

**Eric Fryson**

---

**From:** Roberts, Brenda [ROBERTS.BRENDA@leg.state.fl.us]  
**Sent:** Monday, November 05, 2012 1:43 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Saylor, Erik; Vandiver, Denise; Gene Brown; Lisa Bennett; Martha Barrera; Marty Friedman; Ralph Jaeger  
**Subject:** E-filing (Dkt. No. 110200-WU)  
**Attachments:** 110200.OPC response to WMSI motion to dismiss.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  
[Saylor.erik@leg.state.fl.us](mailto:Saylor.erik@leg.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 7 pages.

e. The document attached for electronic filing is 110200.OPC response to WMSI motion to dismiss.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

07466 NOV-5 2012

FPSC-COMMISSION CLERK

11/5/2012



4. On September 12, 2012, OPC filed a Petition protesting portions of the PAA Order and requested an administrative hearing on certain issues of disputed material fact. Those issues of disputed material fact relate to (a) the Commission's decision relating to the prudence of Cash Advances to WMSI's President and Associated Companies - Account 123;<sup>1</sup> (b) Previously Authorized Rate Case Expense by Order No. PSC-11-0011-SC-WU in the last case and whether the Utility's non-payment and/or slow payment is contrary to the statutory intent of Sections 367.081(7) and 367.0816, F.S.; (c) Timing and amount of Service Availability Charges established by the PAA Order; and (d) The remaining amount of Unamortized Gain on Sales calculated by Order No. PSC-11-0011-SC-WU that apparently was not addressed in the PAA Order.

5. On September 19, 2012, WMSI filed a Cross-petition for formal hearing protesting certain issues in the PAA Order.

6. On October 3, 2012, Order No. PSC-12-0526-PCO-WU establishing procedure ("OEP") was issued, setting forth controlling dates, discovery procedures, and other hearing procedures.

7. On October 30, 2012, the Utility filed its motion to dismiss the Office of Public Counsel's lawful Petition Protesting Portions of the Proposed Agency Action order.

#### **Argument**

8. The Utility's motion to dismiss erroneously implies that the Office of Public Counsel may not have standing to protest the PAA order because there are no individually

---

<sup>1</sup> Citizens protest all aspects of the Commission's PAA decision relating to Account 123, including but not limited to the fact the Commission did not (1) make a finding or determination of managerial imprudence or managerial negligence, (2) take proactive steps to repatriate the funds in Account 123 to Utility operations (i.e., did not order the liquidation of the so-called investments in associated companies), (3) ensure that the Utility does not continue to increase investments in Account 123, and (4) address adequately the harm to customers resulting from the Utility's cash management practices (i.e., the nearly \$1.2 million in additional interest added to the DEP loan which customers will have to pay).

identified customers who have joined OPC in protesting the PAA order. Section 350.0611, F.S., sets forth the duties and powers of the Public Counsel. The statute states, in pertinent part: "It shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the commission. . . ." and subsection (3) "In any proceeding in which he or she has participated as a party, to seek review of any determination, finding, or order of the commission or the counties, or of any hearing examiner designated by the commission or the counties, in the name of the state or its citizens; . . . ." Thus, the Public Counsel provides legal representation for the "people of the state" and "in the name of the state or its citizens."<sup>2</sup> The Utility correctly asserts that the Public Counsel has a duty to provide legal representation to its customers. Since WMSI's customers reside in the State of Florida and the Utility is located in the State of Florida, the Public Counsel has an express statutory duty to represent WMSI's customers before the Commission, and that includes protesting portions of a PAA order which are adverse to the interests of the Utility's customers.

9. The seminal case regarding the Public Counsel's statutory role representing customers before the Public Service Commission in proceedings which affect the rates and charges of customers is *Citizens v. Mayo*, 333 So. 2d 1 (Fla. 1976) (hereinafter *Citizens v. Mayo*). The Court described the role of the Public Counsel as follows:

Whatever public format the Commission chooses to provide, however, special conditions pertain in cases where public counsel has intervened. This is a consequence of the statutory nexus between the file and suspend procedures and the role prescribed for public counsel in rate regulation. Public counsel was authorized to represent the citizens of the State of Florida in rate proceedings of this type. *That office was created with the realization that the citizens of the state cannot adequately represent themselves in utility matters, and that the rate-setting function of the Commission is best performed when those who will pay utility rates are*

---

<sup>2</sup> There is no statutory requirement that Public Counsel be joined by individually identified customers who have standing to intervene in a matter before the Commission.

