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Subject: E-Filing (Dkt. No. 100330-WS) OPC's Memorandum in Support of Inclusion of Issue 24 on Affordability
Attachments: OPC's Memorandum in Support of Inclusion of Issue 24 on Affordability.pdf

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 100330-WS

In re: Application for increase in water/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. Document being filed on behalf of Office of Public Counsel

d. There are a total of 8 pages.

e. The document attached for electronic filing is the Office of Public Counsel's Memorandum in Support of Inclusion of Issue 24 on Affordability.

Thank you for your attention and cooperation to this request.

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DOCUMENT NUMBER-DATE

08177 NOV-4 =

FPSC-COMMISSION CLERK

11/4/2011

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: November 4, 2011

MEMORANDUM IN SUPPORT OF INCLUSION OF ISSUE 24 ON AFFORDABILITY

The Citizens of the State of Florida, by and through the Office of Public Counsel, file this Memorandum in Support of Inclusion of Issue 24: Are the total operating expenses prudently incurred such that the resulting rates are affordable within the meaning and intent of fair, just, and reasonable pursuant to Sections 367.081 and 367.121, Florida Statutes? As grounds in support of this Memorandum, Citizens state as follows:

1. By Order No. PSC-11-0256-PAA-WS, issued June 13, 2011 (PAA Order), the Commission issued its PAA Order in Docket No. 100330-WS regarding rates. Pursuant to Rule 25-22.029(3), Florida Administrative Code, a person whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a Section 120.57, Florida Statutes, hearing and shall identify the particular issues in the proposed action that are in dispute. On July 1, 2011, Citizens filed such a petition requesting a 120.57 hearing. In that petition, Citizens identified the "... affordability of the rates generated from the revenue requirement" as one of the particular issues in dispute from the PAA Order. See, Citizens' Petition Protesting Portions of the Proposed Agency Action at p. 5.

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2. As part of the issue identification process, Citizens further refined the wording of the disputed affordability issue as worded in Issue 24: Are the total operating expenses prudently incurred such that the resulting rates are affordable within the meaning and intent of fair, just, and reasonable pursuant to Sections 367.081 and 367.121, Florida Statutes?

3. Rule 28-106.201(d), Florida Administrative Code, requires that the petitioner provide a statement of all disputed issues of material fact. Rule 28-106.201(3), Florida Administrative Code, states that “[u]pon receipt of a petition involving disputed issues of material fact, the agency shall grant or deny the petition, . . .” not modify the disputed issues. The Commission’s remedy under Rule 28-106.201(4), Florida Administrative Code, is to dismiss a petition that is not in substantial compliance with the rule, and at least once without prejudice. Moreover, Section 120.57(b), Florida Statutes, provides that “[a]ll parties shall have an opportunity to respond, to present evidence and argument on all issues involved, . . .”

Essentially, the agency takes the petition as they find it once a determination is made that the petition contains the information required by the uniform rules. Even if a petition were to contain a defect, the petitioner is to be given at least one opportunity to cure the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. See, Section 120.569, Florida Statutes. Obviously, the petition filed in this matter was not determined to be defective. As discussed below in detail, the issue of the affordability of the rates generated as a result of the requested rate increase is squarely within the Commission’s jurisdiction to decide.

4. In addition, Issue 24 on the affordability of the rates involves issues of material fact. Citizens’ issue in this case requires the Commission to make factual determinations. The Commission will need to make a factual determination based on testimony of customers and experts whether customers can afford the requested rate increase based on its impact on the

customers' livelihoods. Additionally, the Commission will need to make a factual determination if the totality of the operating costs in the test year were incurred in a prudent manner or whether Aqua spent too much money in total on its operating costs. Based on these factual decisions, the Commission will then need to decide what remedy to apply, including reducing some or all of the requested operating costs. Even though Citizens' issue references the legal standard by which the Commission must make all its determinations, the issue as framed requires specific factual determinations.

5. Furthermore, the Commission has the legal obligation under Sections 367.081, and 367.121, Florida Statutes, to set rates that are fair, just, reasonable, compensatory, and not unfairly discriminatory. The Commission's factual and legal determinations as to whether the rates generated by the recommended revenue requirement are fair, just and reasonable by being affordable to the customers is clearly within the four corners of the Commission's statutory obligation to decide.

6. Contrary to Aqua's assertion that the idea of "affordability" is a new novel concept that Citizens has invented, the Commission stated in AUF's last rate case:

Implicit in the rates approved by this Commission in all cases is the determination that the resulting bills are **affordable**. An analysis of the results in the table based on our prior decisions reveals that the average water bill from the cases presented is \$33.39, while the corresponding wastewater bill is \$44.60. In the **Affordability** Table, the calculated standard deviation is \$16.26 for the water systems and \$19.16 for the wastewater systems. The standard deviation measures the spread of the data on either side of the average. Based on the respective system averages plus 1.96 standard deviations (which captures approximately 95 percent of the

variation), the **affordability** limits are \$65.26 for the water system and \$82.15 for the wastewater system. Rounding each of these values to the nearest \$0.25 results in **affordability** values of \$65.25 for the water system and \$82.25 for the wastewater system. All other factors being equal, we find these values, based on our historical decisions, are reasonable. (Emphasis added.)

