

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for review of service availability charges in Highlands County by PLACID LAKES UTILITIES, INC.) DOCKET NO. 920118-WU) ORDER NO. PSC-93-0043-PCO-WU) ISSUED: 01/11/93)))

ORDER DENYING IN PART MOTION FOR RECONSIDERATION OF ORDER NO. PSC-92-0869-PCO-WU AND DENYING ORAL ARGUMENT

Order No. PSC-92-0869-PCO-WS, issued August 25, 1992, is the Order Establishing Procedure in this Docket. On August 31, 1992, Placid Lakes Utilities, Inc. (Placid Lakes or the Utility), filed a Motion for Reconsideration of that Order and a Motion for Oral Argument.

In its Motion, the Utility argues that it should not be required to file its testimony first because, in a show cause proceeding, the Commission staff has the burden of proof. The Utility also states that it received the Order only three days prior to its testimony being due. Therefore, the Utility requests that the dates for prefiling testimony be rescheduled. In addition, the Utility argues that the noticing requirements of Rule 25-22.0406(7), Florida Administrative Code, are not required because this is not a rate proceeding.

1. Motion for Oral Argument Denied

Upon consideration, the Prehearing Officer finds it appropriate to deny the Utility's Motion for Oral Argument because the Utility's pleading sufficiently sets out its position and, therefore, oral argument is not necessary.

2. Motion for Reconsideration as to Burden of Proof Denied

Upon review of the cases cited by the Utility, the Motion for Reconsideration is denied.

The Utility's argument that the Commission Staff has the burden of proof is not persuasive. As a regulated utility, Placid Lakes has the burden of proof, that is, the ultimate burden of persuasion that it is in compliance with Commission statutes, rules, and orders.

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As the agency regulating this public utility, the Commission is not in the same posture as an adversarial party in a civil court proceeding against this utility. In this administrative context, the relationship of the Commission with this regulated utility is different because public utilities are granted the privilege to operate on the basis that they will do so within the public interest. The Commission must regulate such utilities to assure that they continue to do so.

In his Administrative Law Treatise, Kenneth Culp Davis, a Professor of Law at the University of San Diego, discusses the case law regarding burden of proof and, specifically, Environmental Defense Fund, Inc. v. Environmental Protection Agency, 548 F.2d 998 (D.C. Cir. 1976), cert. denied 431 U.S. 925 (1977). In that case, an order of the Environmental Protection Agency (EPA) suspended the registration of two pesticides except for limited minor uses. To support its challenge of the suspension order, the manufacturer (and the Secretary of Agriculture) argued that Section 556(d) of the federal Administrative Procedures Act (APA) allocated the burden of proof to the proponent of an order.

The court held that Section 556(d) of the APA "allocates the burden of going forward rather than the burden of ultimate persuasion. . . ." 548 F.2d at 1004. The court stated that the Federal Insecticide, Fungicide and Rodenticide Act put the burden of establishing a product's safety on the registrant, and the EPA regulation regarding the burden of proof in suspension proceedings provides:

At the hearing, the proponent of suspension shall have the burden of going forward to present an affirmative case for the suspension. However, the ultimate burden of persuasion shall rest with the proponent of the registration. 40 C.F.R. Section 164.121(g) (1975)

Section 367.011(3), Florida Statutes, declares that the regulation of utilities is in the public interest and that Chapter 367 is an exercise of the police power of the state for the protection of the public health, safety and welfare. Section 367.111(2), Florida Statutes, requires utilities to provide safe, efficient and sufficient service. Therefore, the ultimate burden of persuasion that its operation is in the public interest must be the regulated utility's.

Based on the foregoing, it is appropriate in a show cause proceeding for a public utility to have the burden of proof that it is, in fact, operating within the public interest which, of necessity, includes operating in compliance with the Commission's statutes, rules and orders.

The Utility has been placed on notice of the allegations against it in the show cause Order No. PSC-92-0632-FOF-WU and it may address these allegations in its prefiled direct testimony. The Commission Staff will then have an opportunity to fulfill its burden of "going forward" by filing Staff testimony supporting the allegations in the show cause order. The Utility will have, at that point, the opportunity to file rebuttal testimony to any testimony filed by the Staff.

Based on the foregoing, Placid Lakes' Motion for Reconsideration on the burden of proof is hereby denied.

3. Motion for Reconsideration Granted as to
Additional Time for Utility to File Testimony

Based upon the Utility's assertion that it received Order No. PSC-92-0869-PCO-WU three days prior to the due date for filing its direct testimony in this proceeding, the Prehearing Officer finds it appropriate to grant the Utility's request that the dates for pre-filing testimony be rescheduled. Therefore, this Commission will reschedule the key activities in this matter as follows:

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| 1) Utility's direct testimony and exhibits | February 15, 1993 |
| 2) Staff's direct testimony and exhibits | March 30, 1993 |
| 3) Utility's rebuttal testimony and exhibits | April 23, 1993 |
| 4) Prehearing Statements | May 1, 1993 |
| 5) Prehearing Conference | May 17, 1993 |
| 6) Hearing at a time and location to be determined | May 27 and 28, 1993 |

4. Motion for Reconsideration Granted as to Requirement for Notice Pursuant to Rule 25-22.0406(7), Florida Administrative Code

Order No. PSC-92-0869-PCO-WU inadvertently included a requirement that the Utility provide notice pursuant to the provisions of Rule 25-22.0406(7), Florida Administrative Code. That Rule applies to general rate increase requests. The Commission finds it appropriate to grant the Utility's Motion for Reconsideration on this point. The Utility is, therefore, not required to comply with the provisions of this Rule.

Based on the foregoing, it is, therefore,

ORDERED by Susan F. Clark, as Prehearing Officer, that Placid Lakes Utilities, Inc.'s Motion for Oral Argument on its Motion for Reconsideration is hereby denied. It is further

ORDERED that Placid Lakes Utilities, Inc.'s Motion for Reconsideration of Order No. PSC-92-0869-PCO-WU is denied as set forth in the body of this Order. It is further

ORDERED that the requirement in Order No. PSC-92-0869-PCO-WU that the Utility comply with the noticing requirements of Rule 25-22.0406(7), Florida Administrative Code, is deleted. It is further

ORDERED that the new dates as set forth in the body of this Order shall be controlling unless modified by the Commission.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 11th day of January, 1993.



SUSAN F. CLARK, Commissioner
and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR 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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, 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.