

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 16, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Rendell, Bulecza-Banks, Lingo, Willis)
Office of the General Counsel (Gervasi, Fleming, Jaeger)

RE: Docket No. 060368-WS – Application for increase in water and wastewater rates in Alachua, Brevard, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.

AGENDA: 08/28/07 – Regular Agenda – Decision Prior to Hearing – Oral Argument
Requested on Issue 2 -- Interested Persons May Participate on Issues 3-8

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: 03/26/08 - Twelve Month Statutory Deadline

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\APP\WP\060368.RCM.DOC

Case Background

Aqua Utilities Florida, Inc. (AUF or utility) is a wholly-owned subsidiary of Aqua America, Inc. AUF provides water and wastewater service in eighty service areas (56 water and 24 wastewater systems) in 15 counties pursuant to certificates issued by the Commission. As a result of a recent corporate reorganization, AUF became the sole shareholder of the eighty Florida Commission-regulated water and wastewater systems that are the subject of this rate case application. In 2005, the utility recorded total company operating revenues of \$5,057,386 and \$2,754,640 for water and wastewater, respectively. AUF reported net operating losses for 2005

of \$540,773 for water and \$552,776 for wastewater. In 2005, AUF had 16,717 water and 6,302 wastewater customers on a total company basis.

On December 1, 2006, AUF filed an application for approval of interim and final water and wastewater rate increases, pursuant to Sections 367.081 and 367.082, Florida Statutes (F.S.). The utility also requested an increase in service availability charges and an allowance for funds prudently invested. On January 3, 2007, the Commission staff determined that AUF's Minimum Filing Requirements (MFRs) had several deficiencies. From January 19, 2007 through February 21, 2007, AUF had submitted several responses to correct its MFR deficiencies. On February 27, 2007, the Commission staff determined that AUF still had some engineering MFR deficiencies. AUF submitted its additional responses to correct its MFR deficiencies on March 26, 2007. Staff determined these responses satisfied the deficiencies and established the official date of filing as March 26, 2007.

The Office of Public Counsel's (OPC) notice of intervention in this rate case was acknowledged by Order No. PSC-07-0084-PCO-WS, issued January 30, 2007. The Attorney General, State of Florida's (AG) petition to intervene in this rate case was granted by Order No. PSC-07-0631-PCO-WS, issued August 1, 2007.

The utility's application for increased final water and wastewater rates is based on the projected twelve-month period ending December 31, 2007. In its filing, the utility states that the rate increase is necessary because the utility did not earn a fair and reasonable rate of return on its investment. AUF's requested final rate increase would result in additional operating revenues of \$7,298,294 for the utility's combined water and wastewater operations.

By Order No. PSC-07-0325-FOF-WS, issued April 16, 2007, the Commission granted interim rates to AUF. The order required AUF to collect the interim rate increase under guarantee subject to refund with interest. Aqua America, Inc. submitted a corporate undertaking on behalf of AUF in the amount of \$2,671,026.

The Commission conducted 12 customer service hearings in 10 Counties throughout Florida during the months of May and June, 2007. At these service hearings, the customers of AUF presented testimony as well as exhibits related to AUF's operations, billing, and quality of service.

This recommendation addresses the Joint Motion to Dismiss filed by OPC and the AG on July 31, 2007 (Joint Motion to Dismiss), AUF's Response in Opposition to Joint Motion to Dismiss (Response), and other causes which staff recommends warrants the dismissal of AUF's request for an increase in water and wastewater rates. The recommendation also addresses the appropriate rates for AUF, the refund of interim rates, and several show cause issues for apparent violations of Commission rules and orders. OPC and AUF have requested oral argument on the Joint Motion to Dismiss. Those requests are addressed in Issue 1.

The Commission has jurisdiction pursuant to Sections 367.081, 367.082, and 367.161, F.S.

Discussion of Issues

Issue 1: Should OPC and AUF's Requests for Oral Argument on the Joint Motion to Dismiss filed by OPC and the AG be granted?

Recommendation: Yes, the Requests for Oral Argument on the Joint Motion to Dismiss should be granted. Parties should be allotted up to 15 minutes for each side (OPC/AG and AUF) to address the Commission on Issue 2. (Gervasi, Fleming, Jaeger)

Staff Analysis: OPC and AUF filed their Requests for Oral Argument pursuant to Rule 25-22.0022, Florida Administrative Code (F.A.C.). Rule 25-22.0022(1), F.A.C., requires requests for oral argument to be filed concurrently with the motion on which argument is requested and to state with particularity why oral argument would aid the Commission in understanding and evaluating the issues to be decided.

In support of its Request for Oral Argument, which OPC electronically submitted for filing concurrently with the Joint Motion to Dismiss,¹ OPC states that the Joint Motion to Dismiss is based on the grounds that AUF effectively filed an entirely new case just two weeks before intervenor testimony is due, that AUF failed to comply with Order No. PSC-07-0592-PCO-WS, issued July 19, 2007, compelling AUF to respond to certain overdue discovery requests, and that Commission precedent would support dismissal of the rate case under the current conditions. OPC further states that due to the complexity of the issues and the gravity of the Joint Motion to Dismiss, the Commission would be well-served to avail itself of the give-and-take format of oral argument.

In support of its Request for Oral Argument, AUF states that this case has been an enormous undertaking and involved the substantial expenditure of resources by the Commission, staff, AUF, and the intervening parties. In light of the extreme sanction sought by OPC and the AG, AUF argues that at the very least, it should have the opportunity to appear and present oral argument in opposition to the Joint Motion to Dismiss. Further, AUF states that oral argument will aid the Commissioners in understanding and evaluating the factual and legal issues raised by the Joint Motion to Dismiss, which include the substantial number of discovery requests that AUF has responded to, the revised operations and maintenance (O&M) expense numbers provided by AUF in response to the staff audit, and the consequences of dismissal to AUF, the potential impact on AUF's continued operations, and the potential resulting impacts on AUF's customers should the Commission dismiss the case.

Staff agrees that oral argument may aid the Commission in evaluating the issues before it. Therefore, staff recommends that the Requests for Oral Argument should be granted. AUF requests that each side (OPC/AG and AUF) be granted up to 20 minutes for oral argument. Although required by Rule 25-22.0022(1), F.A.C, OPC does not specify an amount of time requested for oral argument.

¹ OPC's Request for Oral Argument was electronically submitted for e-filing on July 31, 2007. However, due to the Request for Oral Argument having initially been sent to a spam folder in the Clerk's Office, filing lag occurred and the actual date of the filing is August 3, 2007. OPC electronically served the parties and staff with a copy of the Request on July 31, 2007, concurrent with the Joint Motion to Dismiss.

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Date: August 16, 2007

Staff recommends that 15 minutes per side (OPC/AG and AUF) is a reasonable and sufficient amount of time to address the Commission on Issue 2. Interested persons may also address the Commission on Issues 3-8.

Issue 2: Should the Joint Motion to Dismiss AUF's request for an increase in water and wastewater rates filed by OPC and the AG be granted?

Recommendation: Yes, the Joint Motion to Dismiss should be granted. AUF's Minimum Filing Requirements (MFRs) regarding its operating expenses are irreparably flawed, the utility has failed to provide sufficient or timely supporting documentation in response to discovery and audit requests to support its rate request, and failed to fully comply with two Orders compelling discovery responses by dates certain. AUF's request for a general rate increase should also be dismissed because the MFRs are irreparably flawed with respect to 1) projected plant additions; and 2) engineering data. In addition, AUF has not provided sufficient documentation regarding the historical number of bills rendered or the number of gallons sold during either the 2005 test year or during 2006, its 2005 and 2006 gallons data are irreparably flawed, and AUF has failed to support its 2006 and 2007 billing determinants projections. (Rendell, Lingo, Gervasi, Fleming, Jaeger)

Staff Analysis:

A. Joint Motion to Dismiss

1. OPC and AG's Arguments

In its Joint Motion to Dismiss, OPC and the AG (intervenors) state that AUF's rate filing should be dismissed for three reasons. First, on July 20, 2007, the utility effectively withdrew all of its initial expense MFRs and refiled a new case. OPC and the AG point out that in a test year approval letter dated May 23, 2006, the Chairman instructed the utility that "[b]ecause of the time limitation contained in Section 367.081, F.S., and the lengthy auditing and investigation required, information not filed with the original application may not be considered." A second request for extension of time to file MFRs on December 1, 2006, was approved with the admonition that "any subsequent request may be rejected if the December 31, 2007 projected test year no longer corresponds to the company's operations." AUF's MFRs were not officially filed until March 26, 2007, after staff issued two rejection letters citing numerous deficiencies.

