

**RUTLEDGE, ECENIA, PURNELL & HOFFMAN**

PROFESSIONAL ASSOCIATION  
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA  
RICHARD M. ELLIS  
KENNETH A. HOFFMAN  
JOHN M. LOCKWOOD  
MARTIN P. McDONNELL  
J. STEPHEN MENTON

POST OFFICE BOX 551, 32302-0551  
215 SOUTH MONROE STREET, SUITE 420  
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788  
TELECOPIER (850) 681-6515

R. DAVID PRESCOTT  
HAROLD F. X. PURNELL  
MARSHA E. RULE  
GARY R. RUTLEDGE  
MAGGIE M. SCHULTZ  
GOVERNMENTAL CONSULTANTS  
JONATHAN M. COSTELLO  
MARGARET A. MENDUNI

December 27, 2007

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

RECEIVED-FPSC  
07 DEC 27 PM 3:39  
COMMISSION CLERK  
HAND DELIVERED

Re: Docket No. 070183-WS

Dear Ms. Cole:

Enclosed for filing on behalf of Aqua Utilities Florida, Inc. ("AUF"), are the original and fifteen copies of AUF's Motion for Leave to File Surrebuttal Testimony and Request for Expedited Ruling.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- GCL 3 \_\_\_\_\_
- OPC \_\_\_\_\_
- RCA \_\_\_\_\_
- SCR \_\_\_\_\_
- SGA \_\_\_\_\_
- SEC \_\_\_\_\_
- OTH \_\_\_\_\_

Thank you for your assistance with this filing.

Sincerely,

  
Kenneth A. Hoffman

KAH/rl  
Enclosures

cc: Rosanne Gervasi, Esq., with enclosure, via hand delivery  
Stephen C. Reilly, Esq., with enclosure, via hand delivery  
Martin S. Friedman, with enclosure, via telecopier and U. S. Mail  
Kimberly A. Joyce, Esq., with enclosure, via U. S. Mail

DOCUMENT NUMBER-DATE  
11242 DEC 27 5  
FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Proposed adoption of Rule 25-30.4325, )  
F.A.C., Water Treatment Plant Used and )  
Useful Calculations. )  
)

Docket No. 070183-WS  
Filed: December 27, 2007

**AQUA UTILITIES FLORIDA, INC.'S  
MOTION FOR LEAVE TO FILE  
SURREBUTTAL TESTIMONY AND  
REQUEST FOR EXPEDITED RULING**

Aqua Utilities Florida, Inc. ("AUF"), by and through its undersigned counsel, and pursuant to Rule 28-106.204(1), Florida Administrative Code , hereby requests the Prehearing Officer to enter an Order authorizing AUF to file limited Surrebuttal Testimony as specifically described below on or before January 10, 2008. In addition, in light of the tight time frames for the remaining critical filing dates and the scheduled January 22-23, 2008 final hearing, AUF requests the Prehearing Officer to enter her ruling on an expedited basis. In support of this Motion, AUF states as follows:

1. This docket was opened in response to a Petition for a Formal Evidentiary Hearing filed by the Office of Public Counsel ("OPC") on June 29, 2007, attacking the Commission's proposed adoption of Rule 25-30.4325, Florida Administrative Code, addressing water treatment plant used and useful calculations, methodologies and related provisions.

2. On September 17, 2007, the Commission issued Order No. PSC-07-0741-PCO-WS granting OPC's Petition for Hearing and suspending the rulemaking pending the completion of the formal evidentiary hearing process.

3. Pursuant to the Order Establishing Procedure, Order No. PSC-07-0777-PCO-WS issued September 25, 2007, Petitioner OPC filed its Prefiled Direct Testimony and Exhibits on November 5, 2007. Intervenors AUF and Utilities, Inc. of Florida filed testimony and exhibits on

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

December 3, 2007. Staff then filed testimony and exhibits on December 17, 2007. OPC's testimony challenges most of the provisions in the proposed Rule and offers OPC's alternative rule proposals. AUF's testimony responds to the arguments and proposed alternative rule proposals offered by OPC and goes on to offer AUF's limited set of alternatives to the proposed rule language, referred to hereinafter as "AUF's Alternative Rule Proposals."

4. AUF's Alternative Rule Proposals are set forth in the prefiled testimony of AUF witness John F. Guastella and on pages 3 and 4 of AUF's Prehearing Statement and for convenience are reiterated below:

(a) Proposed Rule 25-30.4325(1)(a) -- High service pumps should be separated from storage facilities for purposes of identifying their cost and percentage used and useful. The calculation of used and useful for high service pumps should not be limited to a formula reflecting the ratio of demand to capacity.

