

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: April 20, 2017

MOTION TO STRIKE PORTIONS OF REBUTTAL TESTIMONY AND EXHIBITS

The Citizens of the State of Florida (Citizens), by and through the Office of Public Counsel (OPC), pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), hereby file this Motion to Strike Portions of Rebuttal Testimony and Exhibits. The Citizens ask that this Motion be granted for good cause, and as grounds state the following:

1. Utilities, Inc. of Florida (UIF or Company) serves approximately 33,000 water and 26,000 wastewater equivalent residential connections (ERCs) in 10 counties across the state. In early 2016, UIF consolidated 12 separate operating companies and numerous standalone systems into one combined company named UIF. On April 28, 2016, UIF filed its test year approval request.
2. On August 31, 2016, UIF filed its application for increase in rates and accompanying minimum filing requirement (MFR) documents in support of its rate increase and state-wide uniform rates.
3. In the direct testimony of UIF witness Patrick Flynn, on pages 4 through 10, he identified a number of pro forma projects with estimated cost amounts with no supporting documentation attached to his testimony. He indicated that the necessary supporting documentation for Exhibits PCF-6, 9, 12, 17, 20, 28, 33, and 34 would be provided within 30 days, 60 days, or 90 days of filing. PCF-20 was subsequently dropped as a project.
4. In OPC's First Request for Production of Documents, No. 15, propounded on September 16, 2016, OPC requested documents to support UIF's pro forma requests:

Pro Forma Plant Additions. Please provide all documents supporting the requested pro forma plant additions discussed in Mr. Flynn's testimony at pages 3 – 13 and found on each of the MFR Schedules A-3 for each of the systems. These documents should include but not be limited to: invoices, budgets, budget requisitions, signed contracts, bids, bid evaluations, purchase orders, invoices, engineering studies, cost benefit analysis conducted by or for the Company, DEP correspondence and other requirements of the DEP for the proposed plant additions, and any other documents management relied upon for evaluating plant additions and improvements. Documentation already provided in Exhibit Nos. PCF-1 through PCF-47 may be excluded from this response.

OPC's request covered Exhibits PCF-6, 9, 12, 17, 28, 33, and 34 in part because the documentation was not provided with witness Flynn's direct testimony.

5. On October 31, 2016, UIF supplemented witness Flynn's direct testimony and exhibits in response to Staff's deficiency letter. Exhibit PCF-6 was provided; PCF-9 said "Held for Future Use"; PCF-12, was a one-page quote; PCF 17 said "Held for Future Use"; PCF 28, 33, and 34 each said "Held for Future Use".

6. On February 6, 2017, more than three months after OPC's initial request for production of documents and well after the 90 day unqualified commitment to provide these missing exhibits, UIF provided a number of amended exhibits to witness Flynn's direct testimony, including Amended PCF-6. UIF also included Amended PCF-33 and 34, which were missing from his direct testimony. No documentation was provided for PCF-9, 17, and 28. Some of other documents and amended exhibits provided in UIF's response indicated that UIF had *significantly* misestimated [underestimated ?] the cost for these projects. Meaning, for some of these projects, UIF would be seeking recovery beyond what was originally requested or supported in UIF's direct testimony.

7. On February 10, 2017, Staff's Seventh Set of Interrogatories No. 179, and Fifth Request for Production of Documents No. 8, stated:

UIF did not provide any supporting documents for the projects identified in the exhibits listed below, and have been requested in Staff's Fifth Request for Production of

Documents, No. 8. If supporting documents are not available for that request, please explain why not and if this project should be excluded from Commission consideration in this case.

- PCF-1 Cypress Lake Hydro Tank replacement
- PCF-9 Eng Lake Groves WTP Upgrades
- PCF-13 Longwood Groves I&I Remediation
- PCF-17 Mid-County I&I Remediation
- PCF-20 Pennbrooke WTP Electrical Improvements
- PCF-28 Wekiva Blower Replacement
- PCF-33 Buena Vista/Orangewood WM Replacement
- PCF-34 Summertree Well Abandonment
- [PCF-28] Sanlando Shadow Hills Electrical Generator

Staff's discovery request sought information that UIF failed to provide in its direct testimony and exhibits or in response to OPC's discovery. Without this information, UIF cannot meet its burden of proof.

