

## Crystal Card

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**From:** Woods, Monica <WOODS.MONICA@leg.state.fl.us>  
**Sent:** Thursday, April 17, 2014 2:50 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Motion for Summary Final Order (corrected)  
**Attachments:** Dkt No. 120161 - Motion for Summary Final Order.pdf

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 120161-WS

In Re: Analysis of Utilities, Inc.'s financial accounting and customer service computer system

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 12 pages.

e. The document attached for electronic filing is Motion for Summary Final Order

**\*\*Please Note: This filing (Motion for Summary Final Order) replaces FPSC Electronic Filing Submission : ID=1463 to correct a Scrivener's Error in footnote number 2.**

Thank you for your attention and cooperation to this request.

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Analysis of Utilities, Inc.'s financial /  
accounting and customer service computer system. /

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Docket No: 120161-WS

Filed: April 17, 2014

**MOTION FOR SUMMARY FINAL ORDER**

The Citizens of the State of Florida, through the Office of Public Counsel (“Citizens” or “OPC”), pursuant to Section 120.57(1)(h), Florida Statutes (F.S.), and Rule 28-106.206, Florida Administrative Code (“F.A.C.”), file this Motion for Summary Final Order on the grounds that the single remaining issue to be decided in this docket is barred by the application of the principle of administrative finality. The remaining issue concerns the protest by Utilities, Inc. (“UI” or “Utility”) of the divestiture allocation adjustment used by the Florida Public Service Commission (“FPSC” or “Commission”) for allocating Project Phoenix costs. In previous orders, the Commission decided not to allow UI to reallocate Project Phoenix costs from divested systems to surviving, non-divested systems because the ratepayers of the non-divested systems received no additional benefit associated with bearing additional allocated Project Phoenix costs reallocated from divested systems as well as the appropriate amortization period. The Commission’s divestiture allocation adjustment for Project Phoenix costs was initially decided by PAA Order No. PSC-10-400-PAA-WS, issued June 18, 2010, in Docket No. 090392-WS, which UI did not protest. This allocation adjustment was subsequently confirmed by six (6) additional unprotested PAA Orders prior to UI protesting the Eagle Ridge PAA Order No. PSC-11-0587-PAA-SU, issued December 21, 2011, in Docket No. 110153-SU (“Eagle Ridge PAA Order”). Each of these prior PAA Orders became final when no party protested it and the Commission issued a consummating order.

On December 22, 2011, UI protested the Commission's divestiture allocation adjustment for Project Phoenix costs set forth in the Eagle Ridge PAA Order. As a result of the Eagle Ridge Settlement, this issue of the Commission's Project Phoenix divestiture allocation adjustment was subsequently carried over into Docket No. 120161-WS ("Generic Docket"). In order to avoid the application of the principle of administrative finality, UI should have protested the Commission's divestiture allocation adjustment the very first time the Commission made that adjustment in Order No. PSC-10-400-PAA-WS. See Order No. PSC-14-0143-PCO-WS, issued March 28, 2014, in the Generic Docket. Moreover, UI allowed six (6) additional PAA Orders memorializing the Commission's Project Phoenix adjustment to become final, and thus administrative finality has attached to the Commission's Project Phoenix divestiture allocation adjustment. UI cannot ask the Commission to revisit its divestiture allocation adjustment in this docket nor use the Settlements in the Eagle Ridge or the Generic Docket to collaterally attack matters which have become final without violating the principle of administrative finality. Therefore, the Citizens ask this Commission to grant this motion for summary final order, dismiss UI's sole remaining issue with the Commission's Project Phoenix adjustment, and close this docket. As further grounds for this motion, Citizens state as follows:

1. The Eagle Ridge PAA Order No. PSC-11-0587-PAA-SU, issued December 21, 2011, in Docket No. 110153-SU (Eagle Ridge PAA Order), was protested by UI on December 22, 2011. UI protested, among other issues, the Commission's Project Phoenix divestiture allocation adjustment. OPC cross-protested raising, among other things, issues related to Project Phoenix.

