

BEFORE THE 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

**UTILITIES, INC. OF FLORIDA'S RESPONSE TO OPC'S
MOTION FOR RECONSIDERATION OF ORDER NO. PSC-17-0147-PCO-WS**

Applicant, UTILITIES, INC. OF FLORIDA ("UIF") by and through its undersigned attorneys and pursuant to Commission Rule 25-22.0376 (2), files this Response to the Office of Public Counsel's ("OPC") Motion for Reconsideration of Order No. PSC-17-0147-PCO-WS ("Order"), which denied OPC's Motion to Strike portions of the Prefiled Rebuttal Testimony of Patrick C. Flynn, and states as follows:

1. While OPC's Motion to Strike addressed 23 of the proforma projects, it appears that in the Motion for Reconsideration is limited the Motion to the 11 proforma projects enumerated in its Motion for Reconsideration.¹

2. At the outset, the Motion for Reconsideration, despite its attempts to do so, does not meet the long-standing standard for reconsideration:

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. Diamond Cab Company v. King, 146 So.2d 889, 891 (Fla. 1962). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Id.* The alleged overlooked fact or law must be such that if it was considered, we would reach a different decision than the decision in the order. See Order No. PSC-14-0261-FOF-EI, Order Denying Motions for Reconsideration, issued May 23, 2014, in Docket No. 130223-EI. In re: Petition for approval of optional non-standard meter rider, by FPL. It is not

¹ As to PCF-9, Mr. Woodcock admitted at the final hearing that the cost was reasonable.

necessary to respond to every argument and fact raised in the motion for reconsideration because "[a]n opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant." See *id.* at p. 7. [ORDER NO. PSC-15-0101-DS-EM]

3. OPC, is now effectively asserting that in its Motion to Strike it did not adequately articulate the factual or legal basis for the Motion. The six alleged “errors” articulated on pages 2 and 3 of its Motion for Reconsideration are nothing more than more detailed arguments and factual allegations that were set forth in its Motion to Strike. It is clear that OPC is not arguing facts or law that were overlooked but devotes its entire argument to attempting to distinguish the prior opinions that Commissioner Brisé cited in the Order.

4. Notwithstanding the clear inappropriateness of the Motion for Reconsideration, OPC will address the substantive arguments raised by OPC in its Motion. It is evident from the prefiled testimony of OPC witness Woodcock that OPC’s strategy, at least as far back as March 6, 2017, was not to address the merits of Mr. Flynn’s documentation of the proforma project costs.² Mr. Woodcock did admit in his prefiled testimony that the appropriate documentation to support proforma projects were actual invoices, or signed contracts (page 35), all of which are present which regard to UIF’s proforma projects. Notwithstanding OPC’s position being apparent at that time, inexplicably it waited three weeks after Mr. Flynn’s prefiled rebuttal testimony was filed, until the day of the prehearing conference, to file its Motion to Strike, which date was the deadline within which to file such motions.³ Had the Motion to Strike been filed more timely there would have been an opportunity for Mr. Woodcock to file supplemental testimony. It should be obvious

² See page 45 of Mr. Woodcock’s Prefiled Testimony where he asserts the legal opinion that “UIF had the burden to demonstrate the reasonableness of the costs when it filed its MFRs, direct testimony, and exhibits”

³ Order Establishing Procedure, Order No. PSC-16-0558-PCO-WS, issued December 14, 2016.

that OPC's strategy has been not to attempt to address the merits of the proforma projects at issue⁴ but to attempt to get them excluded based upon a procedural due process argument. This Commission should not condone that strategy. OPC made a conscience decision to make sure that it did not have an opportunity to file supplemental testimony, thus causing its alleged due process violation.⁵ A party cannot cause a due process violation and then claim a due process violation.

5. In Mr. Flynn's Prefiled Direct Testimony filed on August 31, 2016, on pages 3 through 13 he identified and described in detail 47 proforma projects (one was subsequently withdrawn). To the extent contracts and documentation were in existence those were provided as well as Exhibits to his testimony. Admittedly, at that time while the full documentation and costs of the proforma projects had not all been finalized, all proforma projects were described and Mr. Woodcock was afforded an opportunity to, and did in fact between January 23 and 25, 2017, view any systems and proforma project locations he wanted.

6. As admitted by OPC in its Motion to Strike, over the course of the next several months UIF provided updated documentation as it became available. Most of these updates were provided in discovery responses on January 9, 2017, February 21, 2017 and March 25, 2017 before Mr. Woodcock filed his Prefiled Testimony. OPC's statement in its Motion that Mr. Woodcock only had four days to review this documentation was incorrect. Mr. Woodcock admitted that this documentation was provided "a little more than a week" before his Prefiled Testimony was due (p. 43, line 14). Certainly one week would be sufficient time to focus on the significant ones, but apparently he chose not to do so, consistent with OPC's strategy to create a due process issue.

