

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of:

DOCKET NO. 110200-WU

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

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PROCEEDINGS: ORAL ARGUMENT

COMMISSIONER  
PARTICIPATING: COMMISSIONER JULIE I. BROWN

DATE: Tuesday, June 5, 2012

TIME: Commenced at 1:00 p.m.  
Concluded at 1:45 p.m.

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

REPORTED BY: JANE FAUROT, RPR  
Official FPSC Reporter  
(850) 413-6732

## 1 APPEARANCES:

2 ERIK L. SAYLER, ESQUIRE, Office of Public  
3 Counsel, c/o The Florida Legislature, 111 W. Madison  
4 Street, Room 812, Tallahassee, Florida 32399-1400,  
5 appearing on behalf of the Citizens of the State of  
6 Florida

7 MARTIN S. FRIEDMAN, ESQUIRE, Sundstrom Law  
8 Firm, 766 North Sun Drive, Suite 4030, Lake Mary,  
9 Florida 32746, appearing on behalf of Water Management  
10 Services, Inc.

11 RALPH JAEGER, ESQUIRE, and MARTHA BARRERA,  
12 FPSC General Counsel's Office, 2540 Shumard Oak  
13 Boulevard, Tallahassee, Florida 32399-0850, appearing  
14 on behalf of the Florida Public Service Commission  
15 Staff.

16 MARY ANNE HELTON, Deputy General Counsel,  
17 Florida Public Service Commission, 2540 Shumard Oak  
18 Boulevard, Tallahassee, Florida 32399-0850, Advisor to  
19 the Commissioners.

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## P R O C E E D I N G S

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2           **COMMISSIONER BROWN:** This oral argument will  
3 be called to order this 5th day of June at 1:00 p.m.  
4 Staff, will you please read the notice.

5           **MR. JAEGER:** Yes, Commissioner.

6           Pursuant to notice, this time and place has  
7 been set to hear oral argument on OPC's motion to  
8 establish discovery procedures and motion to compel  
9 discovery in the response of Water Management Services,  
10 Inc. Each side has been allowed ten minutes, and this  
11 is in Docket Number 110200-WU.

12           **COMMISSIONER BROWN:** Thank you.

13           Good afternoon. We'll take appearances now,  
14 starting with Mr. Friedman.

15           **MR. FRIEDMAN:** Thank you.

16           My name is Martin Friedman of the law firm of  
17 Sundstrom Friedman and Fumero representing Water  
18 Management Services, Inc. Also with me is Mr. Gene  
19 Brown.

20           **COMMISSIONER BROWN:** Thank you.

21           And, Office of Public Counsel.

22           **MR. SAYLER:** Erik Sayler on behalf of the  
23 Office of Public Counsel, the Citizens of the State of  
24 Florida, and the customers of Water Management  
25 Services, Incorporated.

1                   **COMMISSIONER BROWN:** Thank you.

2                   And, Staff.

3                   **MR. JAEGER:** Ralph Jaeger, and with me is  
4 Martha Barrera on behalf of the Commission staff.

5                   **MS. HELTON:** And Mary Anne Helton, Advisor to  
6 the Commission.

7                   **COMMISSIONER BROWN:** Thank you.

8                   We are here today to hear the oral argument  
9 on OPC's motion to establish discovery procedures and  
10 motion to compel discovery, as well as WMSI's response  
11 thereto. This oral argument was granted at the request  
12 of WMSI, Mr. Friedman. As noted by Staff counsel, each  
13 side will have ten minutes. And we will begin with the  
14 Office of Public Counsel, since it's its motion.

15                   And, Mr. Sayler, you may proceed. And I'm  
16 timing you here, and I'll give you one-minute notice.

17                   **MR. SAYLER:** Thank you very much. I need to  
18 set up my watch. I have timed myself, and I'm right at  
19 ten minutes, so --

20                   Good afternoon, Commissioner Brown. Thank  
21 you for the opportunity to argue OPC's motion.  
22 Initially we didn't request oral argument, but we will  
23 take full advantage of it. Any time I have left over  
24 I'd like to reserve for rebuttal.

25                   On January 23rd, OPC's intervention as a

1 party was acknowledged in this rate case, and on  
2 March 14th OPC exercised its discovery rights as a full  
3 party and propounded its first set of discovery to  
4 which the utility has only partially responded, thus  
5 requiring OPC to file this motion.

6 Under the statutes and rules which govern, as  
7 well as Commission practice in rate cases, OPC asserts  
8 there is good cause to establish discovery procedures  
9 and discovery limits and compel discovery responses.  
10 I'll start off by addressing the arguments for  
11 establishing discovery procedures first.

12 There's good cause for establishing discovery  
13 limits and procedures beyond the initial allowed by the  
14 rule, initial 30 interrogatories allowed by the rule.  
15 I do note the rule does not limit the number of POD  
16 requests. Because there are issues left unanswered  
17 from the last rate case, namely issues surrounding  
18 Account 123 and approximately \$1.2 million which flowed  
19 out of the utility through this account which effect,  
20 we believe, the financial health of the utility as a  
21 result, debt and things of that nature, OPC believes  
22 that these lingering questions cannot be answered  
23 without propounding discovery beyond the initial  
24 30-interrogatory limit that the utility mistakenly  
25 claims is binding upon the Commission.

1                   Second, every practitioner before this  
2 Commission knows that the Commission routinely  
3 increases interrogatory limits in rate cases well in  
4 excess of 30 interrogatories. In this rate case, OPC's  
5 interrogatories are tailored to elicit sworn responses  
6 to verify and/or refute the utility's claims regarding  
7 Account 123 and other financial assertions by the  
8 utility. OPC's requests for document production are  
9 tailored to discover documents which verify or refute  
10 the utility's claims, and also which -- and hopefully  
11 provide a more complete picture of the utility's health  
12 and financial viability. Responses to OPC and now  
13 Staff's discovery will allow the Commission staff to  
14 have the necessary and relevant evidence upon which to  
15 base its PAA recommendation in this case.

