BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities Inc. of Florida.	DOCKET NO. 160101-WS FILED: May 10, 2017

CITIZENS' MOTION FOR RECONSIDERATION OF ORDER NO. PSC 17-0147-PCO-WS BEFORE THE FULL COMMISSION

The Citizens of the State of Florida (Citizens), pursuant to Rule 25-22.0376, Florida Administrative Code, hereby file Citizens' Motion for Reconsideration of Order No. PSC 17-0147-PCO-WU ("Order 17-0147" or Order), issued May 2, 2017, in the above docket. The Order states that reconsideration must be filed within 10 days or by Friday May 12, 2017; however, the Citizens committed to file by Wednesday May 10, 2017. The Citizens seek review and reconsideration by the full Commission of the prehearing decision not to strike portions of the rebuttal testimony of Utilities Inc. of Florida ("UIF" or "Company") witness Patrick Flynn and as grounds state the following:

In filing this motion, OPC is aware that on reconsideration, the Commission will limit its review to matters of fact or law that it overlooked or failed to consider. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962). The standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer 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. The instant motion for reconsideration satisfies these criteria as discussed below.

The specific errors are (1) the factual characterization of information in UIF witness Flynn's rebuttal testimony exhibits PCF-9, PCF-13 and PCF-17 as "updated" when the information provided was brand new on March 2, 2017 and thus was not in any sense of the word "updated"; (2) the factual characterization in material percentage and gross dollar amounts as "rebuttal" or "updates" or "updated" the information found in the following UIF witness Flynn's rebuttal testimony exhibits PCF-3 (increased $588,140 or 168%), PCF-10 (increased $956,990 or 53%), PCF-20 (increased $150,937 or 56%), PCF-23 (increased $238,000 or 67%), PCF-27 (increased $3,537,316 or 83%), PCF-33 (increased $974,118 or 82%), PCF-35 (increased $418,146 or 52%) or PCF-41 (increased $568,631 or 473%); (3) that the OPC's commencement of discovery on September 16, 2016 allowed for discovery that could be utilized in responsive expert testimony when on its face such "discovery" was an impossibility since the very first of the missing or incomplete cost support was not provided prior to February 6, 2017, and even that supporting information later materially changed in the rebuttal subsequently filed on April 3, 2017, or was provided after the close of business on March 2, 2017; (4) the legal and factual conclusion that Orders No. PSC-10-0611-PCO-WU, PSC-11-0563-PCO-EI, and PSC-09-

0640-PCO-EI (collectively "Prehearing Orders") have a precedential or factual bearing on the facts of this case; (5) the legal and factual conclusion that the case of Gulf Power Company v. Bevis, 289 So. 2d 401, 404 (Fla. 1974) governs the disposition of this case, has any factual application, or is even a correct statement of the law in its broad application (Order 17-0147 cites Bevis at 4 for the proposition that "[i]t is established law that the Commission cannot ignore an existing fact that admittedly will affect the future rates"), and (6) that in the aggregate, the Order overlooks the fact that the totality of circumstances meant that the Citizens were deprived of their right to file responsive expert testimony on 11 enumerated projects that – based on the date of filing – represent over $8 million of costs that had never been subject to expert witness scrutiny in time for responsive testimony to be filed.

These errors in Order 17-0147 are fundamental and in their cumulative nature constitute an error of law, in that the Order overlooks or fails to acknowledge that UIF filed purported cost support on at least 11 projects many months after the original filing date and also the date the utility's MFR's were deemed complete, and in such a manner that the Citizens' engineering expert Andy Woodcock was precluded from questioning, evaluating, challenging and applying his professional judgment to, the underlying engineering and cost information. As such, Mr. Woodcock was blocked from offering responsive expert testimony. The information in its final form in the 11 projects listed above was either brand new or substantially altered such that Mr. Woodcock had no reasonable opportunity to develop expert testimony and incorporate it into his testimony that was due on March 6, 2017, as required under the Order Establishing Procedure in this docket. The inability to file expert responsive testimony on the enumerated 11 projects (three of which the supporting cost information was never even seen until after 5:00 PM on March 2, 2017) is a violation of the Citizen's due process rights, which include the rights

enumerated in Section 120.57(1)(b), Fla. Stat., and includes the "opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence."

In the April 20, 2017 Motion to Strike Portions of Rebuttal Testimony and Exhibits ("Motion to Strike"), which is incorporated by reference herein, Citizens asked the Commission to strike or not consider the testimony exhibits as listed therein in the table on pages 6 and 7, in lieu of delaying the hearing and affording the Citizens their right to file responsive expert testimony. On reconsideration, the Citizens continue to maintain that the 11 projects (out of a total of 23 contained in the Motion to Strike) listed above are the ones that require exclusion from the case, because UIF filed necessary, material information too late for responsive expert testimony to be considered. The Prehearing Orders cited in Order 17-0147 are not applicable to this specific circumstance where supporting pro forma cost information – that the utility acknowledged in its initial filing as being required – on up to 23 separate, individual projects was filed for the very first time or materially altered months later, well after the opportunity to file responsive testimony had passed.