2. On July 5, 2012, by Order No. PSC-12-0346-FOF-SU, the Commission approved a stipulation and settlement between OPC and UI in Docket No. 110153-SU (Eagle Ridge Settlement). This settlement allowed UI to petition to open a Generic Docket to address disputed issues generic to

all UI systems in the State of Florida which were raised by UI and OPC in the Eagle Ridge docket.<sup>1</sup> The purpose of the investigatory period in the Generic Docket was to provide UI and OPC additional time to resolve or narrow the disputed issues raised by UI and OPC.

3. During the time period resulting from four motions to extend time granted by the Prehearing Officer in the Generic Docket, UI and OPC resolved the accounting and ratemaking issues raised by OPC but not the Project Phoenix issues as stated in paragraph 1 of the Eagle Ridge Settlement.<sup>2</sup> The Commission approved a subsequent stipulation and settlement agreement by Order No. Order PSC-14-0044-FOF-WS, issued January 22, 2014, in this docket (Generic Docket Settlement).

4. The remaining issue to be resolved is framed as follows: "Should any adjustment be made to the Utility's Project Phoenix Financial/Customer Care Billing System (Phoenix Project)?" This issue was broadly drafted by the parties with the concurrence of staff in order to encompass UI's and OPC's various positions on the Commission's adjustments to Project Phoenix.

5. The formal discovery phase of the Generic Docket commenced after the issuance of Order PSC-14-0041-PCO-WS establishing procedure on January 16, 2014. On January 28, 2014, OPC propounded its First Set of Interrogatories and First Request for Production of Documents to the Utility. UI objected to and did not produce any responses relevant to discovery related to OPC's issue with the Commission's Project Phoenix adjustment.

6. On March 4, 2014, OPC filed its motion to compel discovery responses. UI objected to OPC's motion to compel on various grounds including an implied administrative finality argument. (See p. 2-3 of UI's Response in opposition to OPC's motion to compel discovery responses, filed

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<sup>1</sup> See Paragraph 1 of the Eagle Ridge Settlement.

<sup>2</sup> "... [1] a separate generic docket to address the issue relating to the Utility's Phoenix Project as raised in its December 22, 2011 Petition... and [2] Eagle Ridge will not object to OPC including additional Phoenix Project issues and other issues in the generic docket which broadly relate to the issues raised by OPC in its petition, [and] in issue identification meetings in this docket..." (emphasis added).

March 11, 2014). UI argued that the Commission had already decided OPC's issue relating to the Commission's Project Phoenix adjustment (i.e., original cost of Project Phoenix) and OPC did not challenge the reasonableness of those costs until the Eagle Ridge case. UI's administrative finality argument was as follows:

... This Commission has approved the recovery of Project Phoenix costs in probably twenty (20) or more rate cases, and it is beyond reason to argue that in those rate cases there is not at least an implicit determination that the cost was reasonable and prudent. In fact, until the Eagle Ridge rate case, OPC did not challenge the reasonableness of Project Phoenix in any of those prior rate cases.

(Emphasis added)

7. Oral argument on OPC's Motion to Compel was held on March 13, 2014.

8. OPC argued that the doctrine of administrative finality did not apply to OPC's Project Phoenix issue. (OA transcript p. 5; 8-9). OPC also argued that if administrative finality attached to OPC's issue with the Commission's Project Phoenix adjustment, then administrative finality likewise attached to UI's issue with the Commission's Project Phoenix adjustment. (OA transcript p. 10-11). OPC pointed out the fact that UI had multiple opportunities to protest the Commission's Project Phoenix adjustment, but let those PAA Orders become final, and waited until the Eagle Ridge PAA Order to protest the Commission's Project Phoenix adjustment. (OA transcript p. 10-11).

