

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

RECEIVED-FPSC
11 FEB 10 AM 9:25
COMMISSION
CLERK

DATE: February 10, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Jaeger, Saylor, *BS*, *ALM*, *CRYS*)
Division of Economic Regulation (Hudson, Fletcher, Maurey)

RE: Docket No. 100104-WU – Application for increase in water rates in Franklin County by Water Management Services, Inc.; Motion for Reconsideration and/or Clarification of Order No. PSC-11-0010-SC-WU

AGENDA: 02/22/11 – Regular Agenda – Motion for Reconsideration -- Oral Argument Not Requested -- Participation of Parties is at Discretion of the Commission

COMMISSIONERS ASSIGNED: Graham, Edgar

PREHEARING OFFICER: Edgar *Graham-ac*

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\100104.RCM.DOC

Case Background

Water Management Services, Inc. (WMSI or Utility) is a Class A water utility providing service to approximately 1,805 water customers in Franklin County. For the year ended December 31, 2009, the Utility reported operating revenues of \$1,319,558 and a net operating loss of \$23,496.

On May 25, 2010, the Utility filed its application for the rate increase at issue in the instant docket, and requested that the application be set directly for hearing. WMSI requested final rates designed to generate annual water revenues of \$1,943,296. This represents a revenue increase of \$641,629 (49.29 percent). By Order No. PSC-10-0513-PCO-WU, issued August 12,

DOCUMENT NUMBER-DATE
00952 FEB 10 =
FPSC-COMMISSION CLERK

2010, the Commission suspended the Utility's rates and approved interim rates for WMSI. The interim increase granted was \$109,228, or 8.27 percent. Subsequent to a formal hearing, the Commission issued Order No. PSC-11-0010-SC-WU (Final Order) on January 3, 2011. The Final Order approved a revenue increase of \$13,474 (a 1.03 percent increase), and required all interim rates to be refunded with interest.

In the Final Order, the Commission also found that there was "some evidence that the Utility advanced approximately \$1.2 million to associated companies while reporting cumulative net losses of approximately \$727,000."¹ In its post-hearing brief, the Office of Public Counsel (OPC), which had intervened, argued that these advances were not prudent, and requested that the Commission take the following actions:

- (1) bar WMSI from further investments in associated companies;
- (2) require WMSI to demand return of its affiliate investments prior to the next rate case . . . ;
- and (3) if repayment is not made by the next rate case, impute a return on the outstanding investment.

Having considered OPC's arguments, the Commission determined that "there was no evidence presented that documented Mr. Brown or BMG having misappropriated funds from the Utility."² The Commission found that with the adjustments to expenses and an overall rate of return of 3.85 percent, the customers were not being charged higher rates due to these advances, and the customers continue to receive quality service. Further, the Commission stated that it did not want to micromanage this Utility, and declined to take the three actions that OPC suggested. The Commission concluded that "based on the record in this proceeding, it cannot be determined if the level of investment in associated companies is appropriate," but directed staff to "initiate a cash flow audit of the Utility as soon as possible, and if it is determined that the activity in the account has impaired the Utility's ability to meet its financial and operating responsibilities, our staff shall recommend an appropriate adjustment for imprudence."³

On January 14, 2011, OPC filed its timely Motion for Reconsideration and/or Clarification (Motion) of the Final Order pursuant to Rule 25-22.060, Florida Administrative Code (F.A.C.),⁴ which is the subject of this recommendation. The Commission has jurisdiction pursuant to Section 367.081, F.S.

¹ Final Order, at page 55.

² Final Order, at page 55.

³ Final Order, at page 56.

⁴ OPC did not request oral argument as required by Rule 25-22.0022, F.A.C. Pursuant to Rule 25-22.0022(2), F.A.C., the Commission may request oral argument on matters over which it presides.

Discussion of Issues

Issue 1: Should the Commission grant the Office of Public Counsel's Motion for Reconsideration of a portion of Order No. PSC-11-0010-SC-WU?

