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RECORDS AND REPORTING

BY HAND DELIVERY

Ms. Blanca S. Bayó
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Mid-County Services, Inc. - Docket No. 971065-SU

Dear Ms. Bayó:

Enclosed for filing, on behalf of Mid-County Services, Inc., are the original and fifteen copies of its Memorandum On Issues A, B and C.

If you have any questions regarding this filing, please call.

Very truly yours,

Richard D. Melson

RDM/clp
Enclosures

cc: Ms. Brubaker
Mr. Wenz
Mr. Rasmussen
Mr. Seidman

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

MID-COUNTY SERVICES, INC.'s
MEMORANDUM ON ISSUES A, B AND C

Pursuant to the direction of the Prehearing Officer, Mid-County Services, Inc. hereby submits its memorandum on the three legal and policy issues identified in the Prehearing Order as Issues A, B and C. Mid-County understands that the Commission intends to hear argument and rule on these issues at the beginning of the final hearing in this case.

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

Utility: The only issues "in dispute" for purposes of Section 120.80(13)(b) are those issues raised by a timely protest of a PAA Order. All matters in a PAA Order which are not specifically protested are "deemed stipulated" and are not the proper subject of a hearing on the protest.

The matters identified as Issue 5 (effluent disposal used and useful), Issue 6 (wastewater collection used and useful), Issue 9 (return on equity) and Issue 10 (overall return) were not the subject of a timely protest, and therefore may not be addressed at the hearing in this case.

The Commission should exclude these issues from the case and should strike the related testimony identified on Exhibit A.

THE STATUTE AND THE QUESTION PRESENTED

Section 120.80(13)(b), Florida Statutes controls the matters that may be addressed at hearing when an objection has been filed to a Notice of Proposed Agency Action (PAA) Order issued by the Florida Public Service Commission. That statute provides:

**120.80 Exceptions and special requirements;
agencies. --**

(13) FLORIDA PUBLIC SERVICE COMMISSION. --

(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.

The question presented for decision by the Commission is what is required in order for an issue to be "in dispute" within the meaning of Section 120.80(13)(b). Mid-County's position is that the only issues "in dispute" are those which are identified in a timely protest to a PAA Order.

THE COMMISSION MAY ONLY ADDRESS ISSUES RAISED IN A TIMELY PROTEST

Section 120.80(13)(b) appears intended to clarify that an objection to actions taken in a PAA Order issued by the Commission does not render the entire PAA Order a nullity, but instead requires and permits a hearing only on the matters that are put into dispute by the objection. Both former Commission Rules 25-24.036(2) and 25-22.036(7)(a)3, and currently effective Uniform Rule 28-106.201(d), require petitions, including

petitions on proposed agency action, to contain a statement of all known disputed issues of material fact. Mid-County submits that reading these provisions together, it is clear that the only matters that are open for hearing in the event of a protest of a PAA Order are the specific matters that are protested and put into issue by the petition.

Mid-County's petition in this case was carefully prepared to comply with both Section 120.80(13)(b) and with the applicable pleading rules. The petition takes a rifle-shot approach to identifying the matters "in dispute." The petition protests seven specific determinations in the PAA Order. It also protests a number of "fall-out" determinations, but only to the extent those "fall-out" issues are affected by the seven matters specifically protested. (Petition, ¶3) The petition then identifies the issues of material fact, and the ultimate facts alleged, with regard to each of the seven protested issues. (Petition, ¶4)

If the Office of Public Counsel was aggrieved by any of the other determinations in the PAA Order, it had the right to file a timely protest and put those issues "in dispute." OPC chose not to file such a protest; instead it intervened in the case over a month after Mid-County's protest was filed. Under Rule 25-22.039, intervenors "take the case as they find it." In a case involving a petition on proposed agency action, the case an intervenor takes includes the issues -- and only the issues --

put in dispute by the protest. By operation of law, the unprotested issues are "deemed stipulated."

The primary purpose of the Commission's PAA procedure is to avoid the necessity for a hearing when all parties are satisfied with (or can accept) the results of the Commission's proposed resolution of a case. The primary purpose of Section 120.80(13)(b) is to avoid the necessity for a hearing on the portions of a PAA order that no party has elected to challenge, and which therefore are "deemed stipulated." These procedures work in concert to reduce the number of issues that the Commission must hear, and consequently to minimize the time and expense that parties are required to invest in obtaining a final decision from the Commission. That purpose would be frustrated if additional issues could be placed "in dispute" after the deadline for filing a protest has passed.

PRIOR COMMISSION DECISIONS

While the prior Commission decisions relating to Section 120.80(13)(b) do not definitively resolve the issue presented in this case, Mid-County submits that those prior decisions are consistent with its view of the statute.

