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Public Service Commission

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

DATE: February 4, 2021

TO: Adam Teitzman, Commission Clerk

FROM: Charles Murphy TCT

RE: Docket No. 20200215-WS Petition for approval to defer legal expenses in Marion County, by East Marion Utilities, LLC

Please place the attached correspondence from the Office of Public Counsel in the above referenced docket file.

Thank you.

Charlie

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WILTON SIMPSON
President of the Senate

CHRIS SPROWLS
Speaker of the House of Representatives

January 20, 2021

Chairman Gary F. Clark
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 20200215-WS; PETITION FOR APPROVAL TO DEFER LEGAL EXPENSES IN MARION COUNTY, BY EAST MARION UTILITIES, LLC.

Chairman Clark:

The Office of Public Counsel wishes to lodge this objection to the Notice of Proposed Agency Action ("PAA"), Order No. PSC-2021-0029-PAA-WS, issued January 11, 2021 in Docket No. 20200215-WS. On December 29, 2020 OPC expressed to Staff that it wished to comment on this item at the January 5 Agenda Conference. However, the Office was not recognized during the discussion on the item. After the vote, counsel made an attempt to request that the vote on the item be revisited and that the Office be given the opportunity to speak, which was denied.

OPC is stating its objection to the request to defer legal expenses for several reasons. The first reason is that the precedent cited in the recommendation is distinguishable from the instant case. In Docket No. 19960451-WS, the Commission allowed legal expenses incurred by the utility contesting DEP fines to be included in the test year. Here, East Marion Utilities is not merely requesting to recover these costs but to defer them into a regulatory asset and earn interest on these legal expenses until its next rate case. Furthermore, the precedent cited in Order No. PSC-1993-0301-FOF-WS for allowing recovery of legal expenses involved a case in which those expenses were related to permitting and compliance issues. In the instant case, the violations which East Marion agreed to settle are directly related to the quality of service that East Marion has provided to its customers. East Marion settled violations related to a failure to monitor for inorganic contaminants, lead, and copper and a failure to notify customers of its failure to sample for inorganic contaminants as required by rule. Violations of these rules could have exposed customers to dangerous contaminants including heavy metals, and it is patently unfair to make those same customers pay for defending the utility's transgressions.

Second, the assertion that these legal expenses should be recovered from customers because they "may have helped to reduce fines" is at odds with the longstanding precedent that

penalties and fines levied by DEP should not be recoverable from customers.[1] Of note is the fact that the precedent that DEP fines should not be recovered from customers was established after the precedent that Staff cites for allowing the recovery of legal expenses. This newer precedent regarding the recovery of DEP fines from customers runs counter to the precedent cited by Staff. Customers should not pay to help reduce costs that they would never have been responsible for in the first place. Nor does the reasoning that the settlement may have helped to delay system improvements apply because the violations here were due to the utility's own failure to conduct monitoring and provide notice rather than a failure of the system which may warrant improvements. Again, it is patently unfair to penalize customers for the transgressions of the utility.

Additionally, the Notice of Proposed Agency Action, Order No. PSC-2021-0029-PAA-WS, states that deferral accounting is appropriate for "events beyond [the utility's] control" and states that the alternative would be for the utility to seek a rate case every time it experiences an exogenous event. However, the events for which East Marion was fined were obviously not outside of its control and cannot be stated to be exogenous at all. The utility is presumed to be aware of the rules governing the provision of water service in the state of Florida. Furthermore, DEP alleges the utility willfully failed to comply with those requirements. While the settlement does not constitute an admission of liability, it is reasonable to infer that when a potential violation results from a direct lack of action on the part of the utility, that lack of action was not beyond the utility's control.

There is no precedent for allowing deferral accounting for legal expenses related to DEP penalties and the Commission should not create one using a PAA order that will become final only by virtue of the unacceptable and outsized cost of litigation that would be added to these unwarranted legal costs, were the OPC to request a hearing in this docket. As we have stated in other dockets involving deferral accounting, it is inappropriate to not only allow recovery of these expenses but to allow the utility to earn a profit on the deferral. Allowing the utility to earn interest on legal expenses that resulted from its own failures to follow the law only compounds the problem. In this pandemic environment, many more customers are hurting financially and their health can be impacted by the types of violations which DEP alleged in this settlement. The fine that the utility ultimately paid to DEP was $2,125 while the claimed legal expenses associated with settling the matter were $6,594. Even this ratio of defense costs to the fine seems out of line. Allowing the utility to push the costs of settling this matter onto customers while earning a profit minimizes the incentive of a utility to follow the rules because there is the potential that all of the legal costs, and at least some of the settlement amount, will be recovered through the carrying costs paid on the legal costs. The Commission is proposing to set a dangerous precedent which has the potential to put customers at risk as there will be a lessened incentive to comply with the law or avoid potential litigation when the litigation itself becomes profitable.

Notwithstanding the above comments, OPC does not intend to file a formal protest of this Proposed Agency Action because it would be cost-prohibitive to litigate this matter with regard to a Class C utility and impose the litigation costs of that protest upon the utility's customers. Likewise, it is inappropriate for the Commission to use a utility of this size to establish a precedent

[1] See Order No. PSC-1997-0618-FOF-WS, issued May 30, 1997, in Docket No. 960451-WS

regarding the use of regulatory assets for the deferral of costs incurred defending violations of the law under these circumstances. Moreover, the OPC's intent not to file a formal protest should not be a bar to the Commission undertaking its own action to re-open this docket or to ensure that there is no precedential value in this procedurally infirm order, in light of the circumstances described herein.

The OPC submits that a better course of action is to seek establishment of a mechanism for deferral and recovery of costs related to a utility defending its violations of the law. The Commission should at the very least undertake rulemaking to create such a system and allow interested persons the opportunity to make recommendations and be heard in a way that does not impose the cost of litigation on a small utility.

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Respectfully Submitted,

Charles Rehwinkel
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/s/Anastacia Pirrello
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Cc: Parties of Record
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