

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: August 27, 2021

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Economics (Bruce, Hudson) *JGH*
Office of the General Counsel (Trierweiler, Crawford) *JSC*

RE: Docket No. 20200139-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.

AGENDA: 09/08/21 – Regular Agenda – Motion for Reconsideration – Oral Argument Requested; Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

Utilities, Inc. of Florida (UIF or Utility) filed its Application for Increase in Rates (Application) on June 30, 2020, and the official filing date was August 31, 2020. The Office of Public Counsel (OPC) intervened and is the only other party to this docket. Type 2 Stipulations were proposed on 14 of the 45 contested issues, which were approved by the Commission at the February 3, 2021 hearing and set forth in the Commission’s Final Order approving the rate increase.¹ Two of the stipulated issues were Issue 34 (“What are the appropriate rate structures and rates for the water systems?”) and Issue 36 (“What are the appropriate rate structures and rates for the

¹ Order PSC-2021-0206-FOF-WS, issued June 4, 2021, in Docket No. 20200139-WS, *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.*

wastewater systems?”).² The approved Type 2 stipulations for Issues 34³ and 36⁴ provided for an across-the-board increase to UIF’s water and wastewater service rates at the time of filing.

On June 18, 2021, UIF served counsel for OPC and staff with a Motion for Reconsideration (Motion) and Request for Oral Argument (Request) of Order No. PSC-2021-0206-FOF-WS. However, UIF inadvertently filed with the Commission Clerk two copies of its Request for Oral Argument, on June 18, 2021, omitting the Motion itself. Notwithstanding the untimely filing of the Motion, OPC filed its Response to UIF’s Motion (Response), on June 25, 2021. UIF’s Motion wasn’t filed in the docket until July 2, 2021, by memorandum from Commission counsel, having discovered UIF’s error in filing.⁵

In its Motion, UIF states that neither the staff post-hearing recommendation nor the Final Order mentioned the application of a repression adjustment⁶ that was requested by UIF in its Application.⁷ UIF concludes that as a repression adjustment was not mentioned, the Commission must have overlooked the matter in the Final Order.

In its Response, OPC contends that UIF failed to provide evidence at hearing upon which a repression adjustment could be made, and that such an adjustment was unnecessary given UIF’s stipulation to rate design.

This recommendation addresses UIF’s Request for Oral Argument, UIF’s Motion for Reconsideration, and OPC’s Response thereto. The Commission has jurisdiction pursuant to Section 367.081, Florida Statutes (F.S.).

² Order No. PSC-2021-0064-PHO-WS, issued January 29, 2021, in Docket No. 20200139-WS, pp. 27-28.

³ Order No. PSC-2021-0206-FOF-WS, issued June 4, 2021, in Docket No. 20200139-WS, p. 118. The approved language for Issue 34 provides, in pertinent part: “The appropriate rate structure is a continuation of the existing rate structure and the percentage increase shall be applied as an across-the-board increase to service rates at the time of filing. To determine the appropriate percentage increase to apply to the service rates, miscellaneous revenues of \$363,563 shall be removed from the test year revenues.” Table 16, showing the fall-out percentage increase to water service rates, is not included herein.

⁴ Order No. PSC-2021-0206-FOF-WS, p. 119. The approved language for Issue 36 provides, in pertinent part: “The appropriate rate structure is a continuation of the existing rate structure and the percentage increase shall be applied as an across-the-board increase to service rates at the time of filing. To determine the appropriate percentage increase to apply to the service rates, miscellaneous revenues of \$333,719 shall be removed from the test year revenues.” Table 17, showing the fall-out percentage increase to wastewater service rates, is not included herein.

⁵ See duplicate Document Nos. 06228-2021 and 06229-2021, and Document No. 07450-2021.

