

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: May 2, 2019

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Accounting and Finance (Andrews, Mouring) *MA M ALM*
Office of the General Counsel (Dziechciarz, Weisenfeld) *RAD AJW TLT*

RE: Docket No. 20180061-EI – Petition for limited proceeding to recover incremental storm restoration costs, by Florida Public Utilities Company.

AGENDA: 05/14/19 – Regular Agenda – Motion for Reconsideration – Oral Argument Requested; Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On February 28, 2018, Florida Public Utilities Company (FPUC or Company) filed its petition for Limited Proceeding to Recover Incremental Storm Restoration Costs. FPUC requested to recover approximately \$2 million for the incremental restoration costs related to several hurricanes and tropical storms named by the National Hurricane Center during the 2016 and 2017 hurricane seasons, and to replenish its storm reserve subject to true-up.

The Office of Public Counsel (OPC) intervened in this docket on March 22, 2018. On August 14, 2018, Order No. PSC-2018-0404-PCO-EI was issued establishing hearing dates and procedures to be followed. On November 26, 2018, a prehearing conference was held. On December 4, 2018, Order No. PSC-2018-0567-PHO-EI (Prehearing Order) was issued to outline the procedures to be used at the December 11, 2018 hearing. On December 7, 2018, OPC filed a

Motion for Reconsideration of the Decision in Prehearing Order No. PSC-2018-0567-PHO-EI to Strike All or Part of Issues 7 and 10 (Prehearing Motion). On December 11, FPUC filed a Response in Opposition to OPC's Prehearing Motion.

A formal hearing was held on December 11, 2018. At the hearing, the Commission voted to deny OPC's Prehearing Motion, and to accept and approve the parties' proposed stipulations. By Order No. PSC-2019-0114-FOF-EI (Final Order), issued on March 26, 2019, the Commission found that FPUC prudently incurred \$426,261 in net recoverable storm restoration costs, and that the appropriate amount to recover these costs and to replenish FPUC's storm reserve is \$1,927,648.

On April 3, 2019, OPC filed a timely Motion for Reconsideration of Order No. PSC-2019-0114-FOF-EI (Posthearing Motion). In the Posthearing Motion, OPC requested that the Commission reconsider its decisions: (1) authorizing FPUC's recovery for additional compensation related to its Inclement Weather Exempt Employee Compensation Policy (Inclement Weather Policy); and (2) striking, in whole or in part, Issues 7 and 10. On April 5, 2019, OPC filed a Request for Oral Argument on its Posthearing Motion (Request). On April 10, 2019, FPUC filed a Response in Opposition to Citizens' Motion to Reconsider Portions of Order No. PSC-2019-0114-FOF-EI and Response to Separate Request for Oral Argument (Response in Opposition).

The Commission has jurisdiction over this matter pursuant to Sections 366.04, 366.041, 366.05, 366.06, and 366.076, Florida Statutes (F.S.), and Rules 25-6.0143, 25-6.0431, and 25-6.044, Florida Administrative Code (F.A.C.).

Discussion of Issues

Issue 1: Should the Commission grant OPC's Request for Oral Argument?

Recommendation: No. The Commission should deny OPC's Request for Oral Argument. However, if the Commission decides that oral argument would aid in its understanding and disposition of OPC's Posthearing Motion, staff recommends that the Commission allow three minutes per side. (Dziechciarz, Weisenfeld)

Staff Analysis:

OPC's Request for Oral Argument

OPC requested the opportunity to present oral argument on its Posthearing Motion pursuant to Rule 25-22.058, F.A.C.¹ OPC asserts that oral argument will aid the Commission in comprehending and evaluating points that were overlooked in the Final Order. More specifically, OPC contends that oral argument will aid the Commission in understanding that the classification of employees as it relates to overtime pay is a necessary consideration for the application of Rule 25-6.0143, F.A.C. Although the Request was not filed concurrently with OPC's Posthearing Motion, OPC asks that its Request be considered timely.