Recommendation: No. The Commission did not overlook or fail to consider a point of fact or law in rendering Order No. PSC-11-0010-SC-WU; therefore, OPC's Motion for Reconsideration should be denied. (Jaeger)

Staff Analysis:

Legal Standard

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). The purpose of reconsideration is to bring to the administrative agency's attention a specific point that, had it been considered when it was presented in the first instance, would have required a different decision. State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (Wigginton, J., concurring); Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959). The Commission's decision to grant a motion for reconsideration must be based on specific factual matters rather than an arbitrary feeling that a mistake may have been made. Stewart Bonded Warehouse, Inc., 294 So. 2d at 317 (overturning a Commission order on reconsideration because the Commission's basis for granting reconsideration was to reweigh the evidence, which was "not sufficient").

Parties' Arguments on OPC's Motion for Reconsideration

I. OPC's Argument on Motion for Reconsideration

Although OPC states that it agrees with nearly all of the Commission's findings and dispositions, it requests the Commission reconsider and/or clarify a single subject: the Commission's treatment of the \$1.2 million (net) that WMSI currently has advanced to "associated companies" and WMSI's president. OPC asks the Commission to reconsider its statement that the record is not adequate to enable the Commission to ascertain whether the \$1.2 million level of advances to associated companies is appropriate, and find that the level is both inappropriate and imprudent. OPC states that the Commission should reconsider its treatment of advances because it failed to consider the utility's legal burden of proof and the import of evidence of record. Each of these arguments are set out below.

A. The Commission Failed to Place the Burden of Proof on WMSI

OPC argues that in a ratemaking proceeding, the burden of proof is on the utility to demonstrate that it has acted prudently, and the costs it wishes to recover from its customers are

reasonable. OPC notes that this burden is heightened when analyzing transactions with related companies,⁵ and citing Order No. PSC-06-0170A-PAA-WS,⁶ states:

By their very nature, related-party transactions require closer scrutiny. Although a transaction between related parties is not per se unreasonable, it is the utility's burden to prove that its costs are reasonable. This burden is even greater when the transaction is between related parties.

OPC argues that although WMSI's president sought to justify the \$1.2 million of advances on the grounds that he and associated companies have taken out loans and used the proceeds to pay some of the utility's expenses, the Commission found that WMSI presented absolutely no documentary evidence to prove that assertion.⁷ OPC asserts that: "Having observed WMSI's complete failure to prove its claim, the Commission failed to apply the legal standard of the utility's burden of proof."

B. The Commission overlooked and/or failed to consider evidence of record demonstrating that customers have been injured by WMSI's imprudent advances to associated companies.

OPC also argues that "the Commission's conclusion that the record is 'inadequate' conflicts with factual findings located elsewhere in the Order," and in the record. OPC notes that at page 53 of the Final Order, "the Commission observed that, by allowing associated companies to withdraw \$1.2 million from the utility during the period 2004-2009, WMSI's management placed itself in a position in which it could not even meet the basic debt payment obligations of its very favorable loan from the Florida Department of Environmental Protection . . .," and ". . . WMSI was forced to reschedule and extend loan payments, which had the effect of increasing costs borne by customers over time."

OPC claims that the Commission overlooked or failed to consider other evidence in the Final Order that further demonstrates WMSI's imprudence. OPC witness Donna Ramas pointed out that WMSI's debt obligations exceed the value of its plant. She also established how this condition came about; WMSI has on occasion reduced the value of plant on its books without at the same time paying down debt associated with the adjusted plant. For instance, after settling litigation with a contractor over the quality of coatings applied to bridge crossing structures, WMSI received a settlement of \$760,000 (TR 370-371; Exhibit 37). WMSI appropriately reduced the value of plant associated with the litigation and settlement. This had the effect of reducing WMSI's rate base. However, WMSI did not use all of the settlement proceeds to pay down the debt associated with the plant. Instead, during the three-month period following the receipt of the \$760,000, the balance in Investment in Associated Companies increased by

⁵ WMSI's president owns or controls the "associated companies" to whom WMSI has advanced the \$1.2 million.

