

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water/wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.

DOCKET NO. 100330-WS  
ORDER NO. PSC-11-0384-PCO-WS  
ISSUED: September 13, 2011

ORDER GRANTING IN PART  
OFFICE OF PUBLIC COUNSEL'S MOTION TO COMPEL AND  
MODIFYING ORDER ESTABLISHING PROCEDURE

Background

Aqua Utilities of Florida (AUF) filed an application for increase in water and wastewater rates, seeking Commission approval through the Commission's Proposed Agency Action (PAA) process. By Order No. PSC-11-0256-PAA-WS, issued June 13, 2011, we granted in part AUF's application. Several parties to the proceeding, including the Office of Public Counsel (OPC) and AUF, protested portions of our decision. Accordingly, an Order Establishing Procedure was issued and hearing dates were scheduled.

OPC has conducted discovery through both the PAA and hearing portions of this docket. On August 9, 2011, OPC served its Sixth Set of Interrogatories (Nos. 204-244) and its Sixth Set of Requests for Production of Documents (Nos. 132-172) on AUF. On August 29, 2011, AUF filed both general and specific objections to OPC's August 9, 2011 discovery requests. On September 6, 2011, OPC filed a Motion to Compel Aqua's Responses to Discovery. This order is issued pursuant to Rule 28-106.211, Florida Administrative Code (F.A.C.), which provides that the Prehearing Officer has authority to issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case.

AUF's Objections

While, AUF filed general and specific objections to OPC's Sixth Sets of Discovery, this Order addresses the specific objections. AUF's objections can be categorized as objections to requests for legal and work product, and objections to discovery requests that extend beyond the protested issues to those that are deemed stipulated. In addition, AUF responded that it would limit certain of its responses to the information requested only as it relates to the expenses allocated to AUF by its affiliates.

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Production of Documents Request No. 133 asks AUF to provide copies of all documents that were relied upon to make the claim that the Commission has never reduced a utility's return on equity based on a finding that the utility's quality of service is marginal. AUF objects to this request alleging that the request seeks legal research or information protected by the attorney/client privilege and work product doctrine.

The remainder of AUF's objections to the discovery requests are based on AUF's belief that these requests involve issues that have not been protested. AUF argues that pursuant to Section 120.80(13)(b), Florida Statutes (F.S.), and Rule 25-22.029(3), F.A.C., issues in a PAA order that are not identified in the protest petition or cross-petition shall be deemed stipulated. AUF's position is that the discovery relating to these unprotested issues is irrelevant to the protested proceeding. AUF expresses concern that by permitting this type of discovery, the scope of the proceeding is improperly expanded and rate case expense will be increased. Furthermore, AUF argues that expanding the scope of the proceeding runs contrary to the purpose of the statutory and rule framework governing PAA proceedings.

AUF objects to production of document requests 134, 159, 160-162, and interrogatories 209, and 212 on the grounds that these discovery requests seek information regarding "Legal Expenses." AUF states that "Legal Expenses" is not a particular protested issue identified by any party to the proceeding. Furthermore, AUF argues that as to interrogatories 209 and 212 and production of document request 134, AUF has previously responded to OPC's discovery requests that these "Legal Expenses" are not allocated to AUF by its affiliates. AUF also states that its Minimum Filing Requirements, Vol. 1, Appendix 1, reflects that "Legal Expenses" are not allocated to AUF by its affiliates.

AUF objects to production of document requests 143, 146, and interrogatories 224 and 225, which relate to direct expense allocations. AUF states that "Direct Expenses" have not been identified as a protested issue by any party. Likewise, AUF objects to production of document requests 157, 165-168, and interrogatories 210, 211, and 215, which relate to "Miscellaneous Expenses." AUF asserts that "Miscellaneous Expenses" have not been identified as a protested issue by any party. AUF states that while it objects to production of document requests 165-168, and interrogatories 210, 211, and 215, it will provide the discovery requested to the extent a "Miscellaneous Expense" is allocated to AUF by its affiliates.

AUF objects to production of document requests 141, 142, and 144-154, and interrogatories 219, 222 and 225-240. These requests seek information relating to variance reports provided by AUF to OPC in response to prior discovery requests. AUF argues that these new requests are based on the erroneous assumption that budget variance reports are used to determine or normalize the historic test year. According to AUF, budget variance reports are used to determine or normalize the historic test year and are irrelevant when an historic test year is used because actual data is used to determine the historic test year. AUF also argues that the historic test year of 2010 was not protested and therefore is deemed stipulated. AUF concludes that information from the variance report is irrelevant to the current proceeding. Additionally, AUF argues that questions that relate to billing determinants are based on the erroneous assumption that billing determinants are established using budget variance reports. AUF argues

that budget variance reports are irrelevant to establishing the appropriate billing determinants where an historic test year is used because the determinants are based on actual not estimated data. While AUF objects to interrogatories 239 and 240 on the stated grounds, it does affirm that it will answer the interrogatories.

