BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for rate increase in Pasco County by Labrador Utilities, Inc.	DOCKET NO. 030443-WS ORDER NO. PSC-04-0719-PCO-WS ISSUED: July 23, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING MOTION TO INTERVENE, DENYING MOTION FOR RECONSIDERATION, AND DENYING REQUEST FOR EMERGENCY RATE RELIEF

BY THE COMMISSION:

By Order No. PSC-04-0200-PCO-WS, issued February 24, 2004, in Docket No. 030443-WS, In re: Application for rate increase in Pasco County by Labrador Utilities, Inc., ("interim rate order") this Commission established interim rates for Labrador Utilities, Inc. ("Labrador"). In our interim rate order, we recognized the unique nature of this proceeding in that Labrador filed a request for interim rate relief on October 30, 2003, prior to filing its MFRs for permanent rate relief, which are due to be filed June 30, 2004. We found this procedure permissible under Chapter 367, Florida Statutes, as a means of establishing fair interim rates for Labrador (based on an interim test year ended June 30, 2003) until such time as Labrador could prepare and file MFRs for a test year that would be representative for prospective rate setting (a final test year ended December 30, 2003). In our interim rate order, we approved interim rates designed to allow the utility the opportunity to generate increased annual operating revenues of $141,177 for water service and $146,292 for wastewater service. The approved interim rates reflected an across-the-board increase in Labrador's existing flat rates.

On March 9, 2004, Forest Lake Estates Co-Op, Inc. ("Forest Lake") filed a motion to intervene and motion for reconsideration of our interim rate order, as well as a request for emergency rate relief. On the same date, Forest Lake filed a request for oral argument on these pleadings. On March 19, 2004, Labrador filed a response in opposition to Forest Lakes' pleadings. We heard oral argument on these pleadings at our July 6, 2004, Agenda Conference.

We have jurisdiction over this matter pursuant to Chapter 367, Florida Statutes, including Section 367.082, Florida Statutes. As set forth below, we grant Forest Lake's motion to intervene and deny its motion for reconsideration and request for emergency rate relief.

DOCUMENT NUMBER-DATE
08040 JUL 23 04
FPSC-COMMISSION CLERK

I. Motion to Intervene

In its motion to intervene, Forest Lake states that it is a co-op consisting of 268 shareholders who are each individual residents of the Forest Lake Estates Co-op, Inc., an 892-lot residential community. As such, each shareholder is an individual, residential service customer of Labrador. Further, Forest Lake states that it is the owner of Forest Lake R.V. Resort ("R.V. Resort") and, as such, is a bulk service customer of Labrador which pays one monthly bill for water and wastewater service to the R.V. Resort. Forest Lake contends that its substantial interests will be and have been affected by Labrador's application for increase in rates, filed October 27, 2003, and implementation of the interim rates approved by the Commission. Forest Lake asserts that being granted party status will allow it to receive copies of all filings and pleadings so that it may be fully informed of the developments in this docket.

In its response, Labrador contends that Forest Lake's motion to intervene is premature and should therefore be denied. Labrador notes that it requested that its application for a rate increase be processed using the Commission's proposed agency action ("PAA") procedure, as permitted by Section 367.081, Florida Statutes. Labrador argues that Rule 25-22.029, Florida Administrative Code, expressly provides that the point of entry in a proposed agency action proceeding is after the PAA order is entered.

We find that Forest Lake's motion to intervene shall be granted. As a customer of Labrador, Forest Lake's substantial interests will be affected by this proceeding to address Labrador's application for a rate increase. Further, Labrador's reliance on Rule 25-22.029 as establishing the sole point of entry is misplaced. Rule 25-22.029 provides that persons whose substantial interests may or will be affected by proposed agency action of this Commission may file a petition for an administrative hearing on the matter pursuant to Section 120.569 or 120.57, Florida Statutes. The rule does not preclude persons whose substantial interests may be affected by the PAA proceeding from intervening prior to issuance of a PAA order. Further, Rule 25-22.039, Florida Administrative Code, which solely addresses intervention in Commission proceedings, makes no distinction between intervention in PAA proceedings and formal proceedings set for an administrative hearing. Indeed, we have granted requests to intervene in PAA proceedings where the person seeking intervention made the necessary showing of standing. See, e.g., Order No. 04-0269-PCO-GU, issued March 9, 2004, in Docket No. 030954-GU, In re: Petition for Rate Increase by Indiantown Gas Company (granting intervention in PAA rate proceeding).