8. On March 2, 2017, four days before OPC witness Andrew Woodcock filed his testimony regarding the reasonableness of UIF's requested pro forma and at a time he had substantially completed it in accordance with the minimum time needed for review, proofing, and filing, UIF served its responses to staff's discovery on UIF's missing exhibits. UIF provided Amended exhibits to PCF-1, 9, 13, 17, 33, and 34, but not the requested PCF-28 Sanlando Shadow Hills Electrical Generator project documents. UIF indicated it was no longer seeking recovery for the project identified in Exhibit PCF-20. Without advance notice or indication, UIF also submitted Amended Exhibit PCF-27, Sanlando Shadow Hills Diversion project. The documents purport to show that the project costs have increased from approximately \$4 million to almost \$7.8 million.

9. On March 6, 2017, OPC witness Woodcock prefled his testimony, assessing the reasonableness of UIF's pro forma projects. He carefully organized the projects into four categories for cost recovery:

- a. Pro forma projects with adequate cost justification

- b. Pro forma projects with cost justification supporting less than requested
- c. Pro forma projects lacking adequate cost justification, and
- d. Pro forma projects without any cost justification

Woodcock Testimony page 32. He states: “Pro forma projects in the first two categories should be included in rate base because the costs appear to be reasonable and were adequately supported by the documentation provided by UIF. Pro forma projects in the second two categories should not be included in rate base for the reasons discussed in my testimony.” Woodcock at 32.

10. Regarding the documentation for the projects provided to staff and OPC on March 2, 2017, witness Woodcock further states “There is no opportunity to verify any of the information in the amended exhibits, conduct discovery, or adequately review all the documents.” (Woodcock at 45).

The reason he excluded those projects from consideration was:

In order to incorporate all the requested pro forma projects into rate base and the requested revenue requirement, UIF had the burden to demonstrate the reasonableness of the costs when it filed its MFRs, direct testimony, and exhibits. UIF clearly failed to provide the necessary support for the reasonableness of all its requested pro forma projects at the time of its initial filing in August or even by the time its MFR deficiencies were cured in November. It is unreasonable to inject such late information into this rate case with no time for review.

Woodcock at 45. Thus, UIF failed to justify its costs in response to OPC’s discovery before OPC filed its testimony. As this was the last opportunity allowed for OPC to submit testimony, Citizens have been deprived of the opportunity to thoroughly analyze and provide testimony on the unsupported projects.

11. UIF’s First Set of Interrogatories to OPC No. 6, UIF asked: “Noting that Mr. Woodcock stated did not have time to review documents on pro forma projects that were submitted a week before his testimony was filed, has he now done so?”

12. Witness Woodcock’s response served on April 19, 2017, stated:

No thorough review was performed. About ten days after the responses to staff's discovery were received on March 2, 2017, Mr. Woodcock took a brief, cursory look at the final numbers and the detail supporting those numbers contained in UIF's response to staff's discovery. Except for one project, PCF-9, Mr. Woodcock has not done enough of a review to change his professional opinion described in his pre-filed testimony and does not intend to do such a thorough review. In its direct case, UIF provided little or no documentation for the subparts identified in this interrogatory. On February 10, 2017, staff requested that UIF provide the missing information from the direct testimony and exhibits of UIF witness Flynn. On March 2, 2017, four days prior to the filing of Mr. Woodcock's testimony, UIF responded to staff's discovery request, providing additional information on these projects. Mr. Woodcock did not have time to review these late-in-the-case discovery responses before his testimony was filed on March 6, 2017. Mr. Woodcock believes UIF should have provided this documentation when it filed its rate case.