Of the three orders in the Prehearing Order, only the WMSI order (10-0611) bears even the slightest of superficial resemblance to the facts of this case (primarily because the utility attorney and engineering witness and the OPC's engineering and accounting witnesses are the same). Yet when examined, it does not support the decision in the Order. In the WMSI case, the utility did not file testimony promising to provide the admittedly missing, but required, information on 3 projects or file "rebuttal" upwardly altering the initial estimates on at least 8 other projects with percentage increases ranging from 50% to 473% in the aggregate of $7.4 million ($8.1 million when all 11 projects are totaled, as can be derived in the far right column

on the table on pages 6 and 7 in the Motion to Strike for those 11 enumerated projects). In the WMSI case, the $2.2 million pro forma amount did not increase, nor did the engineering support change. The dispute there was about whether the notion of a phasing of rates discussed in rebuttal was properly responsive to the OPC's testimony, or whether it should have been included in the initial filing. There was no new cost data or engineering analysis supplemented in the rebuttal. The two cases are legally and factually "apples and oranges." Nonetheless, it is notable that, the Commission did not allow the WMSI pro forma addition in the final rates in that case.

Likewise, the cited Gulf Power order (11-0563) has no bearing on the UIF fact scenario. In the Gulf case, the OPC raised an issue in its responsive expert testimony that challenged the justification for Gulf's decision to buy land for a nuclear plant site that Gulf had purchased or had under contract. In its rebuttal testimony, the company provided analyses the OPC claimed should have been included in the company's decision making. That fact pattern has nothing to do with cost support that the company **acknowledged** in its direct filing was missing or which it materially altered in rebuttal. Again, it is notable, in the Gulf case that, the Commission did not allow the disputed land in rate base in the final order.

Finally, the 2009 Progress Energy (PEF) order (09-0640) is completely inapplicable and – if anything – supports disallowance of the proposed 11 UIF pro forma additions. PEF filed an updated sales forecast of nearly $100 million in its rebuttal testimony. In the order denying the intervenors' motion to strike or move the hearing, the Commission declined to change the hearing or strike the testimony but did rule that the updated sales forecast "shall not be used as the basis for claiming additional revenue requirements in this proceeding." UIF is certainly asking the Commission to rely on the increased and new cost information in setting

rates. Allowing such a result would be contrary to the PEF case. Once again, it is notable that, the Commission did not allow the updated sales forecast as a basis for rate relief for PEF in the final order.

As can be seen, the Prehearing Orders do not provide a basis for the Commission to permit UIF to file its case in a way that deprives the Citizens the ability to file responsive expert testimony. This case is one of first impression and has no antecedent in Commission practice either on basic facts or the sheer breadth of the number of separate projects with new or radically altered cost estimates. It is a factual error in the Order to label testimony that includes the formerly missing information as "rebuttal" when the intervenor witness – who does not shoulder the burden of proof – simply observed that the information was deficient.[1] An inaccurate label cannot convert late-filed direct testimony into rebuttal and thereby cure a patently defective filing. Allowing this practice will expose Commission ratemaking (including electric and gas utilities) for all industries to a cynical circumvention of the right of the customers to provide responsive expert testimony. If this Order stands as written, instead of filing required cost support at the outset of a filing (a time over which the utility has full control), companies will be able to file "placeholder" exhibits promising to provide actual supporting documentation months later. As a result, customers can be stiff-armed on discovery; and then later when the omissions are noted in intervenor responsive testimony, the required documentation will be filed with the slick appellation of "rebuttal," thus thwarting any critical evaluation by an expert. Even allowing adequate opportunity for supplemental responsive testimony by Mr. Woodcock would require

[1] Had Mr. Woodcock chosen to remain silent on the issue, UIF would have been in a quandary. With nothing to rebut, it would have had no vehicle for supplementing its incomplete case (for which it chose the filing date solely on its own). This conundrum illustrates that the supplemented and new information is truly direct testimony. The "rebuttal' label was one of convenience and cannot elevate form over substance.

additional supplemental testimony testimony by OPC witness Donna Ramas which would then give rise to the need to afford the utility supplemental rebuttal, and would heavily erode the administrative process and efficiency. The Commission should require the utility to get it right up front and strongly discourage such "trickle-in" or piecemeal filings. Such a practice is not what Section 120.57, Fla. Stat., contemplates, nor is it consistent with Commission Rule 25-30.436, F.A.C., which establishes the required information to initiate a general rate increase.