⁶ Issued March 9, 2006, in Docket No. 050281-WS, In re: Application for increase in water and wastewater rates in Volusia County by Plantation Bay Utility Company, at page 15 of 49 (The Commission determined that the utility had failed to prove that the price it paid a related company for land was based on market value, and so entered a value of zero for the property for rate base valuation purposes.)

⁷ Final Order, at pages 53-54.

\$254,125 for items such as \$50,000 advanced to BMG, \$85,000 advanced to SMC Investment Properties and \$50,000 advanced to Gene D. Brown (Exhibit 37). Had WMSI used some or all of the \$1.2 million of advances to associated companies (which amount is equal to roughly one-third the value of its entire rate base), on which it receives no interest and no return, to instead reduce its debt, OPC argues that the Utility's interest expense would be lower, WMSI would be in a better position to pay its debt obligations timely, and WMSI's lower debt burden would be reflected in the rates that customers pay. In short, OPC states that the Commission overlooked evidence which shows injury to customers. On reconsideration, OPC requests the Commission take this evidence into account and conclude that the \$1.2 million balance of outstanding advances to associated companies is inappropriate, imprudent, and harmful to customers.

II. Utility's Response to OPC's Motion for Reconsideration

As stated above, OPC filed its Motion for Reconsideration and/or Clarification of the Final Order on January 14, 2011. No response was filed by WMSI, and the time for doing so has expired.

III. Staff's Analysis and Recommendation

Regarding OPC's first argument concerning the proper placing of the burden of proof, staff believes that the Commission was well aware of the burden of proof and always placed the burden of proof on the Utility as required. The Commission specifically found that with its "adjustments to expenses and an overall rate of return of 3.85 percent, we do not believe that the customers are being charged higher rates due to Mr. Brown's actions."⁸ Further the Commission also found that the Utility was supplying satisfactory quality of service and specifically noted that based on customer testimony the customers were receiving quality service.

Regarding OPC's argument that the Commission overlooked or failed to consider evidence of record, staff notes that in many instances OPC is referring to findings in the Final Order that it thinks would support its position that the Commission should immediately find that the level of transfers are both inappropriate or imprudent. Staff does not understand how, if the Commission specifically noted those findings, it could be said to have overlooked or failed to consider those findings.

Regarding OPC's claim that the Commission overlooked or failed to consider the refinancing of the DEP loan, the Commission specifically noted that over time the "refinancing of the loan added an additional \$955,113 of interest over the life of the loan . . .," and disallowed the DEP refinancing costs of \$2,500.⁹ Therefore, the Commission clearly considered this fact.

Also, the Commission was well aware that WMSI had no equity in the system, and the capital structure was primarily comprised of debt, plus a small amount of customer deposits. As regards OPC's argument concerning the disposition of the funds received by WMSI for the

⁸ Final Order, at page 56.

⁹ Final Order, at page 27.

settlement of the quality of coatings applied to bridge crossing structures, the Commission specifically stated:

We find that the Utility's treatment of the settlement was appropriate. Even though we find that the proceeds are not for the maintenance of the bridge, we are concerned with the management's use of the funds.

Therefore, it is clear that the Commission also considered this fact, and merely reached a different conclusion as to the actions to be taken on a going forward basis.

OPC also argues that if WMSI had used some or all of the \$1.2 million of advances to "reduce its debt, the utility's interest expense would be lower." However, staff notes that the capital structure is reconciled to rate base, and any interest on the debt instruments to be included in the rates would be limited to that amount included in rate base. Therefore, the customers do not pay for any interest paid by the utility over and above the amount associated with used and useful rate base. Staff further notes that even if the full amount of \$1.2 million was used to pay down the Utility's debt, the capital structure of WMSI would still consist almost entirely of debt. Finally, staff notes that if the Utility ever does obtain any equity investment, the current cost of equity is set at 10.85 percent, which is almost three-times the current debt cost and overall cost of capital.

