BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of GULF POWER COMPANY for a rate increase.	)	DOCKET NO. 891345-EI
	)	ORDER NO. 23894
	)	ISSUED: 12-17-90

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
GERALD L. GUNTER
BETTY EASLEY

ORDER ON RECONSIDERATION

BY THE COMMISSION:

On October 3, 1990, the Commission issued Order No. 23573, regarding Gulf Power Company's (Gulf or Company) petition for an increase in its rates and charges. On October 18, 1990, Gulf filed the following motions:

1) Motion for Reconsideration of Decision Requiring Partial Refund of Interim Rates;

2) Request to be Heard in Oral Argument or at Agenda Conference on Motion for Reconsideration;

3) Motion to Sever as to Issue 111, or in the alternative, Request for Expedited Consideration of Motion for Reconsideration; and

4) Motion for Stay as to Issue 38.

On October 25, 1990, the Office of Public Counsel (OPC) filed the following documents:

1) Public Counsel's Response to Motion for Stay;

2) Public Counsel's Response to Motion for Reconsideration; and

3) Public Counsel's Cross-Motion for Reconsideration.

The Federal Executive Agencies (FEA) also filed a very brief Cross-Motion for Reconsideration in support of the OPC Motion. Gulf responded to the OPC and FEA Cross-Motions on November 1, 1990.

In Order No. 23707, issued October 31, 1990, Commissioner Beard, as Prehearing Officer, denied the oral argument request and the request to be heard at Agenda Conference on these issues. As to the Motion to Sever or in the Alternative, Request for Expedited Consideration of Motion for Reconsideration, because OPC has filed a Cross-Motion for Reconsideration of the reduction in return on equity issue, the Commission will not grant the Motion to Sever. This order has been expedited and therefore the motion for expedited consideration is moot.

This sequence of events leaves the following matters for Commission decision:

1) Gulf's Motion for Reconsideration and OPC response thereto;

2) Gulf's Motion for Stay and OPC response thereto;

3) OPC's and FEA's Cross-Motions for Reconsideration and Gulf's response thereto; and

4) A factual error in Order No. 23573.

DISCUSSION

The purpose of a motion for reconsideration is to point out some matter of law or fact which the Commission failed to consider or overlooked in its prior decision. Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981).

The Motion for Reconsideration seeks Commission reconsideration of refund of a portion of the interim increase. Gulf argues that the refund is inconsistent with the purpose of the interim statute which is to prevent regulatory lag. Gulf offers an exhibit showing that with or without the interim refund, Gulf's earnings would be below what the Commission found to be fair and reasonable on a permanent basis.

OPC argues that the Commission should not reconsider its decision to order a refund of a portion of the interim rates. OPC argues that the statute contemplates a rate-of-return test, not the total revenue comparison Gulf advocates. OPC argues that case law on the subject forbids using the hearings in the full case to retroactively justify the interim award. OPC finally points out

that the decision is consistent with Docket No. 881056-EI, Florida Public Utilities (Fernandina Beach Division).

This issue centers on the meaning of Section 366.071(4), Florida Statutes (1989). The pertinent language provides that "[a]ny refund ordered by the Commission shall be calculated to reduce the rate of return of the public utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return which is found fair and reasonable on a prospective basis . . ." (Emphasis supplied). An analysis of proper application of this language is contained in Order No. 12221, issued July 13, 1983. As that discussion points out, the statute does not provide which data the new rate of return is to be applied.

There are three options as to which data to use:

1) The use of actual data for the period interim rates were in effect (here from March 10, 1990 through September 12, 1990 meter readings).

2) The use of data from the test year used in the full rate case (here the year ending December 31, 1990).

3) The use of the data from the test year used in granting interim rates (here the year ending September 30, 1989).

As Order No. 12221 points out, actual data is impractical to use because it has not been audited and adjustments would have to be made consistent with the rate case, thus forcing another calculation. This method has never been used by the Commission and will not be employed here. Each of the last two approaches has been used by the Commission in the past.

In Order No. 23573, we used option 3, based on the decision in Docket No. 881056-EI (FPUC-Fernandina Beach). This treatment was premised upon following the Commission's most recent precedent on the subject. Other Commission decisions have utilized option 2. Gulf Power cites seven of these decisions in its motion, including the Southern Bell case discussed above.

