

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: May 25, 2017

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Trierweiler, Janjic, Mapp, Taylor) *ALM*
Division of Accounting and Finance (Maurey)
Division of Engineering (Ballinger, P. Buys) *POB TB*

RE: Docket No. 160101-WS – Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida.

AGENDA: 06/05/17 – Regular Agenda – Motion for Reconsideration – Oral Argument Requested; Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brisé

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On April 20, 2017, the Office of Public Counsel (OPC) filed a Motion to Strike Portions of the Rebuttal Testimony and Exhibits of Utilities, Inc. of Florida (UIF) witness Flynn. By Order No. PSC-17-0147-PCO-WS, issued May 2, 2017, the Prehearing Officer denied OPC’s Motion to Strike (Order Denying the Motion to Strike).

On May 10, 2017, OPC filed a Motion for Reconsideration of Order No. PSC-17-0147-PCO-WS before the Full Commission (Motion for Reconsideration). Along with the Motion for Reconsideration, OPC filed a Request for Oral Argument on the motion. On May 16, 2017, UIF filed its Response in Opposition to OPC’s Motion for Reconsideration. The motion and response were timely filed pursuant to Rule 25-22.060, Florida Administrative Code (F.A.C.).

Docket No. 160101-WS

Date: May 25, 2017

The technical hearing for this docket was held on May 8-10, 2017. The Commission's vote on the issues in dispute is scheduled for the Special Agenda on August 3, 2017.

This recommendation addresses OPC's Motion for Reconsideration and Request for Oral Argument. The Commission has jurisdiction pursuant to Chapter 367, Florida Statutes (F.S.), and Rule 25-22.060, F.A.C.

Discussion of Issues

Issue 1: Should the Office of Public Counsel's Request for Oral Argument on its Motion for Reconsideration of Order No. PSC-17-0147-PCO-~~ET~~ before the Full Commission be granted?

WS (17)

Recommendation: The pleadings are clear on their face; however, it is within the Commission's discretion to grant oral argument if the Commission finds that it would assist the Commission in its disposition of the motion. If oral argument is granted, staff recommends 5 minutes per side. (Trierweiler)

Staff Analysis:

Law

Rule 25-22.0022(1), F.A.C., allows a party to request oral argument before the Commission for any motion by separate written pleading filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order. Failure to timely file a request for oral argument constitutes a waiver thereof. Rule 25-22.0022(1), F.A.C. Granting or denying oral argument is within the sole discretion of the Commission. Rule 25-22.0022(3), F.A.C. Only parties to the docket and the staff attorney may participate in the oral argument when conducted at an agenda conference. Rule 25-22.0022(7)(a), F.A.C. Parties should be prepared to proceed with oral argument on all issues pertaining to the motion being discussed, whether raised in the request for oral argument or not. Rule 25-22.0022(7)(c), F.A.C.

OPC's Position

OPC states that oral argument on its Motion for Reconsideration will assist the Commission in understanding and evaluating the alleged mistakes of law and fact overlooked in rendering Order No. PSC-17-0147-PCO-WS. OPC contends that the Motion for Reconsideration at issue involves complex legal and factual matters, the resolution of which will be facilitated by oral argument. Specifically, oral argument will assist the Commission in understanding why the contested rebuttal testimony and exhibits significantly and adversely impacted Intervenors' ability to adequately prepare meaningful testimony, and adversely affected OPC's rights in this proceeding. UIF did not file a response to OPC's Request for Oral Argument.

Staff's Analysis and Conclusion

Staff believes the pleadings are clear on their face. However, it is within the Commission's discretion to grant oral argument if the Commission finds that it would assist the Commission in its disposition of the motion. If oral argument is granted, staff recommends 5 minutes per side.

Issue 2: Should the Office of Public Counsel's Motion for Reconsideration of Order No. PSC-17-0147-PCO-WS before the Full Commission be granted?

