

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of ATLANTIC UTILITIES)	DOCKET NO. 870249-WS
OF JACKSONVILLE, INC. for rate increase)	ORDER NO. 20861
in Duval County.)	ISSUED: 3-7-89

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD
JOHN T. HERNDON

ORDER DENYING MOTION FOR
RECONSIDERATION AND REQUEST FOR HEARING

BY THE COMMISSION:

On December 15, 1988, we issued Order No. 20464 ("corrective order"), in which we corrected, on our own motion, our calculation error contained in Order No. 20063 ("original order"), issued September 23, 1988. The Office of Public Counsel ("OPC") filed a timely Motion for Reconsideration of Order No. 20464. On January 11, 1989, Atlantic Utilities of Jacksonville, Inc. ("utility") filed its timely response.

OPC seeks to have us rescind our corrective order, alleging that the Commission did not have authority to reconsider its final order after the time for appeal had passed, relying on the case of Mills v. Laris Painting Co., 125 So.2d 745 (Fla. 1960). OPC does not believe that Reedy Creek Utilities v. Florida Public Service Commission, 418 So.2d 248 is applicable. In that case, the Supreme Court upheld the Commission's correction of an order two and one-half months after it had been issued. OPC states that Reedy Creek is distinguishable because the facts are different than the facts in this case, with the critical difference here being OPC's belief that the staff was acting on behalf of a party outside the prescribed avenues for requesting reconsideration by a party. OPC further states it was prejudiced because if the utility had filed for reconsideration, it would have had the opportunity to file a response and a separate cross-motion for reconsideration.

OPC further states that neither the staff recommendation or the corrective order contain sufficient information for it to properly evaluate whether there really was an error.

In the alternative, OPC requests that the Commission hold an evidentiary hearing on two issues: whether there was an error in the final order and whether the staff was acting on behalf of the utility in bringing its recommendation for correction to the Commission.

On December 30, 1988, OPC made a public records request and on January 10, 1989, OPC was given copies of work papers and correspondence from the utility regarding the error.

The utility, in its response to OPC's Motion and Request, stated that OPC's motion does not conform to the purpose for which a motion for reconsideration is appropriate, since the motion does not state with particularity the points of law or fact that the Commission has overlooked or misapprehended. OPC's only allegation is that it does not know whether the Commission's action taken in the corrective order is properly based on an error in the Commission's final order. The utility also alleges that OPC knew of the alleged error at least from

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the date of the first agenda conference on it and apparently made no attempt to verify the nature of the error stated in the recommendation or final order, or have found no error in staff's recommendation or the corrective order.

Regarding the request for hearing, the utility states that OPC did not allege any issues of material fact, which it must do to be entitled to a hearing on an agency's actions. The utility further states that OPC bases its right to a hearing on the Reedy Creek case, but in that case an issue of material fact was raised.

The utility also states that as a result of OPC's motion, the utility will and has incurred additional legal expenses, and if OPC's request for hearing is granted, additional rate case costs will be incurred.

The utility also argues that OPC has mischaracterized the Commission's action and case law. OPC states in its motion that the Commission's decision raises rates paid by the customers by more than an additional \$7,000 per year. The utility states this is contrary to the wording of the order, since there was no revenue increase resulting from the Commission's action. The correction simply insured that the utility is provided the opportunity to generate the revenues authorized in the final order.

The utility argues against OPC's contention that the staff acted on behalf of the utility, stating it is also contrary to the wording of the corrective order. The utility states "While the utility may have helped in bringing the error to the attention of the Commission and its staff, the staff and the Commission, acting on their own motion, in conformance with long-standing Commission policy, chose to correct this error."

Finally, the utility posits that OPC's reliance on the Mills case in arguing the Commission could not correct its order in this case is incorrect. Both the Reedy Creek case and the case of Taylor v. Department of Professional Regulation, 520 So.2d 557 (Fla. 1988) established that an agency has inherent power to correct mistakes brought about by inadvertence or clerical error. In both cases, the corrective order was issued by the agency after the time for appeal had run. Under the Taylor case, if the utility had chosen to file something with the Commission, it would have been a motion to alter or amend, not for reconsideration, thus OPC was in no way precluded from filing a Motion for Reconsideration according to the utility.

