inc. (SSU) to make refunds with interest to customers who overpaid under uniform rates, but did not allow SSU to collect surcharges from the customers who underpaid. The Commission found that the GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), decision, which mandated that GTE be allowed to recover erroneously denied expenses through a surcharge, was inapplicable to the instant case for several reasons.

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG
LIN
OPC
RCH
SEC
WAS
OTH

SSU appealed the Commission's decision, presenting the issue to the court as whether the Commission erred in ordering refunds without providing offsetting surcharges. The court did not address the other issues of whether "law of the case" requires maintenance of revenue neutrality on remand; whether the final order violated SSU's constitutional rights; or whether it was improper for the Commission to require the payment of interest on the refunds. The court reversed on the issue of the surcharge, and remanded for further proceedings.

The factual differences the Commission found in this case to distinguish it from the

GTE/Clark case that the court in turn found were error, were that SSU assumed the risk of a refund without a surcharge by requesting vacation of the automatic stay and implementing uniform rates; and that potential surcharge customers in this case were not represented by the Office of Public Counsel and lacked notice of any possibility of a surcharge. According to the court, SSU's action in asking for vacation of the stay was not dispositive of the surcharge issue and that by merely acting according to the order establishing rates, SSU did not assume the risk of refunds without surcharges. The Court said the Commission's action was contrary to the principle stated in GTE that equity applies to both utilities and ratepayers when an erroneous rate order is entered, and agreed with SSU's contention that the Commission considered only the interests of the two groups of customers.

The decision is not final until the time expires to file a motion for rehearing, which will be July 2, 1997, and if filed, disposed of by the court. A copy of the opinion is attached.

Attachment
cc: All Attorneys
All Directors

CORRECTED COPY 6/20/97 ED

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

SOUTHERN STATES UTILITIES, INC.

v.

FLORIDA PUBLIC SERVICE COMMISSION

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

CASE NOS. 96-3334/96-3454/96-3489

KEYSTONE HEIGHTS and MARION OAKS CIVIC ASSOCIATION

v.

SOUTHERN STATES UTILITIES, INC., and FLORIDA PUBLIC SERVICE COMMISSION

BURNT STORE MARINA

v.

PUBLIC SERVICE COMMISSION

Opinion filed June 17, 1997.

An appeal from an order of the Public Service Commission.

Arthur J. England, Jr. and Joe N. Unger of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, Miami; Kenneth A. Hoffman of Rutledge, Ecenia, Underwood, Purnell & Hoffman, P.A., Tallahassee; and Brian P. Armstrong of Southern States Utilities, Inc., Apopka, for Southern States Utilities, Inc.

Robert D. Vandiver, Christiana T. Moore, and Richard C. Bellak for Florida Public Service Commission.

Joseph A. McGlothlin and Vicki Gordon Kaufman of McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, Tallahassee, for City of Keystone Heights and Marion Oaks Civic Association.

Darol H. M. Carr of Farr, Farr, Emerich, Sifrit, Hackett and Carr, P.A., Port Charlotte, for Burnt Store Marina.

Susan W. Fox of Macfarlane, Ferguson & McMullen, Tampa for Sugarmill Woods Association, Inc., and Michael B. Twomey, Tallahassee for Citrus County Civic Board of County Commissioners.

the PSC erred, however, in its consideration of GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), with regard to the issue of whether SSU may surcharge the customers who underpaid under the erroneously approved uniform rates, we reverse and remand this case for further proceedings. In addition, on remand, we direct the PSC to reconsider its decision denying intervention by cross-appellants Keystone Heights, Marion Oaks Civic Association, and Burnt Store Marina.[2]

On remand from this court's decision in Citrus County, the PSC found it appropriate to change the rate structure to comply with the court's mandate, and it thus approved a modified stand-alone rate structure for SSU. As the PSC observed in its order, "[t]he utility's revenue requirement was never challenged as a point on appeal" and "[a]ccordingly, it shall not be changed." The PSC further observed, however, "[t]his change in the rate structure results in a rate decrease for some customers and a rate increase for others." The PSC then directed SSU to provide refunds to customers who had overpaid under the erroneous uniform rate structure, but determined that SSU could not collect surcharges

