

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Limited)
Proceeding to Recover Costs of Water) Docket No. 992015-WU
System Improvements In Marion County)
By Sunshine Utilities of Central Florida,) Filed: September 13, 2002
Inc.)
_____ /

**SUNSHINE UTILITIES OF CENTRAL FLORIDA, INC.'S
MOTION IN LIMINE AND MOTION TO STRIKE CERTAIN
PORTIONS OF THE PREFILED DIRECT TESTIMONY OF
TED L. BIDDY AND KIMBERLY H. DISMUKES**

Petitioner, Sunshine Utilities of Central Florida, Inc. ("Sunshine"), by and through undersigned counsel, pursuant to Rule 28-106.204, Florida Administrative Code, files this Motion in Limine and Motion to Strike Certain Portions of the Prefiled Direct Testimony of Ted L. Bidy and Kimberly Dismukes. Through these motions, Sunshine seeks the entry of an order consistent with Section 120.80(13)(b), Florida Statutes, limiting the evidence to be presented at hearing and the scope of discovery in this limited proceeding to those issues raised in timely-filed protests to the Florida Public Service Commission's (the "Commission"'s) Notice of Proposed Agency Action Order Approving In Part and Denying in Part A Limited Proceeding for Increased Water Rates, Order No. PSC-02-0656-PAA-WU (the "PAA Order"). Sunshine also seeks entry of an order striking those portions of the prefiled direct testimony of Ted L. Bidy and Kimberly H. Dismukes, witnesses for the Citizens of the State of Florida ("Citizens") to the extent that such testimony: (1) addresses issues not protested, and therefore, deemed

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stipulated pursuant to Section 120.80(13)(b); (2) contains inadmissible hearsay that does not corroborate any other evidence; and (3) requests relief beyond the scope of this limited proceeding. In support of its Motions, Sunshine states:

Factual and Procedural Background

1. This is a limited proceeding filed by Sunshine pursuant to Section 367.0822, Florida Statutes, in which Sunshine seeks a rate increase to recover the costs of water system improvements in Marion County, Florida.

2. The Commission issued its PAA Order in this limited proceeding on May 14, 2002. The PAA Order memorializes the Commission's April 23, 2002 vote on 19 separate issues identified in Commission staff's recommendation dated April 11, 2002.

3. In accordance with the Notice of Further Proceeding or Judicial Review set forth on page 27 of the PAA Order, any petitions for formal proceeding protesting any aspect of the PAA Order were required to be filed by the close of business on June 4, 2002.

4. On June 4, 2002, Sunshine filed a Petition for Expedited Limited Formal Proceeding protesting three limited issues addressed in the PAA Order:

- i. The proposed reduction in the 2001 salary of Sunshine's president from \$91,731 to \$45,233;

- ii. The proposed disallowance of \$27,239 in legal fees incurred by Sunshine in participating in the proceeding that resulted in the issuance of the PAA Order; and
- iii. The impact of the proposed salary reduction and the proposed disallowance of legal fees on the proposed revenue requirements and monthly rates for Sunshine.

5. The Citizens also protested certain issues addressed in the PAA Order by filing a Petition on Proposed Agency Action before expiration of the June 4, 2002 deadline. The Citizens' Petition only protests the following two issues identified in the April 11, 2002 staff recommendation, which were voted on by the Commission and memorialized in the PAA Order:

Issue 1: Should the Commission approve Sunshine's requested limited proceeding to increase its rates for all customers to interconnect five of its water systems?

Issue 13: What is the appropriate amount of rate case expense for this docket?

6. On August 2, 2002, the Citizens served their first set of interrogatories and their first request for production of documents on Sunshine. These discovery requests sought information beyond the scope of the issues protested by either Sunshine or the Citizens, such as information relating to the salary of Sunshine's vice president. Sunshine timely filed objections to, and requests for clarification of, such discovery requests objecting to the discovery requests, for among other reasons, on the basis that they sought information relating to issues deemed stipulated pursuant to

Section 120.80(13)(b). In a telephone conference between undersigned counsel and counsel for the Citizens, counsel for the Citizens indicated that the Citizens agreed that the issue of the vice president's salary was not in dispute and was deemed stipulated pursuant to Section 120.80(13)(b).¹ Accordingly, the parties agreed that Sunshine would not respond to the discovery requests to the extent they sought information relating to the salary of Sunshine's vice president.

