

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase
in wastewater rates in Seven
Springs System in Pasco County
by Aloha Utilities, Inc.

DOCKET NO. 991643-SU
ORDER NO. PSC-00-2534-PCO-SU
ISSUED: December 28, 2000

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR.
LILA A. JABER
BRAULIO L. BAEZ

ORDER DENYING ALOHA'S MOTION FOR RECONSIDERATION
WITHOUT PREJUDICE TO REFILE

BY THE COMMISSION:

BACKGROUND

On February 9, 2000, Aloha Utilities, Inc. (Aloha or utility) filed an application for an increase in rates for its Seven Springs wastewater system. The utility was notified of several deficiencies in the minimum filing requirements. Those deficiencies were corrected and the official filing date was established as April 4, 2000, pursuant to Section 367.083, Florida Statutes. The application was set directly for formal hearing.

In compliance with the Order Establishing Procedure as revised, the Office of Public Counsel (OPC) filed the prefiled rebuttal testimony of Ted L. Bidy, on September 11, 2000. In response, on September 18, 2000, Aloha filed its Motion to Strike "Rebuttal" Testimony (Motion) of OPC witness Bidy. In that Motion, Aloha raised two points. First, it claimed that it was improper for OPC to file rebuttal testimony at all. Secondly, Aloha claimed that the testimony filed by Mr. Bidy did not constitute proper rebuttal testimony.

On September 25, 2000, OPC timely filed its Response to Aloha's Motion to Strike Rebuttal Testimony. In that response,

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OPC argued that our staff witness MacColeman's use of 150 gallons per day (gpd) per equivalent residential connection (ERC) and his failure to find that there was excessive infiltration and inflow (I&I) was adverse to its position, that OPC was therefore entitled to rebut this testimony, and that Mr. Bidy's prefiled rebuttal testimony did rebut this testimony.

By Order No. PSC-00-1779-PCO-SU, issued September 29, 2000, the Prehearing Officer granted Aloha's Motion to Strike. In that Order, the Prehearing Officer found that Mr. Bidy's prefiled rebuttal testimony was direct testimony that OPC could have or should have filed in its direct testimony.

Subsequent to that ruling, on October 2-3 and November 2, 2000, we conducted the formal hearing on Aloha's application for increased wastewater rates. On the first day of the hearing (October 2, 2000), OPC presented its ore tenus motion requesting reconsideration of the portion of the Order that struck the portion of witness Bidy's rebuttal testimony which concerned the existence of excessive I&I. OPC's request for reconsideration was denied (with one Commissioner dissenting).

At the hearing on November 2, 2000, OPC moved to strike major portions of the supplemental rebuttal testimony and exhibits of utility witnesses Watford and Nixon. On that same day, Aloha moved to strike in its entirety the supplemental direct testimony of our staff witness Merchant. On the days those motions were presented, upon consideration of the motions and arguments of counsel, we made oral rulings granting OPC's Motion to Strike and denying Aloha's Motion to Strike.

On November 16, 2000, OPC filed a Motion for Extension of Time to File Brief. The Motion was granted by Order No. PSC-00-2191-PCO-SU, issued November 17, 2000, which made all briefs due on November 29, 2000. Finally, on November 15, 2000, Aloha filed a Motion for Reconsideration of our ruling granting the ore tenus motion of OPC to strike portions of the supplemental rebuttal testimony and exhibits of Aloha witnesses Robert C. Nixon and Stephen G. Watford.

ALOHA'S MOTION FOR RECONSIDERATION

As stated above, Aloha filed its Motion for Reconsideration on November 15, 2000. OPC filed a timely response to the Motion on November 29, 2000. We have jurisdiction pursuant to Section 367.081, Florida Statutes.

Aloha's Argument

Aloha contends that it learned for the first time through the direct testimony of our staff witness Merchant, that our staff required a cost-benefit analysis to justify the prudence of Aloha's decision to purchase a building for office use. The requirement of conducting a cost-benefit analysis and the manner in which it is to be performed is not found in any promulgated rule or order of this Commission. Aloha goes on to argue that such requirement constitutes a rule pursuant to Section 120.52(15), Florida Statutes, which states that a rule is an agency statement that implements, interprets or prescribes law or policy or describes the procedure and practice requirements of an agency.

Aloha contends that it has the right to challenge any portion of staff witness Merchant's testimony which attempted to demonstrate that the unadopted rule constituted a valid exercise of delegated legislative authority. See Gulf Coast Home Health Services v. HRS, 513 So. 2d 704 (Fla. 1st DCA 1987). Moreover, Aloha argues that when an agency relies upon non-rule policy, other parties must be given an opportunity to provide contrary evidence. See Florida Power & Light Co. v. State of Florida, Siting Board, etc., 693 So. 2d 1025 (Fla. 1st DCA 1997). However, Aloha asserts that the only opportunity to scrutinize staff witness Merchant's newly announced cost-benefit analysis "requirements" was through rebuttal testimony and exhibits.

