BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: PETITION FOR ORDER TO SHOW CAUSE AGAINST SERVICE MANAGEMENT SYSTEMS, INC. IN BREVARD COUNTY FOR FAILURE TO PROPERLY OPERATE AND MANAGE WATER AND WASTEWATER SYSTEM.

Docket No: 100318-WS

Filed: November 3, 2010

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AQUARINA UTILITY ASSOCIATION, INC.'S
MOTION FOR RECONSIDERATION OF ORDER NO. PSC-10-0624-FOF-WS

AQUARINA UTILITY ASSOCIATION, INC., ("Customers"), by and through its undersigned counsel and pursuant to Rule 25-22.060, Florida Administrative Code, moves for reconsideration of the following three issues in Order No. PSC-10-0624-FOF-WS, issued on October 19, 2010 ("Order 0624"): (1) It overlooked or failed to considered the appropriate standard of review for a motion to dismiss by considering facts outside the scope of the Customers' pleadings; (2) It overlooked or failed to properly consider facts alleged by the Customers and its own Rules relating to utility plant operations and safety; and (3) it overlooked or failed to address the Customers' request for a limited proceeding.

I. The Standard for Reconsideration.

1. The Commission has recited the following standard for review of its orders on reconsideration:

> 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 the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v.

Green, 105 So.2d 817 (Fla. 1st DCA 1958). *In re: Petition for rate increase by Tampa Electric Company,* Docket No. 080317, Order No. PSC-09-0571-FOF-EI, August 21, 2009, at 8.

2. As will be shown below, Customers respectfully submit that the Commission (a) overlooked or failed to consider the appropriate standard in reviewing a motion to dismiss by considering facts beyond the scope of the Customers' Petition, and by failing to make reasonable inferences in favor of the Customers, (b) overlooked or failed to consider important facts and Rules of the Commission leading it to conclude incorrectly that the utility was in compliance with Commission rules and standards, and (c) overlooked or failed to consider the Customers' request that the Commission conduct a limited proceeding to investigate the rates charged by Service Management Systems, Inc. ("Utility" or "Bank").

II. By considering facts not presented in the Customer's petition, and by failing to make reasonable inferences in favor of the Petitioner based on the facts plead by the Customers, the Commission overlooked or failed to properly consider the appropriate standard of review to be applied in disposing of a Motion to Dismiss.

3. On page 4 of its Recommendation, Commission Staff correctly identifies the appropriate standard of review to be applied in disposing of a motion to dismiss. The Recommendation states:

> A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So.2d 198, 202 (Fla. 1st DCA 2000). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So.2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So.2d 759, 765 (Fla. 1st DCA 1963); and Rule 1.130, Florida Rules of Civil Procedure (F.R.C.P.)

4. In its Final Order, the Commission adopted the standard of review asserted by

Staff, verbatim, Order 0624 at p. 3, but expressly and improperly relied upon facts outside the four corners of the Customers' petition. Order 0624 states:

> [Twenty-three days after the filing of the Customers' Petition] staff sent a data request to the utility to inquire into those issues identified by the Association, including environmental compliance and the current status of facility repairs and improvements. In its July 30, 2010 response, the utility outlined ongoing steps it is taking to make the necessary repairs and improvements and stated that while repairs are being made, all applicable requirements are being met. Staff also contacted the FDEP about the status of the required repairs and the overall environmental compliance status of the utility. The FDEP verified through the utility's monthly Discharge Monitoring Reports that all effluent standards and operation requirements are being met while repairs are being made. *FDEP acknowledges that the plant is not currently operating as designed. However, the FDEP is allowing the utility time to bring the facility into compliance* because it recognizes the financial and ownership issues the utility is facing.

