STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison St.
Room 812
Tallahassee, Florida 32399-1400
850-488-9330

JACK SHREVE
PUBLIC COUNSEL

June 16, 1999

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 971065-SU

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of the Citizens' Prehearing Brief on Specified Issues for filing in the above referenced file.

Also enclosed is a 3.5 inch diskette containing the Citizens' Prehearing Brief on Specified Issues in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Stephen C. Burgess
Deputy Public Counsel

SCB/dsb
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for rate increase in Pinellas County by Mid-County Services, Inc.	)))	Docket No. 971065-SU Filed: June 16, 1999

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PREHEARING BRIEF ON SPECIFIED ISSUES

The Citizens of the State of Florida, through their attorney, the Public Counsel, pursuant to directive from Commissioner Julia L. Johnson, as Prehearing Officer, hereby file this brief on certain issues listed in the prehearing order.

ISSUE A:

What issues are considered to be "in dispute" for the purpose of Section 120.80(13)(b), Florida Statutes?

OPC POSITION:

This issue will be relevant to virtually all of the many PAA protests that the PSC entertains. The PSC needs to address this issue definitively for consistent future application. The Citizens believe that any issue put into dispute through the prehearing process must be heard by the Commission.

ARGUMENT:

Statutory Language. Mid-County argues that only those issues raised in a "timely protest" should be considered in dispute for purposes of the Administrative Procedure Act (APA). The statutory language, however, does not support Mid-County's claim. Section 120.80(13)(b), Florida Statutes, reads:

> (b) Notwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

Id.

Neither "protest" nor "timely protest" is found in the statute. That which the utility characterizes as a "timely protest" would appear to equate to what the statute calls "an objection to proposed agency action." Had the legislature intended to restrict a subsequent hearing to the issues raised in the "objection," it easily could have done so by direct reference. The language would have read:

> "[A] hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues raised in that objection."

The linguistic ease with which that clarification could have been accomplished should lead one to suppose that the term "in dispute" may mean something other than a direct reference to the "objection" referenced in the same sentence.

In determining how to interpret "in dispute," it is perhaps worth considering how the Commission interprets that same term as it appears elsewhere in the same chapter. Section 120.57(1), Florida Statutes, refers to "disputed issues." In applying section 120.57(1), however, the Commission does not restrict the disputed issues to only those identified in the initial pleading. Rather, the Commission has always allowed parties to raise issues subsequent to the initial pleading through a deliberate prehearing process. The Citizens believe that the same approach is equally applicable to a hearing under section 120.80(13).

Procedural Logic. The Citizens' interpretation also would prevent a great many unnecessary hearings that are certain to arise under Mid-County's interpretation.

Consider the position of any party who may be affected by a PAA. Perhaps more often than not, a party finds the overall result of a PAA acceptable, even though it might consider some isolated issues to be unfair or unfavorable. Under the Citizens' interpretation,

that party would not protest for two reasons: (i) the overall outcome is acceptable, so the party does not protest, but instead waits to see if its opposition protests; and (ii) there is the jeopardy that by protesting, the party may actually lose ground due to successful counter-issues raised by the opposing party. Both of these reasons are strong incentives for a party to be circumspect about filing a protest when the overall PAA is acceptable.

Under Mid-County's interpretation, on the other hand, both of these reasons evaporate. The overall acceptability of the PAA is no longer a safe harbor. If a party does not file and its opposition does file, the first party can only lose ground. As protection, then, the first party must protest its own issues, even when it finds the PAA acceptable.

As to the second reason, there would no longer be any jeopardy that an opposing party could raise a counter-issue. Since a party need not fear that its opposing party might raise a valid counter-issue, it has no reason not to file a protest.

With a strongly compelling reason to file a protest and no reason not to file a protest, the parties' response is predictable. Parties will protest a PAA even when they find the overall result acceptable and there would otherwise be no protest.

Other Models to Consider. The interpretation recommended by the Citizens finds validation is other analogous procedures. A prime example is the Commission's own procedures for reconsideration. The Commission allows a party to file a cross-motion for reconsideration. Even when it has a valid issue to raise, a party need not file for reconsideration if it is satisfied with the overall result of a final order because it has the opportunity to file a cross-motion if necessary. By this logically sound process, the Commission prevents unnecessary motions

filed only for self-protection. If cross-motions were not available, however, a party would need to file a motion to preserve its valid issue, even if it were satisfied with the final order.