The intervenors further state that by POD No. 124 from OPC's second set of PODs served on AUF on April 27, 2007, OPC requested that the utility "[p]rovide all documents utilized by the company to project 2006 and 2007 test year expenses. Please provide the data in an electronic format." After being forced by Order No. PSC-07-0592-PCO-WS to respond to large quantities of long overdue discovery, the utility's response was to submit, on July 20, 2007, a 628-page electronic worksheet with all new expense numbers. The intervenors state that, in so doing, the utility disavows the entirety of its original expense filing, and seeks to replace all of it with an entirely new unexplained 628-page spreadsheet within a timeframe that prevents any meaningful analysis. The intervenors assert that AUF's answer amounts to a complete refiling under the guise of a discovery response provided almost two months late, two weeks before intervenor testimony is due.

Along with its 628-page spreadsheet, AUF provided the following information:

During the course of the post-filing analysis, the Company became aware of several unintended results within the filed expense data. These discoveries led to disconnects between the Company's intended and supportable expense trends and results, and the data represented in the MFRs. This resulted in the inability to present to the FLPS Staff Audit team a clear, comprehensible, detailed analysis of expense development by total or by system. The Company responded with any and all available detail regarding the results of actual operations in 2005 and 2006 to assist the auditors on the development of their analysis. Concurrently, the Company commenced with preparation of a revised and refreshed expense development analysis for the years 2006 and 2007 that is presented in the attached excel file in response to the Staff Audit and this document request. The Company is providing a "bridge" document which is being submitted to support the rationale behind the revised 2007 expenses and the change in expense as compared to year 2006 actual expenses. Note that the O&M expense analysis and comparison prepared in response to Staff Audit Findings Nos. 22 and 24 is based on Staff's observed 2006 actual O&M expense level of \$7,186,381, which by its nature does not include amortization.

According to the intervenors, by submitting new MFRs at this stage of the proceeding, AUF would make a mockery of the process and AUF is urging the Commission to violate its statutory responsibility. By statute, the Commission is prohibited from establishing rates that are not shown to be reasonable. By statute and rule, the Commission has a very deliberative process whereby it can fully analyze a filing in a timely fashion and, in the final analysis, assure the public that the rates that result from the Commission's hearing process are reasonable. With AUF's wholesale re-filing at this date, the intervenors assert that they would be robbed of the timeframes that have been established to allow for the depth of analysis necessary for the Commission to assure the public of reasonable rates.

The intervenors' second reason for dismissing the rate case is that AUF has violated Order No. PSC-07-0592-PCO-WS, compelling the utility to provide long overdue discovery responses to numerous OPC discovery requests. This matter is further addressed in Issue 5. Attached to the Joint Motion is a compilation of all OPC discovery to which AUF referred to its response to OPC POD No. 124 as its answer. OPC invites the Commission to examine the specific questions asking for the justification and explanation of a multitude of specific individual entries and their growth from one year to the next, and consider whether such questions can be answered by a spreadsheet of numbers without any explanation. OPC claims it is utterly preposterous and an insult to this Commission's due process procedures to suggest that a series of specific questions can be answered with a 628-page spreadsheet of entirely new, unexplained numbers. The intervenors argue that by refusing to provide meaningful responses to 112 interrogatories and 28 PODs, AUF has failed to comply with a lawful Commission Order and its filing should be dismissed.

The intervenors' third reason for dismissing the rate case is that Commission precedent supports dismissal under the current circumstances. Although there are no Commission cases

directly on point, the Commission has dealt with the issue of dismissal a number of times, most recently in Docket No. 060262-WS.² In that case, without proceeding to hearing, the Commission denied Labrador Utilities, Inc.'s (Labrador) request for a final rate increase and required the utility to refund the interim rate increase that had been granted earlier. By Order No. PSC-07-0129-SC-WS, issued February 14, 2007, in that case, the Commission concluded that the data supplied by Labrador was insufficient to determine the revenue requirement and set reasonable rates. The Commission dismissed the case without a hearing because of the utility's inability to produce reliable test year data. The intervenors state that in the instant case, AUF has admitted that its expense data is unsupported. Therefore, like Labrador, its data is insufficient to determine the revenue requirement and set reasonable rates. Just as with Labrador, the Commission should deny AUF's requested rate increase.

Among other cases cited by the intervenors as precedent for dismissing the instant case,³ the intervenors point out that the Commission reached a similar result in Docket No. 900329-WS.⁴ In that case, the Commission denied in its entirety the application for rate increase filed by Southern States Utilities, Inc. (SSU), stating that "we repeatedly were confronted with flaws in the utility's case."⁵ The intervenors note that, unlike Labrador, the Commission first held a hearing for SSU before denying the case based on the unreliability of the filed data. In the instant case, however, a hearing is unnecessary because AUF itself is already admitting that its own forecasts are so severely in error that they cannot be relied upon.

Finally, OPC cites to Order No. 18335,⁶ in which the Commission continued a hearing after the hearing was convened upon finding that the testimony filed by General Development Utilities, Inc. (GDU) was inconsistent with the MFRs with respect to the cost of a storage station. By a subsequent order, the Commission rescheduled the hearing for four months later.⁷ OPC argues that if the change in the cost of just one storage station called for a four-month

² In Re: Application for increase in water and wastewater rates in Pasco County by Labrador Utilities, Inc.

³ Order No. 23123, issued June 26, 1990, in Docket No. 891114-WS, In Re: Application of Sailfish Point Utility Corporation for rate increase in Martin County; (dismissing the case on the grounds that the utility changed its MFRs after the initial filing); and Order Nos. PSC.93-1735-FOF-WU, issued December 2, 1993, in Docket No. 930770-WU, In Re: Application for a rate increase in Franklin County by St. George Island Utility Company, LTD and 24922, issued November 25, 1991, in Docket No. 900757-SU, In Re: Application for a rate increase in Collier County by Naples Sewer Company; (dismissing rate case applications before hearing because of utilities' failure to timely notice the customers).

⁴ In Re: Application for a rate increase in Citrus, Martin, Marion, and Charlotte/Lee Counties by Southern States Utilities, Inc.; in Collier County by Marco Island Utilities (Deltona) and Marco Shores Utilities (Deltona); in Marion County by Marion Oaks Utilities (United Florida); and in Washington County by Sunny Hills Utilities (United Florida).

⁵ Order No. 24715, issued June 26, 1991, at p. 512, in Docket No. 900329-WS.

⁶ Issued October 22, 1987, in Docket No. 870239, In Re: Application of General Development Utilities, Inc., Silver Springs Shores Division, for increased water and sewer rates in Marion County.

⁷ Order No. 18557, issued December 16, 1987, in Docket No. 870239.

continuance, the wholesale replacement of 628 pages of different expense items for all 80 systems should require a dismissal and refiling.

2. AUF's Response

AUF timely filed its Response on August 10, 2007.⁸ AUF states that its application for rate increase is of a size and magnitude not seen by the Commission since SSU filed its application for rate increase in Docket No. 950495-WS. The initial filing consists of 7 volumes of MFRs containing 168 bound books and file folders totaling approximately 439,400 pages. AUF's filing is uniquely large when compared with other water and wastewater utilities regulated by the Commission. Based on 2007 investments, expenses and revenues, AUF will earn negative overall rates of return and returns on equity for its water and wastewater systems in 2007. AUF's requested final rate increase would result in additional operating revenues of \$7,298,294 for the utility's combined operations. Virtually all of the 80 systems have not been granted rate relief in over ten years. Accordingly, AUF requires rate relief to gain some measure of financial viability in Florida.

