BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of ORANGE-OSCEOLA UTILITIES, INC. to increase water and sewer rates in Osceola County	DOCKET NO. 871134-WS ORDER NO. 21337 ISSUED: 6-5-89

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD
JOHN T. HERNDON

ORDER ON RECONSIDERATION AND CORRECTING ORDER NO. 20434

BY THE COMMISSION:

CASE BACKGROUND

On February 19, 1988, Orange-Osceola Utilities, Inc. (OOU or utility) filed an application for increased water and sewer rates in Osceola County. Its application satisfied the minimum filing requirements (MFRs) for a general rate increase and that date was established as the official filing date. The test year for this docket is the twelve-month period ended June 30, 1987. OOU requested interim and final rates designed to generate annual revenues of $561,785 for water and $1,579,941 for sewer. These requested revenues exceed test year revenues by $185,326 (49.23 percent) for water and $521,807 (49.31 percent) for sewer.

By Order No. 19164, issued April 18, 1988, we suspended OOU's proposed rates and granted interim rate increases, subject to refund, designed to generate annual revenues of $403,436 for water and $1,313,483 for sewer. These revenues represented annual increases of $30,191 (8.09 percent) for water and $263,700 (25.12 percent) for sewer.

On March 16, 1988, the Office of Public Counsel (OPC) served notice of its intervention in this docket on behalf of OOU's customers. By Order No. 19081, issued April 4, 1988, the Commission acknowledged OPC's intervention.

A Prehearing Conference was held in Tallahassee on July 13, 1988. A formal hearing was held on August 4 and 5, 1988, in Kissimmee, Florida.

By Order No. 20434, issued December 8, 1988, we established increased rates for water and sewer service. The final revenue requirement for water service was higher than the revenue requirement established for interim purposes. Therefore, no refund was required for the water operations. However, since the final revenue requirement for sewer service was less than the revenue requirement established for interim purposes, by Order No. 20434, we also required that OOU refund 6.63 percent of the interim sewer revenues collected, excluding miscellaneous service revenues of $1,141.

On December 23, 1988, OOU timely filed a motion for reconsideration of Order No. 20434. On January 4, 1989, OPC filed a response to OOU's motion for reconsideration and a cross-motion for reconsideration. On January 17, 1989, OOU filed a response to OPC's cross-motion for reconsideration. The parties also filed requests for oral argument on the various motions and responses.

The Director of Legal Services originally granted the parties' requests for oral argument. However, prior to oral argument being held, the Commission decided to review the procedure whereby the Director of Legal Services was empowered to grant oral argument. Pending its decision on the matter, oral argument in this case was temporarily suspended. The Commission subsequently divested the Director of Legal Services of the power to grant requests for oral argument. By Order No. 21076, issued April 20, 1989, the Prehearing Officer denied the parties' requests for oral argument on the basis that the parties' motions and responses made their positions abundantly clear, that oral argument would not help the Commission understand the issues and that the parties had already argued their positions at the hearing and in their briefs.

The standard that must guide us in ruling on a motion for reconsideration is whether we have made any error or omission of fact or law.

WETLANDS DISPOSAL AREA (WDA)

OOU's motion for reconsideration addresses our finding that the WDA is only 15.2 percent used and useful. OOU argues that we must have misapprehended or overlooked the current rated capacity of the WDA in making our decision and that we should have found that the WDA is at least 75.3 percent used and useful. OOU further questions the accuracy of our findings regarding test year flows and available capacities of disposal systems on line during the year.

In its response to the motion for reconsideration, OPC contends that this Commission did, in fact, consider the current rated capacity of the WDA and that the hydraulic efficiency and cost effectiveness of the WDA are "part and parcel" of our decision regarding the used and useful portion of the WDA. In addition, in its cross motion, OPC addresses its concerns regarding the balance struck within the previous rate case and the "unfair disadvantage to the customers of changing the used and useful standard without the opportunity for a full hearing on the prudence issue."

