

Eric Fryson

From: Roberts, Brenda [ROBERTS.BRENDA@leg.state.fl.us]
Sent: Thursday, March 01, 2012 2:11 PM
To: Filings@psc.state.fl.us
Cc: Saylor, Erik; Vandiver, Denise; Gene Brown; Martha Barrera; Marty Friedman; Ralph Jaeger
Subject: e-filing (Dkt. No. 110200-WU)
Attachments: 110200 OPC's request for hearing on disputed issues.pdf

Electronic Filing

a. Person responsible for this electronic filing:

Erik L. Saylor, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
Sayler.erik.state.fl.us

b. Docket No. 110200-WU

In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 10 pages.

e. The document attached for electronic filing is Office of Public Counsel's Motion for an Administrative Hearing on Water Management Services, Inc.'s Application for Rate Increase.
(See attached file: 110200 OPC's request for hearing on disputed issues.pdf)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 488-4491

DOCUMENT NUMBER - DATE

01199 MAR-1 2012

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water
rates in Franklin County by Water
Management Services, Inc.

Docket No. 110200-WU

Filed: March 1, 2012

OFFICE OF PUBLIC COUNSEL'S MOTION FOR AN
ADMINISTRATIVE HEARING ON WATER MANAGEMENT SERVICES, INC.'S
APPLICATION FOR RATE INCREASE

The Office of Public Counsel ("OPC"), by and through J.R. Kelly, Public Counsel, on behalf of the Citizens of the State of Florida, pursuant to Sections 120.569, 120.57, and 367.081(6), Florida Statutes (F.S.), and Rules 28-106.201 and 28-106.204, Florida Administrative Code (F.A.C.), moves for an evidentiary hearing on Water Management Services, Inc.'s ("WMSI's" or "Utility's") application for increase in rates and charges ("rate case"), and in support of this motion, states as follows:

1. On June 8, 2011, WMSI filed its test-year letter with the Commission, stating its intent to submit an application for an increase in rates and charges. In the letter, WMSI indicated it would seek interim rates, and specifically requested the Commission schedule its rate case directly for hearing rather than using the proposed agency action ("PAA") process set forth in Section 367.081(8), F.S. (DN 03973-11)
2. On June 9, 2011, Commission staff administratively acknowledged that WMSI's rate case should be set directly for hearing. (DN 03995-11)
3. On September 8, 2011, WMSI requested an extension of time to file its minimum filing requirements (MFRs) and testimony, which was granted on September 15, 2011. (DNs 06467-11, 06636-11) In its request for an extension of time, WMSI did not indicate it would request the Commission process its application using the PAA process.

DOCUMENT NUMBER-DATE

01199 MAR -1 2012

FPSC-COMMISSION CLERK

4. On November 7, 2011, WMSI filed its application for interim and permanent increases in rates and charges (“application”) and the testimonies of three witnesses along with MFRs in support of its rate case. In its application, WMSI requested that this rate case be processed using the Commission’s PAA process. WMSI also requested the Commission to refer the case to the Division of Administrative Hearings (“DOAH”) to conduct the hearing “when and if the PAA is protested.”¹ (DN 08218-11; Application ¶ 32.) This request for the PAA process was inconsistent with its earlier request to set this matter directly for a hearing.

5. On January 19, 2012, by Order No. PSC-12-0030-PCO-WU, the Commission granted WMSI’s request for an interim rate increase. The case background of the order indicated the Utility requested its application be processed using the PAA process.

