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 ORDER NO. PSC-10-0611-PCO-WU ISSUED: October 4, 2010

ORDER DENYING OPC'S MOTION TO STRIKE PORTIONS OF WMSI'S REBUTTAL TESTIMONY

In its original application for an increase in water revenues filed on May 25, 2010, Water Management Services, Inc. (WMSI or Utility) requested an increase in water rates designed to pay for approximately $2.2 million of capital improvements. Paragraphs 6 and 16 of WMSI's application state:

> 6. The Applicant is requesting rates that would allow it to recover all expenses that WMSI will incur on a going-forward basis, and generate a fair rate of return on its investment.
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> 16. The Applicant has experienced increased Operations and Maintenance expenses due to the aging infrastructure of the system, much of which was originally constructed over 30 years ago. In order to make the necessary capital improvements to WMSI's aging infrastructure, the Applicant is requesting a rate increase to pay for the improvements, totaling an estimated $2,202,481. A summary of the elements of the capital improvements and their costs are shown at page 3 of MFR, Volume I.

WMSI included the $2.2 million of capital improvements in its requested rate base, in the form of pro forma adjustments. In their direct testimony, WMSI witnesses Gene Brown and Frank Seidman addressed WMSI's request for an increase to include the cost of the $2.2 million of capital improvements in their direct testimony.

In his prefiled testimony filed on August 23, 2010, OPC witness Andrew Woodcock, P.E., asserted that the Commission should deny the $2.2 million of pro forma adjustments sought by WMSI, on the grounds that the only support consists of "planning level" engineering estimates, which are insufficient to document the cost of the proposed capital additions for ratemaking purposes. Based on Mr. Woodcock's testimony, OPC accounting witness Ms. Donna Ramas removed the $2.2 million of pro forma adjustments from rate base. On September 17, 2010, WMSI Witnesses Gene D. Brown, Frank Seidman, Michael Scibelli and Barbara S. Withers filed rebuttal testimony with the Commission.

On September 27, 2010, OPC filed its Motion to Strike Portions of WMSI's Rebuttal Testimony (Motion to Strike). The Motion to Strike addressed certain portions of the rebuttal testimony of Mr. Brown and Mr. Seidman relating to the proposed pro forma plant improvements, 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. WMSI filed its Response to OPC's Motion to Strike (Response) on September 29, 2010.

OPC's Motion to Strike

The Citizens of the State of Florida, by and through the Office of Public Counsel, move to strike the following portions of "rebuttal" testimony of WMSI witnesses Gene Brown and Frank Seidman:

> Mr. Brown - page 33, lines 18 through page 34, line 5; page 34, lines 16 through 22; and
> Mr. Seidman - page 5, lines 9 though page 6, line 12; page 8, line 1 through page 9, line 5.[1]

OPC states that above portions of prefiled testimony should be stricken "because they are not in the nature of rebuttal to the testimony of OPC's witnesses," and are instead an "attempt to inject at this late stage of the proceeding an impermissible modification of WMSI's case in chief." OPC argues that this modification "at this juncture constitutes an abuse of procedure and, if permitted, would violate OPC's right to due process."

OPC states that the "only legitimate rebuttal to Mr. Woodcock's position would be an assertion disputing his characterization of the 'planning level' estimates as inadequate to support an addition to rate base." OPC argues that, instead, both WMSI witness Brown and Seidman "introduced for the first time in testimony the concept of a series of proceedings beginning with an acknowledgement of the need for improvements and proceeding ultimately to an after-the-fact, true-up proceeding."

Citing several cases, OPC acknowledges that the adversary who goes second has an advantage and notes that case law has stated 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.'" (citations omitted) However, OPC argues to permit the rebutting party to introduce new subjects and/or alter the party's theory of the case would be to place OPC at a disadvantage.

OPC cites Driscoll v. Morris, 114 So.2d 314, 315 (Fla. 3d DCA 1959), in which the court held:

> Generally speaking, rebuttal testimony which is offered by the plaintiff is directed to new matter brought out by evidence of the defendant and does not consist of

[1] The rebuttal testimony of WMSI witnesses Brown and Seidman respond to OPC witnesses Woodcock and Ramas' testimony that there is not sufficient cost information for allowance of the pro forma projects at this time. The testimony appears to not dispute that there is sufficient information to determine costs, but allude to the fact that there may be the need for phased in rates, and further proceedings in the nature of a true up proceeding based on actual costs.

