

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. 160101-WS  
ORDER NO. PSC-17-0147-PCO-WS  
ISSUED: May 2, 2017

ORDER DENYING THE OFFICE OF PUBLIC COUNSEL'S  
MOTION TO STRIKE  
PORTIONS OF REBUTTAL TESTIMONY AND EXHIBITS OF PATRICK FLYNN  
AND DENYING REQUEST FOR ORAL ARGUMENT

Background

On April 20, 2017, pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), the Office of Public Counsel (OPC), filed a motion to strike portions of the rebuttal testimony and exhibits of Patrick Flynn that was filed on behalf of Utilities, Inc. of Florida (UIF). On that same date, pursuant to Rules 25-22.0022 and 25-22.0376, F.A.C., OPC filed a request for oral argument on its motion to strike. On April 25, 2017, UIF filed its response in opposition to the motion as well as its response in opposition to OPC's request for oral argument.

Rule 28-106.211, F.A.C., grants the presiding officer before whom a case is pending broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case...." Based upon this authority, and having considered the motions and responses, my findings are set forth below. See Dale v. Ford Motor Co., 409 So. 2d 232 (Fla. 1st DCA 1982)(a trial court has broad discretion to admit rebuttal testimony).

OPC's Motion to Strike and Request for Oral Argument

OPC seeks to strike portions of witness Flynn's April 3, 2017, rebuttal testimony and amended exhibits concerning cost information for certain pro forma projects. OPC's position is that its motion to strike should be granted because UIF is using rebuttal testimony to present new facts beyond the scope of UIF's or OPC's direct case. OPC argues that UIF was required to provide all the necessary information to the parties in its direct case in order to support its burden of proof for the requested pro forma projects. OPC alleges that the rebuttal testimony and amended exhibits are an untimely attempt to inject more than \$6 million in new, unsubstantiated pro forma plant cost information not included or addressed in the minimum filing requirement documents (MFRs). OPC states that this new pro forma cost information fundamentally changes UIF's rate case by increasing the requested revenue requirement by more than \$500,000 annually.

OPC further argues that its due process rights were violated because UIF failed to justify its costs in response to OPC's discovery before OPC filed its testimony, thus depriving OPC of the opportunity to thoroughly analyze and provide testimony on unsupported pro forma projects. OPC alleges that this due process violation can only be cured by a continuation of the hearing to allow additional discovery and testimony by OPC's expert witnesses. However, OPC requests that instead of rescheduling the hearing, which it believes would be administratively inefficient and costly, all the rebuttal testimony and amended exhibits identified in its motion should be struck.

As noted above, OPC filed a request for oral argument. In support of this request, OPC asserts that oral argument will assist the Commission in understanding and evaluating the Motion to Strike.

#### UIF's Response

UIF responds that witness Flynn's rebuttal testimony is in fact proper rebuttal testimony to OPC witness Woodcock's testimony that various pro forma projects were not adequately supported by documentation. UIF acknowledges that it carries the burden of proof to prove entitlement to the revenue requirement requested in the original MFRs. UIF points to several Commission orders to support its contention that the burden of proof in this rate case may be met by providing documentation subsequent to the MFRs and through the duration of the proceeding. Further, UIF affirms to the Commission that it is not requesting more revenues than those set forth in its MFRs.

UIF contends that OPC's due process rights have not been violated. UIF states that all of the pro forma projects were identified and described in witness Flynn's prefiled direct testimony; that witness Woodcock did not disagree with the prudence or necessity of any of those projects; and that the discovery process in this case is meant to refine the projects' costs, not to create new projects. UIF further asserts that there has been ample time for OPC to explore witness Flynn's rebuttal testimony through discovery. Specifically, UIF contends that most of the updated cost documentation was provided in discovery responses on January 9, 2017, February 21, 2017, and March 25, 2017 [sic],<sup>1</sup> before witness Woodcock filed his testimony. Further, UIF states that it provided additional updated documentation in discovery responses served on March 2, 2017, and to OPC informally on March 14, 2017. In addition, UIF alleges that OPC witness Woodcock visited all of the UIF systems that he wanted to visit and viewed pro forma projects between January 23 and 25, 2017, and that OPC has deposed witness Flynn extensively on the pro forma projects' documentation.

UIF notes that witness Woodcock correctly articulated the Commission's policy of considering pro forma projects based upon actual invoices and signed contracts based upon competitive bids, and that all of UIF's pro forma projects in this case meet one of those requirements. UIF also notes that witness Woodcock's testimony suggests recognizing the

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<sup>1</sup> This date appears to be a typographical error, as UIF provided discovery responses on March 2, 2017, not on March 25, 2017.

updated costs of pro forma projects that ultimately were less than the amounts shown in the MFRs, but that increased costs of pro forma projects should not be recognized. UIF alleges that witness Woodcock indicated that he was not going to review documentation for pro forma projects he had excluded from his schedule of acceptable projects in his prefiled testimony. UIF concludes that there is no legal basis for striking any of witness Flynn's rebuttal testimony.

With respect to OPC's request for oral argument, UIF states that oral argument is not necessary because the Commission on numerous occasions has addressed the same due process claims and related requests to strike rebuttal testimony as raised in OPC's motion to strike. If oral argument is allowed, UIF requests that it be granted \$3,600 in rate case expense to be added to what it previously requested because OPC's Motion to Strike and Summertree Water Alliance's Motion to Intervene were not contemplated when UIF filed its estimate of future legal rate case expense.

