

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 110200-WU

APPLICATION FOR INCREASE IN WATER
RATES IN FRANKLIN COUNTY BY WATER
MANAGEMENT SERVICES, INC.

PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 3

COMMISSIONERS
PARTICIPATING: CHAIRMAN RONALD A. BRISÉ
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER ART GRAHAM
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Tuesday, April 10, 2012

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

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FLORIDA PUBLIC SERVICE COMMISSION

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P R O C E E D I N G S

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3 **CHAIRMAN BRISÉ:** Now we're moving on to
4 Item Number 3, Docket No. 110200-WU.

5 **MR. JAEGER:** Yes, Commissioners, Chairman.
6 Ralph Jaeger, legal staff.

7 Item 3 is staff's recommendation on OPC's
8 motion to go directly to hearing on WMSI's
9 application for increased water rates. Mr. Erik
10 Sayler is here for OPC, and Marty Friedman and Mr.
11 Gene Brown are here for WMSI.

12 **CHAIRMAN BRISÉ:** Thank you. At this time
13 we're going to hear from OPC, so Mr. Sayler.

14 **MR. SAYLER:** Thank you, Mr. Chairman,
15 Commissioners. Thank you for the opportunity to
16 speak.

17 My name is Erik Sayler, and I'm with the
18 Office of Public Counsel. I do have the unique
19 privilege of being familiar with this utility when I
20 was on staff in the Commission legal staff. I
21 worked with Mr. Jaeger on the first rate case, and I
22 have not been working on the first rate case or the
23 appeal or anything since then.

24 Since coming to the Office of Public
25 Counsel, now I have the opportunity to be the lead

1 counsel for the customers, to represent them and
2 their interests. And I understand the major issues
3 in this case, many of which are reiterated from the
4 prior rate case. There's a water tank issue that's
5 potentially going to fail catastrophically. There
6 is an issue of whether or not \$1.2 million was taken
7 out of the utility and what effect, if any, that
8 should have on the utility's finances or abilities
9 to continue providing safe, adequate, and reliable
10 service for the customers.

11 There's used and useful issues, and then
12 there's a host of other new issues -- or a few new
13 issues, but just for generally -- I don't intend to
14 really get into the issues, but the issues of this
15 case, the facts and issues of this case I believe
16 really lend not to the PAA process but to the full
17 adversarial process.

18 And I'm not going to spend any time really
19 going into the substance of the motions. I believe
20 staff's recommendation did a great summary of both
21 sides, our side and the utility's side, but I do
22 want to make one clarification regarding the
23 utility's motion.

24 They characterize the PAA process as being
25 an election. The statute does not use the word

1 "elect." The statute says, "A utility may
2 specifically request that the Commission process its
3 petition for relief using the agency's proposed
4 agency action procedure." And it is a request. It
5 is not an election. It's not -- it's a statutory
6 right to request it. But because it's a request,
7 it's ultimately up to this Commission to make a
8 decision whether or not to set it for PAA or for the
9 adversarial proceeding.

10 And as was pointed out in the staff's
11 recommendation, historically the Commission has
12 deferred to the utilities when they ask for PAA,
13 it's administratively approved somewhere, and it
14 just processes. But I believe there are facts and
15 circumstances regarding this case that really lend
16 to the fact that we should go to hearing now and
17 have everything resolved within eight months as
18 opposed to going through the PAA process, which is
19 five months plus one month, for a protest after the
20 order is issued plus another eight months of a
21 hearing process.

22 And one of the main reasons for getting
23 this case resolved sooner than later is the fact
24 that the utility does have this large groundwater
25 storage tank that, according to the testimony in

1 this docket by their engineer, is at risk of
2 catastrophic failure. And that was something that
3 was litigated in the last case. There was no
4 dispute on whether or not that tank is at its --
5 nearing the end of its useful life and that it
6 should be replaced. The issue was whether or not
7 the utility had proved up its costs as it relates to
8 that tank, and the Commission decided that it
9 didn't. And in this case they're now requesting
10 that this Commission consider the cost. The
11 customers -- we dispute the cost and the location of
12 the tank, and that is something that we believe it's
13 very important to hear both sides on the issue, to
14 have testimony from our expert.