FPUC's Response to OPC's Request

FPUC notes that OPC's Request for Oral Argument was not timely filed pursuant to Rule 25-22.0022, F.A.C. FPUC further contends that the issues that are the subject of OPC's Posthearing Motion were thoroughly argued and briefed during the hearing process, and thus oral argument is not likely to provide additional, revelatory insight for the Commission. FPUC suggests that in the event that the Commission determines oral argument would be helpful, the time should be limited to no more than three minutes per side.

Analysis

Rule 25-22.0022(1), F.A.C., states:

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof.

OPC's Request was not filed concurrently with the Posthearing Motion on which the oral argument was requested. OPC filed its Posthearing Motion on April 3, 2019, and the Request was filed on April 5, 2019. Staff recommends that OPC's Request be denied both because it was not filed timely (and therefore waived), and because staff believes that the pleadings are clear on their face. However, staff notes that pursuant to Rule 25-22.0022(3), F.A.C., the Commission has the sole discretion to grant or deny oral argument. Therefore, if the Commission decides that oral argument would aid in its understanding and disposition of the underlying matter, staff recommends that the Commission allow three minutes per side.

¹ OPC erroneously cited Rule 25-22.058, F.A.C., which was repealed on January 1, 2007. The Oral Argument Rule is Rule 25-22.0022, F.A.C.

Conclusion

The Commission should deny OPC's Request for Oral Argument; however, if the Commission decides that oral argument would aid in its understanding and disposition of OPC's Posthearing Motion, staff recommends that the Commission allow three minutes per side.

Issue 2: Should the Commission grant OPC's Posthearing Motion to reconsider the decision to authorize FPUC's recovery of \$69,632 pursuant to Rule 25-6.0143, F.A.C.?

Recommendation: No. OPC's Posthearing Motion to reconsider the decision to authorize FPUC's recovery of \$69,632 pursuant to Rule 25-6.0143, F.A.C., should be denied because it does not meet the required standard for a motion for reconsideration. OPC has failed to identify a point of fact or law that was overlooked or that the Commission failed to consider in rendering Order No. PSC-2019-0114-FOF-EI. (Dziechciarz, Weisenfeld)

Staff Analysis:

By Final Order No. 2019-0114-FOF-EI, issued on March 26, 2019, the Commission authorized FPUC to recover \$69,632 in costs incurred under FPUC's Inclement Weather Policy pursuant to Rule 25-6.0143, F.A.C. Rule 25-6.0143(1)(f)2., F.A.C., 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: ... Bonuses or any other special compensation for utility personnel not eligible for overtime pay[.]

In the Final Order, the Commission found that:

We interpret 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 ... [T]he "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. Thus ... the "extra compensation" in this case 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."

Standard of Review

The appropriate standard of review in a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that the Commission failed to consider in rendering its Final Order. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958).

OPC's Posthearing Motion for Reconsideration

OPC asserts that the purpose of a motion 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. Thus, OPC argues that the Commission has misinterpreted the

language of Rule 25-6.0143, F.A.C., by finding that the additional compensation of \$69,632 contemplated by FPUC's Inclement Weather Policy is not a bonus or special compensation, but rather an additional supplemental compensation that is permissible for storm cost recovery under the Rule. OPC alleges that the Commission was incorrect to focus its analysis on whether the additional compensation was discretionary.

OPC submits that the language of Rule 25-6.0143, F.A.C., does not focus on the discretionary nature of the payment, but rather on the classification of the employee as it relates to eligibility for overtime pay. OPC also contends that the Commission's definition of a bonus as a discretionary payment appears to ignore how bonuses are treated under the Fair Labor Standards Act. Because of this, OPC asserts that the question before the Commission is not whether the additional compensation is a "bonus," but rather: (1) whether the employee who received additional compensation was ineligible for overtime pay, and (2) whether the additional compensation was "special compensation." OPC contends that the payments under FPUC's Inclement Weather Policy constituted "special compensation" to employees who were ineligible for overtime, and therefore the payments should be disallowed.