In addition, accepting Labrador's argument would create a situation whereby interested persons who have standing to protest our PAA order would not be allowed significant input into the process leading to that order until the date of our vote on the matter. Such a result could create inefficiencies. We believe that granting Forest Lake party status at this point in the proceeding will allow Forest Lake and Labrador the opportunity to address potential areas of dispute early in the ratemaking process and potentially avoid the need for a hearing later.

In conclusion, we grant Forest Lake's motion to intervene. Pursuant to Rule 25-22.039, Forest Lake takes the case as it finds it. By separate filing in this docket, Forest Lake shall notify this Commission and Labrador of the name(s) and address(es) of those persons to receive service on behalf of Forest Lake in this docket.

II. Motion for Reconsideration of Interim Rate Order

The standard of review for a motion for reconsideration of a Commission order is whether the motion identifies a point of fact or law that this Commission 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. 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 (Fla. 3rd 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." Steward Bonded Warehouse, Inc. v. Bevis.

In its motion for reconsideration, Forest Lake notes that our interim rate order states, in part, that "[t]he utility provides service to . . . 274 lots in Forest Lakes R.V. Resort." Forest Lake further notes that the interim rate order establishes interim water and wastewater rates for the R.V. Resort on a per lot basis. Forest Lakes argues that we erred because we failed to consider that the R.V. Resort, rather than the individual lot owners in the R.V. Resort, pays one monthly bill for all water and wastewater service provided to the lots within the R.V. Resort and, in turn, collects utilities charges from the R.V. Resort tenants based upon either an annual lease or a shorter term lease. Forest Lakes states that only 11 of the 274 lots in the R.V. Resort are occupied by tenants who live there year-round pursuant to an annual lease. Forest Lake asserts that it will not be able to adjust the amount included for utilities in these annual leases until the leases are renewed on November 1, 2004. Forest Lake states that the remaining 263 lots are primarily occupied only from late November into late December through late March into late April, leaving the R.V. Resort at an occupancy rate of 3-5% from April through November and without an adequate revenue stream to pay the increased interim rates. Based on this understanding of the facts, Forest Lake requests that we reconsider our interim rate order and modify the interim rates to the R.V. Resort such that the rates are not effective until December 1, 2004, at which time the R.V. Resort will be able to structure leases to account for the changed rates and collect additional revenues through the increased occupancy at that time.

In its response, Labrador contends that the issue raised by Forest Lake is essentially a contractual issue between the R.V. Resort and its tenants. Labrador asserts that the relevant terms of the leases between the R.V. Resort and its tenants are solely within the control of the R.V. Resort. Labrador states that these circumstances arise in virtually every rate proceeding, noting that apartment complexes face the same circumstances: absent a lease provision allowing the lessor to pass on increased utility costs in the rent, the lessor must wait until the lease comes

up for renewal to raise the rent. Further, Labrador argues that the billing structure contained in the R.V. Resort's leases is irrelevant to our decision approving interim rates applicable to any time period. Labrador also asserts that the seasonality of the R.V. Resort's occupancy is completely outside the control of Labrador or this Commission. Labrador notes that it is required to provide service at a cost year-round, regardless of fluctuations in occupancy. Labrador asserts that the customers who receive the benefit of the assurance of year-round service should bear the cost of providing such service.