A review of Order No. 20434 reveals that we did consider the current rated capacity of the WDA prior to making our decision regarding the used and useful portion thereof. At page 10 of Order No. 20434, we expressly noted both the original rated capacity and the current rated capacity. Our finding that the WDA is only 15.2 percent used and useful implicitly recognizes that the efficiency, cost-effectiveness and thus, the prudence of the system, have fallen far short of OOU's original estimates. In addition, we have reviewed our findings regarding the test year flows and available capacities of OOU's disposal systems and find that the disposal capacity was sufficient to meet the system's demand.

Although we believe that our decision regarding the used and useful portion of the WDA is appropriate, an issue that neither OOU, OPC nor the Staff of this Commission (Staff) raised during this case was whether OOU, its customers or both should bear the cost of the failed WDA experiment. Had the experiment succeeded, OOU's customers would have shared in the

benefits and paid OOU a return on this investment. As a result of our decision, the cost of the failed WDA experiment, $1,585,257, will be borne primarily by OOU's investors. While it would be inappropriate for us to reach the issue of who should bear the risk of an experimental investment at this time, we believe that this issue should be addressed in future cases where applicable.

Based upon the discussion above, we do not believe that OOU has pointed out any error or omission of fact or law in our decision regarding the used and useful portion of the WDA. Its motion for reconsideration of this issue is, therefore, denied.

RATE CASE EXPENSE

In its cross motion, OPC urges this Commission to reconsider its award of rate case expense. OPC argues that the record does not support such an award. OPC contends that there was substantial and unrebutted evidence that the amounts of discovery and other legal proceedings were less in this case than in OOU's last rate case, yet rate case expense was approximately $10,000 higher than in that case. OPC argues further that OOU justified no more than $50,000 in rate case expense and that the Commission's allowance of $104,199 amounts to a virtually automatic award of rate case expense without reference to the prudence thereof, in contravention of the Court's decision in Meadowbrook Utility Systems, Inc. v. The Florida Public Service Commission, 518 So. 2d 326 (Fla. 1 DCA 1987).

In its response to OPC's cross motion, OOU argues that, although we may not have used the word "prudent" in our discussion of rate case expense, we nevertheless must have found the allowed costs to have been prudent. OOU points out that Staff's recommendation regarding rate case expense was over nine pages long, that there was much discussion regarding this matter at the agenda conference and that a full three pages of Order No. 20434 are devoted to a discussion of rate case expense. OOU further points out that we disallowed $13,573 of requested rate case expense and, therefore, suggests that our allowance of rate case expense includes an implicit finding that these costs were prudent.

We agree that our discussion of rate case expense in Order No. 20434 contains an implicit finding that the amounts allowed were prudently incurred. We read the Meadowbrook decision to hold that an automatic award of rate case expense, without reference to the prudence thereof, would constitute an abuse of our discretion, not that the word "prudent" is required in each and every case. We note, in fact, that in Order No. 17304, issued March 19, 1987, the order under appeal in the Meadowbrook case, which the court upheld, approximately two pages were devoted to our decision regarding rate case expense, yet the word "prudent" was not specifically used.

Based upon the discussion above, we find that our decision, as reflected by Order No. 20434, fully addresses the issue of the prudence of rate case expense. Further, we do not believe that OPC has pointed out any error or omission of fact or law in our decision. Accordingly, we hereby deny OPC's cross-motion for reconsideration of rate case expense.

NON-UTILITY BUILDING

In OOU's last rate case, by Order No. 17366, issued April 6, 1987, we did not allow a non-used and useful building, which was rented to an affiliate, or the associated revenues and expenses, for ratemaking purposes. The basis of our decision was that there was no evidence that the rental income produced a fair rate of return on the property. We stated, however, that "[w]hen that income is equal to or greater than a fair return, then the revenue and other costs should be included above the line."

In this case, we did allow the non-used and useful building and the revenues and expenses for ratemaking purposes. However, instead of including the entire $12,000 of rental income above the line, we limited the revenues included to those revenues which would generate an 11.7 percent return on the asset. That return is the high-end of the range of reasonableness of the overall rate of return. By doing such, we included $5,187 of the rental income above the line, allowing OOU to record the remaining $6,813 below the line. Our reasoning was that, to be consistent with the treatment afforded in the utility's last case, the income should be included only to the extent that it provides a fair rate of return, not the return of approximately 38 percent generated by the entire $12,000.