⁶ A repression adjustment reflects the elasticity of demand, or customer’s change in the quantity of a product demanded in response to a change in price. The purpose of the repression adjustment is to ensure the utility will achieve the approved revenue requirement, taking into account the customers’ reaction to the price increase. Staff does not use a repression adjustment with respect to non-discretionary usage, because it assumes that non-discretionary usage is not responsive to price.

⁷ DN 03423-2020. On page 3 of its Application, UIF requested “the revenue which the Company requests should be adjusted to incorporate the repression in the customer usage as a result of the rates established in this case, in accordance with the standard methodology as utilized by the staff.”

Discussion of Issues

Issue 1: Should UIF's Request for Oral Argument on its Motion for Reconsideration of Order No. PSC-2021-0206-FOF-WS be Granted?

Recommendation: No. Staff recommends that oral argument was not requested consistent with the requirements of Rule 25-22.0022, Florida Administrative Code (F.A.C.), and that the pleadings are sufficient for the disposition of this matter. However, if the Commission chooses to hear oral argument at its discretion, staff recommends providing 5 minutes per party. (Trierweiler)

Staff Analysis:

Law

Rule 25-22.0022(1), F.A.C., allows a party to request oral argument before the Commission for any motion by separate written pleading filed concurrently with the motion on which argument is requested. Failure to timely file a request for oral argument constitutes a waiver thereof. Granting or denying oral argument is within the sole discretion of the Commission. Rule 25-22.0022(3), F.A.C. Pursuant to Rule 25-22.0022(2), F.A.C., the Commission may request oral argument at its discretion.

UIF's Position

UIF contends that because the repression adjustment was not discussed in the Staff Recommendation and was not addressed by the Commissioners at the post-hearing Commission Conference, the Commissioners would benefit by hearing oral argument on the issue. UIF requests fifteen (15) minutes for each party. OPC did not file a response to UIF's Request for Oral Argument.

Staff Analysis

As discussed in the case background, the Utility's Request for Oral Argument was not filed concurrently with the Motion, as required by Rule 25-22.0022(1), F.A.C. Further, staff believes that the pleadings are sufficient on their face for the Commission to evaluate and decide UIF's Motion. Staff recommends that UIF's Request should be denied as unnecessary for the disposition of this matter, and because its request for oral argument was not made consistent with the requirements of Rule 25-22.022, F.A.C. However, if the Commission, in its discretion, chooses to hear oral argument, staff recommends 5 minutes per party is sufficient.

Issue 2: Should UIF's Motion for Reconsideration of Order No. PSC-2021-0206-FOF-WS be Granted?

Recommendation: No. UIF's Motion for Reconsideration should be denied as being untimely filed. However, if the Commission wishes to address the substance of UIF's Motion, staff recommends the Motion should be denied because UIF fails to raise a point of fact or law that the Commission overlooked or failed to consider in rendering its decision. (Trierweiler)

Staff Analysis:

Law

Rule 25-22.060(3), F.A.C., applies to requests for reconsideration of final orders, and states:

(3) Time. A motion for reconsideration of a final order shall be filed within 15 days after issuance of the order. A response to a motion for reconsideration or a cross motion for reconsideration shall be served within 7 days of service of the motion for reconsideration to which the response or cross motion is directed. A response to a cross motion for reconsideration shall be served within 7 days of service of the cross motion.

The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that Commission overlooked or failed to consider in rendering the order. *See 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 162 (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. 3rd DCA 1959); citing *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse, Inc.*

UIF's Motion

UIF states in its Motion that a water repression adjustment quantifies changes in consumption in response to an increase in price. UIF also states that the Commission has historically estimated that the rate by which residential customers will reduce their water consumption in response to an increase in price - elasticity of demand - is four percent of discretionary usage for every ten percent increase in price. UIF asserts that inclusion of a repression adjustment is a long-standing Commission practice. According to UIF, the Commission's failure to apply a repression adjustment establishes that this Motion clearly meets the strict standard for reconsideration of a point of fact being overlooked.