LUSI Case. The case most closely on point was a water rate case involving Mid-County's sister company, Lake Utility Services, Inc. (LUSI). That case had a somewhat complicated procedural background. LUSI objected to portions of the initial

PAA Order setting rates (First PAA Order) by filing a petition on proposed agency action which raised a discrete number of issues. LUSI subsequently submitted a unilateral Settlement Offer which was accepted by the Commission in a second PAA Order (Second PAA Order). The Second PAA Order specifically stated that:

On May 30, 1997, LUSI filed a Petition on Proposed Agency Action, protesting certain portions of the PAA Order. Pursuant to Section 120.80(13)(b), Florida Statutes, those portions of the PAA Order which were not protested are deemed stipulated.

* * *

[W]e find it appropriate to accept LUSI's offer of settlement as a reasonable resolution of this matter. Pursuant to Section 120.80(13)(b), Florida Statutes, those portions of [the First PAA Order] which were not protested are deemed stipulated. Therefore, we find that our acceptance of LUSI's offer of settlement resolves all issues in [the First PAA Order].

Order No. PSC-98-0683-AS-WU, pages 2, 6 (emphasis added).

The Office of Public Counsel then filed a timely protest to the Second PAA Order which identified a number of specific issues to be litigated, some of which were within the scope of the Second PAA Order and some of which went to matters in the First PAA Order which had not been protested by LUSI. Following unsuccessful negotiations with OPC, LUSI sought to withdraw its offer of settlement and its protest of the First PAA Order, thereby mooting the case.

In its "Order Rejecting Withdrawal of Settlement Offer and Withdrawal of Protest," the Commission engaged in a lengthy analysis of the matters that were properly at issue in the hearing on OPC's protest to the Second PAA Order:

We reiterated on page six of the [First PAA] Order that the issues which were not protested were deemed stipulated and stated that our acceptance of the settlement offer "resolves all issues in [the First PAA Order]." Therefore, this second Order superseded the original PAA Order, thus, eliminating the existence of the original PAA Order, with regard to the disputed issues. **Further, because LUSI's settlement offer specifically excluded the protested issues of used and useful and quality of service, and because [the Second PAA Order] resolved the first PAA Order, those issues cease to exist in this docket.**

On June 8, 1998, OPC filed a petition on PAA, protesting [the Second PAA Order] and requesting a formal hearing on its protest. OPC protested the following issues approved in the Order: plant in service; CIAC; fall-out issues, including accumulated depreciation and revenue requirement; service availability charges; and return on equity. **OPC did not protest the approved rate case expense, and pursuant to Section 120.80(13)(b), Florida Statutes, that issue is deemed stipulated.** OPC also raised the following issues in its protest: LUSI's quality of service; the appropriate calculation of LUSI's used and useful plant; LUSI's cost of capital and capital structure; and LUSI's alleged overcollection of allowances for fund prudently invested charges. OPC is precluded from raising these issues, because they go beyond the scope of [the Second PAA Order].

Order No. PSC-98-1582-PCO-WU, pages 4-5 (emphasis added).

The bottom line of this analysis is simple: (i) issues from the First PAA Order which had not originally been protested by any party were "deemed stipulated" and could not be opened or reopened upon protest of the Second PAA Order; and (ii) issues not raised by OPC's protest of the Second PAA Order (e.g. rate case expense) were likewise "deemed stipulated" and could not be litigated by the utility or any other party.¹

Mid-County submits that the principles discussed and applied in the LUSI case apply with equal force to the current docket. Matters not protested are deemed stipulated, and are not the proper subject of the final hearing.

FPC Case. In Order No. PSC-97-0779-FOF-EQ, the Commission considered a motion by OPC which had asked it to dismiss Florida Power Corporation's petition on proposed agency action on the grounds (among others) that the petition was an improper motion for reconsideration of the PAA Order. In denying OPC's motion to dismiss, the Commission stated:

We believe that Section 120.80(13)(b), Florida Statutes, can be interpreted to effectively preclude a party from addressing at hearing any disputed issues in the PAA order that are not raised in that party's petition on proposed agency action. We also note that Rule 25-22.036(2) and (7)(a)3., Florida Administrative Code, requires that initial pleadings, including petitions on proposed agency action, contain a statement of all known disputed issues of material fact. Therefore, OPC's contention that the

¹ The Commission's rulings in the LUSI case were made by a panel consisting of Commissioners Deason, Clark and Jacobs.

statement of disputed issues of fact provided in FPC's Petition somehow transforms FPC's Petition into a motion for reconsideration should be rejected.