16                   Third, there's nothing in the PAA process  
17 which limits the discovery rights of parties, and OPC  
18 is exercising these rights as a party in this case.  
19 And we believe without the establishment of discovery  
20 procedures, critical questions related to the  
21 ratemaking will remain unanswered.

22                   Fourth, there is past precedent from the Aqua  
23 PAA rate case. In Aqua's PAA rate case, OPC propounded  
24 discoveries and moved this Commission to establish  
25 discovery procedures. Aqua objected. The Prehearing

1 Officer in that case reviewed the arguments of both  
2 parties and established discovery procedures, see Order  
3 Number PSC-11-0018-PCO-WS. In addition to that ruling,  
4 the Prehearing Officer ordered Aqua to respond to OPC's  
5 discovery within ten days of his order.

6 In this case, because WMSI is not nearly as  
7 large as Aqua, OPC does not request the same amount of  
8 discovery as authorized by the Commission in the Aqua  
9 rate case. However, since many of the issues in the  
10 current WMSI rate case are very similar to the last  
11 rate case, OPC believes that the discovery amount and  
12 procedures from the last rate case should be sufficient  
13 through the PAA process, protest by parties, if any,  
14 hopefully not, and the full evidentiary hearing, if  
15 required.

16 The discovery limit in the last case was 300  
17 ROGs and 300 PODs, and we believe that should be more  
18 than sufficient, but if you decide that it should be  
19 less, we are open to that. The response time at the  
20 last case, twenty days for any additional discovery  
21 propounded by the parties, for us is extremely  
22 important, because the PAA recommendation in this case  
23 is due to be filed on July 19th.

24 As for discovery already propounded, time is  
25 of the essence. OPC requests that WMSI respond within

1 ten days of your decision, because we will need time to  
2 review those responses to see if any follow-up  
3 discovery needs to be sent.

4 As for rate case expense, OPC believes that  
5 the utility will raise the specter of increased rate  
6 case expense, and OPC is very sensitive to rate case  
7 expense, and as such wants to keep it as low as  
8 possible. And in this case, OPC has limited the amount  
9 of discovery we would normally serve to the two main --  
10 or the main critical issues that we are concerned about  
11 during the PAA process. And we believe that the  
12 discovery we have served should be addressed during the  
13 PAA process.

14 And as it relates to the discovery that staff  
15 and OPC has already propounded, the question of rate  
16 case expense is really now a matter of timing. It's  
17 not a matter if rate case expense will be incurred, but  
18 when. And OPC is hopeful that a timely, full,  
19 forthright response to its discovery now will avoid a  
20 protest of the PAA order later. For these reasons, we  
21 hope that you grant our motion in full.

22 For the basis for compelling responses, OPC's  
23 argument per its motion to compel can be summarized by  
24 a well-known quote by President Ronald Reagan, "Trust,  
25 but verify." However, as a party it's not our job to



1 trust the statements of WMSI, it is our job to verify  
2 them, and we have tailored our discovery to do such.  
3 And OPC hopes that by granting the motion to establish  
4 discovery procedures will -- really the utility will  
5 answer all the discovery that we have asked, and staff  
6 has asked, and will then verify those responses. But  
7 whether or not we are successful in our motion to  
8 establish discovery procedures, we do respectfully ask  
9 that the utility be compelled to respond to our  
10 interrogatories as set forth in Attachment B and  
11 Attachment C to our motion, our interrogatories and  
12 production of document request. And I won't -- I'll  
13 save time by not telling you those numbers.

14 To date the utility is more than six weeks  
15 late in responding to OPC's first set of  
16 interrogatories, and has flatly refused to answer some  
17 of the PODs identified in OPC's motion claiming, we  
18 believe, without merit, that OPC's PODs are, quote,  
19 overly broad, onerous and made solely for harassment.  
20 That is not true.

21 Many of the interrogatories and PODs  
22 referenced in Attachment B and C of OPC's motion center  
23 around the single enormous left-over issue from the  
24 last rate case; namely, the \$1.2 million which flowed  
25 through Account 123 and out of the utility, and what we

1 believe are unsubstantiated statements by the utility  
2 concerning its finances.

3 And as you may have gathered from reading the  
4 Commission's order in the last rate case, OPC argued  
5 that the owner of the utility had moved \$1.2 million of  
6 cash out of the utility through Account 123. The  
7 utility vigorously denied that assertion. And as a  
8 result, in order to verify, to confirm, or deny, the  
9 Commission ordered a cash-flow audit.

10 The Commission's cash-flow audit confirmed  
11 that that amount was accurate and classified those  
12 dollars as an account receivable payable to the  
13 utility. And now the issue of the \$1.2 million is ripe  
14 for consideration in this rate case by this Commission.  
15 And I can't tell you how many customers have personally  
16 spoken to me that they believe that this \$1.2 million  
17 in Account 123 is a central issue in the rate case for  
18 them. They want to know how the Commission will  
19 respond and resolve the remaining issues because  
20 \$1.2 million is huge, given the size and the scope of  
21 this utility. And OPC questions how this issue can be  
22 adequately resolved without compelling the utility to  
23 fully respond to OPC's discovery tailored to get to the  
24 heart of the matter.

25 Between the rate cases, shortly after the

1 Commission's final order in the last rate case, the  
2 utility reportedly transferred all the shares of Brown  
3 Management Group, an investment entity that the owner  
4 owned and controlled, in order to purportedly satisfy  
5 the \$1.2 million that eventually the cash-flow audit  
6 proved was taken out of the utility.

7 If you'll look to the July 29, 2011,  
8 Commission cash-flow audit, OPC is very skeptical of  
9 this seemingly self-serving transaction, and OPC openly  
10 questions whether WMSI should own shares in Brown  
11 Management Group, and whether this transaction should  
12 be ignored for ratemaking purposes.