AUF did not object to interrogatories 204-208, 213-214, 216-218, and 220-221. AUF did not object to document requests 132, 135-140, 155-156, 158, 169-172. AUF objected to interrogatories 224, 239, and 240 and document requests 143, 163, and 164, but stated that it would respond without waiving the objections.

#### OPC's Motion to Compel

OPC argues that pursuant to Rule 1.280(b)(1), Florida Rules of Civil Procedure, a party is required to provide responses to discovery that is reasonably calculated to lead to the discovery of admissible evidence. OPC asserts that its Sixth Set of Discovery is based upon previously served discovery and upon pre-filed testimony. OPC contends that it is not on a fishing expedition but rather is in the process of refining its positions and prefiled testimony on the protested issues in the case.

OPC states that discovery requests (such as those relating to "Legal Expenses") are permissible because they may lead to admissible evidence. OPC assures that it is not proposing adjustments to expense categories that are not part of the protested issues. OPC explains that year-to-year fluctuations in accounts are relevant to the understanding and testing of a utility's proposed representative financial statements. OPC concludes that because it needs a complete picture, it is entitled to propound discovery that is broader than just the limited protested issues. OPC states that a complete and consistent financial picture is relevant and necessary to set rates using accounting information that directly impacts the protested issues on a forward-looking basis.

OPC asserts that AUF should be required to respond to the discovery regarding "Legal Expenses" because these requests are designed to obtain information that is related to and may impact affiliate transactions and/or rate case expense. OPC contends that AUF's parent company's "Legal Expenses" are affected by the allocations of affiliate legal expenses which in turn impacts AUF's regulated affiliated expenses. OPC points to a prior AUF response to OPC interrogatory 130 and Schedule B-7 of AUF's Minimum Filing Requirements which appear to indicate that legal expenses and costs are charged pursuant to allocated legal expenses from the parent.

OPC contends that AUF should be compelled to respond to OPC's discovery requests relating to budget variances. OPC asserts that it should not be limited to asking for information limited to the 12-month historic test year period. OPC contends that the Commission has not traditionally held that budgets are only relevant for the test year period. OPC asserts that budgeting is a normal annual process that companies use to prioritize spending, compare current revenue and expenses to budgeted ones, and for which companies create budgeting documents. OPC claims that the variance reports and analysis is the sort of budgeting documents that OPC is

seeking from AUF. OPC concludes that this type of year-to-year budgeting information can be used to test the reasonableness of the historical test year expenses. Additionally, OPC argues that the explanations on budget variances can lead to evidence explaining why certain expenses might be deferred into or out of a given financial reporting period. Finally, OPC, argues that AUF asks for pro forma adjustments that are outside of the test year and so cannot now argue that other information outside of the test year is irrelevant.

OPC asks that AUF be compelled to completely respond to OPC's discovery requests regarding "Direct Expenses" and "Miscellaneous Expenses." OPC claims that AUF has impermissibly and arbitrarily limited its responses to those discovery requests. As to the direct expense discovery request, OPC contends that it is requesting information about the affiliate Aqua Customer Service Organization, which is a division of Aqua Services, Inc., because the direct expense may impact recommended adjustments on affiliate costs, which is a protested issue. OPC states that as to "Miscellaneous Expenses," AUF has shifted costs allocated from affiliates between accounts such as between "Miscellaneous Expense" and "Management Fees" and "Contractual Services-other." OPC states that in response to its interrogatory 130, AUF explained that part of the increase in test year management fees is due to shifting expenses from one account to another. OPC explains that it seeks information not only in the "Management Fee" account, but also in the accounts AUF claims are responsible for the increase to management fees. OPC argues that even if the accounts no longer hold expenses from the affiliate, the information as to how the shifting of the expenses impacted test year management fees and other shared costs is relevant to understanding the increase in management fees in the test year. OPC concludes that it should have the information to test the reasonableness of the level of test year affiliate charges including the causes of increases.

OPC also contends that AUF should be compelled to provide full and complete responses, without limitations, to its discovery request. AUF asserts in some of its responses that it will provide a response "to the extent a 'Miscellaneous Expense' is allocated to AUF by its affiliates." OPC contends that the impact on regulated AUF expenses and the substantial increase in affiliate charges to AUF regulated expenses are affected not only by the allocation of expenses, but also the movement of expenses from other expense accounts to the "Management Fee" account.

OPC counters AUF's assertions of increased rate case expense by explaining that its requests are ordinary and necessary for the prosecution of the case. OPC asserts that if discovery is limited as AUF has argued, parties would be chilled from limiting protested issues for fear of being artificially prevented from gathering relevant information to prosecute their case. OPC argues that this could lead to an unnecessary increase in rate case expense.