9. The following are the seven PAA Orders whereby the Commission previously decided UI's issue with the Commission's divestiture allocation adjustment for Project Phoenix costs which the Utility failed to protest:

- Order No. PSC-10-0400-PAA-WS, issued June 18, 2010, in Docket No. 090392-WS, In re: Utilities, Inc. of Pennbrooke PAA rate case at page 7-9.
- Order No. PSC-10-0407-PAA-SU, issued June 21, 2010, in Docket No. 090381-WS, In re: Utilities Inc. of Longwood PAA rate case at pages 5-7.
- Order No. PSC-10-0423-PAA-WS, issued July 1, 2010, in Docket No. 090402-WS, In re: Sanlando Utilities Corporation PAA rate case at pages 5-7.

- Order No. PSC-10-0585-PAA-WS, issued September 22, 2010, in Docket No. 090462-WS, In re: Utilities Inc. of Florida PAA rate case at pages 9-11.
- Order No. PSC-10-0682-PAA-WS, issued November 15, 2010, in Docket No. 090349-WS, In re: Cypress Lakes Utilities, Inc. limited proceeding to include Phoenix Project costs at pages 2-3, 9-11.
- Order No. PSC-11-0015-PAA-WS, issued January 5, 2011, in Docket No. 090531-WS, In re: Lake Placid Utilities, Inc. PAA rate case pages 8-9.
- Order No. PSC-11-0514-PAA-WS, issued November 3, 2011, in Docket No. 100426-WS, In re: Lake Utility Services, Inc. PAA rate case at 7-10.

10. These PAA Orders all determined the allocation of Project Phoenix costs, appropriate methodology to address the divestiture of UI subsidiaries (i.e., Commission's divestiture allocation adjustment for Project Phoenix costs), and proper amortization period for Project Phoenix (i.e., ten years).

11. On March 28, 2014, Order No. PSC-14-0143-PCO-WS was issued on OPC's motion to compel. This order determined that OPC's issue with the Commission's Project Phoenix adjustment was barred for two reasons. First, OPC's sub-issues regarding the Commission's Project Phoenix adjustment were barred because they were not specifically identified in the Eagle Ridge docket or Generic Docket Settlement. Order No. PSC-14-0143-PCO-WS at 2-3. Second, the order stated because the principle of administrative finality attached to the Commission's prior Project Phoenix adjustments, OPC cannot raise its issue with the Commission's Project Phoenix adjustment. *Id.* at 4.

12. The principle of administrative finality discussed in the order is equally applicable to UI's issue with the Commission's Project Phoenix divestiture allocation adjustment.

13. In discussing administrative finality, Order No. PSC-14-0143-PCO-WS cited Order No. PSC-10-0585-PAA-WS, issued September 22, 2010, in Docket No. 090462-WS ("2010 UIF PAA

Order”), as an example where the Commission *previously* addressed Project Phoenix allocation costs.<sup>3</sup> *Id.* at 4. OPC notes that the 2010 UIF PAA Order was one of the seven PAA Orders not protested by UI prior to the 2011 Eagle Ridge PAA Order.

14. As discussed in Order No. PSC-14-0143-PCO-WS, the 2010 UIF PAA Order determined two things concerning Project Phoenix costs: (1) it approved the total Phoenix Project costs (which is OPC’s issue in this docket) and (2) it held that UI could not reallocate costs to surviving utilities as a result of the divestiture of certain utility systems (which is UI’s issue in this docket). *Id.* at 4. Order No. PSC-14-0143-PCO-WS concluded that the 2010 UIF PAA Order and all the subsequent orders concerning Project Phoenix are subject to the principle of administrative finality, citing *Peoples Gas v. Mason*, 187 So. 2d 335, 339 (Fla. 1966) as authority. *Id.* at 4.