15 We've retained a couple of experts to work
16 on our behalf on the engineering side and also the
17 numbers side, which will help us convey the customer
18 side. And in the PAA process, while I do agree that
19 it's expedited, that staff will adequately review
20 the application, but they'll ask data requests and
21 there won't be any sworn testimony evidence
22 presented to the Commission and the customers will
23 not necessarily have their opportunity to give their
24 side.

25 In addition was the 1.2 million. That is

1 something that is a highly contentious issue. I
2 know there was a staff, internal staff audit report
3 that was performed that described these monies, and
4 it's really a decision that we think in this rate
5 case the Commission needs to come to a resolution
6 whether in favor of the utility or in favor of the
7 customers or somewhere in between. But, again, we
8 think that it's helpful and beneficial to the
9 Commission to have both sides. Because in the PAA
10 process and any other process, the Commission staff
11 is supposed to be taking a neutral position, hearing
12 the facts and evidence from both sides, weighing it,
13 and making a recommendation to this Commission for a
14 decision. And we believe that the adversarial
15 process for this rate case is very important and
16 necessary.

17 And, you know, I don't know -- if, if this
18 Commission decides to set it for hearing, I don't
19 know which Commissioners will be on the panel. But
20 we do have two Commissioners that are already
21 familiar with the facts and circumstances from the
22 last rate case, and, you know, many of those same
23 issues will be recounted. So in a sense we can move
24 things along more quickly.

25 And then also as far as rate case expense,

1 our office is always mindful about rate case
2 expense. And the utility pointed out in its motion
3 that our office many years ago took the position
4 that they should -- the utility should have used the
5 PAA process. And now we're on the opposite side; we
6 think it's the hearing process. Because we really
7 think in this particular case, because of the unique
8 facts and circumstances of this case, it'll speed
9 the resolution, we'll have it all done in eight
10 months, they'll have the final order. And then
11 assuming the Commission approves a certain amount of
12 money for the replacement of that tank, they can go
13 forth, get lending, get financing for that tank so
14 that they can proceed to rebuild that tank, which is
15 really a necessary issue for the utility as they
16 have put forth.

17 So really the question before this
18 Commission I would submit would be do we want to
19 resolve everything in eight months or wait for the
20 PAA process to play out another month and then
21 another month for a contested hearing on the issues,
22 which by the utility's own application when it filed
23 this rate case requested either the PAA process or,
24 when and if this is protested, that it go to DOAH
25 for a hearing. Whether it goes to DOAH for a

1 hearing, that is for this Commission to decide. We
2 take no position on that.

3 However, we do feel that this Commission
4 does have the discretion to -- even though the
5 utility requested the PAA process, we believe the
6 Commission has the inherent discretion to either
7 proceed with the PAA process or not. And one
8 question I have is if we know there's going to be
9 some highly contested issues that are very important
10 to the customers, you know, why come to a conclusion
11 or a policy decision when only one side has been
12 heard?

13 So I do want to say thank you very much
14 for your time and for listening. I do want to note
15 that there are 12 customers who did file e-mails
16 with this Commission requesting that it be set
17 straight for hearing. And if you have any further
18 questions, I'm here available for you. Thank you.

19 **CHAIRMAN BRISÉ:** Thank you.
20 Commissioners, any questions and comments at this
21 time, or hopefully we can reserve them after Mr.
22 Friedman.

23 All right. Mr. Friedman.

24 **MR. FRIEDMAN:** Thank you, Mr. Chairman,
25 Commissioners. My name is Martin Friedman, Law Firm

1 of Sundstrom, Friedman & Fumero, and we represent
2 Water Management Services in this proceeding.

3 I'm kind of surprised at the OPC's lack
4 of, lack of confidence in the PAA process that has
5 worked -- I don't remember when it came into effect,
6 but I've been doing this since 1980, and the PAA
7 process has worked exceptionally well.

8 To start at the end of Mr. Sayler's
9 comments, the fact that he said there are
10 contentious issues and therefore it's going to go to
11 hearing, boy, I've sat here before you and had
12 customers sitting over there where Mr. Sayler is and
13 we have argued contentious issues at PAA Agenda
14 Conferences many times and we knew that case was
15 going to be protested. And when it really came to
16 making the decision, the utility decided, despite
17 the contentious nature, they didn't protest it, and
18 in many of those cases the Public Counsel didn't
19 either. So just because OPC thinks that this case
20 is going to have contentious issues does not mean
21 that the PAA process isn't appropriate. We've done
22 it for years and hopefully will continue to do it
23 for years because it is an expedited process.

