

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 20200139-WS
ORDER NO. PSC-2021-0373-FOF-WS
ISSUED: September 28, 2021

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman
ART GRAHAM
ANDREW GILES FAY
MIKE LA ROSA
GABRIELLA PASSIDOMO

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

Utilities, Inc. of Florida (UIF or Utility) filed its Application for Increase in Rates (Application) on June 30, 2020, and the official filing date was August 31, 2020. The Office of Public Counsel (OPC) intervened and is the only other party to this docket. Type 2 Stipulations were proposed on 14 of the 45 contested issues, which were approved by us at the February 3, 2021 hearing and set forth in our Final Order approving the rate increase.¹ Two of the stipulated issues were Issue 34 (“What are the appropriate rate structures and rates for the water systems?”) and Issue 36 (“What are the appropriate rate structures and rates for the wastewater systems?”).² The approved Type 2 stipulations for Issues 34³ and 36⁴ provided for an across-the-board increase to UIF’s water and wastewater service rates at the time of filing.

¹ Order PSC-2021-0206-FOF-WS, issued June 4, 2021, in Docket No. 20200139-WS, *In re: 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*.

² Order No. PSC-2021-0064-PHO-WS, issued January 29, 2021, in Docket No. 20200139-WS, pp. 27-28.

³ Order No. PSC-2021-0206-FOF-WS, issued June 4, 2021, in Docket No. 20200139-WS, p. 118. The approved language for Issue 34 provides, in pertinent part: “The appropriate rate structure is a continuation of the existing rate structure and the percentage increase shall be applied as an across-the-board increase to service rates at the time of filing. To determine the appropriate percentage increase to apply to the service rates, miscellaneous revenues of \$363,563 shall be removed from the test year revenues.” Table 16, showing the fall-out percentage increase to water service rates, is not included herein.

⁴ Order No. PSC-2021-0206-FOF-WS, p. 119. The approved language for Issue 36 provides, in pertinent part: “The appropriate rate structure is a continuation of the existing rate structure and the percentage increase shall be applied as an across-the-board increase to service rates at the time of filing. To determine the appropriate percentage

On June 18, 2021, UIF served counsel for OPC and Commission staff with a Motion for Reconsideration (Motion) and Request for Oral Argument (Request) of Order No. PSC-2021-0206-FOF-WS. However, UIF inadvertently filed with the Commission Clerk two copies of its Request for Oral Argument, on June 18, 2021, omitting the Motion itself. Notwithstanding the untimely filing of the Motion, OPC filed its Response to UIF's Motion (Response), on June 25, 2021. UIF's Motion wasn't filed in the docket until July 2, 2021, by memorandum from Commission counsel, having discovered UIF's error in filing.⁵

In its Motion, UIF states that neither the Commission staff's post-hearing recommendation nor the Final Order mentioned the application of a repression adjustment⁶ that was requested by UIF in its Application.⁷ UIF concludes that as a repression adjustment was not mentioned, we must have overlooked the matter in the Final Order.

In its Response, OPC contends that UIF failed to provide evidence at hearing upon which a repression adjustment could be made, and that such an adjustment was unnecessary given UIF's stipulation to rate design.

This order addresses UIF's Request for Oral Argument, UIF's Motion for Reconsideration, and OPC's Response thereto. We have jurisdiction pursuant to Section 367.081, Florida Statutes (F.S.).

DECISION

REQUEST FOR ORAL ARGUMENT

Rule 25-22.0022(1), F.A.C., allows a party to request oral argument before us for any motion by separate written pleading filed concurrently with the motion on which argument is requested. Failure to timely file a request for oral argument constitutes a waiver thereof. Granting or denying oral argument is within our sole discretion. Rule 25-22.0022(3), F.A.C. Pursuant to Rule 25-22.0022(2), F.A.C., at our discretion, we may request oral argument over any of our proceedings.

UIF contends that because the repression adjustment was not discussed in the Commission staff's recommendation and was not addressed by us at the post-hearing Commission Conference, that we would benefit by hearing oral argument on the issue. UIF

increase to apply to the service rates, miscellaneous revenues of \$333,719 shall be removed from the test year revenues." Table 17, showing the fall-out percentage increase to wastewater service rates, is not included herein.

⁵ See duplicate Document Nos. 06228-2021 and 06229-2021, and Document No. 07450-2021.

⁶ A repression adjustment reflects the elasticity of demand, or customer's change in the quantity of a product demanded in response to a change in price. The purpose of the repression adjustment is to ensure the utility will achieve the approved revenue requirement, taking into account the customers' reaction to the price increase. We do not use a repression adjustment with respect to non-discretionary usage, because we assume that non-discretionary usage is not responsive to price.