7. On August 29, 2002, the Citizens submitted prefiled direct testimony of two witnesses, Ted L. Bidy and Kimberly H. Dismukes. As described in further detail below, both Mr. Bidy and Ms. Dismukes address issues in their testimony that were not protested by either Sunshine or the Citizens, and therefore, are deemed stipulated pursuant to Section 120.80(13)(b). In addition, Mr. Bidy's testimony contains hearsay that is inadmissible under the Florida Rules of Evidence and the Florida Administrative Procedure Act, and Ms. Dismukes' testimony recommends that the Commission take action that is beyond the scope of this limited proceeding.

8. Pursuant to the Order Establishing Procedure, Order No. PSC-02-0852-PCO-WU, issued in this docket on June 20, 2002, Prehearing Statements were due to be filed on or before September 6, 2002. The Order Establishing Procedure states:

¹ In their Petition on Proposed Agency Action, the Citizens did not dispute or protest any issues relating to the salary paid to any of Sunshine's officers. Sunshine only protested the Commission's proposed reduction to its president's 2001 salary.

Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position. . . .

[Order Establishing Procedure at 4 (emphasis added)].

9. Both Sunshine and Commission staff timely filed their prehearing statements on September 6, 2002. The Citizens, however, did not timely file a prehearing statement on September 6, 2002, but filed their prehearing statement on September 9, 2002, after having received Sunshine's prehearing statement by hand-delivery on September 6, 2002. Prior to untimely filing their prehearing statement on September 9, 2002, the Citizens did not move for an extension of time to file their prehearing statement. Had they done so, and such a motion been granted, any extension would likely have applied equally to all of the parties. Instead, the Citizens simply claim in their late-filed prehearing statement that their failure to meet the filing deadline was due to an alleged "misapprehension of the Commission's First Order Revising Order Establishing Procedure." Sunshine, however, questions how misapprehension of the First Order Revising Order Establishing Procedure could have resulted in the Citizens' failure to timely file their prehearing statement when the order only addresses timelines for responding to discovery and filing testimony, does not address the filing of prehearing statements in any respect, and reaffirms "all other controlling dates in the Order Establishing Procedure." [First Order Revising Order Establishing Procedure and Controlling Dates, Granting in

Part and Denying in Part Expedited Discovery, and Setting Uniform Expedited Discovery Deadlines at 3].

10. The Citizens' prehearing statement lists issues of fact, law and policy which the Citizens state they believe are at issue in this proceeding, but were not timely protested, and are deemed stipulated pursuant to Section 120.80(13)(b). Staff's prehearing statement correctly notes that some issues set forth in the April 11, 2002 staff recommendation and on which the Commission voted resulting in the PAA Order, were not protested, and pursuant to Section 120.80(13)(b) are deemed stipulated. However, staff's prehearing statement also incorrectly identifies other issues that were not protested, and are deemed stipulated pursuant to Section 120.80(13)(b), as issues to be addressed at hearing.

Motion In Limine

Section 120.80(13)(b) Limits the Parties In This Proceeding To The Issues Raised In the Timely Protests to the PAA Order

11. Section 120.80(13)(b), Florida Statutes, states:

Notwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

12. The Commission has interpreted "issues in dispute" as used in Section 120.80(13)(b) to mean those issues raised in a timely protest of a PAA Order. *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, 00 F.P.S.C. 8:402, 404, Docket No. 990080-WS, Order No. PSC-00-1549-PCO-WS (August 25, 2000) (addressing the Office of Public Counsel's ("OPC"'s) motion in limine requesting that the hearing be limited to issues raised in OPC's protest). The Commission has held that Section 120.80(13)(b) "is designed to limit the parties to the issues presented by the protest in order to prevent them from relitigating issues that the Commission already decided and that were not protested." *Id.*² Thus, the Commission has routinely held that issues in a PAA Order that are not specifically protested are deemed stipulated pursuant to Section 120.80(13)(b). *See e.g., In re: Application for increase in water rates in Highlands County by Placid Lakes Utilities, Inc.*, 01 F.P.S.C. 2:242, 252 n.1, Docket No. 000295-WU, Order No. PSC-01-0327-PAA-WU (Feb. 6, 2001) ("While portions of that PAA order were protested, and are not final, this specific issue was not protested and is, therefore, deemed stipulated pursuant to Section 120.80(13)(b), Florida Statutes."); *In re: Review of the appropriate application of incentives to wholesale power sales by investor-owned electric utilities*, 01 F.P.S.C. 1:160, 165, Docket No. 991779-EI, Order No. PSC-01-0084-FOF-EI (Jan. 10, 2001) ("No person challenged Item 4 of part III of Order 00-1744. Pursuant to Section 120.80(13)(b), Florida Statutes, Item 4 is deemed stipulated."); *In re: Number Utilization Study: Investigation into Number Conservation Measures*, 01 F.P.S.C. 1:100, 102, Docket No. 981444-

