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100104-WU

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Cc: Ralph Jaeger; Erik Saylor; 'McGLOTHLIN.JOSEPH'; 'Gene D. Brown'
Subject: Docket No. 100104-WU - electronic filing
Attachments: WMSI's Response to OPC's Motion to Strike 09.29.10.pdf

Electronic Filing

a. **Person responsible for this electronic filing:**

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- b. **Docket No. 100104-WU – In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.**
- c. **Document being filed on behalf of Water Management Services, Inc. (WMSI)**
- d. **There are a total of 10 pages.**
- e. **The document attached for electronic filing is WMSI's Response to OPC's Motion to Strike Portions of WMSI's Rebuttal Testimony**
- f. **(See attached file: WMSI's Response to OPC's Motion to strike 09.29.10)**

Thank you for your assistance in this matter.

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FLPSC-CORPREG-REG-001

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water)
rates in Franklin County by Water)
Management Services, Inc.)

Docket No. 100104-WU

Filed: September 29, 2010

**WATER MANAGEMENT SERVICE, INC.'S RESPONSE TO OPC'S MOTION
TO STRIKE PORTIONS OF WMSI'S REBUTTAL TESTIMONY**

Water Management Services, Inc. ("WMSI" or the "Utility"), pursuant to Rule 28-106.204, F.A.C., submits this response to the Office of Public Counsel's ("OPC") Motion to Strike Portions of WMSI's Rebuttal Testimony ("Motion to Strike") and responds as follows:

I. Introduction

1. On September 17, 2010, WMSI Witnesses Gene D. Brown, Frank Seidman, Michael Scibelli and Barbara S. Withers filed rebuttal testimony with the Florida Public Service Commission ("PSC" or "Commission").

2. On September 27, 2010, OPC filed a motion to strike certain portions of the rebuttal testimony of Mr. Brown and Mr. Seidman relating to the proposed pro forma plant improvements,¹ arguing that such testimony should be stricken because it introduced "an impermissible modification" of WMSI's case and would violate OPC's right to due process. In its Motion to Strike, OPC did not assert that the rebuttal testimony was beyond the scope of OPC Witnesses' direct testimony.

3. As demonstrated below, OPC's Motion to Strike must fail because the rebuttal

¹ The disputed portions of Mr. Brown's and Mr. Seidman's rebuttal testimony essentially explain that the Utility proposes an approach that the capital improvements be implemented in multiple steps, with the Utility receiving approval from the PSC on the improvements that should be made, rates being set without the improvement projects, rates later being set based on competitive bids of the projects, and a final true-up of actual costs. See Rebuttal Testimony of Gene D. Brown, p. 33, lines 18-23; p.34, lines 1-5; Rebuttal Testimony of Frank Seidman, p. 5, lines 9 through p. 6, line 12; page 8, line 1 through page 9, line 5.

testimony in question neither introduces a new concept nor violates OPC's due process right.

II. The disputed portions of Mr. Brown's and Mr. Seidman's testimony do not introduce a modification of WMSI's case.

a. WMSI has consistently characterized the proposed capital projects as recommendations with estimated costs, requiring prior PSC approval before further action would be taken.

4. Although OPC attempts to characterize Mr. Brown and Mr. Seidman's rebuttal testimony regarding the pro form plan adjustment as "new and different," that is simply not accurate, as WMSI has consistently stated that the proposed capital improvements were recommendations by the PBS&J engineers, that the costs were estimates only, and that Commission approval was required before competitive bidding and other required steps in the construction process could take place. WMSI's Application stated the need for "capital improvements to WMSI's aging infrastructure," which were "an *estimated* \$2,202,481." Application, ¶16 (emphasis added). The Application, in addition to seeking increased rates, also explicitly requested that the Commission "[g]rant such further relief as the Commission deems fair, just equitable and appropriate based on the evidence contained in the record." Application, p. 10.

