

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and request
for hearing by Linda J. McKenna
and 54 petitioners regarding
unfair rates and charges of
Shangri-La by the Lake
Utilities, Inc. in Lake County.

DOCKET NO. 990080-WS
ORDER NO. PSC-00-1239-FOF-WS
ISSUED: July 10, 2000

The following Commissioners participated in the disposition of
this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER MODIFYING ORDER NO. PSC-00-0629-PCO-WS AND
DEFERRING RULING ON ESTABLISHING THE BURDEN OF PROOF

BY THE COMMISSION:

BACKGROUND

Shangri-La by the Lake Utilities, Inc. (Shangri-La or utility)
is a Class C utility located in Lake County. The utility currently
provides water and wastewater service to approximately 129 mobile
homes and water service to five single family homes. On January
19, 1999, Ms. Linda J. McKenna and 54 other customers filed the
formal complaint which is the subject of this docket. The
customers requested a formal hearing, rate relief, establishment of
a seasonal rate for customers not in residence, that the utility
not be allowed to charge for service until the matter was
addressed, and that the utility's certificates be revoked until a
satisfactory resolution was reached between all the concerned
parties. By Order No. PSC-99-2254-PCO-WS, issued November 18,
1999, we acknowledged the Office of the Public Council's (OPC)
intervention in this docket.

By Proposed Agency Action (PAA) Order No. PSC-00-0259-PAA-WS,
issued February 8, 2000, we adjusted rates, established a new class
of service, authorized the collection of meter charges for
irrigation, denied the request that the utility not be allowed to
charge for service pending a resolution of the matter, and denied
the request to revoke Shangri-La's certificates. On February 29,

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2000, OPC timely filed a Petition on Proposed Agency Action and Objection to Proposed Agency Action.

By Order No. PSC-00-0629-PCO-WS, issued April 3, 2000, this matter was scheduled for an administrative hearing and controlling dates were established. However, on April 10, 2000, Shangri-La filed a Motion for Reconsideration of Order No. PSC-00-0629-PCO-WS and to Establish the Burden of Proof. OPC filed its timely Response on April 24, 2000. Shangri-La's Motion and OPC's response are the subjects of this Order.

ORAL ARGUMENT

Rule 25-22.0376(5), Florida Administrative Code, states that "Oral argument on any motion filed pursuant to this rule may be granted at the discretion of the Commission. A party who fails to file a written response to a point on reconsideration shall be precluded from responding to that point during oral argument."

Pursuant to Rule 25-22.0376(5), Florida Administrative Code, Shangri-La requested oral argument on the issue of burden of proof. Shangri-La's motion states that oral argument on the burden of proof issue would be helpful because the Commission has struggled in the past with the question of who has the ultimate burden of proof when customers initiate a proceeding and seek affirmative relief.

In response, OPC states that if we adopt its stipulation on the order of testimony and defers the ruling on the burden of proof until the end of the proceeding, oral argument on the motion would be unnecessary and inappropriate.

We find that it is unnecessary to rule upon Shangri-La's request for oral argument because interested persons may participate at the agenda conference since this matter has not been to a hearing. Accordingly, Shangri-La and OPC were permitted to address us during the course of discussion on this item at the June 20, 2000 agenda conference.

MOTION FOR RECONSIDERATION AND TO ESTABLISH THE BURDEN OF PROOF

On April 10, 2000, pursuant to Rule 25-22.0376, Florida Administrative Code, Shangri-La filed its timely Motion for Reconsideration of Order No. PSC-00-0629-PCO-WS and to Establish

Burden of Proof. On April 24, 2000, OPC timely filed its Response to Motion for Reconsideration.

Rule 22-25.0376, Florida Administrative Code, permits a party who is adversely affected by an order issued by a Prehearing Officer to file a motion for reconsideration of that order. The purpose of a motion for reconsideration is to bring to the attention of the Commission some point of law or fact which it overlooked or failed to consider when it rendered its order. Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962); Pingtree v. Ouaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). The granting of a motion for reconsideration should not be 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. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Order of Testimony

* Shangri-La requests that the complainants be required to present their testimony first instead of Shangri-La. In addition, Shangri-La states that the Order Establishing Procedure erroneously listed the Complainants as intervenors in this matter.