Order 0624 at pp. 2-3 (emphasis added). Leaving aside the fact that the Order expressly acknowledges that the utility is not currently in compliance with FDEP standards, it is impossible to understand how the Commission could have rationally concluded that the utility is in compliance, and is being safely operated based on the Customers' allegations, i.e., that FDEP ordered repairs to bring the utility into compliance, that the Customers' belief is that the repairs have not been made, that a broken 20-foot clarifier arm is lying across the catwalk above the sewage tank (and is therefore not in place and functioning properly), that there is a gap in the catwalk covered by a loose board, that a hose and sprinkler rigged to "aerate" the sewage tank is continuously spraying water on the catwalk, that a length of one-inch pipe is laying on the catwalk, that the utility operator is aware of these conditions, that the operator has acknowledged that these kinds of conditions "may pose serious health, safety and environmental risks," and that a 1,000 gallon single-walled oil storage tank has been present for decades without required permits, registration, or inspections. The Commission, itself, stated that it is required to consider these allegations as true, and make all

reasonable inferences in favor of the petitioner, and that it may not consider any evidence outside of the Petition's allegations.

5. The only reasonable explanation for the Commission's conclusion grant the Bank's motion to dismiss is that it relied on the incomplete facts discovered by the Staff in its data requests of FDEP and the utility and the facts asserted in the Bank's responsive pleadings. In fact, beginning at p. 11, line 9 of the Agenda Conference Transcript for this case ("TR"), Staff Attorney Helton stated:

> It is my understanding that before staff brought their recommendation to you that they, in fact, did do that. They did do some initial information gathering, and based on what they learned, they did not see that there was a problem. Maybe they didn't dig far enough, I don't know the answer to that question.

Further, Commissioner Skop asks a number of questions related to staff's "initial information gathering":

> **COMMISSIONER SKOP:** Okay. All right. I just have some questions for staff, and then I will look back to the bench. If staff could please turn to Staff Data Request Number 1, Question 1. And on that list there's four items. There's a backup aeration blower motor, backup RAS improvement support frame for the RAS motor, a clarifier drive unit, and underground storage tank. With respect to each of the items on those lists, does staff know the status of the repair or improvements for each item listed in that response?
>
> **MR. WILLIAMS:** Good morning, Commissioners. My name is Jay Williams, Commission staff. The most recent status update that we have is the response to the data request that you referred to. I spoke with Tom Powers who constructed the inspection for DEP on last Monday. They were supposed to do a follow-up inspection, but had to postpone it, and he said that once they rescheduled the inspection that he would get back to me about the status of the utility's facilities.

TR, beginning at p. 13, line 22. Commissioner Skop goes on to ask several more questions about facts gathered by Staff, and therefore outside the scope of the Customers' Petition. At p. 14, line 22, Commissioner Skop asks Staff if their data request indicates that the utility management is working diligently to bring the utility into compliance with FDEP and County

standards. The Commissioner goes on to ask several additional questions of Staff with respect to their data request's findings in regard to potential deficiencies, FDEP communications with the utility, the potential impact of deficiencies on customers, and the operational impacts of certain "work around" measures the utility may have placed into effect to avoid FDEP enforcement actions. TR at pp. 14-16.

6. Not only did Commissioners ask questions about the Staff Data Request, but they expressly considered those incomplete facts in concluding that the utility was compliant with Commission or FDEP rules:

> **COMMISSIONER SKOP:** Commissioner Graham – I have a question for Ms. Williams. Again, I think that a show cause is discretionary certainly. The utilities are looking for a rate reduction, whereas the critical issue seems to be the quality of service of the water and wastewater facilities being provided.
>
> In relation to Rule 25.30.225, specifically (7), the utility itself is not currently in compliance with DEP and county operational requirements, is that correct?
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> **MS. WILLIAMS:** I'm sorry, could you repeat the question? They currently are or are not?
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> **COMMISSIONER SKOP:** Are not.
>
> **MS. WILLIAMS:** They currently are from staff's discussions with DEP, yes.
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> **COMMISSIONER SKOP:** So the statement in Data Request Number 1, Question 2, the LLC is working diligently to bring the utility facilities into compliance with Florida DEP and county operational requirements, all of that has been accomplished?
>
> **MS. WILLIAMS:** No, I don't believe that has been accomplished, but I had the same confusion you did with the language "in compliance." When I called the DEP and spoke with Clarence Anderson, who wrote the letter that was sent to the utility and which was referenced by the association, he said – you know, I said, "What are they violating, what are they not in compliance with?" And he said, "Ms. Williams, I want to make clear this is just things we want them to improve. They are not in violation."