AUF states that after the audit staff recommended a reduction of O&M expense for 2006 and 2007, due to audit staff's inability to fully understand and analyze the utility's originally filed expense data, the utility made a good faith effort to review and reanalyze the data. This is consistent with the purpose of the post-filing auditing process. The utility does not believe that its corrected O&M expense data constitutes a new rate filing. AUF considered itself to have a duty and obligation to provide the corrected information, even though the effect was to lower its requested revenue requirement. Further, AUF provided the parties and staff with a "bridge document" that it created with documented rationale for the changes in O&M expenses. AUF argues that the expense portion of the MFR filing is only one portion of this case, and that the case should not be dismissed as a response to the utility's good faith provision of more complete and accurate expense analysis.

AUF further states that it has responded to a voluminous number of inquiries, data requests, interrogatories, and PODs served by the staff, staff auditors, and OPC. While AUF has admittedly been late in serving a number of responses to discovery requests, the utility has expended enormous resources and hours in a good faith effort to comply with applicable Commission rules, respond to all discovery and audit requests, and to generally be cooperative and responsive to staff and OPC.

AUF argues that "motions to dismiss are looked on with disfavor . . . and are granted sparingly and with care."⁹ Typically, a motion to dismiss directs itself to the sufficiency of a

⁸ On August 3, 2007, AUF filed a Motion for Extension of Time and Request for Expedited Ruling, requesting a five-day extension of time to file and serve its Response to the Joint Motion to Dismiss. That request was granted in part and denied in part by Order No. PSC-07-0638-PCO-WS, issued August 6, 2007, which allowed AUF to file its Response by August 10, 2007.

⁹ Oguz v. Oguz, 478 So. 2d 437 (Fla. 5th DCA 1985). See also Midflorida Schools Federal Credit Union v. Fansler, 404 So. 2d 1178 (Fla. 2nd DCA 1981) (holding that cases are generally to be tried on their proofs rather than the pleadings.)

pleading be it a complaint or petition. In such cases, the standard applied by the courts and the Commission is well established:

The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. (Citations omitted). In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. (Citations omitted). Significantly, all material factual allegations of the complaint must be taken as true. (Citations omitted).¹⁰

The Joint Motion to Dismiss is not predicated on an alleged deficiency or defect in AUF's application from a pleading standpoint. Instead, the dismissal sought by OPC and the AG is sought as a sanction. And "[b]ecause dismissal is the ultimate sanction in the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result."¹¹

By their own admission, the intervenors state that there are no Commission cases directly on point to support dismissal in this case. AUF argues that the Commission must reject such a far reaching attempt to impose the ultimate sanction of dismissal on AUF without any supporting precedent.

According to AUF, the most applicable precedent comes from the series of orders issued by the Commission addressing the numerous motions to dismiss filed by OPC in the SSU multi-system rate case in Docket No. 950495-WS. All of OPC's motions to dismiss were denied in that case. The denial of OPC's Fifth Motion to Dismiss is particularly instructive here. The Commission noted the severity of dismissal as a penalty and that dismissal requires an express finding for a willful or deliberate refusal to obey an order regarding discovery. The party moving for sanctions must demonstrate meaningful prejudice as a result of the failure to comply. The Commission found that SSU's untimely responses to discovery did not rise to the level for which sanctions should be imposed, let alone the dismissal of the entire proceeding.¹²

AUF asserts that, in the instant case, no allegation is or could be made in the Joint Motion to Dismiss that AUF has willfully or deliberately refused to obey a discovery order and that

¹⁰ See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So. 2d 214, 215 (Fla. 2nd DCA 1998); Order No. PSC-05-0171-FOF-TP, issued February 15, 2005, in Docket No. 041269-TP, In Re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

¹¹ Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1994). See also Jacob v. Henderson, 840 So. 2d 1167, 1169 (Fla. 2003).

¹² Order No. PSC-95-1568-FOF-WS, issued December 18, 1995, in Docket No. 950495-WS, In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.

meaningful prejudice has resulted as a result of such actions. While the intervenors have indicated they may be prejudiced by the filing of the corrected O&M expense data, they have not demonstrated prejudice which would justify dismissal because AUF has previously advised OPC, the AG, and staff of its willingness to reschedule the controlling dates for filing testimony and the date for the final hearing, while also addressing interim rates. AUF reaffirms its commitment to do so and is willing to suspend the collection of interim rates for a period of time in this proceeding to insure no prejudice to the parties or to AUF's customers.

Also in Docket 950495-WS, in denying OPC's Tenth and last Motion to Dismiss, the Commission noted that the allegations of the intervenors, including alleged misconduct by SSU, were based upon facts which were in dispute. Thus, the Commission correctly concluded that the proper motion would have been a motion for summary final order rather than a motion to dismiss.¹³ That rationale applies here as well. OPC and the AG have made allegations in their Joint Motion to Dismiss disparaging AUF's intent and conduct in providing the corrected O&M expense data and have mischaracterized the impacts of the corrected data. AUF disputes these allegations. These disputed, material facts cannot, as a matter of law, be resolved through a motion to dismiss and must be adjudicated by the Commission before the Commission can make any determination that it is appropriate to impose the ultimate sanction of dismissal.

Finally, AUF argues that typically, where a rate case has been dismissed, it has been a case involving a water and/or wastewater system and not an extremely large multi-system filing where the Commission has recognized that adjustments will be made due to the enormity, volume and complexity of the filing. While it is true, as pointed out in the Joint Motion to Dismiss, that the Commission denied an application for a rate increase filed by SSU in 1990 due to flaws in the utility's data and a determination that the utility had not met its burden of proof, those determinations were made by the Commission only after the utility had been given the opportunity to go to hearing and present its case.¹⁴ Indeed, in the GDU rate case cited in the Joint Motion to Dismiss, the Commission confirmed its authority to avoid the extreme sanction of dismissal and reschedule a hearing on a rate case where the Commission has concerns that "new data" has been filed by the utility after the filing of the initial MFRs.

AUF requests that the Commission enter an order denying the Joint Motion to Dismiss. AUF further requests that the Commission continue and reschedule the controlling dates for filing testimony, the prehearing conference and the final hearing in this docket to allow reasonable and sufficient time for the intervenors and staff to serve discovery to address and respond to the corrected O&M expense data.

¹³ Order No. PSC-96-1320-FOF-WS at 13-16, issued October 30, 1996.

¹⁴ See Joint Motion to Dismiss at paragraph 12, citing Order No. 24715, issued June 26, 1991, in Docket No. 900329-WS.

3. Analysis and Recommendation

a. Legal Authority to Dismiss

Motions to dismiss are typically addressed by considering whether the facts set forth in the initial pleadings, viewed in the most favorable light, demonstrate a claim for which the Commission can grant relief under the substantive law on the matter; in this case, the provisions of section 367.081, F.S.¹⁵ Pursuant to Rule 28-106.204(2), F.A.C., such motions to dismiss must be filed no later than 20 days after service of the petition unless otherwise provided by law. However, OPC and the AG did not allege that AUF did not state a cause of action, but rather that the case should be dismissed because the utility effectively withdrew all of its initial expense MFRs and refiled a new case, and violated a Commission order compelling the utility to provide long overdue discovery responses to numerous discovery requests.

AUF argues that because the allegations supporting the Joint Motion to Dismiss are based upon facts that are in dispute, the proper motion would have been a motion for summary final order rather than a motion to dismiss. However, Section 120.57(1)(h), F.S., provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), F.A.C., states that "any party may move for summary final order whenever there is no genuine issue as to any material fact." Clearly there are many material facts in dispute as pointed out by the intervenors and by the utility, which would render the filing of a motion for summary final order inappropriate.