In its Motion, UIF concedes that it did not present evidence on repression as it and other utilities have done in the past. To support its position, UIF cites to prior Commission orders addressing base rate proceedings for Commission-regulated water and wastewater utilities, in which repression adjustments were made to reflect anticipated reductions in the number of gallons sold.

In Final Order No. PSC-2021-0206, the Commission approved a 10.20 percent increase in water rates and a 22.82 percent increase in wastewater rates, which UIF asserts requires a repression adjustment in order for UIF to have a fair opportunity to achieve its authorized rate of return consistent with the Commission's practice of applying a repression adjustment. UIF estimates that the repression adjustment revenues should have been approximately \$250,000 for water and \$250,000 for wastewater, for a total annual revenue shortfall of approximately \$500,000. UIF contends this results in a rate of return of closer to the lower end of its authorized rate of return of 8.75 percent, almost assuring the need for another rate case in less than four years.

UIF concludes by asking the Commission to reconsider the lack of a repression adjustment and increase UIF's revenue requirement to incorporate the expected repression in usage, so UIF can have an opportunity to earn its authorized return.

OPC's Response

OPC asserts that UIF entered into a stipulation of Issue 36,⁸ as reflected in Prehearing Order No. PSC-2021-0064-PHO-WS, issued January 29, 2021, which OPC did not oppose. OPC avers that the stipulation of Issue 36 resolved all rate design matters, including the single reference to a repression adjustment listed in UIF's Application, filed June 30, 2020. Moreover, OPC argues that UIF did not present testimony to explain or support a repression adjustment and that by its own admission, UIF simply "did not present evidence on repression." Therefore, OPC contends that even if the issue had not been resolved by UIF 's stipulation, the Utility failed to carry its burden of proof for a repression adjustment.

OPC notes that UIF's witnesses, Swain and Seidman, each referenced repression only tangentially in an exhibit schedule concerning the Used and Useful (U&U) status of just one of UIF's systems - Pennbrooke.⁹ While acknowledging demand had dropped at Pennbrooke, the witnesses proposed that the U&U for that one system should remain at 100% "to reflect reduced demand due to repression and conservation."

OPC argues that no statute or administrative rule requires the Commission to apply a repression adjustment to rate increases in all cases. Instead, application of a repression adjustment is subject to the discretion of the Commission. OPC reasons that the law does not require a repression adjustment in cases in which a utility fails to present testimony or evidence to support such an adjustment.

OPC cites to *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982), for the premise that the burden of proof is always on a utility seeking a rate change. OPC notes that the Commission's rules do not require the Commission to automatically apply a repression adjustment to rate increases of a certain amount and thus, argues that UIF's reliance on staff to automatically include a repression adjustment has no legal basis. Moreover, OPC argues that UIF's stipulation negated any reliance on alleged but unfounded "long-standing Commission practice." OPC asserts that to allow a utility to merely list allegations or requests in its petition,

⁸ In its response, OPC references Issue 36 regarding wastewater rate structure, but does not specifically reference Issue 34 regarding water rate structure. However, its Response references both water and wastewater rates.

⁹ Swain Ex. DDS-I, page 276; Seidman Ex. FS-3, page 130.

fail to produce evidence, and then expect all aspects of the petition to be granted, would establish a dangerous precedent and represent a shift in the burden of proof away from the petitioning utility.

OPC also takes issue with UIF's complaint that the Commission did not discuss a repression adjustment during the post-hearing Commission Conference. OPC notes that in light of the stipulation to which UIF agreed, there was no basis for the Commission to delve into that topic. OPC asserts that even if a repression adjustment had been at issue, UIF resolved the matter via stipulation. OPC also asserts that the lack of a particular discussion of one item in a document or proceeding is not presumptive proof that the item or matter was not considered by the tribunal at all.¹⁰ OPC argues that there is no reason to believe the Commission overlooked or failed to consider a repression adjustment and that the record evidence shows that all aspects of rate design were considered, and that UIF's stipulation fully addressed and resolved the issue.