⁷ DN 03423-2020. On page 3 of its Application, UIF requested "the revenue which the Company requests should be adjusted to incorporate the repression in the customer usage as a result of the rates established in this case, in accordance with the standard methodology as utilized by the staff."

requests fifteen (15) minutes for each party. OPC did not file a response to UIF's Request for Oral Argument.

As discussed above, the Utility's Request for Oral Argument was not filed concurrently with the Motion, as required by Rule 25-22.0022(1), F.A.C. Further, we find that the pleadings are sufficient on their face to evaluate and decide UIF's Motion. Therefore, UIF's Request for Oral Argument is denied as unnecessary for the disposition of this matter, and because its request for oral argument was not made consistent with the requirements of Rule 25-22.022, F.A.C.

MOTION FOR RECONSIDERATION

Law

Rule 25-22.060(3), F.A.C., applies to requests for reconsideration of final orders, and states:

(3) Time. A motion for reconsideration of a final order shall be filed within 15 days after issuance of the order. A response to a motion for reconsideration or a cross motion for reconsideration shall be served within 7 days of service of the motion for reconsideration to which the response or cross motion is directed. A response to a cross motion for reconsideration shall be served within 7 days of service of the cross motion.

The standard of review for reconsideration of our order is whether the motion identifies a point of fact or law that we overlooked or failed to consider in rendering the order. *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 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 (Fla. 3rd 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, Inc.*

UIF's Motion

UIF states in its Motion that a water repression adjustment quantifies changes in consumption in response to an increase in price. UIF also states that this Commission has historically estimated that the rate by which residential customers will reduce their water consumption in response to an increase in price - elasticity of demand - is four percent of discretionary usage for every ten percent increase in price. UIF asserts that inclusion of a repression adjustment is our long-standing practice. According to UIF, our failure to apply a repression adjustment establishes that this Motion clearly meets the strict standard for reconsideration of a point of fact being overlooked.

In its Motion, UIF concedes that it did not present evidence on repression as it and other utilities have done in the past. To support its position, UIF cites to our prior orders addressing base rate proceedings for Commission-regulated water and wastewater utilities, in which repression adjustments were made to reflect anticipated reductions in the number of gallons sold.

In Final Order No. PSC-2021-0206-FOF, we approved a 10.20 percent increase in water rates and a 22.82 percent increase in wastewater rates, which UIF asserts requires a repression adjustment in order for UIF to have a fair opportunity to achieve its authorized rate of return consistent with our practice of applying a repression adjustment. UIF estimates that the repression adjustment revenues should have been approximately \$250,000 for water and \$250,000 for wastewater, for a total annual revenue shortfall of approximately \$500,000. UIF contends this results in a rate of return of closer to the lower end of its authorized rate of return of 8.75 percent, almost assuring the need for another rate case in less than four years.

UIF concludes by asking us to reconsider the lack of a repression adjustment and increase UIF's revenue requirement to incorporate the expected repression in usage, so UIF can have an opportunity to earn its authorized return.

OPC's Response

OPC asserts that UIF entered into a stipulation of Issue 36,⁸ as reflected in Prehearing Order No. PSC-2021-0064-PHO-WS, issued January 29, 2021, which OPC did not oppose. OPC avers that the stipulation of Issue 36 resolved all rate design matters, including the single reference to a repression adjustment listed in UIF's Application, filed June 30, 2020. Moreover, OPC argues that UIF did not present testimony to explain or support a repression adjustment and that by its own admission, UIF simply "did not present evidence on repression." Therefore, OPC contends that even if the issue had not been resolved by UIF's stipulation, the Utility failed to carry its burden of proof for a repression adjustment.

OPC notes that UIF's witnesses, Swain and Seidman, each referenced repression only tangentially in an exhibit schedule concerning the Used and Useful (U&U) status of just one of UIF's systems - Pennbrooke.⁹ While acknowledging demand had dropped at Pennbrooke, the witnesses proposed that the U&U for that one system should remain at 100% "to reflect reduced demand due to repression and conservation."

OPC argues that no statute or administrative rule requires us to apply a repression adjustment to rate increases in all cases. Instead, application of a repression adjustment is subject to our discretion. OPC reasons that the law does not require a repression adjustment in cases in which a utility fails to present testimony or evidence to support such an adjustment.

