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July 24, 2008

VIA HAND DELIVERY

Ms. Ann Cole, Director
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, FL 32399-0850

Re: *In Re: Application for increase in water and wastewater rates in Alachua, Brevard, DeSoto, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.*, Docket No. 080121-WS

Dear Ms. Cole:

Aqua Utilities Florida, Inc. ("AUF") respectfully requests permission to address the Commission at its July 29, 2008 Agenda Conference and respond to two specific matters relative to staff's memorandum dated July 18, 2008, namely (1) to support the premise of staff's recommendation that AUF has made a prima facie showing for interim rate relief, and (2) to point out a legal oversight in staff's recommended adjustment to the amount of interim rate relief to AUF. Both issues have serious due process implications.

1. AUF's Entitlement to Interim Rate Relief. On page 13, staff cites a number of Florida Supreme Court cases in support of its recommendation that the company has made a prima facie showing that it is entitled to interim rate relief pursuant to Section 367.082, Florida Statutes. AUF agrees that those cases are important for purposes of establishing interim rates. In particular, these and other cases confirm that Florida's interim rate laws provide utilities with important due process protections that cannot be ignored, and that the Commission has limited discretion when it comes to interim rate relief matters. *Citizens of the State of Florida v. Public Service Commission,* 435 So. 2d 784 (Fla. 1983). In keeping with those Supreme Court decisions, the Commission has recognized that:

> The determination of the appropriate interim amount is one strictly made following the formula found in section 367.082, Florida Statutes. Interim rates "protect utilities from 'regulatory lag' associated with full blown rate proceedings." *Citizens of the State of Florida v. Public Service Commission,* 425

> So. 2d 534, 540 (Fla. 1981) (*citing Florida Power Corp. v. Hawkins,* 367 So. 2d 1011, 1013 (Fla. 1979). These rates provide a utility relief pending our final decision on rates, requiring only a prima facie showing of entitlement to relief.

In re: Investigation of rates of Gulf Utility Company in Lee County for possible overearnings; In re: Application for increase in rates and service availability charges in Lee County by Gulf Utility Company, 96 F.P.S.C. 2:393, Order No. PSC-97-1544-FOF-WS, Docket No. 96-0234-WS, Order No. PSC-97-1544-FOF-WS (December 9, 1997) (emphasis added).

Florida's interim rate statutes for water, wastewater, electric and gas utilities are virtually identical in structure, and are designed to extend due process protections to utilities and other parties participating in prolonged proceedings to establish permanent rates. *United Telephone Company of Florida v. Beard,* 611 So.2d 1240 (Fla. 1993). Courts interpreting these statutes have uniformly explained that their purposes are to provide accelerated rate relief to utilities that make a prima facie showing that current rates are insufficient, and to protect consumers by requiring interim revenues be held subject to refund. *See Florida Power Corporation v. Hawkins,* 367 So. 2d at 1014; *Citizens of the State of Florida v. Public Service Commission,* 425 So. 2d at 534; *United Telephone Company of Florida v. Mann,* 403 So. 2d 962 (Fla. 1981).

The Florida Supreme Court has provided direct guidance on what constitutes a "prima facie showing" for purposes of interim rate relief. In *Southern Bell Telephone & Telegraph Co. v. Bevis,* 279 So. 2d 285 (Fla. 1973), the Court found that when a utility "alleged that its rate of return was below that approved by the Commission" it had established "a prima facie case to require approval of the Commission for an interim rate increase, so long as the increase would not raise the company's rate of return above the minimum level . . . approved by the Commission." *See also Osceola Service Company v. Hawkins*, 357 So. 2d 403 (Fla. 1978)(the Florida Supreme Court recognized that a water and wastewater utility had made a prima facie showing by filing financial schedules that on their face showed that the company's finances required timely rate relief). In other words, once a utility submits a filing that on its face shows that its achieved rate of return falls below its Commission-authorized rate of return, it is entitled to interim rate relief. That is precisely what AUF's interim rate filings show in this docket. As reflected in staff's recommendation, AUF has filed MFRs and supporting prefiled testimony that clearly show that AUF's achieved rate of return during the 2007 test year falls below the minimum authorized rate of return established by Commission. In fact, it is undisputed that none of AUF's water and wastewater systems have had any permanent rate relief from the Commission for over 10 years. The company is operating at a loss due to the antiquated rates currently in effect. Thus, AUF is in complete agreement with staff that it is entitled to interim rate relief.

2. Staff's Attempt to Adjust the Amount of Interim Rate Relief. As indicated above, AUF fully supports the premise of staff's recommendation that the company has made a prima facie showing of entitlement to interim rate relief. However, AUF takes exception to staff's recommendation that the amount of interim rate relief should be adjusted on account of what staff deems to be "discrepancies" in the number of customer bills reflected in AUF's MFR Schedule E-2 compared to MFR Schedule E-3. Staff recommends that the revenues for each of

AUF's systems be adjusted for the respective percentage difference of residential bills between Schedules E-2 and E-3. According to AUF's calculations, Staff's recommended "adjustment" has the effect of reducing AUF's interim rate relief by approximately $450,705[1], based solely on its opinion that "because each of these schedules are based on the same billing records, there should be little, if any discrepancy between the numbers being reported on these schedules." Recommendation @ 11.