² At least one former Commissioner, however, has concluded that Section 120.80(13)(b) does not prevent the Commission from addressing matters it deems necessary to a full resolution of a case in the manner it deems appropriate. *Id.*

TP, Order No. PSC-01-0051-PAA-TP (Jan. 8, 2001) (“The remaining portions of the PAA Order were not protested by the Joint Petitioners and were deemed stipulated pursuant to Section 120.80(13)(b), Florida Statutes.”); *In re: Petition by Florida Power & Light Company for approval of conditional settlement agreement which terminates standard offer contracts originally entered into between FPL and Okeelanta Corporation and FPL and Osceola Farms, Co.*, 00 F.P.S.C. 12:89, 93, Docket No. 000982-EI, Order No. PSC-00-2341-FOF-EI (Dec. 6, 2000) (“Pursuant to Section 120.80(13)(b), Florida Statutes, these undisputed matters [which were not protested] are deemed stipulated.”)

13. As noted above, only four issues were timely raised by any party in a protest to the PAA Order. These issues are those set forth in Sunshine’s prehearing statement, which are:

- i. Should the Commission approve Sunshine’s requested limited proceeding to increase its rates for all customers to interconnect five of its water systems?
- ii. Should an adjustment be made to the salary level of Sunshine’s president?
- iii. What is the appropriate rate case expense for this docket?
- iv. Should the revenue requirement and monthly rates for Sunshine as set forth in the PAA Order be revised to reflect the elimination of any reduction in the president’s salary and rate case expense?

The remaining portions of the PAA Order were not protested and are deemed stipulated pursuant to Section 120.80(13)(b).

14. Had the Citizens desired to protest all of the issues in the PAA Order they could have easily done so by identifying all of the issues in the PAA Order as issues in dispute when they filed their Petition on Proposed Agency Action.³ The Citizens did not do so and cannot now through the filing of prefiled testimony and an untimely prehearing statement, or through discovery, expand the scope of this proceeding to include issues that were not timely protested and are deemed stipulated. Accordingly, the Citizens seek entry of an order limiting the issues to be addressed at hearing and the scope of discovery to the four issues identified above, which are the only issues in the PAA Order that have not been deemed stipulated by operation of Section 120.80(13)(b).

*The Citizens Have Waived Any Issue Not Raised
By Sunshine or by the Commission*

15. As previously noted, the Order on Prehearing Procedure in this docket provides that: “Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission.” [Order Establishing Procedure at 4 (emphasis added)].

16. The Citizens did not timely file a prehearing statement. Rather, the Citizens filed their prehearing statement three days after they were

³ The Notice of Further Proceedings or Judicial Review which is part of the PAA Order requires any petition for formal proceeding to be filed in accordance with Rule 28-106.201, Florida Administrative Code, which requires a “statement of all disputed issues of material fact.”

served with, and presumably their counsel had a chance to review, the prehearing statement filed by Sunshine and Commission staff.

17. The use of the word “shall” is mandatory in nature. *Stanford v. State*, 706 So. 2d 900, 902 (Fla. 1st DCA 1998) (“the normal meaning of the word ‘shall’ is mandatory by nature. . . .”) (quoting *White v. Means*, 280 So. 2d 20, 21 (Fla. 1st DCA 1973)). Accordingly, by failing to timely file a prehearing statement, the Citizens have waived any issue not raised by Sunshine or by the Commission in this proceeding.

