

**Marguerite McLean**

100318-WS

**From:** jennifer.gillis@hklaw.com  
**Sent:** Monday, November 15, 2010 4:46 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No. 100318-WS  
**Attachments:** 100318-WS.pdf

a. Person responsible for this electronic filing:

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b. Docket number and title for electronic filing are Docket 100318-WS, Petition for order to show cause against Service Management Systems, Inc. in Brevard County for failure to properly operate and manage water and wastewater system.

c. The name of the party on whose behalf the document is filed: FL-Service Management, LLC.

d. Total number of pages: 10

e. Brief description of filing: FI-Service management, LLC's Response in Opposition to Aquarina Utility Association, Inc.'s Motion for Reconsideration of Order No. PSC-10-0624-FOF-WS and Request for Oral Argument and letter of transmittal regarding same.

**Jennifer Gillis | Holland & Knight**

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November 15, 2010

*Via E-mail (filings@psc.state.fl.us)*

Ms. Ann Cole, Director  
Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Betty Easley Conference Center, Room 110  
Tallahassee, FL 32399-0850

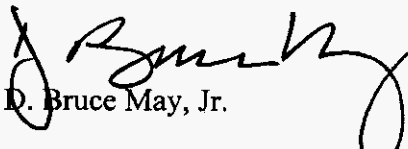
Re: In Re: Petition of Aquarina Utility Association, Inc., For Order to Show Cause  
Against Service Management Systems, Inc., Docket No. 100318-WS

Dear Ms. Cole:

Enclosed is FI-Service Management, LLC's Response in Opposition to Aquarina Utility Association, Inc.'s Motion for Reconsideration of Order No. PSC-10-0624-FOF-WS and Request for Oral Argument. Thank you for your assistance with this filing.

Sincerely yours,

HOLLAND & KNIGHT LLP

  
D. Bruce May, Jr.

DBM:kjg  
Enclosure

cc: Anna Williams, Esq.  
Brian Armstrong, Esq.  
Mr. Dennis Basile

Atlanta | Bethesda | Boston | Chicago | Fort Lauderdale | Jacksonville | Lakeland | Los Angeles | Miami | New York  
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition of Aquarina  
Utility Association, Inc., For  
Order to Show Cause Against  
Service Management Systems, Inc.

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Docket No. 100318-WS

Dated: November 15, 2010

**FL-SERVICE MANAGEMENT, LLC'S RESPONSE  
IN OPPOSITION TO AQUARINA UTILITY ASSOCIATION, INC.'S  
MOTION FOR RECONSIDERATION OF ORDER NO. PSC-10-0624-FOF-WS  
AND REQUEST FOR ORAL ARGUMENT**

FL-Service Management, LLC, ("LLC"), by and through undersigned counsel and pursuant to Rule 25-22.060, Florida Administrative Code ("FAC"), responds in opposition to the Motion for Reconsideration of Order No. PSC-10-0624-FOF-WS ("Motion") and the Request for Oral Argument filed on behalf of Aquarina Utility Association, Inc. ("Association") on November 3, 2010.<sup>1</sup> The Association's Motion reargues its initial case with sound and fury but signifies nothing under Florida law that would require the Commission to reconsider Order No. PSC-10-0624-FOF-WS (the "Order"). Moreover, the Association improperly attempts to use the Commission's reconsideration procedures to correct deficiencies in its initial petition instead of filing an amended petition as directed by the Commission. Accordingly, and as explained more fully below, LLC respectfully submits that the Association's Motion and Request for Oral Argument should be denied.

**BACKGROUND**

1. The Association's Petition for Order to Show Cause, which it filed on June 7, 2010 (the "Petition"), requested two types of relief. First, the Petition requested that the

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<sup>1</sup> The LLC was served with the Association's Motion and Request for Oral Argument by U.S. Mail on November 3, 2010. Thus, pursuant to Florida Administrative Code Rules 25-22.060(3), 28-106.204(1), and 28-106.103, the LLC's response in opposition to the Association's filing is due on or before November 15, 2010.

DOCUMENT NUMBER: DATE

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Commission initiate show cause proceedings against the LLC based upon broad and general quality of service allegations that revolved around claims that the utility's wastewater system is in need of repair to address alleged safety hazards and to achieve compliance with the Florida Department of Environmental Protection ("FDEP") requirements. Second, based upon those same broad and general quality of service allegations, the Petition requested that the Commission initiate a limited proceeding under Section 367.0822, Florida Statutes, to reduce rates on the basis that the utility allegedly had failed to properly operate its water and wastewater systems.