5. Mr. Brown's and Mr. Seidman's direct testimony both discussed the pro forma capital improvements. Mr. Brown's direct testimony made it clear that the plant improvements were "*recommendations* for improvements" by PBS&J, and that the cost, based on engineering estimates, was "*approximately* \$2.2 million." Direct Testimony of Gene D. Brown, p. 7, lines 11-13; p. 8, line 10 (emphasis added). Mr. Brown also referred to the fact that Commission approval of the improvements would be needed before bidding and other work could commence. Direct Testimony of Gene D. Brown, p. 12, lines 17-20.

6. Further, in his deposition testimony,² Mr. Brown reiterated that the capital improvement projects would be competitively bid if and when Commission approval of the projects was obtained. Deposition of Gene Brown, p. 134, lines 22-25; p. 135, lines 1-7. He stated that the projects had not yet been bid, because of the steep costs associated with doing so, but that they would be if approved by the Commission. Deposition of Gene Brown, p. 135, lines 8-11; p. p. 135, lines 22-25; p. 136, lines 1-10, 13-19. During his deposition, Mr. Brown also mentioned that a possible option in handling the capital improvements was a “staged proceeding with a true-up phase,” similar to the “three-phase” process used by the PSC in the Utility’s limited proceeding for the relocation of the water main.³ Deposition of Gene Brown, p. 136, lines 3-5; p. 138, lines 5-9.

7. Thus, contrary to OPC’s claims, the disputed portions of Mr. Brown’s and Mr. Seidman’s rebuttal testimony did not introduce a new idea or modification of WMSI’s case.

b. Mr. Brown’s and Mr. Seidman’s rebuttal testimony rebuts points raised by OPC Witnesses.

8. Based on the direct testimony of OPC Witness Andrew Woodcock, Mr. Woodcock appears to have gleaned from the direct testimony of Mr. Brown and Mr. Seidman that the capital improvements are based on “engineering recommendations and cost estimates” and that other work, including competitive bidding, remains to be done. Direct Testimony of Andrew T. Woodcock, p. 4, lines 16-23; p. 5, lines 1-3; p. 6, lines 1-2.

9. Mr. Woodcock, while noting that final installed cost is most accurate, suggests that the costs from bids of the capital projects could be used in a Commission determination.

² Mr. Brown was deposed by OPC and Commission staff on August 10, 2010.

³ In the Utility’s limited proceeding, the Commission found that the construction of a new water supply main was justified and approved a three-step increase with a true-up. See Order No. PSC-00-2227-PAA-WU, Docket Nos. 940109-WU; 000694-WU (Nov. 21, 2000), consummated by Order No. PSC-00-2405-CO-WU (Dec. 14, 2000).

Direct Testimony of Andrew T. Woodcock, p. 6, lines 1-2, 5-10. If competitive bids are used, Mr. Woodcock suggests (similar to Mr. Brown's earlier suggestion) that a "subsequent true up" should be done. Direct Testimony of Andrew T. Woodcock, p. 6, lines 10-13.

10. Mr. Woodcock does not take issue with the need for any of the improvements. Instead, he notes a key issue related to the capital improvements is when to include them in rate base, stating: "Therefore, it is my recommendation that the pro forma adjustment to rate base not be included *at this time*." Direct Testimony of Andrew T. Woodcock, p. 9, lines 2-4 (emphasis added).

11. OPC Witness Donna Ramas also alludes to the question of when capital improvements should be included in rate base in her direct testimony. Direct Testimony of Donna Ramas, p. 45, lines 19-20.

12. The disputed portions of the rebuttal testimony of Mr. Brown and Mr. Seidman respond to and rebut the testimony of Mr. Woodcock and Ms. Ramas as to when the capital improvements should be included in rate base, by suggesting the timing and three-phase process.

13. Thus, the disputed portions of Mr. Brown's and Mr. Seidman's rebuttal testimony, responding to OPC witnesses and explaining a possible solution, fit within the definition of "rebuttal testimony" as described by the federal courts and as adopted by the Commission:

It is well settled that the purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party" and if the defendant opens the door to the line of testimony, he cannot successfully object to the prosecution "accepting the challenge and attempting to rebut the presumption asserted."

