

State of Florida



Public Service Commission

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DATE: May 12, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Jaeger)
Division of Economic Regulation (Hudson, Fletcher, Maurey)

Handwritten initials: JASO, SH, BJ, CRE, ALM, and a circled 'W'.

RE: Docket No. 100104-WU – Application for increase in water rates in Franklin County by Water Management Services, Inc.

AGENDA: 05/24/11 – Regular Agenda – Response to Show Cause – Interested Persons May Participate

COMMISSIONERS ASSIGNED: Graham, Edgar, Brown

PREHEARING OFFICER: Graham

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\100104.RCM.DOC

Case 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. Prior to the current case, WMSI's last full rate case proceeding was in 1994.¹

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

¹ See Order No. PSC-94-1383-FOF-WU, issued November 14, 1994, in Docket No. 940109-WU, In re: Petition for interim and permanent rate increase in Franklin County by St. George Island Company, Ltd.

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final rates designed to generate annual water revenues of \$1,943,296. This represented a revenue increase of \$641,629 (49.29 percent). By Order No. PSC-10-0513-PCO-WU, issued August 12, 2010, the Commission suspended the Utility's rates and approved interim rates for WMSI. The interim increase granted was \$109,228, or 8.27 percent. By Order No. PSC-11-0010-SC-WU (Final Order), issued January 3, 2011, the Commission approved a revenue increase of \$13,474 (a 1.03 percent increase), and required all interim rates to be refunded with interest.²

In the Final Order, the Commission also found that WMSI shall show cause in writing, within 21 days, why it should not be fined \$1,000 for its apparent failure to comply with the requirements of Order No. PSC-94-1383-FOF-WU (1994 Order).³ In the 1994 Order, the Commission discussed the inadequate records for calculating transportation expense, and ordered the Utility to "hereinafter keep accurate mileage records."⁴

On January 14, 2011, the Office of the Public Counsel (OPC) filed its Motion for Reconsideration and/or Clarification. By Order No. PSC-11-0156-FOF-WU, issued March 7, 2011, the Commission denied OPC's Motion for Reconsideration but granted its Motion for Clarification.

On January 24, 2011, WMSI filed its timely written Response to the requirement to show cause in the Final Order, stating that it had complied with the 1994 Order, and that there were both issues of fact and law concerning whether the Utility had maintained travel records as required and whether it complied with the 1994 Order. Based on these disputed issues of fact and law, WMSI requests a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes (F.S.). OPC did not respond to the Utility's Response.⁵

This recommendation addresses WMSI's response and the appropriate actions for the Commission to take in regards to this response. The Commission has jurisdiction pursuant to Sections 367.081 and 367.161, F.S.

² Although OPC filed a Motion for Reconsideration and/or Clarification of the Final Order, the Commission voted to deny the Motion for Reconsideration on February 22, 2011.

³ Issued November 14, 1994, in Docket No. 940109-WU, In re: Petition for interim and permanent rate increase in Franklin County by St. George Island Utility Company, Ltd.

⁴ See 1994 Order, at page 79.

⁵ Counsel for OPC has stated verbally that it takes no position on the action that the Commission should take in regards to the Utility's response to the requirement to show cause.

Discussion of Issues

Issue 1: What actions should the Commission take concerning the response of Water Management Services, Inc. (WMSI) to the requirement to show cause why it should not be fined \$1,000 for its apparent failure to timely comply with the requirements of Order No. PSC-94-1383-FOF-WU?

Recommendation: Staff believes that WMSI has made a good faith effort to comply with the 1994 Order, and has substantially complied with the explicit directions of the 1994 Order to keep accurate mileage records. Therefore, staff recommends that the Commission take no further action in regards to any show cause proceeding in this docket. (Jaeger)

Analysis: These show cause proceedings were initiated when it appeared that WMSI had failed to comply with the requirements of the 1994 Order to keep accurate mileage records. The requirements of the 1994 Order, the Utility's timely response to the requirement to show cause in the Final Order, and staff's analysis and conclusion are set out below.