13 In this rate case, the owner has prefiled  
14 testimony alleging that the value of Brown Management  
15 Group exceeds \$1.2 million. Well, we want to verify  
16 that, and we believe that because the owner asserted  
17 that, that that lends himself to discovery. The owner  
18 has also prefiled testimony that he personally  
19 subsidized the operation of the utility. Therefore, we  
20 believe that makes his personal finances subject to  
21 discovery.

22 And getting back to the shares of Brown  
23 Management Group, if those shares are really valued at  
24 more than \$1.2 million, perhaps the Commission should  
25 order that those shares be liquidated to pay out some

1 of the utility's debt, which vastly exceeds the rate  
2 base.

3 It's based solely upon statements by the  
4 utility and its owner to the Commission, to the  
5 Commission auditors and prefiled testimony that OPC has  
6 said that we believe that he has commingled --

7 **COMMISSIONER BROWN:** You have one minute.

8 **MR. SAYLER:** -- commingled his personal  
9 finances with that of the utility, and we believe that  
10 those need to be verified. And also based upon the  
11 utility's present litigation strategy, OPC believes  
12 that discovery now must be compelled. OPC notes that  
13 staff has also served very similar discovery, and the  
14 utility said that that discovery wasn't relevant to  
15 Account 123 and the ratemaking process. But if Staff  
16 served it, then we believe that it's also relevant.

17 For the foregoing reasons, we respectfully  
18 ask that you grant our motion to compel. In closing,  
19 Commissioner Brown, as the Prehearing Officer, OPC  
20 believes that you do have the latitude under the  
21 relevant statutes and rules which govern, as well as  
22 Commission practice, to establish discovery procedures  
23 and compel responses to OPC's discovery, discovery  
24 which is designed to produce relevant admissible  
25 evidence, and which we hope, if it's provided to this

1 Commission, will hopefully avoid a protest of the order  
2 and save rate case expense. Thank you very much.

3 COMMISSIONER BROWN: Exactly ten minutes to  
4 the T.

5 Good afternoon, Mr. Friedman.

6 MR. FRIEDMAN: Good afternoon. Thank you,  
7 Commissioner Brown.

8 COMMISSIONER BROWN: You may begin.

9 MR. FRIEDMAN: I likely will not take the  
10 entire ten minutes, but the fact that the Commission,  
11 quote, routinely allows discovery in PAA cases doesn't  
12 have any bearing on whether it should in this case.  
13 The arguments that I am going to give you are not the  
14 same arguments that were made, assuming that Aqua even  
15 objected to the discovery that OPC attempted to  
16 propound in the Aqua case. And, in fact, in an earlier  
17 case, the homeowner's association wanted to intervene  
18 in a case and cited the Aqua case as a basis for it, I  
19 argued that intervention by a customer group is not  
20 appropriate because of the PAA process. And  
21 Commissioner Graham, in fact, denied their motion to  
22 intervene on behalf of that homeowner's association.  
23 So the fact that this Commission may have done it in  
24 the Aqua case certainly isn't precedence for having to  
25 do it in this case, and I'm going to tell you why

1           legally you can't.

2                       Section 28-106.101, this is the chapter under  
3           which the Public Counsel has proposed or propounded its  
4           discovery. This section, which applies to all  
5           administrative agencies, not just the Commission, says  
6           this chapter shall apply to all proceedings in which  
7           substantial interests of a party are determined by the  
8           agency and shall be construed to secure a just, speedy,  
9           and inexpensive determination of every proceeding.  
10          This Chapter applies to all proceedings under Chapter  
11          120 except where the agency has adopted rules covering  
12          the subject matter pursuant to Section 120.54, et  
13          cetera, et cetera.

14                      I'll point out that this Commission has not  
15          adopted any discovery rules other than what is  
16          applicable under the Administrative Procedures Act.  
17          The discovery that counsel and that Public Counsel  
18          candidly asserts that it has propounded its discovery  
19          under is Section 28-106.206, which says after the  
20          commencement of a proceeding, the parties may obtain  
21          discovery through the means provided -- same rules as  
22          civil procedure. And then if you look at  
23          Section 28-106.111, that's the point of entry into a  
24          proceeding.

25                      The discovery rules do not apply until a

1 proceeding happens. A proceeding does not occur until  
2 after a proposed agency action is determined, and  
3 that's not just applicable to the Commission. And you  
4 would think, well, gee, while that allows the Public  
5 Counsel to come in and ask questions so that maybe they  
6 won't protest the PAA. That's no different than, say,  
7 a DEP permit where somebody who may be a resident or a  
8 person who may be affected by that DEP permit would  
9 say, hey, if I could come in and send discovery, maybe  
10 I won't protest that DEP permit. The same set of  
11 standards apply, and you could imagine what havoc that  
12 would reek upon the administrative process if people  
13 can intervene in an agency action before it issues its  
14 proposed agency action and start all kinds of  
15 discovery.

16 And as I point out, this case is the poster  
17 child for why that's not appropriate. A PAA case has  
18 got to be resolved in five months from the date of the  
19 official date of filing. Now we've got a little bit of  
20 extra time in here, because I couldn't make the 17th  
21 agenda which was really the agenda this was going to be  
22 scheduled on. I had a conflict. Staff was nice enough  
23 to put it to the 31st agenda. But five months is not  
24 enough time to do what Public Counsel wants us to do.

25 And keep in mind that this is a utility

1 company that doesn't only have to answer discovery from  
2 Public Counsel, it has also got to run a business.  
3 It's got a utility company it has got to run in  
4 addition to answering all these discovery. And as I  
5 pointed out in my response, and I've got to look at it  
6 to make sure I get the numbers right, the staff -- the  
7 utility has already had to respond to a staff audit.  
8 The staff has responded to six data requests by the  
9 staff, a total of 58 questions and 90 subparts, so it  
10 has got that question that it has had to respond to in  
11 the staff's evaluation.

12 Further, the staff recently served  
13 interrogatories with 41 subparts and requests for  
14 production with 28 separate documents. So just the  
15 sheer amount of information that the company has got to  
16 provide as a response to the staff takes all of the  
17 company's time to respond. And as I pointed out, the  
18 Public Counsel has propounded 91 interrogatories and  
19 subparts in addition to 42 requests to produce. Then  
20 they has filed their issues and concerns with the staff  
21 or with the Commission that included another 29  
22 documents and then they also have filed requests for  
23 production.