---

[2]Keystone Heights and Marion Oaks Civic Association have appealed the PSC's denial of their petition to intervene, included in the order on appeal. Burnt Store Marina has also appealed the denial of its petition to intervene. We have consolidated the cases for briefing by treating these appeals as cross-appeals. We also note that Citizens of the State of Florida, through the Office of Public Counsel, as well as Sugarmill Woods Civic Association and Citrus County cross-appealed the PSC order. The Citizens of the State of Florida subsequently dismissed their cross-appeal, however. In addition, Sugarmill Woods and Citrus County have apparently abandoned their cross-appeal as their briefs address only the points raised in SSU's appeal.

recovery of the disputed expenses only on a prospective basis beginning nine months after the mandate issued. Id. In Clark, the supreme court reversed the PSC's order implementing the remand and mandated that GTE be allowed to recover its erroneously disallowed expenses through the use of a surcharge. Id.

In particular, the supreme court rejected the two reasons offered by the PSC for denying GTE's proposed surcharge. The PSC contended (1) GTE's failure to request a stay during the pendency of the appellate and remand processes precluded it from recovering expenses incurred during that period, and (2) the imposition of a surcharge would constitute retroactive ratemaking. Id. The court explained that GTE's failure to request a stay was not dispositive:

> Both the Florida Statutes and the Florida Administrative Code have provisions by which GTE could have obtained a stay. However, neither of these mechanisms is mandatory. We view utility ratemaking as a matter of fairness. Equity requires that both ratepayers and utilities be treated in a similar manner. . . . [E]quity applies to both utilities and ratepayers when an erroneous rate order is entered. It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order. The rule providing for stays does not indicate that a stay is a prerequisite to the recovery of an overcharge or the imposition of a surcharge. The rule says nothing about waiver, and the failure to request a stay is not, under these circumstances, dispositive.

Id. at 972-73 (footnote and citations omitted). The court further explained that a surcharge in this circumstance did not constitute retroactive ratemaking:

> We also reject the contention that GTE's requested surcharge constitutes retroactive ratemaking. This is not a case where a new rate is requested and then applied retroactively. The surcharge we sanction is implemented to allow GTE to recover costs already expended that

> and equity. As such this situation does not comport with the equitable underpinnings of the holding in [Clark].

Because we find the PSC erred in relying on these reasons for finding Clark inapplicable, we reverse and remand its decision for reconsideration.

Following the principles set forth by the supreme court in Clark, we find that the PSC erroneously relied on the notion that SSU "assumed the risk" of providing refunds when it sought to have the automatic stay lifted and therefore should not be allowed to impose surcharges. Just as GTE's failure to request a stay in Clark was not dispositive of the surcharge issue, neither is SSU's action in asking the PSC to lift the automatic stay. The stay itself was little more than a happenstance, in effect only because a governmental entity, Citrus County, appealed the original PSC order in this matter. See Fla. R. App. P. 9.310(b)(2); Fla. Admin. Code R. 25-22.061(3).

We are unable to discern any logic in the PSC's contention that SSU, having merely acted according to the terms of the order establishing uniform rates, assumed the risk of refunds, yet is precluded from recouping charges from customers who underpaid because of the erroneous order. As the supreme court explained in Clark, "equity applies to both utilities and ratepayers when an erroneous rate order is entered" and "[i]t would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order." 668 So. 2d at 973. Contrary to this principle, the PSC in this case has allowed

erred in denying these petitions as untimely in the circumstances of this case, where the issue of a potential surcharge and the applicability of the Clark case did not arise until the remand proceeding. Accordingly, on remand, we direct the PSC to reconsider its decision denying intervention by these groups and to consider any petitions for intervention that may be filed by other such groups subject to a potential surcharge in this case.

REVERSED and REMANDED, with directions.

BARFIELD, C.J. and DAVIS, J., CONCUR

Commission Rule 25-22.036(7)(a), and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interest of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.