

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-17-0243-FOF-WS
ISSUED: June 23, 2017

The following Commissioners participated in the disposition of this matter:

JULIE I. BROWN, Chairman
ART GRAHAM
RONALD A. BRISÉ
JIMMY PATRONIS
DONALD J. POLMANN

ORDER GRANTING REQUEST FOR ORAL ARGUMENT
AND DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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 its Motion for Reconsideration of Order No. PSC-17-0147-PCO-WS (Motion for Reconsideration). Along with the Motion for Reconsideration, OPC filed a Request for Oral Argument. 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.).

The technical hearing for this docket was held on May 8-10, 2017. This motion was heard by the full Commission on June 5, 2017, during which, we denied OPC's Motion for Reconsideration after hearing oral argument from OPC and UIF. We will consider the remaining issues at the Special Agenda on August 3, 2017

We have jurisdiction pursuant to Chapter 367, Florida Statutes (F.S.), and Rule 25-22.060, F.A.C.

MOTION FOR RECONSIDERATION

Standard of Review

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 Argument

OPC contended that its Motion for Reconsideration met the standard for reconsideration by identifying six errors of fact or law that it believed were fundamental and cumulatively constitute an error of law resulting in a violation of its due process rights. OPC alleged that violation of its due process rights included 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 argued 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, in 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, in 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 overlooked 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 were violated by the failure to afford it a reasonable opportunity to provide responsive expert testimony on the information to which it objects.

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

OPC argued 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 stated “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 contended 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 also stated that this was a case of first impression and had 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 argued that OPC’s Motion for Reconsideration did 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 maintained that OPC was not arguing facts or law that were overlooked but devoted its entire argument to attempting to distinguish the prior Commission orders cited in the Order Denying the Motion to Strike.

UIF alleged 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 argued that a party cannot claim a due process violation it had caused. UIF contended 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 pointed 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 acknowledged 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 stated 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 further stated 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 asserted that if OPC had filed its Motion to Strike earlier, it would have had the opportunity to file supplemental testimony.

UIF maintained 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; therefore, witness Woodcock had the opportunity to visit all of UIF's systems, and witness Woodcock did not question the reasonableness or prudence of any project. UIF stated 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 alleged that OPC incorrectly stated that Mr. Woodcock only had four days to review documents provided after-hours on March 2, 2017, before he filed his March 6, 2017, testimony. UIF contended 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 contended was sufficient time "to focus on the significant ones."

UIF reaffirmed that it was not requesting more than the proposed revenue requirement requested in its MFRs. UIF pointed 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 this 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 contended that this 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.

Analysis

The six alleged errors raised by OPC in its Motion for Reconsideration are addressed below.

Alleged Error 1

OPC argued 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 essentially made the same argument in its Motion to Strike, alleging 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 argued 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 argued that Mr. Flynn's rebuttal testimony filed April 3, 2017, was actually direct testimony raising supplemented and new information. Again, OPC essentially reargued 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 for OPC to reargue matters that have already been considered in a motion for reconsideration. Sherwood, 111 So. 2d at 98.

Alleged Error 3

OPC further argued 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 made 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 asserted 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 it characterized its argument as a legal or factual error, a close look at OPC's argument shows that OPC was 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 illustrated that this 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 recognized, this Commission's consideration of updated cost information that was 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 argued 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), applied or governed 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.

We agree 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 this 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 [emphasis added].

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, this 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 reaffirmed that it was not requesting an increase to its proposed revenue requirement.

Alleged Error 6

OPC's final argument was that the Order Denying the Motion to Strike overlooked 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 were 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 rested 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 were 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 proceedings before this Commission, 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 argued. 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 was 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 this 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, or a revenue requirement higher than originally filed.

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, OPC's Motion for Reconsideration is denied, as it did not meet the required standard for granting the motion.

Based on the foregoing, it is

ORDERED that the Office of Public Counsel's Motion for Reconsideration is hereby denied for the reasons stated above. It is further

ORDERED that this docket shall remain open pending the resolution of the underlying issues in this proceeding.

By ORDER of the Florida Public Service Commission this 23rd day of June, 2017.


CARLOTTA S. STAUFFER
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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.

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 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.