24 The staff has done a good job of analyzing
25 the policy reasons why the PAA process works in this

1 proceeding. And despite what Mr. Sayler said, I
2 believe that the use of a PAA process is something
3 that the, the Legislature has determined is made by
4 the utility. The use of the word "may" just means
5 that they may use the PAA process or they may use a
6 go to hearing process. The use of the term "may"
7 doesn't have any other, any other meaning in the
8 statute.

9 And as I pointed out in my response,
10 written response to the OPC's motion, OPC's request
11 is perplexing because in the past the OPC has sought
12 to reduce a utility's rate case expense when they
13 went directly to hearing instead of using the PAA
14 process, arguing that the PAA process is cheaper.
15 And in fact, OPC argued -- and this is a Florida
16 City's Water Company case. My guess is it probably
17 predates all of y'all. But the OPC in that case
18 argued that the PAA order, had it (phonetic) been
19 entered, the customers could have decided to avoid
20 the cost of a hearing as a result of FCWC, Florida
21 Cities Water Company. Avoiding the PAA process, OPC
22 states that customers were deprived of an
23 opportunity to avoid a hearing. And now you hear
24 Mr. Sayler saying the customers are going to be
25 deprived by the PAA process of having an opportunity

1 for a hearing. So it seems to me that Public
2 Counsel speaks both sides of its mouth depending
3 upon what situation it seems fits it best.

4 In the last rate case for this utility
5 they did go directly to hearing. There were over 50
6 issues that were identified in that case, and you
7 heard Mr. Sayler talk about issues today. As a
8 matter of fact, an e-mail has been circulating on
9 the island that, that includes a portion of an
10 e-mail from Mr. Sayler to some island resident, and
11 it identifies the issue he talked about, this, this
12 Account 123 issue and the, having to replace the
13 water tank and where to put it as an issue. And so
14 there's the three -- there's the major issue right
15 there. I mean, out of, out of 50 issues, even if
16 Public Counsel disagrees with the determination and
17 we end up going to a hearing, instead of having a
18 hearing on over 50 issues, we will likely narrow
19 that down to having a hearing on, on two or three
20 issues, which is the, which is really the benefit
21 and the purpose of the PAA process.

22 And it doesn't -- you know, by saying
23 that, oh, Public Counsel wants a say, Public Counsel
24 gets a say in the PAA process. They've sent
25 discovery to the utility. I mean, they're going to

1 have some input in what the staff's recommendation
2 is in this case.

3 And while I question whether the OPC has
4 the authority to initiate discovery, you know, we've
5 voluntarily let them do so and we're responding to
6 discovery. So they're going to have every
7 opportunity to, to have their input into whatever
8 the staff ultimately recommends, and then they'll be
9 sitting here before you sometime this summer arguing
10 whatever they want to argue, if they, if they don't
11 agree with the staff's recommendation, and we would
12 do likewise.

13 One issue that, that, that the staff did
14 not address in its recommendation, and that is
15 whether or not OPC even has a right to ask for a
16 formal hearing. As OPC pointed out in its motion,
17 they said we can't comply with a rule that requires
18 that you set forth certain requirements in order to
19 ask for a hearing because we're not at that point in
20 the proceeding. That's the exact point of that
21 whole process is that we're not at the point in the
22 proceeding where somebody can ask for a formal
23 hearing. The Administrative Procedures Act doesn't
24 provide that you get an opportunity to ask for a
25 formal hearing until the agency takes some action.

1 And the agency, as we do this process here, doesn't
2 take action until the PAA order is entered, and
3 that's the point in which the Administrative
4 Procedures Act allows the OPC and any other
5 interested party an opportunity to, to request a
6 formal hearing.

7 So in addition to the good policy reasons
8 that, that the staff has pointed out, they've given
9 you some examples of some, some cases where, you
10 know, everybody thought it would go to hearing and
11 it turned out that, that nobody asked for a hearing
12 when everybody analyzed the cost and expense of
13 doing so. And I mentioned that earlier, that in
14 addition to those good policy reasons, I suggest to
15 you that under the Administrative Procedures Act, an
16 interested party, be it Public Counsel or anybody
17 else, doesn't have the authority to demand a formal
18 administrative hearing until the agency takes some
19 action, and that being the issuance of the PAA.

20 Thank you.

21 **CHAIRMAN BRISÉ:** Thank you.

