

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 160101-WS

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.

\_\_\_\_\_ /

PROCEEDINGS: COMMISSION CONFERENCE AGENDA  
ITEM NO. 3

COMMISSIONERS  
PARTICIPATING: CHAIRMAN JULIE I. BROWN  
COMMISSIONER ART GRAHAM  
COMMISSIONER RONALD A. BRISÉ  
COMMISSIONER JIMMY PATRONIS  
COMMISSIONER DONALD J. POLMANN

DATE: Monday, June 5, 2017

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: LINDA BOLES, CRR, RPR  
Official FPSC Reporter  
(850) 413-6734

## P R O C E E D I N G S

1  
2           **CHAIRMAN BROWN:** All right. Moving on to  
3 Item 3, which is -- we will be taking up the parties at  
4 the table as well. We have Public Counsel and  
5 Utilities, Inc. of Florida.

6           You are fast. I know you're a marathon  
7 runner.

8           It's been a long time since we saw you,  
9 Mr. Trierweiler. Two weeks?

10           **MR. TRIERWEILER:** At least. Good afternoon,  
11 Madam Chair, Commission. Walt Trierweiler.

12           We're addressing Item 3, OPC's motion for  
13 reconsideration of the order to strike certain portions  
14 of Witness Flynn's rebuttal testimony and pro forma  
15 exhibits. UF responded in opposition to the motion.  
16 OPC has also filed a request for oral argument.  
17 Although the pleadings are clear on their face, it is  
18 within the discretion of -- the Commission's discretion  
19 to hear oral argument if you find that it would be  
20 helpful. Staff is prepared to answer any of your  
21 questions.

22           **CHAIRMAN BROWN:** Thank you, Mr. Trierweiler.

23           And, Commissioners, I'm inclined to grant oral  
24 argument. I think it will help. This is a very  
25 important issue, and five minutes -- ten minutes seems

1 reasonable for both of them. Seeing -- can I get a  
2 motion granting oral argument, five minutes per side,  
3 Commissioners?

4 **COMMISSIONER PATRONIS:** So move.

5 **CHAIRMAN BROWN:** Thank you. Is there a  
6 second?

7 **COMMISSIONER GRAHAM:** Second.

8 **CHAIRMAN BROWN:** Thank you.  
9 All those in favor of granting oral argument,  
10 please say aye.

11 (Vote taken.)

12 Thank you.

13 All right. We will start -- since it is  
14 Public Counsel's request, we will start with Public  
15 Counsel first, followed by Utility.

16 All right. And you have five minutes,  
17 Mr. Rehwinkel. You may begin now.

18 **MR. REHWINKEL:** Thank you, Madam Chairman.

19 My name is Charles Rehwinkel, Deputy Public  
20 Counsel, and I believe I can do this in well under five  
21 minutes.

22 Commissioners, while we wholeheartedly  
23 disagree with your staff's recommendation, we will not  
24 endeavor to respond to it here. Our position before you  
25 today is very simple. Appellate justices can read your

1 cases and they can read case law, especially the *Bevis*  
2 case.

3 We believe your staff has not given you  
4 correct legal advice. We also believe that the Florida  
5 Supreme Court has freshly admonished this agency about  
6 exceptions swallowing the rule.

7 The cavalier use of the term "routine" and  
8 "update" in describing wholesale amendments and  
9 overhauls of the -- and the in question capital projects  
10 is egregiously in error. And we believe it is contrary  
11 to the law of Florida; we believe it is contrary to our  
12 due process rights; and we believe it is especially  
13 contrary to the burden of proof that this agency is  
14 required to hold the utility when recovering costs. And  
15 we're very serious about this matter in this case today.

16 If you consider these late-filed project costs  
17 in setting rates in this case, we will be very  
18 hard-pressed not to seek review in a court. Allowing  
19 this cynical and sloppy filing that the utility brought  
20 forward will benefit the utility for doing a bad job,  
21 and it will be a train that you cannot stop when it  
22 comes to larger companies, i.e., electric companies,  
23 seeking to use it by holding back on crucial information  
24 until either the eve of intervenor testimony, the eve of  
25 discovery cutoff, or till their rebuttal testimony.