Recommendation: No, the Office of Public Counsel's Motion for Reconsideration of Order No. PSC-17-0147-PCO-WS before the Full Commission should be denied because it does not meet the standard for reconsideration. (Trierweiler)

Staff Analysis:

Law

The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (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, 98 (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, 294 So. 2d at 317.

OPC's Position

OPC argues that its Motion for Reconsideration meets the standard for reconsideration by identifying six errors of fact or law that it believes are fundamental and cumulatively constitute an error of law resulting in a violation of its due process rights. OPC alleges that violation of its due process rights includes the Section 120.57(1)(b), F.S., hearing requirements of having the "opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence." The six alleged errors are as follows:

- 1) It was factual error to characterize the information in UIF witness Flynn's rebuttal testimony exhibits PCF-9, PCF-13 and PCF-17 as "updated" when the information provided was brand new on March 2, 2017.
- 2) It was factual error to characterize the information in UIF witness Flynn's rebuttal testimony exhibits PCF-3, PCF-10, PCF-20, PCF-23, PCF-27, PCF-33, PCF-35, or PCF-41 in material percentage and gross dollar amounts as "rebuttal," "updates," or "updated." OPC argues that Mr. Flynn's rebuttal testimony filed April 3, 2017, was actually direct testimony raising supplemented and new information.
- 3) It was error to state that commencement of discovery on September 16, 2016, allowed for discovery that could be utilized in responsive expert testimony when the very first of the missing or incomplete cost support was not provided prior to February 6, 2017, and, further, that such information was materially changed in the rebuttal filed on April 3, 2016, or was provided after the close of business on March 2, 2017.
- 4) It was legal and factual error to conclude that Order No. PSC-10-0611-PCO-WU, issued October 4, 2010, Docket No. 100104-WU, In re: Application for increase in water rates

in Franklin County by Water Management Services, Inc.; Order No. PSC-11-0563-PCO-EI, issued December 8, 2011, Docket No. 110138-EI, In re: Petition for increase in rates by Gulf Power Company; and Order No. PSC-09-0640-PCO-EI, issued September 21, 2009, in Docket No. 090079-EI, In re: Petition for increase in rates by Progress Energy Florida, Inc., have a precedential or factual bearing on the facts of this case.

- 5) It was legal and factual error to conclude that Gulf Power Company v. Bevis, 289 So. 2d 401 (Fla. 1974), applies or governs the disposition of this case.
- 6) In the aggregate, the Order Denying the Motion to Strike overlooks the fact that the totality of circumstances meant that OPC was deprived of its right to file responsive expert testimony on 11 enumerated projects that represent over \$8 million of costs that had never been subject to expert witness scrutiny in time for responsive testimony to be filed. OPC maintains that as a matter of law, its due process rights are violated by the failure to afford it a reasonable opportunity to provide responsive expert testimony on the information to which it objects.

OPC states that it is a mistake of law to suggest that OPC, as an intervenor, had a burden to “determine the reasonableness of” the “outrageously late-filed direct evidence that was six months overdue.” OPC maintains that only the utility has the burden of proof to justify all costs for which it seeks recovery.

OPC argues that if the Order Denying Motion to Strike is allowed to stand, companies in all industries will be able to file “placeholder” exhibits promising to provide actual supporting documentation months later, as was done in this case, instead of filing required cost support at the outset of a filing. As a result, OPC states, “customers can be stiff-armed on discovery” and then later when the omissions are noted in intervenor responsive testimony, the required documentation will be filed as “rebuttal,” thus thwarting any critical evaluation by an expert. OPC contends that allowing piecemeal filing is not contemplated by Section 120.57, F.S., and is inconsistent with Rule 25-30.436, F.A.C., which establishes the required information to initiate a general rate increase. OPC contends that this is a case of first impression and has no antecedent in Commission practice either on basic facts or the sheer breadth of the number of separate projects with new or radically altered cost estimates.

UIF’s Response

UIF argues that OPC’s Motion for Reconsideration does not meet the standard for reconsideration because the six alleged errors are simply more detailed arguments and factual allegations that were argued in OPC’s Motion to Strike. Further, UIF maintains that OPC is not arguing facts or law that were overlooked but devotes its entire argument to attempting to distinguish the prior Commission orders cited in the Order Denying the Motion to Strike.

