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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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e. Brief description of filing: Aqua Utilities Florida, Inc.'s Response to OPC's Motion to Compel AUF's Responses to Discovery.

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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.)

DOCKET NO. 100330-WS

Dated: September 9, 2011

AQUA UTILITIES FLORIDA, INC.'S RESPONSE TO CITIZENS' MOTION TO COMPEL AQUA'S REPOSSES TO DISCOVERY (REGARDING SIXTH REQUEST FOR PRODUCTION OF DOCUMENTS AND SIXTH SET OF INTERROGATORIES)

Aqua Utilities Florida, Inc. ("AUF" or the "Company"), by and through its undersigned counsel, hereby responds to Citizens' Motion to Compel Aqua's Responses to Discovery (the "Motion"), which was filed by the Office of Public Counsel ("OPC") on September 6, 2011, and states as follows:

Procedural Background

In this Proposed Agency Action ("PAA") rate case, OPC served its Sixth Set of Interrogatories and Sixth Request for Production of Documents on August 9, 2011 (the "Discovery Requests"). On August 29, 2011, in accordance with the Order on Prehearing Procedure, AUF timely served its advanced objections to the Discovery Requests, including specific objections to some of the interrogatories and requests for production.¹ On September 6,

¹On September 8, 2011, AUF filed its Answers and Objections to OPC's Sixth Set of Interrogatories (Nos. 204-244) and its Responses and Objections to OPC's Sixth Request for Production (Nos. 132-172), providing answers to the Discovery Requests to the extent they were not objectionable.

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2011, OPC moved to compel responses to certain interrogatories and requests for production of documents.²

Preliminary Statement

AUF's objections are not intended to delay or adversely affect the OPC's ability to fully participate in the rate case. While the Company believes that all of its objections have merit, it finds itself in a "Catch 22" scenario in which by answering objectionable Discovery Requests it will certainly increase rate case expense – an item which the OPC has protested. If the Company does not challenge the Discovery Requests, which it believes in good faith fall outside the confines of this proceeding, the expense associated in answering those questions is foreseeably at risk.

If the Commission does not agree with AUF's objections, the Company will certainly endeavor to provide OPC with the requested information to the extent it exists. However, the Company would respectfully seek clarity from the Commission and agreement from the parties that the rate case expense involved in reviewing, answering, processing, Bates stamping, copying and serving the requested information is a valid rate case expense. Many of the propounded questions will require consultant time, rate analyst time and legal review. If the Company is tasked with answering all of OPC's questions, it does not seem appropriate for the OPC to then object to rate case expense.

In this case, the PAA Order proposes a total increase of approximately \$2.6 million. To date, the Company has answered over 450 of OPC's interrogatories including subparts, and over 150 of OPC's request for production of documents. To put this volume of discovery in some

² These discovery requests at issue in the Motion are the following interrogatories contained in OPC's Sixth Set of Interrogatories: Nos. 209-212, 215, 219, 222, and 224-240; and the following requests for production contained in OPC's Sixth Request for Production of Documents: Nos. 134, 141-154, 157, 159-162, and 165-168.

perspective, in Docket No. 080001-EI, which involved the recovery of hundreds of millions of dollars by electric utilities, OPC served 6 interrogatories and 8 requests for production of documents on Florida Power & Light Company, and served no interrogatories or requests for production of documents on other utilities involved in the case. While the Company respectfully continues to cooperate with OPC on discovery issues, in order contain rate case expense AUF is compelled to bring to the Commission's attention discovery that it believes in good faith is irrelevant and outside of the scope of the proceeding.

Validity of Objections

OPC disagrees with AUF's objections that certain of the Discovery Requests seek information that is not within the scope of this PAA proceeding. At the outset it is important to note that this is a PAA rate case, which by statute, is designed to save rate case expense by limiting the issues to be litigated to those identified in a party's protest petition. Accordingly, the proceeding may address only those items that are in dispute, and any other issue is "deemed stipulated." § 120.80(13)(b), Fla. Stat.; Rule 25-22.029(3), F.A.C. As a petitioner, OPC had the opportunity to define the scope of the proceeding in its petition protesting the PAA Order. To expand this proceeding, including discovery, beyond its established borders contradicts the policy of defining a discrete set of protest issues to be resolved. In essence, it invites the expense and reduplication of another full rate proceeding, the costs of which are ultimately borne by the ratepayers.

To be sure, AUF recognizes OPC's need for discovery to address the issues raised in its protest petition. And AUF does not dispute that OPC "may obtain discovery regarding any subject matter, not privileged, that is relevant to the subject matter of the pending action..." Fla. R. Civ. P. 1.280(b)(1). But for purposes of this proceeding, the relevant subject matter is

established by the issues of dispute raised in the protest petitions and cross-petitions, including OPC's own protest petition.