2. The Order dismissed the Petition without prejudice and rejected the Association's request to initiate show cause and limited proceedings against the utility. In so doing, the Order makes it clear that the Commission thoroughly addressed all of the Association's quality of service allegations and found the Petition deficient with respect to the requested show cause and limited proceedings.

Assuming that all of these allegations are true, and viewing all reasonable inferences in favor of the Association, it has not alleged facts sufficient to make a prima facie showing that the utility is willfully violating or refusing to comply with any rule, statute or order of the Commission. Furthermore, the Association has not cited to any FDEP or county health department notices of violation, consent orders, or rule violations. Accordingly, a proceeding requiring the utility to show cause why it should not be fined is inappropriate and shall not be initiated. [Order at 6.]

\* \* \*

The Association has failed to make substantive allegations that there is a service quality problem which would warrant a reduction to the utility's return on equity or a requirement that the utility make certain repairs. The Association does not make specific factual allegations that the standards prescribed by this Commission or promulgated by the FDEP are not being met or that the utility is not providing adequate service, nor does it specifically identify any "violations" or "deficiencies." As noted above, the Association has failed to cite to any FDEP or county health department notices of violation or consent orders. The

Association's conclusory assertions are unsupported by sufficient factual allegations. [Order at 7.]

3. Finally, Order makes it clear that the Association's Petition was dismissed "without prejudice" and the Association was expressly instructed that it could file an amended petition. Order at 7.

### **ARGUMENT**

4. The Association's Motion should be denied because fails to meet the standards for reconsideration prescribed by Florida law. More specifically, the Motion improperly attempts to use the Commission's reconsideration procedures (i) to reargue matters that have been fully aired and carefully considered by the Commission, and (ii) to attempt to cure defects in its Petition.

#### **Standards Governing Motions for Reconsideration.**

5. The purpose of a motion for reconsideration is to identify a point of fact or law which was overlooked or which the tribunal failed to consider in rendering its order. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974). A motion for reconsideration is not the appropriate vehicle to reargue matters that have been already considered by the Commission. *Diamond Cab Co. of Miami v. King*, 146 So. 2d 889 (Fla. 1962). *See also, United Gas Pipe Line Co. v. Bevis*, 336 So. 2d 560, 565 (Fla. 1976) (reh'g den. April 7, 1976). The Commission has also recognized that a motion for reconsideration is not an appropriate vehicle to amplify allegations and make new arguments in order to cure defects in earlier pleadings. *See 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*, 04 F.P.S.C. 11:364, Docket No. 030623-EI, Order No. PSC-04-1160-PCO-EI (Nov. 22, 2004); *In re: Development of local exchange telephone company cost study*

*methodology(ies)*, 92 F.P.S.C. 3:666, Docket No. 900633-TL, Order No. PSC-92-0132-FOF-TL (Mar. 31, 1992).

6. The Florida Supreme Court in *United Gas Pipe Line Co. v. Bevis, supra*, specifically explained the policy problems of attempting to use a motion for reconsideration to reargue a matter that has been fully considered. Justice England, concurring in the denial of reconsideration in that case, stated:

I would deny rehearing in this case in the face of the multi-page, argumentative rehearing petitions which have been filed, for the reasons set forth in *Texas Co. v. Davidson*, 76 Fla. 475, 478, 80 So. 558, 559 (1918). See also Florida Appellate Rule 3.14(b), which states that a petition for rehearing shall be 'without argument'.

Counsel for Monsanto (7 page petition), Air Products (14 page petition), and the Public Service Commission (4 page petition) have essentially reargued the entire case, prompting counsel for United Gas Pipe Line and Florida Gas Transmission to file brief-like replies of 15 and 18 pages, respectively. This expenditure of counsel's time, and the clients' money, is completely unjustified. This case had been argued, briefed and fully considered by the Court when the decision was initially rendered. It is not the office of rehearing to invite a complete re-analysis of all that has gone before. See *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d 817, 818-19 (1st DCA Fla. 1958).

*United Gas Pipe Line Co. v. Bevis, supra*, 336 So. 2d at 565.

