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ASSISTANT
CLERK

October 21, 2010

Via Hand-Delivery

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

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

Dear Ms. Cole:

On behalf of Aqua Utilities Florida, Inc. ("AUF"), enclosed for filing are the original and seven (7) copies of AUF's Response in Opposition to Citizens' Motion to Set Discovery Procedure and Motion to Compel Discovery Responses.

Please acknowledge receipt of this filing by stamping the extra copy of this letter "filed" and returning the copy to me. Thank you for your assistance.

Sincerely,

HOLLAND & KNIGHT LLP



D. Bruce May, Jr.

- COM _____
- APA _____
- ECR _____
- GCL _____
- RAD _____
- SSC _____
- ADM _____
- OPC _____
- CLK _____

:kjm
Encls.

cc: Katherine Fleming, Esq.

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Ann Cole
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for increase in water and wastewater rates in Alachua, Brevard, DeSoto, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.) DOCKET NO. 100330-WS) FILED: October 21, 2010)

AQUA UTILITIES FLORIDA, INC.'S RESPONSE IN OPPOSITION TO CITIZENS' MOTION TO SET DISCOVERY PROCEDURE AND MOTION TO COMPEL DISCOVERY RESPONSES

Aqua Utilities Florida, Inc. ("AUF"), by and through its undersigned counsel, and pursuant to Florida Administrative Code Rule 28-106.204(1), hereby responds in opposition to Citizen's Motion to Set Discovery Procedure and Motion to Compel Discovery Responses (the "Motion"), which was filed on October 14, 2010, by the Citizens of the State of Florida through the Office of Public Counsel ("OPC").

OPC's Motion should be denied because it seeks unprecedented expansion of the discovery parameters in this proposed agency action ("PAA") matter, which will cause rate case expense to needlessly increase. Moreover, the relief sought by OPC is unnecessary because AUF has agreed to provide OPC with responses to all the discovery it has propounded thus far no later than December 13, 2010—more than 90 days' prior to the Commission's PAA vote. This is more than a sufficient amount of time for OPC to digest the discovery information and make an informed decision as to whether to protest the PAA order. In further support of its

Response, AUF states:

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1. **OPC Offers No Legitimate Basis For Expanding Discovery Limits.**

Discovery in this PAA matter is governed by Florida Administrative Code Rule 28-106.206, which limits OPC to 30 interrogatories, including subparts, unless OPC can first show that there is "good cause" to expand the interrogatory limit and obtain an order authorizing such expansion.¹ Contrary to those rules, OPC did not seek the Commission's permission to exceed the 30 interrogatory limit. Instead, OPC preemptively served AUF with over 208 interrogatories including subparts, and 101 requests for production of documents including subparts.

Subsequently, OPC has made no credible argument for why the discovery parameters in this case should be expanded far beyond the limits established by the rules that govern this matter. Instead, OPC simply argues that because the Commission allowed discovery to be expanded in AUF's last full-evidentiary rate case in Docket No. 080121-WS, it should likewise expand discovery in this PAA proceeding. OPC's argument improperly equates this PAA proceeding to AUF's last full-evidentiary case, and undermines the fundamental cost-savings policy that underlies the PAA process.

2. **The Discovery Limits in a Full Evidentiary Rate Case Should Not Control This PAA Proceeding.**

Unlike this PAA proceeding, AUF's last rate case in Docket No. 080121-WS was litigated as a full-evidentiary rate case, during which OPC and other parties were required to sponsor witnesses, prefile direct and rebuttal testimony, participate in formal customer service hearings, cross-examine witnesses in multi-day hearings in Tallahassee, and file post-hearing briefs. In the last case, OPC asserted that the discovery limits should be expanded in order for it

¹Rule 28-106.206 adopts the discovery limits set forth in the Florida Rules of Civil Procedure ("FRCP") which, among other things, states that "interrogatories shall not exceed 30, including all subparts, unless the court permits a larger number on motion and notice and for good cause." Fla. R. Civ. P. R. 1.340(1).

to prepare prefiled testimony to address the books and records of 82 separate systems, to cross-examine expert witnesses, and to develop a record basis for post-hearing briefs.