In this instance, the Discovery Requests clearly appear to be beyond the disputed issues in OPC's protest petition. OPC challenges whether these objections are in good faith and asserts the objections will simply increase costs.³ In so doing, OPC ignores the parameters placed on this PAA proceeding by Section 120.80(13)(b), Florida Statutes and Rule 25-22.029, F.A.C. It is entirely appropriate for AUF to object to questions which reach beyond the proceeding's established scope, particularly where AUF has already responded to literally hundreds of discovery requests by OPC. In honoring the dictates of Section 120.80(13)(b) and being respectful of the rate proceeding's overall costs, AUF is fully justified in raising these objections.

For instance, OPC disputes AUF's objections to discovery requests related to budget variances (Interrogatories Nos. 219, 222, 224-240, and Production of Documents Nos. 141, 142, 144-154). OPC's requests are based on the erroneous assumption that budget variance reports are used to determine or normalize the historic test year. But budget variance reports are irrelevant where, in a rate case like this, an historic test year is used. By definition, when rates are set using a historic test year, actual (not projected) data is used. Thus, positive or negative budget variances have no relevance to the historic test year. Moreover, at the very outset of this PAA rate case, AUF proposed the use of a historic year test period, which the PAA Order acknowledged and applied. OPC's protest petition made no attempt to protest the use of the historic test year; thus, by law the use of the historical 13-month average test year ended April 30, 2010 is "deemed stipulated." § 120.80(13)(b), Fla. Stat.; Rule 25-22.029(3), F.A.C.; Order

³ OPC's allegation is curious given that the agency recently objected to 33 out of 37 interrogatories and 36 out of 38 requests for production of documents, which AUF served on OPC on August 19, 2011.

No. PSC-11-0256-PAA-WS at 10. OPC argues various grounds that variances and budgets generally could be relevant to other issues which are in dispute, but taking this argument to its logical conclusion would essentially open up discovery on any issue involving any budgeted item despite the intent of Section 120.80(13)(b) to narrow the proceeding and reduce its expense. To accept OPC's interpretation would begin to convert this narrow protest into a full-blown rate proceeding and impose the associated costs on the ratepayers.

OPC furthermore argues that AUF's interpretation would cripple OPC and the Commission from carrying out their public duties. But AUF's position is entirely consistent in the context of a limited protest on a defined subset of disputed issues from the PAA Order, following a thorough rate proceeding in which OPC was a full participant. Notwithstanding these objections, AUF has provided responses to Interrogatories Nos. 224, 225, 239 and 240 in its answers served September 8, 2011.

With respect to OPC's requests related to "Legal Expenses" (Interrogatories Nos. 209 and 212, and Production of Documents Nos. 134, 159, 160, 161 and 162), OPC named a number of cost issues in its protest, but did not protest "Legal Expenses", which was a discrete and specifically designated issue on page 77 of the PAA Order.⁴ Accordingly, these issues should be deemed stipulated and therefore not discoverable. Additionally, AUF's responses to OPC's prior discovery requests make clear that such "Legal Expenses" are not allocated to AUF by its affiliates.⁵ To the extent that OPC believes that Legal Expenses may relate to any allocation issues which are in dispute, AUF has attempted to explain to OPC that any such allocation was

⁴ The "Legal Expense" issue was also addressed in OPC's Preliminary Areas of Concern filed on March 24, 2011, and AUF's Response to OPC's Preliminary Areas of Concern.

⁵ In particular, this is clear from AUF's responses to OPC's Interrogatories Nos. 22, 23, 157, 186 and Request for Production No. 113, as well as Vol. 1, App. 1 of AUF's MFRs.

simply an intra-state adjustment which therefore does not involve any of the affiliate issues identified in the protest.

Similarly with respect to OPC's requests related to "Miscellaneous Expense" (Interrogatories Nos. 210, 211 and 215, and Production of Documents Nos. 157, 165-168), AUF is not arbitrarily limiting its responses, as OPC suggests, but rather is responsibly objecting to requests that appear beyond the scope of this proceeding. OPC did not protest "Miscellaneous Expense," which was discrete and specifically designated issue on page 63 of the PAA Order.⁶ OPC has not disputed the issue of "Miscellaneous Expense" in its protest petition. Moreover, AUF's answers to all of these discovery requests, served September 8, 2011, included responses to the extent that any "Miscellaneous Expense" is allocated to AUF by its affiliates.

The same holds true with respect to OPC's request in Request for Production No. 143 seeking information regarding certain "direct expenses," which have not been identified as a protested issue. In any event, AUF provided in its September 8, 2011, response documentation for all allocated charges from AUF affiliates to AUF.

Conclusion

For the reasons set forth above, AUF respectfully requests that the Commission deny OPC's Motion to Compel. If, however, the Commission determines to grant the Motion, AUF will endeavor to provide the requested discovery responses by Thursday, September 15, 2011. Because other discovery responses are already scheduled to be provided to OPC on September 19, 2011, AUF believes that no additional time will be needed for OPC to serve its pre-filed testimony on September 22, 2011.

⁶ The "Miscellaneous Expense" issue was also addressed in OPC's Preliminary Areas of Concern filed on March 24, 2011, and AUF's Response to OPC's Preliminary Areas of Concern.

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CERTIFICATE OF SERVICE

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