24 So you have got discovery just by the OPC of  
25 this amount, first and second discovery. You have got



1 the staff asking for this amount. You have got six  
2 data requests, and you have got a company who has got  
3 to respond to that and get it done within the time  
4 frame, the five-month time frame, which is supposed to  
5 be to provide a just and inexpensive and quick  
6 determination -- a preliminary determination of whether  
7 a utility is entitled to a rate increase or not,  
8 preliminary determination.

9 Staff wants to treat this, as they candidly  
10 point out, we asked for 300 discovery when this was a  
11 full rate case, we want the same thing in this case.  
12 That makes absolutely no sense at all. It would not  
13 be -- besides being, as I point out, and I'd be  
14 interested to hear the General Counsel's thought on  
15 this, is that there is no right to discovery prior to a  
16 PAA. The Administrative Procedures Act applies to  
17 everybody the same, and there is no right to discovery.  
18 In theory, if there is, then we may end up having to  
19 start sending out discovery to Public Counsel and to  
20 the staff.

21 On the specific interrogatories, because I  
22 probably don't have much time --

23 **COMMISSIONER BROWN:** You have six minutes and  
24 30 seconds.

25 **MR. FRIEDMAN:** Oh, okay. I'm talking a lot

1 faster. I grew up in the south, so I tend to speak  
2 slowly, and I give myself credit for talking faster  
3 than normal.

4 The OPC really misconstrues and exaggerates  
5 two things, and that's the two things that they think  
6 are so important, and that is this Account 123 where  
7 they claim that Mr. Brown took \$1.2 million out of the  
8 company, and they say it's supported by the cash-flow  
9 audit. I say it doesn't do that at all. The cash-flow  
10 audit doesn't support that Mr. Brown took any money  
11 out. In fact, the cash-flow audit really shows that  
12 the rates that were being charged to customers were  
13 woefully insufficient to cover the cash flow, and as  
14 result Mr. Brown had to go borrow money or sign  
15 guarantees in order to let the utility borrow money,  
16 because the utility can't borrow money on it's own  
17 credit. It just doesn't have it, and no small utility  
18 does have it. And so the owner has got to stick his  
19 neck out and sign guarantees or co-sign as a debtor on  
20 all obligations of the utility, and so I think that the  
21 cash-flow audit says that.

22 The Account 123 that they make so much hay  
23 about -- and, boy, it sounds great, it has got great  
24 appeal, and it riles up those customers out there --  
25 the point is that in the last rate case this Commission

1 made a determination, and Account 123 was an issue  
2 there, too. But what the Commission found in that  
3 order was that there was no misappropriation of funds  
4 by Mr. Brown in that case. And they said, the  
5 Commission also said that the rates would not be lower  
6 or higher because of whatever is in this Account 123.  
7 The account just doesn't have any bearing on the rate  
8 relief that the utility sought in that case and it's a  
9 big smoke screen. And, boy, it sounds -- it's a sexy  
10 issue because it really gets customers riled up.

11 This is one of those cases that is -- I have  
12 been doing this for 35 years. Very seldom have I seen  
13 a customer base so personal about a utility as this one  
14 is. And I see a lot of them where they just don't like  
15 the utility, they don't like the service, they don't  
16 like the quality, but this is personal. It's not the  
17 utility, it's Mr. Brown. And as a result, I think that  
18 people have overreacted, and unfortunately OPC hasn't  
19 helped that any by making a big deal out of this --

20 **COMMISSIONER BROWN:** You have one minute.

21 **MR. FRIEDMAN:** -- by making a big deal out of  
22 this Account 123. And that was the bulk of the  
23 discovery they seek. And what I suggest to you is  
24 that, first of all, there is no legal authority for  
25 Public Counsel or anybody else to serve discovery in a

1 PAA process, because it will reek havoc on the process.  
2 As you can see by this case, because it reeks havoc on  
3 the process, there is absolutely no way that a  
4 utility -- and now he wants us to respond in 20 days.  
5 There is no way that you can respond to all this -- in  
6 ten days, I'm sorry -- wants discovery objections in  
7 ten days and responses in 20.

8 There is no way that a utility this size can  
9 respond to all of this discovery plus the data requests  
10 from the staff. And I think the data requests from the  
11 staff are legitimate. That's what their job is, to  
12 send out data requests and to find out what this case  
13 is about. If Public Counsel wants to intervene, I  
14 think they have to case as they find it, and do their  
15 discovery in the back door like they have been doing by  
16 filing these issues they do. They do this in all their  
17 cases. The Commission staff looks at those issues, and  
18 the ones they are interested in they turn it around and  
19 put it as --

20 **COMMISSIONER BROWN:** You're time is up.

21 **MR. FRIEDMAN:** -- turn it around and put it  
22 in the data requests. So that is the appropriate way  
23 to deal with OPC's concerns.

24 Thank you.

25 **COMMISSIONER BROWN:** Thank you. And I will

1 get to Ms. Helton in a second and ask her to respond to  
2 some of your comments earlier. But, first, I have a  
3 couple of questions for both the Office of Public  
4 Counsel and WMSI.

5 How large is WMSI in Florida, how many  
6 customers?

7 **MR. BROWN:** We have 1,825 active customers;  
8 right at 2,000 connections. A lot of inactive  
9 connections.

10 **COMMISSIONER BROWN:** Publicly traded, is it  
11 publicly traded?

12 **MR. BROWN:** I thought you were talking about  
13 customers.

14 **COMMISSIONER BROWN:** Yes, customers. Is it a  
15 publicly traded company?

16 **MR. FRIEDMAN:** No.

17 **MR. BROWN:** Oh, no. It's a --

18 **MR. FRIEDMAN:** No, it's a private company.