See, Order No. PSC-09-0385-FOF-WS, issued May 29, 2009 at p. 127. Moreover, the Commission's own website states the Commission is committed to making sure that Florida's consumers receive some of their most essential services -- electric, natural gas, telephone, water, and wastewater -- in a safe, **affordable**, and reliable manner. Clearly, the term affordable has been utilized by the Commission as part of its ratemaking process.

7. Commission staff contends in its prehearing statement that the issue as worded is flawed because once an expense is found to be prudently incurred; the statute requires the Commission to allow recovery. However, staff's position contains a faulty premise. The faulty premise is that an expense can be determined to be prudent based solely on reviewing the cost in isolation. The same expense determined to be "prudent" when reviewed on a standalone basis, can also be considered unreasonable when reviewed in the totality of all expenses. The main premise of Citizens' issue is that the Commission must review the sum total of the operating costs before they make a final determination of whether any given cost was prudently incurred. In addition, Citizens assert that this backward looking analysis is required by the statute given that the Commission must make a determination on the fairness, justness and reasonableness of rates, which is the end product of the ratemaking process. Moreover, operating expenses are not the same as investment in capital projects that are placed into rate base. Since ratemaking sets rates prospectively, should the Commission deny a portion of any operational expenditures like

salaries or affiliate costs, the Company can cut those expenses on a going forward basis, unlike capital investments.

Staff's proposed modification of Citizens' wording materially changes the meaning of the issue. Nevertheless, in the interest of clarification, Citizens would be willing to reword Issue 24 to read: Have the total operating expenses been incurred in a prudent manner such that the resulting rates are affordable within the meaning and intent of fair, just, and reasonable pursuant to Sections 367.081 and 367.121, Florida Statutes? Citizens believe this rewording clarifies the intent to capture the Commission's factual and legal ability to make a determination of the prudence of costs based on the totality of circumstances and not solely on an individual cost basis.

8. The Citizens v. Public Service Commission, 435 So.2d 784, (1983) might be cited for the proposition that the Commission has the discretionary authority under the Administrative Procedure Act to determine the issues that will be litigated in a rate case, both to put parties on notice and to ensure an adequate mustering of evidence. See, Citizens v. Public Service Commission, 435 So.2d 784, 787 (1983). This case is distinguishable for several reasons. First, in Citizens v. Public Service Commission, the Florida Supreme Court upheld the Commission's exclusion of an issue that was raised for the first time on reconsideration. Id. Second, the instant case is clearly distinguishable from the 1983 case in that the issue in dispute herein has been raised prior to prehearing, thus placing all parties on notice and allowing adequate time for evidence to be produced at the hearing. Therefore, there are no due process issues raised by the timeliness of the issue.

This issue is also different than the issue raised in the 2009 rate case involving Florida Power and Light.¹ In the FPL case, ISSUE 171 was worded as follows: *What is a fair and reasonable rate for the customers of Florida Power and Light Company?* The prehearing officer ruled that the issue referenced legal standards established by the legislature in Chapter 366, Florida Statutes, and permeated the issues in that docket. While the issue in the FPL rate case appears to be similar on the surface to the issue raised in this docket, it is not. As stated above, Issue 24 requires that Commission to make factual findings.

9. In prior cases, the Commission has excluded issues when they have been beyond the scope of the current docket² or where “subsumed”³ in another issue, thereby allowing the parties to address the merits of the issue. However, Issue 24 as worded is clearly not beyond the scope of this docket, but rather is directly within the Commission’s jurisdiction in this docket. The next question is whether Issue 24 as worded is “subsumed” by another issue in the docket. If an issue is subsumed, then it assumes that the merit of the subsumed issue can be fully and completely addressed in the other issue. Citizens’ issue as framed requires the Commission make a factual determination on the prudence of the Company’s actions in incurring all of the operating costs during the test years as it impacts the affordability of rates. There is no other single issue or group of issues that would allow the heart of Citizens’ Issue 24 to be addressed. Therefore, Citizens assert that, based on the statutory framework and the Commission’s past

¹ See, In Re: Petition for Rate Increase by Florida Power & Light and In Re: 2009 Depreciation Study by Florida Power & Light Company, Order No. PSC-09-0573-PCO-EI, issued August 21, 2009, in Dockets Nos. 080677-EI and 090130-EI.

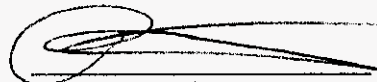
² See, In Re: Petition of Florida Power & Light Company for Determination of Need for Proposed Electrical Power Plant and Related Facilities- Lauderdale Repowering Project and In Re: Petition of Florida Power & Light for Determination of Need for Proposed Electrical Power Plant and Related Facilities- Martin Plant , Order No. 2286, issued April 16, 1990, in Dockets Nos. 890973-EI and 890974-EI.

³ See, In Re: Petition for Rate Increase by Florida Power & Light and In Re: 2009 Depreciation Study by Florida Power & Light Company, Order No. PSC-09-0573-PCO-EI, issued August 21, 2009, in Dockets Nos. 080677-EI and 090130-EI.

implementation of those requirements, Issue 24 on affordability should be presented to the full Commission for resolution at hearing in this docket.

WHEREFORE, Citizens request that the Prehearing Officer accept and approve Citizens Memorandum in Support of Inclusion of Issue 24 on Affordability.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by e-mail and

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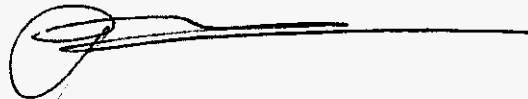
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