

In Re: Application for increase in water and wastewater rates in Alachua, Brevard, Highlands, Lake, Lee Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia and Washington Counties by Aqua Utilities Florida, Inc.

DOCKET NO. 060368-WS

Filed: August 10, 2007

**AQUA UTILITIES FLORIDA, INC.'S
RESPONSE IN OPPOSITION TO JOINT MOTION TO DISMISS**

Aqua Utilities Florida, Inc. ("AUF"), by and through its undersigned counsel, and pursuant to Rule 28-106.204(1), Florida Administrative Code, hereby files this Response in Opposition to the Joint Motion to Dismiss filed by the Office of Public Counsel ("OPC") and Attorney General, State of Florida ("Attorney General"). For the reasons expressed below, the Commission should not impose the drastic sanction of dismissal on AUF. Dismissal of this proceeding would violate established rules of law and judicial precedent, as well as prior orders of this Commission. Contrary to the contentions of OPC and the Attorney General, which are mere allegations, AUF has not effectively filed a new rate case and has made every effort to comply with Commission Order No. PSC-07-0592-PCO-WS. Thus, dismissal of this rate case is not supportable as a matter of law and is not justified.

In support of AUF's Response in Opposition to the Joint Motion to Dismiss, AUF states as follows:

1. The sum and substance of the Joint Motion to Dismiss is summarized by OPC in OPC's Request for Oral Argument on the Motion.¹ There, OPC stated:

¹ The Request for Oral Argument was filed only by OPC and was not joined by the Attorney General.

The Citizens base the Motion to Dismiss on the grounds that Aqua has effectively filed an entirely new case just two weeks before Intervenor testimony is due, that Aqua has failed to comply with Commission Order No. PSC-07-0592-PCO-WS, and that PSC precedent would support dismissal under the current conditions.

2. AUF will limit its recitation of the pertinent background facts to the facts relevant to the grounds for dismissal raised by OPC and the Attorney General.

A. Background Facts

1. **AUF's Initial Filing and Subsequent Submission of Corrected Operations and Maintenance Expenses**

3. On December 1, 2006, AUF filed an application for approval of interim and final water and wastewater rate increases, pursuant to Sections 367.081 and 367.082, Florida Statutes.

4. AUF's Application is of a size and magnitude not seen by the Commission since Southern States Utilities, Inc. ("SSU") filed its application for increased water and wastewater rates for over 140 SSU water and wastewater systems in Docket No. 950495-WS. In this proceeding, AUF seeks rate relief and the establishment of county-wide rates for 80 water and wastewater systems located in 15 counties. Specifically, the initial filing consists of 7 volumes of Minimum Filing Requirements containing 168 bound books and file folders totaling approximately 439,400 pages. AUF's filing is uniquely large when compared with other water and wastewater utilities regulated by the Commission, complex, and has already required the dedication and expenditure of substantial resources by AUF, OPC, the Attorney General and the Commission and its Staff.

5. AUF's application for increased final water and wastewater rates is based on the projected twelve-month period ending December 31, 2007. Based on projected

2007 investments, expenses and revenues, AUF will earn negative overall rates of return and returns on equity for its water and wastewater systems in 2007. AUF's requested final rate increase would result in additional operating revenues of \$7,298,294 for the utility's combined water and wastewater operations. This represents a significant deficiency in the combined present earnings levels of the 80 systems included in this filing. Virtually all of the 80 systems have not been granted rate relief in over ten years. Accordingly, AUF has sought and requires rate relief to gain some measure of financial viability in the State of Florida.

6. At the heart of the Joint Motion to Dismiss are OPC's and the Attorney General's mischaracterizations of the manner in which AUF became aware of and provided corrected operations and maintenance ("O&M") expense data to the Staff and parties. *See* Joint Motion to Dismiss, at ¶6.

7. Consistent with the purpose of the post-filing auditing process, the Company became aware of several issues with its originally filed O&M expense data. In fact, within the Audit, Staff recommended a reduction of O&M expense by \$454,674 for 2006 and \$1,228,239 for 2007, sighting in their recommendation an inability to fully understand and analyze the company's originally filed expense data. In light of this finding and internal reviews, the Company made a **good faith effort** to review and re-analyze this data.

8. At no time did the Company believe its actions would signal or be interpreted as an attempt to file a new rate case. Nor does the Company believe that its provision of corrected O&M expense data constitutes a new rate filing. The Company strongly takes issue with the assertion of OPC and the Attorney General that the

Company tried to “slip” the revised O&M expense data into this proceeding.² The corrected O&M data was filed and served on Staff and OPC in response to the Staff Audit consistent with the rights afforded to the Company under the procedures set forth in the Staff Audit. Moreover, contrary to the implication of OPC and the Attorney General, AUF considered itself to have a duty and obligation to come forward with and provide the corrected information - - **even though the effect was to lower its requested revenue requirement**³ - - rather than hold this information or otherwise fail to disclose it to the Commission and the parties. Simply put, AUF reasonably, responsibly, and in good faith provided corrected information as a result of the auditing process to ensure that its O&M expense development analysis would be placed before the Commission and the parties for appropriate review and analysis.