15. Pursuant to the plain reading of Order No. PSC-14-0143-PCO-WS issued in this case, both OPC’s and UI’s issue with the Commission’s Project Phoenix adjustment have already been previously decided, not only by the 2010 UIF PAA Order, but also by subsequent PAA Orders issued prior to UI’s protest and OPC’s cross-protest of the Eagle Ridge PAA Order.<sup>4</sup> Therefore, the principle of administrative finality must attach not only to OPC’s issue, but also to UI’s issue.

16. Since OPC’s and UI’s issue with Commission’s Project Phoenix adjustment is barred by administrative finality, the Commission should dismiss the remainder of UI’s case, saving the Utility, the customers, and the Commission the time and expense of an unnecessary hearing to decide an issue the Commission has previously decided seven different times.

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<sup>3</sup> The 2010 UIF PAA Order addressed the allocation of Project Phoenix costs to the six UIF systems. This order also reiterated the Commission’s Project Phoenix divestiture allocation adjustment which UI is attempting to collaterally attack in this docket.

<sup>4</sup> Three PAA Orders preceded the 2010 UIF PAA Order and three PAA Orders were issued after the 2010 PAA Order. All seven of the PAA Orders determined UI’s issue with Commission’s Project Phoenix adjustment.

### Standard for Granting a Motion for Summary Final Order

17. The statutory standard for granting a motion for summary final order is set forth in Section 120.57(1)(h), F.S., and states in pertinent part:

... A summary final order shall be rendered if the administrative law judge [or the Commission as the judge] determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

18. The standard for granting a motion for summary final order is extensively discussed by the Commission in Order No. PSC-01-0360-PAA-WS, issued February 9, 2001, in Docket No. 000277-WS, In re: Application for transfer of facilities and Certificates Nos. 353-W and 309-S in Lee County from MHC Systems, Inc. d/b/a FFEC-Six to North Fort Myers Utility, Inc., holder of Certificate No. 247-S; amendment of Certificate No. 247-S; and cancellation of Certificate No. 309-S:

... A summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. See Section 120.57(1)(h), Florida Statutes (1999).

Under Florida law, it is well established that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. See Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985) and Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. St. DCA 1993) (citing to Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore 475 So. 2d at 668 (citing Shaffran v. Holness, 93 So. 2d 94 (Fla. 1957)); McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996). "Summary judgment should be cautiously granted. . . . If the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact." McCraney, 677 So. 2d at 355 (citing Lashley v. Bowman, 561 So. 2d 406, 408 (Fla 5th DCA 1991)).

The burden is on the movant to demonstrate that the opposing party cannot prevail. Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996) (citing Snyder v. Cheezem Dev. Corp., 373 So. 2d 719 (Fla. 2nd DCA 1979)). If the record reflects

the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. *Id.* The trial court must draw every possible inference in favor of the party against whom summary judgment is sought. *Albelo v. Southern Bell*, 682 So. 2d 1126 (Fla. 4th DCA 1996) (citing *Moore*, 475 So. 2d at 666). “Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment.” *Franklin County v. Leisure Properties, Ltd.*, 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

Order No. PSC-01-0360-PAA-WS at 8-9.

19. According to this standard, the Commission shall grant a motion for summary final order if (1) no genuine issue as to any material fact exists, (2) the opposing party cannot prevail, and (3) the moving party is entitled as a matter of law to the entry of a final summary order. In this case, no genuine issue as to any material fact exists to be litigated when and where the Commission has previously determined and rendered its decision as it relates to the Project Phoenix divestiture allocation adjustment. It is undisputed that the Commission previously decided in seven PAA Orders how UI should allocate Project Phoenix costs related to divested systems as well as the appropriate amortization period for Project Phoenix. It is undisputed that UI failed to protest any of the seven orders issued by the Commission prior to UI’s protest of the Eagle Ridge PAA Order. Therefore, the principle of administrative finality, according to *Peoples Gas v. Mason*, attaches to the Commission’s Project Phoenix adjustment. Second, since the principle of administrative finality has attached to UI’s sole remaining issue, even if all inferences are drawn in UI’s favor, as a matter of law pursuant to the principle of administrative finality, UI cannot prevail. Finally, as the statutory representative of the UI customers, OPC is entitled to entry of a final summary order.

