BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for interim and permanent rate increase in Franklin County by St. George Island Utility Company, Ltd.	DOCKET NO. 940109-WU ORDER NO. PSC-95-0274-FOF-WU ISSUED: March 1, 1995

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
DIANE K. KIESLING

ORDER ON RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

St. George Island Utility, Ltd. (St. George or utility) is a Class B utility providing water service to approximately 993 customers in Franklin County. For the test year ended December 31, 1992, the utility reported operating revenues of $314,517 and a net operating loss of $428,201.

On January 31, 1994, St. George filed an application for an interim and permanent rate increase pursuant to Sections 367.081 and 367.082, Florida Statutes. The utility's application is based on the test year ended December 31, 1992, for both interim and final purposes. St. George requested interim rates designed to generate annual revenues of $435,453, which exceed test year revenues by $120,935 (38.45 percent). The utility requested final rates designed to generate annual revenues of $742,718, which exceed test year revenues by $428,201 (136.15 percent).

On February 11, 1994, the Office of Public Counsel (OPC) served notice of its intervention in this proceeding. OPC's intervention was acknowledged by this Commission by Order No. PSC-94-0291-PCO-WU, issued March 14, 1994. On April 27, 1994, the St. George Island Water Sewer District (District) petitioned to intervene in this matter. We granted its petition by Order No. PSC-94-0573-PCO-WU, issued May 16, 1994.

By Order No. PSC-94-0461-FOF-WU, issued March 18, 1994, we suspended the utility's proposed permanent rates and granted an interim rate increase subject to refund. We also required St.

George to provide a bond in the amount of $34,307 as guarantee for any potential refund of interim water revenues.

The hearing for this matter was held in Apalachicola on July 20 and 21, and continued in Tallahassee on August 3, 9, and 10, 1994. By Order No. PSC-94-1383-FOF-WU, issued November 14, 1994, among other things, we increased the utility's monthly service rates and decreased its service availability charges.

On November 29, 1994, St. George filed a motion for reconsideration of Order No. PSC-94-1383-FOF-WU. On December 12, 1994, OPC filed a response to St. George's motion for reconsideration and a cross motion for reconsideration. Also on December 12, 1994, OPC filed a motion to strike Attachment 3 to St. George's motion for reconsideration. On December 27, 1994, St. George filed a response to OPC's motion to strike, along with a reply to OPC's response to its motion for reconsideration and a response to OPC's cross motion for reconsideration. On January 12, 1995, OPC filed a motion to strike St. George's response to its cross motion for reconsideration. On January 19, 1995, St. George filed a response to OPC's motion to strike.

MOTION TO STRIKE ATTACHMENT 3

St. George included several attachments to its motion for reconsideration. Attachment 3 consists of a letter from Les Thomas, one of St. George's engineering consultants. On December 12, 1994, OPC moved to strike Attachment 3. OPC argues that it is not a part of the record for this proceeding, the Commission cannot rely upon it, and that it should, therefore, be stricken.

On December 27, 1994, St. George filed a response to OPC's motion to strike. St. George argues that the letter is not offered as evidence, but "to illustrate the unreliability of the hearsay evidence and to demonstrate the sort of testimony that could have been elicited on cross examination if direct rather than hearsay evidence had been presented."

Upon consideration, we agree with OPC. The letter is not in evidence, and our decision, even on reconsideration, must be based solely upon the record. We, therefore, grant OPC's motion to strike Attachment 3.

MOTION TO STRIKE REPLY

As mentioned in the case background, St. George filed a reply to OPC's response to its motion for reconsideration. Although the Commission's rules do not expressly authorize the reply, they also

do not specifically disallow it. Accordingly, OPC's motion to strike St. George's reply is denied.

STAFF AS PARTY

In its motion for reconsideration, St. George alleges that Staff is a party to this proceeding. In its response to St. George's motion for reconsideration, OPC rejects that allegation. In its reply to OPC's response, St. George cites the definition of "party" as "[a]ny other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party." Section 120.52(12)(c), Florida Statutes.

Although Staff is authorized to act as a party, it is not a party. South Florida Natural Gas v. FPSC, 534 So. 2d 695 (Fla. 1988). Staff has no interest in the outcome of the case, other than to see that "all relevant facts and issues are clearly brought before the Commission for its consideration." Rule 25-22.026(3), Florida Administrative Code. We, therefore, reject St. George's allegation that Staff is a party.