United States v. Delk, 586 F.2d 513, 516 (5th Cir. 1978) (quoting *Luttrell v. United States*, 320 F.2d 462, 464 (5th Cir. 1963)). See Order No. PSC-10-0426-PCO-WS, Docket No. 090478-WS

(July 2, 2010) (denying motion to strike rebuttal testimony because the rebuttal testimony on behalf of Skyland Utilities responded to challenges raised by witnesses or explained and disproved the concerns of the witnesses); Order No. PSC-04-0928-PCO-EI, Docket No. 030623-EI (Sept. 22, 2004) (denying motion to strike rebuttal testimony because it rebutted assertions made in the direct testimony of the adverse witnesses).

III. OPC will not be prejudiced and its due process right will not be violated if the testimony of Mr. Brown and Mr. Seidman is not stricken.

14. Florida Statutes grant the PSC ratemaking authority for regulated utilities. *See e.g.*, Section 366.04(1), Florida Statutes (“ . . . the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service”); Section 366.041(1), Florida Statutes (“In fixing the just, reasonable, and compensatory rates, charges . . . for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the . . . cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities”); Section 366.05(2), Florida Statutes (“In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges”); Section 367.121, Florida Statutes (“ . . . [T]he commission shall have power: [t]o prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements”).

15. The Commission has considerable discretion and latitude in the ratemaking process, as has been well documented in decisions of the Florida Supreme Court. *See Citizens v. Public Serv. Comm’n*, 425 So. 2d 534, 540 (Fla. 1982) (“This court has consistently recognized the broad legislative grant of authority which these statutes [Sections 366.06(2) and 366.05(1), Florida Statutes] confer and the considerable license the Commission enjoys as a result of this delegation.”); *Gulf Power Co. v. Bevis*, 296 So. 2d 482, 487 (Fla. 1974) (“As pointed out by the

Commission, it has considerable discretion and latitude in the rate fixing process.”); *Storey v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968) (“The regulatory powers of the Commission . . . are exclusive and, therefore, necessarily broad and comprehensive.”); *City of Miami v. Fla. Public Serv. Comm’n*, 208 So. 2d 249, 253 (Fla. 1968) (“It is quite apparent that these statutes [Sections 364.14 and 366.06, Florida Statutes] response considerable discretion in the Commission in the ratemaking process.”). Further, the Commission has the authority to approve prospective rate increases and routinely does so. The Commission’s authority to approve prospective rate increases has been expressly recognized by the Florida Supreme Court. *Floridians United for Safe Energy, Inc. v. Public Serv. Comm’n*, 475 So. 2d 241 (Fla. 1985); Order No. PSC-05-0945-S-EI, Docket No. 050078 (Sept. 28, 2005); Order No. PSC-05-0902-S-EI, Docket Nos. 050045-EI, 050188-EI (Sept. 14, 2005).

16. As part of that broad ratemaking authority, the Commission can choose or construct a reasonable alternative. See *Gulf Power Co. v. Fla. Public Serv. Comm’n*, 453 So. 2d 799, 805 (Fla. 1984) (affirming the Commission’s ability “to make some other reasonable determination” even though the alternative approved by the PSC was not proposed by either party or PSC staff). While the Commission clearly has the authority to craft its own alternative, regardless of whether it has been advocated by one of the parties, here, the Utility has explicitly proposed a multi-phase approach.

17. Recently, the Commission authorized a step increase for Tampa Electric Company (“TECO”) even though (the Intervenors contended) the step increase was not requested by TECO in its petition, was not requested by any of TECO’s witnesses in direct or rebuttal testimony, was not raised as an issue verbally or in TECO’s pre-hearing statement, was not added in any other portion of the pre-hearing process, was not added as an issue after the

hearing, and was not addressed in post-hearing briefs. Order No. PSC-09-0571-FOF-EI, Docket No. 080317-EI (Aug. 21, 2009). In the Commission's order, it was noted that the step increase was proposed as an alternative during the hearing by one of TECO's witnesses and was mentioned in TECO's post-hearing brief. *Id.*