20. The Eagle Ridge Settlement and Generic Docket Settlement, approved by the Commission, cannot be used to disturb prior determinations that are administratively final. *See Fla. Power Corp. v. Garcia*, 780 So. 2d 34 (Fla. 2001).

21. Therefore, since both OPC's and UI's issue with the Commission's Project Phoenix adjustment is barred by administrative finality, the Commission must as a matter of law dismiss the sole remaining issue in this docket, cancel the upcoming hearing (saving the utility, the customers, and the Commission the time and expense of an unnecessary hearing), and close this docket.

22. Attached to this motion is an affidavit stating that, due to the principle of administrative finality of past Commission decisions in Order No. PSC-10-0400-PAA-WS, Order No. PSC-10-0407-PAA-SU, Order No. PSC-10-0423-PAA-WS, Order No. PSC-10-0585-PAA-WS, Order No. PSC-10-0682-PAA-WS, Order No. PSC-11-0015-PAA-WS, and Order No. PSC-11-0514-PAA-WS, no genuine issue as to any material fact exists to be determined in the May 14, 2014 hearing.

23. OPC requests that the Commission take judicial notice or official recognition of its decisions in Order No. PSC-10-0400-PAA-WS, Order No. PSC-10-0407-PAA-SU, Order No. PSC-10-0423-PAA-WS, Order No. PSC-10-0585-PAA-WS, Order No. PSC-10-0682-PAA-WS, Order No. PSC-11-0015-PAA-WS, and Order No. PSC-11-0514-PAA-WS, as it relates to UI's issue with the Commission's Project Phoenix adjustment when considering this Motion.

24. A separate request for oral argument will accompany this Motion.

25. OPC respectfully requests the Commission rule on this Motion at its May 8, 2014 Agenda Conference in advance of the May 14, 2014 hearing.

26. In accordance with Rule 28-106.204(3), F.A.C., OPC consulted with Counsel for UI prior to the filing of this Motion and UI opposes OPC's request for a summary final order.

WHEREFORE, the Office of Public Counsel respectfully requests on behalf of UI's customers that the Commission grant a summary final order consistent with this motion, dismiss the sole remaining issue with the Commission's Project Phoenix adjustment as being barred by the principle of administrative finality, and close this docket.



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Attorney for the Citizens  
of the State of Florida

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Office of Public Counsel **Motion for Final Summary Order** has been furnished by electronic mail and/or U.S. Mail to the following parties on this 17th day of April, 2014, to the following:

Martha Barrera  
Julia Gilcher  
Florida Public Service Commission  
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Martin S. Friedman  
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Erik L. Sayler  
Associate Public Counsel

AFFIDAVIT

STATE OF FLORIDA)

COUNTY OF Leon)

I hereby certify that on this 17<sup>th</sup> day of April, 2014, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared **Erik L. Sayler**, who is personally known to me, and he acknowledged before me, in support of the Citizen's assertion in its **Motion for Summary Final Order** filed in Docket No. 120161-WS, that due to the principle of administrative finality of past Commission decisions in Order No. PSC-10-0400-PAA-WS, Order No. PSC-10-0407-PAA-SU, Order No. PSC-10-0423-PAA-WS, Order No. PSC-10-0585-PAA-WS, Order No. PSC-10-0682-PAA-WS, Order No. PSC-11-0015-PAA-WS, and Order No. PSC-11-0514-PAA-WS, **no genuine issue as to any material fact exists** to be determined in the May 14, 2014 hearing before the Florida Public Service Commission.

In Witness Whereof, I have hereunto set my hand and seal in the State and County aforesaid as of this 17<sup>th</sup> day of April, 2014.

  
\_\_\_\_\_  
Notary Public  
State of Florida, at Large

My Commission Expires: 10/11/2016

