



# Public Service Commission

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**DATE:** June 8, 2000

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF LEGAL SERVICES (VAN LEUVEN) *DLV*  
 DIVISION OF POLICY ANALYSIS AND INTERGOVERNMENTAL LIAISON (GOLDEN) *ms/gpw*  
 DIVISION OF REGULATORY OVERSIGHT (RIEGER) *SR*

**RE:** DOCKET NO. 990080-WS - COMPLAINT AND REQUEST FOR HEARING BY LINDA J. MCKENNA AND 54 PETITIONERS REGARDING UNFAIR RATES AND CHARGES OF SHANGRI-LA BY THE LAKE UTILITIES, INC. IN LAKE COUNTY.  
 COUNTY: LAKE

**AGENDA:** 06/20/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\990080.RCM

### CASE BACKGROUND

Shangri-La by the Lake Utilities, Inc. (Shangri-La or utility) is a Class C utility located in Lake County. The utility currently provides water and wastewater service to approximately 129 mobile homes and water service to five single family homes. On January 19, 1999, Ms. Linda J. McKenna and 54 other customers filed the formal complaint which is the subject of this docket. The customers requested a formal hearing, rate relief, establishment of a seasonal rate for customers not in residence, that the utility not be allowed to charge for service until the matter was addressed, and that the utility's certificates be revoked until a satisfactory resolution was reached between all the concerned parties. By Order No. PSC-99-2254-PCO-WS, issued November 18,

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DÓCKET NO. 990080-WS  
DATE: May 25, 2000

1999, the Commission acknowledged the Office of the Public Council's (OPC) intervention in this docket.

By Proposed Agency Action (PAA) Order No. PSC-00-0259-PAA-WS, issued February 8, 2000, the Commission adjusted rates, established a new class of service, authorized the collection of meter charges for irrigation, denied the request that the utility not be allowed to charge for service pending a resolution of the matter, and denied the request to revoke Shangri-La's certificates. On February 29, 2000, OPC timely filed a Petition on Proposed Agency Action and Objection to Proposed Agency Action.

By Order No. PSC-00-0629-PCO-WS, issued April 3, 2000, this matter was scheduled for an administrative hearing and controlling dates were established. However, on April 10, 2000, Shangri-La filed a Motion for Reconsideration of Order No. PSC-00-0629-PCO-WS and to Establish the Burden of Proof. OPC filed its timely Response on April 24, 2000. Shangri-La's Motion and OPC's response are the subjects of this recommendation.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should Shangri-La's request for oral argument be granted?

**RECOMMENDATION:** Staff recommends that it is unnecessary to rule upon the request for oral argument because interested persons may speak on this item at the agenda conference since this matter has not been to hearing. (VAN LEUVEN)

**STAFF ANALYSIS:** Rule 25-22.0376(5), Florida Administrative Code, states that "Oral argument on any motion filed pursuant to this rule may be granted at the discretion of the Commission. A party who fails to file a written response to a point on reconsideration shall be precluded from responding to that point during oral argument." Pursuant to this rule, Shangri-La has requested oral argument on the issue of burden of proof. Shangri-La's motion states that oral argument on the burden of proof issue would be helpful because the Commission has struggled in the past with the question of who has the ultimate burden of proof when customers initiate a proceeding and seek affirmative relief.

In response, OPC states that if the Commission adopts a stipulation on the order of testimony and defers a ruling on the burden of proof until the end of the proceeding, oral argument on the motion would be unnecessary and inappropriate.

Staff recommends that it is unnecessary to rule upon Shangri-La's request for oral argument because interested persons may participate at the agenda conference since this matter has not been to a hearing. Therefore, Shangri-La and OPC should be permitted to address the Commission during the course of discussion on this item at the agenda conference.

**ISSUE 2:** Should Shangri-La's Motion for Reconsideration of Order No. PSC-00-0629-PCO-WS and to Establish Burden of Proof be granted?

**RECOMMENDATION:** Staff recommends that it is unnecessary to rule upon the reconsideration portion of Shangri-La's Motion for Reconsideration of Order No. PSC-00-0629-PCO-WS and to Establish Burden of Proof because the parties are in agreement as to who should file testimony first. Therefore, staff recommends that Order No. PSC-00-0629-PCO-WS should be modified to reflect that OPC will file its testimony first. Staff recommends that Shangri-La's request to establish the burden should be denied. In addition, staff recommends that the ultimate burden of proof rests with the utility. (VAN LEUVEN)

**STAFF ANALYSIS:** On April 10, 2000, pursuant to Rule 25-22.0376, Florida Administrative Code, Shangri-La filed its timely Motion for Reconsideration of Order No. PSC-00-0629-PCO-WS and to Establish Burden of Proof. On April 24, 2000, OPC timely filed its Response to Motion for Reconsideration.

Rule 22-25.0376, Florida Administrative Code, permits a party who is adversely affected by an order issued by a Prehearing Officer to file a motion for reconsideration of that order. The purpose of a motion for reconsideration is to bring to the attention of the Commission some point of law or fact which it overlooked or failed to consider when it rendered its order. Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962); Pingtree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). The granting of a motion for reconsideration should not be 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. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

#### Order of Testimony

Shangri-La requests that the complainants be required to present their testimony first instead of Shangri-La. In addition, Shangri-La states that the Order Establishing Procedure has erroneously listed the Complainants as intervenors in this matter.