UIF alleges that OPC caused its alleged due process violation because it had a strategy to not address the merits of the pro forma projects at issue, and that it made a conscious decision to make sure it did not have an opportunity to file supplemental testimony. UIF argues that a party cannot claim a due process violation it has caused.

UIF contends that OPC had a strategy, at least as far back as March 6, 2017, of not addressing the merits of witness Flynn's documentation of the pro forma project costs. UIF points out that even though OPC's position was apparent at that time, it waited three weeks after Mr. Flynn's prefiled rebuttal testimony was filed before filing its Motion to Strike, which was filed at the Prehearing Conference.

UIF acknowledges that the Order Establishing Procedure, Order No. PSC-16-0558-PCO-WS, issued December 14, 2016, set the deadline for filing a Motion to Strike as the date of the Prehearing Conference. UIF further states that when OPC took the deposition of Mr. Flynn, consistent with its strategy to create a due process issue, it did not address the specific costs of any pro forma project, or why such costs may have changed. UIF states that although OPC had every opportunity to cross-examine Mr. Flynn at hearing on the pro forma project costs, it chose not to do so. UIF believes that if OPC had filed its Motion to Strike earlier, it would have had the opportunity to file supplemental testimony.

UIF maintains that OPC's due process rights have not been infringed upon because all of the pro forma projects were identified and described in Mr. Flynn's Prefiled Direct Testimony, witness Woodcock had the opportunity to visit all of UIF's systems, and witness Woodcock does not question the reasonableness or prudence of any project. UIF states that it provided updated documentation as it became available, and that most of the updates were provided in discovery responses before Mr. Woodcock filed his Prefiled Testimony. UIF alleges that OPC incorrectly states that Mr. Woodcock only had four days to review documents provided after-hours on March 2, 2017, before he filed his March 6th testimony. UIF contends that Mr. Woodcock testified on page 43, line 14 of his prefiled testimony that this documentation was provided "a little more than a week" before his Prefiled Testimony was due, which UIF contends was sufficient time "to focus on the significant ones."

UIF reaffirms that it is not requesting more than the proposed revenue requirement requested in its MFRs. UIF points to the Pluris Wedgefield rate case, Order No. PSC-13-0187-PAA-WS, issued May 2, 2013, in Docket No. 120152-WS, for the proposition that the Commission has allowed changes in individual elements of the revenue requirement so long as the amount originally requested is not exceeded. Citing to Commission orders addressed in the Order Denying Motion to Strike, UIF contends that the Commission may or may not agree to allow all of the pro forma projects in the revenue requirement, but it should be afforded the opportunity to consider them.

Staff's Analysis

As discussed above, OPC raises six alleged errors in its Motion for Reconsideration. Staff addresses each of the alleged errors below.

Alleged Error 1

OPC argues that it was a factual error to characterize the information in UIF witness Flynn's rebuttal testimony exhibits PCF-9, PCF-13 and PCF-17 as "updated" when the information was brand new on March 2, 2017. OPC is essentially making the same argument it made its Motion to Strike — that exhibits PCF-9, PCF-13 and PCF-17 should have been included in the utility's direct testimony, not the utility's rebuttal testimony. The Prehearing Officer considered OPC's

arguments in regard to exhibits PCF-9, PCF-13 and PCF-17 in rendering the Order Denying the Motion to Strike. It is not appropriate to reargue matters that have already been considered in a motion for reconsideration. Sherwood, 111 So. 2d at 98.

