

State of Florida



Public Service Commission

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DATE: March 29, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Jaeger, Barrera)
Division of Economic Regulation (T. Brown, Fletcher, Maurey)

RA JS CRB

ALM

RE: Docket No. 110200-WU – Application for increase in water rates in Franklin County by Water Management Services, Inc.

AGENDA: 04/10/12 – Regular Agenda – Interested persons may participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\110200.RCM.DOC

Case Background

On June 8, 2011, Water Management Services, Inc. (WMSI or Utility) filed its test-year letter with the Commission, stating its intent to submit an application for an increase in rates and charges. In the letter, WMSI indicated it would seek interim rates, and specifically requested the Commission schedule its rate case directly for hearing rather than using the proposed agency action (PAA) process set forth in Section 367.081(8), Florida Statutes (F.S.).

On November 7, 2011, WMSI filed its application for interim and permanent increases in rates and charges (application) and the testimonies of three witnesses along with the minimum

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filing requirements (MFRs) in support of its rate case.¹ In its application, WMSI changed its mind about going directly to hearing and requested that the rate case be processed using the Commission's PAA procedures. WMSI also requested that the Commission refer the case to the Division of Administrative Hearings (DOAH), when and if the PAA Order was protested.²

On January 19, 2012, by Order No. PSC-12-0030-PCO-WU, the Commission suspended the proposed rate increase and granted WMSI's request for an interim rate increase. That Order also noted that the Utility had requested its application be processed using the PAA process.

On March 2, 2012, the Office of Public Counsel (OPC), who had intervened earlier, filed its Motion for an Administrative Hearing on Water Management Services, Inc.'s Application for Rate Increases (Motion), i.e., OPC is requesting that the rate application be set directly for hearing, and that the PAA procedures not be used.³ On March 8, 2012, WMSI filed its timely Response opposing OPC's motion. Neither OPC nor WMSI requested oral argument on the Motion. However, staff notes that the Commission has discretion to hear oral argument on all matters over which it presides.

This recommendation addresses OPC's Motion and WMSI's Response. The Commission has jurisdiction pursuant to Sections 367.011 and 367.081, F.S.

¹ However, it was not until February 17, 2012, that WMSI completed the MFRs and this date was set as the official date of filing.

² This request is not being addressed in this recommendation, and will be addressed when and if there is a protest of the PAA Order.

³ After this recommendation was drafted and circulated for approval, the Commission received several e-mail filings from customers requesting that the matter be set directly for hearing.

Discussion of Issues

Issue 1: What action should the Commission take on the Office of Public Counsel's (OPC's) Motion for an Administrative Hearing on Water Management Services, Inc's Application for Rate Increase?

Recommendation: OPC's Motion for an Administrative Hearing should be denied, and the rate application should continue to be processed using the proposed agency action process. (Jaeger, Fletcher)

Staff Analysis: Set out below are summaries of OPC's Motion and WMSI's Response, with staff's analysis and conclusion following.

OPC's Argument

OPC notes that Section 367.081(8), F.S., states that "[a] utility may specifically request the commission to process its petition for rate relief using the agency's proposed agency action procedure, as prescribed by commission rule." OPC argues that the Commission has discretion to deny a utility's request for the PAA process on its own motion and to proceed directly to hearing where the circumstances indicate the direct path to hearing would be more administratively efficient and in the public interest. Citing Sections 120.569, and 120.57(1), F.S., OPC argues that an affected party has the right to request an administrative hearing to decide disputed issues and decisions which affect the substantial interests of a party.

OPC believes that proceeding directly to an administrative hearing will be a more efficient use of time and resources for the parties and Commission staff, and ultimately reduce rate case expense that WMSI will seek to collect from its customers for the following reasons:

- a. A hearing would reduce the amount of time the Utility must wait prior to receiving a final order on the Utility's requested rate relief.
- b. Historically, WMSI rate cases and limited proceedings have been very controversial and have been adjudicated through hearings, and based upon what is known about the disputed issues in this case, it appears this rate case will be controversial.
- c. The disputed issues to be raised by the parties will be more efficiently and effectively addressed through an administrative hearing (e.g., discovery and the taking of sworn testimony and cross examination) as opposed to unsworn and untested evidence using the PAA process.
- d. WMSI's statement in its application "when and if the PAA is protested ..." already contemplates that its rate case can and will likely be protested (either by WMSI or an intervening party). If one or more parties already believe that the PAA order will ultimately be protested, then setting the matter for a full evidentiary hearing is in the parties' best interest.