Conclusion

In considering the arguments raised by OPC in its Motion for Reconsideration, staff believes that OPC has merely reargued its positions already set forth at hearing and in its post-hearing brief, rather than identifying a point of fact or law that the Commission overlooked or failed to consider in the first instance. A motion for reconsideration is not the appropriate vehicle for rearguing matters that have already been considered by the Commission. Diamond Cab Co. of Miami, 146 So. 2d at 891 (holding that it is not the province of reconsideration to provide "a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order"); Sherwood, 111 So. 2d at 98 (citing State ex. rel. Jaytex Realty Co., 105 So. 2d at 819 (Wigginton, J., concurring) (stating that it is inappropriate to reargue in a motion for reconsideration matters that have already been considered); Stewart Bonded Warehouse, Inc., 294 So. 2d at 316-317 (noting that it is improper in a motion for reconsideration to ask the deciding body to reexamine the evidence presented and "change its mind").

In consideration of the above, staff believes that OPC's Motion for Reconsideration should be denied as it fails to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Final Order. Staff further believes that the Commission relied on evidence in the record and applied the correct legal standards. Finally, the Motion for Reconsideration should be denied because OPC's Motion for Reconsideration merely reargues its case set forth in great detail in its post-hearing brief.

Docket No. 100104-WU
Date: February 10, 2011

In the event the Commission denies reconsideration, OPC requests the Commission to clarify the nature and scope of the cash flow audit of WMSI that it directed Staff to initiate. This request is addressed in the next issue.

Issue 2: Should the Commission grant the Office of Public Counsel's Motion for Clarification of a portion of Order No. PSC-11-0010-SC-WU?

Recommendation: Yes. The Commission should clarify that the tool of imputation advocated by OPC is available if needed to protect customers. Further, the Commission should find that the parameters of the cash flow audit that it directed staff to begin are adequate. (Jaeger, Hudson, Fletcher)

Staff Analysis:

Parties' Arguments

I. OPC's Motion for Clarification

OPC asks the Commission to clarify the portion of the Final Order that states that the measures proposed by OPC, especially imputing a return on the advances for purposes of calculating future revenue requirements in the event the amounts remain at such inappropriate levels, would constitute "micromanagement," so as to avoid the unwarranted implication that the Commission is limited in its options to the specific measures¹⁰ enumerated in the Final Order. OPC requests the Commission to clarify the Final Order to acknowledge clearly that the type of imputation advocated by OPC is a ratemaking tool that the Commission can and frequently does employ to guard customers of regulated utilities from the excesses or mistakes of utility management. Also, OPC requests the Commission to clarify the nature and scope of the cash flow audit of WMSI that it directed staff to initiate. OPC's argument on these two points of clarification are addressed below:

A. The Commission Should Clarify That It Can and Will Employ the Tool of Imputation Advocated by OPC When Needed to Protect Customers

In its post-hearing brief, OPC argued that the Commission should impute a return on the \$1.2 million in WMSI's next case if, after being placed on notice of the Commission's determination regarding the imprudence of the advances, WMSI fails to restore the cash to the Utility. Referring to page 56 of the Final Order, in its Motion, OPC states that "the Commission described OPC's proposed measures as 'well intended' but expressed its intent to avoid 'micromanaging' the utility."¹¹ OPC requests the Commission "clarify the Order to avoid any implication that it regards 'imputation' as 'micromanagement.'"

¹⁰ In the Final Order, the Commission noted that when there was a determination of mismanagement or imprudence, the Commission could take the following actions: (1) remove the asset or expense in question from the determination of rates; (2) in the case of non-regulated investments, it could reduce equity in the capital structure by the amount of the investment; or (3) it could reduce the president's salary. See Final Order, at pages 54-55.