22 Commissioners? Commissioner Edgar.

23 **COMMISSIONER EDGAR:** Thank you, Mr.
24 Chairman. I have a couple of questions, if I may.

25 **CHAIRMAN BRISÉ:** Sure.

1 **COMMISSIONER EDGAR:** I think I heard both
2 Mr. Sayler and Mr. Friedman base part of their
3 argument on the reading of the language in
4 367.081(8), and I think what I heard was some of
5 that analysis focused on the word "may," which in my
6 mind is not the, the part of the statute that seems
7 to be determinative.

8 So my question is looking at the language
9 of that statute, and I would say first to
10 Mr. Friedman and then to Mr. Sayler, by the reading
11 of that statute and the use of the term "request,"
12 do you believe that this Commission has discretion
13 as to whether to grant or to not grant the request
14 of the utility to proceed through PAA?

15 **MR. FRIEDMAN:** Yes, Commissioner Edgar, I
16 think legally they do.

17 **COMMISSIONER EDGAR:** Okay. So, so your --
18 am I understanding you correctly to say that by
19 reading that statute, we have the discretion to deny
20 your request for PAA and put it directly to hearing
21 under the statute?

22 **MR. FRIEDMAN:** You know, I guess, I guess
23 by the use of the word "request," although I don't
24 think you can pick that one word out and interpret
25 the whole provision based upon that one word, I

1 think you have to look at the, at the whole section
2 of that statute, what that whole statute is intended
3 to mean, and not just pick the one word out and say
4 request means you request.

5 I think what the statute is intending to
6 do is that at some point when the utility files its
7 application, it says here's the proceeding that we
8 think we should utilize. And, and it says may
9 because it doesn't mean that they have to use the
10 PAA process. It means they can go to another
11 process.

12 I have yet to see this Commission
13 interpret this statute to say, no, you picked the
14 PAA, we're going to make you go directly to hearing,
15 or in one of those cases where utilities have chosen
16 to go directly to hearing, that the PSC has said,
17 no, we've got the authority and we're going to tell
18 you you've got to go PAA. I've never seen either
19 one of those, those scenarios.

20 The Commission has by policy always
21 deferred to the utility, who has the initial
22 decision in what process to initiate. And I think
23 that there's no basis really for the Commission that
24 I've seen to deviate from that policy.

25 **COMMISSIONER EDGAR:** Do you believe there

1 are other sections of the APA that are controlling
2 that would have some sort of impact on our ability
3 under the statute to grant or not grant the request
4 for PAA on this? As you said, taking all, taking it
5 all --

6 **MR. FRIEDMAN:** I don't think Public
7 Counsel has the right to request it. I don't think
8 there's a procedure under the Administrative
9 Procedures Act for a party to request that something
10 be set for a hearing before an agency issues some
11 proposed action.

12 Now whether an agency on its own can say
13 we're not going to issue a proposed action, not just
14 you, DEP, any other -- every, every agency has got a
15 proposed agency action procedure, although they may
16 call it different names. And so when they issue
17 that proposal, we're going to issue -- or DEP says,
18 we're going to issue a permit, I've never seen an
19 agency say, we're not going to issue the permit,
20 we're going to set it right for hearing and make
21 everybody prove it.

22 I don't think the Administrative
23 Procedures Act contemplates that procedure. I think
24 the Administrative Procedures Act itself
25 contemplates that an agency will issue some proposed

1 action, be it in this case a proposed rate increase,
2 or, in DEP, the proposed granting of a permit, and
3 at that point in time somebody requests a formal
4 hearing.

5 Now y'all have built in, the Legislature
6 has built into the PSC's procedures an opportunity
7 for a utility to, to jump the PAA process and go
8 directly to a hearing.

9 **COMMISSIONER EDGAR:** Mr. Friedman, my
10 question is a little more specific, and it is this.
11 By the statutes that are specific controlling for
12 this agency and working hand in hand with the
13 umbrella APA requirements that also apply, do we
14 have the discretion to send this directly to hearing
15 to make that decision, do we have the discretion to
16 do that, should we choose to, recognizing the
17 utility's request under the statute to go to PAA?

18 **MR. FRIEDMAN:** I would say no. I hate to
19 tell -- I always hate to tell the Commission you
20 don't have the discretion to do something because I
21 know you want all the discretion you can get, and I
22 would if I were sitting in your chair as well.