In OPC's response, it states that the "Citizens voluntarily agree to 'trade places' with the utility for the purposes of providing testimony."

Therefore, since the parties are in agreement as to the order of testimony, OPC shall file its testimony first, and Order No. PSC-00-0629-PCO-WS, the Order Establishing Procedure, shall be modified to reflect the following changes.

- 1) OPC's direct testimony and exhibits August 11, 2000
- 2) Utility's direct testimony and exhibits September 11, 2000

Except as modified herein, Order No. PSC-00-0629-PCO-WS is hereby reaffirmed in all other respects.

Burden of Proof

Shangri-La states that the complainants carry the initial burden of proof and must make an initial showing before Shangri-La has to go forward with its evidence. In support of its position, Shangri-La cites to Metropolitan Dade County Water and Sewer Board v. Community Utilities Corporation, 200 So.2d 831 (Fla. 3d DCA 1967) and In re: Complaint of Hugh Keith against Beverly Beach Enterprises, Inc. for overcharge of contributions-in-aid-construction in Flagler County, Order No. 22605, issued February 26, 1999, in Docket No. 890450-WS.

In Metropolitan Dade County Water and Sewer Board, 200 So.2d 831 (Fla. 3d DCA 1967), the Court affirmed the trial court's order quashing an order of the county's water and sewer board requiring Community Utility Corporation to reduce its rates. In affirming, the Court quoted the trial judge as saying "The . . . Board, as the initiator of these proceedings was the complainant, and as the complainant it should have carried the initial burden of proof to establish the unreasonableness of the rates." Furthermore, the Court found that there is no presumption that a public utility's rates are unreasonable but rather there is a presumption that its rates are reasonable. Therefore, Shangri-La argues that "merely because the Complainants raise rate issues [it] does not shift the initial burden to Shangri-La."

Next, Shangri-La analogizes its case to that of In re: Complaint of Hugh Keith against Beverly Beach Enterprises, Inc. for overcharge of contributions-in-aid-construction in Flagler County, Order No. 22605, issued February 26, 1999, in Docket No. 890450-WS, because that case involved a customer who complained that he had paid too much contributions-in-aid-of-construction. In In re: Complaint of Hugh Keith, the complainant was required to file his testimony before the utility. Additionally, the Commission cited to Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981) and Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977), in finding that it is a well established administrative law principle that the burden of proof is on the party asserting the affirmative of an issue. Therefore, Shangri-La asserts that it has no burden of proof because it has not asserted the affirmative of any issues in this proceeding. Furthermore, Shangri-La states that the complainants have the ultimate burden of proof because they have asserted that Shangri-La is imposing unfair rates and charges.

In response to Shangri-La's motion, OPC states that we do not need to consider the ultimate burden of proof at this time because "a preliminary decision of the burden of proof is only necessary as that decision may bear on the order of testimony." OPC reasons that if the order of testimony is resolved amicably, then we need not consider the ultimate burden of proof until the end of the proceeding when it is more appropriate.

We find it appropriate to defer ruling on Shangri-La's request to establish the burden of proof until the end of the proceeding.

Conclusion

We find that it is unnecessary to rule upon the reconsideration portion of Shangri-La's Motion for Reconsideration of Order No. PSC-00-0629-PCO-WS and to Establish Burden of Proof because the parties are in agreement as to who shall file testimony first. Therefore, Order No. PSC-00-0629-PCO-WS shall be modified to reflect that OPC will file its testimony first. Additionally, we find that Shangri-La's request to establish the burden of proof shall be deferred until the end of the proceeding.

This docket shall remain open to allow for the final disposition of this matter.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Order No. PSC-00-0629-PCO-WS is hereby modified, as set forth in the body of this Order. It is further

ORDERED that Order No. PSC-00-0629-PCO-WS is reaffirmed in all other respects.

ORDERED that Shangri-La by the Lake Utilities, Inc.'s request to establish the burden of proof is deferred until the end of the proceeding. It is further

ORDERED that the docket shall remain open to allow for the final disposition of this matter.

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By ORDER of the Florida Public Service Commission this 10th
day of July, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

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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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater 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.