6. Section 367.081(8), F.S. states that “[a] utility *may specifically request* the [C]ommission to process its petition for rate relief using the agency’s [PAA] procedure, as prescribed by [C]ommission rule. . . .” (emphasis added). While a utility may have a right to *request* a PAA process, there is no specific requirement in Section 367.081, F.S., that indicates that the Commission *must grant* the utility’s request for the PAA process. OPC submits the Commission has discretion to deny a utility’s request for the PAA process on its own motion and to proceed directly to hearing where the circumstances indicate the direct path to hearing would be more administratively efficient and in the public interest. At the time of filing of this motion, the CASR for this docket does not

¹ In its request that this matter be assigned to DOAH “when and if the PAA is protested,” WMSI suggests that the Utility would be unable to receive a fair and impartial hearing before the Commission. WMSI’s request however is consistent with its arguments made in its appeal pending before the First District Court of Appeal. Continuing to request its rate case be set for hearing before the Commission would undermine its creative appellate argument(s) that the Commission is somehow biased against WMSI.

indicate that the Commission has determined whether to grant WMSI's request for a PAA process. For the reasons identified herein, OPC believes that proceeding directly to an administrative hearing will be a more efficient use of time and resources for the parties and Commission staff and ultimately reduce rate case expense that WMSI will seek to collect from its customers.²

7. With regards to matters involving disputed issues and decisions which affect substantial interests of a party, Sections 120.569, and 120.57(1), F.S., clearly state an affected party has the right to request an administrative hearing to decide those disputed issues. OPC asserts that the substantial interests of WMSI's customers can and will be affected by any PAA order issued by this Commission as well as any subsequent protest of that PAA order, thus, pursuant to the statutory right described in Chapter 120, F.S., OPC requests this matter be set directly for hearing now instead of waiting many months for the PAA order to be issued and protested.

8. For the following reasons, OPC believes that setting this matter for a full administrative evidentiary hearing would ultimately serve the best interests of WMSI and its customers:

- a. A hearing would reduce the amount of time the Utility must wait prior to receiving a *final order* on the Utility's requested rate relief.
- b. Historically, WMSI rate cases and limited proceedings have been very controversial and have been adjudicated through hearings, and based upon

² Rule 25-22.029(3), F.A.C. provides a "point of entry" into PAA proceedings for "one whose substantial interests may or will be affected by the Commission's proposed action" and requires a petitioner to submit a petition for hearing "in the form provided by Rule 28-106.201, F.A.C. Because the Commission has not granted WMSI's request for a PAA proceeding, Rule 25-22.029(3) is inapplicable to the instant motion. However, within this motion OPC will demonstrate why the direct path to an evidentiary hearing is preferable to the PAA.

what is known about the disputed issues in this case, it appears this rate case will be controversial.

c. The disputed issues to be raised by the parties will be more efficiently and effectively addressed through an administrative hearing (e.g., discovery and the taking of sworn testimony and cross examination) as opposed to unsworn and untested evidence using the PAA process.

d. WMSI's statement in its application "when and if the PAA is protested..." already contemplates that its rate case can and will likely be protested (either by WMSI or an intervening party). If one or more parties already believe that the PAA order will ultimately be protested, then setting the matter for a full evidentiary hearing is in the parties' best interest.

9. In addition to the customers' statutory right to ask for a full evidentiary hearing now, there are (and are anticipated to be) significant disputed issues in WMSI's new rate case which should be addressed through an evidentiary hearing. In addition to the typical rate case issues which must be adjudicated, WMSI's new rate case contains some disputed matters left unresolved from WMSI's last rates case in Docket No. 100104-WU ("2010 Rate Case"). The Commission may recall that WMSI's 2010 Rate Case was decided after a full evidentiary hearing. The Commission issued its final order on January 3, 2011,³ and subsequently denied motions for reconsideration,⁴ and terminated a show cause proceeding initiated by the Commission.⁵ In addition, the

³ See Order No. PSC-11-0010-SC-WU, on January 3, 2011

⁴ See Order No. PSC-11-0156-FOF-WU, issued March 7, 2011.

⁵ See Order No. PSC-11-0250-FOF-WU, issued June 13, 2011.