COMMISSIONER SKOP: Very well. I think that does it for me, Commissioners. So I will look to the bench for a motion.

TR at pp. 29-30.

7. In light of the standard of review in disposing of a motion to dismiss, it is troubling that a Commissioner had access to staff's data request and the responses to it prior to disposition of the motion. It is also troubling that the Commission spent considerable time not only inquiring about, but openly evaluating the impact facts not found in the pleadings should have on the outcome of the Bank's motion with no concern raised by legal staff. Clearly, the information gathered by the Staff in its data request had a significant impact on the Commission's decision to grant the motion to dismiss. Because the Commission improperly considered facts outside the four corners of the Customers' Petition, this motion for reconsideration should be granted.

III. The Commission overlooked significant facts, and improperly relied on others, when deciding whether the operating conditions of the subject wastewater plant alleged by the Customers constituted a violation of Commission rules, and failed to fully consider Rules 25-30.225 and 25-30.235, F.A.C.

8. Rule 25-30.225, F.A.C., provides standards for the condition of water and wastewater plant and facilities. Specifically, the Rule requires that:

- Each utility shall exercise due care to reduce the hazards to which employees, customers, and the public may be exposed by reason of the utility's equipment or facilities; Rule 25-30-225(3), F.A.C.
- Each water utility shall operate and maintain in safe, efficient, and proper condition, all of its facilities and equipment used to distribute, regulate, measure, or deliver service up to and including the point of delivery into the piping owned by the customer; Rule 25-30-225(5), F.A.C.
- Each utility which provides both water and wastewater service shall operate and maintain in safe, efficient, and proper condition, all of its facilities to the point of delivery; Rule 25-30-225(7), F.A.C.

9. In addition, Rule 25-30-335, F.A.C., provides standards for the safety of public utilities that provide water and wastewater service. That Rule provides: "Every public utility shall at all times use every reasonable effort properly to warn and protect the public from any danger, and shall exercise due care to reduce the hazards to which employees, customers, and the public may be subjected by reason of its equipment and facilities."

10. The Customers have made several allegations, which if believed to be true, give rise to a reasonable inference that a violation of Rules of the Florida Public Service Commission described above, exists, and that the utility is in violation of the rules of several other local, state and federal agencies as well. To whit, the Customers have alleged: 1) that FDEP ordered the utility to make certain repairs to bring the utility into compliance, 2) that they believe that the repairs have not been completed, 3) that a broken 20-foot clarifier arm is lying across the catwalk above the sewage tank (and is therefore not in place and functioning properly), 4) that there is a gap in the cat walk above the sewage tank that is now covered by a loose board, 5) that a hose and sprinkler rigged to "aerate" the sewage tank is continuously spraying water on the catwalk, 6) that a length of one-inch pipe is laying on the catwalk, 7) that the utility operator is aware of these conditions, 8) that the operator has acknowledged that these kinds of conditions "may pose serious health, safety and environmental risks," and 9) that a 1,000 gallon single-walled oil storage tank has been present underground at the site of the utility in proximity to the utility's water supply for decades without required permits, registration, or inspections, and that the tank is on a barrier island and as a result may be susceptible to corrosion.