OPC asserts that FPUC acknowledged that the employees who receive compensation under the Inclement Weather Policy are ineligible for overtime pay. OPC argues that because the Inclement Weather Policy was designed for "exempt employees," they are necessarily ineligible for overtime, and thus the payments are prohibited by Rule 25-6.0143(f)2., F.A.C. OPC argues that this fact contradicts the Commission's treatment of the payments and requires reconsideration.

OPC further asserts that the Commission's definition of "special compensation" renders the word "bonus" in Rule 25-6.0143(f)2., F.A.C., superfluous. OPC argues that the rules of statutory construction dictate that a deciding body must give the words of a rule or statute their plain meaning, and that significance and effect must be given to every word or phrase in the rule. OPC argues that since "special compensation" is not defined in the Florida Administrative Code, it is helpful to review the definition in the dictionary. According to Merriam-Webster's online dictionary, "special" is defined as "being other than the usual: additional, extra."

OPC concludes that therefore "special compensation" constitutes any compensation beyond a salaried employee's regular or ordinary salary. To support this argument, OPC cites to case law that discusses the relationship between salary, overtime, fixed compensation, and irregular compensation. OPC concludes that storm payments to employees who are ineligible for overtime pay are either part of the employee's standard compensation, or are a kind of special compensation, both of which are excluded under Rule 25-6.0143(f)2., F.A.C.

FPUC's Response in Opposition

FPUC asserts in its Response in Opposition that OPC's Posthearing Motion must be denied, because it fails to identify any mistake of fact or law in the Commission's decision, or anything that was overlooked in rendering the decision. FPUC contends that OPC simply disagrees with the Commission's conclusions, which is not sufficient to meet the standard required for reconsideration.

FPUC argues that OPC's assertion that the Commission gave undue weight to the discretionary aspect of the payments under FPUC's Inclement Weather Policy overlooks the fact that the Commission considered what constitutes "special compensation" and "bonus" payments with respect to exempt employees. FPUC notes that the Commission recognized that a supplemental payment recognized in an employee's base salary package does not necessarily constitute "special compensation," a "bonus," or "base rate recoverable regular payroll."

FPUC contends that after consideration the Commission disagreed with, and therefore rejected, OPC's argument that the supplemental compensation should be disallowed. The Commission found that the Inclement Weather Policy requires that FPUC supplement the compensation for employees who are not eligible for overtime when they perform storm-related work that exceeds their normal hours and job functions. Accordingly, FPUC argues that because this supplemental compensation is part of the standard pay and benefits package for all employees who fall under the Inclement Weather Policy, it is neither "special," nor is it a "bonus" that can be awarded at FPUC's discretion. FPUC further contends that OPC's argument constitutes a re-argument, which is not proper in the context of a motion for reconsideration.

FPUC also notes that OPC's argument that the supplemental compensation should be excluded from storm cost recovery because it is part of the standard compensation package for exempt employees (and thus should be recovered, if at all, through base rates recoverable through payroll) is untimely. FPUC contends that this argument fails to meet the standard for reconsideration because it improperly expands the actual language of Rule 25-6.0143, F.A.C., and assumes a dichotomy not contemplated in the Rule. OPC's argument that the supplemental compensation should be excluded because it is part of the standard compensation package does not identify a mistake of fact or law in the Commission's analysis, but instead asks the Commission to reconsider its interpretation of Rule 25-6.0143, F.A.C., which is not appropriate. FPUC also notes that there is no evidence in the record to support that the supplemental compensation should be categorized as "base rate recoverable through payroll."