A second analogous situation exists in the appellate process which has been carefully designed to allow for a fair orderly process to allow parties to raise disputed issues, without forcing needless appeals filed only for self-protection. The appellate process accomplishes this balance, in part, by allowing cross-appeals. The underlying principle is to allow a satisfied party to wait, without losing the opportunity to raise valid issues if the opposition decides to appeal.

The logic, fairness and practicality of this approach are beyond question. The Commission likewise should allow parties responding to a PAA protest to bring issues into dispute through the prehearing process.

POLICY ISSUE: (CURRENTLY UNNUMBERED)

Should the Commission take evidence on a protested issue, when the PAA granted the utility all the revenue it sought on that position?

CITIZENS POSITION:

No. The PAA granted Mid-County a return on all of its requested CWIP, much of it invested well after the close of the test year. Accordingly, Mid-County does not have a dispute with the PAA.

ARGUMENT:

In this case, the Citizens are not raising any legal argument against the Commission's authority to take evidence on the issue in question. Rather, the Citizens believe that the circumstances for this case are such that, as a matter of policy, the Commission should not entertain this issue.

The relevant facts are simple:

(1) Mid-County filed its MFR's based on a 1996 average test year, but sought a return on CWIP projects through 1997.

(2) Through PAA Order No. PSC-98-0524-FOF-SU, the Commission granted the entirety of Mid-County's request on CWIP.

(3) On May 7, 1998, Mid-County protested the very CWIP treatment that it had sought in its original MFR's.

(4) The protest now seeks the full amount of rate case expense incurred for the initial filing and for the protest of the PSC decision to grant Mid-County's initial filing.

The Citizens are astonished at the utter brazenness of this approach.

Allowing post test year CWIP into rate base is a generous regulatory treatment. Because of the unique nature of CWIP, it is often excluded from rate base (and allowed AFUDC) even when it actually occurs during the test year. Thus, by receiving both 1996 and 1997 CWIP in an otherwise average balance 1996 test year, the utility benefitted from an already liberal regulatory construction.

It should also be noted that the method of calculating the CWIP in the original MFRs was a deliberate choice of a regulatory philosophy. It was not simply a mistake, as the utility now characterizes it. It is neither unfair nor highly unusual to divide an ending balance by two, as a surrogate or estimate of an average balance over a period of time. Mid-County chose to ask for a return on what appears to be an estimated average CWIP balance for the test year and the subsequent year. The PAA granted the method chosen by the utility. It is improper for the utility to revive this issue, under the guise that it "disputes" the Commission PAA.

The Commission should recognize the policy implications here. The statute allows only issues in dispute to be the subject of a hearing. In this issue the only dispute is a dispute the utility has with itself. When the Commission grants everything a utility seeks, that can hardly be said to give rise to a dispute with the PAA.

Finally, as a peripheral matter, the Commission should also be aware of the effect on an interim refund. If the Commission grants any part of Mid-County's request on this issue, it should not allow it to affect the interim rate refund. Generally, the final approved rates will affect the amount of interim rates to be refunded. Since the interim rates and the PAA permanent rates were based on the utility's initial filings, it would be totally unfair to allow the utility to reduce the interim refund by "objecting" to the method it chose to make in its own initial filing.

Respectfully submitted,

Jack Shreve
Public Counsel

Stephen C. Burgess
Deputy Public Counsel

Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street
Tallahassee, Florida 32399-1400
(850) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 971065-SU

I HEREBY CERTIFY that a true and correct copy of the foregoing Prehearing Brief on Specified Issues has been furnished by U.S. Mail or *hand delivery to the following parties, this 16th day of June, 1999.

Jennifer Brubaker, Esquire*
Division of Legal Services
Florida Public Service Commission
Room 370
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Richard D. Melson, Esquire
Hopping Green Sams & Smith, P.A.
Post Office Box 6526
Tallahassee, Florida 32314

Stephen C. Burgess
Deputy Public Counsel