9. As further evidence of its good faith efforts, Aqua proactively created a “bridge document” with documented rationale for the changes in O&M expenses and provided this document to the parties and Staff. The bridge document was provided to explain the corrected O&M expense development analysis for the years 2006 and 2007, to support the rationale behind the 2007 expenses and the change in projected 2007 O&M expenses as compared to actual 2006 O&M expenses.

10. The expense portion of the MFR filing is only one portion of this case. AUF’s case should not be dismissed as a response to AUF’s good faith provision of more complete and accurate expense analysis for Staff and OPC to use in their research and analysis of the expense portion of this case.

2. Discovery Efforts and Responses

² See Joint Motion to Dismiss, at ¶6.

³ Verification of the Company’s intentions to provide the best available information to the Commission lies in the fact that the total O&M expenses actually decrease in the Company’s submittal to Audit Finding 24.

11. Throughout this proceeding, the Company has expended enormous hours endeavoring to adequately answer the voluminous number of inquiries, data requests, interrogatories and requests for production of documents served by the Commission Staff, the Staff auditors, and OPC. To date, apart from responses to data requests that were part of the Staff audit, AUF has responded to 196 interrogatories and 207 document requests served by OPC and 89 interrogatories and 40 document requests served by the Commission Staff. Many of these discovery requests have multiple subparts and require in-depth analysis to answer. While AUF has admittedly been in late in serving a number of responses to discovery requests, there is no debate that the Company has expended enormous resources and hours in a good faith effort to comply with applicable Commission rules, respond to all discovery and Staff audit requests, and to generally be cooperative and responsive to Staff and OPC whether the issue concerned a customer complaint or a request by OPC for additional time to file its testimony.

12. On July 30, 2007, OPC and the Attorney General filed their Joint Motion to Dismiss. Based on the concerns expressed in the Joint Motion, AUF attempted to enter into negotiations with OPC to postpone the controlling dates for the filing of Intervenor testimony and, if necessary, the final hearing, while also negotiating an acceptable mechanism to address interim rates which would remain in place during a potential postponement or continuance of the hearing. The purpose of these negotiations, of course, was to provide OPC (and any other Intervenor) additional, sufficient time to respond to the corrected O&M expense data. AUF was attempting to reasonably and cooperatively address the contention in the Joint Motion to Dismiss that its “wholesale re-filing” as characterized by OPC and the Attorney General would rob the Intervenors

and Staff “of the time frame that have (sic) been established to allow for the depth of analysis necessary for the PSC to assure the public of reasonable rates.”⁴ AUF’s attempt to work cooperatively with OPC and insure that OPC would not be prejudiced by the provision of the corrected O&M expense data was initially rejected by OPC; however, at a meeting of the parties on August 8, 2007, OPC advised AUF that it may reconsider whether to engage in such discussions.

B. Argument

“[M]otions to dismiss are looked on with disfavor... and are granted sparingly and with care.” *Oguz v. Oguz*, 478 So.2d 437 (Fla. 5th DCA 1985); *see also, Midflorida Schools Federal Credit Union v. Fansler*, 404 So.2d 1178 (Fla. 2nd DCA 1981) (holding that cases are generally to be tried on their proofs rather than the pleadings...).

Typically, a motion to dismiss directs itself to the sufficiency of a pleading be it a complaint or petition. In such cases, the standard applied by the courts and the Commission is well established:

The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. (Citations omitted). In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. (Citations omitted). Significantly, all material factual allegations of the complaint must be taken as true. (Citations omitted).

See, Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993); *McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So.2d 214, 215 (Fla. 2nd DCA 1998); *see, e.g., In re: Petition to establish generic docket to consider amendments to*

⁴ *See* Joint Motion to Dismiss, at ¶7.

interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc., Order No. PSC-05-0171-FOF-TP issued February 15, 2005.

The Joint Motion to Dismiss is *not* predicated on an alleged deficiency or defect in AUF's Application from a pleading standpoint. Nor is it based on jurisdictional grounds. Instead, the dismissal sought by OPC and the Attorney General is sought as a **sanction**, indeed, the ultimate sanction as described by Florida's appellate courts and this Commission. So, OPC seek the ultimate sanction under a set of circumstances where, by their own admission, "there are no Public Service Commission cases directly on point...."⁵ The Commission must reject such a far reaching attempt to impose the ultimate sanction of dismissal on AUF **without any supporting precedent**. As cautioned by the Supreme Court of Florida:

Because dismissal is the ultimate sanction in the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result.