Order No. PSC-97-0779-FOF-EQ at 3-4 (emphasis added).

While the Commission's statement about Section 120.80(13)(b) in the FPC order was made in the context of ruling on a motion to dismiss, as opposed to a ruling on the proper scope of issues in the case, this statement is clearly consistent with Mid-County's interpretation that the statute limits the issues to be heard in a case of this type to those raised in a timely protest of a PAA Order.²

Payphone Deregulation Order. This case involved a protest of a PAA Order that: (i) addressed the removal of LEC subsidies of their pay telephone operations, and gave the LECs discretion to determine which rate elements would be reduced in order to eliminate any subsidy; and (ii) kept the docket open to address implementation matters. MCI protested the portion of the PAA Order which gave the LECs discretion to choose the rate elements to be reduced, insofar as that portion of the order affected BellSouth and GTE. MCI requested a hearing on its protest. The order establishing procedure for the docket identified a number of implementation issues to be addressed at the final hearing, beyond the single issue raised by MCI's protest. Sprint-Florida then requested that the Prehearing Officer reconsider the order

² The Commission's ruling in the FPC case was made by a panel consisting of Commissioners Clark, Kiesling and Garcia.

on procedure, arguing that since MCI did not specifically protest Sprint's tariff, Sprint should be excused from the docket and not affected by any further actions in the docket.

In denying Sprint's motion for reconsideration, the Prehearing Officer's order stated:

Section 120.80(13)(b), Florida Statutes, is designed to limit the parties to the issues presented by the protest in order to prevent them from relitigating issues that the Commission already decided and that were not protested. It is not designed to prevent the Commission from addressing matters it deems necessary to a full resolution of the case in the manner it deems appropriate. The issues the Commission plans to address in this hearing are relevant and necessary to full implementation of payphone deregulation pursuant to the Act and the FCC's implementing orders. . . [The PAA Order] expressly stated that Docket No. 970281-TL would remain open to address exactly these sorts of implementation matters.

Order No. PSC-97-0860-PCO-TL, page 3
(emphasis added).

Mid-County submits that this order stands for two propositions.³ First, Section 120.80(13)(b) limits parties to litigating issues that were raised by a timely protest. Second, under the circumstances present in the payphone case, Section 120.80(13)(b) does not prevent the Commission from considering, on its own motion, additional issues during the hearing on the protest. Mid-County submits that the portion of this order regarding the Commission's ability to consider additional issues

³ The decision in the payphone case was made by Commissioner Clark, acting as Prehearing Officer.

is properly limited to cases such as the payphone docket where: (i) the issues added by the Commission were not resolved by the original PAA order, (ii) the future litigation of such issues was expressly contemplated in the original PAA Order, and (iii) those issues are essentially being consolidated for administrative efficiency with a hearing on a party's protest. In any event, it is OPC, not the Commission or its staff, which is attempting to interject new issues into the current docket, so the Commission is not required to address its ability to add issues in order to resolve the question presented in this case.

FPL Case. This case involved a PAA Order that approved an extension and modification of FPL's plan for recording certain nuclear and other expenses. AmeriSteel filed a timely protest of the PAA Order. FPL moved to deny and dismiss the protest on the grounds (among others) that AmeriSteel's protest was not specific about the issues in the PAA that were placed in dispute and many aspects of the PAA Order were thus "deemed stipulated". In denying the motion to dismiss, the Commission held that the PAA Order "takes one and only one substantive action. It modifies and extends the previously approved plan to two future periods." (Order No. PSC-97-1070-PCO-EI) Because there was only one substantive action in the PAA order, and that action was protested, the Commission ruled that the entire PAA order was put in dispute, and there were no issues on which Section

120.80(13) (b) could operate.⁴ The FPL case is thus totally unlike the current case, in which the PAA Order made numerous severable findings on various rate-making issues, and only a discrete number of specific issues were protested by Mid-County.

Summary. While none of the prior Commission decisions on the proper application of Section 120.80(13) (b) appears to be controlling in this case, they are all consistent with Mid-County's position that where a severable PAA order is involved, the only issues "in dispute" as between the parties to the case are those which have been specifically raised in a timely protest.

ISSUES NOT PROPERLY "IN DISPUTE"

The issues not properly in dispute in this case are (i) Issues 5 and 6, related to used and useful determinations for the effluent disposal system and the wastewater collection system, respectively, and (ii) Issues 9 and 10, related to the cost of equity and the overall cost of capital, respectively. Mid-County's protest raised a used and useful issue only as to the wastewater treatment plant, not as to the effluent disposal system or the wastewater collection system. The used and useful percentages determined in the PAA Order for these facilities are thus "deemed stipulated" and may not be relitigated. Similarly,

⁴ The decision in this case was rendered by the full Commission, consisting of Commissioners Johnson, Deason, Clark, Kiesling and Garcia.