7. Here, similar to the situation addressed by the Supreme Court in *United Gas*, the Association has filed a 16-page motion for reconsideration that is nothing more than a regurgitation of broad and general quality of service allegations that the Commission thoroughly considered and rejected as deficient. The Association goes to great lengths in its Motion to quote from the transcript of Commission's September 28, 2010, Agenda Conference in an apparent attempt to show that the Commission's decision to dismiss the Petition was based on the consideration of facts outside of the pleadings. That argument rings hollow because the quoted

discussions from the Agenda Conference were precipitated by counsel for the Association who attempted to inject information outside the scope of the pleadings over timely objection by LLC counsel and after caution from Commission counsel. Importantly, nowhere in the Order does it indicate that the Commission expressly considered those discussions in its decision to dismiss the case. Indeed, the legal analysis section of the Order makes no mention of those discussions. It is disingenuous now to use those remarks and ensuing discussions as grounds to reconsider the Commission's prior decision. Moreover, where, as here, the Commission's decision has been reduced to a reasoned written order, a party should not be permitted to refashion the grounds of the ruling by reference to gratuitous questions and remarks during an oral argument.

8. Distilled to its essence, the Association's Motion is nothing more than an attempt to rehabilitate the deficiencies in the pleadings which the Commission previously identified. As indicated above, to the extent the Association wishes to rehabilitate its prior deficient pleadings, it has ample opportunity to do so in an amended petition. In that case, the LLC and other interested persons would have an opportunity to exercise their due process rights and respond in due course. However, to allow the Association to essentially rehabilitate a deficient pleading through a motion for reconsideration is an abuse of the reconsideration procedures and should not be allowed. Indeed, the Commission has consistently recognized that a motion for reconsideration is not an appropriate vehicle to amplify initial allegations and make new arguments in order to cure defects in prior pleadings. See Order No. PSC-04-1160-PCO-EI ("This Commission has previously found that where a motion for reconsideration 'more fully develops the arguments in the initial request and adds entirely new arguments . . . not included in the Company's initial pleading,' such new arguments and explanations are not appropriate matters for reconsideration.") (citing Order No. PSC-92-0132-FOF-L).

**The Commission Appropriately Declined to Grant the Discretionary Relief Requested.**

9. The Association's Petition essentially requested two avenues of relief. First, it requested that the Commission initiate show cause proceedings against the utility based upon general allegations of poor quality of service. Second, the Association requested that the Commission initiate a limited proceeding under Section 367.0822, Florida Statutes, to reduce the utility's rates again based upon the same general allegations of poor quality of service. At the outset, it should be noted that the Association has no organic or statutory right to require the Commission to initiate a show cause proceeding or a limited proceeding. As indicated in the Order, the decision to initiate a show cause proceeding is entirely within the discretion of the Commission. See Order at 5 ("However, the decision to invoke this Commission's show cause procedure is ultimately ours."). The Association makes no showing that the Commission abused its discretion by rejecting the request to initiate a show cause proceeding against the utility.

10. Likewise, Florida law makes it clear that the decision to initiate a limited proceeding against a utility is entirely within the discretion of the Commission. See § 367.0822(1), Fla. Stat. ("Upon petition or by its own motion the commission may conduct limited proceedings to consider, and act upon any matter within its jurisdiction, including any matter the resolution of which requires the utility to adjust its rates."). The analysis in the Order makes it clear that the Commission thoroughly considered Association's requested relief and did not abuse its discretion by refusing to initiate a limited proceeding to reduce the utility's rates. See Order at 7 ("The Association has failed to make substantive allegations that there is a service quality program which would warrant a reduction in the utility's return on equity....").

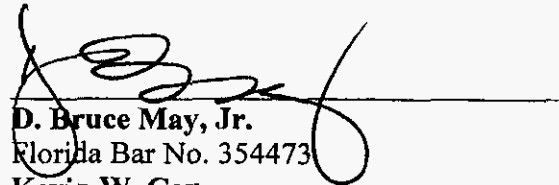


**The Association's Request for Oral Argument Should be Denied.**

11. Based upon the foregoing, oral argument would serve no purpose other than to allow the Association to reargue matters that have been thoroughly addressed and fully considered by the Commission, and would place an unnecessary economic burden on the utility whose financial resources are already strained and are better directed toward utility operations.

WHEREFORE, for the foregoing reasons, the Association's Motion for Reconsideration and its Request for Oral Argument should be denied.

Respectfully submitted,



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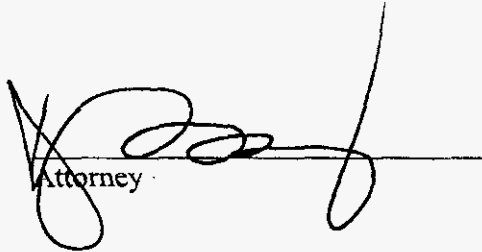
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy was provided by U.S. Mail and e-mail this  
15<sup>th</sup> day of November, 2010 to:

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