None of those factors are sufficiently present in this PAA case to warrant the expanded discovery OPC now seeks. First, unlike the formal evidentiary process that governed the last rate case, the Commission's PAA process is structured around a much more streamlined review of rate case data. The PAA process culminates in the Commission's issuance of a "proposed" order tentatively disposing of the issues in the case without subjecting the parties to the significant costs of expert witnesses, prefiled testimony, cross-examination of witnesses, formal hearings and post-hearing briefs. If OPC disagrees with the Commission's "proposed" order, then it can protest all or portions of the order and proceed to formally litigate the contested issues *de novo*, with a full arsenal of discovery options available to it at that time. However, during this preliminary stage of the PAA process, there is no need to exponentially expand discovery beyond the limits provided in the FRCP.

Second, as a result of the final order in AUF's last rate case, the books and records of AUF's multiple systems have been consolidated for purposes of accounting and record keeping, which dramatically lessens the need for additional discovery. *See* Order No. PSC-09-0385-FOF-WS at 158.

Third, this is not a case of first impression where extensive discovery is needed for OPC to familiarize itself with this utility. Indeed, OPC is intimately familiar with AUF's business model and its operations by having served in the last case (and AUF having answered) no less than 1,561 interrogatories and 625 requests for production of documents. Many of the interrogatories and requests for production of documents propounded by OPC in this PAA

proceeding were asked, verbatim, in the last formal evidentiary case. Simply put, OPC is not "starting from scratch" in this case, and there is no legitimate reason to propound expansive discovery.

3. **Expanded Discovery Will Impose Substantial Additional Rate Case Expense On Customers.**

The expanded discovery parameters in AUF's last full-evidentiary rate case imposed a significant cost to the ratepayers. In fact, the Prehearing Officer in the last rate case expressly warned that OPC's request to expand the discovery limits involved "a large number of interrogatories and will almost certainly increase the rate case expense." Order No. PSC-08-0536-PCO-WS at 3. The Prehearing Officer's warning of increased rate case expense proved correct when OPC's expansive discovery in that case ultimately drove AUF's rate case expense up over \$1.7 million, of which over \$1.5 million was passed on to customers through rates. *See* Order No. PSC-09-0385-FOF-WS at 96-103.

In order to minimize rate case expense in this case, AUF has asked that the case be processed using the Commission's PAA process set forth in Section 367.081(8), Florida Statutes. According to the Commission, this PAA process was "specifically intended to reduce rate case expense by streamlining rate case procedures." *See In re: Application for a rate increase in Seminole County by Sanlando Utils. Corp.*, Docket No. 900338-WS, Order No. 23809, Order No. 23809-A (Fla. Pub. Serv. Comm'n Nov. 27, 1990, as amended Dec. 13, 1990).

As explained above, the streamlined PAA process allows the Commission to preliminarily address and propose a resolution of issues without the parties having to incur significant discovery and other litigation costs at the front end of the process. If later OPC finds

fault with the Commission's "proposed" order, then it can protest all or portions of the tentative order and formally litigate the contested issues *de novo*, and may exercise an array of discovery options at that time. However, to engage in expansive discovery prior to the vote on the PAA order would needlessly cause rate case expense to increase to the detriment of the customers and the company, and would eviscerate the cost-savings policies underlying the PAA process. *See In re: Application for a Rate Increase in Pasco County by Mad Hatter Utility, Inc.*, Docket No. 910637-WS, Order No. PSC-92-0123-FOF-WS (Fla. Pub. Serv. Comm'n Mar. 31, 1992) ("When a utility requests that its rate case be processed using the proposed agency action (PAA) procedure pursuant to Section 367.081(8), Florida Statutes, we expect that rate case expense will be relatively minimal. Reducing rate case expense is one of the main purposes of the statutory provision."); *In re: Application for Rate Increase in Duval, St Johns and Nassau Counties by United Water Inc.*, Docket No. 980214-WS; Order No. PSC-99-0513-FOF-WS (Fla. Pub. Serv. Comm'n March 12, 1999) ("The purpose in processing this case as a PAA is to save cost.").