13. With regards to project PCF-9, witness Woodcock agreed that the belated, supplemental information on a brief, cursory review indicated the costs were supported. See OPC Response to UIF's First Set of Interrogatories No. 6.

14. On April 3, 2017, UIF prefiled witness Flynn's rebuttal testimony and 21 Amended Exhibits, in an untimely attempt to inject more than \$6 million in new and unsubstantiated cost information for pro forma projects. The costs of some projects were not adequately supported by witness Flynn's pre-filed direct testimony. Moreover, the costs of some projects vetted by OPC witness Woodcock have purportedly increased since he prefiled his testimony. All the Amended Exhibits and supporting testimony are untimely, improper supplemental direct testimony filed in contravention to the OEP.

15. The Citizens' due process rights require that the following pages and Amended Exhibits be struck from the rebuttal testimony of witness Flynn since there was no meaningful opportunity to conduct discovery, analyze and provide testimony on the unsupported projects:

- a. Page 8, line 20 through page 12, line 9;
- b. Page 12, line 19 through page 13 line 7; and
- c. Page 13, line 22 through page 14, line 15.

16. The following is a table that shows the cost information from witness Flynn’s direct testimony, costs identified in OPC witness Woodcock’s testimony, and the new unsubstantiated cost information contained in witness Flynn’s rebuttal testimony and Amended Exhibits. In order to avoid a violation of the Citizens’ due process rights, OPC respectfully requests the following Amended Exhibits contained in the column entitled “Flynn’s Amended Exhibit in Rebuttal” be struck from the rebuttal testimony of witness Flynn:

Flynn's Exhibit Direct	<u>Project</u>	<u>Project Amount per Flynn's Testimony</u>	<u>Project Amount per Woodcock's Testimony</u>	<u>Flynn's Amended Exhibit in Rebuttal</u>	<u>NEW Amount per Flynn's Rebuttal*</u>
PCF-1	Hydrotank Replacement	\$30,000	\$25,732		
PCF-3	Eagle Ridge, WWTP EQ Tank and Headworks	\$350,000	\$106,388	PCF-3A	\$938,140
PCF-5	LUSI, Sludge Dewatering Equipment	\$245,000	\$240,000	PCF-5A	\$249,295
PCF-7	SCADA	\$470,000	\$458,902		
PCF-9	LUSI, TTHM & HAA5 Study	\$450,000	\$0 lacking any cost justification	PCF-9A	\$330,832
PCF-10	LUSI US 27 Utility Relocation	\$1,806,000	\$1,806,000	PCF-10A	\$2,762,990
PCF-11	Longwood Church Ave. Relocation	\$193,880	\$193,880	PCF-11A	\$253,524
PCF-13	Longwood Groves I&I Remediation	\$450,000	\$0 lacking any cost justification	PCF-13A	\$323,717
PCF-14	Mid County Electrical Improvements	\$900,000	\$0 lacking needed cost justification	PCF-14A	\$1,139,100
PCF-17	Mid-County Excess I&I Remediation	\$600,000	\$0 lacking any cost justification	PCF-17A	\$147,577

PCF-19	Mid County US Hwy 19 Relocation	\$230,000	\$172,879	PCF-19A	\$230,000
PCF-20	Pennbrooke WTP Electrical Improvements	\$270,000	\$0 lacking any cost justification	PCF-A	\$420,937
PCF-23	Sanlando Lift Station RTU Installation	\$353,200	\$353,200	PCF-23A	\$591,200
PCF-25	Myrtle Hills WM	\$695,450	\$684,271	PCF-25A	\$695,450
PCF-26	Sanlando I&I Study and Remediation	\$1,573,884	\$1,573,884	PCF-26A	+\$152,500
PCF-27	Sanlando, Shadow Hills Diversion Project	\$4,243,423	\$0 lacking needed cost justification	PCF-27A	\$7,781,739
PCF-30	Sanlando, Wekiva WWTP Rehabilitation	\$1,803,000	\$1,729,034	PCF-30A	\$1,837,324
PCF-33	Orangewood, Buena Vista WM Replacement	\$1,200,000	\$0 lacking any cost justification	PCF-33A	\$2,174,118
PCF-34	Summertree Well Abandonment	\$200,000	\$0 lacking any cost justification	PCF-34A	\$176,826
PCF-35	Lake Tarpon Water Main Replacement	\$800,000	\$800,000	PCF-35A	\$1,218,146
PCF-36	UIF, Electrical Improvements at Little Wekiva	\$323,000	\$268,830	PCF-36A	\$281,181
PCF-38	UIF Seminole Bear Lake WM Replacement	\$1,485,270	\$1,485,270	PCF-38A	\$1,495,127
PCF-41	UIF Seminole Weathersfield Northwest FM	\$120,000	\$120,000	PCF-41A	\$688,631