1           That's it in a nutshell. We think this is an  
2 opportunity to fix an error in the way this case was  
3 started out and the way this information was brought  
4 before you. Our expert witness was denied a fair  
5 opportunity to provide expert rebuttal testimony to the  
6 entire case of the company. It is not the utility's  
7 right to pick and choose which information they will  
8 file initially and which information they will trickle  
9 out during the case and then tell us at the very brink  
10 of the hearing you could have done more to analyze the  
11 case under the emergency that we put out there. Their  
12 dalliance is not our emergency, and we do not have the  
13 burden of proof in this case. Thank you.

14           **CHAIRMAN BROWN:** Thank you, Mr. Rehwinkel.

15           All right. Just a second.

16           Mr. Friedman.

17           **MR. FRIEDMAN:** Thank you, Madam Chairman,  
18 Commissioners. Marty Friedman on behalf of Utilities,  
19 Inc. of Florida.

20           The staff has addressed the legal standard for  
21 reconsideration. I'm going to avoid that argument.  
22 It's been done well in the staff recommendation.

23           It's been the Commission's long-standing  
24 practice that a pro forma project is appropriate if it's  
25 supported by invoices or contracts -- or signed

1 contracts. The OPC acknowledged that, as did their  
2 witness, and it's, I think, a policy that is without  
3 question.

4 Since all of UIF's pro forma projects fall  
5 into those two categories, the only way that OPC has to  
6 reduce the impact of those pro forma projects is to get  
7 them excluded. And what OPC has done is to, is to  
8 execute a carefully orchestrated process to the filing  
9 of its motion to strike such that there would be no way  
10 for this Commission to mitigate against OPC's due  
11 process complaint.

12 Keep in mind that Mr. Flynn identified all of  
13 the pro forma projects in his initial testimony. What  
14 was provided later was the documentation for -- or the  
15 actual costs and signed contracts for some of those pro  
16 forma projects. So, so all the projects were disclosed  
17 at the outset.

18 Further, most of the documentation was  
19 provided prior to OPC's witness actually preparing his  
20 prefiled testimony; however, in keeping with OPC's  
21 strategy to not have to address those, Mr. Woodcock  
22 testified that he just didn't look at them. He chose  
23 not to do so, and that plays into OPC's theory, and that  
24 is not to address any of those on the merits but merely  
25 try to get them excluded on a procedural issue.

1           They took Mr. Flynn's deposition, they took  
2 Mr. -- for a full day. They took Mr. Hoy's deposition  
3 for, it seems like, a full day, and chose not to ask  
4 questions about specific costs of those projects. And  
5 as you know, at the, at the hearing they followed  
6 through with that mantra and didn't really address or  
7 attempt to address any of the merits of the actual cost  
8 of any of those projects. I think they thought that to  
9 do so would be contrary to their motion they filed.

10           OPC's witness has been afforded an opportunity  
11 to, to vet those projects. They could have asked  
12 discovery after the -- Mr. Flynn's prefiled testimony,  
13 and they chose not to do so. What they did was they  
14 carefully timed the process. They knew, as I point out  
15 in as early as March 6th, they put their cards on the  
16 table about what their position was. They didn't think  
17 it was appropriate to consider anything other than what  
18 was filed with the initial application. They waited  
19 three weeks -- so they knew in March, but they waited  
20 three weeks after Mr. Flynn's rebuttal testimony, not  
21 asking any discovery about Mr. Flynn's rebuttal  
22 testimony, but they waited three weeks, until the very  
23 last minute -- the deadline for filing motions to strike  
24 is the prehearing conference, and they waited until that  
25 very day to do that. And I think the strategy is

1 obvious because by that point in time it doesn't afford  
2 us an opportunity to, to give them any options or to  
3 provide any options other than --

4 **CHAIRMAN BROWN:** One minute, one minute.