Kozel v. Ostendorf, 629 So.2d 817, 818 (Fla. 1994); *see also, Jacob v. Henderson*, 840 So.2d 1167, 1169 (Fla. 2003) (the Florida Supreme Court reversed the dismissal of an action where the trial court found that the plaintiff perpetrated a fraud on the court, again noting that because dismissal is the most severe of all possible sanctions, it should be employed only in extreme circumstances).

The most applicable precedent comes from the series of orders issued by the Commission addressing the numerous motions to dismiss filed by OPC in the SSU multi-system rate case in Docket No. 950495-WS. SSU, like AUF, was unique in terms of Commission rate case filings in terms of the magnitude, volume and complexity of an

⁵ Joint Motion to Dismiss, at ¶10.

SSU rate case. In Docket No. 950495-WS, SSU filed to increase rates for 141 water and wastewater systems. OPC filed **10 motions to dismiss SSU's rate case**. These motions to dismiss addressed almost every conceivable perceived defect or complaint with SSU's filing - - from interim rates to notice issues to alleged changes in the requested final revenue requirement. **All of OPC's motions to dismiss were denied**. In denying OPC's Fifth Motion to Dismiss, the holding of the Commission was particularly instructive to the instant case:

The dismissal of a proceeding, even a dismissal without prejudice, is a severe penalty to impose upon a party. It is "the most severe of all sanctions, and should be employed only in extreme circumstances." *Neal v. Neal*, 636 So.2d 810, 812 (Fla. 1st DCA 1994). It requires an express finding for a willful or deliberate refusal to obey an order regarding discovery. *Commonwealth Federal Savings & Loan v. Tubero*, 569 So.2d 1271, 1273 (Fla. 1990). The party moving for sanctions must demonstrate meaningful prejudice as a result of the failure to comply. *In re Estate of Brandt*, 613 So.2d 1365, 1367 (Fla. 1st DCA 1993).

* * *

SSU's untimely responses did not comply with Rules 1.340 and 1.350, Florida Rules of Civil Procedure, or our rules and orders cited above. Moreover, when the utility recognized that certain responses would be late, it could have notified OPC of the delay, and the anticipated response time. This may have alleviated the need for OPC to file its motions to compel. Nonetheless, while SSU has not responded to every request within the appropriate time period, the vast majority of the discovery has been responded to within the appropriate time limits. We therefore find that SSU's untimely responses to discovery do not rise to the level for which sanctions should be imposed, let alone the dismissal of the entire proceeding. SSU has not willfully or deliberately refused to comply with the Commission's rules or orders, as required by *Neal v. Neal*. Furthermore, we find that OPC has not

demonstrated a meaningful prejudice which would justify the dismissal of the case, as required by *In re Estate of Brandt*.⁶

In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc., 95 F.P.S.C. 12:280, 282 (Dec. 18, 1995); *see also Southern States Utilities, Inc.*, 95 F.P.S.C. 11:136, 138 (Nov. 1, 1995) (Order Denying OPC's First Motion to Dismiss).

The Commission's Order Denying OPC's Fifth Motion to Dismiss is instructive and should guide the Commission's disposition of the Joint Motion to Dismiss in this proceeding.

First, the Commission again emphasized the severe nature of the dismissal sanction and the heavy burden on the moving party to demonstrate that the party against whom dismissal is sought has willfully or deliberately refused to obey a discovery order and that meaningful prejudice has resulted as a result of such actions. No such allegation is made or could be made in the Joint Motion to Dismiss.

Second, SSU, like AUF, was involved in an enormous rate case proceeding involving several hundreds of discovery requests. SSU, like AUF, had a number of late responses to OPC's discovery requests. While the Commission took issue with SSU's failure to notify OPC of delays and anticipated response times, the Commission acknowledged that SSU had responded to the vary majority of the discovery within the appropriate time limits. Based on these findings, the Commission concluded that SSU

⁶ *See also Ham v. Dunmire*, 891 So.2d 492, 495-6 (Fla. 2004) ("the dismissal of an action based on the violation of a discovery order will constitute an abuse of discretion where the trial court fails to make express written findings of fact supporting the conclusion that the failure to obey the court order demonstrated willful or deliberate disregard. (Citation omitted). Express findings are required to ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation.")

had not willfully or deliberately refused to comply with Commission rules or orders and that OPC had not demonstrated a meaningful prejudice justifying the severe sanction of dismissal. The Commission should make similar findings in response to the Joint Motion. Further, while OPC has indicated that it may be prejudiced by the filing of the corrected O&M expense data, it certainly has not demonstrated prejudice which would justify dismissal of the case as AUF has previously advised OPC, the Attorney General and Staff of its willingness to reschedule the controlling dates for filing testimony and the date for the final hearing, while also addressing interim rates, to insure no prejudice to these parties. **AUF reaffirms its commitment to postpone and reschedule the controlling dates for testimony and the hearing in this matter and to suspend the collection of interim rates for a period of time in this proceeding to insure no prejudice to the parties or AUF's customers.**