*represented in an adversary proceeding by counsel at least as skilled as counsel for the utility company.*

*Citizens v. Mayo, supra*, at page 6. (emphasis supplied)

10. The Court's description of the statutory role and duty of the Public Counsel in *Citizens v. Mayo* is equally applicable to Public Counsel's petition protesting portions of the proposed agency action that is pending before the Commission. The statutory duty of the Public Counsel in representing customers does not change or diminish simply because the Commission utilizes the proposed agency action process for a requested rate increase (Section 367.081(8), F.S.) instead of the file and suspend process (Section 367.081(6), F.S.). Where Public Counsel intervenes as a matter of statutory right and contests portions of a PAA order authorizing a rate request, a utility cannot challenge the Public Counsel's legal standing to represent the utility's customers.

11. Pursuant to the authority conferred by Section 350.0611, F.S., OPC filed notice of its intervention in the instant case, participated in the PAA process, and identified and protested certain issues arising out of the PAA order which OPC deems are adverse to the customers' interest. OPC is currently engaged in seeking discovery relevant to the protested issues and drafting testimony which will support those issues.

12. The Utility's motion to dismiss should be seen for what it is – a transparent attempt by the Utility to distract the Commission from focusing upon the relevant issues protested by the parties. Evidence is being developed in this case that could lead to significant customer rate reductions should OPC prevail on all the issues it protested and in the manner it recommends. The litigation posture taken by the Utility to date is simply designed to hinder Public Counsel's ability to prepare its testimony and positions on the issues protested, especially

on the issue of managerial imprudence surrounding Account 123. The Utility's most recent motion is yet another attempt to evade a resolution of this and the other protested issues.

13. The Utility's argument that OPC does not have standing to protest the PAA order is patently without merit. The principle of statutory standing is recognized in the Administrative Procedures Act's definition of "party." Section 120.52(13), F.S. (" 'Party' means: (b) Any other person who, as a matter of constitutional right, *provision of statute*, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.") (emphasis added). It is also recognized by Uniform Rules governing administrative proceedings. Rule 28-106.205, F.A.C., requires an intervening party to "demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right. . . ." Because OPC is expressly authorized by Section 350.0611, F.S., to legally represent WMSI's customers before the Commission and has a legal duty to do so, OPC has standing to protest this PAA order. Therefore, the Utility's motion to dismiss the Public Counsel's petition protesting portions of the proposed agency action should be denied with prejudice. Further, the Commission should reject any claim by the Utility for reimbursement of rate case expense associated with the filing and preparation of this meritless motion.

14. With respect to the Utility's hearsay statements concerning an island civic association's interest in acquiring the water system, statements about a potential sale being "in the works" is not relevant to the Utility's motion to dismiss or the issues protested by either party. OPC is not aware of any details of these alleged discussions, is not engaged in these alleged discussions, and is not providing any legal representation to any group on the island with respect to these alleged discussions. If any sale of the water system is imminent and to avoid

incurring any additional rate case expense which would be borne by the customers, the Utility has the ability to file a motion to hold the procedural order in abeyance until the sale closes.

WHEREFORE, the Office of Public Counsel, on behalf of the customers of WMSI, respectfully requests that the Commission deny the Utility's motion to dismiss the Public Counsel's petition protesting portions of the proposed agency action with prejudice.

Respectfully submitted by:

**J.R. KELLY**  
**PUBLIC COUNSEL**



---

Erik L. Sayler  
Associate Public Counsel

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

Attorneys for the Citizens  
of the State of Florida


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing **RESPONSE TO WATER MANAGEMENT SERVICES, INC.'S MOTION TO DISMISS THE OFFICE OF PUBLIC COUNSEL'S PETITION PROTESTING PORTIONS OF THE PROPOSED AGENCY ACTION** has been furnished by electronic mail and U.S. Mail to the following parties on this 5th day of November, 2012, to the following:

Martha Barrera  
Lisa Bennett  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

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

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



---

Erik L. Saylor  
Associate Public Counsel