

JAMES E. "JIM" KING, JR.

PRESIDENT



Charles J. Beck
Interim
Public Counsel

ORIGINAL

JOHNNIE BYRD

SPEAKER



STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

c/o THE FLORIDA LEGISLATURE
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July 9, 2003

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

JUL -9 AM 11:27
COMMISSION CLERK
FPSC

RE: Docket No. 020010-WS

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Citizens' Response to L.P. Utilities, Inc.'s Motion to Strike Portion of Public Counsel's Post-Hearing Statement for filing in the above-referenced docket.

Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Stephen C. Burgess
Deputy Public Counsel

SCB/dsb
Enclosures

- AUS _____
- CAF _____
- OMP _____
- COM 3
- CTR _____
- ECR _____
- GCL _____
- OPC _____
- MMS _____
- SEC 1
- OTH _____

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
06071 JUL -9 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for staff-)
assisted rate case in Highlands)
County by The Woodlands of Lake)
Placid, L.P.)
_____)

DOCKET NO. 020010-WS
FILED: July 9, 2003

**CITIZENS' RESPONSE TO L.P. UTILITIES, INC.'S
MOTION TO STRIKE PORTION OF PUBLIC COUNSEL'S
POST-HEARING STATEMENT**

The Citizens of the State of Florida, through their attorney, the Public Counsel, pursuant to Rule 28-106-204, Florida Administrative Code, hereby file this response to L.P. Utilities, Inc.'s Motion to Strike Portion of Public Counsel's Post-Hearing Statement. The Citizens submit:

1. By its motion, L.P. Utilities seeks to strike two issues that were raised by utility customers at the customer service hearing. The utility argues that its due process rights are violated by allowing the two issues to be considered by the Commission. The glaring omission in L.P.'s argument is its failure to consider any due process for the customers.

2. Because they must pay the rates, it is axiomatic that the customers are directly affected by any result of the hearing in question. Historically, the Commission has always shown concern for the customers' specific interest by allowing customers to testify in rate cases. The instant case is consistent with this longstanding practice. The Commission specified a time during which it would receive customer testimony and gave unequivocal notice of its intent. On April 25, 2003, the Commission issued a document titled in bold print as "NOTICE OF HEARING." The Notice began with a statement of the subject of the hearing:

DOCUMENT NUMBER DATE
06071 JUL -98
FPSC-COMMISSION CLERK

NOTICE IS HEREBY GIVEN that a hearing will be held before the Florida Public Service Commission regarding the application of The Woodlands of Lake Placid, L.P. for an increase in water and wastewater rates in Highlands County. . . .

The Notice then explicitly stated that “[c]ustomers would be given the opportunity to present testimony. . . .” The Notice neither states nor implies that the customer testimony would be restricted in any way.

3. Although the Notice does restrict the testimony of the parties to “evidence on the issues identified by the parties at the prehearing conference,” it explicitly differentiates between party testimony and customer testimony, as follows:

By providing customer testimony, a person does not become a party to the proceeding.

The Notice then states that “[a]ll witnesses shall be subject to cross-examination at the conclusion of their testimony.” At the hearing, Mr. Friedman was given full opportunity to cross-examine on the issues in question, but chose not to avail himself of that opportunity.

4. As legal authority for its motion to strike, L.P. Utilities relies on Epic Metals Corporation v. Samari Lake East Condominium Association, Inc., 547 So.2d 198 (Fla. 3d DCA 1989). The utility’s reliance, however, is misplaced. The language used by the court in the Epic Metal case totally undermines the very premise of L.P. Utilities’ argument. The court stated:

A trial court violates a litigant’s due process rights when it expands the scope of a hearing to address and determine matters not noticed for hearing.
[Emphasis added]
[Id.]

As fully detailed in paragraph 3., above, the Notice of Hearing in this case:

1. described the purpose of the hearing to consider the petition for an increase in water and wastewater rates;
2. explicitly authorized customer testimony;

3. explicitly limited party testimony to prehearing issues, but placed no similar restriction on customer testimony.

The conduct of the hearing was perfectly consistent with the Notice of Hearing. Under the very language quoted by L.P. Utilities, therefore, the Epic Metals case supports the Commission practice.

5. It has always been the Commission practice to allow customer testimony and to consider the effect of that testimony on rate issues. It has also been the Commission practice to ensure that a utility has ample opportunity to address any issues raised by the customer testimony. To this end, the Commission variously allows cross-examination, rebuttal testimony and/or late-filed exhibits (as in the case of customer complaints). In the instant case, Chairman Deason first assured Mr. Friedman that the Commission would entertain any reasonable means for the utility to respond to customer issues, stating:

“[E]ven if it means delaying a decision and giving you the opportunity to present some type of rebuttal testimony.”

[T. 12 (First Service Hearing)]

Chairman Deason left to Mr. Friedman the discretion to choose which procedural device(s) to employ and to request in a timely fashion:

“I will give you the latitude that if new matters come up that you feel that you need to address in some manner to either request that you recall one of your witnesses to address that in some manner. And I will leave that to your discretion to request that if you see fit.”