19 **COMMISSIONER BROWN:** In it's motion, WMSI  
20 states that there is insufficient time and resources to  
21 respond to the discovery requests as well as during its  
22 oral argument you presented that. How much time are  
23 you estimating that you need to respond to OPC's first  
24 request for interrogatories, since you have had since  
25 March 14th?

1                   **MR. FRIEDMAN:** Well, we answered -- we  
2 answered the ones -- oh, the interrogatories we didn't  
3 answer any of them. We answered some of the production  
4 of documents. The breadth of the interrogatories,  
5 Gene, any indication as to how long that would take to  
6 answer those? You still have some discovery  
7 outstanding to the staff that is due shortly. And  
8 that's another problem you have put us in. You have  
9 put us in the quagmire of -- in responding to --

10                   **MR. BROWN:** We have to pick and choose. We  
11 can't do everything.

12                   **COMMISSIONER BROWN:** Sir, if you could have  
13 Mr. Friedman please respond.

14                   **MR. FRIEDMAN:** I was just going to say the  
15 problem you've got is that Public Counsel is sending  
16 discovery; staff is sending discovery. When you don't  
17 have but limited resources, who do you respond to? And  
18 it would take -- in the length of time we have got to  
19 go, it would take them a large amount of time to answer  
20 the interrogatories because of the fact that we have  
21 got discovery outstanding, responses to staff.

22                   **COMMISSIONER BROWN:** I understand.

23                   **MR. FRIEDMAN:** And I think staff is priority.  
24 And I don't know how long it takes to do -- if you just  
25 sat down and did the interrogatory responses, probably,

1 what, three or four days?

2 **MR. BROWN:** I think it would take longer than  
3 that, but we would have to put off doing some other  
4 things that we need to be doing.

5 **COMMISSIONER BROWN:** Mr. Friedman -- and I  
6 get all of that. I understand that there is a  
7 voluminous amount that WMSI has to respond, in addition  
8 to OPC's, also staff's requests, but you have had it  
9 for six and a half weeks, and I'm just kind of curious  
10 why WMSI hasn't responded to any by --

11 **MR. FRIEDMAN:** We filed an objection to it,  
12 which we have a right -- they are citing the rules,  
13 they are citing the discovery rules, so they cited the  
14 rule that says we get a right to discovery. If those  
15 discovery rules apply, and we don't think they do, but  
16 if they do, we've got a right to object to discovery,  
17 which means we don't have to answer it until they file  
18 a motion to compel and you order us to do so. They  
19 want us to automatically just, oh, no, no, no, you  
20 ought to answer it anyway. If we have got a rule we  
21 are going to follow, they have got to follow the part  
22 they don't like if they are going to take advantage of  
23 the part they do like. And they can't have it both  
24 ways.

25 **COMMISSIONER BROWN:** Do you have an estimate

1 of how much additional or legal rate case expenses will  
2 increase if WMSI is ordered to or compelled to respond  
3 to OPC's discovery requests?

4 **MR. FRIEDMAN:** I haven't estimated it, but it  
5 has got to be thousands and thousands of dollars. I  
6 mean, you saw the breadth of the discovery. I mean,  
7 it's a lot of discovery. A lot of that information is  
8 also confidential that they have asked for, and so we  
9 would have to file, you know, for confidentiality,  
10 which is whole another set of pleadings. And so it's  
11 not as easy as just having them sit down and write  
12 answers.

13 **COMMISSIONER BROWN:** Okay. Thank you.

14 I'm going to turn to the Office of Public  
15 Counsel. Now I have a few questions for you, Mr.  
16 Sayler.

17 **MR. SAYLER:** Yes, ma'am.

18 **COMMISSIONER BROWN:** OPC is seeking to  
19 establish the discovery procedures that were used in  
20 the prior case, but the prior rate case was set  
21 straight for hearing. So why is it appropriate, in  
22 your opinion, to set limits in a PAA case similar to  
23 the limits set in the hearing-track case?

24 **MR. SAYLER:** With regard to the actual  
25 amount, if this were to go to, you know, through --



1 from PAA protest through a hearing, we think that 300  
2 interrogatories and PODs would be more than sufficient.

3 Also, looking to the Aqua case where the  
4 Prehearing Officer determined -- and they were in a  
5 similar situation where there was PAA track. There was  
6 no -- there was a question of whether it was going to  
7 be protested or not, and ultimately our office  
8 protested. But I believe that the discovery limits  
9 from the PAA still govern in the hearing track.

10 So the limits really are just for a  
11 full-blown rate case and, we are amenable to a lesser  
12 amount. It's just if there was a lesser amount, and  
13 then there's a protest and we're in the middle of a  
14 hearing track, then we would have to file another  
15 motion and show good cause why they would need to be  
16 enlarged, and the utility would have an opportunity to  
17 respond. And that would generate more rate case  
18 expense, more -- we feel it would be administratively  
19 inefficient.

20 Do I think we are going to need the full 300,  
21 no, I can't -- unless something out of the blue shows  
22 up, I don't think we would need the full 300.

23 **COMMISSIONER BROWN:** And you have already  
24 have 91, you have already propounded 91 with subparts?

25 **MR. SAYLER:** I would disagree with their

1       assertion that we have -- in the first set that we had  
2       91 interrogatories. Oftentimes we do an interrogatory  
3       with, you know, Subpart A, B, C, D, you know the whole  
4       alphabet, not because we're looking for separate  
5       distinct answers to the interrogatory, but we just want  
6       to have an answer that covers all the bases of our  
7       question. Because if we were to say one of our  
8       questions was please give us a listing of all the  
9       assets that were, you know, sold by, you know, Brown  
10      Management Group. And the problem is if you just said  
11      that, you don't know what kind of response you would  
12      get. And a useful response we tailored that says  
13      please, you know, tell us how many assets you have,  
14      when you bought them, what is their valuation, how do  
15      you value them, did you have an independent  
16      appraiser, you know, things of that nature which kind  
17      of, you know, help provide hopefully a complete  
18      comprehensive answer as opposed to one that we go,  
19      okay, we need to ask continued follow-up over and over  
20      and over, which would be very inefficient, given the  
21      very, very short time frame that we have in a regular  
22      full rate case, and a much more expedited time frame  
23      that we have in a PAA rate case.

