

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for limited proceeding to recover /
incremental storm restoration costs by Florida Public / Docket No. 20180061-EI
Utilities Company /
_____/ Filed: April 3, 2019

MOTION TO RECONSIDER

The Citizens of Florida, through the Office of Public Counsel (“Citizens” or “OPC”), pursuant to Rule 25-22.060, Florida Administrative Code, requests the Commission to reconsider its decision in Order No. PSC-2019-0114-FOF-EI, Docket No. 20180061-EI (FPSC Mar. 26, 2019) (“Order” or “Final Order”). In support, Citizens state as follows:

The Commission Should Reconsider its Decision in Issue 1: Inclement Weather Exempt Employee Compensation Policy

The purpose of a petition for reconsideration is to bring to the attention of the administrative agency some point that it overlooked or failed to consider when it rendered its order in the first instance. *See In Re: Petition of Florida Power & Light Company for Inclusion of the Scherer Unit No. 4 Purchase in rate case, including an acquisition adjustment -- Citizens and Nassau’s motions for reconsideration, Docket No. 900796-EI, Order No. 24668, 91 Fla. Pub. Serv. Comm’n Rep. 6:354, at 3 (Fla. P.S.C. June 17, 1991) (order denying reconsideration) (quoting Maule Industries, Inc. v. Seminole Rock and Sand Co., 91 So. 2d 307 (Fla. 1956)).* “It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order.” *Id.* (quoting *Diamond Cab Co. of Miami v. King*, 146 So. 2d 889, 891 (Fla. 1962)). Citizens submit that the Commission has overlooked part of the language of rule 25-6.0143, Florida Administrative Code (“F.A.C.”).

In its Final Order, the Commission determined, “that the additional compensation of \$69,632 contemplated by the Company’s payroll policy is not a bonus or special compensation,

but rather an additional supplemental compensation, and is allowable under Rule 25-6.0143, F.A.C.” Final Order at 4. The Commission’s analysis of this issue appears to have focused on whether the pay was discretionary.¹ *See id.* OPC submits that the language of the rule does

¹ In its Recommendation, Document No. 01153-2019 (Feb 21, 2019), Commission Staff analyzed the issue as follows:

ANALYSIS

Rule 25-6.0143(1)(f)2, F.A.C., states “Bonuses or any other special compensation for utility personnel not eligible for overtime pay” are prohibited from being charged to the reserve under the Incremental Cost and Capitalization Approach (ICCA) methodology. Staff believes that the “extra compensation” of \$69,632 contemplated by the Company’s payroll policy is not a “bonus” or “other special compensation” and is allowable under Rule 25-6.0143, F.A.C. FPUC asserted that they had many salaried employees perform beyond their regular duties and work in excess of 16 hour days for an extended period of time. The duties far exceeded their normal hours and normal job functions. (EXH 7, BSP 00015) According to FPUC’s Inclement Weather Exempt Employee Compensation Policy, every eligible employee, without discretion, is compensated after every storm. (TR 160; TR 214) The “extra compensation” is part of FPUC’s standard pay and benefit package. (TR 160) Because the “extra compensation” is paid to every eligible employee regardless of the nature of the storm, number of hours worked, or duties, it is not discretionary. Staff interprets the prohibition on recovery for bonuses or any other special compensation under Rule 25-6.0143, F.A.C., as prohibition on giving bonuses or other incentives on a discretionary basis, with no guidelines regarding the distribution or amount of the additional compensation received. In contrast, FPUC has a clear, non-discretionary policy for providing supplemental compensation to account for the additional hours its employees are required to work during an emergency. Staff agrees with FPUC witness Cassel, that the “extra compensation” is not a “special” compensation or a bonus, but rather an additional supplemental compensation for eligible employees, who have performed beyond their regular duties. (FPUC BR 8) Thus, staff believes that the “extra compensation” is not a prohibited cost, but an incremental cost. Rule 25-6.0143(1)(d), F.A.C., allows utilities to charge for “costs that are incremental to costs normally charged to non-cost recovery clause operating expenses in the absence of a storm.”

CONCLUSION

FPUC asserted that their salaried employees worked beyond their regular duties and in excess of 16 hour days for an extended period of time. (EXH 7, BSP 00015) Staff recommends that the additional compensation of \$69,632 contemplated by the Company’s payroll policy is not a bonus or special compensation, but rather an additional supplemental compensation, and is

not focus on the discretionary or mandatory nature of the payment but rather the classification of the employee as it relates to eligibility for overtime pay.

Rule 25-6.0143(1)(f), Florida Administrative Code states:

The types of storm related costs prohibited from being charged to the reserve under the ICCA methodology include, but are not limited to, the following:

1. Base rate recoverable regular payroll and regular pay-roll related costs for utility managerial and non-managerial personnel;
2. Bonuses or any other special compensation for utility personnel not eligible for overtime pay;

Accordingly, based upon the language of this rule, neither salary nor any additional compensation for managerial, exempt, or overtime ineligible employees is recoverable from the storm reserve. The question before the Commission is not whether the additional compensation is a “bonus”² because the rule also prohibits recovery of “any other special compensation for utility personnel not eligible for overtime pay.” The questions before the Commission are therefore: (1) whether the employee who received additional compensation was ineligible for overtime pay and (2) whether the additional compensation was “special compensation.” Citizens submit that the answer to both inquires is yes.

allowable under Rule 25-6.0143, F.A.C., therefore, staff recommends approval of these costs.