11. Certainly the facts exist among these allegations to raise an inference in the

minds of reasonable Commissioners that the utility has not exercised "due care to reduce the hazards to which employees, customers, and the public may be subjected by reason of its equipment and facilities," as required by Commission rules. The Customers have also alleged facts sufficient to raise a reasonable inference that the utility is not operating or maintaining its facilities in a manner which will avoid exposing its customers to health hazards, as required by Rule 25-30.225, F.A.C.

12. In fact, OSHA and FDEP have promulgated rules which are designed to protect the public against hazards created by the conditions present at this utility.

13. For example, pursuant to 29 C.F.R. § 1910.22(b)(1), "Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard." The utility's catwalk is obstructed by a 25-foot clarifier arm and a length of 1-inch pipe, and is not in good repair, as it has a sizeable gap which has been covered by a loose board. Moreover, pursuant to 29 C.F.R. § 1910.23(a)(7) and (8), "every temporary floor opening shall have standard railings, or shall be constantly attended by someone" and "every floor hole into which persons can accidentally walk shall be guarded by either: (i) a standard railing with standard toeboard on all exposed sides, or (ii) a floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing." The size of the gap in the utility's catwalk is determinative of whether it is a "temporary opening" or a "hole." If it is large than 12 inches, it is a temporary opening, and must be attended by someone. It clearly is not. If it is a "hole" rather than an "opening" it should be covered. It is unlikely that a loose board is considered by OSHA to be "standard strength and construction."

13. FDEP rules governing domestic wastewater treatment plants require that "All facility operations shall provide for the minimum care and maintenance of the facility in accordance with Chapters 61E12-41 and 62-699, F.A.C.," and that "All facilities and equipment necessary for the treatment, reuse, and disposal of domestic wastewater and domestic wastewater residuals shall be maintained, at a minimum, so as to function as intended." Rule 62-600.410(5) and (6), F.A.C. In addition, FDEP rules require that, "In the event that the treatment facilities or equipment no longer function as intended, are no longer safe in terms of public health and safety, or odor, noise, aerosol drift, or lighting adversely affect neighboring developed areas at the levels prohibited by paragraph 62-600.400(2)(a), F.A.C., corrective action (which may include additional maintenance or modifications of the treatment plant) shall be taken by the permittee. Other corrective action may be required to ensure compliance with rules of the Department." Rule 62-600.410(8), F.A.C. In its Petition, the Customers have alleged that "the Florida Department of Environmental Protection advised SMS that its wastewater system requires several modifications and repairs in order to achieve compliance." Petition, at p. 4. The Customers further allege that "To date, upon information and belief, the utility remains noncompliant." Id. As already discussed, for the purposes of disposing of the motion to dismiss, the Commission is required to view these allegations as true, and form all reasonable inferences arising from these allegations in favor of the Customers. Furthermore, any facts gathered by staff which tend to contradict these allegations may not be considered by the Commission, which is limited to considering only the facts asserted within the four corners of the Customers' petition.

14. The Commission overlooked its own standard of review when it considered the testimony of Staff Attorney Williams at the September 28, 2010, Agenda Conference, in

support of a decision to grant the motion to dismiss. However, even if the Commission were permitted to consider Ms. Williams' testimony that FDEP staff informed her that the utility was "not in violation," TR at p. 30, that statement is not dispositive. There is insufficient context surrounding the purported statements by FDEP staff as characterized by Ms. Williams to determine conclusively that the utility is in compliance with FDEP rules. The utility is clearly out of compliance with FDEP rules, and that is why the agency's staff has ordered the utility to come into compliance. The wastewater treatment facilities are not functioning as intended in violation of FDEP rules. To date, it appears that no enforcement action has been taken because the utility appears to be meeting separate environmental standards – so far. That does not mean that the utility is in compliance with FDEP rules governing the proper function of the facilities and equipment.