⁴ In fact, there would have been nothing to contest since all proforma projects met Mr. Woodcock's requirements, and he did not refute the reasonableness of any of them.

⁵ For the reasons set forth below, even without having an opportunity to file supplemental testimony OPC was afforded its due process rights.

7. UIF provided additional updated documentation in discovery responses served on March 2, 2017. The complete documentation was filed with Mr. Flynn's Prefiled Rebuttal Testimony in rebuttal to Mr. Woodcock's testimony addressing those projects for which Mr. Woodcock claimed he did not have sufficient time to review.

8. With regard to the documents served by UIF in late February and early March, 2017, Mr. Woodcock has chosen to play ostrich. In response to UIF's Interrogatory No. 6, as quoted by OPC in its Motion, Mr. Woodcock basically says he just isn't going to review them. When asked about each specific project that he had excluded from his schedule of acceptable projects in his Prefiled Testimony, he again stated that he did not have the inclination to review the documentation. While no one can make Mr. Woodcock review the documentation, he and OPC cannot then complain about the consequences of such ambivalence.

9. OPC's due process rights have not been infringed upon. All of the proforma projects were identified and described in Mr. Flynn's Prefiled Direct Testimony. Mr. Woodcock was afforded an opportunity to visit all of UIF's systems, including those with proforma projects. He does not question the reasonableness or prudence of any project, so the bottom line is whether the costs of those projects are reasonable. Mr. Woodcock has correctly articulated this Commission's policy of considering proforma projects based upon actual invoices and signed contracts based upon competitive bids (p. 35, lines 2 & 6). All of the proforma projects of UIF in this case meet one of those requirements.

10. OPC claims it does not have a meaningful opportunity to vet the cost of the proforma projects that it seeks to exclude. However, by Mr. Woodcock's own admission he chose not to do so, choosing to put all of his eggs in the basket of asserting that all of the documentation

had to be filed with the original MFRs. It is clearly disingenuous to claim that the documentation filed with Mr. Flynn's Prefiled Rebuttal Testimony is "unsubstantiated cost information".

11. Further, OPC took the deposition of Mr. Flynn and was afforded every opportunity to question him about the proforma projects to allow OPC to conduct cross-examination at the final hearing. OPC extensively questioned Mr. Flynn at his deposition on the proforma projects documentation for approximately two hours. Consistent with OPC's strategy to create a due process issue, it did not address the specific costs of any proforma project, or why such costs may have changed.

12. It is interesting, and somewhat contradictory, for OPC to argue that changes in the cost of some pro forma projects that decrease are not fundamental changes for which it asserts a due process violation, but it is so when the cost increases. What UIF provided through the discovery process and in its prefiled rebuttal testimony was to refine the costs of the proforma projects, not to create new projects.

13. It is disingenuous for OPC to argue that had it received the detailed proforma cost documentation earlier that it could have conducted discovery. OPC had that opportunity in response to Mr. Flynn's rebuttal testimony but did virtually no discovery on any of the proforma documentation it admitted that it reviewed.⁶ Further, this Commission at the final hearing made it clear that it was going to afford OPC every opportunity to cross-examine Mr. Flynn on the proforma project costs, but it chose not to do so. UIF and this Commission cannot force OPC to exercise its due process rights, but if OPC does not do so, it cannot now complain.

⁶ Again consistent with its strategy to create a due process issue.

14. OPC devotes a substantial part of its argument to attempting to distinguish the prior PSC Orders which were cited in the prehearing officer's Order. OPC totally miscomprehends the applicability of the Progress Energy Order, Order PSC-09-0640-PCO-EL (issued September 21, 2009). In that case, OPC and other intervenors sought to reschedule the hearing when through rebuttal testimony Progress Energy filed a new load and energy forecast which increased the revenue requirement by \$94.8 million. As in the instant case, OPC argued that its due process rights had been violated. As in the instant case OPC argued that it needed an opportunity to respond, present evidence and argument. In spite of the evidence Progress Energy presented in its rebuttal testimony of the \$94.8 million revenue increase, it made clear that it was not seeking any more in revenues than the amount requested in the original MFRs. This Commission denied OPC's Motion. In the instant case, even though the actual cost of the proforma projects exceeds the amount requested in the MFRs resulting in approximately \$400,000 of additional revenue required, UIF is not seeking more revenues than those set forth in its MFRs, and the Commission may accept this statement as that affirmation. The Commission in the Progress Energy case distinguished the General Development Utilities case relied on by OPC in its Motion to Strike by noting that in the GDU case the utility sought to include additional plant that existed at the time of filing (whereas the plant in the instant case is proforma), and GDU had sought to increase its revenue requirement above that in its original MFRs (which UIF is not seeking to do). OPC in the GDU case also offered the same alternative that has been offered in the instant case to strike the "offending" portion of the rebuttal testimony. That request was also denied, noting that the testimony rebutted that of an intervenor witness, and that such testimony could not be used to increase the revenue requirement above the amount in its original request. Based upon OPC quoting the portion of the Progress