In addition, Aloha alleges that the stricken supplemental rebuttal testimony of witnesses Watford and Nixon did constitute proper rebuttal. Aloha states that we have defined rebuttal as testimony offered by the plaintiff which is directed to new matter brought out by evidence of the defendant, or as additional facts required by new matter developed by the defendant. Moreover, Black's Law Dictionary, 4th Edition, defines "rebuttal," in part,

as "the showing that statement of witnesses as to what occurred is not true."

For example, staff witness Merchant expressed concern that "Aloha should have documented the minimum requirements for its new location. . . ." In his supplemental rebuttal testimony, utility witness Watford stated that this was incorrect and then explained the list of criteria furnished to the realtor.

As another example, Aloha states that it was merely responding to staff witness Merchant's newly established criteria of a listing of available properties, a documented comparison of each alternative and a detailed listing of the attributes of the acceptable locations. In response to the new matter, Mr. Watford provided a detailed description of each of the properties which Aloha reviewed as alternatives, as well as their attributes and disadvantages.

Finally, Aloha contends that we overlooked or failed to consider clear and material principles of administrative law, concepts of due process of law, and the resulting prejudice to Aloha if the evidence is stricken as opposed to the lack of any prejudice to the adverse parties if such evidence is admitted. Aloha contends that the presiding officer should have exercised his broad discretion to allow the testimony, when there is no prejudice to the adverse parties other than having evidence in the case. Aloha states that the only harm, if any, was that the evidence was simply cumulative to that presented during Aloha's supplemental direct testimony. We have allowed such cumulative evidence when it did not prejudice the result of the proceedings. Aloha states that OPC and staff did not conduct cross-examination on the portion of testimony not stricken, nor request the opportunity to provide surrebuttal evidence. Consequently, Aloha argues that OPC and our staff cannot demonstrate any prejudice from the receipt into evidence of the supplemental rebuttal testimony and exhibits and that the allowance of such evidence will provide us with more complete information upon which to base our decision.

OPC's Response

OPC timely filed its Response pursuant to Rule 25-22.0376, Florida Administrative Code, claiming that the evidentiary ruling

should be a non-final order and that under that rule, Aloha's Motion is untimely.

Even if the Motion is timely, OPC states that Aloha has misinterpreted the entire rationale for the oral motion and our ruling on that Motion. OPC states in paragraphs five and six of its Response that:

5. Ms. Merchant's position is basically two-fold: (1) the utility was given the opportunity to present whatever information it considered necessary to demonstrate the prudence of the building purchase; (2) the information that the utility brought forward was not adequate to demonstrate the prudence of its decision.

6. There are only two ways to rebut the two-fold position Either:

(a) the utility could have argued that it had, in fact, provided the information that Ms. Merchant said was missing; or

(b) the utility could have argued that notwithstanding the omission of the information suggested by Ms. Merchant, the utility's supplemental direct testimony nevertheless demonstrated the prudence with the information that it did contain.

OPC argues that the utility did neither, but instead untimely provided the information that should have been provided in the first instance. OPC goes on to state that in paragraph 10, Aloha admits that utility witness Watford was simply "responsive" in providing the information. OPC argues that "[t]hat is precisely the point: Mr. Watford rebutted nothing."

Next, OPC argues that the portions of Aloha's Motion alleging that staff witness Merchant adopted improper criteria for Aloha's burden of proof have nothing to do with our evidentiary ruling. Finally, OPC argues that paragraph 11 of Aloha's Motion merely reargues the points raised during the hearing and does not show any point of law or fact which we misapprehended or misapplied.

Decision

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958)). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse at 317.

Aloha states that its Motion for Reconsideration is filed pursuant to Rule 25-22.060, Florida Administrative Code. However, OPC argues that it should have been filed pursuant to Rule 25-22.0376, Florida Administrative Code, and that it is therefore untimely. In reviewing these rules, we note that both rules state that any party who is adversely affected by either a non-final order (Rule 25-22.0376), or a final order (Rule 25-22.060), may file a motion for reconsideration within ten days of issuance of a non-final order and within 15 days of issuance of a final order. In the case at hand, we have not yet issued any order on our November 2, 2000 ruling to grant OPC's Motion to Strike. Consequently, we find that neither Rule is applicable at this time, and that the Motion for Reconsideration is premature. Therefore, Aloha's Motion for Reconsideration is denied without prejudice to refile, in accordance with Rule 25-22.060, Florida Administrative Code, after rendition of the Final Order memorializing our ruling.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Aloha Utilities, Inc.'s Motion for Reconsideration is hereby denied without prejudice to refile, in accordance with Rule 25-22.060, Florida Administrative Code, after rendition of the Final Order memorializing our ruling. It is further

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ORDERED that this docket shall remain open pending a ruling on Aloha Utilities, Inc.'s application for an increase in wastewater rates for its Seven Springs system.

By ORDER of the Florida Public Service Commission this 28th day of December, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

JKF/RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

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Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) 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 wastewater utility. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.