15. In addition, FDEP has very specific rules governing the registration of underground storage tanks, which require owners to notify the agency when they are installed and removed, notify the County, register the tank, inspect it, file reports and keep specified records, ensure that the tank has leak detection systems. See Rules 62-761.100 through 900, F.A.C. The Customers have alleged that the "[u]tility has never obtained the required permit for the tank, never registered the tank and thus the tank has never been inspected for proper operation." The Customers further alleged that the tank "has been in place, upon information and belief, for decades." Petition at p. 3. This allegation by itself, should raise grave concerns among the Commissioners and the Commission Staff.

16. The Customers not only allege that the underground oil storage tank has been present for decades without proper reporting or inspection, but also that the underground tank is installed on a barrier island and subject to contact with salt water, and that it is in

proximity to the utility's water source. Petition at p. 3. FDEP's wellhead protection rules are intended "to protect potable water wells ... from contamination, and to prevent the need for their replacement or restoration due to contamination." See Rules 62-521.100-400, F.A.C. These rules provide protections to the water supply that are in addition to others that exist. Whether the wellhead protection rules apply to this underground oil tank must be investigated to ensure the protection of the Customers.

17. Rules 25-30-335 and 25-30-225(3), F.A.C., require utilities to exercise "due care" in the use of their facilities and equipment so as to minimize hazards to employees, their customers and the public. As such, utilities are required to refrain from engaging in negligent conduct to remain in compliance with Commission rules, as the use of "due care" is, by definition, the absence of negligence. The violation of federal and state regulations concerning the facilities and equipment of a utility which are designed to provide for the health and safety of the employees, customers and the public, is negligence *per se*, and is automatically a violation of the Commission rules cited in this motion. See Fla. Jur., Negligence §§ 20 and 52-54.

18. Because the Customers have alleged sufficient facts to raise an inference that the utility has failed to use due care in the maintenance and operation of its facilities and equipment, and it has also alleged sufficient facts which allow the commission to infer that the utility is in violation of Rules 25-30.225 and 25-30.335, F.A.C., the Commission can invoke its authority to command the utility to show cause why it should not be held to account for its violation of Commission rules.

IV. In concluding that the Customers have failed to demonstrate a cause of action the Commission's analysis overlooks the Customer's allegations of, and the

Commission's jurisdiction over, the utility's safety hazards, and fails to consider any basis for action other than "quality of service."

19. In Order 0624, the Commission, in good faith and in attempting to read the Customers' Petition in the most favorable light, attempts to construe it as requesting: 1) that rates be reduced due to poor quality of service; or 2) that repairs be required due to poor service quality. Order at p. 6. However, in doing so, the Commission overlooks the single most important aspect of the Customers' Petition – and that is its emphasis on the *unsafe and hazardous* conditions present at the utility's facilities, and the potential threats to the public health, safety, and welfare posed by those conditions.

20. Sections 367.011(2) and (3), F.S., state respectively, "The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates," and "The regulation of utilities is declared to be in the public interest, and this law is an exercise of the police power of the state for the protection of the public health, safety, and welfare. The provisions of this chapter shall be liberally construed for the accomplishment of this purpose." In Order 0624, the Commission seems to read subsection (1) as limiting its jurisdiction to service and rates. That reading, however, ignores the word "exclusive" in the provision. The language does not preclude the Commission from exercising jurisdiction over safety, rather it provides that its jurisdiction over service and rates is exclusive. Section 367.111(2), F.S., plainly states:

> Each utility shall provide to each person reasonably entitled thereto such safe, efficient, and sufficient service as is prescribed by part VI of chapter 403 and parts I and II of chapter 373, or rules adopted pursuant thereto; *but such service shall not be less safe, less efficient, or less sufficient than is consistent with the approved engineering design of the system and the reasonable and proper operation of the utility in the public interest.* If the Commission finds that the utility has failed to provide its customers with water or wastewater service that meets the standards promulgated by the Department of

> Environmental Protection or the water management districts, the commission may reduce the utility's return on equity until the standards are met.