> testimony which should have properly been submitted by the plaintiff in his case-in-chief. It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief unless such additional facts are required by the new matter developed by the defendant. If the proffered evidence appears to be cumulative rather than rebuttal, it is within the sound discretion of the trial judge to allow its admission and the exercise of this discretion will not be disturbed on appeal unless it appears to so prejudice the result as to indicate an abuse of discretion.

OPC states that based on the language cited above, the Commission granted a motion to strike the rebuttal testimony of Aloha Utilities, Inc. See Order No. PSC-00-0087-PCO-WS, issued January 10, 2000, in Docket No. 960545-WS, In re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County. In that case, the utility attempted to present evidence in the "rebuttal" phase concerning regulatory expense that was not mentioned in its case-in-chief and that rebutted nothing in the Intervenors' case. The Commission found that the testimony and exhibits "do not rebut any parties' testimony, are not cumulative to any other testimony, and are, therefore, not proper rebuttal testimony and exhibits."

OPC argues that the same result should occur here, as the "testimony that is the subject of OPC's motion is not 'cumulative' to WMSI's direct case" and is inconsistent and contradicts WMSI's direct case. Further, the testimony appears to accept the assertions of Mr. Woodcock and Ms. Ramas, and proceeds to alter WMSI's basic request for relief. OPC states that WMSI does not seek to contradict or disprove OPC's assertion that WMSI has not documented or supported the cost of the proposed additions, but "seeks to change the course of the case in light of that assertion," which is not the appropriate function of rebuttal.

Further, OPC argues that to allow such rebuttal would prejudice OPC's case. OPC states that:

> Implicit in the rebuttal that is the subject of OPC's Motion to Strike is the idea that the Commission should indicate in this case that it will agree to increase rates by the amount of the costs of the proposed capital additions. Elsewhere in this case, OPC witness Donna Ramas has pointed out that WMSI's investment in "associated companies" now stands at $1.2 million—at a time when WMSI claims it has difficulty paying its obligations. Had WMSI presented its concept of findings and phases in its direct case, OPC's witnesses could have addressed the proposal in the full context of WMSI's financial condition and issues of imprudence to which it gives rise. If WMSI is permitted to present "out of bounds" testimony, it will have denied OPC that opportunity.

In conclusion, OPC states that WMSI's rebuttal witnesses say nothing in opposition to Mr. Woodcock's assertion that WMSI has failed to support the costs of its proposed capital projects adequately, and that nowhere prior to its rebuttal does WMSI say anything about a series of proceedings, initial findings, or true-ups. OPC argues that to allow the testimony would change the nature of WMSI's application, and that if "WMSI intended or desired to pursue this route, it should have laid out the proposal in its case in chief." Based on all the above, OPC

requests that WMSI's efforts to overcome the "shortcomings of the documentation it offered to support $2.2 million of capital projects by changing its basic case in chief is not legitimate rebuttal and should be stricken."

WMSI's Response to OPC's Motion to Strike

In its Response, WMSI presented two main arguments that the disputed testimony did not introduce a modification to WMSI's case, and also disputed whether any prejudice to OPC or due process rights would result by allowing the disputed testimony. Each section is listed and summarized below.

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

WMSI states that OPC's attempts to characterize the Utility's pro form plant adjustments as "new and different," is not accurate. First, WMSI points to its application where, in paragraph 16, it notes the need for "capital improvements to WMSI's aging infrastructure," were "an *estimated $2,202,481."* WMSI argues that it "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."

In the Direct Testimony of Gene D. Brown, p. 7, lines 11-13; and p. 8, line 10, WMSI argues that it is "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." (Italics added by the Utility) Also, in the direct testimony of Gene D. Brown, p. 12, lines 17-20, WMSI states that Mr. Brown testified "that Commission approval of the improvements would be needed before bidding and other work could commence." WMSI argues that this position was further reiterated in the deposition of Mr. Brown, and 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. See deposition of Gene Brown, p. 135, lines 8-11; p. 135, lines 22-25; and p. 136, lines 1-10, 13-19.

Thus, contrary to OPC's claims, WMSI argues that 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. WMSI notes that in its Application, it requests "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.

B. Mr. Brown's and Mr. Seidman's Rebuttal Testimony Rebut Points Raised by OPC Witnesses.

WMSI notes that in "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; and p. 6, lines 1-2. Further, WMSI argues that Mr. Woodcock noted that that the costs from bids of the capital projects could be used, but that they still would not be as accurate as final installed cost. Direct Testimony of Andrew T. Woodcock, p. 6, lines 1-2, 5-10. WMSI notes that 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. WMSI argues that Mr. Woodcock does not take issue with the need for any of the improvements, but recommends "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). WMSI also argues that OPC Witness Donna Ramas "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.