FPUC argues that Rule 25-6.0143, F.A.C., does not require that payments made to exempt employees must, in all circumstances under the Rule, either be excluded from recovery as part of the employees' standard compensation package, or excluded as "special compensation" or bonus payments. Rather, FPUC argues, Rule 25-6.0143, F.A.C., clarifies that payroll already being recovered through base rates cannot also be eligible for recovery as a storm cost, and that bonuses or other discretionary incentives likewise cannot be recovered as a storm cost. FPUC argues that Rule 25-6.0143, F.A.C., does not preclude recovery of other categories of compensation, such as non-discretionary, supplemental compensation that is not otherwise recovered through base rates. FPUC reiterates that OPC failed to identify a mistake of fact or law that could serve as the basis for reconsideration.

Analysis

In its Posthearing Motion, OPC failed to meet the standard of review for a motion for reconsideration because it did not cite to any point of fact or law that was overlooked by the Commission in rendering its decision to allow FPUC to recover the supplemental compensation under Rule 25-6.0143, F.A.C. Instead, OPC improperly uses its Posthearing Motion to reargue the merits of matters that have already been considered.

Regarding the recovery of supplemental compensation as established in FPUC's Inclement Weather Policy, OPC takes issue with how the Commission used the non-discretionary nature of the compensation to facilitate its analysis in interpreting Rule 25-6.0143, F.A.C. OPC also cites to the Fair Labor Standards Act, Merriam-Webster's online dictionary, Black's Law Dictionary, and several cases (none of which are authoritative) to support its contention that FPUC's supplemental compensation is "special," and thus prohibited from storm cost recovery. OPC conflates its submission of dictionary definitions and terms from case law with actual points of fact or law that the Commission failed to consider. Nowhere in its Posthearing Motion does OPC note a point of fact or law that was overlooked by the Commission in rendering its decision on this matter. In fact, OPC cites to the Commission's analysis in its Posthearing Motion, thus showing that the Commission carefully considered whether the payments were discretionary (to ascertain if they were "bonuses"), and whether the payments were contemplated on a standard basis in a standard manner (to ascertain if they were "special"). OPC merely disagrees with the Commission's interpretation of "special compensation," and is asking the Commission to review and reweigh the evidence, which is not a proper basis for reconsideration.

Conclusion

Staff recommends that OPC did not meet the standard of review for reconsideration in its Posthearing Motion to reconsider the decision to authorize FPUC's recovery of \$69,632 pursuant to Rule 25-6.0143, F.A.C. OPC failed to identify a point of fact or law that was overlooked or that the Commission failed to consider in rendering Order No. PSC-2019-0114-FOF-EI.

Issue 3: Should the Commission grant OPC's Posthearing Motion for reconsideration of the denial of the Prehearing Motion to reconsider the decision to strike, in whole or in part, Issues 7 and 10?

Recommendation: No. Staff recommends that Final Order No. 2019-0114-FOF-EI, issued on March 26, 2019, already disposed of OPC's Prehearing Motion, and therefore the Commission should not entertain this facet of OPC's Posthearing Motion. (Dziechciarz, Weisenfeld)

Staff Analysis:

At the prehearing conference, held on November 26, 2018, OPC, FPUC, and staff discussed whether Issue 7 should be struck in part, and whether Issue 10 should be struck in its entirety.

Issue 7 was phrased:

In connection with the restoration service associated with electric power outages affecting customers as a result of Hurricanes Matthew and Irma, were the contractor rates **of up to \$509 per hour** that FPUC paid for storm recovery activities reasonable and prudent, in incurrence and amount? If not, what amount should be approved? (emphasis added)

Issue 10 was phrased:

As a result of the evidence in this case, what action, if any, should the Florida Public Service Commission take to ensure contractor rates charged to utilities are reasonable and prudent?

In Prehearing Order No. PSC-2018-0567-PHO-EI, issued on December 4, 2018, the prehearing officer memorialized the decision she made at the prehearing conference to exclude the words "of up to \$509 per hour" from Issue 7, and to strike Issue 10 in its entirety. On December 7, 2018, OPC submitted its Prehearing Motion to reconsider this decision. At the hearing, held on December 11, 2018, the Commission denied OPC's Prehearing Motion, and found that the Prehearing Motion failed to identify a point of fact or law that the prehearing officer overlooked or failed to consider. By Final Order No. PSC-2019-0114-FOF-EI, issued on March 26, 2019, the Commission disposed of OPC's Prehearing Motion.