24                    So we would dispute that we had 91. And in  
25      our motion under B we pretty much isolated the ones

1 that we think that we really definitely want as far as  
2 interrogatories and those come out to about 28  
3 interrogatories and subparts.

4 **COMMISSIONER BROWN:** Okay. Other than the  
5 Aqua rate case that you cited and cited in your motion,  
6 are you aware of whether this Commission has ever set  
7 discovery parameters in a PAA case?

8 **MR. SAYLER:** No, ma'am, I am not. This case  
9 is very unusual for a PAA rate case. Generally, when  
10 there is a very complicated rate case coming down the  
11 track, the utility contacts Commission staff and says,  
12 you know, what flavor do you want to have the rate  
13 case. And then usually there is some communication  
14 that goes on to determine whether they file it PAA or  
15 nonPAA.

16 In this case, when this utility filed its  
17 test year letter, or its initial letter with this  
18 Commission, it said we are going to set it for a full  
19 administrative hearing. So that was kind of our  
20 assumption. And then in November when they filed their  
21 rate case, it turned out that they were filing PAA with  
22 a request to go to DOAH, should there be a protest.  
23 You know, bad on our office for not noticing that back  
24 in November and taking appropriate measures to request  
25 that it be set for a full administrative hearing back

1 then, because, you know, we had gone --

2 **COMMISSIONER BROWN:** I saw it.

3 **MR. SAYLER:** Yes. So it's our bad, so a mea  
4 culpa on our office's part. But as far as the Aqua  
5 rate case, it is also very controversial. Both of  
6 these are controversial for differing reasons. In this  
7 one mainly because, you know, the Commission still  
8 needs to make its decision with regard to what effect,  
9 if any, that 1.2 million -- and from the last order  
10 there's a statement that, you know, it's not clear why  
11 the operations and the finances of the utility and  
12 associated companies are so intertwined. And I believe  
13 the order goes on to state that even though no evidence  
14 was presented that any funds were misappropriated --  
15 and we're not saying that they are misappropriated, but  
16 we are saying that, you know, has the cash management  
17 of the utility adversely affected its financial health  
18 and viability, and it's those issues that we are  
19 concerned about because --

20 **COMMISSIONER BROWN:** Thank you. We're going  
21 a little bit beyond.

22 **MR. SAYLER:** Sorry.

23 **COMMISSIONER BROWN:** I appreciate it. At  
24 this point I would like to hear from Ms. Helton  
25 regarding some of the arguments raised by Mr. Friedman,

1 specifically about the proceeding when -- after  
2 commencement of a proceeding, and what you interpret a  
3 proceeding to be.

4 MS. HELTON: Can I go into a little bit of a  
5 history lesson before I do that?

6 COMMISSIONER BROWN: I'm sure we all would  
7 love to hear it.

8 MS. HELTON: I actually for a different  
9 reason researched the Proposed Agency Action process  
10 recently, and had a discussion with a lot of the  
11 lawyers about it, and crystalized some things that I  
12 thought and learned some things, as well.

13 We have not always used the Proposed Agency  
14 Action process to process rate cases. I'm probably  
15 preaching to the choir here when I'm talking to Mr.  
16 Friedman, and he probably could tell me more than what  
17 I'm going to tell you.

18 It's my understanding that about the early  
19 1980s when about the same time that the Commission  
20 became an appointed Commission versus an elected  
21 Commission, that is when the Commission lost its  
22 hearing officers that were on staff. And the hearing  
23 officers that were on staff processed all of the rate  
24 cases by way of a hearing, and then they would bring a  
25 recommended order to the Commission. And they would --

1 the Commission then would vote out a final order,  
2 following what most administrative lawyers would call  
3 the typical DOAH process.

4 Well, when we lost the hearing officers, it  
5 then became the Commissioners' responsibility to sit in  
6 on all of the hearings. And depending on how many  
7 water and wastewater rate case hearings you have in the  
8 course of a year, which as you know you vote often on  
9 many rate case decisions at just one agenda conference,  
10 that workload would become really practically  
11 impossible for the Commissioners to conduct a hearing  
12 for each of those water and wastewater utilities.  
13 Beside which it's really expensive. It's much more  
14 expensive, typically, to process a water and wastewater  
15 rate case by way of a hearing versus the Proposed  
16 Agency Action process.

17 So if you look back at old orders starting in  
18 the early '80s when we lost the hearing officers, you  
19 will start to see a reference to, well, we're going to  
20 look at a different process for water and wastewater  
21 rate cases. We are going to start following what they  
22 first called the Proposed Agency Action process.

23 Now, as Mr. Friedman pointed out, there are  
24 other agencies that also follow this Proposed Agency  
25 Action process, but that is when we first started using

1 it for water and wastewater utilities. Since then, the  
2 way the courts think about it, and I think the way the  
3 Legislature thinks about it, that Proposed Agency  
4 Action process is outside the scope of Chapter 120.  
5 You'll see language it's an informal free-form  
6 proceeding. That thought is codified in Chapter 120.  
7 And 120 -- when they changed the numbers, I can't ever  
8 remember -- 120.57, Subsection 5, which is the section  
9 of 120 that sets out the procedures for cases where the  
10 facts are disputed, it says this section does not apply  
11 to agency investigations preliminary to agency action.

12 So I agree with Mr. Friedman's conclusion  
13 that the Legislature does not contemplate and the  
14 administration commission in approving or codifying the  
15 Uniform Rules of Procedure does not contemplate formal  
16 discovery in preliminary actions or preliminary  
17 decisions. You will see that sometimes in cases here  
18 at the Commission. I think that the utilities who have  
19 filed petitions recognize that that's an efficient way  
20 for the staff and for interested persons or intervenors  
21 to gather information, and they don't push it, they  
22 don't fight it. Recognizing, too, that if a Proposed  
23 Agency Action goes to hearing, then we have already got  
24 that discovery done and that can be used in the case at  
25 hand for the formal hearing. So I agree with Mr.