Requirements of 1994 Order and Show Cause Issue in This Docket

The appropriate amount of travel expenses was an issue in the 1994 case. After a full evidentiary hearing, in discussing the appropriate travel expenses to be allowed, the Commission divided its analysis into two parts: (1) the appropriate amounts for the field employees; and (2) the appropriate amounts for the administrative employees (Tallahassee based employees). For the administrative employees, the Commission found that the Utility did not provide any evidence to support the requested amounts for Ms. Chase (\$2,600) and Ms. Hill (\$1,300) and disallowed the entire amounts. Also, for Mr. Brown, the Commission found he was not an employee of the Utility and disallowed his entire requested amount of \$3,900.⁶

For the field employees, the Commission noted in the 1994 Order that the Utility did not own any vehicles, but had promised an adequate transportation allowance to them if the field employees used their own vehicle. Mr. Garrett (a field employee), Mr. Seidman (an accounting witness), and Mr. Brown all testified as to the appropriateness of the amount requested for the field employees (\$5,200 for Mr. Garrett and \$2,600 for Mr. Shiver).⁷ Mr. Garrett testified that the conditions on St. George Island (salt air, sand, and other adverse conditions) warranted a mileage allowance of \$.40 per mile. Mr. Garrett further noted that he had kept mileage records for one month before the hearing, and had driven 2,381 miles in that month, for what would have been a travel allowance of \$952 (2,381 x \$.40) just for him for that month.⁸

Although OPC argued that only half of the requested \$7,800 travel expense for field employees should be allowed, the Commission found that the full amount should be allowed.⁹ In the body of the 1994 Order regarding the field employees, the Commission stated as follows:

⁶ See 1994 Order, at pages 43-44.

⁷ Mr. Shiver did not testify, and only Mr. Garrett kept mileage records for one month.

⁸ See 1994 Order, at page 43.

⁹ Considering Mr. Garrett's recorded mileage for one month, and multiplying by \$.40, the Commission calculated the one-month expense to be \$952. Multiplying this figure by 12, the Commission calculated his annual expense

Upon consideration of Mr. Garrett's testimony regarding the conditions on St. George Island and his one-month travel records, it appears that the requested transportation allowance for field employees is reasonable. However, these employees shall maintain travel records prospectively so that we may adequately consider the level of such expenses in future proceedings.

1994 Order, at page 44. As to the Utility's administrative employees, in the body of the 1994 Order, the Commission made no such directive, but disallowed all administrative travel expenses. In the ordering paragraphs, the Commission "Ordered that St. George Island Utility Company, Ltd., shall hereinafter keep accurate mileage records." See ordering paragraphs of 1994 Order, at page 78.

Based on the above-noted provisions, and the filings of the Utility, the following issue was listed as an issue in the Prehearing Order for this 2010 rate case:¹⁰

ISSUE 49: Did the Utility fail to maintain field employee travel records pursuant to Order No. PSC-94-1383-FOF-WU? If so, should the Utility be ordered to show cause why it failed to maintain field employee travel records pursuant to Order No. PSC-94-1383-FOF-WU, issued November 14, 1994?

The show cause issue (Issue 49) only addressed whether the Utility had violated the 1994 Order with regards to field employees, and the issues in dispute at the formal hearing did not include any show cause issue regarding the administrative employees. In the Final Order, in addressing the show cause issue for field employees, the Commission noted that the 1994 Order made it clear that the Utility must document travel expenses. Therefore, based on inadequate recordkeeping for Ms. Chase, the Commission concluded that the Utility had apparently failed to maintain travel records in accordance with the requirements of the 1994 Order, and required the Utility to show cause, in writing, why it should not be fined a total of \$1,000 for its apparent failure to timely comply with the requirements of the 1994 Order.

Utility's Response

In its timely response to the Commission's requirement to show cause set out in the Final Order, the Utility argues that the ordering paragraph found on page 78 of the 1994 Order must be read in context with the facts of this case and the discussions found on pages 42-44 of the 1994 Order. Based on the Commission's discussions in the body of the 1994 Order, WMSI argues that the directive to maintain travel records was for field employees. In any event, WMSI argues that it

. . . has gone above and beyond the mandate of the '94 Order by keeping the following records regarding transportation expenses:

alone would have been \$11,424 (\$952 x 12), and the Utility was only requesting \$7,800 for Mr. Garrett and Mr. Shiver combined.

¹⁰ See Order No. PSC-10-0601-PHO-WU, issued September 30, 2010, in this docket.