(b) Proposed Rule 25-30.4325(1)(c) and (d) -- In defining peak demand and accounting for fire flow, the definitions should be expanded to allow recovery of "an appropriate fire flow" to ensure that utilities recover the cost of fire flow requirements for multiple hydrants throughout an entire service area. This amendment would permit utilities to recover the cost of facilities necessary to meet fire flow requirements over the entire system and as necessary to combat multiple or coincidental fires, or buildings requiring higher flows than may be identified by local fire departments or districts.

(c) Proposed Rule 25-30.4325(1)(c), (d) and (7) -- Peak demands should not be reduced by excessive unaccounted for water. The cost of treatment facilities does not diminish if a system's lost and unaccounted for water becomes excessive over time. Adjustments for unaccounted for water should be limited to operating expenses. In addition, the calculation of the

amount of unaccounted for water should be revised to read: “Excessive unaccounted for water (EUW) is finished potable water produced (delivered to the system) that exceeds 10% of that production quantity.” With respect to plant, the more appropriate response is to conduct a cost-benefit analysis to determine if the cause(s) of the excessive unaccounted for water should be repaired.

(d) Proposed Rule 25-30.4325(7)(a) and (b) -- Peak demands, either maximum day or peak hour, should not be limited to a rate setting test year. Water systems are not designed for a rate setting test year but, instead, for the maximum demand whenever it might occur.

(e) Proposed Rule 25-30.4325(7)(a) and (b) -- If there is an unusual occurrence on the single maximum day or peak hour in determining peak demand, the rule should be amended to provide for the use of the next highest maximum day so long as there is not an unusual occurrence on that day, rather than the use of the average of the five highest days within a thirty day period.

5. It is well established that in any “draw-out” rule challenge proceeding such as that initiated by OPC in this docket, the burden of proof is on the party attacking the agency’s proposed rule. See In re: Petitions for Draw-Out Proceedings, Division of Administrative Hearings Case Nos. 88-1067RP, et. al. (Recommended Order entered March 28, 1989, adopted in toto by Final Order entered May 26, 1989). Thus, as a matter of law, OPC bears the burden of proof with respect to its challenge of specific sections and subsections of the proposed rule. As the party bearing the burden of proof with respect to such sections and subsections, OPC has

been properly granted the opportunity to file rebuttal testimony which is due under the Order Establishing Procedure on December 31, 2007.<sup>1</sup>

6. AUF bears the same burden of proof with respect to AUF's Alternative Rule Proposals. However, AUF has not been given the same opportunity to file rebuttal testimony provided to the initial Petitioner, OPC, despite the fact that both parties bear the same burden of proof when challenging specific parts of the Commission's proposed adoption of Rule 25-30.4325.

7. At this point, the remaining critical deadlines and hearing dates in this proceeding are as follows:

December 31, 2007	OPC's Rebuttal Testimony
January 7, 2008	Prehearing Conference
January 15, 2008	Discovery Deadline
January 22-23, 2008	Final Hearing

8. AUF maintains that it is entitled to the same opportunity as OPC to file rebuttal testimony responding to arguments and assertions that take issue with AUF's Alternative Rule Proposals.

9. In light of the upcoming holiday season and tight time frames under the Order Establishing Procedure as outlined above, counsel for AUF e-mailed counsel for OPC on December 19, 2007 to ascertain if OPC had an objection to AUF's request to file surrebuttal testimony as described above. A copy of AUF counsel's December 19 e-mail is attached hereto as Exhibit "A". Counsel for OPC advised by e-mail dated December 20, 2007 that OPC objected

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<sup>1</sup> See, e.g., Zanoletti v. Norle Properties, Corp., 688 So.2d 952 (Fla. 3<sup>rd</sup> DCA 1997) where the court reversed a trial judge's exclusion of non-cumulative rebuttal testimony offered by the plaintiff, the party with the burden of proof in that civil action.

to AUF's request and evidently does not believe that AUF should be given the same opportunity to meet its burden of proof as provided to OPC. A copy of OPC counsel's December 20 e-mail is attached hereto as Exhibit "B". The only way to achieve that result and guarantee fairness and equal due process in this proceeding is to grant AUF the opportunity to file limited surrebuttal testimony responding to any and all testimony addressing AUF's Alternative Rule Proposals. AUF maintains that a period of ten days following the filing and service of OPC's rebuttal testimony is a reasonable period of time, particularly in light of the fact that we are currently in the middle of the holiday season, for AUF's witness to prepare and file surrebuttal testimony, while still leaving a reasonable amount of time to review such testimony prior to the January 22-23, 2008 final hearing. Accordingly, AUF requests that it be granted up to and until January 10, 2008 to file surrebuttal testimony rebutting testimony addressing AUF's Alternative Rule Proposals.