Energy Order that the updated sales forecast “shall not be used as the basis for claiming additional revenue requirements in this proceeding” OPC incorrectly believes that UIF is seeking more revenue than was requested in its MFRs. As stated above, UIF is clearly not doing so. UIF’s request for the proforma projects is not unlike that the Commission considered in a Pluris Wedgefield rate case, Order No. PSC-13-0187-FOF-WS (issued May 2, 2013). In that case the utility originally sought approximately \$56,000 in proforma projects, but during the course of the proceeding added a little over \$92,000 in an additional proforma projects. This Commission stated:

As noted in the background, Wedgefield submitted pro forma expense and capital items subsequent to filing its MFRs. However, the Utility did not request an increase in revenue requirement. As a result, the revenue requirement for the Utility’s water system is nearly equal to the amount requested by the Utility despite the numerous adjustments mandated throughout this Order.

So, obviously, the concept of changes in individual elements of the revenue requirement is nothing new, and is acceptable ratemaking policy so long as the amount originally requested is not exceeded.

15. OPC attempts to distinguish the Gulf Power Order, Order No.PSC-11-0563-PCO-EI (issued December 8, 2011) based on the assertion that when UIF filed its original testimony it knew that it was not complete, and would have to be supplemented, whereas the documentation filed in the rebuttal testimony in the Gulf Power case existed at the time of filing. A distinction without a difference. In the Gulf Power case Commission refused to strike rebuttal testimony of studies that were available when the witness’ direct testimony was filed since it was in rebuttal of an intervenor’s witness, and in addressing the due process complaint pointed out that the intervenor had an opportunity to cross examine the witness. In the instant case the OPC also has been able to depose Mr. Flynn, and cross examine him at the final hearing. Also see Commissioner Graham’s

opinion in Order No. PSC-11-0203-PCO-GU (issued April 22, 2011). OPC believes it is notable that ultimately the Commission did not allow the land in the final order. What is notable is that the Commission was able to consider whether or not to include the land. This Commission may or may not agree to allow all of the proforma projects in the revenue requirement, but it should be afforded the opportunity to consider them.

16. OPC tries hard, but unsuccessfully, to distinguish this Commission's Order in the Water Management Services, Inc. rate case, Order No. PSC-10-0611-PCO-WU (issued October 4, 2010).⁷ The only distinguishing factor is that in the WMSI case is that OPC asserted that there was insufficient information to support \$2.2 million in a proforma project, while the amount in the instant case is greater. The OPC believes it was "notable" that the Commission ultimately denied the proforma project in the WMSI case. Again, what is notable is that the Commission was able to consider the proforma project. This Commission may or may not agree to allow all of the proforma projects in the revenue requirement, but it should be afforded the opportunity to consider them.

17. In summary, OPC caused its due process claim but waiting until the 11th hour to file the Motion to Strike when there was no opportunity to mitigate its claim, OPC did not seek a continuance of the hearing to afford it an opportunity to supplement the testimony of its witness, OPC deposed Mr. Flynn but chose not to delve into the cost details which would have afforded its witness to prepare for cross examination of Mr. Flynn at the final hearing, at the final hearing OPC was again afforded wide latitude in cross examining Mr. Flynn on the proforma project costs but

⁷ OPC incorrectly asserts that WMSI's attorney in that case was the same as UIF's attorney in this case. UIF's attorney handled WMSI's subsequent rate case.

again chose not to do so,⁸ and UIF is not seeking a revenue requirement in excess of that requested in its MFRs.

WHEREFORE, based upon the argument and authorities set forth above, Utilities, Inc. of Florida, respectfully requests this Commission deny OPC's Motion for Reconsideration of Order PSC-17-0147-PCO-WU.

Respectfully submitted this 16th day of
April, 2017

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⁸ One would logically conclude that since UIF's documentation met Mr. Woodcocks requirements to be an appropriate proforma project, that excluding these projects on procedural grounds would be the only way to exclude them for being considered in the revenue requirement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

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