² The Commission’s definition of bonus as a discretionary payment also appears to ignore how bonuses are treated under the Fair Labor Standards Act (“FLSA”). The Interpretive Guidance provided by the United States Department of Labor contemplates two types of bonuses—bonuses that are part of the regular compensation and bonuses that are discretionary. *See* Field Operation Handbook, Chapter 32 “Overtime” at 32c (available at: https://www.dol.gov/whd/FOH/FOH_Ch32.pdf).

First, FPUC acknowledges that these employees are not eligible for overtime pay.³ FPUC, in response to Citizens' First Interrogatory, No. 19, which asked whether any incentive compensation or storm bonus payments were included in the recorded costs charged to the reserve, stated that "additional compensation payments" were made "in accordance with the Company's Inclement Weather *Exempt Employee* Compensation Policy." (TR 72) (emphasis added). FPUC Witness Cassel testified that FPUC always provides compensation for *exempt* employees who perform qualifying functions during or following any extreme inclement weather event since the event requires hours and often duties exceeding those their pay was based on, and that the Inclement Weather Exempt Employee Compensation Policy provides compensation for these excess hours. (TR 161). Further, in its prehearing statement, Document No. 07115-2018, 4 (Nov. 14, 2018), FPUC stated:

Yes. The "extra compensation" in the amount of \$69,632 is compensation that is anticipated, regular pay for salaried employees engaged in storm restoration work as contemplated by the Company's payroll policy. Such pay does not constitute a bonus or special compensation, which are prohibited under Rule 25-6.0143, F.A.C., as these amounts are specifically contemplated by the Company's payroll policy and are not otherwise subject to discretion or being withheld based upon performance.

Accordingly, there is no question whether these employees are those contemplated as excluded by the rule because, as *exempt* employees, they are necessarily "ineligible for overtime." This fact contradicts the Commission's treatment of these payments and requires reconsideration.

Second, the Commission has defined "special compensation" to render the word "bonus" superfluous in the rule. The rules of construction state that a deciding body must first give the

³ The FLSA, 29 U.S.C. 201, et seq., provides exemptions for certain employees who meet the salary and duty tests provided therein and in the federal regulations. See 29 U.S.C. 213(a)(1). Exempt employees, as defined by the FLSA, are by definition and classification those not eligible for overtime pay.

words of a rule or statute their plain and ordinary meaning and that “significance and effect must be given to every word, phrase, sentence, and part of the [rule] if possible and . . . should not be construed as mere surplusage.” *Gulfstream Park Racing Ass’n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006) (quoting *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003)). Since “special compensation” is not defined in the Florida Administrative Code or in the Florida Statutes, it is helpful to turn to the dictionary definitions of the words. “Special” is defined as “being other than the usual; additional, extra”⁴ or “unusual, extraordinary.” Black’s Law Dictionary 1402 (7th ed. 1999). In their plain and usual meaning, “special compensation” therefore means any compensation beyond a salaried employee’s regular, normal, ordinary salary. This definition is supported by inference in caselaw.

Salary suggests regular compensation at fixed periods without regard to the number of days actually worked so long as the employee is in good standing with his employer. Thus, providing there be no agreement to the contrary, an employee on salary might reasonably expect to receive his regular salary even though he missed an occasional day’s work due to illness or otherwise; and compensation paid during vacations incident to the position is ordinarily based upon the salary regularly paid. Traditionally “salary” does not seem to have encompassed situations where additional pay is given for overtime. The phrase “time and half” pay sounds more in terms of special compensation for extra work, rather than a regular rate of compensation.

State ex rel. Murray v. Riley, 70 A.2d 712, 713 (Del. 1949).

While “salary” denotes a fixed amount of compensation periodically paid without regard to hours actually worked, overtime compensation varies according to the amount of extra work performed. Rather than being regular, periodic, fixed compensation, overtime earnings are customarily irregularly paid in varying amounts depending upon when, and to what extent, the additional work is actually performed. The irregular pay for the variable number of overtime hours actually worked by appellee during the last sixty months of his employment does not, therefore, constitute salary because the payments were not fixed compensation regularly paid.

⁴ <https://www.merriam-webster.com/dictionary/special>

Beaver v. Liston, 464 A.2d 679, 682 (Pa. 1983). OPC's position is that storm payments constitute special compensation that is not recoverable when paid to an exempt employee. Storm payment to employees otherwise exempt from overtime pay is either special compensation or it is "part of the standard compensation package," both of which are excluded under rule 25-6.0143(1)(f), Florida Administrative Code.

The Commission Should Reconsider its Decision to Strike, in Whole or in Part, Issues 7 and 10

Next, Citizens requests that the Commission reconsider its prehearing decision to strike, in whole or in part, issues 7 and 10. *See* Order No. PSC-2018-0567-PHO-EI ("Prehearing Order"). Issue 7 was reworded and Issue 10 was stricken, both without explanation. OPC previously requested that the Commission reconsider this decision, *see* Document No. 07439-2018 (Dec. 7, 2018); however, the Commission did not issue a written order or offer any further explanation. *See* Transcript of Hearing Vol 1 at 8-11. Citizens do not wish to reargue its previous motion but still seek clarification of the Commission's decision or reconsideration thereof. Without legal justification provided, it is difficult for OPC to assert a point of law or fact that was overlooked or misapprehended. It also deprives the reviewing court of the ability to determine whether the Commission's order complies with applicable legal standards. Indeed, the Commission's decision to withhold that information precludes a successful argument against the action. Accordingly, Citizens request, as has been previously requested, that the Commission provide the grounds for striking Issue 10 and rephrasing Issue 7.

WHEREFORE, the Citizens hereby request the Commission grant this Motion for
Reconsideration of Order No. PSC-2019-0114-FOF-EI.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Motion to Reconsider has been furnished by electronic mail on this 3rd day of April, 2019, to the following:

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