¹¹ OPC believes that in the Final Order, the Commission indicated it lacked authority to prohibit WMSI from investing further in associated companies. OPC regards its recommendation that the Commission direct WMSI to recall the advances to be more in the nature of notice of the Commission's intent to impute a return on advances in the event advances remain inordinately high. OPC notes that in WMSI's 1994 rate case, in response to evidence of troubling business practices, the Commission required WMSI to place service availability payments it received in an escrow account to ensure the money would be available for future capital additions and not be used by the utility for

OPC then notes that “by rule the Commission imputes a value for Contributions In Aid of Construction (CIAC) from a developer when the utility fails to record it.” See Rule 25-30.570, F.A.C. Similarly, the Commission has imputed additional revenues in a test year: (1) to adjust for a utility’s failure to meter and bill sales to parties related to the utility; and (2) to take into account opportunities for sales for reuse that a utility failed to include in its test year revenues. This imputation of revenues has “the effect of lowering the utility’s calculated revenue deficiency, thereby protecting customers from unreasonably high rates.”

Citing Order No. PSC-04-0128-PAA-GU,¹² OPC asserts in its Motion that:

[T]he Commission noted that City Gas’ actual cost of short term debt was unreasonably high due to severe financial/credit difficulties being experienced by its corporate parent. To protect City Gas’ customers from being penalized (in the form of high interest costs and correspondingly high rates) for the difficulties created by the parent corporation, the Commission imputed a short term cost of debt of 3.9% in lieu of the 7% reported by the utility and used the imputed rate to calculate City Gas’ revenue requirements.

Motion, at page 5. Based on the above, OPC argues that the Commission “has in its arsenal of regulatory tools the ability to either impute income to the utility associated with the advances or, alternatively, to impute a lower overall indebtedness (and correspondingly lower interest cost) reflecting the prudent use of cash to pay down costly debt rather than sending it to associated companies ‘free of charge,’” and should clarify the Final Order “to affirm the availability of the imputation tool in circumstances such as those presented in this case.”

B. The Commission Should Clarify the Parameters of the Cash Flow Audit That it Directed Staff to Begin.

If the Commission proceeds solely with the cash flow audit described in the Final Order, “OPC asks the Commission to clarify that the scope of the audit will include the books and records of associated companies and WMSI’s president to the full extent necessary to establish definitively the extent of payments made by recipients of advances to defray utility expenses, and that the Commission will provide OPC and customers a point of entry in the event the audit does not support WMSI’s claim.”

II. Utility’s Response

As noted previously, OPC filed its Motion for Reconsideration and/or Clarification of the Final Order on January 14, 2011. No response was filed by WMSI, and the time for doing so has expired.

other purposes. Further, among other restrictions, OPC notes that WMSI was required to submit a written request for release of those funds. See Order No. PSC-94-1383-FOF-WU, at page 66.

¹² Issued February 9, 2004, in Docket No. 030569-GU, In re: Application for rate increase by City Gas Company of Florida.

III. Staff's Analysis and Conclusion

A. The Commission Should Clarify That It Can and Will Employ the Tool of Imputation Advocated by OPC When Needed to Protect Customers

Staff does not believe that the Commission limited itself to the actions listed in the Final Order. As noted in the examples designated by OPC, staff agrees that imputation is one of the many tools that the Commission may use if the facts of the case warrant such an imputation. Staff notes that, in the City Gas case, the Commission reduced the cost of short-term debt from 7 percent to 3.9 percent, while, in this case, the cost of long-term debt is already at 3.79 percent. In denying OPC's request, staff believes that, under the facts of this case as set forth in the record, the Commission merely disagreed that it should impute an interest return on the \$1.2 million that may have been advanced to related parties. Therefore, staff does not believe that the customers have been penalized by the Utility's actions.¹³ Further, staff believes the Commission has historically avoided "micromanaging" utilities. Pursuant to Section 367.011(3), F.S., the Commission must act in the "public interest" and the provisions of Chapter 367, F.S., "shall be liberally construed for the accomplishment of this purpose." Therefore, to the extent that this discussion clarifies the Commission's position on this issue, staff recommends that OPC's Motion for Clarification be granted.