#### AUF's Response to Motion to Compel

AUF states it finds itself in a Catch 22 position. AUF asserts that it does not wish to delay OPC's case preparation, but if AUF does not object to certain requests, it believes that recovery of those rate case expenses associated with responding to those discovery requests will be in jeopardy. AUF asserts that the consultant, administrative, and legal time in preparing and

reviewing the discovery responses may be substantial. AUF states that it has already responded to 450 interrogatories from OPC in this docket and over 150 requests to produce documents. AUF believes that to contain rate case expense, it must bring to the Commission's attention discovery requests that it believes are outside the scope and irrelevant to the current proceedings.

AUF states that a PAA rate case proceeding is designed to save rate case expense by limiting the issues to be litigated to those identified in a party's protest petition. AUF contends that OPC, as a petitioner, had the opportunity to define the scope of the proceeding.

AUF acknowledges OPC's need for discovery to address the issues raised in the protest petition but is concerned that it be designed for those issues which are relevant to the protested proceeding. One instance AUF points to are OPC's assumptions that budget variance reports are used to determine or normalize the historic test year. AUF states that OPC argues that budget variances generally could be relevant to other issues which are in dispute. AUF contends that if this argument is taken to its ultimate conclusion, any area of discovery would be open and the narrow protest would convert into a full-blown rate proceeding. AUF warns that would impose the associated rate case expenses on ratepayers.

AUF stresses that each of its objections is a good faith objection to what it believes are discovery requests outside of the scope of the current proceeding. AUF concludes its response by asking that OPC's Motion to Compel be denied. AUF does state that if the Motion to Compel is granted, it will endeavor to provide the requested discovery responses by Thursday, September 15, 2011.

#### Analysis and Ruling

I have reviewed the arguments of both OPC and AUF. It appears that the discovery requested by OPC does fall within the ambit of discoverable material with the exception of its Request for Production of Documents No. 133, which seeks attorney/client privileged and work product information. The remaining discovery requests seek information that appears to be reasonably calculated to lead to the discovery of admissible evidence.

Having acknowledged that OPC may need the responses to its Sixth Set of Discovery requests, I am cognizant that one of the purposes of a PAA rate case proceeding is to limit rate case expense. As the Prehearing Officer, my responsibilities include the promotion of the just, speedy, and inexpensive determination of all aspects of the case. Based upon OPC's motion, and AUF's responses, it appears that some discovery disputes may be resolved by informal meetings between the parties, rather than the more extensive and formal discovery process.

Accordingly, I direct OPC and AUF to meet and attempt to resolve in good faith, any questions regarding the need for complete responses to OPC's Sixth Set of Discovery requests. The meeting's goal shall be to limit discovery requests that are unnecessary in an effort to limit rate case expense. This meeting shall occur no later than September 14, 2011. At the conclusion of the informal meeting, OPC shall file a report with the Commission listing the remaining Sixth Set of Discovery responses for which it still has need. To the extent OPC

determines that it must have the responses to those Sixth Set of Discovery requests, I direct that AUF provide those responses on or before September 16, 2011.

Furthermore, pursuant to Rule 28-106.211, F.A.C., I find it appropriate to modify the Order Establishing Procedure, Order No. PSC-11-0309-PCO-WS as follows: with respect to all parties to this proceeding and to Commission Staff, prior to any additional motion to compel being brought to the Prehearing Officer's attention, I direct the parties in dispute to meet and attempt in good faith to resolve their discovery disputes. Any motion to compel must include a statement that a meeting was held and must include the results of that meeting.

Based on the foregoing it is

ORDERED that Aqua Utilities Florida, Inc. and the Office of Public Counsel shall conduct an informal meeting on or before September 14, 2011 to discuss Aqua Utilities Florida, Inc.'s responses to the Office of Public Counsel's Sixth Set of Interrogatories and Production of Documents. It is further

ORDERED that upon the conclusion of the informal meeting the Office of Public Counsel shall file a list with the Commission of all of the Sixth Set of Discovery responses that it still needs from Aqua Utilities Florida, Inc. It is further

ORDERED that Aqua Utilities Florida, Inc. shall respond to those discovery requests listed by the Office of Public Counsel, except for Production of Document No. 133, on or before September 16, 2011. It is further

ORDERED that the Office of Public Counsel's Motion to Compel is granted, except for production request number 133, and as subject to the conditions set out in this Order. It is further

ORDERED that the Order Establishing Procedure, Order No. PSC-11-0309-PCO-WS shall be modified as set forth herein.

By ORDER of Commissioner Ronald A. Brisé, as Prehearing Officer, this 13th day of September, 2011.



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NOTICE OF FURTHER PROCEEDINGS OR 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) 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. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.