OPC characterizes UIF's Motion an attempt to use reconsideration as a tactic to reargue the case or persuade the Commission to change its mind in the absence of evidence to support the change, and that such use of reconsideration is contrary to law.¹¹ OPC concludes that that UIF's Motion fails to meet the requirements for reconsideration under Rule 25-22.060, F.A.C., and that granting UIF's Motion would be a departure from established Commission policy and would result in reversible error.

Staff Analysis

Untimely Filing of the Motion

Although OPC chose not to raise the matter in its Response, UIF's Motion should have been filed within 15 days, pursuant to Rule 25-22.060(3), F.A.C. Failure to file a timely motion for reconsideration shall constitute waiver of the right to do so. Rule 25-22.060(1)(d), F.A.C. As discussed in the case background, any request for reconsideration of Order No. PSC-2021-0206-FOF-WS was due to be filed by June 21, 2021.¹² UIF inadvertently filed two copies of its Request for Oral Argument on June 18, 2021. While timely served to counsel for OPC and staff, UIF's Motion for Reconsideration was not filed with the Commission Clerk until July 2, 2021, when the error was discovered by staff, and a copy of the Motion was placed by staff in the docket file. The time limitation for filing reconsideration is jurisdictional, and the Commission does not have the authority to enlarge it.¹³ Staff recommends that UIF's Motion should be denied on the basis of untimeliness. However, if the Commission addresses the substance of UIF's Motion,¹⁴ staff recommends it should be denied for the reasons set forth below.

¹⁰ *Citing cf., State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (“[c]ounsel should not . . . draw the conclusion that the matters not discussed were not considered”).

¹¹ *Citing Stewart Bonded Warehouse, Inc. v. Bevis*, and *Sherwood v. State*, *supra*.

¹² The 15th day fell on Saturday, June 19, 2021. Pursuant to Rule 28-106.103, F.A.C., regarding the computation of time, the reconsideration period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

¹³ *See City of Hollywood v. Public Employees Relations Commission*, 432 So.2d 79 (Fla. 4th DCA 1983), in which the court held that, since neither Chapter 120, Florida Statutes, PERC's rules, nor the Model Rules of Procedure expressly authorized an extension of time to file for reconsideration, PERC erred in granting such an extension.

¹⁴ *See* Order No. PSC-95-0047-FOF-WS, issued January 11, 1995, in Docket No. 930880-WS, *In re: Southern States Utilities, Inc.*, in which the order under reconsideration had been subsequently amended (thus tolling the time

Absence of Evidence in the Record

In its Motion, UIF cites to 11 Commission orders addressing base rate increases for Commission-regulated water and wastewater utilities, in which repression adjustments were made to reflect anticipated reductions in the number of gallons sold. However, 9 of the 11 cases referenced by UIF were conducted pursuant to the Commission's Proposed Agency Action (PAA) process. If a utility is dissatisfied with the Commission's PAA order, it can request an administrative hearing, at which it bears the ultimate burden to support its rate request and to place into evidence the various components that go into setting rates, including testimony and evidence as to the appropriate repression adjustment, if any.

The other two orders cited by UIF were post-hearing decisions, issued after the Commission conducted an administrative hearing. In both instances, the repression adjustments were supported by expert testimony. For example, a repression adjustment was prominently featured in UIF's 2016 rate case, where UIF filed evidence in support of the repression adjustment issue in the record, which included the testimony of the Utility's own expert witness, that was then countered by the testimony of the Commission staff witness.¹⁵ UIF provided no citations to Commission orders where a repression adjustment was made after conducting a hearing in which no evidence was provided regarding such an adjustment. Nor did UIF cite to a case where a repression adjustment was made after an across-the-board increase to service rates was approved by the Commission.