ST. GEORGE AS ADVERSELY AFFECTED BY OUR FINAL DECISION

In its response to St. George's motion for reconsideration, OPC also rejects St. George's assertion that it is adversely affected by the final order in this proceeding. In its reply to OPC's response, St. George argues that OPC's rejection of this assertion is "ridiculous."

In a utility rate proceeding, the burden lies with the utility to prove the level and prudence of its investment and expenses. Id. St. George has received a rate increase. The rate increase includes components for all investment and expenses for which St. George has met the burden of proof. We, therefore, reject St. George's claim that it is adversely affected by our final decision.

MOTION FOR RECONSIDERATION

The purpose of reconsideration is to bring to the Commission's attention some point which it overlooked or failed to consider when it rendered its final order. Diamond Cab Company of Miami v. King, 146 So. 2d 889 (Fla. 1962). In its motion for reconsideration, St. George identified seven items which it believes we overlooked or failed to consider. Each of these items is taken up, separately, below.

Duplication of Pro Forma CIAC Adjustment

The minimum filing requirements (MFRs) for this proceeding were based on the average historical test year ending December 31, 1992, with pro forma adjustments to its expenses. By Order No. PSC-94-1383-FOF-WU, we adjusted rate base to the 1993 average balance in order to be consistent with our use of 1993 revenues and pro forma expenses. We made this adjustment by taking the difference between the December 31, 1992 adjusted balances in the MFRs and the balances from the utility's December 31, 1993 general ledger. As a result of this adjustment, the utility's rate base decreased by $190,062. One component of this adjustment was to increase CIAC by $267,148.

In its motion for reconsideration, St. George argues that $22,220 in additions to CIAC were included in both the test year and in the average 1993 additions to CIAC. Therefore, the utility argues that CIAC is overstated by $22,220. Netting the appropriate amount of accumulated amortization of CIAC, the utility argues that rate base should be increased by a total of $21,962.

In its response to the utility's motion for reconsideration, OPC argues that St. George failed to provide any cite to the record in support of its claim. OPC argues that St. George could have provided evidence to demonstrate that the CIAC was booked in 1993, but failed to do so. Accordingly, OPC argues that we should reject St. George's motion on this subject.

In its reply to OPC's response, St. George argued that evidence was presented at the hearing, in the form of testimony by Mr. Seidman. St. George claims that the allegedly duplicative pro forma adjustment resulted from using information outside of the test year, and that it was not able to correct the error because the it was not apparent until after the close of the hearing.

Our rate base adjustment was based primarily on the testimony of Ms. Dismukes. St. George had ample opportunity to dispute the amounts testified to by Ms. Dismukes, but failed to do so. Mr. Seidman's testimony disputed the adjustment in total, but not by any specific amounts.

St. George has not demonstrated any error or omission of fact or law. Its motion for reconsideration of this issue is, therefore, denied.

Matching Property Contributions and Plant in Service

As noted above, the utility's December 31, 1992 average rate base balances were adjusted to reflect the average 1993 balances by using the MFRs and the 1993 general ledger balances. These adjustments increased plant in service by $104,553 and CIAC by $267,148.

St. George argues that the increase in CIAC to the 1993 level included $137,739 in contributed property, $92,952 from Casa del Mar and $44,787 from Billy Schultz. These amounts are not in the record. The utility contends that its average rate base should have been increased by half, or $68,870, and that accumulated amortization of CIAC in the amount of $802, for one half year, should be netted against this amount, for a total increase to rate base of $68,068.

In its response to the utility's motion, OPC states that the St. George failed to produce evidence substantiating its claim, as highlighted by the absence of any cite to the record. In its reply to OPC's response to its motion for reconsideration, the utility agrees that it did not cite to the record, but argues that it is being asked to rebut evidence that was never presented.

As noted above, in adjusting the plant balances to 1993 levels, we relied on the testimony of Ms. Dismukes. Although Mr. Seidman testified in this regard, his testimony reflects the total amounts collected in 1993, but not the accuracy of the utility's 1993 CIAC general ledger balance. If the utility believes that property CIAC was picked up from the general ledger, but the corresponding plant was not, the problem may lie with its accounting practices. If the plant was not included in the 1993 general ledger, it was the utility's burden to dispute the testimony on the record. It did not do so. Accordingly, its motion for reconsideration of this issue is denied.