5 **MR. FRIEDMAN:** Oh, thank you. So the, the --  
6 in conclusion, the staff, in its recommendation, clearly  
7 pointed out the due process rights in administrative  
8 proceedings. This Commission has granted those due  
9 process rights. The Public Counsel has chosen not to  
10 afford themselves of any attempt to exercise those due  
11 process rights, and they can't now be heard to complain.  
12 Thank you.

13 **CHAIRMAN BROWN:** Thank you.

14 All right. Commissioners, any questions of  
15 the parties or comments?

16 Commissioner Graham.

17 **COMMISSIONER GRAHAM:** Thank you, Madam Chair.

18 I guess I have a quick question to OPC. Why  
19 didn't OPC ask for more time when this information came  
20 out in early March? I had heard that you had asked for  
21 more time earlier on and the Prehearing Officer  
22 accommodated that. Why didn't you feel that you could  
23 ask or why didn't you ask for more time when this  
24 information came out in March?

25 **MR. REHWINKEL:** Well, I did address



1 Chairman -- Commissioner Graham, I did address the  
2 timing of our case and the way our testimony is put  
3 together.

4 Mr. Woodcock is an esteemed expert in the  
5 State of Florida in water and wastewater engineering.  
6 He represents customers. He represents governments. He  
7 represents utilities. It is, it is demeaning to the  
8 expertise that he brings here to ask him, because of  
9 information that should have been filed in November or  
10 October or even August when they first filed their case,  
11 to say -- he puts everything down and all his other  
12 business dealings and he focuses on the smattering of  
13 information that the utility threw down in front of him  
14 at the last minute and applies his professional judgment  
15 to that information. That's not fair.

16 He had the time to look at the information  
17 that was timely filed in the fall of 2016 and apply his  
18 judgment to that. We have \$8 million worth of projects  
19 at the last minute that change in scope, and asking him  
20 to rush to judgment is not fair and is not -- and we're  
21 not afforded the opportunity.

22 But that's not even the real issue. The  
23 burden of proof is on the utility. We shoulder no  
24 burden. If we don't address this at all in our, in our  
25 testimony, it doesn't mean they get a free pass. They

1 still have to justify everything.

2 So our asking for additional time is  
3 meaningless. It is not the same as a utility asking for  
4 additional time to shoulder its burden of proof, which  
5 the agency should be a little bit more lenient to grant  
6 if they are -- have a genuine need. But we don't have  
7 the need to shoulder any burden to prove their case up.  
8 This was a sloppy case and our expert was put behind the  
9 eight ball, and to have him put down other matters he  
10 might have when he'd known for months what the deadline  
11 was -- and even had he had that additional time,  
12 Ms. Ramas would have had to adjust her testimony. That  
13 is a coordinated set of testimonies that then, after she  
14 had a chance to fix her testimony, the utility then  
15 would have had a right under the law to rebut that, and  
16 then the case doesn't really resemble any element of  
17 administrative efficiency.

18 But I apologize for the long answer, but it is  
19 not our burden and it is not our emergency that the  
20 company's dalliance puts us behind the eight ball. It  
21 shouldn't -- it's not fair.

22 **CHAIRMAN BROWN:** Thank you. And I put a lot  
23 of thought into this, Mr. Rehwinkel. This request  
24 obviously came in the -- we knew about it coming in at  
25 the onset of the hearing. We knew when Mr. Flynn was on

1 the stand. We knew that you were not going to be asking  
2 questions on the pro forma, and I was confused by that  
3 because that's live -- that is your -- right there, that  
4 is your due process right there. That is an opportunity  
5 for you to, to ask Mr. Flynn on cross, on rebuttal. Can  
6 you elaborate why, why Public Counsel didn't do that?

7 **MR. REHWINKEL:** Yes, ma'am. Again, that is  
8 not our opportunity.