The Commission has the authority to dismiss a matter for failure to comply with discovery procedures pursuant to Rule 1.380(b)(2), Florida Rules of Civil Procedure. Section 120.569(2)(f), F.S., provides that the presiding officer has the power to, among other things, "effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions, except contempt."¹⁶ Moreover, when a utility fails to establish its entitlement to the relief requested in its petition, the Commission has the authority to deny that petition.¹⁷

b. Withdrawal of Initial Expense MFRs

Staff reviewed the utility's MFR Schedules, which present the accounting information required to process AUF's rate case. Based on the documentation and projections presented in

¹⁵ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957).

¹⁶ See also Rule 28-106.206, F.A.C., stating that "[a]fter commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure."

¹⁷ Order No. PSC-07-0129-SC-WS at 9, issued February 14, 2007, in Docket No. 060262-WS, In Re: Application for increase in water and wastewater rates in Pasco County by Labrador Utilities, Inc (citing City Gas Co. of Fla. v. FPSC, 501 So. 2d 580 (Fla. 1987)).

the MFRs, the operating expenses appear to be highly questionable. AUF presented projected expenses in the B Schedules of its MFRs for 2006 and 2007. The staff auditors attempted to perform an audit of the utility's 2006 projections because the audit was actually performed after the conclusion of 2006. Pursuant to Audit Findings 23 and 24, staff auditors requested support, including all information necessary to show the basis of projections for AUF's projected O&M expenses. Staff auditors specifically requested workpapers and explanations and support of any allocation methodologies. This was followed up by several e-mails detailing the outstanding requests and due dates. Staff auditors note that the supporting documentation should have been readily available since this information was used by AUF in preparing its MFRs. The utility had over three months to provide the required support; however, this information was not provided to the auditors. On July 17, 2007, AUF submitted its response to the Audit Report, stating that

[d]uring the course of the post-filing analysis, the Company became aware of several unintended results within the filed expense data. These discoveries led to disconnects between the Company's intended and supportable expense trends and results, and the data represented in the MFRs. This resulted in the inability to present to the audit team a clear, comprehensible, detailed analysis of expense development in total or by system.

AUF further states that:

[c]oncurrently, the Company commenced with preparation of a revised and refreshed expense development analysis for the years 2006 and 2007 that is presented in the attached excel file in response to this audit finding.

The above response was also submitted in response to staff's Interrogatory No. 60 and OPC's POD No. 124, prompting the intervenors to file their Joint Motion to Dismiss. Staff's discovery sought information concerning utility expenses for purchased water for systems with water wells and no interconnections with another provider, and for purchased wastewater for systems with wastewater treatment plants and no interconnections with another provider.

By way of its response, the utility is attempting to revise its rate case application by submitting additional information seven months after it filed its MFRs, four months after the official date of filing, and one month after the Commission concluded the service hearings in this rate case. The filing of this revised data is also one month before the testimony is due from the intervenors and staff. For the 2007 projected test year, the newly revised projected O&M expenses vary by a total of \$1,145,384.

Staff does not view this new information as merely a reduction from the utility's MFRs. An attempt to correct AUF's MFRs would result in a complete reconstruction of the projected O&M expenses by staff. To do so would be an insurmountable task, which is not contemplated in the rate case procedures. As stated previously, AUF's rate case involves 80 systems on a projected test year basis. The revenue requirement must be established for each system individually. Staff notes that the Commission has made adjustments to filed data in past rate cases for utilities when the corrections were based on known and measurable changes. Nevertheless, the data supplied by AUF is so voluminous that staff cannot make corrective

adjustments in this case. To correct and revise the utility's filing would equate to a staff-assisted rate case for the largest Class A utility in the state. The timeframes established early in this docket¹⁸ assume that the basis for the utility's rate request was accurately reflected in its MFRs, and by the utility's own admission, that is no longer the case.

c. AUF's Non-Responsiveness to Discovery Requests

As part of the discovery process in this rate case, both staff and OPC have served numerous interrogatories and PODs upon AUF. AUF has habitually either been late or non-responsive to this discovery. On July 16, 2007, OPC filed a Motion to Compel the utility to answer by July 20, 2007, all discovery requests propounded by OPC and staff. OPC noted that its prefiled testimony was due on August 7, 2007, and that it was imperative that it receive the discovery responses requested from both OPC and staff in time to prepare its testimony. OPC stated that out of 183 OPC interrogatories, AUF had not responded to 99 of them, and that on average, the responses were more than 40 days overdue. Also, out of 174 PODs propounded by OPC, OPC stated that AUF had not responded to 91 of them, and that on average, the responses were 33 days overdue. Staff served 89 interrogatories and 40 PODs upon AUF. Out of the 89 interrogatories, 74 of the responses were late, and on average, were filed approximately 26 days overdue. Out of the 40 PODs, 21 of the responses were late, and on average, the responses were filed approximately 23 days overdue.

In admitting that it has been late in serving a number of responses to discovery requests, AUF argues that the utility has expended enormous resources and hours in a good faith effort to comply with applicable Commission rules, and to respond to all discovery and audit requests. AUF points out that its rate case application is of a size and magnitude not seen by the Commission since SSU filed its rate case application for over 140 water and wastewater systems in Docket No. 950495-WS. AUF should therefore have anticipated the magnitude of discovery requests that would be propounded upon it in such a case, and it should have assured that it had adequate staffing to respond to those requests within the required timeframes when it filed the rate case.

The intervenors argue that by refusing to provide meaningful responses to 112 interrogatories and 28 PODs, AUF has failed to comply with a lawful Commission Order and its filing should be dismissed. Staff agrees. AUF argues that the Commission's denials of the motions to dismiss filed in the SSU multi-system rate case in Docket No. 950495-WS are instructive here. Unlike that case, however, staff believes that the magnitude of AUF's non-responsiveness to discovery requests in this case warrants dismissal of the proceeding, and that the intervenors have made a showing of meaningful prejudice as a result of AUF's failure to comply.

In Issue 5 of this recommendation, staff recommends that if the Commission denies the Joint Motion to Dismiss, AUF should be ordered to show cause as to why it should not be fined

¹⁸ See Orders No. PSC-07-0219-PCO-WS, issued March 9, 2007, establishing procedure for this rate case, and PSC-07-0540-PCO-WS, issued June 28, 2007, revising the due dates established for pre-filing testimony.

for its apparent failure to fully comply with Order Nos. PSC-07-0592-PCO-WS and PSC-07-0598-PCO-WS, compelling discovery responses by dates certain.

d. AUF's Request to Continue Controlling Dates and Suspend Collection of Interim Rates

AUF states that it is willing to postpone and reschedule the controlling dates for testimony and the hearing in this matter, and to suspend the collection of interim rates for a period of time in this proceeding to insure no prejudice to the parties or to AUF's customers. AUF requests that the Commission continue and reschedule the controlling dates for filing testimony, the prehearing conference and the final hearing in this docket to allow reasonable and sufficient time for the intervenors and staff to serve discovery to address and respond to the corrected O&M expense data. AUF does not state when it proposes that the suspension of interim rates would start, nor what rates AUF proposes to charge during the suspension period.

Staff does not believe it would be appropriate to postpone and reschedule the controlling dates for testimony and the hearing in this matter, or to suspend the collection of interim rates for a period of time in order to address the corrected O&M expense data. In addition to the O&M expense data, there are numerous other errors, inconsistencies and discrepancies throughout AUF's entire filing, as further discussed below. Any attempt to repair the filing at this juncture would in fact result in a complete refiling of the entire rate case, starting from the utility's application, MFRs and direct testimony in support thereof.

e. Recommendation on Joint Motion to Dismiss

Based on the foregoing, staff recommends that the Joint Motion to Dismiss should be granted for the reasons stated therein, without prejudice for AUF to refile a new application for rate relief. The utility's MFRs regarding its operating expenses are irreparably flawed. Moreover, AUF has failed to provide sufficient, timely supporting documentation in response to discovery and audit requests to support its rate request.