State Park Lines

St. George argues that we failed to include the lines located within the state park in our original cost calculation. In support of its claim, the utility references our statement, at page 25 of Order PSC-94-1383-FOF-WU, that "[t]he costs for the T&D system and its appurtenances within the state park are not included in this calculation." St. George argues that, if we do not allow the cost of the lines, we should also reduce CIAC by $27,873.

In its response, OPC argues that there is no evidence in the record to support either the amount of CIAC allegedly included in rate base, or the suggestion that it was included in rate base.

St. George has taken the referenced statement out of context. When placed in context, it is clear that the state park lines were only excluded for the purpose of calculating the ratio of appurtenances to lines. It does not mean that the lines within the state park were somehow excluded from the calculation of original cost. Since we used Mr. Coloney's 1988 original cost study for inventory purposes, the only way these lines could have been excluded from original cost is if Mr. Coloney failed to include them.

The utility has not demonstrated any error or omission of fact or law. Accordingly, its motion for reconsideration on this item is denied.

Engineering Design Fees

St. George argues that we erred by disallowing engineering design fees in the amount of $21,000. St. George claims that there is no evidence in the record to demonstrate that these fees were previously capitalized or expensed. OPC argues that there is adequate support in the record for the disallowance of the fees in the form of testimony by our Staff auditor.

St. George appears to misapprehend that it is the one that has the burden of proof in a rate proceeding. St. George provided cites to the record which, it argues, demonstrates that the evidence does not support the Commission's decision. One cite is where Mr. Seidman testifies, quite generally, that the utility prepared responses to the Staff audit report. This does not constitute competent substantial evidence that the fees were not previously capitalized or expensed. The other cite consists of a bill rendered by Mr. Coloney, several years after the fact. At best, Mr. Coloney's bill might support that the costs were incurred, but it does not prove that these costs were not previously capitalized or expensed.

In its reply to OPC's response to its motion for reconsideration, St. George provides another cite, wherein Mr. Seidman testified that he believed that the fees had not been capitalized or expensed based upon "discussions with Ms. Drawdy, and my understanding is that they were booked, I think, through accounts payable and never entered onto either plant or expense." Mr. Seidman's statement does not prove that the fees were not capitalized or expensed. When faced with conflicting testimony or

other evidence, our role is to determine which is the more credible. Rolling Oaks Utilities, Inc. v. FPSC, 533 So. 2d 770 (Fla. 1988). Here, we determined that the evidence offered by St. George did not satisfy its burden of proof.

St. George has not identified any evidence that we overlooked or failed to consider on this issue. Accordingly, its motion for reconsideration of the engineering design fees issue is denied.

Travel Expense

St. George argues that we erred by not approving a travel allowance for its Tallahassee-based employees. In support of its claim, St. George cited certain testimony by Witnesses Brown, Seidman, and Chase. St. George claims that its mileage estimates are conservative, based upon experience, and less than would be required if it owned and maintained its own vehicles.

OPC argues that the Commission did not err, and that St. George merely failed to carry its burden of proof on this issue. In support of its claim, OPC cited countervailing testimony of its witness, Kimberly Dismukes.

We agree with OPC. The burden lies with St. George to prove its expenses, not with OPC or this Commission to disprove them. The only evidence that St. George has to rely upon is uncorroborated testimony. When faced with conflicting testimony or other evidence, the Commission, as the finder of fact, must determine which is more credible. Rolling Oaks Utilities, Inc. v. FPSC, 533 So. 2d 770 (Fla. 1988). We do not suggest that St. George's Tallahassee-based employees do not perform work-related travel, just that the utility failed to prove its estimates. St. George was on notice that its mileage estimates would be scrutinized. At his deposition, utility employee and witness Hank Garrett was asked to keep detailed records of his mileage for use at the hearing. St. George could have kept similar records for its other employees, which information would have been more compelling than its estimates.

Upon consideration, St. George has not demonstrated that we erred by disallowing travel expense for the utility's Tallahassee-based employees. Its motion for reconsideration of the travel allowance is, therefore, denied.

Legal Contractual Services

St. George also argues that we erred in our decision regarding contractual fees for legal services. St. George argues that the

allowed legal fees, (which, it argues, were based upon the legal fees of a "comparable utility"), were based upon "the testimony of a witness [Ms. Dismukes] who admitted that she was not qualified to determine when it is necessary to secure legal service." St. George further argues that the "comparable utility" is unlike St. George and, if we are going to base legal fees upon a comparable utility, we should choose one that is more comparable.