Rule

Rule 25-22.060(1)(a), F.A.C., states:

Any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order. The Commission will not entertain any motion for reconsideration of any order that disposes of a motion for reconsideration.

OPC's Posthearing Motion for Reconsideration

OPC requests that the Commission "reconsider its prehearing decision to strike, in whole or in part, Issues 7 and 10." OPC asserts that Issue 7 was reworded and Issue 10 was stricken, both without explanation. OPC argues that without legal justification provided, OPC cannot

assert a point of law or fact that was overlooked or misapprehended, and that the Commission's decision to withhold the explanation precludes a successful argument against the action.

FPUC's Response in Opposition

FPUC argues that a motion for reconsideration of a decision that disposes of a motion for reconsideration should not be entertained pursuant to Rule 25-22.060(1)(a), F.A.C. FPUC also argues that OPC is still unable to point to a mistake of fact or law related to the exclusion of the phrase "of up to \$509 per hour" from Issue 7. FPUC notes that exclusion of the phrase had no material impact on the issues addressed in this docket, nor did it hinder OPC's ability to make its arguments.

Similarly, with the exclusion of Issue 10 from the Prehearing Order, FPUC argues that OPC has failed to identify a proper basis for reconsideration. FPUC notes that the hearing transcript clearly reflects that the Commission considered OPC's Prehearing Motion, but decided that OPC had not identified a mistake of fact or law in the prehearing officer's decision and thus, accordingly, OPC's Prehearing Motion was denied. FPUC argued that the Commission also identified that this docket was not the appropriate vehicle for addressing a broad policy question with potential impacts that extend beyond the parties to this proceeding.

Analysis

Regarding the Commission's decision to deny OPC's Prehearing Motion, Rule 25-22.060(1)(a), F.A.C., states that the Commission will not entertain any motion for reconsideration of any order that disposes of a motion for reconsideration. OPC argues that it is seeking clarification of the Commission's decision on this point because no explanation was given. However, at the prehearing conference, in which OPC participated, the prehearing officer clearly articulated that the language to be stricken from Issue 7 was an effort to reduce bias, and Issue 10 was stricken because it was not appropriate for this docket.² The Final Order disposed of OPC's Prehearing Motion regarding Issues 7 and 10, and therefore staff does not recommend that the Commission entertain this facet of OPC's Posthearing Motion.

Conclusion

Staff recommends that OPC's Posthearing Motion be denied. The Final Order disposed of OPC's Prehearing Motion to reconsider the prehearing officer's decision regarding Issues 7 and 10, and therefore staff does not recommend that the Commission entertain this facet of OPC's Posthearing Motion.

² Staff notes that the reasons for re-phrasing Issue 7 and striking Issue 10 were discussed at length by the prehearing officer at the prehearing conference – the transcript of which is available for OPC's review. With respect to Issue 7, the prehearing officer reasoned that the language "of up to \$509 per hour" rendered the issue language biased, and that the Commission has not seen such language "in an impartial technical, evidentiary hearing." The prehearing officer further explained to the parties that, "when you have a final issue list, it has to be impartial. And it has to be able to convey a sentiment that will provide balance to the proceedings." The prehearing officer concluded that striking the phrase "of up to \$509 per hour" would still permit OPC to make the same argument within Issue 7 had the phrase been left in, while removing bias from the wording. Regarding Issue 10, the prehearing officer found that this docket is not the appropriate forum to consider whether contractor rates charged to utilities are reasonable and prudent. She explained that removal of Issue 10 was appropriate, given that the Commission has limited jurisdiction related to price gouging and profiteering.

Issue 4: Should the docket be closed?

Recommendation: Yes, this docket should be closed after the time for filing an appeal has run. (Dziechciarz, Weisenfeld)

Staff Analysis: Yes, this docket should be closed after the time for filing an appeal has run.