* The **Yellow** highlighting in the table above indicates some of the larger increases to UIF's request.

17. These Amended Exhibits contain more than \$6 million in new, unsubstantiated pro forma plant cost information that were not included with UIF's initial petition filed in this docket, bringing UIF's

total pro forma request to \$36,850,000. There is no time left in the hearing schedule to adequately vet this new information or provide additional testimony by OPC.

Due Process Violation

18. It is a fundamental violation of the customers' due process for UIF to belatedly and continually inject so much new, untimely-filed information into this case without any adequate time to review or submit additional testimony. The new pro forma cost information provided in rebuttal ***fundamentally*** changes UIF's rate case, increasing its requested pro forma plant additions by more than \$6 million to \$36.86 million and its requested revenue requirement by more than \$500,000 annually. Basically, this amounts to a "running filing" over a six month period. When a utility fundamentally changes the basic underpinnings of its rate case, the Commission has previously set the case for a new hearing or disallowed the consideration of new material information. See Docket No. 870239-WS, In re: Application of General Development Utilities, Inc. Shilver Springs Shores Division, for increased water and sewer rates in Marion County.

19. In order to have sufficiently known and measurable cost information, the Company could have filed a projected test year, or waited another six to nine months to file this rate case; however, UIF chose to file using a 2015 historic test year with inadequate cost information offered to support approximately \$21 million of its initially requested \$30 million in pro forma projects.

20. This due process violation cannot be cured by additional discovery (written or deposition). It can only be remedied by an opportunity to provide additional testimony to respond to the new information that was in the control of UIF to provide. Curing this violation would further require additional discovery, additional testimony by OPC's expert witnesses on the effect this information has, and the restart of the statutory time clock to allow the Commission additional time to review this

new information consistent with the burden of proof that the company has to recover any costs. *See Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (1982).

21. This Motion is designed to protect the Citizens' fundamental due process and preserve the current hearing schedule. As such this Motion could be filed at any time during the hearing process; however, in order to seek timely resolution of this matter, OPC files this Motion in order to put the Commission and the Utility on notice that the Citizens' due process rights have been violated by the continual, ongoing and untimely cost support filings of the company. This is not a staff assisted rate case or a proposed agency action rate case where the normal rules of administrative procedure, civil procedure, and evidence are somewhat relaxed. This is a Section 120.57(1) evidentiary hearing where the applicable rules are designed to protect the due process of rights of the Utility and the Customers alike.

22. In lieu of rescheduling this hearing, which would be administratively inefficient and costly to the Company and the Customers (through added rate case expense), OPC respectfully requests all the testimony and Amended Exhibits identified in this motion be struck, and the hearing continue based on the information remaining in the hearing record.

Burden of Proof

23. As required by Florida Statutes and reiterated by the Commission and the Florida Supreme Court the burden of proof is upon UIF to justify its costs and to show that its present rates are unreasonable, fail to compensate it for its prudently incurred expenses, and fail to produce a reasonable return on its investment. Pursuant to Section 367.081, Florida Statutes ("F.S."), "Except as provided in subsection (4) or subsection (6), a utility may only charge rates and charges that have been approved by the commission" and "the commission shall, either upon request or upon its own motion, fix rates which are just, reasonable, compensatory, and not unfairly

discriminatory. In every such proceeding, the commission shall consider the value and quality of the service and the cost of providing the service. . . .” When there are material issues in dispute, such as the case here, a person whose material interests will be effected may request a Section 120.57, F.S., hearing.