A. Employee Owned Vehicles. For each mile driven for utility purposes by any employee owned vehicle, WMSI requires a reimbursement request from each employee which details the date and miles driven. Each of these are reviewed and approved by management to insure that they are reasonable and that the miles were driven for utility purposes prior to reimbursement to the employee at the IRS approved rate. This procedure is applied evenly and consistently to all WMSI employees, not just “field employees,” as referenced in the order.

B. Company Owned Vehicles. For each company owned vehicle, WMSI maintains “accurate mileage records,” as referenced in the '94 order. In addition, WMSI maintains detailed and accurate gasoline records to document that all gas purchased by WMSI was used in a company owned vehicle. The utility also maintains detailed repair and maintenance expense records on all company owned vehicles, as well as accurate lease and finance expense records.

WMSI Response, at page 2.

WMSI concludes its response, by stating that the record “demonstrates a good faith effort to comply with” the 1994 Order, and there has been “nothing wilful or intentional in anything WMSI has done or not done with regard to transportation expenses.” Therefore, there being a disputed fact as to whether WMSI “has complied with the 1994 Order regarding transportation expenses,” WMSI requests a hearing pursuant to Sections 120.569 and 120.57(1), F.S. WMSI Response, pages 2-3.

Staff Analysis/Conclusion

Upon close review of the 1994 Order, WMSI’s response, and the record evidence in this case, staff believes the arguments of the Utility have merit. First, the show cause issue in the Prehearing Order itself is phrased such that it addresses “field employees” only, i.e., the show cause issue before the Commission in this case was whether the Utility maintained field employee records in accordance with the 1994 Order. Inadequate travel records for field employees driving their own vehicles appears to be a specific problem that the Commission was struggling with in the 1994 Order. Regarding the travel records for the field employees in this case, the Commission found: “There does appear to be support or adequate records when field employees use their personal vehicle.” See Final Order, at page 60. Therefore, staff believes that the Utility has complied with the 1994 Order as regards the field employees, and any show cause, whether under Issue 49 or as set forth in the Final Order, should be closed.

While the Utility appears to have corrected the problem with its field employees noted in the 1994 Order, the Commission noted in the Final Order that the Utility still has problems with the appropriate documentation for its administrative employees. It is a fundamental ratemaking concept that a utility must provide record evidence if travel expenses are to be allowed, whether for field employees or administrative employees. However, upon reading the Commission’s discussion in the 1994 Order, there is ambiguity concerning whether the directive for maintenance of accurate travel records found in the ordering paragraphs of the 1994 Order was

directed solely at field employees, or if it included administrative employees. Even if it included administrative employees, there is some question whether the recordkeeping contemplated in the 1994 Order contemplated the specific facts in this case.

In the 1994 Order, the Commission did not face the situation of utility ownership or lease of vehicles driven by administrative employees,¹¹ and whether the Utility's investment and expenses for operations of those vehicles should be included in rate base and expenses. In the Final Order in this 2010 case, the Commission again disallowed all of the requested travel expense for Ms. Chase, and only allowed travel expenses for Mr. Brown based on the finding that he made four trips a month to St. George Island from Tallahassee.

However, in the Final Order, the Commission went beyond the show cause issue concerning field employees as set forth in Issue 49, and noted that the Utility had again failed to document travel expenses, specifically, Ms. Chase's travel expenses for the vehicle used by her for Utility purposes. Ms. Chase is an administrative employee and there was some question about the ownership or leasing of her vehicle for Utility purposes. In the 1994 Order, the Utility neither owned nor leased any vehicles for the benefit of its employees. Therefore, the situation in this case was not addressed at all by the 1994 Order. Because this situation was not considered in the 1994 Order, staff does not believe it could be said that the Utility violated that Order when it comes to the appropriate documentation for its use. Clearly, the Utility was warned that it needed to keep better travel records, and it has. It just has not kept sufficient travel records for the vehicle driven by Ms. Chase. The remedy for this insufficiency was to disallow all of Ms. Chase's travel expenses. Staff believes that this was an appropriate remedy and that no further remedy is warranted. In the Final Order in this docket, the Commission has directed WMSI to "maintain travel records or logs for all vehicles used for utility purposes to enable this Commission to evaluate the appropriate level of Utility-related usage in future rate case proceedings." Hopefully, this directive will alleviate any problems in the future.