OPC objects to St. George's characterization of Ms. Dismukes' "qualifications" to determine when legal services were appropriate. OPC agrees that Ms. Dismukes testified that Mr. Brown should determine when legal services are necessary; however, OPC points out that it is up to this Commission to determine whether such costs should be borne by the ratepayers. OPC also takes issue with the utility's argument regarding the so called "comparable utility". OPC also suggests that the utility to which St. George compares itself is similar mainly in its litigiousness. Finally, OPC argues that we did not base legal fees upon only one utility, but on an average of legal fees for all Class B utilities.

We found that St. George had not adequately supported its legal fees. In part, our finding was based upon the fact that legal services are provided to the utility based upon a retainer agreement between Mr. Brown and St. George. Our decision was also based, in part, upon the fact that the utility's only objective support for the fees were timeslips kept for a four- to six-week period in 1993. In addition, our finding was based upon the fact that many of the legal services performed are not appropriately borne by the ratepayers. OPC is also correct that the fees allowed were not based upon any one utility, but an average of legal expense for all Class B utilities.

The burden to prove that any of the fees were prudently incurred belongs with St. George. South Florida Natural Gas, supra. It is not up to OPC or this Commission to prove the contrary. St. George simply did not adequately support its requested legal fees. Its motion for reconsideration of legal contractual fees is, therefore, denied.

Original Cost of Utility System

In our final decision in this case, this Commission utilized three different engineering studies to arrive at the original cost of the system: a 1978 Bishop study; a 1982 Bishop study; and a 1988 Coloney study. St. George argues that we erred by considering the two Bishop studies. According to St. George, the Bishop studies are "rank hearsay."

OPC notes that St. George's only objection to the 1978 Bishop study at the hearing was one of authentication, not hearsay. As for the 1982 Bishop study, OPC points out that it was both identified and moved into the record without objection by St. George itself. OPC, therefore, argues that St. George has waived its hearsay objections to both of the Bishop studies.

OPC is correct in that no hearsay objections were interposed to either of the Bishop studies. Under Section 90.104, Florida Statutes:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
>
> (a) When the ruling is one admitting evidence, **a timely objection or motion to strike appears on the record, stating the specific ground of objection if the specific ground was not apparent from the context;** (Emphasis added.)

* * *

In McMillan v. Reese, 61 Fla. 360, 55 So. 388 (1911), the Court held that an "[o]bjection to evidence must, as a general thing, be made when it is offered, or its admissibility can not be assigned as error." Moreover, in Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 754, (Fla. 1st DCA 1991), the Court held that "hearsay evidence not objected to becomes part of the evidence in the case and is useable as proof just as any other evidence, limited only by its rational, persuasive power." Accordingly, we agree that St. George has waived any hearsay objection it might have had.

OPC also points out that, under Section 120.58(1)(a), Florida Statutes, "[h]earsay 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." (Emphasis added.) According to OPC, the Bishop studies would have been admissible over objection as admissions. Under Section 90.803, Florida Statutes:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not

> inadmissible as evidence, even though the declarant is available as a witness:
>
> * * *
>
> **(18) Admissions.** A statement that is offered against a party and is:
>
> (a) His own statement in either an individual or a representative capacity;
>
> (b) A statement of which he has manifested his adoption or belief in its truth;
>
> (c) A statement by a person specifically authorized by him to make a statement concerning the subject;
>
> (d) A statement by his agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship;
>
> * * *

The Bishop studies would be admissible, over objection, because Mr. Bishop was authorized by St. George to conduct the studies and did, in fact, conduct the studies. In addition, Mr. Brown, one of the utility's principals, adopted the 1978 study under oath.

OPC also argues that the studies corroborate other evidence in the record. We agree. There was plenty of testimony, from Messrs. Seidman and Coloney regarding the accuracy of the studies. The 1978 study also corroborates St. George's 1979 audited financial statement.

Finally, St. George argues that we erred by not including any of the "soft costs" in our determination of original cost. This is simply not the case. We specifically added engineering and administrative costs for those components which we determined did not include such costs.

Accordingly, for the reasons set forth above, St. George's motion for reconsideration of the original cost issue is denied.