B. Other Causes for Dismissal

In addition to the above-described concerns about AUF's operating expenses data, staff has grave concerns about three other major areas of this case: 1) projected plant additions 2) engineering data; and 3) billing determinants. These concerns are further reason to dismiss the case. A discussion of these areas of concern follows.

1. Projected Plant-in-Service

Based on the documentation and projections presented in the MFRs, the requested plant-in-service amounts appear to be highly questionable. AUF projected capital improvements for 2006 and 2007 for the various systems in MFR Schedules A-4, A-5, and A-6. To support its projections, the utility filed testimony by witness Gerard P. Connolly, Jr. with Exhibit No. GPC-3. Exhibit No. GPC-3 contains AUF's construction budget, by system, for 2006 and 2007. Staff compared amounts presented in Exhibit GPC-3 in support of the requested plant to MFR

Schedules A-4, A-5, and A-6. According to this comparison, the 2006 amounts requested in the utility's MFRs differ in 48 of the 80 systems (or 60%) and vary by a total amount of \$119,756 for water and \$1,788,427 for wastewater. The 2007 amounts requested in AUF's MFRs differ in 14 of the 80 systems (or 17.5%) and vary by a total amount of \$117,404 for water and \$4,919 for wastewater.

Pursuant to Audit Finding No. 7, the audit staff compared the projected plant balances for December 31, 2006, in AUF's MFRs to the actual plant balances as of December 31, 2006. The actual plant balances recorded were \$6,227,656 less than the projected balances included in the MFRs. In response, the utility indicated that while the actual plant balances were significantly lower than the projected balances, it had a substantial balance in construction work in process (CWIP), as well as numerous budget carry-forwards. Staff auditors indicated that while they believe the 2006 projections may be overstated, AUF provided information that the ending balance for December 31, 2007 may be reasonable. However, the staff auditors requested supporting information for numerous system projects that were over- or under-budget for 2006. In response, the utility provided forms that indicated when a project in one system was deferred and the current year's budget money was moved to another system or project, or to a general budget fund. However, the utility did not provide any additional information regarding the budget differences. The utility did indicate that certain under-budget items in 2006 would not be made up by spending additional amounts in 2007. Staff auditors summarized these amounts, which equate to a total amount of \$403,032 for 10 individual systems.

Further, the staff auditors sampled projected 2007 plant-in-service additions for systems with increases greater than 25%. As part of the audit, staff requested supporting documentation to include any bids, quotes, invoices, or projection basis that AUF used to project its plant additions. AUF's response did not provide any significant support. Of the \$1,410,000 in projections requested by AUF in 2007, the utility provided invoices for only \$21,204, with no other supporting documentation.

While the total amount of plant-in-service costs not spent in 2006 may actually be spent in the projected year 2007 for the entire group of systems as a whole, AUF has indicated this may not be the case for individual systems. In response to OPC Interrogatory No. 178, AUF explained that projected amounts not placed in service in one year for an identified system may not necessarily be spent in the same water or wastewater system. Thus, AUF's trade-off program is state-wide, not system-wide. The most important substitutions will be made, regardless of location within the state. While this may not be as much of a problem to correct for a single system utility, as indicated previously, this rate case filing includes 80 individual systems. The revenue requirement must be established for each system individually.

In Order No. 24715, the Commission cited a number of flaws with SSU's rate case filed in Docket No. 900329-WS. Of those, the Commission indicated that "[m]ost troubling perhaps, was that the utility's construction budget showed errors in the utility's own projections." By Order No. 18335 issued in the GDU case, the Commission found that "by having a mismatch between the MFRs and the testimony, a burden shifts from the utility to the Commissioners to understand and interpret the filings." Staff believes a similar situation has occurred in the instant

rate case due to the errors in AUF's own projections and the inconsistencies between the MFRs and prefiled testimony described above.

Furthermore, just as correcting and revising the operating expenses discussed above would equate to a staff-assisted rate case for the largest Class A utility in the state, the same holds true if staff were to attempt to correct and revise the projected plant-in-service amounts. An attempt to correct AUF's MFRs would result in a complete reconstruction of the projected rate base by staff. This would include plant-in-service, accumulated depreciation, and depreciation expense for all 80 systems for both the years 2006 and 2007. To do so would be an insurmountable task, which is not contemplated in the rate case procedures. The timeframes established in this docket assume that the basis for the utility's rate request was accurately reflected in its MFRs, and by the utility's own admission, that is no longer the case.

2. Engineering Data

Staff reviewed the utility's MFR Schedules, which present the engineering information required to process AUF's rate case. The water and wastewater monthly flow data appear to be highly questionable. For example, in the F-1 Schedules - Gallons of Water Pumped, Sold and Unaccounted for Water, the number of water gallons sold for all of the water systems do not match the water gallons sold on the E-13w Schedules. Further, the number of water gallons pumped for four of the water systems do not match the reported water gallons pumped on the Monthly Operating Reports (MORs) submitted to the Department of Environmental Protection (DEP). For five of the water systems, the rated capacities of the water wells reported on Schedule F-5 of the MFRs do not match the rated capacity on the utility's sanitary surveys submitted to DEP.

For wastewater, the number of wastewater gallons sold reported on the F-10 Schedules does not match the number of wastewater gallons sold on the E-13s Schedules for all of the wastewater systems. The utility also did not comply with Rule 25-30.432, F.A.C., in calculating its used and useful percentages for wastewater plant for all of the wastewater treatment systems. No explanation was given as to why the rule was not followed. The rule requires that the flow data be the same period or basis as the permitted capacity of the wastewater treatment facility. In addition, the rule provides that the Commission may consider other factors, including whether the area served by the plant is built out. All of AUF's wastewater treatment plants are permitted on either an annual average daily flow, 12-month average daily flow, or three-month average daily flow basis. However, in all of the MFR Schedules F-6, the utility used a peak month to calculate the used and usefulness for each of its wastewater treatment plants, which would typically result in a higher used and useful percentage. Further, according to the F-6 schedules, 18 of its 21 wastewater treatment plants are 100% used and useful based on the systems being fully developed. However, in other MFR schedules and responses to discovery, the utility provided conflicting information as to which systems are actually built out. For example, in response to OPC's Interrogatory No. 10, AUF indicated that only six of the wastewater systems are built out.

Some of the system maps submitted by the utility as required by Rule 25-30.440(1), F.A.C., have been revised several times and in some instances still do not match the MFRs. The maps originally filed did not separately identify residential and general service customers. In

addition, many of the maps were revised subsequent to the staff engineers' field inspections to address problems discovered during those inspections, such as vacant lots. For eleven of the water systems and four of the wastewater systems, the service areas are reported as built out on Schedule F-7 of the MFRs. However, the maps indicate these service areas are not built out and contain vacant lots. Further, in response to staff Interrogatory No. 52, AUF indicated it is currently revising the system maps for Arredondo Estates/Farms and Ocala Oaks and that the discrepancy between the number of lots shown on those maps and the number of lots shown on MFR Schedule F-7 "will be addressed and resolved by the engineering and operations staff as soon as possible for Staff's review." Thus, AUF did not indicate a need to provide these system map revisions for these two systems until well after staff and OPC conducted the engineering site visits, and less than one month prior to the filing deadlines for intervenor and staff testimony. Even though intervenor testimony has already been filed in this case and staff testimony is due to be filed on August 21, 2007, AUF has yet to provide these system map revisions.

Based on the deficiencies and inconsistencies in the engineering data as discussed above, staff recommends that the data is flawed for ratemaking purposes.

3. Billing Determinants (Number of Bills and Gallons Sold)

a. 2005 and 2006 Historical Billing Data

During the customer service hearings held throughout the state, 100% of the customers who gave sworn testimony expressed their opposition to AUF's requested rate increase. Other common concerns raised by customers included problems associated with: 1) the utility's billing practices; 2) meter reading and/or the quality of the meter; 3) quality of service; 4) customer service; and 5) other complaints. To follow up on the customers' concerns raised at the service hearings, staff propounded interrogatories and PODs pertaining to historical 2005 and 2006 data. These discovery requests included, but were not limited to, individual system information regarding: 1) billing adjustments by customer and service area; 2) billing and meter reading dates for each system; 3) meter reading logs; and 4) the results of the utility's meter testing program.