As regards show cause proceedings, utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Section 367.161(1), F.S., authorizes the Commission to assess a penalty of not more than \$5,000 for each offense if a Utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, F.S., or any lawful order of the Commission. If the Utility failed to comply with the above-noted requirements of the 1994 Order, the Utility's acts could be said to be "willful" in the sense intended by Section 367.161, F.S. In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "willful" implies an intent to do an act, and this is distinct from an intent to violate a statute or rule. As regards compliance with the 1994 Order, staff tends to agree with the Utility that there are changed circumstances and there is sufficient uncertainty in the wording of that Order, such that

¹¹ The 1994 Order specifically noted that the Utility did not own any vehicles. See 1994 Order, at page 43.

it cannot be said that the Utility violated that Order. Moreover, the only show cause issue in this case was whether WMSI violated the 1994 Order in regards to its field employees. Based on all the above, staff recommends that the Commission take no further action in regards to any show cause proceeding in this docket, and the show cause proceeding should be terminated with no further action taken against the Utility.

If the Commission disagrees with staff about terminating the show cause proceeding, and believes that a fine of \$1,000 may be warranted, then it should address WMSI's request for a hearing pursuant to Sections 120.569 and 120.57(1), F.S. WMSI alleges that the "essential, disputed issue of fact in this proceeding" is "whether WMSI has complied with the 1994 order regarding transportation expenses." WMSI claims there is a factual issue as to whether WMSI did maintain the records outlined in paragraphs 4.A. and 4.B. of its Response,¹² "and a legal issue as to whether those records, even if they were maintained, are sufficient to constitute compliance with the 1994 order." The Utility concludes in its Response that it will "show that such records were kept and that they were sufficient to meet the requirements of the order," and no fine should be imposed. Based on the factual issue listed above, WMSI requests a formal hearing pursuant to Section 120.569 and 120.57(1). F.S.

Staff notes that the Commission just concluded a full evidentiary hearing where the following issues were addressed:

- (1) Should any adjustments be made to rate base for vehicles (Issue 4);
- (2) Should any adjustment be made to transportation expense (Issue 27); and
- (3) Did the Utility fail to maintain field employee travel records pursuant to Order No. PSC-94-1383-FOF-WU? If so, should the Utility be ordered to show cause why it failed to maintain field employee travel records pursuant to Order No. PSC-94-1383-FOF-WU, issued November 14, 1994 (Issue 49).

Staff believes that the Utility had a chance to put on evidence about complying with the 1994 Order, and did put on such evidence. Further, the Utility was allowed to brief those issues and respond to the Commission's show cause why it should not be fined \$1,000 for its apparent violation of the 1994 Order. Staff believes that the Utility has provided evidence of what travel records were maintained, i.e., there is no dispute of material fact as to what was maintained. Therefore, staff believes that the Utility has not raised a factual issue, but a legal issue of whether the facts as presented show that the Utility has complied with the 1994 Order, i.e., a legal conclusion.

In consideration of all the above, if the Commission disagrees with staff's recommendation that the Utility has complied with the 1994 Order as regards compliance with the recordkeeping requirements, then staff believes the Commission has the following options concerning the Utility's response to the requirement to show cause in the Final Order:

¹² See page 4 of this recommendation.

1. If it believes the Utility has raised an issue of material fact, it should grant the Utility's request for another formal evidentiary issue pursuant to Section 120.57, F.S.; and
2. If it believes that the Utility has raised only a legal issue, it may authorize an informal proceeding pursuant to Section 120.57(2), F.S.¹³

¹³ In the past, the Commission has allowed parties to brief a legal issue if there is no dispute of material fact. See Order No. PSC-04-0614-PCO-WU, issued June 21, 2004, in Docket No. 010503-WU, In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

Docket No. 100104-WU

Date: May 12, 2011

Issue 2: Should this docket be closed?

Recommendation: No, this docket should remain open until the appeal is completed and staff confirms that the appropriate refunds of the interim increase have been made. Upon this being accomplished and verified by staff, the docket may be closed administratively pursuant to Order No. PSC-11-0010-SC-WU. (Jaeger)

Staff Analysis: This docket should remain open until the appeal is completed and staff confirms that the appropriate refunds of the interim increase have been made. Upon this being accomplished and verified by staff, the docket may be closed administratively pursuant to Order No. PSC-11-0010-SC-WU.