WMSI argues that 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." Citing 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, issued July 2, 2010, in Docket No. 090478-WS, In re: Application for original certificates for proposed water and wastewater systems, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC., (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, issued Sept. 22, 2004, in Docket No. 030623-EI, In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. against Florida Power & Light Company concerning thermal demand meter error. (denying motion to strike rebuttal testimony because it rebutted assertions made in the direct testimony of the adverse witnesses), WMSI notes that:

> 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."

Therefore, WMSI concludes that 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."

C. 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.

In this section WMSI notes the authority of the Commission to set fair and reasonable rates and charges. WMSI notes that the Commission has considerable discretion and latitude in the ratemaking process, and cites 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."); and City of Miami v. Fla. Public Serv. Comm'n, 208 So. 2d 249, 253 (Fla. 1968). Further, WMSI notes that the Commission has authority to approve prospective rate increases and can choose or construct a reasonable alternative. See Floridians United for Safe Energy, Inc. v. Public Serv. Comm'n, 475 So. 2d 241 (Fla. 1985); 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 noting that the Commission clearly has the authority to craft its own alternative, regardless of whether it has been advocated by one of the parties, here, WMSI states that it is explicitly proposing a multi-phase approach prior to hearing.

In Order No. PSC-09-0571-FOF-EI, issued August 21, 2009, in Docket No. 080317-EI, In re: Petition for rate increase by Tampa Electric Company, WMSI notes that 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. 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. Ultimately, in the TECO case, WMSI argues that the Commission found that the step increase "was within a range of alternatives that it could consider when deciding how to address a pro forma adjustment." Id. At 10-11

In the TECO case, despite the fact that the idea was not raised until the hearing, WMSI argues that 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)). WMSI states:

> 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.

"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 argues that it has "actually aided OPC's due process rights by explicitly raising the issue early in the case, in its Application, in Mr. Brown's deposition testimony, in Mr. Brown's and Mr. Seidman's rebuttal testimony, and again in WMSI's pre-hearing statement," and that OPC has been given ample time and opportunity to respond to this issue. WMSI notes that in its limited proceeding in 2000, 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.

See Order No. PSC-00-2227-PAA-WU, issued November 21, 2000, in Docket No. 940109-WU, In re: Petition for interim and permanent rate increase in Franklin County by St. George Island Utility Company, Ltd., and Docket No. 000694-WU, In re: Petition by Water Management Services, Inc. for limited proceeding to increase water rates in Franklin County, p. 8. Based on the above, WMSI argues that the multi-step process and true-up proposed by WMSI would be appropriate even if not requested by the Utility, but, as noted above, WMSI argues that it has explicitly requested such relief. Therefore, WMSI states OPC has had and continues to have opportunities to address WMSI's proposal in various venues, including in the hearing commencing next week.

Based on all the above, WMSI argues that 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, and that OPC's Motion to Strike must fail because the rebuttal testimony in question neither introduces a new concept nor violates OPC's due process rights.

Decision

Although WMSI relies in part on TECO Order No. PSC-09-0571-FOF-EI, I note that an administrative appeal of that Order was taken and ultimately settled. However, upon review of OPC's Motion to Strike and WMSI's Response, I find WMSI's arguments more persuasive. Therefore, in review of all the above, I find that the testimony in question does not constitute an

impermissible modification of WMSI's case, and does constitute proper rebuttal testimony. See United States v. Delk, 586 F.2d 513, 516 (5th Cir. 1978). Furthermore, its admission will not be an abuse of discretion, and will not cause prejudice to OPC or violate OPC's right to due process. See Hadley v. Dep't of Admin., 411 So. 2d 184, 187 (Fla. 1982). Moreover, the rebuttal testimony of witness Brown and witness Seidman are subject to objection and cross examination. Accordingly, the Commission will give the testimony of witness Brown and witness Seidman the weight it is due. Therefore, OPC's Motion to Strike Portions of WMSI's Rebuttal Testimony is denied.

Based on the foregoing, it is

ORDERED by Commissioner Nathan A. Skop, as Prehearing Officer, that OPC's Motion to Strike Portions of WMSI's Rebuttal Testimony is denied.

By ORDER of Commissioner Nathan A. Skop, as Prehearing Officer, this 4th day of October, 2010.

NATHAN A. SKOP
Commissioner and Prehearing Officer

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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

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