(emphasis supplied by OPC)

Further, in the instant case, OPC notes that WMSI has again proposed significant capital improvements and pro forma adjustments, but they are not identical to those originally proposed in its 2010 Rate Case. In the 2010 Rate Case, OPC notes that the proposed capital improvements and pro forma adjustments were the subject of a full evidentiary hearing and were very controversial. Given the controversial and adversarial nature of issues related to the proposed capital improvements litigated in the 2010 Rate Case, the relationship between the last case and WMSI's proposed improvements in this case, and the significance of the project costs to the customers, OPC believes an evidentiary hearing as opposed to the PAA process would be a more efficient use of limited time and resources.

Moreover, in the 2010 Rate Case, OPC notes that much attention was directed to the factual assertion that WMSI's president had transferred over time, on a net basis, approximately \$1.2 million of cash from WMSI to himself and/or his unregulated business entity, Brown Management Group ("BMG") or other associated companies. Based on this dispute, OPC states that "the Commission voted to order a cash flow audit 'as soon as possible' of WMSI and Account 123 - Investment in Associated Companies (the account that reflected \$1.2 million of cash taken out of WMSI and placed with BMG and/or its president)." Subsequent to that vote, and before the audit could commence, OPC notes that Mr. Brown advised the staff auditor that the security interest in BMG was transferred to WMSI. In the WMSI Cash Flow Audit, published on July 29, 2011, the audit staff stated that this transaction had no effect on the conclusions drawn in the report.

OPC states that it intends to participate fully in issues related to Account 123 and the purported transaction. Further, OPC asserts that proceeding directly to an evidentiary hearing track would provide the more efficient means for OPC and the Commission to address those issues. Noting that the audit staff determined there was a net receivable from Mr. Gene Brown and associated companies in the amount of \$1,175,075 owed to WMSI, as of December 31, 2010, OPC contends that the conclusion of the Cash Flow Audit Report constitute grounds for revisiting the issue of whether the Commission should impute a return on the net accounts receivable that will offset any revenue deficiency that the Commission may determine in the case. Proceeding directly to hearing will enable OPC and the Commission to investigate and address the subject more efficiently than would the PAA process.

Although OPC notes that minimizing rate case expense is important, it believes that WMSI's new rate case filing is going to be the subject of contentious disputes. That being the case, OPC argues that proceeding first to a PAA Order would add unnecessary time and costs to the rate case for no good purpose or advantage. OPC avows that the protest of a PAA Order is virtually assured, and that the five months spent going to a PAA Order would be inefficient. Given the controversial nature of WMSI's filing, OPC asserts that proceeding directly to hearing would be more efficient, both as to time requirements and limiting duplication of rate case expense. "For the reasons stated above, OPC believes setting this matter immediately for hearing would prevent delay, and promote the just, speedy, and (hopefully) less expensive determination of all the issues to be raised in this docket. *See* Rule 28-106.211, F.A.C."

WMSI's Response

WMSI states that pursuant to Section 367.081(8), F.S., a utility may elect to have its petition for rate relief processed using the PAA procedure, and that it has so requested in this case. WMSI argues that OPC misconstrues the meaning of the term "may" in Section 367.081(8), F.S., and that when used in this section, it makes the election discretionary with the utility. In other words, WMSI contends that a utility is not compelled to use the PAA process or the statute would have used the mandatory term "shall." WMSI further argues that OPC, as an intervenor, does not have the statutory authority to dictate the Utility's decision on whether to utilize the PAA process or the direct hearing route. Citing Order No. PSC-96-1147-FOF,⁴ WMSI argues that use of the PAA procedures or going directly to hearing is totally discretionary to the utility.

WMSI notes that in the aforementioned Order, the utility chose to go directly to hearing, and that it was OPC who asserted that the PAA process results in lower rate case expense and thus lower rates to customers. WMSI states that in that case, OPC's case was articulated as follows:

OPC argues that if a PAA order had been entered, the customers could have decided to avoid the cost of hearing. As a result of FCWC avoiding the PAA process, OPC states that customers were deprived of an opportunity to avoid a hearing.⁵

WMSI notes that one of the primary purposes of the PAA process is to reduce rate case expense and thus control customer rates, and is perplexed at OPC's opposition to its use in this case. WMSI argues that using the PAA

process makes OPC and the utility give careful consideration as to whether to protest a PAA order. In many cases, OPC and/or the utility have chosen not to protest a PAA order with which they disagree because of the additional expense of such a protest. At the very least, a PAA order narrows the scope of a protest, if one is filed, resulting in lower rate case expense than if the case had begun as one set directly for hearing.