In OPC's response, it states that the "Citizens voluntarily agree to 'trade places' with the utility for the purposes of providing testimony."

Therefore, staff recommends that since the parties are in agreement as to the order of testimony, OPC should file its testimony first, and the Order Establishing Procedure should be modified to reflect the following changes.

- 1) OPC's direct testimony and exhibits August 11, 2000
- 2) Utility's direct testimony and exhibits September 11, 2000

Burden of Proof

Shangri-La states that the complainants carry the initial burden of proof and must make an initial showing before Shangri-La has to go forward with its evidence. In support of its position, Shangri-La cites to Metropolitan Dade County Water and Sewer Board v. Community Utilities Corporation, 200 So.2d 831 (Fla. 3d DCA 1967) and In re: Complaint of Hugh Keith against Beverly Beach Enterprises, Inc. for overcharge of contributions-in-aid-construction in Flagler County, Order No. 22605, issued February 26, 1999, in Docket No. 890450-WS.

In Metropolitan Dade County Water and Sewer Board, 200 So.2d 831 (Fla. 3d DCA 1967), the Court affirmed the trial court's order quashing an order of the county's water and sewer board requiring Community Utility Corporation to reduce its rates. In affirming, the Court quoted the trial judge as saying "The . . . Board, as the initiator of these proceedings was the complainant, and as the complainant it should have carried the initial burden of proof to establish the unreasonableness of the rates." Furthermore, the Court found that there is no presumption that a public utility's rates are unreasonable but rather there is a presumption that its rates are reasonable. Therefore, Shangri-La argues that "merely because the Complainants raise rate issues [it] does not shift the initial burden to Shangri-La."

Next, Shangri-La analogizes its case to that of In re: Complaint of Hugh Keith against Beverly Beach Enterprises, Inc. for overcharge of contributions-in-aid-construction in Flagler County, Order No. 22605, issued February 26, 1999, in Docket No. 890450-WS, because that case involved a customer who complained that he had paid too much contributions-in-aid-of-construction. In In re: Complaint of Hugh Keith, the complainant was required to file his testimony before the utility. Additionally, the Commission cited to Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981) and Balino v. Department of

Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977), in finding that it is a well established administrative law principle that the burden of proof is on the party asserting the affirmative of an issue. Therefore, Shangri-La asserts that it has no burden of proof because it has not asserted the affirmative of any issues in this proceeding. Furthermore, Shangri-La states that the complainants have the ultimate burden of proof because they have asserted that Shangri-La is imposing unfair rates and charges.

In response to Shangri-La's motion, OPC states that the Commission does not need to consider the ultimate burden of proof at this time because "a preliminary decision of the burden of proof is only necessary as that decision may bear on the order of testimony." OPC reasons that if the order of testimony is resolved amicably, the Commission needs not consider the ultimate burden of proof until the end of the proceeding when it is more appropriate.

In addressing the burden of proof issue, it is first important to note that

The term 'burden of proof' has two distinct meanings. By one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in a sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 787 (Fla. 1st DCA 1981).

In its motion, Shangri-La is asking that the initial burden of producing evidence be put upon the complainants by requiring the complainants to present their evidence first. Staff sees no need to address the issue of who has the duty of producing evidence first because, as previously noted, the parties are in agreement that OPC should file its testimony first.

However, as previously discussed, the utility has requested that the ultimate burden of proof also be placed upon the

complainants. Staff recommends that the ultimate burden of proof rests upon the utility. Staff believes that it is appropriate to analogize this proceeding to a rate proceeding because the protested issues will have an affect upon the rates. Therefore, in this case, as in all rate proceedings, the utility has the burden of proof because a utility always has the ultimate burden of proof with regard to its rates. Order No. PSC-00-0264-FOF-WS, issued February 8, 2000, in Docket No. 971220-WS; Order No. PSC-98-1092-FOF-WS, issued August 12, 1998, in Dockets Nos. 960235-WS and 960283-WS.

In addition, the Commission has previously stated that "a regulated utility . . . has the burden of proof, that is, the ultimate burden of persuasion that it is in compliance with Commission statutes, rules, and orders." Order No. PSC-93-1386-FOF-WS, issued September 22, 1993, in Dockets Nos. 920649-WS and 930642-WS.

Therefore, given the parties' arguments and prior Commission decisions, staff recommends that Order No. PSC-00-0629-PCO-WS contains no mistake of law or fact and that the ultimate burden of proof rests with the utility.

#### Conclusion

Staff recommends that it is unnecessary to rule upon the reconsideration portion of Shangri-La's Motion for Reconsideration of Order No. PSC-00-0629-PCO-WS and to Establish Burden of Proof because the parties are in agreement as to who should file testimony first. Therefore, staff recommends that Order No. PSC-00-0629-PCO-WS should be modified to reflect that OPC will file its testimony first. Staff recommends that Shangri-La's request to establish the burden should be denied. In addition, staff recommends that the ultimate burden of proof rests with the utility.

DOCKET NO. 990080-WS

DATE: May 25, 2000

**ISSUE 3:** Should the docket be closed?

**RECOMMENDATION:** No. The docket should remain open to allow for the final disposition of this matter. (VAN LEUVEN)

**STAFF ANALYSIS:** The docket should remain open to allow for the final disposition of this matter.