The Florida Supreme Court has specifically warned against making these types of "adjustments" to a utility's prima facie case for interim relief based on opinion.

> Interim awards attempt to make a utility whole during the pendency of a proceeding without the interjection of any opinion testimony. The statute removes most of the Commission's discretion in such areas as cost-of-equity capital. Interim relief is prescribed by a formula that locks authorized rate of return to previously authorized rate of return and mandates that any adjustments be made consistent with those authorized in the last rate case. . . . This limits the number of issues which may be initially considered in granting interim relief.

Citizens of Florida v. Public Service Commission, 435 So. 2d at 786 (emphasis added). Staff obviously recognized the prominence of this case when it cited (and quoted from) this passage in its recommendation on page 13. Inexplicably, however, staff proceeds to interject the same "opinion" into AUF's request for interim relief that the Court cautioned against, and that is more appropriately raised as part of the formal hearing on permanent rates.

Staff presents its opinion that there may be "discrepancies" between AUF's Schedules E-2 and E-3 without any mention of the extensive information on this issue that AUF provided in its formal response to staff's deficiency letter dated June 20, 2008 ("Response"). AUF respectfully submits that its Response addresses staff's questions and shows that the information in Schedule E-3 is consistent and fully reconcilable with the information in Schedule E-2. In any event, and as noted by the Florida Supreme Court, if the staff or the Commission has lingering "doubts" about whether information in AUF's Schedules E-2 and E-3 should "match", and is concerned that those "doubts" might be resolved against AUF during the full-blown hearing on the request for a permanent rate increase, then

> the Commission is fully empowered to make the rate increase contingent upon the outcome of the full hearing, and to require the company to repay any part of the interim increase to its customers which the Commission may, at a later date, determine was improper.

See Southern Bell v. Bevis, supra, 279 So. 2d at 285. The same type of customer protection measures that comforted the Supreme Court in *Bevis* are embedded in the interim rate procedures in Chapter 367, Florida Statutes and serve to protect AUF's customers in this case. Indeed, Section 367.082 (and staff's recommendation) specifically provides that interim revenues

[1] $297,001 for water and $153,704 for wastewater.

collected by AUF are held subject to refund with interest so that customers are protected if AUF recovers revenues during interim period in excess of its newly authorized rate of return established at the final hearing.

As mentioned above, staff's recommendation presents an opinion that there may be "discrepancies" between AUF's Schedules E-2 and E-3. Staff has raised this so-called "E-Schedule discrepancy" issue in its letter to AUF dated June 20, 2008, in which it instructed AUF to file a written response to this issue and other alleged MFR deficiencies by July 21, 2008. AUF did as instructed and on July 21, 2008 filed its Response with the Commission and served it on the parties. Included in that response is a detailed discussion and explanation of the alleged Schedule E discrepancies which show the information in Schedule E-2 is consistent and fully reconcilable with Schedule E-3, and that the billing determinants provided in Schedule E-14 were properly used to verify the accuracy of the revenues for that test year. In addition to the information in the Response, AUF's E Schedules are supported and explained in the prefiled direct testimony of AUF witness Gary Prettyman, which also provides detailed support for AUF's billing analysis that was filed as Volume 6 of the MFRs. To date there has been no discovery propounded by staff on this specific subject matter.

In summary, it is improper at this stage in the proceeding for staff to attempt to rebut AUF's prima facie case for interim rate relief by interjecting opinions about alleged Schedule E discrepancies. The Commission, the staff, and the parties will have the right to test AUF's prima facie case and to put on evidence to attempt to rebut it, but due process requires that to occur with proper notice during the discovery and proceedings attendant to the full-blown case for permanent rates. *See Florida Gas Company v. Hawkins,* 372 So.2d 1118 (Fla. 1979). Moreover, statements in staff's recommendations regarding the possible discrepancies with the company's E-Schedules are premature and fail to take into account the extensive information and explanations provided in AUF's Response and in the prefiled direct testimony. This problem may be due to the sequence in which staff's recommendation and AUF's Response were filed. AUF's Response, wherein it extensively addressed questions regarding its E Schedules, was due and was submitted after staff's recommendation was filed in this case. Thus, when staff prepared its recommendation, it did not have the benefit of that additional information. AUF would respectfully request that staff consider revising its recommendation on the Schedule E issue after reviewing AUF's Response.

Sincerely,

HOLLAND & KNIGHT LLP

D. Bruce May

DBM:kjg

cc: Mr. Tim Devlin
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