

Fla. Admin. Code R. 25-22.029(2) and (4).

3. United Water did not protest the order, thus the order became final on October 13, 1998.

4. On November 10, 1998, United Water filed its notice of appeal of the order, which was filed within 30 days of the order becoming final.

5. On December 3, 1998, this Court issued an order to show cause to the utility inquiring why United Water's appeal should not be dismissed because it appeared to the court that the notice of appeal was not timely filed.

6. After the Court received United Water's show cause response, the Court issued an order to show cause to the Commission that stated in part:

[i]t appears to the court that the procedure employed by the Commission in this cause impermissibly combines a notice of proposed agency action and a final order. A final order must be rendered by filing with the agency clerk on the effective date of that order. See s. 120.52(7), Fla. Stat. (1997); Fla. R. App. P. 9.020(h) and 9.110(c).

APP-2.

II. The Commission's Proposed Agency Action Procedure

7. At the Commission, initial decisions affecting substantial interests are made through free-form proceedings using the agency's proposed agency action (PAA) procedure memorialized in an order. Interested persons are given the opportunity to address the Commission concerning its proposed action at the public meeting (agenda conference) at which the matter is considered. Within 20 days of the Commission's vote concerning the action, the decision

is memorialized in a PAA order.

8. At the beginning of each PAA order, notice language is included that states:

"the actions discussed herein are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding"

APP-1, p. 2.

9. At the end of each PAA order, a notice section is also included to inform parties of administrative hearings or judicial review that may be available. For each order issued, the clerk inserts the actual date by when a petition for a hearing must be filed. APP-1, p. 34. This notice establishes the clear point of entry to request an administrative hearing.

10. The notice also provides that if no protest to the PAA order is received, the "order shall become effective on the day subsequent to" the day that is the last day of the protest period. APP-1, p. 34. Thus the date of finality is clearly established. In addition, the notice provides information on judicial review. Id.

11. The PAA order is filed with the Commission clerk, who is the Director of the Division of Records and Reporting. Upon receipt of the order, the clerk assigns an order number, inserts the issuance date, inserts the expiration date of the protest period in the notice section at the end of the PAA order, and sends the order to all affected persons. All of this information is then

included in the Commission's computerized Case Management System (CMS), which can be accessed through every Commission computer as well as the Internet.

12. Until December of 1990, the Commission entered consummating orders after the protest period expired for its PAA orders. APP-3. These were brief form orders which simply indicated that no request for hearing had been filed and the order had become final. Because this procedure was cumbersome and expensive, the Commission implemented the current practice of simply indicating in its PAA orders when they would become final and effective by operation of law. Now, when a protest period has expired and no hearing is requested, the clerk simply closes the docket file and notes the date of closing in the computerized CMS system. In the almost nine years since the Commission stopped issuing consummating orders, no problems have arisen due to the elimination of this ministerial step, and no judicial challenge to the Commission's procedure has ever been made.

13. In 1998, the clerk issued 504 PAA orders. Many of these orders affected the substantial interests of more than one person, which often required the clerk to send multiple copies of each PAA order issued. If the clerk were required to resume sending out consummating orders, it would result in adding a cumbersome, expensive ministerial layer to a cost-effective, streamlined, computer-automated procedure for issuing PAA orders.

III. Consistency with Florida Law

14. In Capeletti Brothers, Inc. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978), this Court pronounced that there must be a clear point of entry at the conclusion of an agency's free-form proceedings to provide affected parties the opportunity to request a hearing. This requirement is codified at Section 120.569(1), Fla. Stat. (Supp.1998).

15. The Commission's clear point of entry required by Capeletti and Section 120.569(1) is set out in Fla. Admin. Code R. 25-22.029, which establishes the procedure the Commission follows to provide affected parties with a clear point of entry into Commission proceedings.

16. The Capeletti court also recognized that "[t]he vast majority of an agency's free-form decisions become conclusive because they are not challenged in Section 120.57(1) or (2) proceedings." 362 So. 2d at 348. This is definitely the case at the Commission. Of the 504 PAA orders the Commission issued in 1998, only 22 were protested.

17. Moreover, the potential finality of Commission free-form decisions is clearly set out in the ordering paragraphs and notice language of each PAA order. APP-1, pp. 2, 33, 34.