9 The way Commission process is set up is the  
10 company files its case. The statutory intervenor and  
11 any other intervenor to the case has a reasonable  
12 opportunity to discovery and to provide expert testimony  
13 in response to that. Asking cross-examination questions  
14 at the hearing where you're stuck with that answer is  
15 not the same as having an opportunity for an expert to  
16 ask discovery questions, to synthesize that information,  
17 and to apply his professional judgment to it to provide  
18 responsive testimony. That is nowhere near on par with  
19 asking some shot-in-the-dark questions on  
20 cross-examination.

21 There's an old adage that attorneys are told:  
22 Don't ask a question on cross-examination that you don't  
23 already know the answer to. Cross-examination is  
24 intended to elicit information we already know, not ask  
25 the Commission -- ask the company witnesses blind

1 questions where we're stuck with their answer. That's  
2 not --

3 **CHAIRMAN BROWN:** I appreciate -- and I  
4 appreciate the argument that Public Counsel has made. I  
5 do agree with you. I do think it was a sloppy filing  
6 and I have a little bit of concern about the  
7 placeholder. But I don't see due -- your due process  
8 rights being violated. There were so many points in  
9 this proceeding where you could have. And it is the  
10 utility's burden of proof to put on the case, and so the  
11 Commission should consider all of the evidence in total  
12 in making its decision.

13 Mr. Friedman, would you like to respond to the  
14 comment?

15 **MR. REHWINKEL:** I --

16 **CHAIRMAN BROWN:** No. Thank you.

17 **MR. FRIEDMAN:** No. I was just going to say  
18 that they were -- like I said, they took Mr. Flynn's  
19 deposition. He would not have had to ask Mr. Flynn  
20 questions at the final hearing blindly, as he says,  
21 because they took his deposition and could have asked  
22 his questions and known what his responses were going to  
23 be at that time. So --

24 **CHAIRMAN BROWN:** May I ask you why the utility  
25 went ahead and filed those costs and figures that were

1 very important -- they're very important to the case --  
2 in the rebuttal rather than during the direct?

3 **MR. FRIEDMAN:** We filed the documentation that  
4 was available at each point in time. You know, these  
5 were pro forma projects. They're different -- just like  
6 now, I mean, they're projects that the utility is doing.  
7 It's not like they did these pro forma projects and now  
8 they're not doing any more for a while. You know, it's  
9 a rolling, it's a rolling process. There's always  
10 projects going. And so they picked these projects that  
11 were going to be completed by the end of the year, which  
12 meets the standard that this Commission has, and  
13 thought -- they thought that they would either have  
14 completed or have contracts on by the time we went to  
15 this trial, and they only included those projects in  
16 this case. And as time went on, the project, cost of  
17 the projects, the documentation, we went from estimates  
18 to contracts. And that's just part of the, of the  
19 vetting process, and that's -- I mean, if we filed it  
20 today, you'd see the same kind of issues come up because  
21 projects keep rolling.

22 **CHAIRMAN BROWN:** Thank you. Thank you.

23 Mr. Rehwinkel, did you want to add something?

24 **MR. REHWINKEL:** Yes, Madam Chairman.

25 I do not concede in any way, shape, or form

1 that our opportunity -- our due process is vindicated  
2 by allowing us to ask questions at the hearing.

3 **CHAIRMAN BROWN:** I didn't think you said that.

4 **MR. REHWINKEL:** Well, our due process rights  
5 include the right to provide responsive expert  
6 testimony. It's arbitrary to take 30 projects and say  
7 20 of them your expert can look at and he can analyze  
8 in -- at his leisure, in other words, his professional  
9 judgment, informed professional judgment, but these last  
10 ten, he's got to look at them while he's flying on an  
11 airplane somewhere and just scribble notes down and  
12 throw something out there. That's not the same thing.  
13 And ask -- and an attorney then asking questions on  
14 cross-examination is even more attenuated. That's not  
15 where due process lies.

