BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.	DOCKET NO. 100104-WU ORDER NO. PSC-11-0156-FOF-WU ISSUED: March 7, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR

ORDER DENYING OPC'S MOTION FOR RECONSIDERATION
AND
GRANTING OPC'S MOTION FOR CLARIFICATION

BY THE COMMISSION:

I. Background

Water Management Services, Inc. (WMSI or Utility) is a Class A water utility providing service to approximately 1,805 water customers in Franklin County. For the year ended December 31, 2009, the Utility reported operating revenues of $1,319,558 and a net operating loss of $23,496.

On May 25, 2010, the Utility filed its application for the rate increase at issue in the instant docket, and requested that the application be set directly for hearing. WMSI requested final rates designed to generate annual water revenues of $1,943,296, for a revenue increase of $641,629 (49.29 percent). By Order No. PSC-10-0513-PCO-WU, issued August 12, 2010, we suspended the Utility's rates and approved interim rates granting a water rate increase of $109,228, or 8.27 percent. Subsequent to a formal hearing, we issued Order No. PSC-11-0010-SC-WU (Final Order) on January 3, 2011. The Final Order approved a revenue increase of $13,474 (a 1.03 percent increase), and required all interim rates to be refunded with interest.

In the Final Order, we also found that there was "some evidence that the Utility advanced approximately $1.2 million to associated companies while reporting cumulative net losses of approximately $727,000."[1] In its post-hearing brief, the Office of Public Counsel (OPC), which had intervened, argued that these advances were not prudent, and requested that we take the following actions:

> (1) bar WMSI from further investments in associated companies; (2) require WMSI to demand return of its affiliate investments prior to the next rate case . . .; and (3) if repayment is not made by the next rate case, impute a return on the outstanding investment.

[1] Final Order, at page 55.

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Having considered OPC's arguments, we determined that "there was no evidence presented that documented Mr. Brown or BMG having misappropriated funds from the Utility."[2] We found that with the adjustments to expenses and an overall rate of return of 3.85 percent, the customers were not being charged higher rates due to these advances, and the customers continue to receive quality service. Further, we stated that we did not want to micromanage this Utility, and declined to take the three actions that OPC suggested. We concluded that "based on the record in this proceeding, it cannot be determined if the level of investment in associated companies is appropriate," but we directed our staff to "initiate a cash flow audit of the Utility as soon as possible, and if it is determined that the activity in the account has impaired the Utility's ability to meet its financial and operating responsibilities, our staff shall recommend an appropriate adjustment for imprudence."[3]

On January 14, 2011, OPC timely filed its Motion for Reconsideration and/or Clarification (Motion) of the Final Order pursuant to Rule 25-22.060, Florida Administrative Code (F.A.C.).[4] We have jurisdiction pursuant to Section 367.081, Florida Statutes (F.S.).

II. Office of Public Counsel's Motion for Reconsideration

A. Legal Standard

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). The purpose of reconsideration is to bring to the administrative agency's attention a specific point that, had it been considered when it was presented in the first instance, would have required a different decision. State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (Wigginton, J., concurring); Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959). Our decision to grant a motion for reconsideration must be based on specific factual matters rather than an arbitrary feeling that a mistake may have been made. Stewart Bonded Warehouse, Inc., 294 So. 2d at 317 (overturning a Commission order on reconsideration because the Commission's basis for granting reconsideration was to reweigh the evidence, which was "not sufficient").

B. Parties' Arguments on OPC's Motion for Reconsideration

1. OPC's Argument on Motion for Reconsideration

Although OPC states that it agrees with nearly all of our findings and dispositions, it requests we reconsider and/or clarify a single subject -- our treatment of the $1.2 million (net) that WMSI currently has advanced to "associated companies" and WMSI's president. OPC asks us to reconsider our statement that the record is not adequate to enable us to ascertain whether

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[2] Final Order, at page 55.
[3] Final Order, at page 56.
[4] OPC did not request oral argument as required by Rule 25-22.0022, F.A.C.

the $1.2 million level of advances to associated companies is appropriate, and find that the level is both inappropriate and imprudent. OPC states that we should reconsider our treatment of advances because we failed to consider the utility's legal burden of proof and the import of evidence of record. Each of these arguments are set out below.

a. The Commission Failed to Place the Burden of Proof on WMSI

OPC argues that in a ratemaking proceeding, the burden of proof is on the utility to demonstrate that it has acted prudently, and the costs it wishes to recover from its customers are reasonable. OPC notes that this burden is heightened when analyzing transactions with related companies,[5] and citing Order No. PSC-06-0170A-PAA-WS,[6] states:

> By their very nature, related-party transactions require closer scrutiny. Although a transaction between related parties is not per se unreasonable, it is the utility's burden to prove that its costs are reasonable. This burden is even greater when the transaction is between related parties.

