

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate) DOCKET NO. 921261-WS
increase in Lee County by HARBOR) ORDER NO. PSC-94-1013-PCO-WS
UTILITIES COMPANY, INC.) ISSUED: August 23, 1994

ORDER GRANTING STAFF'S MOTION TO STRIKE
AND GRANTING HARBOR UTILITIES, INC. FOURTEEN
DAYS TO PREFILE TESTIMONY OF WITNESSES

On June 14, 1993, Harbor Utilities Company, Inc. (Harbor) filed an application for approval of interim and permanent rate increases pursuant to Sections 367.081 and 367.082, Florida Statutes. By Proposed Agency Action Order No. PSC-94-0075-FOF-WS, issued January 21, 1994, the Commission denied any increase in water and wastewater rates for Harbor. On February 11, 1994, Harbor timely filed a protest of Order No. PSC-94-0075-FOF-WS. An administrative hearing for this docket has been scheduled for September 21-23, 1994.

An Order Establishing Procedure, Order No. PSC-94-0336-PCO-WS, provided the guidelines when parties were to prefile testimony and prehearing statements. According to this Order, Staff's prefiled testimony was due on July 26, 1994, and Harbor's rebuttal witnesses were to prefile testimony on August 9, 1994. Both Harbor's and Staff's prehearing statements, where all witnesses were to be identified, were due on August 10, 1994.

On July 20, 1994, Staff filed a motion for an extension of time to prefile testimony of two witnesses. Its motion was granted in Order No. PSC-94-0910-PCO-WS, issued July 25, 1994. In consideration of this, Harbor was granted an additional week until August 16, 1994, to prefile its rebuttal testimony if it pertained to these two witnesses.

On August 15, 1994, Harbor advised Staff that it would be calling adverse witnesses as part of its case. These witnesses were: Winston Anderson, a former Department of Environmental Protection inspector; Ray Judah, a Lee County Commissioner; Henri Lafenetre, a former wastewater operator of Harbor; Marcella Quinn, a former water and wastewater operator of Harbor; and Fred Partin, General Manager of Bonita Springs Utility. Harbor timely prefiled rebuttal testimony for two witnesses, but not any of the witnesses named above. On the same day, Staff advised Harbor that they would object to these witnesses being called at the hearing during the prehearing conference to be held the following day.

On August 17, 1994, a prehearing conference was held in this matter. During the conference, Staff made an oral motion to strike Harbor's adverse witnesses. Staff argued that these witnesses were

DOCUMENT NUMBER-DATE

08603 AUG 23 1994

FPSC-RECORDS/REPORTING

not adverse, pursuant to Rule 1.450(a), Florida Rules of Civil Procedure, because they are neither parties, nor had Harbor proved that these witnesses were unwilling or hostile. Staff also contended that adding these witnesses without prefiled testimony would constitute an unfair surprise, since Staff would not know, prior to their actual testimony, what issues they would testify to. Harbor argued that these witnesses were offered in response to testimony prefiled by Staff witnesses and concerning issues of which Harbor was unaware prior to August 10, 1994, when the prehearing statements were filed.

An adverse party witness and an adverse witness are defined differently according to Rule 1.450(a), Florida Rules of Civil Procedure, and the Florida courts. An adverse party witness is a party to an action whose interests are opposed to the interests of another party to the action. This differs from an adverse witness defined in Foremost Dairies Inc. of South v. Cutler, 212 So.2d 37, (Fla. 4th DCA 1968). The court said that an adverse witness is a person, "(not a party, or an officer, director or managing agent of a public or private corporation or of a partnership or association which is an adverse party)", whose testimony is prejudicial to the party who called him and, as a result, may be impeached. Id. at 40. If a person is declared adverse, a party can interrogate them by using leading questions, Rule 1.450(a), Florida Rules of Civil Procedure.

In order to be an adverse party witness, a person must "occupy an adverse position toward" the party seeking to call that person, and must have been able, at some point, to have been named a party in the proceeding. Smith v. Fortune Ins. Co., 404 So.2d 821, 823 (Fla. 1st DCA 1981). Before a witness can be declared an adverse witness, they must give testimony that is "adverse, unfavorable, or prejudicial" to the calling party. Wolcoff v. State, 576 So 2d 726 (Fla. 4th DCA 1991), rev. den. 583 So.2d 1038 (Fla. 1991).

None of the witnesses Harbor desires to call as adverse witnesses are adverse party witnesses. Further, Harbor has not demonstrated that the witnesses in question occupy any position adverse to it. Harbor has presented no evidence that it has even talked to these prospective witnesses to find out whether they would be willing to testify. Counsel for Harbor has indicated that she has attempted to reach them by phone and has been unsuccessful. Therefore, we cannot even conclude if they would be "adverse" in any sense to the utility.

Not only has Harbor failed to show that these witnesses would be adverse, but in fact, counsel for Harbor stated that these witnesses would be used to rebut the testimony of Staff's witnesses. Review of the testimony of the Staff witnesses and the statements of counsel for Harbor as to what the witnesses in

ORDER NO. PSC-94-1013-PCO-WS
DOCKET NO. 921261-WS
PAGE 3

question would testify to, indicates that their position may be adverse to Harbor, but buttresses Harbor's position. As such, their testimony should have been prefiled with that of Harbor's other rebuttal witnesses, in accordance with Orders Nos. PSC-94-0336-PCO-WS and PSC-94-0910-PCO-WS.

The purpose of requiring prefiled testimony is to fully apprise all parties, Staff, and the Commission, of positions in order to mitigate surprise and confusion at hearings. Nevertheless, the Prehearing Officer is not completely unsympathetic to Harbor's claim that it will be difficult to persuade the witnesses to prefile testimony on behalf of Harbor. Accordingly, if Harbor cannot prefile these witnesses' testimony on a voluntary basis, Harbor can subpoena them for deposition and file their deposition transcripts in lieu of prefiled testimony, within fourteen days from the date of this Order.

Based on the foregoing, it is,

ORDERED by the Florida Public Service Commission that Staff's motion to strike the "adverse" witnesses identified by Harbor Utilities Company, Inc., after its filing of its prehearing statement is granted. It is further,

ORDERED that Harbor Utilities Company, Inc., prefile testimony of the above-referenced witnesses, or if they are unwilling to voluntarily provide testimony, take their depositions, and file their deposition transcripts in lieu of prefiled testimony. It is further,

ORDERED that the testimony of these witnesses must be filed within fourteen days of the date of this Order.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 23rd day of August, 1994.



SUSAN F. CLARK, Commissioner and
Prehearing Officer

(S E A L)

MSN

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.