24. This hearing is governed by Section 120.57, F.S., which sets forth the procedures for the Commission’s proceedings. Pursuant to Section 120.57, the findings of fact shall be based upon a preponderance of evidence and shall be based exclusively on the evidence of record and on matters officially recognized. See, Section 120.57(j), F.S. The Commission observed in a water case that:

we are charged with the statutory responsibility of setting rates which are fair and reasonable. It is neither our nor our staff’s responsibility to make the utility’s case. The burden of proof is upon the utility to show that its present rates are unreasonable, fail to compensate the utility for its prudently incurred expenses, and fail to produce a reasonable return on its investment.

Order No. PSC-07-0129-SC-WS, issued February 14, 2007, in Docket No. 060262-WS. The Florida Supreme Court stated in *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (1982), that the “burden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates.” Thus, it is UIF’s burden to demonstrate by a preponderance of evidence in the record in this proceeding that current rates are unjust, unreasonable or insufficient and that the changes UIF has requested are necessary and will result in rates that are just, reasonable, compensatory, and not unfairly discriminatory. It is neither the Commission’s nor its staff’s responsibility to make UIF’s case, or fill any holes or gaps in UIF’s requested rate increase. To support its burden of proof for the requested pro forma, the Utility was required to provide all the necessary information to the parties in its direct case. The

supplemental cost information beyond the scope of its direct case in the Amended Exhibits should be should be struck.

Legal Standard For Striking Rebuttal Testimony

25. As a general rule, “it is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief.” *Driscoll v. Morris*, 114 So. 2d at 315. “[R]ebuttal testimony which is offered by the plaintiff is directed to new matter brought out by evidence of the defendant and does not consist of testimony which should have properly been submitted by the plaintiff in his case-in-chief.” *Id.* Therefore, where a party seeks to use rebuttal to present new facts beyond the scope of the Petitioner’s or Intervenor’s direct case, a motion to strike should be granted.

26. Striking the portions of UIF’s rebuttal testimony and Amended Exhibits identified above is consistent with the Commission’s prior decisions where utilities attempted to inject new facts into evidence through rebuttal testimony. See for example, Order No. PSC-00-0087-PCO-WS at 4-5, issued January 10, 2000, in Docket No. 960545-WS, *In re: Investigation of Utility Rates of Aloha Utilities, Inc. in Pasco County* (The Commission properly struck evidence from the records where Aloha Utility had presented evidence in rebuttal which did not rebut any Intervenor or staff testimony, and which was beyond the scope of the Intervenors’ direct case.).

27. Pursuant to Rule 28-106.204(3), F.A.C., counsel for OPC has contacted counsels for UIF and the Summertree Water Alliance regarding this motion. UIF opposes this Motion. The Summertree Water Alliance indicated support for this Motion. OPC did not seek Staff counsel’s position since Staff is not a party to the underlying litigation.

Conclusion

28. In lieu of rescheduling this hearing, which would be administratively inefficient and costly to the Company and the Customers (through added rate case expense – which should nevertheless be the responsibility of the Utility shareholders due to its imprudence in assembling and filing its rate increase request), OPC respectfully requests all the testimony and Amended Exhibits identified in this motion be struck, and the hearing continue based on the information remaining in the hearing record.

WHEREFORE, the Citizens hereby respectfully requests that the Prehearing Officer grant this Motion to Strike Portions of Rebuttal Testimony and Exhibits as described herein.

Respectfully submitted 20th day of April, 2017.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and foregoing Motion to Strike Portions of Rebuttal Testimony and Exhibits furnished by electronic mail on this 20th day of April, 2017, to the following:

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