OPC argues that although WMSI's president sought to justify the $1.2 million of advances on the grounds that he and associated companies have taken out loans and used the proceeds to pay some of the utility's expenses, we found that WMSI presented absolutely no documentary evidence to prove that assertion.[7] OPC asserts that: "Having observed WMSI's complete failure to prove its claim, the Commission failed to apply the legal standard of the utility's burden of proof."

b. The Commission overlooked and/or failed to consider evidence of record demonstrating that customers have been injured by WMSI's imprudent advances to associated companies.

OPC also argues that our "conclusion that the record is 'inadequate' conflicts with factual findings located elsewhere in the Order," and in the record. OPC notes that at page 53 of the Final Order, we "observed that, by allowing associated companies to withdraw $1.2 million from the utility during the period 2004-2009, WMSI's management placed itself in a position in which it could not even meet the basic debt payment obligations of its very favorable loan from the Florida Department of Environmental Protection . . .," and ". . . WMSI was forced to reschedule and extend loan payments, which had the effect of increasing costs borne by customers over time."

OPC claims that we overlooked or failed to consider other evidence in the Final Order that further demonstrates WMSI's imprudence. OPC witness Donna Ramas pointed out that

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[5] WMSI's president owns or controls the "associated companies" to whom WMSI has advanced the $1.2 million.
[6] Issued March 9, 2006, in Docket No. 050281-WS, In re: Application for increase in water and wastewater rates in Volusia County by Plantation Bay Utility Company, at page 15 of 49 (We determined that the utility had failed to prove that the price it paid a related company for land was based on market value, and so entered a value of zero for the property for rate base valuation purposes.)
[7] Final Order, at pages 53-54.

WMSI's debt obligations exceed the value of its plant. She also noted that WMSI has on occasion reduced the value of plant on its books without at the same time paying down debt associated with the adjusted plant. For instance, after WMSI settled litigation with a contractor over the quality of coatings applied to bridge crossing structures, she noted that WMSI received a settlement of $760,000. WMSI appropriately reduced the value of plant associated with the litigation and settlement, and thus reduced WMSI's rate base. However, WMSI did not use all of the settlement proceeds to pay down the debt associated with the plant. Instead, during the three-month period following the receipt of the $760,000, the balance in Investment in Associated Companies increased by $254,125 for items such as $50,000 advanced to BMG, $85,000 advanced to SMC Investment Properties and $50,000 advanced to Gene D. Brown. Had WMSI used some or all of the $1.2 million of advances to associated companies (which amount is equal to roughly one-third the value of its entire rate base), on which it receives no interest and no return, to instead reduce its debt, OPC argues that the Utility's interest expense would be lower. Further, WMSI would be in a better position to pay its debt obligations timely, and WMSI's lower debt burden would be reflected in the rates that customers pay. In short, OPC states that we overlooked evidence which shows injury to customers. On reconsideration, OPC requests we take this evidence into account and conclude that the $1.2 million balance of outstanding advances to associated companies is inappropriate, imprudent, and harmful to customers.

2. Utility's Response to OPC's Motion for Reconsideration

As stated above, OPC filed its Motion for Reconsideration and/or Clarification of the Final Order on January 14, 2011. No response was filed by WMSI, and the time for doing so has expired.

3. Commission Analysis

Regarding OPC's first argument concerning the proper placing of the burden of proof, we were well aware of the burden of proof and always placed the burden of proof on the Utility as required. We specifically found that with our "adjustments to expenses and an overall rate of return of 3.85 percent, we do not believe that the customers are being charged higher rates due to Mr. Brown's actions."[8] Further, we also found that the Utility was supplying satisfactory quality of service and specifically noted that based on customer testimony the customers were receiving quality service.

Regarding OPC's argument that we overlooked or failed to consider evidence of record, in many instances OPC is referring to findings in the Final Order that it thinks would support its position that we should immediately find that the level of transfers are both inappropriate or imprudent. We do not understand how, if we specifically noted those findings, it could be said that we overlooked or failed to consider those findings.

[8] Final Order, at page 56.

Regarding OPC's claim that we overlooked or failed to consider the refinancing of the DEP loan, we specifically noted that, over time, the "refinancing of the loan added an additional $955,113 of interest over the life of the loan . . .," and disallowed the DEP refinancing costs of $2,500.[9] Therefore, we clearly considered this fact.