CROSS MOTION FOR RECONSIDERATION

In its cross-motion for reconsideration, OPC raises two points. The first is that we should have disallowed expenses for TMB Associates not because Mr. Brown testified that the utility would not seek to include these costs but because the utility specifically withdrew its request for them. OPC is correct. Accordingly, to the extent that the distinction is legally significant, OPC's cross motion is granted in this regard.

Second, OPC points to what it considers to be "a fundamental misapplication of the law of regulation", namely, the following statement, which appears at page 19 of Order No. PSC-94-1383-FOF-WU:

> We agree with Messrs. Seidman and Coloney that original cost should be based upon what is in the ground.

OPC argues that this Commission needs to consider not only what is in the ground, but who paid for it. OPC argues that St. George's books and records, its financial statements, its federal tax returns, an affidavit of Ms. Withers, Ms. Dismukes testimony, and St. George's annual reports to the Commission, all suggest that the utility only has investment in half of what is in the ground.

St. George argues, in its response to OPC's cross motion for reconsideration, that OPC has not identified any error or omission of fact or law and that the Commission should reject its cross motion in this regard.

Staff agrees with St. George in this regard. In support of its claim, OPC provided only one cite to the record; however, that cite discusses the so called "soft costs" which St. George argues the Commission failed to consider. This issue has already been discussed above. To the extent that OPC's argument refers to CIAC, we note that issues regarding CIAC have been considered extensively and, where the utility has failed to carry its burden, resolved against it. We clearly considered all of the evidence to which OPC refers. OPC's cross motion for reconsideration on the original cost issue is, therefore, denied.

MOTION FOR EXTENSION OF TIME

In Order PSC-94-1383-FOF-WU, the Commission ordered St. George to file a copy of its complete permit application addressing the issue of capacity as filed with the Department of Environmental Protection and a copy of its fire protection study by January 1,

1995. On December 30, 1994, St. George filed a Motion for Extension of Time within which to complete and file both the permit application and the fire protection study. The utility requests that it be given until February 1, 1995, to file the documents.

Since the utility is only asking for a one-month extension, we do not believe that any harm will attach if its motion is granted. Accordingly, St. George's motion for extension of time is granted.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's motion to strike Attachment 3 to St. George Island Utility Company, Ltd.'s motion for reconsideration is granted. It is further

ORDERED that the Office of Public Counsel's motion to strike St. George Island Utility Company, Ltd.'s reply to its response to St. George Island Utility Company, Ltd.'s motion for reconsideration is denied. It is further

ORDERED that St. George Island Utility Company, Ltd.'s assertions that the Staff of this Commission is a party is rejected. It is further

ORDERED that St. George Island Utility Company, Ltd.'s assertion that it is adversely affected by Order No. PSC-94-1383-FOF-WU is rejected. It is further

ORDERED that St. George Island Utility Company, Ltd.'s motion for reconsideration is denied on all counts. It is further

ORDERED that the Office of Public Counsel's cross motion for reconsideration is granted with respect to the TMB Associates fees. It is further

ORDERED that the Office of Public Counsel's cross motion for reconsideration is denied in all other respects. It is further

ORDERED that St. George Island Utility Company, Ltd.'s motion for extension of time to file its Department of Environmental Protection permit application and its fire protection study is granted. It is further

ORDERED that this docket shall remain open until such time as the service availability charge escrow account has been released.

By ORDER of the Florida Public Service Commission, this 1st day of March, 1995.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

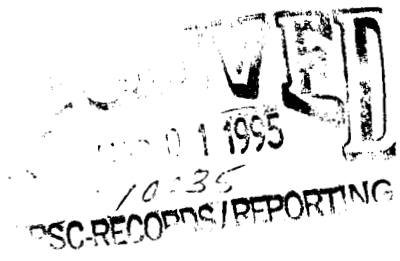
RJP

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 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 or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, 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.

M E M O R A N D U M



FEBRUARY 28, 1995

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PIERSON) RP

RE: DOCKET NO. 940109-WU - PETITION FOR INTERIM AND PERMANENT RATE INCREASE IN FRANKLIN COUNTY BY ST. GEORGE ISLAND UTILITY COMPANY, LTD. 0274-FOF

Attached is an Order on Reconsideration to be issued in the above-referenced docket (No. pages - 13).

RJP

cc: Division of Water and Wastewater

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