Upon reflection, we believe that Option 2 represents the best alternative on the facts of this case. This recommendation results in granting Gulf Power's motion for reconsideration on the interim issue, thus eliminating the refund of any interim rates. The policy reason for this recommendation is that the interim rates were in effect for the test year of the case. This information was

obviously subject to intense scrutiny during the hearing. The Commission found that Gulf Power was entitled to a rate increase based on this information. If interim is truly to combat regulatory lag, the interim amount should act as a surrogate until the final rates are determined. Here the interim award was substantially less than the amount finally determined to be fair and reasonable. Because the period that interim rates were in effect and test year coincide, it makes sense to simply confirm the interim award rather than order a refund.

We do disagree with Gulf Power that option 3 is legally indefensible. The statute does not spell out on which data the new return on equity is to be applied. In the absence of legislative direction or Commission rules, and considering Commission precedent using both options, we believe that it is within the Commission's discretion to use either option. On the facts of this case, we simply believe that option 2 makes more sense to carry out the intent of the statute.

We also disagree with OPC's analysis. OPC's argument elevates form over substance. OPC would have the Commission completely ignore the fact that interim rates were less than those found reasonable on a prospective basis. It makes little sense to further reduce an amount which was inadequate pursuant to the evidence presented. The case law OPC cites to support its position was decided prior to passage of the interim statute, which expressly contemplates using evidence garnered in the full proceeding to test the interim award. Although we believe that OPC's position is legally defensible as discussed above, we do not believe it to be the proper or best course of action.

In the Motion for Stay as to Issue 38, Gulf asks the Commission to stay its decision to reduce Gulf Power Company's return on equity (ROE) by 50 basis points for mismanagement while Gulf appeals this decision to the Florida Supreme Court. In its motion, Gulf requests that it be allowed to implement the full amount of increased rates without the ROE reduction. The Company agrees to post an appropriate bond or corporate undertaking to refund appropriate amounts with interest in the event Gulf is unsuccessful on appeal. Gulf argues that in the absence of a stay, the reduction in ROE translates into lower earnings of $2,293,000 per year, causing irreparable harm to the Company in that the lost revenues are gone forever in the amount of $6,300 per day. Gulf also points to the lowered financial ratings to Gulf debt and security issuances, as well as the 12.8% ROE allowed in February for Florida Power and Light Company.

In response, OPC argues that Gulf just believes its rate increase should have been higher. OPC argues that as a matter of policy the utility should not be permitted to collect more than the Commission found appropriate on the record while the utility appeals. OPC questions whether the Commission would stay a management reward on appeal. OPC argues that Gulf fails to meet the standards of Rule 25-22.061(2), Florida Administrative Code, (which is discussed below), and that any irreparable harm, if it exists, is of the Company's own making. OPC also argues that Gulf's motion is internally inconsistent in that irreparable harm to customers is alleged if the stay is not granted, yet Gulf also alleges that customers are protected by the possibility of refund of any amounts stayed by the Commission.

The standard for evaluation of a request for stay is found in Rule 25-22.061, Florida Administrative Code. Subsection (2) of that Rule provides that the Commission may, among other things, consider: a) whether the petitioner is likely to prevail on appeal; b) whether the petitioner demonstrates the likelihood of irreparable harm without the stay; and c) whether the delay will cause substantial harm or be contrary to the public interest.

The Motion for Stay is denied. Gulf has made no showing whatsoever that it is likely to prevail on appeal. We do not believe Gulf is likely to prevail on the reduction to the ROE issue. The Commission set the ROE within the parameters of evidence stating that a fair return would range from 11.75% to 13.5%. Gulf does show that it suffers a reduction in earnings as a result of the Commission decision, but the same would be true in any rate case in which the Company does not obtain all the relief it requested. We do not believe it to be sound policy to allow the Company to collect what it believes appropriate while the appeal is pending. This is particularly true considering the lack of allegations concerning prevailing on the merits of the appeal. The "harm" Gulf alleges is due solely to the activities of Gulf management. The last criterion, whether delay will cause substantial harm or be contrary to the public interest, is implicit in every vote the Commission takes. We believe the Commission's original decision is consistent with the public interest. See Order No. 23573 at page 29. The Commission could have legally set the ROE at 11.75%, the lowest point indicated by the evidence. Given this fact, we have difficulty with the proposition that an ROE of 12.05% causes irreparable harm to the Company. Finally, we believe the ROE awarded to a different company at a different time on a different record does not automatically entitle Gulf to the same or a higher ROE on these facts.