1 Friedman there.

2 That being said, they have the burden of  
3 proof. They have to be able to show and prove to the  
4 staff and ultimately to you that they have met that  
5 burden in the case that they filed in their MFRs. I  
6 believe that Chapter 367 gives the Commission the  
7 ability to go in and gather additional information,  
8 which the staff has done by way of data requests. I  
9 think that it's efficient to do it by way of  
10 interrogatories, because then there is not -- those are  
11 always answered under oath, and there is not the  
12 question of what additional process, if any, is  
13 necessary to use that information in the hearing if a  
14 hearing is requested.

15 We also have the issue of Public Counsel.  
16 Public Counsel is different than any intervenor that  
17 you are going to see at the Commission. Public Counsel  
18 was created by the Legislature. It specifically set  
19 out in Chapter 350 what its responsibilities are, what  
20 its rights are, and 350.0611, the, like, precursor  
21 paragraph, it says that Public Counsel shall have such  
22 duties as are necessary to carry out the duties of his  
23 or her office, including but not limited to the  
24 following specific powers. So the list there of all of  
25 the Public Counsel's powers is not inclusive, the way I



1 read this statute.

2 The Legislature has also told us that we  
3 don't have any discretion to do any kind of a standing  
4 test when the Public Counsel tells us they want to  
5 decide whether to participate or not. Our practice has  
6 been, and I think the appropriate practice has been we  
7 must acknowledge intervention when they have asked for  
8 intervention.

9 So this is one of those kind of awkward  
10 situations where we have a company that has come in for  
11 a rate case, it's its right to do so, but that company  
12 has the burden of proof to show you that it deserves  
13 the information. Public Counsel, we know they are  
14 interested. They actually wanted us to go to hearing.  
15 The Commission said no, we're going to follow the less  
16 expensive informal route that, you know, the company  
17 has asked for. So then the question becomes, well,  
18 what process is due to the company, to the staff, who  
19 are acting on your behalf, and to Public Counsel.

20 This is a line that we have not, to my  
21 knowledge, been asked to draw before. I think that  
22 there should be some happy medium. I think that Public  
23 Counsel should be able to ask for some information.  
24 Should it be by way of discovery, formal discovery?  
25 Maybe not. But I think it's to everybody's -- I think

1 we are kind of -- we're looking short term, not  
2 long-term if we try to keep Public Counsel from getting  
3 the information, because hopefully what the goal is  
4 here for everyone is to avoid a hearing, to get to the  
5 best decision that we can by using the PAA process. So  
6 those are my kind of off-the-cuff comments at this  
7 time.

8 **COMMISSIONER BROWN:** Ms. Helton, I really  
9 appreciate it. That was very thorough, and I  
10 appreciate your insight.

11 Staff, where are we with regard to WMSI's  
12 response to staff's requests, data requests?

13 **MR. JAEGER:** I can't remember. Has Data  
14 Request 6 come in? I think we had six data requests,  
15 and I think the utility has responded to all. And then  
16 we sent out interrogatories and PODs, I think, that  
17 parroted, pretty much, what we thought we would like to  
18 see this also. And so it was -- they are almost  
19 identical to some of the stuff, discovery that OPC is  
20 seeking to compel here.

21 **COMMISSIONER BROWN:** Which have not been  
22 responded to yet?

23 **MR. JAEGER:** That has not -- that just did go  
24 out, so the time to respond hasn't run yet.

25 **COMMISSIONER BROWN:** Okay. Thank you.

1                   **MR. SAYLER:** (Inaudible; microphone off.) --  
2 May 18th.

3                   **COMMISSIONER BROWN:** I'm sorry?

4                   **MR. SAYLER:** Staff's interrogatories and PODs  
5 were served on May 18th.

6                   **COMMISSIONER BROWN:** Okay. Thank you.

7                   This is a very interesting issue, very  
8 interesting legal arguments on both parties. And I  
9 know we have a very short time frame, so I plan on  
10 ruling on it very swiftly.

11                   Are there any other matters that need to be  
12 addressed at this time?

13                   **MS. HELTON:** Madam Chairman, may I ask Mr.  
14 Friedman a couple questions that I think will maybe  
15 help us a little bit?

16                   **COMMISSIONER BROWN:** Sure.

17                   **MS. HELTON:** Do you object to OPC propounding  
18 data requests on the company?

19                   **MR. FRIEDMAN:** Yes. I don't think OPC has  
20 the right to ask the utility any questions. What it  
21 has traditionally done -- and when you mention the  
22 burden of proof, you're right, the utility has the  
23 burden of proof. But the burden of proof is  
24 preliminarily to prove to the staff our position and  
25 ultimately to the Commissioners. Our burden is not to

1 prove anything to OPC. So that really doesn't have any  
2 bearing on whether they should be entitled to any  
3 discovery or not.

4 **MS. HELTON:** Notwithstanding the fact that  
5 the Legislature has acknowledged in Chapter 350 that  
6 there is that kind of that special category, I think,  
7 that OPC falls into?

8 **MR. FRIEDMAN:** They are a separate category,  
9 and as I pointed out to the Commissioner earlier, in  
10 the one case that I was able to -- the homeowner group  
11 that I was able to get Commissioner Graham to deny  
12 their intervention, you know, I pointed out just that.  
13 The Public Counsel does have a different -- you know,  
14 they've got a different hat they wear because they can  
15 intervene. But that doesn't say anything about once  
16 they intervene that they have got all of these other  
17 rights.

18 As I pointed out, if they have unlimited  
19 discovery rights, which is what they think they have,  
20 there is no way that this PAA process can work. It's  
21 supposed to be a five-month process. And when you talk  
22 about five months, I understand from the staff it's  
23 really not five months. The staff has got to have  
24 their revenue requirement done five weeks before the  
25 agenda. So that five months, really, for the staff is

1 like three and a half months. How they do it, I don't  
2 know, and send out data requests and get that  
3 information back and figure out how to filter it out, I  
4 don't know how they can do it in three and a half  
5 months.