In addition, a dismissal of this case on the basis of OPC/Attorney General's allegation that the corrected O&M expense data constitutes a "new filing" would violate established law and Commission precedent. In Docket No. 950495-WS, OPC filed its Tenth and last Motion to Dismiss based on numerous grounds, including alleged misconduct by SSU and alleged interference with the notice provided by SSU to its own customers. In denying this Motion to Dismiss, the Commission noted that the allegations of OPC and the other intervenors were based upon facts which were in dispute. Thus, the Commission correctly concluded that the proper motion would have been a motion for summary final order rather than a motion to dismiss. *See In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc.*, Order No. PSC-96-1320-FOF-WS issued October 30, 1996, at 13-16.

The Commission's rationale in denying OPC's Tenth Motion to Dismiss in the *Southern States* case applies here as well. OPC and the Attorney General have made allegations in their Joint Motion to Dismiss disparaging AUF's intent and conduct in providing the corrected O&M expense data and have mischaracterized the impacts of the corrected data. These allegations are now, in large part, reiterated and expanded upon in the recently filed testimony of OPC witness Kimberly Dismukes. Ms. Dismukes raises issues with the content of the corrected O&M expense data, expresses concern with the limited time OPC had to review the information, and speculates as to the Company's motives and intent in providing the information.⁷ AUF disputes these allegations which purport to support the Joint Motion to Dismiss. These disputed, material facts cannot, as a matter of law, be resolved through a motion to dismiss and must be adjudicated by the Commission before the Commission can make any determination that it is appropriate to impose the ultimate sanction of dismissal.

A rate case of this volume and magnitude should not be lightly shoved aside and dismissed. The case to date incorporates an enormous number of staff hours and resources expended by AUF, the Commission and its Staff, and the Intervenors. It is not uncommon for utilities and intervenors, especially in complex and unique filings such as the instant case, to have differences of opinion regarding the data included in the initial filing and provided in response to discovery requests. AUF respectfully submits that, consistent with the established line of case law recognized by this Commission, the Commission should make every effort to avoid a total waste of the expenditure of these resources and allow AUF the opportunity to present its case on the merits after

⁷ See Prefiled Testimony of Kimberly H. Dismukes, at 36-39, filed on August 7, 2007, in Docket No. 060368-WS.

appropriate stipulations have been reached to: (a) allow additional time (as suggested and required by Ms. Dismukes) for the Staff and parties to conduct discovery and submit supplemental testimony addressing the corrected O&M expense data and still pending discovery responses; and (b) provide for the suspension of interim rates for a period of time.

The case law, prior Commission orders and sound public policy reasons support a denial of the request for dismissal under the circumstances of this case. No doubt, as noted by the Joint Movants, there are occasions where the Commission has dismissed a rate case. However, typically, where a rate case has been dismissed, it has been a case involving a water and/or wastewater system and not an extremely large multi-system filing where the Commission has tacitly or implicitly recognized that adjustments will be made due to the enormity, volume and complexity of the filing. While it is true, as pointed out by the Joint Movants, that the Commission denied an application for a rate increase filed by SSU in 1990 due to flaws in the utility's data and a determination that the utility had not met its burden of proof,⁸ these determinations were made by the Commission only after the utility had been given the opportunity to go to hearing and present its case. Indeed, in the *General Development Utilities, Inc.* rate case cited in the Joint Motion to Dismiss, at ¶15, the Commission confirmed its authority to avoid the extreme sanction of dismissal and reschedule a hearing on a rate case where the Commission has concerns that what amounts to "new data" has been filed by the utility after the filing of the initial MFRs.

WHEREFORE, for the foregoing reasons, Aqua Utilities Florida, Inc. respectfully requests that the Commission enter an order:

⁸ See Joint Motion to Dismiss, at ¶12 citing *In re: Southern States Utilities, Inc.*, 91 F.P.S.C. 6:509 (1991).

- A. Denying the Joint Motion to Dismiss filed by OPC and the Attorney General; and
- B. Continue and reschedule the controlling dates for filing testimony, the Prehearing Conference and the final hearing in this docket to allow reasonable and sufficient time for the Intervenors and Staff to serve discovery concerning and address and respond to the corrected O&M expense data.

Respectfully submitted this 10th day of August, 2007.



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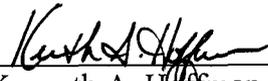
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by Hand Delivery this 10th day of August, 2007 to the following:

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