Despite UIF's admission in its Motion that it failed to provide evidence or testimony to support a repression adjustment in this docket, the Utility claims that Commission staff should have applied it anyway because the Utility requested it in its Application.¹⁶ The Commission's long-standing practice is that the ultimate burden of proof to establish a record sufficient to support requested rates lies with the utility seeking a rate change.¹⁷ When the record is devoid of the evidence required to support a repression adjustment, the Commission cannot create that evidence after the fact and retroactively apply it to the approved rates. Indeed, as the record is silent, UIF's speculated revenue shortfall amounts due to the absence of a repression adjustment cannot be verified. Further, as discussed below, a repression adjustment would not be appropriate in this case, where an across-the-board increase to water and wastewater service rates was made.

UIF's Stipulation to Issues 34 and 36

As discussed in the case background, Type 2 stipulations were agreed to by UIF and approved by the Commission with respect to the rate structure for water (Issue 34) and wastewater (Issue 36) rate structure, resulting in an across-the-board increase to water and wastewater service rates.

for reconsideration), and the Commission found that no harm would occur in any event if it were to take up the motion for reconsideration, since the Commission was denying the motion.

¹⁵ Order No. PSC-2017-0361-FOF-WS, issued September 25, 2017, in Docket No. 20160101-WS, *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*, pp. 202, 206-207.

¹⁶ See DN 03423-2020, at p. 3 of UIF's Application: "The revenue which the Company requests should be adjusted to incorporate the repression in the customer usage as a result of the rates established in this case, in accordance with the standard methodology as utilized by the Staff." See also FN7 above; these appear to be the sole references to repression made by UIF in this proceeding.

¹⁷ *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982).

The Commission does not apply a repression adjustment to across-the-board rate increases. The application of an across-the-board increase results in the existing rates being increased uniformly by the percentage increase in the revenue requirement. Under the application of an across-the-board increase, all parameters of rate design are held constant, such as the base facility charge recovery allocation, rate blocks, and billing determinants. Factoring in a repression adjustment negates the premise of an across-the-board increase because cost recovery would have to be redistributed to account for any anticipated reduction in gallons and related operation and maintenance expenses. As OPC notes in its response, UIF's stipulation to water and wastewater rate structure is an across-the-board rate increase where staff does not apply a repression reduction. These stipulations resolved all rate design matters, including the passing reference to a repression adjustment listed in UIF's Application. OPC did not oppose approval of the stipulation, and UIF's stipulation to Issues 34 and 36 is not contested in its Motion.

Conclusion

As stated above, staff recommends that UIF's Motion should be denied as having been untimely filed. However, if the Commission addresses the substance of UIF's Motion, staff recommends it should be denied for the following reasons. The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that Commission overlooked or failed to consider in rendering the order.¹⁸ The lack of a particular discussion of one item in a document or proceeding is not presumptive proof that the item or matter was not considered by the tribunal. Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review."¹⁹

UIF's assertion, that the absence of a repression adjustment in the staff recommendation and subsequent final order suggests that the Commission overlooked the issue, is contrary to UIF's admission in its Motion that it offered no evidence in support of a repression adjustment in the record or at Hearing. It further ignores UIF's stipulation to an across-the-board rate increase to water and wastewater service rates, reflected in the Final Order of this proceeding. The Utility, who has the burden of proof, admits that the record is silent on this issue; therefore, there was nothing for the Commission to consider, other than the proposed stipulations it approved. Rather than overlooking a repression adjustment, the adjustment wasn't relevant considering the absence of evidence in the record and in light of UIF's stipulation to Issues 34 and 36. Accordingly, staff recommends that UIF's Motion for Reconsideration should be denied.

¹⁸ *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974).

¹⁹ *Id.*

Issue 3: Should this docket be closed?

Recommendation: Yes, this docket should be closed. (Trierweiler)

Staff Analysis: This docket should be closed.