For the following reasons, we deny Forest Lake's motion for reconsideration. While Forest Lake clarifies that as owner of the R.V. Resort it receives one monthly bill for all lots in the R.V. Resort, the rates applied to the R.V. Resort were established on a per-lot basis and billed monthly to the R.V. Resort even before the interim rate order. Thus, our interim rate order did not change the manner in which the R.V. Resort was billed or Labrador's rate structure, but changed only the prior per-lot rates that were charged to the R.V. Resort. Our interim rate order simply applied an across-the-board percentage increase to the flat, per-lot rates previously in effect. Because we did not change the manner in which the R.V. Resort was billed or Labrador's rate structure, we find it inappropriate to grant reconsideration of our interim rate order based on an alleged mistake of fact concerning the manner in which the R.V. Resort is billed. In other words, we find that the mistake of fact alleged by Forest Lake is not material to our determination of interim rates.

Clearly, Forest Lake's real concern is with the level of the interim rate increase and the R.V. Resort's slow revenue stream over the next several months. Section 367.082(5)(a), Florida Statutes, provides that "[i]n setting interim rates or setting revenues subject to refund, the commission shall determine the revenue deficiency or excess by calculating the difference between the achieved rate of return of a utility or regulated company and its required rate of return applied to an average investment rate base or an end-of-period investment rate base." Subsection (5)(b) of the statute goes on to define how achieved and required rates of return are defined and calculated. Subsection (2)(a) provides that "the commission shall authorize . . . the collection of rates sufficient to earn the minimum of the range of rate of return calculated in accordance with subparagraph (5)(b)2." Our interim rate order simply applies the provisions of this statute to establish an appropriate interim revenue increase for Labrador and applies the percent revenue increase across the board to the flat rates previously in effect. Forest Lake does not argue that we overlooked or failed to consider any point of fact or law in performing this largely mechanical function. Further, the statute does not provide for consideration of a customer's seasonal revenue stream in setting interim rates. As Labrador states, it is required to assure the availability of service year-round at a cost, regardless of fluctuations in its customers' revenues.

Finally, although not the basis for its motion for reconsideration, Forest Lake notes that Labrador's customers were not provided notice of the interim rate proceeding prior to our decision to approve interim rates. Forest Lake argues that this lack of notice and associated lack of customer involvement in the interim rate process contributed to the rates established for the

R.V. Resort to which Forest Lake objects. As set forth above, however, we find that the mistake of fact alleged by Forest Lakes (a mistake which Forest Lake suggests would not have been made with the benefit of notice and customer involvement) was simply not material to our determination of interim rates for Labrador. Further, it would be unusual for this Commission to invite input in performing the largely mechanical function of setting interim rates as set forth in Section 367.082, Florida Statutes.

As Forest Lake recognizes, the unusual course of this rate proceeding created a situation where notice of the proposed interim rate increase was not required by any rule or statute. In this unique case, Labrador pursued interim rate relief in advance of its MFR filing for permanent rate relief. In our interim rate order, we addressed this situation, finding this process permissible under Chapter 367, Florida Statutes, and noting that customers will be protected during this proceeding because interim rates are subject to refund with interest. Pursuant to Rule 25-22.0407, Florida Administrative Code, customer noticing of a rate case filing is triggered by the official date of filing of the utility's MFRs. The request for interim rate relief alone did not trigger the noticing requirements of any rule or statute. As discussed above, we find that the lack of notice of this interim rate proceeding created no error or harm to customers in the interim rate setting process and did not violate any rule or statute.

In conclusion, we deny Forest Lake's motion for reconsideration of our interim rate order.

III. Request for Emergency Rate Relief

On February 17, 2004, Labrador filed with this Commission an affidavit indicating that it had served a Notice of Interim Rate Increase to its customers by U.S. Mail on February 10, 2004. According to that Notice, the interim rates would be effective on that same date. The stamped approval date on the tariff sheets was also February 10, 2004.

In its request for emergency rate relief, Forest Lake asserts that our interim rate order provided that the interim rates authorized shall become effective for service rendered as of the stamped approval date on the tariff sheets, provided customers have received notice. Forest Lake states that it received a Notice of Interim Rate Increase stating that the Commission-approved interim rates would become effective February 10, 2004, but that it did not receive such notice until February 16, 2004. Forest Lake contends that because Labrador did not meet all conditions precedent set by this Commission until February 16, 2004, at the earliest, Labrador's customers should be credited as if the rates for the residential lots had not become effective until February 16, 2004.

