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b. Docket number and title for electronic filing are: Docket No. 100330-WS - In Re: Application for increase in water and wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.

c. The name of the party on whose behalf the document is filed: Aqua Utilities Florida, Inc. ("AUF").

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for increase in water and wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.)
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) DOCKET NO. 100330-WS
) FILED: November 4, 2011
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AQUA UTILITIES FLORIDA, INC.'S MEMORANDUM ON THE PROPOSED ISSUE IDENTIFIED IN ORDER NO. PSC-11-0484-PCO-WS

Pursuant to Order No. PSC-11-0484-PCO-WS, issued on October 25, 2011, Aqua Utilities Florida, Inc. ("AUF"), submits this Memorandum on whether a novel issue proposed by the Office of Public Counsel ("OPC")—Proposed Issue No. 24—is a proper issue to include in this rate case. OPC's Proposed Issue No. 24 is drafted as follows:

Are the total operating expenses prudently incurred such that the resulting rates are affordable within the meaning and intent of fair, just, and reasonable pursuant to Sections 367.081 and 367.121, Florida Statutes?

For the reasons set forth below, AUF respectfully requests the Prehearing Officer to exercise his authority and exclude Proposed Issue No. 24 from the Prehearing Order because the issue seeks to incorporate an unprecedented "affordability" standard for determining a water and wastewater utility's revenue requirement that is not supported anywhere in Chapter 376, Florida Statutes, or relevant case law.

INTRODUCTION

OPC seeks, through Proposed Issue No. 24, to inject an unprecedented and legally unsupported criterion to determine AUF's rates in this case. Once an expense is found to be prudently incurred, the applicable statutes and case law require that rates be set to allow the utility to recover those expenses, and to earn a fair rate of return on its used and useful

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investment. In this case, the prudence of all expenses is an issue already subsumed within other issues before the Commission.

Considering this undefined concept of “affordability” in any other context would run contrary to Florida law for several reasons. First, neither the term “affordability” nor any similar concept appears in Chapter 367, Florida Statutes, and there can be no question the Florida Legislature knows how to include such terms when it wants to. Second, even where the Legislature has required affordability to be considered in some fashion, it has never been properly applied to deprive a utility of the opportunity to recover its prudently incurred expenses and to earn a fair return on its investments. Rather, Florida law makes clear that such consideration of “affordability” must be limited to designing the appropriate rate structure. To allow otherwise would result in illegal, confiscatory rates.

The Commission may properly limit the nature and scope of proposed issues in a proceeding before it. *See, e.g., In Re: Complaint of Florida Competitive Carriers Ass'n against BellSouth Telecom., Inc.*, Docket No. 020507-TL, Order No. PSC-02-1537-PCO-TL (Nov. 12, 2002). Likewise, the Commission has authority to remove proposed issues on the basis that positions on those issues can be adequately presented within the context of other issues. *See, e.g., In Re: Generic Investigation into the aggregate electric utility reserve margins planned for Peninsular Florida*, Docket No. 981890-EU, Order No. PSC-99-1274-PCO-EU (July 1, 1999). This authority vests in the Prehearing Officer. *See, e.g.,* Docket No. 070691-TP, Order No. PSC-08-0549-PCO-TP (Aug. 19, 2008) (establishing that the Prehearing Officer has the authority to determine requests pertaining to the scope of an issues list).

Accordingly, AUF respectfully requests the Prehearing Office to exercise its lawful authority and exclude Proposed Issue No. 24.

ANALYSIS

The Commission is required to fix water and wastewater utility rates that are just, reasonable, compensatory, and not unfairly discriminatory. § 367.081(1), Fla. Stat. Those rates must be established by the Commission at a level which will allow a utility the opportunity to recover its prudently incurred expenses and to earn a fair return on its investments. *See, e.g., United Telephone Co. v. Mayo*, 403 So. 2d 962, 966 (Fla. 1981); *Keystone Water Co. v. Bevis*, 278 So. 2d 606 (Fla. 1973).

In determining a utility's rates, the Commission must consider whether rates are confiscatory and deprive a utility of a fair return. *See Westwood Lake, Inc. v. Dade County*, 264 So. 2d 7 (Fla. 1972). To that end, the Florida Supreme Court has made it clear that a regulated public utility is entitled to earn a fair rate of return on capital investment and failure to allow a fair rate of return is a violation of due process rights.¹ *See Gulf Power Co. v. Bevis*, 289 So. 2d 401 (Fla. 1974); *Keystone Water Co.*, 278 So. 2d at 606 (holding utility rates which do not yield a fair rate of return are unjust, unreasonable, and confiscatory, the enforcement of which deprives a utility of due process).