16 If the Commission enforced its rules about  
17 what you expect to be filed upfront, then we wouldn't  
18 have this problem. So, you know, I just -- my fear is,  
19 is that if X IOU comes in and files a case and files  
20 four placeholder pages in the MFRs and says we're going  
21 to be putting in some CTs in the next few months but we  
22 haven't gotten all the numbers in, but we'll fill it in  
23 before the hearing starts, you wouldn't, you wouldn't  
24 countenance that.

25 **CHAIRMAN BROWN:** No, that is -- that's a

1 legitimate concern that you have. That example is a  
2 very legitimate concern.

3           Again, we're in a different posture right now.  
4 We're on -- considering a motion for reconsideration.  
5 All of these facts the Prehearing Officer determined in  
6 the motion to strike. So we are limited to the standard  
7 of review: Was there a mistake of law or fact here?

8           Commissioners --

9           **MR. FRIEDMAN:** You know, I would just point  
10 out, I just --

11           **CHAIRMAN BROWN:** Mr. Friedman, no.

12           Commissioners, any questions or comments?

13           If not, we are ripe for a motion at this time.

14           **COMMISSIONER GRAHAM:** Move staff  
15 recommendation.

16           **CHAIRMAN BROWN:** Is there a second?

17           **COMMISSIONER PATRONIS:** Second.

18           **CHAIRMAN BROWN:** Any further discussion from  
19 the bench?

20           Commissioner Brisé.

21           **COMMISSIONER BRISÉ:** Thank you, Madam Chair.  
22 So I think there are some issues that have come up  
23 through this process that -- and this is primarily  
24 directed to staff -- that we have to take a look at our  
25 process from beginning to end to make sure that this

1 type of circumstance doesn't arise again.

2 So I recognize the decision that I made and  
3 ultimately whatever the decision that the Commission  
4 makes with respect to whether I made the right decision  
5 or not, we still have to then look back and see what in  
6 our process we can improve, thereby ensuring that as  
7 much information that is available is available upfront  
8 and holding the utilities to that, recognizing that  
9 there are circumstances as, as things move along the way  
10 that some information may be required to come later, but  
11 that shouldn't be a bulk of a case. So those, those are  
12 some things that I hope that staff will move forward and  
13 take a look at.

14 **CHAIRMAN BROWN:** Thank you, Commissioner  
15 Brisé, and I agree with you.

16 We have a motion on the floor. Are there any  
17 other comments before we vote on it?

18 Seeing none, all those in favor of the motion,  
19 say aye.

20 (Vote taken.)

21 Nay? None.

22 All right. The motion passes unanimously.

23 **MR. REHWINKEL:** Madam Chairman, thank you very  
24 much for allowing us to talk. We appreciate it.

25 **CHAIRMAN BROWN:** You're welcome. Thank you.



1 Nice to see you all again.

2 (Agenda item concluded.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25


1 STATE OF FLORIDA )  
 : CERTIFICATE OF REPORTER  
 2 COUNTY OF LEON )

3  
 4 I, LINDA BOLES, CRR, RPR, Official Commission  
 Reporter, do hereby certify that the foregoing  
 5 proceeding was heard at the time and place herein  
 stated.

6  
 7 IT IS FURTHER CERTIFIED that I stenographically  
 reported the said proceedings; that the same has been  
 transcribed under my direct supervision; and that this  
 8 transcript constitutes a true transcription of my notes  
 of said proceedings.

9  
 10 I FURTHER CERTIFY that I am not a relative,  
 employee, attorney, or counsel of any of the parties,  
 nor am I a relative or employee of any of the parties'  
 11 attorney or counsel connected with the action, nor am I  
 financially interested in the action.

12 DATED THIS 12th day of June, 2017.

13  
 14  
 15  
 16   
 \_\_\_\_\_  
 LINDA BOLES, CRR, RPR  
 17 Official FPSC Hearings Reporter  
 Office of Commission Clerk  
 18 (850) 413-6734