Alleged Error 2

OPC also argues that it was factual error to characterize the information in UIF witness Flynn's rebuttal testimony exhibits PCF-3, PCF-10, PCF-20, PCF-23, PCF-27, PCF-33, PCF-35, or PCF-41 in material percentage and gross dollar amounts as "rebuttal," "updates," or "updated." OPC argues that Mr. Flynn's rebuttal testimony filed April 3, 2017, was actually direct testimony raising supplemented and new information. Again, OPC is essentially rearguing its position in its Motion to Strike that information in exhibits PCF-3, PCF-10, PCF-20, PCF-23, PCF-27, PCF-33, PCF-35, and PCF-41 should have been included in the utility's direct testimony, not its rebuttal testimony. The Prehearing Officer considered OPC's arguments in regard to exhibits PCF-3, PCF-10, PCF-20, PCF-23, PCF-27, PCF-33, PCF-35, and PCF-41 in rendering the Order Denying the Motion to Strike. It is not appropriate to reargue matters that have already been considered in a motion for reconsideration. Sherwood, 111 So. 2d at 98.

Alleged Error 3

OPC further argues that it was error to state that commencement of discovery on September 16, 2016, allowed for discovery that could be utilized in responsive expert testimony when the very first of the missing or incomplete cost support was not provided prior to February 6, 2017, and, further, that such information was materially changed in the rebuttal filed on April 3, 2017, or was provided after the close of business on March 2, 2017. Like its prior arguments, OPC is essentially making the same arguments it made in its Motion to Strike, which is not appropriate for a motion for reconsideration. Sherwood, 111 So. 2d at 98.

Alleged Error 4

OPC also asserts that it was legal and factual error to conclude that Order No. PSC-10-0611-PCO-WU, issued October 4, 2010, in Docket No. 100104-WU, In re: Application for increase in water rates in Franklin County by Water Management Services, Inc. (denying OPC's motion to strike portions of WMSI's rebuttal testimony); Order No. PSC-11-0563-PCO-EI, issued December 8, 2011, in Docket No. 110138-EI, In re: Petition for increase in rates by Gulf Power Company (denying motion to strike portions of rebuttal); and Order No. PSC-09-0640-PCO-EI, issued September 21, 2009, in Docket No. 090079-EI, In re: Petition for increase in rates by Progress Energy Florida, Inc. (denying intervenors' motion to reschedule evidentiary hearings and not allowing the updated load forecast study provided in rebuttal to result in additional revenue requirements), have a precedential or factual bearing on the facts of this case. Although characterizing its argument as a legal or factual error, a close look at OPC's argument shows that OPC is really attempting to distinguish the orders from the facts of this case. Disagreement in the application of prior Commission orders does not represent fact or law overlooked or not considered and is not an appropriate basis for a motion for reconsideration. See Stewart Bonded Warehouse, 294 So. 2d at 317; Diamond Cab Co., 146 So. 2d at 891; and Pingree, 394 So. 2d at 162.

The above orders illustrate that the Commission routinely considers updated cost information on pro forma projects included in water and wastewater Minimum Filing Requirements (MFRs). As

the Order Denying the Motion to Strike recognizes, the Commission's consideration of updated cost information that is provided during discovery is important to setting fair and reasonable rates, and may result in the cost of an individual pro forma project either being increased or decreased from the cost shown in the MFRs.

Alleged Error 5

OPC also argues that it was legal and factual error to conclude in the Order Denying the Motion to Strike that Gulf Power Company v. Bevis, 289 So. 2d 401 (Fla. 1974), applies or governs the disposition of this case. Disagreement in the application of case law does not represent fact or law overlooked or not considered and is not an appropriate basis for a motion for reconsideration. See Stewart Bonded Warehouse, 294 So. 2d at 317; Diamond Cab Co., 146 So. 2d at 891; and Pingree, 394 So. 2d at 162.

Staff agrees with the Prehearing Officer's interpretation of Bevis, 289 So. 2d at 401. Disallowing all cost information provided after the filing of the MFRs, with no consideration of existing facts would be contrary to law and the ultimate goal of the Commission, "for it is a correct *result* which is the goal of the determination and not merely the *means* or formula used in arriving at the answer." Id. at 406.