23 **COMMISSIONER EDGAR:** Sometimes yes,
24 sometimes no.

25 Okay. So that is your interpretation of

1 --

2 **MR. FRIEDMAN:** Yeah. I don't think just
3 the use of the word "request" necessarily means
4 that, that there is some discretion by the
5 Commission to, to say, no, you can't use the process
6 that you have, you have sought to use, whether it's
7 the PAA or the formal hearing process.

8 **COMMISSIONER EDGAR:** Okay. And then --
9 Mr. Chairman, may I?

10 **CHAIRMAN BRISÉ:** Sure.

11 **COMMISSIONER EDGAR:** I'd like Mr. Sayler
12 to respond, if you can.

13 **MR. SAYLER:** Thank you, Commissioner
14 Edgar.

15 I would disagree with the utility. I
16 believe the statute, 366 or, excuse me, 367, is
17 controlling for the Commission. The Legislature
18 said a utility may request. And so when you're
19 making a request of this Commission that inherently
20 the Legislature contemplated that it was something
21 that the Commission had authority to make a decision
22 on.

23 And the request is the threshold issue.
24 This Commission, when I filed the motion, had not
25 set the internal CASR that this would be a PAA or a

1 hearing track. We were careful and tried to file
2 our motion to request this be sent straight to
3 hearing before that was made, before an internal
4 decision was made. There was a presumption.

5 But, yes, I believe the threshold issue is
6 the utility's request. And I believe under Chapter
7 120, as cited in my motion, Chapter -- Section
8 120.569 and 120.57 of the Administrative Code, which
9 talks about decisions which affect the substantial
10 rights of the parties, you could say that the
11 decision to set this for hearing or to set it for
12 the APA is a, is a decision that will affect the
13 substantial rates of the parties because it'll
14 affect how the customers can, their footing and how
15 they can litigate this case or not litigate this
16 case through the, through the adversarial process or
17 the PAA process.

18 So if you would say -- the decision to go
19 with PAA you could say is a subdecision along the
20 way, and then that would be one point of entry.
21 Once this Commission makes the decision, PAA or for
22 the hearing process, then the next point of entry
23 would be at the end of the PAA process, should the
24 parties want to protest the entire order or some
25 aspects of the order.

1 But I believe that ultimately the
2 Commission does have the discretion because the
3 Legislature in their wisdom said a utility may
4 specifically request that their application be
5 processed PAA.

6 **COMMISSIONER EDGAR:** I would propose --

7 **MR. FRIEDMAN:** Commissioner Edgar, can I,
8 can I just respond briefly to something that he
9 said?

10 **COMMISSIONER EDGAR:** Let me, let me
11 finish.

12 **CHAIRMAN BRISÉ:** Mr. Friedman,
13 Mr. Friedman, if you would allow Commissioner Edgar
14 to, to have the floor.

15 **MR. FRIEDMAN:** Absolutely.

16 **COMMISSIONER EDGAR:** Thank you. I would
17 propose that the -- however this docket was entered
18 into the CASR would be strictly a ministerial action
19 that would have no bearing on the substantial rights
20 of the parties or our discretion under the statute
21 as to how we proceed.

22 The question of whether we have discretion
23 under 367 and/or whether the substantial rights of
24 the parties are affected under 120 by our decision
25 as to how to proceed I think is a more compelling

1 and more interesting set of questions. So with
2 that, I would like to pose that to our legal staff.

3 **MR. JAEGER:** I was afraid that was coming
4 here. I think 367.0818, it is not clear. I think,
5 you know, it has the "may" and the "request." And
6 legal discussed this at length and they were
7 actually -- and I think what we looked at was we
8 found it significant that the Legislature didn't say
9 under what criterion you would grant such request.
10 They just said they may request it. And legal is
11 saying as a general rule, then we don't go behind
12 and we grant that request. But under -- and we're
13 not sure under what circumstances -- we're not
14 saying the Commission is absolutely barred. The
15 Commission always has to act in the public interest.
16 But we were looking at that this was the intent of
17 the Legislature to give the utility the choice to go
18 either way, and so that's what we thought, that we
19 should leave that up to the utility.

20 **COMMISSIONER EDGAR:** Ms. Helton, do you
21 have anything to add?

22 **MS. HELTON:** I do agree with Mr. Jaeger.
23 I just would like to point out maybe a couple of
24 additional facts.