Mid-County did not protest any aspect of the cost of capital, and the Commission's determinations of the appropriate cost of equity and overall cost of capital are likewise "deemed stipulated" by operation of law.

Exhibit A to this Memorandum identifies the portions of the testimony filed by the Office of Public Counsel which should be stricken as related only to matters that are not at issue in this case. That exhibit also identifies the rebuttal testimony filed by Mid-County that will be withdrawn if and when the corresponding portions of OPC's testimony are stricken.

ISSUE B: Does the Commission have the legal authority to take evidence on a protested issue, when the PAA granted the utility all the revenue it sought on that issue?

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

Utility: Yes, the Commission has the legal authority to take evidence on any issue that is raised in a timely protest to a PAA Order. The Commission should allow a utility to present evidence to correct oversights in its MFRs, so long as the revenues ultimately granted in the case do not exceed those originally requested.

The Commission clearly has the legal authority to hear any issue raised by a timely protest to a PAA Order. It is only those portions of the order which are not put into dispute by the protest that are deemed stipulated and may not be litigated.

The Commission should take evidence on any issue that is included in a timely protest. Except as limited by Section 120.80(13)(b), a party has a right under Sections 120.569 and 120.57 to an evidentiary hearing on any disputed issues of material fact that arise in a proceeding in which its substantial interests are determined. In this case, there is a dispute about the appropriate rate-making treatment of the utility's investment in certain projects which were completed after the close of the test year. The utility contends that the full amount of such projects should be included in rate base, either as CWIP or as a pro forma adjustment to utility plant in service. The utility acknowledges that in its original MFRs, it erroneously included only 50% of the cost of such projects (designed to represent an "average balance") in rate base. This oversight came to the utility's attention upon review of the PAA Order, which made adjustments that had the effect of leaving a negative balance in CWIP. It is entirely appropriate to correct this error in rate-making treatment through a protest to the PAA Order.

OPC's position that the utility should be precluded from litigating the issue because the PAA Order "granted the utility all the revenue it sought on that issue" is flawed. A utility's application for a rate increase requests an overall amount of revenues, based on test year conditions with any appropriate pro forma adjustments; it does not request a specific amount of revenues associated with each component, or subcomponent, of rate

base and expenses. The Commission cannot ultimately grant the utility more total revenues than it requested or less than those required to produce a fair rate of return. Within those bounds, the Commission should always strive to make appropriate adjustments to correct errors in the MFRs, whether the correction of those errors has the effect of increasing or decreasing the final revenue requirement. See, e.g., Order No. PSC-87-0618-FOF-WS at page 34 (correcting an error in the utility's MFRs which had resulted in the utility understating the cost of debt).

In summary, the Commission can and should consider the appropriate treatment of CWIP in this docket. If the Commission agrees with the utility on Issues B and C, then Issue 1A is rendered moot.

RESPECTFULLY SUBMITTED this 16th day of June, 1999.

HOPPING GREEN SAMS & SMITH, P.A.

By: Richard D. Melson
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(850) 425-2313

Attorney for Mid-County Services,
Inc.

EXHIBIT A

Issue	OPC Testimony to be Stricken	Mid-County Testimony to be Withdrawn
5	<p>Biddy</p> <ul style="list-style-type: none"> - Page 4, line 8, strike the words "and the effluent disposal facilities." - Page 9, lines 15-16, strike the words "and the effluent disposal facilities." - Page 12, line 5, strike the words "and effluent disposal facilities." - Page 13, line 1, strike the words "and the effluent disposal facilities." - Exhibit TLB-8, part (2) 	
6	<p>Biddy</p> <ul style="list-style-type: none"> - Page 13, line 2 to page 14, line 14 - Exhibit TLB-9 - Exhibit TLB-10 	<p>Seidman Rebuttal</p> <ul style="list-style-type: none"> - Page 19, line 16 to page 21, line 14
9	<p>Larkin</p> <ul style="list-style-type: none"> - Page 22, lines 10-22 	<p>Wenz Rebuttal</p> <ul style="list-style-type: none"> - Page 9, line 24 to page 10, line 8
10	<p>Larkin</p> <ul style="list-style-type: none"> - Page 22, lines 10-22 	<p>Wenz Rebuttal</p> <ul style="list-style-type: none"> - Page 9, line 24 to page 10, line 8

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following by hand delivery this 16th day of June, 1999.

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