

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Florida)	DOCKET NO. 890509-WU
Cities Water Company, Golden)	ORDER NO. 24062
Gate Division, for a rate)	ISSUED: 2/4/91
increase in Collier County)	
_____)	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 GERALD L. GUNTER
 BETTY EASELY

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

CASE BACKGROUND

Florida Cities Water Company, Golden Gate Division, (Golden Gate or utility) provides water and wastewater service to a community adjacent to the eastern edge of the City of Naples, Florida. The utility is a division of Florida Cities Water Company, a Class A utility.

The official date of filing for the instant rate increase application was October 23, 1989. The utility did not request, nor was it granted, interim rates. The case was originally handled under our Proposed Agency Action (PAA) process, but Order No. 22804, issued April 12, 1990, was protested, so the case went to hearing. After the hearing, the Commission issued Order No. 23660 on October 24, 1990, which approved an increase in Golden Gate's water rates. However, since the final order contained an error in the income tax expense calculation, the Commission issued Order No. 23964 on January 7, 1991, to cure the error and to make all other necessary adjustments resulting from the correction, including an adjustment to rates.

On November 8, 1990, the Office of Public Counsel (OPC) filed a Motion for Reconsideration of Order No. 23660. On November 19, 1990, Golden Gate filed a response to the motion. OPC's motion is the subject of this Order.

DOCUMENT NUMBER-DATE

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PSC-RECORDS/REPORTING

ORDER NO. 24062
DOCKET NO. 890509-WU
PAGE 2

STANDARD FOR MOTIONS FOR RECONSIDERATION

"The purpose of a Petition for Reconsideration is merely to bring to the attention . . . of the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgement or order." Diamond Cab Company of Miami v. King, 146 So.2d 889, 891 (Fla. 1962) (citations omitted). The standard for judging the motion filed in this case, therefore, is whether or not the Commission made a mistake or an oversight in fact or law in rendering the final order.

OPC'S MOTION FOR RECONSIDERATION

OPC raises two issues in its Motion for Reconsideration. First it argues that the Commission erred in applying a margin reserve to Golden Gate's distribution system. OPC claims that "there is no evidence in the record to support the Commission's nonrule policy to allow a margin reserve." In support of this assertion, OPC cites numerous cases for the proposition that an agency has to explicate its nonrule policy on the record. In its response, Golden Gate counters that pages 11 and 12 of Order No. 23660 "explicate in great detail the reasons for applying the margin reserve and sets forth a record foundation for setting margin reserve."

As to this first issue raised by OPC, we find nothing which we overlooked or failed to consider when rendering the final order in the first instance. We took administrative notice of our margin reserve policy as expressed in Order No. 22843. Because we took official notice of the aforementioned precedent, all parties were made aware that the margin reserve policy would be applied in this case. Furthermore, we believe that there is more than adequate record support for applying the margin reserve policy in this case. Utility Witness Harrison was questioned extensively on the subject. His testimony, in conjunction with the information contained in the MFRs, constitutes the record foundation necessary for applying the margin reserve. OPC cites the seminal case of McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), in its motion. The court in that case established the requirement that nonrule policy be explicated on the record in order to assure due process and "to close the gap between what the agency and its staff know about the agency's law and policy and

ORDER NO. 24062
DOCKET NO. 890509-WU
PAGE 3

what an outsider can know." McDonald, 346 So.2d at 580 (citation omitted). We believe that that requirement has been met in this instance.

The second issue OPC raises concerns the Commission's authority to allow deviations from its own procedural rules. OPC argues that the Commission erred in allowing Golden Gate to deviate from Rule 25-30.437, Florida Administrative Code, which then required that a utility calculate the rate base figure appearing in its minimum filing requirements (MFRs) based on a 13-month average, and not a simple average. OPC argues that the case of Hall v. Career Service Commission, 478 So.2d 1111 (Fla. 1st DCA 1985), which the Commission relied on, is no longer good law. Hall was cited in the Commission's final order for the proposition that an agency has the necessary authority to waive, enhance, or alter its procedural rules. OPC points out that Section 120.68(12)(b), Florida Statutes, the applicable section of the Administrative Procedures Act, was amended after Hall was decided, and, thus, that case is not controlling. In opposition, Golden Gate argues that the Commission has the authority to allow deviation from its rules for the following reasons: Rule 25-30.011, Florida Administrative Code, gives the Commission the authority to grant deviations from its rules; under Section 367.121(g), Florida Statutes, the Commission has the power to do all things necessary or convenient to the full and complete exercise of its jurisdiction; and the Hall case is still good law.

As to OPC's second argument, again we think that we did not fail to consider any factual or legal matter of import. Although we agree with all of the arguments made by Golden Gate in its response, we will specifically address the argument OPC has made with regard to the Hall decision since we relied on that case in the final order.

We cited Hall in the final order for the proposition that we had the power to waive, enhance, or alter our own procedural rules. Section 120.68(12)(b), Florida Statutes, addresses the courts' oversight authority with respect to agency rules. As OPC points out, that section was amended a year before the Hall decision. After the amendment, the Section read (and currently reads), "The court shall remand the case to the agency if it finds the agency's exercise of discretion to be . . . (b) Inconsistent with an agency rule" However, the rationale of the Hall decision transcends the impact of this change to Section 120.63(12)(b). The

ORDER NO. 24062
DOCKET NO. 890509-WU
PAGE 4

court in Hall stated that "the general rule is that an express grant of power to an agency will be deemed to include such powers as are necessarily or reasonably incident to the powers expressly granted." Hall at 1112. Thus, the agency's power to conduct orderly hearings under Chapter 120 necessarily implies the incidental power to waive or modify procedural rules. See Hall at 1112. Clearly, the Hall court did not place reliance on the old wording of Section 120.68(12)(b) for its decision. The court did think, however, that the old language of 120.68(12)(b) requiring courts to remand agency decisions where the agency's exercise of discretion is "[i]nconsistent with an agency rule . . . if deviation therefrom is not explained by the agency" impliedly recognized an agency's authority to deviate from its rules in proper cases. Hall at 1113. In conclusion, we think that our initial decision was correct and that we have the authority to waive, enhance, or alter our own procedural rules by virtue of the Hall decision.

In consideration of the foregoing, we deny OPC's Motion for Reconsideration as to both issues.

It is, therefore

ORDERED by the Florida Public Service Commission that the Office of Public Council's Motion for Reconsideration is hereby denied for the reasons stated herein.

By ORDER of the Florida Public Service Commission this 4th
day of FEBRUARY, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

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ORDER NO. 24062
DOCKET NO. 890509-WU
PAGE 5

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.