25 As Mr. Jaeger said, we talked about this

1 question quite a bit before the recommendation was
2 filed for this Agenda Conference, and we actually
3 found some orders where the Commission had denied a
4 request for a proposed agency action rate case to be
5 filed under that process. However, those orders
6 came before this statute was amended. In 1989 the
7 Legislature added this language in subsection -- I
8 think, is it (7) or (8) -- in (8).

9 **MR. JAEGER:** Both (7) and (8).

10 **MS. HELTON:** And also based on my
11 discussions with the man sitting right here to my
12 right, the intent, I believe, of the language in
13 this additional -- or this new language was to allow
14 the utilities to choose which process they wanted to
15 follow. So if they wanted to go the PAA route, this
16 enabled them to do that.

17 I'd also like to add something to what
18 Mr. Friedman said. I generally agree with his
19 statements that the way the APA has evolved, we, the
20 Commission, most agencies, when a license is being
21 issued, a certificate is being issued, or some issue
22 comes before an agency, there's some pronouncement
23 made, and then that gives a point of entry to the
24 person or entity at issue there and they can request
25 a hearing. But I believe that under 350, that first

1 or second subsection there gives the Chairman, in
2 our instance, an ability to set a matter for hearing
3 if he thinks that that is, or she thinks that that
4 is appropriate.

5 So I think that we are situated a little
6 bit differently than maybe other agencies that
7 follow the, the APA model a little bit more closely
8 than we do.

9 **MR. JAEGER:** Commissioner Edgar, if I
10 could add two things. We cite that order, 96-1147,
11 which was after the '89 enactment, and in one of the
12 paragraphs of that order it says, "Section
13 367.081(8), *Florida Statutes*, grants a utility the
14 option of requesting a PAA proceeding in a rate
15 case." And that was what we were going on, that
16 they -- we -- you know, it's just -- it gives the
17 utility the option.

18 And then the other part was on the first
19 paragraph of the staff analysis on page 6, we talk
20 about how 120.569 and 120.57 actually don't kick
21 in -- this is what you were saying -- until after we
22 do a proposed action. And us proposing to either go
23 to hearing or PAA, that's not an action of the
24 Commission. That's not affecting substantial
25 interests. That's all I had.

1 **COMMISSIONER EDGAR:** Mr. Chairman, I have
2 two comments, and then I'd like to hand it back to
3 you for whatever response and other questions or
4 comments.

5 There are two, two points here that
6 particularly concern me. One is the, what appears
7 to me to be the questioning of the PAA process. I
8 can recall in some years past when Harold McLean was
9 Public Counsel, him sitting at this bench speaking
10 to us and speaking very emphatically in defense of
11 the effectiveness and efficiencies of the PAA
12 process for all parties. And to, to prejudge a
13 final decision of this Commission when the issues
14 have not come before us, we have not discussed them,
15 we have not voted on them by saying of course it
16 will be appealed and that that should impact how we
17 try to carry out our duties and decisions in pursuit
18 of the public interest really gives me some concern.

19 And the second point is Ms. Helton
20 mentioned a statute under Chapter 350 that
21 specifically applies to this agency, and we have a
22 process whereby procedural issues are delegated from
23 the Chairman to an assigned Prehearing Officer. And
24 this strikes me as a procedural issue, and I'm not
25 really even sure why it is, why it is before us.

1 There is a process whereby if a party
2 believes that a Prehearing Officer's decision was
3 not correct or not in their best interest, that that
4 can then come before us. But it seems to me that
5 we've got the cart a little bit before the horse.

6 So the two points to me is that erosion of
7 the Chairman's delegation to the Prehearing Officer,
8 and the second, which is the, the commenting that
9 perhaps our decision will of course need to be
10 appealed prior to, again, other steps in the process
11 both give me some concern about the item that is
12 before us. And thank you, Mr. Chairman.

13 **CHAIRMAN BRISÉ:** Thank you.

14 Mr. Friedman, you, you wanted to make a
15 comment prior?

16 **MR. FRIEDMAN:** Yeah. I was just going to
17 raise the same comment, I think, that, that
18 Ms. Helton made, that, you know, if the, if the
19 statute were discretionary, the problem with that
20 statute is that there are no standards set forth in
21 the statute for the agency to determine when to
22 exercise that discretion or not.