Thus, in *Southern States Utilities, Inc. v. Florida Public Service Commission*, 714 So. 2d 1046 (Fla. 1st DCA 1998), the Florida First District Court of Appeal made clear that, "in the aggregate, rates and charges" must assure a water and wastewater utility an opportunity to recover its "revenue requirement," which it described as "the cost of the service the utility

¹ The United States Supreme Court has addressed utility claims of unconstitutional takings in the rate of return regulation environment on several occasions. *See, e.g., Chicago, Minneapolis & St. Paul R.R. v. Minnesota*, 134 U.S. 418 (1890). The Court has held in those cases that rates set so low as to deny an adequate rate of return are confiscatory. *Id.* The principles for determining the appropriate rate of return for a regulated utility are set forth in *Bluefield Co. v. Public Service Commission*, 262 U.S. 679 (1923) (defining the fair and reasonable standards for determining a rate of return for regulated enterprises, and holding that the authorized return for a public utility should be commensurate with returns on investments in other companies of comparable risk, sufficient to maintain the financial integrity of the company, and sufficient to maintain its ability to attract capital under reasonable terms).

provides, operating expenses as well as the cost of capital.” *Id.* at 1053. Moreover, the court explained that, while an “affordability” criterion may be used to design a utility’s rate structure, such a criterion cannot be used to decrease a utility’s “overall revenue requirement.” *Id.* (“Before setting rates for separate classes of customers, the utility must establish and the PSC must approve a determination of the utility’s overall revenue requirements.”).

In other words, to the extent “affordability” criteria would cap the rates of certain systems at a level that would interfere with the recovery of the revenue requirement, the resulting “shortfall” would need to be recovered from the remaining ratepayers of the utility to ensure the utility is afforded an opportunity to recover its “revenue requirement” as required by law. *Id.* To the extent “affordability” is to be made part of this rate case, under Florida law, its pertinence must be confined to determining the appropriate design of AUF’s rate structure. *Id.* OPC’s attempt to inject a new “affordability” criterion to reduce AUF’s revenue requirement blatantly contradicts Florida law and, if accepted, would result in confiscatory rates. *Id.*

The Legislature, in Chapter 367, Florida Statutes, has provided clear direction to the Commission on establishing rates for a water and wastewater utility. Nowhere in Chapter 367 is the term “affordability” ever used. Indeed, the Legislature specifically has not included any such term in Chapter 367 despite knowing precisely how to do so.² *See, e.g., Maddox v. State*, 923 So. 2d 442, 446-47 (Fla. 2006) (stating that the Legislature’s use of different terms in different statutory sections indicates that different meanings were intended); *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) (holding that where the Legislature has used a

² For instance, the Legislature has specifically chosen in Chapter 364, Florida Statutes, to make “affordability” relevant to the development of telecommunications rates. But, even there, “affordability” has never been used to deprive a telephone company of its right to recover its revenue requirement. Rather, federal and state law provide for a telecommunications company offering below-cost rates to low-income customers to receive subsidies from the Universal Service Fund, and define eligibility for such subsidies. In Florida, no similar scheme even remotely exists for water and wastewater utilities.

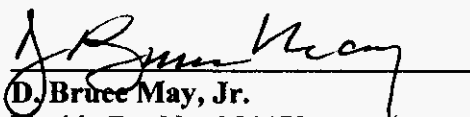
term in one section of a statute but omitted the term in another section, the court will not read the term into the sections where it was omitted); *Fla. Dep't of Child & Fam. Servs.*, 869 So. 2d 760, 762 (Fla. 1st DCA 2004) (“[W]here a department’s construction of a statute is inconsistent with clear statutory language it must be rejected, notwithstanding how laudable the goals of that department.”); *Am. Bankers Life Assurance Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968) (“This court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.”).

CONCLUSION

Pursuant to Chapter 367, Florida Statutes, AUF must be afforded the opportunity to recoup its prudent investment and to earn a reasonable return on that investment. Because the invitation to determine Proposed Issue No. 24 is aimed solely at undermining this well-established requirement, AUF respectfully requests that the Prehearing Officer exercise his authority and exclude it.

Respectfully submitted this 4th day of November, 2011.

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CERTIFICATE OF SERVICE

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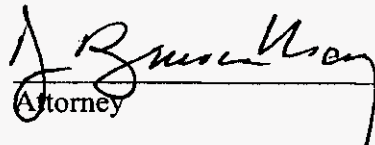
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