WMSI concludes its response by stating that OPC misconstrues its rights pursuant to Sections 120.569 and 120.57, F.S. WMSI argues that these provisions apply to agency decisions which affect the substantial interest of parties, and that there is no agency decision from which a request for a formal hearing can be made until the PAA order is entered. WMSI argues that it is the PAA order which triggers the point of entry into the formal hearing process, and that this is tacitly acknowledged by OPC in its Motion when it admits that it cannot comply with the provision of Rule 28-106.201, F.A.C. Citing Rule 25-22.029, F.A.C., WMSI states that it is clear that the rights afforded interested parties pursuant to Sections 120.569 and 120.57, F.S.,

⁴ Issued September 12, 1996, in Docket No. 951258-WS, In re: Application for a rate increase in Brevard County by Florida Cities Water Company (Barefoot Bay division), p. 33.

⁵ Id., p. 33.

arise after a PAA order is entered. Therefore, WMSI argues that neither the customers nor OPC have the “right to ask for a full evidentiary now.” (emphasis supplied by the Utility).

Staff's Analysis and Conclusion

As the Utility notes, Section 367.081(8), F.S., provides that a utility may specifically request the Commission to process its petition for rate relief using the agency’s proposed agency action procedure. In the alternative, a utility may instead request that its petition be set directly for hearing. Further, staff agrees with the Utility that Rule 25-22.029, F.A.C., contemplates that it is after the agenda conference and issuance of the PAA action⁶ that the provisions of Section 120.569 and 120.57, F.S., become applicable. The plain language of Section 367.081(8), F.S., appears to give the utility the option to choose the process, and the Commission has historically deferred to the utility’s selection since the enactment of that section.

Staff notes that the Commission has just completed a full rate case for WMSI with the Final Order being issued on January 3, 2011.⁷ That Order allowed only a little over a one percent increase⁸ and denied many of the Utility’s pro forma requests as not being properly documented. Staff believes that, in this case, a PAA Order might be crafted such that the parties would not be compelled to protest, or, at least, such that any protest would be narrower in scope and the issues more clearly defined and limited. If OPC is not in agreement with the Commission’s PAA action concerning the pro forma projects, rate case expense, or the proper handling of the approximate \$1.2 million that OPC asserts has been “siphoned” off to either Mr. Brown or his associated companies, then OPC can protest and the Commission could go to hearing on just the issues in controversy.

OPC also argues that because of the controversial nature of WMSI’s application, the matter should be set directly for hearing. The last two rate cases of Aqua Utilities Florida, Inc. (AUF) were very controversial. The first AUF rate case (Docket No. 080121-WS) went directly to hearing, had 76 issues identified for hearing, and the Commission ultimately approved a total rate case expense of \$1,501,609. However, the latest AUF rate case (Docket No. 100330-WS) was processed using the PAA procedures. Although the PAA Order was protested and the matter still went to hearing, staff notes that, ultimately, only 38 issues were identified to be determined at the final hearing. Further, staff notes that the total rate case expense approved in Docket No. 100330-WS was \$1,409,043, some \$92,566 less than that approved in Docket No. 080121-WS. In both dockets there was extensive discovery. Staff believes that AUF’s second rate case (Docket No. 100330-WS) is a good example of where the scope of the protest was narrowed and the number of issues were reduced, and possibly, in spite of a protest, the rate case expense was reduced.

Finally, staff notes that the mere fact that a PAA case is controversial does not mean a hearing will necessarily result. There have been numerous controversial rate cases where it appeared that there would probably be a protest to the PAA Order. One of these was the

⁶ After the Commission proposes to take an action that could affect a person’s substantial interests.

⁷ See Order No. PSC-11-0010-SC-WU, issued January 3, 2011, in Docket NO. 100104-WU, In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.

⁸ There would not have been any increase except for the addition of rate case expense.

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application for increase in water rates in Lee County by Ni Florida, LLC (Docket No. 100149-WU). In that case, over the course of hours at the agenda conference, the Commission heard presentations from customers, OPC, and the utility, and issued what appeared to be a very controversial PAA Order.⁹ However, no protest was filed, and the PAA Order became final agency action.

In conclusion, staff believes that OPC has not demonstrated why WMSI's choice to use the PAA process goes against the public interest and should be reversed in light of the expressed provisions of Section 367.081(8), F.S. Based on all the above, staff recommends that OPC's motion for an administrative hearing be denied, and the case should continue to be processed using the PAA process.

⁹ Issued April 22, 2011, in Docket No. 100149-WU, In re: Application for increase in water rates in Lee County by Ni Florida, LLC.

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Issue 2: Should this docket be closed?

Recommendation: No, the docket should remain open for the continued processing of this rate case. (Jaeger)

Staff Analysis: Whether the Commission decides to go directly to hearing or to continue to use the PAA procedures, the docket should remain open for the continued processing of WMSI's application for increased water rates.