23 **CHAIRMAN BRISÉ:** Thank you. Commissioner
24 Balbis.

25 **COMMISSIONER BALBIS:** Thank you, Mr.

1 Chairman. I have a question or two for Mr. Friedman
2 or for the representative of the utility.

3 There was some discussion about the costs
4 associated with replacement of a ground storage
5 tank, and I believe the term "catastrophic failure"
6 was, was used. And this Commission granted in
7 January of this year interim rates. Were the
8 interim rates that we approved, were those
9 sufficient to cover the operational costs and other
10 costs leading up to whether the PAA decision or an
11 ultimate hearing decision?

12 **MR. FRIEDMAN:** I'm sorry, Commissioner.
13 I'm not sure I, I understood. They did get interim
14 rates, yes. Whether they got interim rates or not,
15 I mean, doesn't have any bearing on the ultimate
16 outcome and ultimate decision that the company makes
17 one way or the other.

18 **COMMISSIONER BALBIS:** Well, then it has a
19 bearing on my decision as to whether or not granting
20 OPC's motion or not.

21 So let me just restate it. The OPC's
22 argument states that a hearing would reduce the
23 amount of time the utility must wait prior to
24 receiving a final order, implying that there's some
25 sort of damage to the utility of having a lengthy

1 process before a final order is issued. And I
2 believe the interim rate process is in place to
3 allow the utilities to recover additional funds
4 while this process goes through.

5 So would there be any damage to the
6 utility if what OPC states is correct, where we go
7 through the PAA process, then go through a hearing
8 process, and however long that takes, would that
9 additional time hinder the utility's ability to
10 operate?

11 **MR. FRIEDMAN:** No. No, it would not. I
12 mean, that's the sole purpose of the interim rates
13 is to take care of some of that regulatory lag that
14 we have in the process. And, you know, it works.
15 And certainly the utility is not the one here
16 saying, you know, let's get this thing going to
17 hearing.

18 I'm confident that we're going to get a
19 PAA order, and I'm not going to like it, and my
20 client is not going to like it, and OPC isn't going
21 to like it, and we're probably both going to swallow
22 our pride and move on.

23 **COMMISSIONER BALBIS:** Okay.

24 **MR. FRIEDMAN:** I've done that and been
25 involved in that on both sides for many years.

1 **COMMISSIONER BALBIS:** Okay. Thank you.
2 And I agree with staff's analysis of the statute.
3 And I also agree with Mr. Friedman's initial comment
4 that because it is a request, I think it does imply
5 we have some discretion if there's some unusual
6 circumstance, if there is an inability of the
7 utility to operate if this process goes on too long.

8 But given fact that the interim rates have
9 been in place, that there are -- at least I cannot
10 see any unusual circumstances that would warrant us
11 to really look closely at this statute as to whether
12 or not we should go straight to the hearing process,
13 I'm supportive of staff's recommendation on these
14 issues.

15 **CHAIRMAN BRISÉ:** Any further comments?
16 Commissioner Graham.

17 **COMMISSIONER GRAHAM:** I move the staff
18 recommendation.

19 **COMMISSIONER BROWN:** Second.

20 **CHAIRMAN BRISÉ:** All right. It's been
21 moved and seconded. All in favor, say aye.

22 (Vote taken.)

23 All right. Seeing that, item is carried.

24 **MR. SAYLER:** Thank you, Mr. Chairman,
25 Commissioners, for allowing us to speak.

(Agenda item concluded.)

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1 STATE OF FLORIDA)
 : CERTIFICATE OF REPORTER
 2 COUNTY OF LEON)

3
 4 I, LINDA BOLES, RPR, CRR, Official Commission
 Reporter, do hereby certify that the foregoing
 5 proceeding was heard at the time and place herein
 stated.
 6

7 IT IS FURTHER CERTIFIED that I stenographically
 reported the said proceedings; that the same has been
 8 transcribed under my direct supervision; and that this
 transcript constitutes a true transcription of my notes
 of said proceedings.
 9

10 I FURTHER CERTIFY that I am not a relative,
 employee, attorney or counsel of any of the parties,
 nor am I a relative or employee of any of the parties'
 11 attorneys or counsel connected with the action, nor am
 I financially interested in the action.
 12

13 DATED THIS 11th day of April, 2012.

14 
 15 LINDA BOLES, RPR, CRR
 FPSC Official Commission Reporter
 16 (850) 413-6734