Based on the utility's response to staff's billing adjustments inquiry, staff created a schedule that demonstrates the pervasiveness of billing errors for the utility as a whole. As shown on Table 2-1, there were 2,511 adjustments made on a total company basis in the 2005 historical test year.

Table 2-1
Aqua Utilities Florida, Inc.
Summary of 2005 Billing Adjustments

	Total Number of Water and WWater Adjustments	Explanations for Each Adjustment Provided	
		Number	Percent
January	250	61	24%
February	190	46	24%
March	192	78	41%
April	73	9	12%
May	157	57	36%
June	323	81	25%
July	263	121	46%
August	276	51	18%
September	176	34	19%
October	162	41	25%
November	145	15	10%
December	304	39	13%
Totals	2,511	633	25%
Source: AUF's response to staff's Interrogatory No. 68.			

As shown in Table 2-1, the utility made in excess of 2,500 adjustments during 2005, providing explanations for the adjustments in only 25% of the occurrences. A similar analysis for January through October of 2006 revealed adjustment explanations in less than 20% of the occurrences. According to the utility, "except where specifically noted, UF's [sic] files do not reflect the specific reason for consumption adjustments."¹⁹ The 1,878 unexplained adjustments during 2005 and the 1,773 unexplained adjustments during the first 10 months of 2006 renders both staff and AUF unable to identify whether any of the problems giving rise to those adjustments were of a recurring nature. This may have an important bearing on the 2005 and 2006 historical billing data because, to the extent there were recurring problems that should have been rectified, the historical data for these years could be materially different.

Staff attempted additional means to gain confidence regarding the 2005 historical billing data. In staff's POD No. 21, the utility was asked to provide billing data, by system and month, for the historical 2005 test year. However, upon comparison of this data to the utility's MFR Schedules E-2 and E-13, there were numerous systems for which the POD No. 21 data and MFR E schedules data did not match. This is of concern to staff. OPC has propounded an interrogatory requesting AUF to explain these differences; however, the response remains outstanding.

In light of the problems discussed above, staff attempted still further means of gaining confidence regarding the historical billing data for 2005 and 2006. For example, there were numerous customers at the service hearings who complained about their bills being based on

¹⁹ AUF's response to staff Interrogatory No. 68.

estimated consumption. In staff's Interrogatory No. 70, the utility was asked to provide, for the years 2005 and 2006, the number of bills that had been based on estimated usage. Unfortunately, the utility does not know how many bills during 2005 and 2006 were based on estimated consumption. In its response to Interrogatory No. 70, the utility stated, "The Company's prior billing system did not provide this information. However, the information is available from the new Banner billing system for November and December, 2006."²⁰

Another problem is that the utility rarely cited faulty meters as a reason for the billing credits. However, because 81% of the billing adjustments were unexplained during the period of January 2005 through October 2006, and because there were customers at the service hearings who complained about their meters, staff propounded Interrogatory No. 74 in order to gain information regarding the condition of the utility's meters. In response to this interrogatory, staff was surprised to learn that the utility does not have a formal meter testing program. Rule 25-30.265, F.A.C., Periodic Meter Tests, requires the utility to inspect and test a representative sample of its meters in service during specific intervals as set forth in the rule. In addition, the utility must perform meter tests in order to know whether its meters comply with the accuracy requirements set forth in Rule 25-30.262, F.A.C., Meter Accuracy Requirements. The implementation of a formal meter testing program would be the most efficient way to insure that the utility is meeting these requirements, and, therefore, billing customers appropriately.

The lack of a meter testing program makes it impossible to know whether or to what extent defective meters were in operation during either the 2005 historical test year, during 2006, or the entire period. It is also impossible to know the magnitude of each meter's error, to the extent an error exists. In addition, the utility made over 3,650 unsubstantiated adjustments to its billing data for the 22-month period discussed above. These adjustments, coupled with the lack of a meter testing program, render staff unable to determine the appropriate number of bills rendered and gallons sold by the utility during the 2005-2006 period. This creates several problems with the resulting billing data that cannot be overcome. Staff is unable to see the entire 2005 test year ratemaking picture, both with respect to: a) the actual number of bills and gallons, which affects whether the current rates are, in fact, noncompensatory, and, if so, by what magnitude; b) the appropriate number of bills and gallons during 2006; and c) the appropriate number of bills and gallons to use in the design of recommended rates. Therefore, staff believes the 2005 and 2006 historical billing determinants data is irreparably flawed and inappropriate for ratemaking purposes.

b. 2006 and 2007 Projected Billing Determinants

In staff's POD No. 2, and later in staff's POD No. 22, the utility was asked to provide work papers and historical data used to support the 2006 customer growth projections. In response to staff's POD No. 22, the utility stated that there are no workpapers supporting the 2006 and 2007 growth projections. Therefore, the utility has failed to support its 2006 and 2007 billing determinants growth projections.

²⁰ AUF's response to staff Interrogatory No. 70.

c. Billing Determinants Summary

Staff has great concerns moving forward with the billing data presented in this case. There are two possible scenarios with respect to the billing determinants data that has been filed. If the test year gallons sold data is too low, then the resulting rates will, all other things being equal, be overstated. This may possibly cause the utility to overearn in subsequent years. Conversely, if the test year gallons sold data is too high, then the resulting rates will be less than compensatory, which would probably result in a shorter period before the utility files another request for a rate increase. Therefore, setting rates based on flawed data would be neither fair nor reasonable to the customers or to the utility. For the foregoing reasons, staff recommends that AUF has not provided sufficient documentation regarding the historical number of bills rendered or the number of gallons sold during either the 2005 test year or during 2006, that its 2005 and 2006 gallons data are irreparably flawed, and that the utility has failed to support its 2006 and 2007 billing determinants projections.

C. Conclusion and Recommendation

In conclusion, the data supplied by AUF is insufficient to determine the appropriate revenue requirement and set reasonable rates. Section 367.081(2)(a)1., F.S., charges the Commission with the statutory responsibility of setting rates that are just, reasonable, compensatory, and not unfairly discriminatory. It is not staff's responsibility to make the utility's case for it. The burden is upon the utility to show that its present rates are unreasonable, fail to compensate the utility for its prudently incurred expenses, and fail to produce a reasonable return on its investment.²¹ When a utility fails to establish its entitlement to the relief requested in its petition, the Commission acts within its discretionary authority in denying that petition.²² Because of the aforementioned inconsistent data, staff believes the utility has failed to provide the necessary information upon which to proceed to hearing in order for the Commission to determine just, reasonable, compensatory, and not unfairly discriminatory rates.

Staff does not believe it would be appropriate to postpone and reschedule the controlling dates for testimony and the hearing in this matter, or to suspend the collection of interim rates for a period of time in order for AUF to file a revised rate case. There are numerous errors and discrepancies throughout AUF's entire filing. Any attempt to repair the filing would in fact result in a complete refiling of the entire case, which would start the entire process over. An attempt to correct these errors and discrepancies would result in a complete reconstruction of AUF's filing by staff. To do so would be an insurmountable task, which is not contemplated in the rate case procedures. As stated previously, AUF's rate case involves 80 systems on a projected test year basis. The revenue requirement must be established for each system individually. To correct and revise the utility's filing would equate to a staff-assisted rate case for the largest Class A utility in the state.

²¹ See South Florida Natural Gas v. Florida Public Service Commission, 534 So. 2d 695 (Fla. 1998); Florida Power Corporation v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982) (finding that the burden of proof in a Commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates).

²² City Gas Company of Florida v. FPSC, 501 So. 2d 580 (Fla. 1987).