In a similar docket, Order No. PSC-13-0187-PAA-WS, issued May 2, 2013, in Docket No. 120152-WS, In re: Application for increase in water and wastewater rates in Orange County by Pluris Wedgefield, Inc., where the utility sought roughly \$56,000 in pro forma project costs, but over the course of the proceeding added approximately \$92,000 in additional pro forma projects, the Commission noted that while the utility submitted pro forma expense subsequent to filing its MFRs, the utility did not request an increase in revenue requirement and the evidence was permitted. In its response to the current motion, UIF has reaffirmed that it is not requesting an increase to its proposed revenue requirement.

Alleged Error 6

OPC's final argument is that the Order Denying the Motion to Strike overlooks the fact that the totality of circumstances meant that OPC was deprived of its right to file responsive expert testimony on 11 enumerated projects that represent over \$8 million of costs that had never been subject to expert witness scrutiny in time for responsive testimony to be filed and that, as a consequence, its due process rights are violated by the failure to afford it a reasonable opportunity to provide responsive expert testimony on the information to which it objects. The whole crux of OPC's Motion to Strike concerned its due process arguments. The Prehearing Officer considered OPC's due process arguments and specifically found in the Order Denying the Motion to Strike that OPC's due process rights have not been violated. It is not appropriate to reargue matters that have already been considered. Sherwood, 111 So. 2d at 98.

OPC's due process argument rests primarily on the assertion that OPC witness Mr. Woodcock did not have the reasonable and necessary time required to adequately respond to the updated pro forma project costs submitted by UIF in late February and early March, when his prefiled testimony was due to be filed on March 6, 2017. These are the same facts considered in OPC's Motion to Strike. It is established law that due process requires that parties to a proceeding be given adequate notice and an opportunity to be heard. Bresch v. Henderson, 761 So. 2d 449, 451

(Fla. 2d DCA 2000). However, the concept of due process in an administrative proceeding is less stringent than in a judicial proceeding, and the extent of procedural due process protections is flexible and calls for such protections as the particular situation demands. Hadley v. Department of Administration, 411 So. 2d 184, 187 (Fla. 1982). Likewise, in Commission proceedings, where testimony is prefiled and the witness is subject to cross-examination during the hearing, the concept of due process is not so limited as OPC argues. In this case, there were many due process opportunities to test the validity of updated information throughout the discovery and hearing process, including, but not limited to, filing supplemental testimony of witness Woodcock, or through cross-examination, even if OPC chose not to avail itself of such opportunities.

As the Prehearing Officer stated in the Order Denying the Motion to Strike, the pro forma updated cost information supplied in this case is not out of the ordinary and can be distinguished from those cases where a utility seeks to fundamentally change its rate case by correcting what appear to be material errors in the initial filing. Order No. PSC-96-0279-FOF-WS, issued February 26, 1996, in Docket No. 950495-WS, In re: Application for Rate Increase by Southern States Utilities, Inc., citing to Order No. 18335, issued October 22, 1987, in Docket No. 870239-WS, In re: Application of General Development Utilities (wherein the Commission continued hearing where utility's correction to MFRs resulted in an increased revenue requirement request from its original filing), and Order No. 23123, issued June 26, 1990, in Docket No. 891114-WS, In re: Application of Sailfish Point Utility (case dismissed where revised MFR filing resulted in a revised revenue requirement request). In this docket, UIF has not sought to either add more pro forma projects, nor is it seeking a revenue requirement higher than its original filing.

In this case, the MFRs were satisfied, and all the projects in question were identified at the time of the initial filing and were then outlined in UIF witness Flynn's direct testimony. Updates to pro forma are contemplated by our statute. Section 367.081(2)(a)2, F.S. The updates in this docket did not constitute any new projects or evidence that substantially changed the scope of the case.

Conclusion

Based upon the above analysis, staff recommends the Commission deny OPC's Motion for Reconsideration as it does not meet the required standard for a motion for reconsideration.

Issue 3: Should this docket be closed?

Recommendation: No, this docket should remain open pending final resolution of UIF's rate case. (Trierweiler)

Staff Analysis: This docket should remain open pending final resolution of UIF's rate case.