Utility appealed the final order.⁶ At the core of WMSI's 2010 Rate Case application was its request for significantly higher rates to pay for major capital improvements, for which it had neither contracts nor binding bids at the time. OPC opposed the premature request. In the final order, the Commission removed the requested pro forma adjustments designed to increase revenue requirements related to the capital projects. In the instant case, WMSI again proposes significant capital improvements and pro forma adjustments, but they are not identical to those originally proposed in its 2010 Rate Case. The costs related to the proposed capital projects represent a significant potential increase in customers' rates. OPC intends to conduct discovery related to the new capital projects and participate to ensure the projects are properly supported and the amounts are reasonable. OPC will engage a consulting engineer to assist OPC in this aspect of the case. Given the controversial and adversarial nature of issues related to the proposed capital improvements litigated in the 2010 Rate Case, the relationship between the last case and WMSI's proposed improvements in this case, and the significance of the project costs to the customers, OPC believes an evidentiary hearing as opposed to the PAA process would be a more efficient use of limited time and resources.

10. Moreover, in the 2010 Rate Case, much attention was directed to the factual assertion that WMSI's president had transferred over time, on a net basis, approximately \$1.2 million of cash from WMSI to himself and/or his unregulated business entity, Brown Management Group ("BMG") or other associated companies. In that case, OPC urged the Commission to either require the return of the \$1.2 million of "investments in associated companies" to WMSI or to impute a return on such

⁶ In its appeal, WMSI asserts (1) the Commission violated Florida's Sunshine Law in order to arrive at a predetermined decision to keep rates where they were and (2) the Commission's order is not supported by competent substantial evidence with respect to two revenue-related issues.

investments to offset any revenue deficiency in future WMSI's rate cases.⁷ The Commission declined to adopt OPC's request regarding the monies shown in Account 123 – Investments in Associated Companies, finding instead that it could not determine at that time if the level of investment in associated companies by WMSI was appropriate. To aid in this determination, the Commission directed its audit staff to conduct a cash flow audit to assist it in gauging the appropriateness of the levels of WMSI's levels of "investments in associated companies."⁸ The Commission further stated that subsequent to the cash flow audit, "if it is determined that the activity in the account has impaired the Utility's ability to meet its financial and operating responsibilities, our staff shall recommend an appropriate adjustment for imprudence."⁹ Following the entry of final Order No. PSC-11-0010-SC-WU, on January 3, 2011, two new developments have occurred which compel the Commission to revisit the issue of the \$1.2 million of cash transferred from WMSI to BMG in the instant case:

a. First, on December 14, 2010, the Commission voted to order a cash flow audit "as soon as possible" of WMSI and Account 123 – Investment in Associated Companies (the account that reflected \$1.2 million of cash taken out of WMSI and placed with BMG and/or its president). On January 3, 2011, coincidentally the date the final order was issued in the 2010 Rate Case, WMSI's president informed Commission audit staff who were starting to perform the cash flow audit that the security interest in BMG was transferred to WMSI, effective December 31, 2010, for the value of the balance of Account 123. It appears that this eleventh hour transfer by conveying to WMSI a claim to BMG's assets was

⁷ Order No. PSC-11-0010-SC-WU at 51.

⁸ Order No. PSC-11-0010-SC-WU at 56.

⁹ Order No. PSC-11-0010-SC-WU at 56.

designed to “erase” the \$1.2 million balance of the Utility’s investments in associated companies. In the WMSI Cash Flow Audit, published on July 29, 2011, the audit staff stated that this transaction had no effect on the conclusions drawn in the report.¹⁰ However, this apparently self-serving transfer, of which the Commission was not aware when it issued its final order on January 3, 2011, raises a plethora of issues – ranging from prudence, to quality of management, to possible misappropriation – which are ripe for resolution in this rate case. This purported transaction alone calls for discovery, scrutiny, and action to protect ratepayers’ interests. OPC intends to participate fully in issues related to Account 123 and the purported transaction. Proceeding directly to an evidentiary hearing track would provide the more efficient means for OPC and the Commission to address those issues.

b. Second, according to the Cash Flow Audit Report, the audit staff reviewed 1,368 transactions in Account 123 from January 1, 2004 to December 31, 2010, and reclassified those transactions as accounts receivable from or accounts payable to Gene Brown and associated companies.¹¹ Audit staff determined there was a net receivable *from* Gene Brown and associated companies in the amount of \$1,175,075 owed to WMSI, as of December 31, 2010, supporting OPC’s assertion in the 2010 Rate Case. The audit staff concluded this net receivable amount “represents funds that have been moved out of the Utility for either Gene Brown’s personal use or one of his associated companies.”¹² At the time the Commission entered its final order, it did not know

¹⁰ See DN 05312-11, WMSI Cash Flow Audit Report, at 2.