18. Commission PAA orders also include the notice of availability of administrative hearings and judicial review as required by Section 120.569(1), Fla. Stat. (Supp.1998). APP-1, p. 34. While this notice does state that judicial review may be

sought if the order becomes final and effective on the prescribed date listed in the notice, it also clearly states that it "should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought." APP-1, p. 34.

19. Requirements concerning the filing and rendering of agency action orders are found in Section 120.52(7), Fla. Stat. (Supp.1998), and Fla. R. App. P. 9.020(h) and 9.110(c). These provisions require a signed, written order to be filed with an agency clerk. These provisions do not explicitly require a separate final order to be filed. The Commission does file its PAA decisions with the Commission clerk; however, they are not re-filed on the day they become final. Instead, PAA orders become final by operation of law, which occurs 22 days after the order is issued if no petition for a hearing is filed. This result is much like opinions of this court which become final after the time to request rehearing has expired. APP-4. (First DCA opinions state "NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.").

20. For most of this decade, the Commission has not filed a consummating order when a PAA order becomes final by operation of law. In so doing, the Commission believes it has acted in good faith and substantially complied with the requirements of Section 120.52(7), Fla. Stat. (Supp.1998), and Fla. R. App. P. 9.020(h) and

9.110(c). This is because the date of finality for PAA orders is clearly established in the notice section at the end of each order, which has been provided to all parties and is on file with the clerk. The Commission believes that its procedure addresses the problems of questions of finality and not filing orders with the agency clerk. Moreover, the absence of any issues surrounding the Commission's procedure for the almost nine years it has been in place confirms that it is understood by those substantially affected by the proposed agency action.

IV. The Anomaly Created by United Water's Appeal

21. Under Florida law, the right to judicial review attaches when final agency action has been taken; however, "the administrative review remedy must first be exhausted before judicial review can commence." Phillips v. Sante Fe Community College, 342 So. 2d 108, 110 (Fla. 1st DCA 1977); see also Brooks v. School Board of Brevard County, 382 So. 2d 422 (Fla. 5th DCA 1980) ("Where administrative review procedures are available, a party must exhaust these remedies before judicial review is appropriate.").

22. Since United Water did not petition the Commission for a hearing concerning the proposed agency action at issue, the utility did not exhaust all administrative remedies in this case. If the utility had petitioned for a hearing, the Commission would have conducted a hearing, after which it would have issued a final

order. This order would have been filed with the clerk, and then would have been appealable within 30 days, pursuant to Fla. R. App. P. 9.110(b).

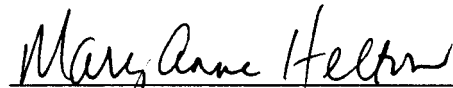
23. It is only because United Water did not exhaust its administrative remedies that no "final order"--that is an order entered after a hearing--was filed in the case at bar. In fact, most matters which come before this Court from the Commission are embodied in such final orders based on a record built during the course of a 120.57 proceeding. These post-hearing orders are final on the date they are filed, whereas the order appealed by United Water became final only by operation of law because the utility did not exhaust its administrative remedies by requesting a hearing.

24. Changing the Commission PAA process currently in place will result in significant increases in personnel time processing orders and result in expenditures of agency funds. The Commission does not believe that the change would address any significant legal problems as far as the effect of Commission procedures on affected parties is concerned. If the Court believes that the current procedure is technically defective, then the Commission would ask that it be given an opportunity to craft a cost-effective solution before being ordered to alter its practice of issuing PAA orders in the current form.

WHEREFORE, the Commission requests that it not be required to issue a separate final order in this case, which would result in the addition of a costly ministerial step to its proposed agency action procedures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 25th day of January 1999, to the following:

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APPENDIX

- APP. 1 In re: Petition for limited proceeding regarding other post-retirement employee benefits and petition for variance from or waiver of Rule 25-14.012, F.A.C., by United Water Florida Inc., PSC Docket No. 971596-WS, Order No. PSC-98-1243-FOF-WS, issued September 21, 1998.
- APP. 2 United Water Florida Inc. v. Florida Public Service Commission, First DCA Case No. 98-4164, Order dated January 8, 1999.
- APP. 3 In re: Application for water and sewer certificates in Nassau County by Yulee Utility, Inc., PSC Docket No. 881584-WS, Order No. 23829, issued December 4, 1990.
- APP. 4 Aloha Utilities, Inc. v. Public Service Commission, First DCA Case No. 98-1398, Order filed January 13, 1999.