9. Due to the expedited time frames in this proceeding, and the need to begin preparation of such surrebuttal testimony on an expedited basis, AUF requests that the Prehearing Officer enter her ruling on this Motion on an expedited basis.

WHEREFORE, for the foregoing reasons, AUF respectfully requests that the Prehearing Office enter an expedited ruling and Order granting this Motion and authorizing AUF to file surrebuttal testimony on or before January 10, 2008.

Respectfully submitted,



Kenneth A. Hoffman, Esq.

Marsha E. Rule, Esq.

Rutledge, Ecenia, Purnell & Hoffman, P.A.

P. O. Box 551

Tallahassee, Florida 32302

(850) 681-6788 (Telephone)

(850) 681-6515 (Telecopier)

- - and - -

Kimberly A. Joyce, Esq.  
Aqua America, Inc.  
762 West Lancaster Avenue  
Bryn Mawr, PA 10910  
(610) 645-1077 (Telephone)  
(610) 519-0989 (Facsimile)

Attorneys for Aqua Utilities Florida, Inc.

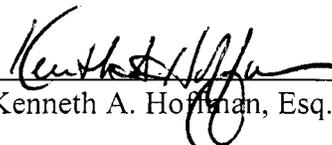
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Motion for One Day Extension of Time to File Testimony was furnished by Hand Delivery(\*) and Telecopier and U. S. Mail(\*\*) this 27<sup>th</sup> day of December, 2007 to:

Stephen C. Reilly, Deputy Public Counsel(\*)  
Office of Public Counsel  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400

Rosanne Gervasi, Esq.(\*)  
Office of General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Martin S. Friedman, Esq.(\*\*)  
Rose, Sundstrom & Bentley, LLP  
2180 W. State Road 434  
Suite 2118  
Longwood, Florida 32779

  
\_\_\_\_\_  
Kenneth A. Hoffman, Esq.

**Ken Hoffman**

**From:** Ken Hoffman  
**Sent:** Wednesday, December 19, 2007 2:54 PM  
**To:** 'reilly.steve@leg.state.fl.us'  
**Cc:** 'rgervasi@psc.state.fl.us'; 'Martin Friedman'; Joyce, Kimberly A.  
**Subject:** FPSC Water Treatment Plant Used and useful Rulemaking Proceeding

Steve—looking ahead, the schedule in this proceeding is fairly tight. The remaining dates are:

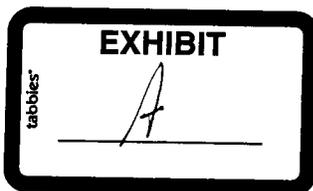
Dec. 31, 2007 – Rebuttal testimony  
Jan. 7, 2008 – Prehearing Conference  
Jan. 15, 2007 – Discovery Deadline  
Jan. 22, 2008 – Hearing

OPC's Rebuttal is due Dec. 31<sup>st</sup>. If OPC takes issue with Mr. Guastella's alternative rule proposals, Aqua Utilities Florida ("AUF") will wish to file surrebuttal testimony limited to those issues. I hope you would agree that AUF would be entitled to surrebuttal on such issues just as OPC has been given the right to file rebuttal to the testimony that takes issue with Mr. Woodcock's alternative proposals. In light of the upcoming holidays and tight time frame, I ask that you advise if OPC has any objection to a potential motion to file surrebuttal – on or before Jan. 10, 2008—limited to the testimony of OPC, if any, that responds to Mr. Guastella's alternative rule proposals.

Thank you for your consideration of our position and this request.

Ken Hoffman

Kenneth A. Hoffman  
Rutledge, Ecenia, Purnell & Hoffman, P.A.  
215 South Monroe Street  
Suite 420  
Tallahassee, Florida 32301  
850-681-6788 (office)  
850-509-2879 (mobile)  
850-681-6515 (facsimile)  
ken@reuphlaw.com



**Ken Hoffman**

**From:** REILLY.STEVE [REILLY.STEVE@leg.state.fl.us]  
**Sent:** Thursday, December 20, 2007 4:58 PM  
**To:** Ken Hoffman  
**Subject:** Surrebuttal testimony

I do not believe it is appropriate to grant you surrebuttal testimony. The limited time frame of our procedure does not contemplate or accommodate surrebuttal testimony. Filing testimony after OPC afforded the Utilities and Staff with their one opportunity to file prefiled testimony responding to OPC's direct case in this proceeding. OPC's rebuttal testimony affords OPC with its one and only opportunity to file prefiled testimony responding to the Utilities' and Staff's direct case in this proceeding. Where does it end, each party responding to the others rebuttal. Why give surrebuttal to the Utilities without giving sursurrebuttal to OPC.