¹¹ Cash Flow Audit Report at 11.

¹² Cash Flow Audit Report at 11.

what the audit staff's cash flow audit would find, determine, or conclude as it relates to Account 123 – Investment in Associated Companies. OPC contends that the conclusion of the Cash Flow Audit Report constitute grounds for revisiting the issue of whether the Commission should impute a return on the net accounts receivable that will offset any revenue deficiency that the Commission may determine in the case. OPC intends to participate fully in pursuing this issue. Proceeding directly to hearing will enable OPC and the Commission to investigate and address the subject more efficiently than would the PAA process.

11. Minimizing rate case expense borne by customers is important. As shown above, OPC has demonstrated that WMSI's new rate case filing is going to be the subject of contentious disputes. That being the case, proceeding first to a PAA would add unnecessary time and costs to the rate case for no good purpose or advantage. The PAA process involves a time frame of five months, during which WMSI would incur costs (legal and other) before the Commission issues its PAA order. The protest of the PAA, which is virtually assured for the reasons stated above and in the Utility's application for rate increase, would commence an additional process of eight more months, during which rate case activity also would generate rate case expenses (legal and other), all of which WMSI would seek to recover from its customers. Given the controversial nature of WMSI's filing, proceeding directly to hearing would be more efficient, both as to time requirements and rate case expense. Setting this matter for hearing will eliminate duplicative and costly rate case expense which will benefit both WMSI and the customers.

12. For the reasons stated above, OPC believes setting this matter immediately for hearing would prevent delay, and promote the just, speedy, and (hopefully) less

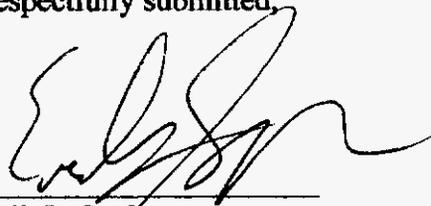
expensive determination of all the issues to be raised in this docket. *See* Rule 28-106.211, F.A.C.

13. Pursuant to Rule 28-106.204(3), F.A.C., the undersigned has conferred with the counsel for WMSI regarding this request, and counsel for WMSI indicated he would need to confer with his client and thus takes no position at this time.

14. OPC does not take a position on WMSI's request whether this matter should be assigned to DOAH or adjudicated before the Commission. OPC believes that the disputed issues can be adjudicated fairly in either forum.

WHEREFORE, on behalf of the customers of WMSI, OPC respectfully requests that WMSI's application for increase in rates and charges be immediately set for hearing instead of utilizing the proposed agency action process for the reasons stated herein.

Respectfully submitted,



Erik L. Saylor
Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330

Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

DOCKET NO. 110200-WU

I HEREBY CERTIFY that a copy of the foregoing Office of Public Counsel's MOTION FOR AN ADMINISTRATIVE HEARING ON WATER MANAGEMENT SERVICES, INC.'S APPLICATION FOR RATE INCREASE has been furnished by electronic mail and U.S. Mail to the following parties on this 1st day of March, 2012, to the following:

Ralph R. Jaeger
Martha Barrera
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Gene D. Brown
Water Management Services, Inc.
250 John Knox Road, #4
Tallahassee, FL 32303-4234

Martin S. Friedman, Esq.
Sundstrom, Friedman & Fumero, LLP:
766 North Sun Drive
Suite 4030
Lake Mary, FL 32746



Erik L. Saylor
Associate Public Counsel