OPC's Cross-Motion for Reconsideration raises two principal issues: 1) The use of a 12.55% figure for the evaluation of the amount of interim revenues subject to refund; and 2) The amount of the reduction in the ROE for management imprudence. Because the FEA motion raises the same points as the OPC motion, both motions will be discussed in the context of the OPC motion. In terms of the interim refund, OPC argues that the interim statute (Section 366.071, Florida Statutes) requires that refunds are to be calculated to reduce the rate of return to the "same level within the range of the newly authorized rate of return which is found fair and reasonable on a prospective basis . . . ." OPC argues that because Gulf's rates were initially set at 12.05% (after the reduction), this is the level that should be used to calculate any interim refund. OPC also argues that the fifty basis point reduction was not a large enough reduction given the magnitude and duration of Gulf Power mismanagement. OPC argues that 11.75% is the proper level for the ROE in this case.

In response, Gulf argues that the Commission specifically found 12.55% to be fair and reasonable on a prospective basis. The reduction to ROE was a step to reduce Gulf's earnings for a specific two year period, from September 13, 1990 to September 12, 1992. Gulf argues that OPC's position would move the reduction's effectiveness back to March 10, 1990, thus ending the reduction in March of 1992, to be consistent with the Commission's decision. As to increasing the reduction to ROE, Gulf states that OPC is merely rearguing its prior case and should be rejected under the Diamond Cab standard.

OPC's Cross-Motion for Reconsideration is denied. The prospective ROE is 12.55%. This ROE was set indefinitely for the future. Interim refunds should not be tied to temporary reductions imposed on the company for mismanagement. The Commission also determined that the reduction be in effect for two years. We believe it to be reargument to expand the time frame or amount of the reduction. The Commission considered the proper amount of the reduction to be 50 basis points for two years on a 3-1 vote. OPC's argument to increase the reduction points out nothing the Commission failed to consider or overlooked. The dissenting opinion would have placed the ROE at the level recommended by OPC, thus leading us to conclude the majority considered and rejected this course of action. See Diamond Cab, supra.

There is also a factual error in Order No. 23572 on Page 29. The quoted language is out of a dissenting opinion and should have been so identified. Thus, the sentence which reads "The New Hampshire Public Utilities has acted in conformity with this

principle:" should be struck and replaced with "This principle has been discussed as follows:"

> The method of addressing managerial inefficiency which is most soundly rooted in proper regulatory principles and is most appropriate to the instant situation is a reduction in the allowed return on common equity. Re: Public Service Commission of New Hampshire, 57 PUR4th 563, 594 (Aeschliman, Commissioner, dissenting)

The principle of adjusting the return on equity for management inefficiency has been employed by other state regulatory Commissions, however. See Re Otter Tail Power Co. (ND 1983) 53 PUR 4th 296, 309-10; Re Southern California Edison Co. (Cal. 1982) 50 PUR 4th 317, 374-76; Re Carolina Power & Light Company (NC 1982) 49 PUR 4th 188, 248, 250, 252.

Therefore, based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Reconsideration of Decision Requiring Partial Refund of Interim Rates filed October 18, 1990, by Gulf Power Company is hereby granted. It is further

ORDERED that Gulf Power Company's Motion for Stay as to Issue 38 filed October 18, 1990, is hereby denied. It is further

ORDERED that Gulf Power Company's Motion to Sever as to Issue 111 filed October 18, 1990, is hereby denied. It is further

ORDERED that the Federal Executive Agencies' Cross-Motion for Reconsideration filed October 25, 1990, is hereby denied. It is further

ORDERED that Public Counsel's Cross-Motion for Reconsideration is hereby denied. It is further

ORDERED that the text of Order No. 23573 be amended as discussed in the body of this Order. It is further

ORDERED that this docket be and the same is hereby closed.

By ORDER of the Florida Public Service Commission, this 17th day of DECEMBER, 1990.

STEVE TRIBBLE, Director
DIVISION OF RECORDS AND REPORTING

(S E A L)

RDV

Commissioner Beard voted to grant Public Counsel's Cross-Motion for Reconsideration on the issue of setting the return on equity at 11.75%.

NOTICE OF 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.