B. The Commission Should Clarify the Parameters of the Cash Flow Audit That it Directed Staff to Begin

Staff has already initiated its cash flow audit, and believes the parameters as shown on the attached audit request are sufficient (Attachment 1). If the Commission believes that the parameters are not sufficient, staff can modify the parameters as directed by the Commission.

¹³ The approved rates only include the recovery of a return on rate base deemed used and useful and devoted to public use. Even though the long-term debt is greater than the approved rate base, any incremental interest expense paid on the long-term debt above rate base is not embedded in the customers' rates.

Issue 3: Should this docket be closed?

Recommendation: No, this docket should remain open until: (1) staff confirms that the appropriate refunds have been made; (2) the appropriate notices and tariffs have been filed and approved by staff; and (3) the show cause proceedings are concluded. Upon those events being completed, the docket may be closed administratively. (Jaeger)

Staff Analysis: This docket should remain open until: (1) staff confirms that the appropriate refunds have been made; (2) the appropriate notices and tariffs have been filed and approved by staff; and (3) the show cause proceedings are concluded. Upon those events being completed, the docket may be closed administratively.

ITEM #	AUDIT OBJECTIVE OR QUESTION (Add supplemental background for auditor)
1	Please perform a cash flow audit of the utility for the period January 1, 2004 through December 31, 2010. For purposes of this audit, determine the beginning and ending balance of cash for each month of this seven-year period.
2	On a monthly basis for the period January 2004 through December 2010, please compare the cash received by the utility for services rendered against cash spent for utility-related expenses. If cash received exceeded cash expenditures, determine where the excess cash went. If cash received was less than cash expenditures, determine how the deficiency was covered.
3	Please determine the beginning and ending balance recorded in Account No. 123 – Investments in Associated Companies for each month for the period January 2004 through December 2010.
4	Please verify the movement of funds between the utility and any associated companies for the period January 2004 through December 2010. For purposes of this item, please itemize the amounts related to Gene Brown, BMG, and any other associated companies.
5	Please verify how much, if any, of the balance recorded in Account No. 123 – Investments in Associated Companies represents repayment of funds spent on utility-related expenses.
6	Please obtain copies of all invoices, receipts, or other documentation that verifies amounts paid by Gene Brown, BMG, and any other associated companies on behalf of the utility for the period January 2004 through December 2010 related to the balance recorded in Account No. 123 – Investments in Associated Companies.
7	Please verify that the amounts referenced in items 5 and 6 are not duplicative of any other expenses or investments recorded on the utility's books and records.
8	Please determine how much debt was incurred by Gene Brown, BMG, and any other associated companies on behalf of the utility over the period January 2004 through December 2010. For purposes of this response, determine the beginning and ending balance of this debt for each month of this seven-year period.
9	Please obtain copies of all loan agreements or other documentation that verifies the amount of loans incurred by Gene Brown, BMG, and any other associated companies on behalf of the utility for the period January 2004 through December 2010.
10	Please prepare a schedule that details the terms and conditions of all debt and/or loans identified in items 8 and 9.
11	During the hearing, testimony was offered that refinancing the DEP loan for the water supply main replacement lowered the debt service payments on this loan. (TR 535) Please verify the following: a) the change in the interest rate, if any, due to the refinancing; b) the amount of the decrease in the annual debt service; and c) the incremental increase in interest paid over the term of the loan compared to the total amount of interest paid if the loan had not been refinanced.
12	Please provide annual cash flow statements of WMSI for the period 2004 through 2010, inclusive, using both the direct and indirect method.
13	
14	
15	