For the foregoing reasons, staff recommends that the Joint Motion to Dismiss should be granted. AUF's MFRs regarding its operating expenses are irreparably flawed, the utility has failed to provide sufficient or timely supporting documentation in response to discovery and audit requests to support its rate request, and failed to fully comply with two Orders compelling discovery responses by dates certain. AUF's request for a general rate increase should also be dismissed because the MFRs are irreparably flawed with respect to 1) projected plant additions; and 2) engineering data. In addition, AUF has not provided sufficient documentation regarding the historical number of bills rendered or the number of gallons sold during either the 2005 test year or during 2006, its 2005 and 2006 gallons data are irreparably flawed, and AUF has failed to support its 2006 and 2007 billing determinants projections.

Issue 3: What are the appropriate water and wastewater rates for AUF?

Recommendation: AUF's appropriate water and wastewater rates should be the rates in effect prior to the approval of interim rates. The utility should file tariff sheets and proposed customer notices to reflect the Commission-approved rates for the respective systems within 20 days of the Commission vote. The appropriate rates are listed in Schedule 1-A for water and Schedule 1-B for wastewater for the respective systems. The approved rates should be effective for service rendered on or after the stamped approval date on the revised tariff sheets pursuant to Rule 25-30.475(1), F.A.C. In addition, the approved rates should not be implemented until staff has approved the proposed customer notice. The utility should provide proof of the date notice was given no less than 10 days after the date of the notice. (Rendell)

Staff Analysis: The utility's minimum filing requirements and discovery responses do not provide credible information upon which the Commission can rely to determine just, reasonable, compensatory, and not unfairly discriminatory rates. Therefore, AUF's appropriate rates should be the rates in effect prior to the approval of interim rates. The utility should file tariff sheets and proposed customer notices to reflect the Commission-approved rates for the respective systems within 20 days of the Commission vote. The appropriate rates are listed in Schedule 1-A for water and Schedule 1-B for wastewater for the respective systems. The approved rates should be effective for service rendered on or after the stamped approval date on the revised tariff sheets pursuant to Rule 25-30.475(1), F.A.C. In addition, the approved rates should not be implemented until staff has approved the proposed customer notice. The utility should provide proof of the date notice was given no less than 10 days after the date of the notice.

Issue 4: Should AUF be required to refund any interim revenues collected?

Recommendation: Yes. The interim revenue increase granted in Order No. PSC-06-0668-FOF-WS, should be refunded with interest, pursuant to Rule 25-30.360, F.A.C. Further, pursuant to Rule 25-30.360(7), F.A.C., AUF should be required to file the appropriate refund reports. (Rendell)

Staff Analysis: Pursuant to Section 367.082, F.S., revenues collected under interim rates shall be placed under bond, escrow, letter of credit, or corporate undertaking subject to refund with interest at a rate ordered by the Commission. In this case, the total annual interim revenue increase granted in Order No. PSC-07-0325-FOF-WS was \$1,851,705 (36.95%) for water and \$1,283,938 (46.60%) for wastewater. Staff calculated the potential refund of revenues and interest collected under interim conditions to be \$1,054,412 for water and wastewater combined at the end of August, 2007. This amount is based on an estimated seven months of revenues being collected from the approved interim rates granted in Order No. PSC-07-0325-FOF-WS. As mentioned previously, this increase is currently being secured by a corporate undertaking by Aqua America, Inc. The interim rates will continue to be collected until the tariffs containing staff's recommended rates in Issue 3 become effective. Therefore, the total amount of the interim refund cannot be determined at this time.

As discussed in Issue 2, the data supplied by AUF is insufficient to determine an appropriate revenue requirement and set reasonable rates. Therefore, the utility has not met its burden of proof for the Commission to determine just, reasonable, compensatory, and not unfairly discriminatory rates. As such, AUF should be required to refund all interim revenues collected pursuant to Order No. PSC-07-0325-FOF-WS.

Pursuant to Rule 25-30.360(7), F.A.C., AUF should be required to file the appropriate refund reports. Pursuant to this rule, the amount of money to be refunded and how that amount was computed will be included in these reports. In no instance should the maintenance and administrative costs associated with the refund be borne by the customers. These costs are the responsibility of, and should be borne by, the utility.

Issue 5: Should AUF be ordered to show cause in writing, within 21 days, why it should not be fined for its apparent failure to comply with Rule 25-30.261(1), F.A.C., which requires meters to be read on the corresponding day of each meter reading period?

Recommendation: Yes. AUF should be ordered to show cause in writing, within 21 days, why it should not be fined a total of \$10,000 for its apparent failure to comply with Rule 25-30.261(1), F.A.C. The order to show cause should incorporate the conditions stated below in the staff analysis. (Gervasi, Lingo, Rendell)

Staff Analysis: Pursuant to Rule 25-30.261(1), F.A.C., Meter Readings, “[t]he utility shall read its service meters at regular intervals and, insofar as practicable within regularly scheduled work days, on the corresponding day of each meter reading period.”

The Commission has received numerous complaints concerning irregular billing and meter reading practices by AUF. During the service hearings, customers provided testimony and exhibits concerning AUF’s billing practices. Based on the exhibits presented during the service hearings, AUF has issued bills for inconsistent billing periods. Further, based on additional information received from AUF, it is evident the billing periods do not meet the requirements of Rule 25-30.261. F.A.C. AUF has indicated that the internal goal for billing periods is 26 to 35 days. Since converting to its new billing system in November 2006, AUF has averaged only 78% of bills meeting this goal. Further, this average is only 82% of bills for the twelve-month period of July 2006 through July 2007. Additionally, for the month of December 2006, which is the first month after the conversion, there were more than 1,215 bills, or 5% of the total, that covered more than a 56-day billing period. AUF has indicated that it has no official documented policies or procedures for meter reading operations. It is important for the utility to comply with Rule 25-30.261(1), F.A.C., especially with AUF’s proposed inclining block rate structure.

Uneven billing periods have implications including, but not limited to: 1) customers’ bills; 2) customers’ ability to budget what those bills will be; and 3) revenue collected by the utility. The utility has proposed for its systems two usage blocks for monthly consumption: 1) 0 - 6,000 gallons in the first usage block; and 2) in excess of 6,000 gallons in the second usage block. When billing using an inclining-block rate structure, it is especially important for the utility to comply with Rule 25-30.261(1), F.A.C. Otherwise, uneven billing periods may be problematic. For example, under the utility’s proposed rate structure, billing periods greater than one month may result in certain customers’ usage exceeding 6,000 gallons. This means that those customers’ bills will be greater than they would otherwise be, since they had part of their usage billed in the second, more expensive, usage block.

Uneven billing periods also make it more difficult for customers to budget what their monthly water and wastewater bills will be. When customers’ bills reflect usage in the more expensive second usage block solely as a result of the utility’s billing period exceeding regular monthly intervals, these budgeting problems are exacerbated. Finally, uneven billing periods under an inclining-block rate structure, will, all other things equal, result in more revenue being collected by the utility because some usage will have been billed at the higher usage rate.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that ‘ignorance of the law’ will not

excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Section 367.161(1), F.S., authorizes the Commission to assess a penalty of not more than \$5,000 for each offense if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, F.S., or any lawful rule or order of the Commission. By failing to comply with the above-noted requirements of Rule 25-30.261(1), F.A.C., the utility's acts were "willful" in the sense intended by Section 367.161, F.S. In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "willful" implies an intent to do an act, and this is distinct from an intent to violate a statute or rule. Id. at 6.

Staff notes that AUF is taking steps to bring its meter reading practices into compliance with the rule. AUF has installed radio frequency (RF) devices on meters in some of its service areas so that the meters can be read remotely, and is in the process of installing RF devices throughout its entire system. RF devices allow utilities to remotely read meters in areas that are deemed unsafe or inaccessible. Nevertheless, staff believes that the circumstances in this case are such that show cause proceedings should be initiated. Staff recommends that AUF should be ordered to show cause in writing, within 21 days, why it should not be fined a total of \$10,000 for its apparent failure to comply with Rule 25-30.261(1), F.A.C.