Also, we were well aware that WMSI had no equity in the system, and the capital structure was primarily comprised of debt, plus a small amount of customer deposits. As regards OPC's argument concerning the disposition of the funds received by WMSI for the settlement of the quality of coatings applied to bridge crossing structures, we specifically stated:

> We find that the Utility's treatment of the settlement was appropriate. Even though we find that the proceeds are not for the maintenance of the bridge, we are concerned with the management's use of the funds.

Therefore, it is clear that we also considered this fact, and merely reached a different conclusion as to the actions to be taken on a going forward basis.

OPC also argues that if WMSI had used some or all of the $1.2 million of advances to "reduce its debt, the utility's interest expense would be lower." However, the capital structure is reconciled to rate base, and any interest on the debt instruments to be included in the rates would be limited to that amount included in rate base. Therefore, the customers do not pay for any interest paid by the utility over and above the amount associated with used and useful rate base. Even if the full amount of $1.2 million was used to pay down the Utility's debt, the capital structure of WMSI would still consist almost entirely of debt. Finally, we note that if the Utility ever does obtain any equity investment, the current cost of equity is set at 10.85 percent, which is almost three-times the current debt cost and overall cost of capital.

4. Commission Conclusion

In considering the arguments raised by OPC in its Motion for Reconsideration, we find that OPC has merely reargued its positions already set forth at hearing and in its post-hearing brief, rather than identifying a point of fact or law that we overlooked or failed to consider in the first instance. A motion for reconsideration is not the appropriate vehicle for rearguing matters that have already been considered by the Commission. Diamond Cab Co. of Miami, 146 So. 2d at 891 (holding that it is not the province of reconsideration to provide "a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order"); Sherwood, 111 So. 2d at 98 (citing State ex. rel. Jaytex Realty Co., 105 So. 2d at 819 (Wigginton, J., concurring) (stating that it is inappropriate to reargue in a motion for reconsideration matters that have already been considered); Stewart Bonded Warehouse, Inc., 294 So. 2d at 316-317 (noting that it is improper in a motion for reconsideration to ask the deciding body to reexamine the evidence presented and "change its mind").

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[9] Final Order, at page 27.

In consideration of the above, OPC's Motion for Reconsideration shall be denied as it fails to identify a point of fact or law which was overlooked or which we failed to consider in rendering our Final Order. We further find that we relied on evidence in the record and applied the correct legal standards. Finally, the Motion for Reconsideration shall be denied because OPC merely reargues its case set forth in great detail in its post-hearing brief.

In the event we were to deny reconsideration, OPC requests we clarify the nature and scope of the cash flow audit of WMSI that we directed our staff to initiate. This request is addressed below.

III. Office of Public Counsel's Motion for Clarification

A. Parties' Arguments

1. OPC's Motion for Clarification

OPC asks us to clarify the portion of the Final Order that states that the measures proposed by OPC, especially imputing a return on the advances for purposes of calculating future revenue requirements in the event the amounts remain at such inappropriate levels, would constitute "micromanagement," so as to avoid the unwarranted implication that we are limited in our options to the specific measures[10] enumerated in the Final Order. OPC requests we clarify the Final Order to acknowledge clearly that the type of imputation advocated by OPC is a ratemaking tool that we can and frequently do employ to guard customers of regulated utilities from the excesses or mistakes of utility management. Also, OPC requests we clarify the nature and scope of the cash flow audit of WMSI that we directed our staff to initiate. OPC's argument on these two points of clarification is summarized below:

a. The Commission Should Clarify That It Can and Will Employ the Tool of Imputation Advocated by OPC When Needed to Protect Customers

In its post-hearing brief, OPC argued that we should impute a return on the \$1.2 million in WMSI's next case if, after being placed on notice of our determination regarding the imprudence of the advances, WMSI fails to restore the cash to the Utility. Referring to page 56 of the Final Order, in its Motion, OPC states that we "described OPC's proposed measures as 'well intended' but expressed" our "intent to avoid 'micromanaging' the utility."[11] OPC requests

[10] In the Final Order, we noted that when there was a determination of mismanagement or imprudence, we could take the following actions: (1) remove the asset or expense in question from the determination of rates; (2) in the case of non-regulated investments, it could reduce equity in the capital structure by the amount of the investment; or (3) it could reduce the president's salary. See Final Order, at pages 54-55.

[11] OPC believes that in the Final Order, we indicated that we lacked authority to prohibit WMSI from investing further in associated companies. OPC regards its recommendation that we direct WMSI to recall the advances to be more in the nature of notice of our intent to impute a return on advances in the event advances remain inordinately high. OPC notes that in WMSI's 1994 rate case, in response to evidence of troubling business practices, we required WMSI to place service availability payments it received in an escrow account to ensure the money would be available for future capital additions and not be used by the utility for other purposes. Further, among other restrictions, OPC notes that WMSI was required to submit a written request for release of those funds. See Order No. PSC-94-1383-FOF-WU, at page 66.

we clarify the Order to avoid any implication that we regard "imputation" as "micromanagement."