(emphasis added) Furthermore, the Commission, "in the exercise of its jurisdiction ... shall have the power ... to require repairs, improvements, additions, and extensions to any facility, or to require the construction of a new facility, if reasonably necessary to provide adequate and *proper* service to any person entitled to service... . (emphasis added) Section 367.121(1)(d), F.S.

21. This case would not be the first in which the Commission ordered a wastewater utility to repair its substandard conditions upon a finding that the utility is unsafe and out of compliance with DEP and Commission standards. In 1987, the Commission ordered Key Haven Utility Corporation to rehabilitate and repair its sewer system and bring its system into compliance with state and federal rules, as well as those of the Commission, within 12 months, and to submit monthly reports to the Commission detailing the progress made toward the rehabilitation. In re: Show Cause Proceeding Against Key Haven Utility Corporation, Monroe County, 1987 Fla. PUC LEXIS 445.

22. Furthermore, it is appropriate for the Commission to grant the Customers' request for a limited proceeding investigate the extent of the health, safety, and environmental hazards posed by the operation of this utility's facilities and equipment. Florida Statutes expressly provide that the Commission may:

> Upon petition or by its own motion ... may conduct limited proceedings to consider, and act upon, any matter within its jurisdiction, including any matter the resolution of which requires a utility to adjust its rates... .

Section 367.0822(1), F.S. This provision expressly states that the Commission may conduct limited proceedings to consider and act upon, ***any matter within its jurisdiction.*** As has been

established above, the safe operation and maintenance of a water and wastewater utility is within the jurisdiction of the Commission. The Commission has a long history of utilizing the limited proceeding to investigate a regulated entity's condition or conduct, or to investigate the adjustment or restructuring of rates. See In re: Investigation of Gulf Power Company, 1989 Fla. PUC LEXIS 858 (granting a motion to spin-off an investigation of "irregularities"); In re: Proposed Rule 25-24.845, F.A.C., Customer Relations; Rules Incorporated, and Proposed Amendments to Rules 25-4.003, F.A.C., Definitions; 25-4.110, F.A.C., Customer Billing; 25-4.118, F.A.C., Interexchange Carrier Selection; 25-4.490, F.A.C., Customer Relations; Rules Incorporated, ORDER NO. PSC-97-1563-PCO-TI (compelling the production of documents in a limited proceeding held for the purpose of conducting discovery regarding "slamming" practices in anticipation of rulemaking); In re: Initiation of limited proceeding to restructure wastewater rates for Florida Water Service Corporation's Tropical Isles service area in St. Lucie County, ORDER NO. PSC-00-0526-PAA-SU (restructuring rates in a limited proceeding spun off from a larger rate case); South Florida Hospital and Healthcare Association v. Jaber, 2004 Fla, PUC LEXIS 1098 (upholding actions of the Commission which flowed from a limited proceeding initiated by the Commission to investigate the reasonableness of FPL's rates).

23. The Customers have alleged sufficient facts to raise a reasonable inference in the minds of Commissioners that the utility is out of compliance with Commission, FDEP, and federal operational and safety rules. Furthermore, the Customers have requested relief that is within the authority of the Commission to grant, i.e., an order requiring the Bank to show cause why the operating condition of the utility should not result in penalties under Commission rules or a reduction in rates charged to the customers, or in the alternative, that a

limited proceeding be commenced investigating the operational condition of the utility so that serious health and safety hazards can be resolved and the utility's system can be rehabilitated.

WHEREFORE, for the foregoing reasons, the Customers respectfully request the Commission to reconsider Order No. PSC-10-0624-FOF-WS to correct the errors in said order as set forth above, to deny the Bank's motion to dismiss, order the Bank to show cause why it should not be found in violation of Commission Rules and penalized accordingly, and order a limited proceeding to investigate whether the Commission should order rehabilitation of the system and a reduction in rates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by U.S. Mail this 3rd day of November, 2010, to:

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