Upon consideration, we find that the Motion for Reconsideration should be denied. In Order No. 20464, we corrected an error which occurred in our calculation of the final rates for this utility. The error consisted of our adding, rather than subtracting, revenues from partial bills. Thus, the rates shown in Order No. 20063, when multiplied by the number of customers, did not equal the revenue requirements we approved in Order No. 20063.

Specific rate levels are matters which are generally not at issue for OPC. In this proceeding, OPC took no position on Issue No. 50, which was the issue in the Prehearing Order regarding the appropriate water and sewer rates. OPC did not address the issue in its Post Hearing Brief.

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Rule 25-22.036(5)(b)(3), Florida Administrative Code, states in pertinent part, that "Unless a matter is not at issue for that party, a party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order . . . the party may maintain 'no position at this time' prior to hearing and thereafter identify his or her position in a post-hearing statement of issues." Since the matter was not at issue for OPC and since OPC took no position on it during the proceeding or in its brief, we do not believe it is appropriate to permit OPC to be granted reconsideration on the issue of specific rate levels.

Further, we believe our action taken in Order No. 20464 to correct our error was done properly and was within our jurisdiction to do so. As we stated in Order No. 20464, it is this Commission's long-standing policy to encourage our staff to bring errors to us for correction. In this instance, apparently the utility noticed the error in the final rates set forth in Order No. 20063 and telephoned staff on September 29, 1988. This was followed with a letter and workpapers on the 30th. This occurred well-within the "reconsideration period," so it is not as if the utility disagreed with the order but missed the reconsideration period. We do not believe that OPC was prejudiced in this matter. Staff was not acting on behalf of the company, but on behalf of the public interest and Commission policy to have errors corrected when possible, so that, in this instance, the intent of the Commission's decision to allow the company the opportunity to achieve a lawfully found revenue requirement could be accomplished.

We do not believe that the Reedy Creek case is inapplicable in this situation. In that case the Supreme Court stated:

The Commission is charged with the statutory duty of regulating and supervising public utilities with respect to their rates. When the Commission determined that it had erred to the detriment of the using public, it had the inherent power and statutory duty to amend its order to protect the customer.

We do not believe that such inherent power and statutory duty to correct an error stops when the correction "benefits" the utility. It is not really a benefit because the correction did not give the utility anything more than what was established in the original order, that is, the revenue requirements for the water and sewer divisions were not changed. The rates, which were incorrectly calculated, were corrected so that the utility would have the opportunity to achieve those revenue requirements.

Finally, we also deny the request for hearing on the two points OPC sought: whether there was an error in the original order and whether staff was acting on behalf of the utility. Staff informs us that after OPC reviewed the documents it received from staff, it concurred with the calculation of the adjustment, although it believed the adjustment resulted in twice the revenue impact that staff indicated and that the Commission did not have the jurisdiction to make the correction. It appears the first question has been resolved and that the second question is not material to the substance of the correction.

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PETITION FOR DECLARATORY AND RATE RELIEF

On December 5, 1988, the utility filed a Notice of Compliance with Certain Provisions of Order No. 20063 and a Petition for Declaratory and Rate Relief (Petition). In the Petition, the utility sought further proceedings in which to address recognition of depreciation and a return on the capital improvements it needs to make in response to Order No. 20063.

OPC filed a timely answer opposing the utility's Petition. By Notice dated December 29, 1988, the utility withdrew its Petition, indicating it had reassessed its circumstances and may address the matters contained in the Petition at some future time. We hereby acknowledge the utility's withdrawal of its Petition.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Reconsideration and Request for Hearing, filed by the Office of Public Counsel, is hereby denied.

By ORDER of the Florida Public Service Commission,
this 7th day of MARCH, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

NSD

by: Kay Hlyon
Chief, Bureau of Records

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting 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.