18. In the TECO case, despite the fact that the idea was not raised until the hearing, the Commission found that the step increase did not violate the Intervenors' due process right, which required only "that parties to a proceeding be given adequate notice and an opportunity to be heard on the issue." *Id.* (citing *Bresch v. Henderson*, 761 So. 2d 449, 451 (Fla. 2d DCA 2000)). The Commission also noted that the concept of due process is less stringent in an administrative proceeding than a judicial proceeding and that due process is "flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Hadley v. Dep't of Admin.*, 411 So. 2d 184, 187 (Fla. 1982)). The PSC found that because the Intervenors were given notice (via a witness's testimony at hearing) and an opportunity to be heard and present possible alternatives (on cross-examination of the witness at hearing and in the post-hearing brief), there was no due process violation. *Id.* Here, unlike in the TECO case, OPC was given notice well in advance of the hearing and on multiple occasions.

19. As part of its Motion to Strike, OPC states that its due process right will be violated and that its case will be prejudiced if the disputed testimony is not stricken. Motion to Strike, p. 1 and ¶10. However, given that the Commission clearly has the authority and discretion to consider and approve such a proposal (even if the idea is introduced for the first time at the hearing, as illustrated by the TECO case), WMSI actually aided OPC's due process right by explicitly raising the issue early in the case, in its Application,⁴ in Mr. Brown's

⁴ WMSI noted in its Application a need for capital improvements, requested an increase in rates, and requested other relief as the Commission deems fair, just equitable and appropriate based on

deposition testimony,⁵ in Mr. Brown's and Mr. Seidman's rebuttal testimony,⁶ and again in WMSI's pre-hearing statement.⁷ By WMSI raising the proposed alternative on these occasions, the Utility has given OPC notice multiple times and has given OPC opportunity to address the matter on numerous occasions, including, if desired, in its pre-hearing statement, at the pre-hearing conference, on cross-examination of Mr. Brown and/or Mr. Seidman at the hearing, and in its post-hearing brief.

20. Ultimately, in the TECO case, the PSC determined that the step increase was an appropriate rate-making mechanism, was properly within its broad rate making authority, and was within a range of alternatives that it could consider when deciding how to address a pro forma adjustment. *Id.* at 10-11.

21. The Commission's broad ratemaking authority, which was reaffirmed by the TECO case, was explicitly exercised for WMSI in its limited proceeding in 2000. In that case, the Commission approved a phased increase process to provide cost recovery for costs that were subject to engineering estimates. In its order, the Commission found:

Further, while the costs and timing associated with Phase One are reasonably estimable at this time, there is considerably more uncertainty regarding the Phase Two time-frame. WMSI is expected to obtain bids for the major construction. When this process is completed, it will be possible to estimate the actual cost with a higher degree of precision than that of an engineering estimate performed two years in advance.

Order No. PSC-00-2227-PAA-WU, p. 8.

22. Here, the multi-step process and true-up proposed by WMSI, which is similar to

the evidence contained in the record.

⁵ Mr. Brown's deposition was taken nearly two weeks prior to the deadline for Intervenor's testimony.

⁶ Rebuttal testimony was due by September 17, 2010, prior to the due dates for the pre-hearing statements and the pre-hearing conference.

⁷ WMSI's pre-hearing statement, filed September 20, 2010, referenced the proposed multi-phase approach with a true-up in the Utility's positions on Issues 9 and 51.

the process utilized in WMSI's limited proceeding, is also an implicit form of relief within the Commission's ratemaking authority. This proposed form of relief would be appropriate even if not requested by the Utility, but, as noted above, WMSI has explicitly requested such relief.

23. Contrary to OPC's Motion to Strike, there were no surprises or lack of notice in connection with WMSI's proposal for a multi-phase approach and true-up regarding the capital improvements. OPC has had and continues to have opportunities to address WMSI's proposal in various venues, including in the hearing commencing next week.

IV. Conclusion

For the foregoing reasons, the Commission should deny OPC's Motion to Strike.

Respectfully submitted this 29th day of September,
2010.



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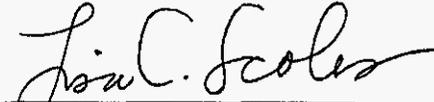
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following by electronic mail and U.S. Mail to the following parties on this 29th day of September, 2010:

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