In its response, Labrador asserts that it complied with all noticing requirements of this Commission's rules and its interim rate order. Further, Labrador argues that the rate paid by customers are flat rates and, thus, any delay in receiving notice of such rates could not affect the ability of any customer to reduce their bill by adjusting consumption.

Our interim rate order provides, in pertinent part:

> These interim rates shall be implemented for service rendered on or after the stamped approval date on the tariff sheets, pursuant to Rule 25-30.475(1), Florida Administrative Code, *provided customers have received notice*. The revised tariff sheets may be approved administratively upon our staff's verification that the tariffs are consistent with this decision, that the proposed notice to the customers is adequate, and that the required security has been filed.

(Emphasis supplied.) This language tracks the language set forth in Rule 25-30.475(1)(a), Florida Administrative Code, and appears to require receipt of notice by the customers prior to implementation of the interim rates.

In contrast, Rule 25-22.0407(10), Florida Administrative Code, states:

> After the Commission issues an order granting or denying a rate change, the utility shall notify its customers of the order and any revised rates. *The customer notification shall* be approved by Commission staff and *be distributed no later than with the first bill containing any revised rates*.

(Emphasis supplied.) This language appears to require only that customers receive notice along with the first bill containing the interim rates, implying that implementation of the interim rates may occur prior to customer notification of the new rates.

Arising from this apparent inconsistency is the question of how our rules should be interpreted and applied in this instance. For the reasons discussed below, we find that the better interpretation of these rules is to give effect to the language in Rule 25-22.0407(10) which indicates that customer notification is sufficient when provided along with the first bill containing the interim rates.

Interpreting our rules to require receipt of notice by customers prior to implementation of the interim rates would make it nearly impossible to establish a uniform, fixed effective date for those rates. Neither the utility nor this Commission can determine when each individual customer will actually receive notice or when all customers have actually received notice. Indeed, individual customers will likely receive notice by mail on different dates. Under Forest Lake's interpretation, the effective date of the interim rates either would vary by customer depending on the day notice was received by each customer or would be established for all customers based on the date that the last customer actually received notice. Labrador could not be expected to accurately bill its customers if the effective date of its interim rates was an unidentifiable target, as it would be under Forest Lake's interpretation. Further, our staff, in reviewing a proposed customer notice, could not determine whether the effective date set forth in the proposed notice would be the true effective date for the interim rates. Giving effect to the requirements of Rule 25-22.0407(10) in this instance allows a fixed, uniform effective date to be

set and communicated to customers in a notice approved by our staff and would avoid the untenable results associated with Forest Lake's literal interpretation of the language in the interim rate order and Rule 25-30.475(1).

Under this interpretation of our rules and interim rate order, we find that Labrador's interim rates became effective as of the stamped approval date (February 10, 2004) on the tariff sheets reflecting those rates. Further, we find that the customer notice provided by Labrador complied with our rules because it was distributed no later than with the first bill to each customer reflecting the interim rates.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Forest Lake Estates Co-Op, Inc.'s motion to intervene is granted. It is further

ORDERED that Forest Lake Estates Co-Op, Inc., takes this case as it finds it and, by separate filing in this docket, shall notify this Commission and Labrador Utilities, Inc., of the name(s) and address(es) of those persons to receive service on its behalf in this docket. It is further

ORDERED that Forest Lake Estates Co-Op, Inc.'s motion for reconsideration of Order No. PSC-04-0200-PCO-WS is denied. It is further

ORDERED that Forest Lake Estates Co-Op, Inc.'s request for emergency rate relief is denied.

By ORDER of the Florida Public Service Commission this 23rd day of July, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

WCK

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 the action taken in Part I or III of 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 Director, Division of the Commission Clerk and Administrative Services, 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.

Any party adversely affected by the action taken in Part II of this Order 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. Citizens of the State of Florida v. Mayo, 316 So.2d 262 (Fla. 1975), states that an order on interim rates is not final or reviewable until a final order is issued. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.