The Order also erroneously relies on the Gulf Power v. Bevis case for the proposition that the Commission is nevertheless required to consider the late-filed pro forma information whenever filed by the company. The Citizens would note that a reviewing court can also read the Bevis decision and discern that that case concerns the very first instance of the state income tax becoming effective during the processing of Gulf Power's rate case. Obviously, Gulf had no control over the effective date of this new state constitutional requirement. Furthermore, there was no dispute about the amount of the state income tax expense ($756,499) and the Court held that the Commission could not ignore the known fact of that expense. There is a wide gulf between the type of known and undisputed fact in Gulf Power's case and the required information belatedly offered in the instant case in support of the 11 UIF projects that was solely in the control of UIF and which is hotly disputed, and which was filed in a way that deprived the Citizens of their right to responsive expert analysis provided for in Section 120.51(1)(b). The Bevis case does not stand for the preposterous notion that a company can file evidence any time it wishes, flaunt the rules and statutes governing the rate cases, delay discovery for many months and still force the Commission to consider and accept the information even if intervenors are denied the opportunity to file responsive testimony. Bevis is limited to circumstances where there are specific, known facts that cannot be ignored. Bevis clearly does not stand for the

proposition that the Commission has to accept any information a company dumps in the agency's lap at any time.

To the extent that the Order suggests that the filing of discovery on March 2, 2017 at 6:00 PM afforded OPC a reasonable opportunity to develop expert testimony to be filed on March 6, 2017, it is in error. It is axiomatic to anyone who practices before the Commission that pre-filing testimony is a serious matter that requires initial drafts, client review and revision. The process further requires strict deadlines for review and coordination with the revenue requirement witness (here Ms. Ramas) to incorporate any revenue requirement changes. The simultaneous testimony finalization process does not allow for an engineering expert witness like Mr. Woodcock to abandon that process, suspend coordination efforts by Ms. Ramas, and engage in the necessary thorough, thoughtful and properly skeptical analysis of, and application of professional judgment to, information being presented for the very first time to the Commission and the OPC at 5:42 pm (after the close of business) less than 4 full days before the deadline for all OPC testimony. The arrival of information that should have been presented in the fall of 2016 (at the very latest) with zero opportunity to conduct discovery is a less-than-meaningless opportunity to evaluate that portion of the company's filing. Even after experts Woodcock and Ramas complete their testimony, it still must be proofed, formatted and approved. Those internal OPC deadlines were reasonably established as Friday, March 3, 2017. Many practitioners would argue that even this was precariously close to being over-the-line in that it left zero margin for error in the final production and filing process. Certainly, it did not allow for the development of new testimony on additional projects.

Further, it is a mistake of law to suggest that the OPC – as an intervenor – shouldered a burden to "determine the reasonableness of" the outrageously late-filed direct evidence that was

six months overdue. Only the utility has the burden of proof to justify all costs for which it seeks recovery. See Florida Power Corp. v. Cresse, 413 So.2d 1187 (1982). Only the Commission makes determinations. The OPC has the right to question and file responsive expert testimony. Having scant hours or even minutes to digest information that is in no way a mere update but instead being seen for the very first time does not afford the Citizens their opportunity in reality or as a matter of law. With regard to the three brand new projects, allowing the late-filed cost support information in the record and basing recovery of costs on it would be a violation of the Citizens' due process rights, and a failure to hold the Company to its burden of proof.

With respect to the other 8 projects that were materially altered in "rebuttal" testimony, it is without question that information subsequently filed 28 days later on April 3, 2017, could not have been addressed on March 6, 2017. On its face, allowing this information into the record and basing recovery of costs on it would be a violation of the Citizens' due process.

In sum, the Commission overlooked the factual errors underlying Order 17-0147 in deciding that information submitted for the first time after the opportunity to provide responsive expert testimony has passed should nevertheless be admitted into evidence. Failure to prohibit this type of conduct at this juncture will leave the Commission unable to prohibit utilities from making this a common practice. The information in the 11 enumerated projects should be excluded from evidence.

Citizens' Counsel conferred with the Parties to this matter. The Summertree Alliance supports the Motion. UIF does not support the Motion. Seminole County takes no position on the Motion.

WHEREFORE, the Citizens hereby request that the Commission grant this Motion for Reconsideration of Order No. PSC 17-0147-PCO-WS and exclude from consideration the information in the 11 enumerated projects as outlined in the body of this Motion.

Respectfully Submitted

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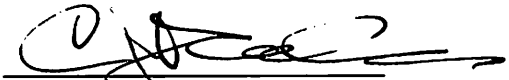

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the following parties on this 10th day of May, 2017.

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