OPC cites to *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982), for the premise that the burden of proof is always on a utility seeking a rate change. OPC notes that our

⁸ In its response, OPC references Issue 36 regarding wastewater rate structure, but does not specifically reference Issue 34 regarding water rate structure. However, its Response references both water and wastewater rates.

⁹ Swain Ex. DDS-I, page 276; Seidman Ex. FS-3, page 130.

rules do not require us to automatically apply a repression adjustment to rate increases of a certain amount and thus, argues that UIF's reliance on Commission staff to automatically include a repression adjustment has no legal basis. Moreover, OPC argues that UIF's stipulation negated any reliance on alleged but unfounded "long-standing Commission practice." OPC asserts that to allow a utility to merely list allegations or requests in its petition, fail to produce evidence, and then expect all aspects of the petition to be granted, would establish a dangerous precedent and represent a shift in the burden of proof away from the petitioning utility.

OPC also takes issue with UIF's complaint that we did not discuss a repression adjustment during the post-hearing Commission Conference. OPC notes that in light of the stipulation to which UIF agreed, there was no basis for us to delve into that topic. OPC asserts that even if a repression adjustment had been at issue, UIF resolved the matter via stipulation. OPC also asserts that the lack of a particular discussion of one item in a document or proceeding is not presumptive proof that the item or matter was not considered by the tribunal at all.¹⁰ OPC argues that there is no reason to believe we overlooked or failed to consider a repression adjustment and that the record evidence shows that all aspects of rate design were considered, and that UIF's stipulation fully addressed and resolved the issue.

OPC characterizes UIF's Motion as an attempt to use reconsideration as a tactic to reargue the case or persuade us to change our opinion in the absence of evidence to support the change, and that such use of reconsideration is contrary to law.¹¹ OPC concludes that that UIF's Motion fails to meet the requirements for reconsideration under Rule 25-22.060, F.A.C., that granting UIF's Motion would be a departure from our established policy and would result in reversible error.

Analysis

Untimely Filing of the Motion

Although OPC chose not to raise the matter in its Response, UIF's Motion should have been filed within 15 days of the filing of the final order, pursuant to Rule 25-22.060(3), F.A.C. Failure to file a timely motion for reconsideration shall constitute waiver of the right to do so. Rule 25-22.060(1)(d), F.A.C. As discussed above, any request for reconsideration of Order No. PSC-2021-0206-FOF-WS was due to be filed by June 21, 2021.¹² UIF inadvertently filed two copies of its Request for Oral Argument on June 18, 2021. While timely served to counsel for OPC and staff, UIF's Motion for Reconsideration was not filed with the Commission Clerk until July 2, 2021, when the error was discovered by Commission staff, and a copy of the Motion was placed by staff in the docket file. The time limitation for filing reconsideration is jurisdictional,

¹⁰ *Citing cf., State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (“[c]ounsel should not . . . draw the conclusion that the matters not discussed were not considered”).

¹¹ *Citing Stewart Bonded Warehouse, Inc. v. Bevis, and Sherwood v. State, supra*.

¹² The 15th day fell on Saturday, June 19, 2021. Pursuant to Rule 28-106.103, F.A.C., regarding the computation of time, the reconsideration period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

and we do not have the authority to enlarge it.¹³ We have no choice but to deny UIF's Motion on the basis of untimeliness. Furthermore, our analysis of the substance of UIF's Motion,¹⁴ only provides additional grounds to deny the Motion, as set forth below.

Absence of Evidence in the Record

In its Motion, UIF cites to 11 of our orders that address base rate increases for Commission-regulated water and wastewater utilities, in which repression adjustments were made to reflect anticipated reductions in the number of gallons sold. However, 9 of the 11 cases referenced by UIF were conducted pursuant to our Proposed Agency Action (PAA) process. When a utility is dissatisfied with a PAA order, it can request an administrative hearing, at which it bears the ultimate burden to support its rate request and to place into evidence the various components that go into setting rates, including testimony and evidence as to the appropriate repression adjustment, if any.

The other two orders cited by UIF were post-hearing decisions, issued after we conducted administrative hearings. In both instances, the repression adjustments were supported by expert testimony. For example, a repression adjustment was prominently featured in UIF's 2016 rate case, where UIF filed evidence in support of the repression adjustment issue in the record, which included the testimony of the Utility's own expert witness that was then countered by the testimony of the Commission staff witness.¹⁵ UIF has provided no citations to orders where a repression adjustment was made after we conducted a hearing in which no evidence was provided regarding such an adjustment. Nor did UIF cite to a case where a repression adjustment was made after we approved an across-the-board increase to service rates.