Staff recommends that the show cause order incorporate the following conditions:

1. The utility's response to the show cause order should contain specific allegations of fact and law;
2. Should AUF file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), F.S., a further proceeding will be scheduled before a final determination of this matter is made;
3. A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;
4. In the event that AUF fails to file a timely response to the show cause order, the fine should be deemed assessed with no further action required by the Commission;
5. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order; and
6. If the utility responds to the show cause order by remitting the fine, this show cause matter should be considered resolved.

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Further, the utility should be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to \$5,000 per day per violation for each day the violation continues, as set forth in Section 367.161, F.S.

Issue 6: Should AUF be ordered to show cause in writing, within 21 days, why it should not be fined for its apparent failure to comply with Rule 25-22.032, F.A.C., concerning customer complaints?

Recommendation: Yes. AUF should be ordered to show cause in writing, within 21 days, why it should not be fined a total of \$10,000 for its apparent failure to comply with Rule 25-22.032(6)(b), F.A.C. The order to show cause should incorporate the conditions stated below in the staff analysis. (Gervasi, Rendell)

Staff Analysis: Pursuant to Rule 25-22.032(6)(b), F.A.C., concerning customer complaints:

[t]he company shall make direct contact with the customer verbally or in writing and provide to the customer its response to the complaint within 15 working days after the Commission staff sends the complaint to the company. Responses sent by mail must be postmarked within the 15 working day time period. The company shall also provide to the Commission staff, within 15 working days after the Commission staff sends the complaint to the company, a written response to the customer's complaint.

During the period of January 1, 2005 through March 31, 2007, the Commission has received seventy-nine complaints concerning AUF. Of these seventy-nine complaints, there were thirty two apparent violations of Rule 25-30.032(6)(b), F.A.C. The utility apparently failed to respond to either the customer or the Commission within the time required.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Section 367.161(1), F.S., authorizes the Commission to assess a penalty of not more than \$5,000 for each offense if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, F.S., or any lawful rule or order of the Commission. By failing to comply with the above-noted requirements of Rule 25-22.032(6)(b), F.A.C., the utility's acts were "willful" in the sense intended by Section 367.161, F.S. In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "willful" implies an intent to do an act, and this is distinct from an intent to violate a statute or rule. Id. at 6.

Staff believes that the circumstances in this case are such that show cause proceedings should be initiated. Staff recommends that AUF should be ordered to show cause in writing, within 21 days, why it should not be fined a total of \$10,000 for its apparent failure to comply with Rule 25-22.032(6)(b), F.A.C. Staff recommends that the show cause order incorporate the following conditions:

1. The utility's response to the show cause order should contain specific allegations of fact and law;

2. Should AUF file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), F.S., a further proceeding will be scheduled before a final determination of this matter is made;
3. A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;
4. In the event that AUF fails to file a timely response to the show cause order, the fine should be deemed assessed with no further action required by the Commission;
5. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order; and
6. If the utility responds to the show cause order by remitting the fine, this show cause matter should be considered resolved.

Further, the utility should be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to \$5,000 per day per violation for each day the violation continues, as set forth in Section 367.161, F.S.

Issue 7: If the Commission denies staff's recommendation to dismiss AUF's request for a general rate increase in Issue 2 of this recommendation, should AUF be ordered to show cause in writing, within 21 days, why it should not be fined for its apparent failure to comply with Order Nos. PSC-07-0592-PCO-WS and PSC-07-0598-PCO-WS, compelling discovery responses?

Recommendation: Yes. If the Commission denies staff's recommendation to dismiss AUF's request for a general rate increase in Issue 2 of this recommendation, AUF should be ordered to show cause in writing, within 21 days, why it should not be fined a total of \$5,000 for its apparent failure to comply with Order Nos. PSC-07-0592-PCO-WS and PSC-07-0598-PCO-WS. The order to show cause should incorporate the conditions stated below in the staff analysis. If the Commission dismisses the rate case in Issue 2, this issue need not be ruled upon. (Fleming, Rendell)

Staff Analysis: Because dismissal of the proceedings is the ultimate penalty for failure to comply with an order compelling discovery responses, and because the discovery process will cease if the rate case is dismissed, staff recommends that this issue need not be ruled upon unless the Commission denies staff's recommendation to dismiss the proceeding in Issue 2.

On July 16, 2007, OPC filed a Motion to Compel AUF to answer by July 20, 2007, all outstanding discovery requests propounded by OPC and staff. In its Response, AUF argued that it filed specific objections to portions of OPC's discovery and that those discovery requests were not yet overdue. Pursuant to Order No. PSC-07-0592-PCO-WS, issued July 19, 2007, the Motion to Compel was granted for responses to which AUF did not raise specific objections. The Order further stated that all overdue discovery requests propounded by OPC and staff were due by July 20, 2007, to the extent possible, and that the remaining uncontested responses were due by Monday, July 23, 2007. AUF failed to meet the Order deadline in response to OPC Interrogatory No. 183, and to OPC POD Nos. 28 and 128. In addition, AUF failed to meet the deadline in response to staff Interrogatory Nos. 37, 39, 48, 49, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, and 66 and to staff POD Nos. 22, 23, 24, 25, 29, 30, 31, 32, and 33.

On July 25, 2007, the Prehearing Officer issued a separate order addressing the portion of the Motion to Compel concerning the OPC discovery to which Aqua specifically objected.²³ In the Order, the Prehearing Officer ruled that AUF was required to file all discovery requests to which it specifically objected and for which the objection was overruled, by August 8, 2007.²⁴ Even though the specific objections were overruled, AUF has yet to provide responses to OPC Interrogatory Nos. 5 and 6.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense if a utility is found to have knowingly refused to comply

²³ Order No. PSC-07-0598-PCO-WS.

²⁴ AUF is required to file responses to OPC Interrogatory Nos. 1, 2, 5, 6, 31, 36, 40, 134, and 182 and OPC POD Nos. 17, 40, 42, 153, 174.

with, or to have willfully violated, any provision of Chapter 367, Florida Statutes, or any lawful order of the Commission. By failing to comply with the above-noted requirements of Order Nos. PSC-07-0592-PCO-WS and PSC-07-0598-PCO-WS in a timely manner, the utility's acts were "willful" in the sense intended by Section 367.161, Florida Statutes. In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "willful" implies an intent to do an act, and this is distinct from an intent to violate a statute or rule. Id. at 6.

Staff believes that the circumstances in this case are such that show cause proceedings should be initiated. Staff recommends that AUF should be ordered to show cause in writing, within 21 days, why it should not be fined a total of \$5,000 for its apparent failure to comply with Order Nos. PSC-07-0592-PCO-WS and PSC-07-0598-PCO-WS. Staff recommends that the show cause order incorporate the following conditions:

1. The utility's response to the show cause order should contain specific allegations of fact and law;
2. Should AUF file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made;
3. A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;
4. In the event that AUF fails to file a timely response to the show cause order, the fine should be deemed assessed with no further action required by the Commission;
5. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order; and
6. If the utility responds to the show cause order by remitting the fine, this show cause matter should be considered resolved.

Further, the utility should be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to \$5,000 per day per violation for each day the violation continues, as set forth in Section 367.161, F.S.

Issue 8: Should this docket be closed?

Recommendation: No. The docket should remain open for staff's verification that the revised tariff sheets and customer notice have been filed by the utility and approved by staff, that the interim refund has been completed and verified by staff, and for the disposition of the show cause portions of the order. If the utility responds to the show cause order by remitting the fines, the show cause matter should be considered resolved and the docket should be closed administratively upon staff's verification of the above items. If the utility timely responds in writing to the show cause order, the docket should remain open pending final disposition of the show cause issues. (Gervasi, Rendell)

Staff Analysis: The docket should remain open for staff's verification that the revised tariff sheets and customer notice have been filed by the utility and approved by staff, that the interim refund has been completed and verified by staff, and for the disposition of the show cause portions of the order. If the utility responds to the show cause order by remitting the fines, the show cause matter should be considered resolved and the docket should be closed administratively upon staff's verification of the above items. If the utility timely responds in writing to the show cause order, the docket should remain open pending final disposition of the show cause issues.