In its Cross-Motion for Reconsideration, OPC contends that we have misapprehended the importance of our decision and its impact on regulatory policy in our treatment of the building rented to OOU's affiliate. OPC argues that, by limiting the income included, we have provided OOU's shareholders with a refund, at the expense of its customers. OPC also believes that we have misinterpreted our decision in OOU's last rate case, as reflected by Order No. 17366. OPC argues that, in order to be consistent with our decision in that case, we should have included the entire amount of the rental income above the line. OPC urges this Commission to follow Order No. 18960, issued March 7, 1988, in Docket no. 861338-WS, the application of Ferncrest Utilities, Inc. for increased rates, by which we included non-utility income above the line. OPC further argues that we failed to consider property taxes or insurance costs in deciding whether to include the revenues above or below the line. Finally, OPC argues that our decision regarding this matter is not based upon testimony in the record.

In its response to OPC's cross-motion, OOU also takes issue with the disposition of the non-used and useful building rented to its affiliate. OOU argues that the Commission has jurisdiction over "utilities" and "utility systems", but not over a utility's endeavors in non-utility business transactions. OOU recognizes that this position could lead to a dilemma, in that a great variety of different kinds of property could conceivably become used and useful in the provision of utility service in the future. Although OOU does not agree with our decision, it believes that the matter is best left to rest in this case. OOU urges the Commission to address this issue in rulemaking and to deny OPC's request for reconsideration.

As for OPC's contention that our decision is not based upon the record, we note that we were only presented with two alternatives, neither of which we believed were entirely satisfactory. Accordingly, we chose a third alternative which, although not specifically addressed in testimony, is nevertheless supported by the facts in the record. In Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799 (Fla. 1984), the Court affirmed the Commission's decision to use an alternative to the two positions supported by the record. The Court further stated that "it is the PSC's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary." The Court further stated that, even though this Commission had rejected the positions advocated by the parties, it "was presented with sufficient evidence to enable it to choose a reasonable alternative." In the case at hand, we believe that it was appropriate to reject the alternatives urged by the parties. We also find that our decision is fully supported by the record. This portion of OPC's argument is, therefore, rejected.

With regard to OPC's argument that our decision in this case is inconsistent with our decision in OOU's last case, we do not believe that there is any inconsistency here. In OOU's last case, we did not consider the income because there was no evidence that it provided a fair rate of return. In this case, we have included the income to the extent that it provides a fair rate of return. Although we stated in Order No. 17366 that, "[w]hen that income is equal to or greater than a fair return, then the revenue and other costs should be included above the line", we do not believe that this necessitates that all of the income be included above the line. Accordingly, we hereby reject OPC's contention that our present decision is inconsistent with our decision in OOU's last rate case.

As for OPC's argument that our treatment of limiting the revenues in this instance has provided the shareholders with a refund at the expense of its customers, we do not agree. Instead, we believe that our treatment is in keeping with the philosophy of a fair rate of return and is consistent with the method used for all other regulatory aspects of return on investment.

Finally, with respect to OPC's argument that we failed to recognize the property taxes and insurance associated with this building, this apparently stems from a statement in Order No. 20434 that we did not consider those items because they were not identified in the record and because we did not believe that those amounts were material. We note, however, that this statement is in error. Although the amounts were not specified in the record, an allocated portion of these expenses was included in our final calculations. Accordingly, we find it appropriate to reject this portion of OPC's argument. Further, we find it appropriate to correct Order No. 20434 by deleting the portion which states that we did not consider property taxes or insurance.

In consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that the motion for reconsideration filed by Orange-Osceola Utilities,

Inc. is hereby denied, as set forth in the body of this Order. It is further

ORDERED the the Office of Public Counsel's cross motion for reconsideration is hereby denied, as set forth in the body of this Order. It is further

ORDERED that Order No. 20434 is corrected amended to delete the portion which states that we did not consider insurance or property taxes. It is further

ORDERED that Order No. 20434 is hereby affirmed in all other respects.

By ORDER of the Florida Public Service Commission, this 5th day of June, 1989.

STEVE TRIBBLE, Director
Division of records and reporting

(S E A L)

RJP

by: Kay Flynn
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.