Despite UIF's admission in its Motion that it failed to provide evidence or testimony to support a repression adjustment in this docket, the Utility claims that Commission staff should have applied it anyway because the Utility requested it in its Application.¹⁶ Our long-standing practice is that the ultimate burden of proof to establish a record sufficient to support requested rates lies with the utility seeking a rate change.¹⁷ When the record is devoid of the evidence required to support a repression adjustment, we cannot create that evidence after the fact and retroactively apply it to the approved rates. Indeed, as the record is silent, UIF's speculated

¹³ See *City of Hollywood v. Public Employees Relations Commission*, 432 So.2d 79 (Fla. 4th DCA 1983), in which the court held that, since neither Chapter 120, Florida Statutes, PERC's rules, nor the Model Rules of Procedure expressly authorized an extension of time to file for reconsideration, PERC erred in granting such an extension.

¹⁴ See Order No. PSC-95-0047-FOF-WS, issued January 11, 1995, in Docket No. 930880-WS, *In re: Southern States Utilities, Inc.*, in which the order under reconsideration had been subsequently amended (thus tolling the time for reconsideration), and we found that no harm would occur in any event if we were to take up the motion for reconsideration, since we were denying the motion.

¹⁵ Order No. PSC-2017-0361-FOF-WS, issued September 25, 2017, in Docket No. 20160101-WS, *In re: 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*, pp. 202, 206-207.

¹⁶ See DN 03423-2020, at p. 3 of UIF's Application: "The revenue which the Company requests should be adjusted to incorporate the repression in the customer usage as a result of the rates established in this case, in accordance with the standard methodology as utilized by the Staff." See also FN7 above; these appear to be the sole references to repression made by UIF in this proceeding.

¹⁷ *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982).

revenue shortfall amounts due to the absence of a repression adjustment cannot be verified. Further, as discussed below, a repression adjustment would not be appropriate in this case, where an across-the-board increase to water and wastewater service rates was made.

UIF's Stipulation to Issues 34 and 36

As discussed above, Type 2 stipulations were agreed to by UIF and approved by us with respect to the rate structure for water (Issue 34) and wastewater (Issue 36) rate structure, resulting in an across-the-board increase to water and wastewater service rates. We do not apply a repression adjustment to across-the-board rate increases. The application of an across-the-board increase results in the existing rates being increased uniformly by the percentage increase in the revenue requirement. Under the application of an across-the-board increase, all parameters of rate design are held constant, such as the base facility charge recovery allocation, rate blocks, and billing determinants. Factoring in a repression adjustment negates the premise of an across-the-board increase because cost recovery would have to be redistributed to account for any anticipated reduction in gallons and related operation and maintenance expenses. As OPC notes in its response, UIF's stipulation to water and wastewater rate structure is an across-the-board rate increase where we do not apply a repression reduction. These stipulations resolved all rate design matters, including the passing reference to a repression adjustment listed in UIF's Application. OPC did not oppose approval of the stipulation, and UIF's stipulation to Issues 34 and 36 is not contested in its Motion.

CONCLUSION

UIF's Motion was untimely filed and is therefore denied. Furthermore, after conducting a substantive review of UIF's Motion, we identify additional grounds upon which the Motion may be denied. The standard of review for reconsideration of our order is whether the motion identifies a point of fact or law that we overlooked or failed to consider in rendering our order.¹⁸ The lack of a particular discussion of one item in a document or proceeding is not presumptive proof that the item or matter was not considered by the tribunal. 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."¹⁹

UIF's assertion, that the absence of a repression adjustment in the Commission staff recommendation and subsequent final order suggests that we overlooked the issue, is contrary to UIF's admission in its Motion that it offered no evidence in support of a repression adjustment in the record or at Hearing. It further ignores UIF's stipulation to an across-the-board rate increase to water and wastewater service rates, reflected in the Final Order of this proceeding. The Utility, who has the burden of proof, admits that the record is silent on this issue; therefore, there was nothing for us to consider, other than the proposed stipulations, which we approved. Rather than overlooking a repression adjustment, we find that the adjustment wasn't relevant considering the

¹⁸ *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974).

¹⁹ *Id.*

absence of evidence in the record and in light of UIF's stipulation to Issues 34 and 36. As a result, the Utility failed to raise a point of fact or law that we overlooked or failed to consider in rendering our decision.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Utilities, Inc. of Florida's Request for Oral Argument is denied. It is further

ORDERED that UIF's Motion for Reconsideration is denied as untimely filed. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 28th day of September, 2021.



ADAM J. TEITZMAN
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

WLT

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.

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 wastewater utility by filing a notice of

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appeal with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.