Motion to Strike

The Testimony of the Citizens’ Witnesses Should Be Stricken In Its Entirety Based on the Citizens’ Failure to Timely File a Prehearing Statement

18. As stated above, the Order on Prehearing Procedure in this docket not only provides that failure to timely file a prehearing statement shall result in waiver of the right to raise issues not raised by other parties or the Commission, but it also provides that failure to timely file a prehearing statement “shall preclude the party from presenting testimony in support of its position.” [Order on Prehearing Procedure at 4 (emphasis added)]. Again, the use of the word “shall” is mandatory, and not permissive in nature.

19. Because the Citizens failed to timely file their prehearing statement on or before September 6, 2002, as required by the Order on Prehearing Procedure, the Citizens are precluded from presenting any

testimony in support of their position in this proceeding. Accordingly, the testimony of the Citizens' witnesses, Ted. L. Bidy and Kimberly H. Dismukes, should be stricken in its entirety.

*The Portions of the Testimony of Ted L. Bidy and
Kimberly H. Dismukes That Address Issues
Not Protested and Deemed Stipulated Pursuant
To Section 120.80(13)(b) Must Be Stricken*

20. Even if the Citizens had timely filed their prehearing statement and were not precluded from presenting any testimony in support of their position in this proceeding, certain portions of the testimony of the Citizens' witnesses, Ted L. Bidy and Kimberly H. Dismukes is required to be stricken because these portions of the testimony address issues in the PAA Order not timely protested by either Sunshine or the Citizens, and therefore, deemed stipulated pursuant to Section 120.80(13)(b).

21. The following pages and lines of the testimony submitted on behalf of the Citizens address used and useful calculations for Sunshine's proposed water system improvements:

Ted L. Bidy	Page 3, the sentence beginning on line 13 through line 16.
	Page 17 (beginning on line 3) through page 26, line 16.
Kimberly H. Dismukes	Page 14, the two sentences beginning on line 11 and ending on line 16.
	Page 15, lines 19-21.

Sunshine's used and useful calculation was addressed in Issue 4 of the April 11, 2002 staff recommendation -- an issue that was not timely protested by either Sunshine or the Citizens. Indeed the words "used and useful" do not appear anywhere in the Citizens' Petition on Proposed Agency Action.

Because the used and useful portion of the PAA Order was not protested, it is deemed stipulated, and the testimony of the Citizens' witnesses on used and useful is irrelevant to the issues to be determined at hearing in this limited proceeding.

22. The following pages and lines of Kimberly H. Dismukes' testimony also addresses other issues not relevant to this proceeding because such issues were deemed stipulated when the Citizens failed to dispute such issues in their Petition on Proposed Agency Action:

Page 15, lines 22-23

Page 16, lines 1-23

Page 17, lines 1-2

Page 24, lines 21-23

Page 25, lines 1-9

As with the testimony addressing used and useful percentages, these portions of Ms. Dismukes' testimony should also be stricken.

23. The Citizens' complete disregard for the effect of Section 120.80(13)(b), and their attempt to expand the scope of this limited proceeding beyond the issues actually protested, is readily apparent from page 11, lines 18-20 of Ms. Dismukes' testimony, which states: "OPC's protest encompassed all aspects of the Commission's PAA Order including

the rate increase granted by the Commission.” It is clear from the face of the Citizens’ Petition on Proposed Agency Action that the Citizens did not protest all aspects of the Commission’s PAA Order, but that the protest only encompassed Issues 1 and Issue 13 of the April 11, 2002 staff recommendation as addressed in the PAA Order. In fact, Ms. Dismukes’ testimony is directly contrary to the position initially taken by the OPC in trying to resolve discovery objections. Because page 11, lines 18-20 of Ms. Dismukes’ testimony incorrectly describes the scope of the Citizens’ protest of the PAA Order, the Commission should also strike this portion of Ms. Dismukes’ testimony.

*The Portions of the Testimony of Ted L. Biddy
That Contain Inadmissible Hearsay Must Be Stricken*

24. Section 120.57(1)(c), Florida Statutes, states:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Similarly, Rule 28-106.213(3), Florida Administrative Code states:

Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.

25. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” § 90.801(1)(c), Fla. Stat. (2001). Section 90.802,

Florida Statutes, provides that except as provided by a statutory exception, hearsay evidence is inadmissible.

26. The following portions of the prefiled direct testimony of Ted L. Biddy contain inadmissible hearsay not within any exception to the hearsay rule:

The two sentences beginning on page 13, line 21 and ending on page 14, line 3.

Page 14, lines 10-13.

These portions of Mr. Biddy's testimony describe statements allegedly made by Britt Williams and Paul Morrison, who are both employees of the Florida Department of Environmental Protection ("DEP"). Mr. Biddy testifies regarding statements made by Mr. Williams about his inspections of Sunshine's systems. Mr. Biddy also testifies regarding statements made by Mr. Morrison regarding the lack of complaints from Sunshine customers relating to sulfur or hydrogen sulfide. Clearly these statements are introduced to attempt to prove the truth of the matter asserted. There is no other evidence in the record addressing the results of DEP inspections of Sunshine or complaints received by DEP about Sunshine, or the lack thereof. Thus, these portions of Mr. Biddy's testimony do not contain hearsay that supplements or explains other evidence which would be inadmissible in a civil action, but potentially admissible in an administrative proceeding. Rather, these portions of Mr. Biddy's testimony contain hearsay not admissible in any proceeding.

27. Neither Mr. Williams nor Mr. Morrison have been identified as witnesses in this limited proceeding and they have not submitted prefiled testimony on behalf of the Citizens or any other party in this proceeding. Thus, unless the above-referenced portions of Mr. Biddy's testimony are stricken, Sunshine will not have an opportunity to challenge, through cross examination at hearing, the veracity of such statements, or the matters that the Citizens are attempting to prove by including such statements in Mr. Biddy's testimony.

*The Portion of the Testimony of Kimberly H. Dismukes
That Requests Relief Beyond the Scope of This Limited
Proceeding Must Be Stricken*

28. There is no dispute that this is a limited proceeding initiated by Sunshine pursuant to, and governed by, Section 367.0822, Florida Statutes.

29. At the conclusion of her testimony on page 25, lines 10-13 and page 26, lines 1-3, Ms. Dismukes suggests that rather than grant Sunshine the modest increase in rates requested in this limited proceeding, the Commission should reduce Sunshine's rates. If the Commission were to reduce Sunshine's rates, due process would require a full rate case exploring all aspects of the company's operations to arrive at fair, just and reasonable rates. *See In Re: Investigation into Currently Authorized Return on Equity of TAMPA ELECTRIC COMPANY*, 94 F.P.S.C. 3:578, 583, Docket No. 930987-EI, Order No. PSC-94-0337-FOF-EI (March 25, 1994). Such a comprehensive review is beyond the scope of this limited proceeding *See*

id. Thus, the Commission should also strike this portion of the Citizens' testimony.

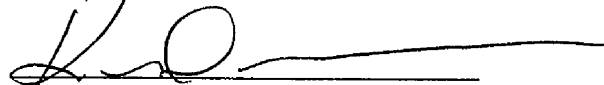
WHEREFORE, Sunshine respectfully requests that the Commission enter an Order:

(a) limiting the evidence to be presented at hearing and the scope of discovery to that which is relevant to the four issues raised in timely protests to the PAA Order as identified herein;

(b) striking the testimony of Ted L. Biddy and Kimberly H. Dismukes in its entirety; or alternatively, striking those portions of the testimony of Ted. L. Biddy and Kimberly H. Dismukes as identified herein that (i) address issues not protested, and therefore, deemed stipulated pursuant to Section 120.80(13)(b); (ii) contain inadmissible hearsay; and (iii) request relief beyond the scope of this limited proceeding; and

(c) granting such other relief as the Commission deems appropriate.

Submitted this 13th day of September, 2002.

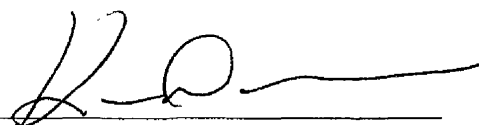


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by hand delivery to Stephen C. Reilly, Associate Public Counsel, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400; and to Ralph Jaeger, Esquire, Florida Public Service Commission, Division of Legal Services, Room 370, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 all on this 13th day of September, 2002.



Karen D. Walker