### Analysis and Ruling

#### OPC's Request for Oral Argument on Motion to Strike

Rule 25-22.0022(1), F.A.C., provides that oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested. The request must state with particularity why oral argument would aid the Prehearing Officer in understanding and evaluating the issues to be decided.

Although OPC properly filed its request for oral argument concurrently with its motion to strike, I find that the pleadings are clear on their face and, therefore, oral argument is unnecessary for the disposition of this matter. On the basis of the foregoing, the request for oral argument is denied.

#### OPC's Motion to Strike

Upon review of OPC's motion to strike and UIF's response, I find UIF's arguments more persuasive. The rebuttal testimony and amended exhibits offered by witness Flynn comport with the definition of rebuttal testimony as described by the Federal Courts and adopted by this Commission:

It is well settled that the purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party" and if the defendant opens the door to the line of testimony, he cannot successfully object to the prosecution "accepting the challenge and attempting to rebut the presumption asserted."

United States v. Delk, 586 F.2d 513, 516 (5th Cir. 1978), quoting Luttrell v. United States, 320 F.2d 462, 464 (5th Cir. 1963); Order No. PSC-11-0203-PCO-GU, issued April 22, 2011, in Docket No.090539-GU, In re: Petition for Approval of Special Gas Service Agreement by Miami-Dade County; 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. Witness Flynn's rebuttal testimony states, in part, that its purpose is to respond to the direct testimony of OPC witness Woodcock with regard to the pro forma projects. Witness Flynn's testimony explains the status of the projects and discusses the justification for additional costs, as supported by amended exhibits. Witness Flynn also explains why he either has no disagreement or disagrees with witness Woodcock's testimony on certain points. Thus, witness Flynn's rebuttal testimony was properly proffered for the specific purpose of rebutting witness Woodcock's direct testimony.

In ruling on OPC's motion to strike, there are several important statutory requirements to consider. In this administrative proceeding held under Sections 120.569 and 120.57(1), Florida Statutes (F.S.), all parties must be given an opportunity to respond, to present evidence and argument on all issues involved, and to conduct cross-examination and submit rebuttal evidence. Section 120.57(1)(b), F.S. Irrelevant, immaterial, or unduly repetitious evidence must be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in Florida courts. Section 120.569(2)(g), F.S. Further, in every water and wastewater rate proceeding, the Commission is required to consider utility property, including land acquired or facilities to be constructed within a reasonable time in the future, not to exceed 24 months after the end of the historic base year used to set final rates unless a longer period is approved by the Commission, as set forth in Section 367.081(2)(a)2, F.S. It is established law that the Commission cannot ignore an existing fact that admittedly will affect the future rates. Gulf Power Company v. Bevis, 289 So. 2d 401, 404 (Fla. 1974).

With the above concepts in mind, the Commission routinely considers updated cost information on pro forma projects included in water and wastewater MFRs. E.g. 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. (Commission denied OPC's motion to strike portions of WMSI's rebuttal testimony); see also 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 (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). 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.

The updated cost data provided by UIF to support pro forma plant identified in the MFRs is not out of the ordinary. Updated cost data of this type is to be distinguished, however, from those cases where a utility seeks to fundamentally change its rate case by correcting what appear to be material errors in the utility's 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 (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). Although not addressed in witness Flynn's rebuttal testimony, UIF has represented in its Response to the Motion to Strike that it is not requesting an increase in its revenue requirement.

I further find that OPC's due process rights have not been violated. The Motion to Strike shows that OPC has engaged in discovery on the pro forma projects' cost support beginning on September 16, 2016, just 16 days after UIF made its original MFR filing; that UIF supplemented witness Flynn's direct testimony and exhibits on October 31, 2016, in response to Staff's deficiency letter; and that additional information was provided, some in response to additional discovery, on February 6, 2017, and March 2, 2017. Witness Woodcocks' testimony was filed on March 6, 2017, and witness Flynn's rebuttal testimony and amended exhibits were filed on April 3, 2017. Discovery by the parties continued through the end of April, 2017, giving OPC additional time to determine the reasonableness of the updated pro form project costs. It would be premature and contrary to Gulf Power Company v. Bevis to broadly disallow all cost information provided after the filing of the MFRs, with no consideration of existing facts that will affect the future rates. At hearing, the testimony of all witnesses will be subject to specific objection and cross examination, and the Commission will give the testimony of both witnesses Flynn and Woodcock the weight it is due. Accordingly, OPC's Motion to Strike Portions of Rebuttal Testimony and Exhibits of Patrick Flynn is hereby denied.

Based on the foregoing, it is

ORDERED by Commissioner Ronald A. Brisé, as Prehearing Officer, that OPC's Request for Oral Argument on its Motion to Strike Portions of Rebuttal Testimony and Exhibits is denied, as set forth herein. It is further

ORDERED that OPC's Motion to Strike Portions of Rebuttal Testimony and Exhibits of Patrick Flynn is denied, as set forth herein. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect.

By ORDER of Commissioner Ronald A. Brisé, as Prehearing Officer, this 2nd day  
of May, 2017.



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

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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.

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) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) 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. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. 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.