6 **COMMISSIONER BROWN:** And it works.

7 **MR. FRIEDMAN:** Well, it has been working for  
8 years and years, and somehow everything always works  
9 out. But that's the point is that if you -- and you've  
10 got a small utility. It's not like Aqua that has got,  
11 I think, unlimited resources.

12 To try to -- I don't think physically that  
13 this company can answer the discovery from the staff,  
14 the data requests from the staff, a response to the  
15 staff audit, all the discovery from the Public Counsel  
16 and still you have got to run a business.

17 **COMMISSIONER BROWN:** But it sounds like  
18 staff's requests mirror OPC's with regard to a lot of  
19 the ROGs.

20 **MR. FRIEDMAN:** And I'm very disappointed in  
21 that, too, because I think that they are off on a  
22 tangent. But, you know, they have got the right to ask  
23 and we've got the right to say something else. But  
24 what it seems to me that has worked in these cases is  
25 that the Public Counsel files these issues, and they

1 have done in at least the last three or four rate cases  
2 I have been involved in, they file with the Clerk,  
3 usually Denise Vandiver does it, they file with the  
4 Clerk a list of issues and concerns, you know, this  
5 case is probably four pages long with 29 or 30 issues.  
6 And that gives the staff an opportunity to see, all  
7 right, this is the way that Public Counsel sees it.

8 And they kind of -- so the Public Counsel is  
9 filtered so that, you know, we don't have to respond to  
10 everything that Public Counsel does. What the staff  
11 has typically done in these other cases and in this  
12 case is they look at those issues and concerns and they  
13 go, you know what, that's a good point Public Counsel  
14 raised, and they turn around and either send it in a  
15 data request or in this case --

16 **COMMISSIONER BROWN:** Mr. Friedman, I  
17 completely -- I hear your concerns.

18 **MR. FRIEDMAN:** That is the process. Because  
19 legally speaking, and I don't -- you know, we really  
20 never got to the question other than saying that Public  
21 Counsel has got some statutory authority to  
22 intervene -- it doesn't say anything about them having  
23 the statutory authority to reek havoc on the PAA  
24 process. It says they have the right to intervene.  
25 And it doesn't even say they have a right to intervene

1 in the PAA process. I mean, you could probably make an  
2 argument that that really means there has got be a,  
3 quote, proceeding, and there is no real proceeding --

4 **COMMISSIONER BROWN:** We are getting a little  
5 bit off course here. Ms. Helton, do you have any other  
6 questions?

7 **MS. HELTON:** I'm sorry. No, ma'am.

8 **MR. FRIEDMAN:** I'm tempted to get on my soap  
9 box sometimes. I apologize.

10 **COMMISSIONER BROWN:** And I usually enjoy it,  
11 but at this juncture another day, another time.

12 **MR. FRIEDMAN:** All right.

13 **COMMISSIONER BROWN:** Are there any other  
14 matters that need to be addressed here?

15 **MR. SAYLER:** No, ma'am, other than to say  
16 that OPC had a much longer list of discovery that we  
17 scaled back significantly to serve what we did serve,  
18 so --

19 **COMMISSIONER BROWN:** Okay. Thank you.

20 Mr. Friedman, any other matters?

21 **MR. FRIEDMAN:** No, and I appreciate the  
22 opportunity to do this verbally, because I think it is  
23 kind of a -- as Ms. Helton pointed out, it's a case of  
24 first impression. I mean, I don't think that the  
25 Commission has dealt -- staff has dealt with what

1 discovery, you know, the Public Counsel or any  
2 intervenor can really have in a PAA case. And I think  
3 it's an important issue that really needs to get some  
4 brain power on it.

5 **COMMISSIONER BROWN:** I've enjoyed listening  
6 to it.

7 **MR. FRIEDMAN:** And I agree with Ms. Helton  
8 when she says, you know, she said discovery, the 106,  
9 the authority that they cited really -- I think what  
10 Ms. Helton said, it doesn't apply.

11 **COMMISSIONER BROWN:** I appreciate it, and I  
12 have enjoyed listening to both parties, or both sides.

13 Staff, are there any other matters that need  
14 to be addressed?

15 **MR. JAEGER:** None that I know of,  
16 Commissioner.

17 **COMMISSIONER BROWN:** Okay. Thank you.

18 **MR. FRIEDMAN:** (Inaudible; microphone off.)

19 **COMMISSIONER BROWN:** (Laughter.) Don't do  
20 that again. Transcripts of this proceeding are due  
21 June 8th, 2012. I will make my ruling after my review  
22 of the transcripts, but I plan on making it hopefully  
23 before then. So thank you very much.

24 (The Oral Argument concluded at 1:45 p.m.)  
25



1  
2 STATE OF FLORIDA )

3 : CERTIFICATE OF REPORTER

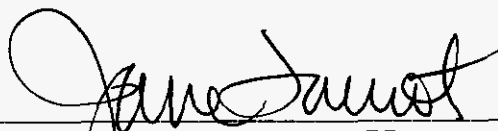
4 COUNTY OF LEON )

5  
6 I, JANE FAUROT, RPR, Chief, Hearing Reporter  
7 Services Section, FPSC Division of Commission Clerk, do  
8 hereby certify that the foregoing proceeding was heard  
9 at the time and place herein stated.

10 IT IS FURTHER CERTIFIED that I  
11 stenographically reported the said proceedings; that  
12 the same has been transcribed under my direct  
13 supervision; and that this transcript constitutes a  
14 true transcription of my notes of said proceedings.

15 I FURTHER CERTIFY that I am not a relative,  
16 employee, attorney or counsel of any of the parties,  
17 nor am I a relative or employee of any of the parties'  
18 attorney or counsel connected with the action, nor am I  
19 financially interested in the action.

20 DATED THIS 7th day of June, 2012.

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JANE FAUROT, RPR  
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