OPC then notes that by rule we impute "a value for Contributions In Aid of Construction (CIAC) from a developer when the utility fails to record it." See Rule 25-30.570, F.A.C. Similarly, we have imputed additional revenues in a test year: (1) to adjust for a utility's failure to meter and bill sales to parties related to the utility; and (2) to take into account opportunities for sales for reuse that a utility failed to include in its test year revenues. This imputation of revenues has "the effect of lowering the utility's calculated revenue deficiency, thereby protecting customers from unreasonably high rates."

Citing Order No. PSC-04-0128-PAA-GU,[12] OPC asserts in its Motion that:

> [T]he Commission noted that City Gas' actual cost of short term debt was unreasonably high due to severe financial/credit difficulties being experienced by its corporate parent. To protect City Gas' customers from being penalized (in the form of high interest costs and correspondingly high rates) for the difficulties created by the parent corporation, the Commission imputed a short term cost of debt of 3.9% in lieu of the 7% reported by the utility and used the imputed rate to calculate City Gas' revenue requirements.

Motion, at page 5. Based on the above, OPC argues that we have in our "arsenal of regulatory tools the ability to either impute income to the utility associated with the advances or, alternatively, to impute a lower overall indebtedness (and correspondingly lower interest cost) reflecting the prudent use of cash to pay down costly debt rather than sending it to associated companies 'free of charge,'" and should clarify the Final Order "to affirm the availability of the imputation tool in circumstances such as those presented in this case."

b. The Commission Should Clarify the Parameters of the Cash Flow Audit

If we proceed solely with the cash flow audit described in the Final Order, OPC asks us "to clarify that the scope of the audit will include the books and records of associated companies and WMSI's president to the full extent necessary to establish definitively the extent of payments made by recipients of advances to defray utility expenses, and that the Commission will provide OPC and customers a point of entry in the event the audit does not support WMSI's claim."

2. Utility's Response

As noted previously, OPC filed its Motion for Reconsideration and/or Clarification of the Final Order on January 14, 2011. No response was filed by WMSI, and the time for doing so has expired.

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[12] Issued February 9, 2004, in Docket No. 030569-GU, In re: Application for rate increase by City Gas Company of Florida.

3. Commission Analysis and Conclusion

a. The Commission Should Clarify That It Can and Will Employ the Tool of Imputation Advocated by OPC When Needed to Protect Customers

We did not limit ourselves to the actions listed in the Final Order. As noted in the examples designated by OPC, imputation is one of the many tools that we may use if the facts of the case warrant such an imputation. In the City Gas case, we reduced the cost of short-term debt from 7 percent to 3.9 percent, while, in this case, the cost of long-term debt is already at 3.79 percent. In denying OPC's request, under the facts of this case as set forth in the record, we merely disagreed that we should impute an interest return on the $1.2 million that may have been advanced to related parties. Therefore, we found and still find that the customers have not been penalized by the Utility's actions.[13] Further, we have historically avoided "micromanaging" utilities. Pursuant to Section 367.011(3), F.S., we must act in the "public interest" and the provisions of Chapter 367, F.S., "shall be liberally construed for the accomplishment of this purpose." Therefore, to the extent that this discussion clarifies our position on this issue, OPC's Motion for Clarification is granted to the extent noted above.

b. The Commission Should Clarify the Parameters of the Cash Flow Audit

Our staff has already initiated its cash flow audit, and we find the parameters in the Audit Service Request are sufficient.

Based on the foregoing, it is

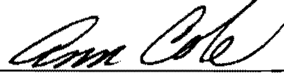
ORDERED by the Florida Public Service Commission that OPC's Motion for Reconsideration is denied. It is further

ORDERED that OPC's Motion for Clarification is granted as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open until: (1) our staff confirms that the appropriate refunds have been made; (2) the appropriate notices and tariffs have been filed and approved by our staff; and (3) the show cause proceedings are concluded. Upon those events being completed, pursuant to Order No. PSC-11-0010-SC-WU, the docket may be closed administratively.

[13] The approved rates only include the recovery of a return on rate base deemed used and useful and devoted to public use. Even though the long-term debt is greater than the approved rate base, any incremental interest expense paid on the long-term debt above rate base is not embedded in the customers' rates.

By ORDER of the Florida Public Service Commission this 7th day of March, 2011.



ANN COLE
Commission Clerk

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NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.