[T. 5 (Second Service Hearing)]

The utility, however, freely made the choice not to avail itself of any of the due process safeguards offered by the Commission.

6. While rejecting all other opportunities to address the issues in question, the utility stubbornly clung to the excuse that it was not adequately prepared to cross-examine. This excuse is disingenuous. Any inadequacy in the utility's preparation was entirely of its own making. Paragraphs 7 and 8 explain why the utility simply squandered the ample opportunity to prepare.

7. In most cases, the majority of customer testimony is new information to all parties, including the Public Counsel. Although the Public Counsel communicates with customer groups, it is impossible to know what every customer intends to say. As a result, all parties usually enter the hearing without any advance notice of customer testimony. In the instant case, on the other hand, the utility was given extensive notice. On May 5, more than three weeks before the hearing, the OPC described in detail: (a) the new information to which the customers intended to testify; and (b) the issues to which that information related. While Chairman Deason did not add new issues to the Prehearing Order, he informed Mr. Friedman that the customers would be allowed to testify, subject to a renewal of the objection:

COMMISSIONER DEASON: Well, let me tell you what my main concern is an what I'm going to preserve to the extent that I can, and that is the ability for customers to appear at the customer phase of the hearing and to present their positions on this case, and I'm going to allow that.

At the point that there is a customer or customers who wish to address this particular issue, Mr. Friedman, that could be subject to objection at the time that testimony is attempted to be made. (Page 16 at lines 8-16)

Under such circumstances, an advocate can prepare to both renew the objection and to cross-examine in the event the objection is unsuccessful. That the utility chose not to prepare for both possibilities does not mean there was not opportunity to do so.

8. The issues that were “raised” by the customer testimony actually had already been addressed by the utility for the PAA. Further, both issues involved factual elements which have always been within the utility’s direct sphere of control. The first issue questioned the number of lots which are rentable by Highvest. All relevant information is known by both Highvest (a party) and the utility. In fact, the utility had already provided just such a lot count for the PAA. [Order No. PSC-02-1739-PAA-WS, at p. 21]. The second issue involved the terms of the transaction through which “Water Plant No. 1” was conveyed to the utility. Since Mr. Lovelette, as president of the POA, made the quitclaim conveyance of the property to the utility which he runs, then he obviously is aware of all factual information relevant to this issue. Just as the first customer issue, this second issue had already been addressed directly by the utility for the PAA. [Order No. PSC-02-1739-PAA-WS, at p. 17]. Under all of these circumstances, three weeks was clearly enough time for the utility to prepare rebuttal and/or cross-examination. That the utility chose to claim it could not adequately prepare is simply an insult to the Commission’s effort to provide for a fair hearing to all affected persons.

9. A recap of this pleading reveals:

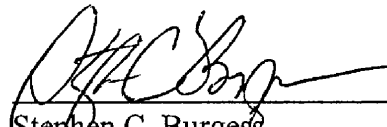
- (a) The Commission’s Notice of Hearing explicitly allowed for customer testimony.
- (b) The Notice of Hearing differentiated between customer testimony and party testimony.
- (c) The Notice of Hearing restricted the party testimony to the issues which the parties had defined in the Prehearing Order, but it did not restrict the customer testimony.
- (d) At the Prehearing Conference, more than three weeks before the hearing, two customer issues were identified and described.
- (e) Both customer issues had already been addressed by the utility for the PAA, and both involved only facts that were already known to the utility.

- (f) The prehearing officer informed the utility of his intention to allow the customer testimony at the hearing.
- (g) At the hearing, the Commission admitted the testimony and informed the utility that the Commission would entertain a request for any reasonable (and timely) means through which the utility could address the customer issues.
- (h) The utility chose not to cross-examine or request rebuttal testimony and instead argued the Commission unfairly ignored the utility's due process rights.

It is abundantly clear that the Commission has carefully observed and safeguarded the utility's due process rights throughout this hearing.

WHEREFORE, the Citizens of the State of Florida, respectfully request the Public Service Commission to deny L.P. Utilities, Inc.'s Motion to Strike Portion of Public Counsel's Post-Hearing Statement.

Respectfully submitted,



Stephen C. Burgess
Deputy Public Counsel

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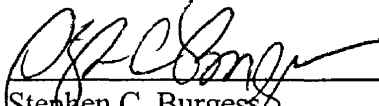
Attorneys for the Citizens of the
State of Florida

**CERTIFICATE OF SERVICE
DOCKET NO. 020010-WS**

I HEREBY CERTIFY that a true and exact copy of the above and foregoing Citizens' Response to L.P. Utilities, Inc.'s Motion to Strike Portion of Public Counsel's Post-Hearing Statement has been furnished by hand delivery* or U.S. Mail to the following parties of record this 9th day of July, 2003.

Lawrence Harris, Esquire*
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