In this PAA matter, AUF has projected that its rate case expense will be approximately \$670,000 (compared to over \$1.7 million in the past full-evidentiary rate case). In making this projection, AUF assumed that the Commission would honor the streamlined procedures and cost-savings policies on which the PAA process in Section 367.081(8), Florida Statutes, was based. However, if OPC's Motion is granted and the discovery parameters are significantly expanded to track the parameters in the last full-evidentiary case, there is no doubt that the discovery costs in this PAA process will increase dramatically, and AUF and its customers will be well on their way to bearing significant additional rate case expense that could match or exceed the rate case expense in the last rate case.

At the end of the day, subject to Commission approval, the cost of a rate case is passed on to a utility's customers. Accordingly, all parties to this case, including AUF and OPC, have a duty to manage discovery in a manner which balances the rights of the parties with the responsibility to mitigate the rate case expense that will ultimately be passed on to Florida's AUF customers. A runaway discovery process does not ultimately serve the citizens of Florida.

4. OPC's Request To Expand The Discovery Limits Is Unprecedented.

To date, AUF has been served by OPC with over 300 discovery requests, to which OPC wants a response within 30 days. Not only is OPC's discovery unnecessary, unduly burdensome and costly, the magnitude of OPC's discovery in this PAA matter is unprecedented. OPC claims that the discovery limits under the FRCP "are routinely increased in Commission proceedings due to complex nature of the litigation." However, AUF respectfully submits that it has found no reported instance where the OPC has propounded discovery in a water and wastewater utility PAA rate case that remotely approaches the volume of discovery that already has been served on AUF in this case.

Although AUF understands that parties need to have access to information in a rate case, the magnitude of discovery propounded in this PAA proceeding is disproportionate to the need. This case should be viewed for what it is—a request by AUF for a rate increase of approximately \$3.75 million. Yet, the discovery requested by OPC in this case is actually broader than the amount of discovery OPC propounded to FPL in Docket No. 080677-EI, wherein FPL requested an increase in rates in excess of \$800 million.

AUF thus respectfully requests that the Commission intercede in order to balance the perceived benefits of OPC's expansive discovery with the significant rate case expense which will be generated by that discovery and which will be passed on to customers.

5. **OPC's Request That AUF Be Required Convert Documents To An Elaborate Electronic Format And Provide Directly To OPC Would Impose Significant Costs On AUF, Is Outside The Discovery Protocol Required By The Rules Of Procedure, And Is Unreasonable.**

Once AUF has gathered and reviewed documents that it determines are responsive to proper discovery requests by OPC, AUF has and will continue to make those documents available for OPC's inspection and copying at the undersigned's office in Tallahassee, Florida. This document production protocol is standard and consistent with the express language of Rule 1.350, Fla. R. Civ. P., which permits a requesting party to "inspect and copy" documents in the responding party's possession, and which provides for a reasonable time, place, and manner "of performing the inspection or performing the related acts." OPC has asked the Commission to deviate from that standard procedure, and to require AUF to provide it with documents responsive to its discovery requests "in electronic format with all links and formulas intact, source data used, and with an explanation of all assumptions and calculations used." OPC's request to change the manner in which documents are produced—by requiring that documents be converted to electronic format and provided directly to OPC—would impose significant financial costs and resource burdens on AUF that AUF is not required to bear under Florida law. *See Evangelos v. Dachiel*, 553 So. 2d 245 (Fla. 3d DCA 1989) (explaining that expenses associated with transporting records from the responding party's location to the requesting party's preferred location should have been borne by the requesting party.).

The Commission recently rejected a very similar request by the South Florida Hospital Association ("SFHA"), which would have required a large electric utility to deviate from the standard document production protocol that AUF has followed in this case. *See In re: Petition for increase in rates by Florida Power & Light Company*, Docket No. 080677-EI, Order No. PSC-09-0239-PCO-EI (Fla. Pub. Serv. Comm'n Apr. 17, 2009). In that case, SFHA, with express support from OPC, requested that FPL be ordered to provide it directly with hard copies or electronic versions of responsive documents in lieu of making those responsive documents available for inspection and copying at its premises. FPL objected to the requests of SFHA and OPC on grounds that it would impose significant financial costs and manpower burdens on the utility that ultimately would drive up rate case expense. As an alternative, FPL offered to contract with a third-party vendor to perform electronic scanning of its documents and to have that vendor provide requesting parties with a compact disc of non-confidential documents, so long as the requesting party assumes direct responsibility for the cost of the compact disc and the scanning. The Commission ultimately denied SFHA's and OPC's requests to deviate from standard document production protocol because those requests were "unduly burdensome and unreasonable."

In so ruling, the Commission expressly found that FPL had "offered a reasonable alternative for producing the documents which allows the requesting party to bear the cost of production." Notably, AUF has offered to provide OPC with electronic versions of its non-confidential documents in the same manner which the Commission found reasonable in Order No. PSC-09-0239-PCO-EI. OPC's request to force AUF to deviate from that established production protocol should, therefore, be denied.

6. AUF Has Offered a Reasonable Process To Respond To OPC's Discovery.

Notwithstanding the foregoing, AUF is committed to ensuring an efficient discovery process and is prepared to accommodate OPC's desire to obtain information through discovery, so long as the scope of that discovery does not obviate the cost-saving policies of the PAA process. Accordingly, AUF has proposed a reasonable pathway to provide OPC with access to all of the requested information in a fashion that minimizes rate case expense and lessens the resource and manpower burdens that would otherwise constrain AUF's ability to diligently search and respond to OPC's extensive discovery requests. More specifically, AUF has agreed to respond to all of OPC's discovery issued thus far in phases, as follows:

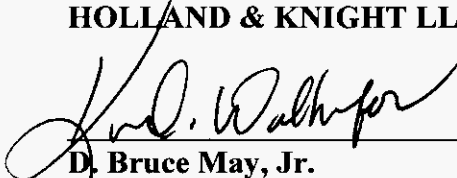
- AUF has responded to Interrogatories Nos. 1-30 and Request for Production Nos. 1-30 on October 11, 2010, which is within 30 days of service.
- AUF will respond to Interrogatories Nos. 31-60 and Request for Production Nos. 31-60 on or before November 11, 2010.
- AUF will respond to all of the remaining Interrogatories and Requests for Production in OPC's First Set of Interrogatories and Requests for Production on or before December 13, 2010.

Under this process, AUF will have responded to all of OPC's extensive discovery by not later than December 13, 2010—well over 90 days before the Commission is scheduled to vote on the PAA. This means that OPC will have access to all of the information it requested more than 90 days before the Commission's PAA vote, which is more than a sufficient amount of time for OPC to assimilate and digest the information it gathers through discovery, and to make an informed determination as to whether to protest all or portions of the PAA Order.

WHEREFORE, based on the foregoing reasons, AUF respectfully requests that the Commission deny OPC's Motion and allow discovery to proceed in this PAA process as proposed in paragraphs 5 and 6 herein.

Respectfully submitted this 21st day of October, 2010 by:

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Attorneys for Aqua Utilities Florida, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by hand-delivery to **J.R. Kelley, Esq., Charles Beck, Esq., and Patricia Christensen, Office of Public Counsel**, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400; and **Katherine Fleming, Esq., Ralph Jaeger, Esq., and Caroline Klancke, Esq., Office of General Counsel, Florida Public Service Commission**, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, this 21st day of October, 2010.



Attorney

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