

## Eric Fryson

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**From:** Michele Parks [mparks@sfflaw.com]  
**Sent:** Monday, November 05, 2012 3:30 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Saylor, Erik; Martha Barrera; Lisa Bennett; Martin Friedman  
**Subject:** Docket No.: 110200-WU; Application for Increase in Water Rates in Franklin County by Water Management Services, Inc.

**Attachments:** Resp to OPC's Motion to Compel Discovery (signed).doc.pdf



Resp to OPC's  
Motion to Compel

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- b. Docket No.: 110200-WU; Application for Increase in Water Rates  
in Franklin County by Water Management Services, Inc.
- c. Water Management Services, Inc.
- d. 13 Pages
- e. Response to OPC's Motion to Compel Discovery (First Set of  
Interrogatories and First Request to Produce)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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Docket No. 110200-WU

**WATER MANAGEMENT SERVICES, INC.'S RESPONSE  
TO OFFICE OF PUBLIC COUNSEL'S MOTION TO COMPEL DISCOVERY**

Applicant, WATER MANAGEMENT SERVICES, INC. ("WMSI" or the "Utility"), by and through its undersigned attorneys, files this Response to Office of Public Counsel's ("OPC") Motion to Compel Discovery filed on October 31, 2012 (Document No. 07400-12), based upon OPC's First Set of Interrogatories (Nos. 1-16) and OPC's First Request for Production of Documents (Nos. 1-36).

**INTRODUCTION**

Most of the discovery relates to Account 123 and is irrelevant, immaterial and not calculated to lead to the discovery of admissible evidence. In WMSI's last rate case, this was the central issue in OPC's attack on Mr. Brown and WMSI. After hearing testimony and considering arguments, this Commission concluded, "We note that there was no evidence presented that documented Mr. Brown or BMG having misappropriated funds from the Utility." Order No. PSC-11-0010-SC-WU, page 55. This Commission at p. 56 concluded that, "We do not believe that the customers are being charged higher rates due to Mr. Brown's actions." and "The amounts in question are not included in rate base

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and are not considered in the determination of the appropriate rates.” If Account 123 is not considered in the determination of rates, how can it be relevant?

OPC’s attempts to micromanage WMSI were correctly rejected by this Commission in Order No. PSC-11-0010-SC-WU. OPC, not to take that rejection lightly, filed for reconsideration of that Order. In its Order on Reconsideration, Order No. PSC-11-0156-FOF-WU, in addressing OPC’s Motion, this Commission reminded OPC that since capital structure was reconciled to rate base, customers are not paying any additional interest. The Commission pointed out that if the \$1.2 million was converted to equity, it would earn almost three times the current debt cost. Since rates would increase if the \$1.2 million was converted to equity, one would wonder why OPC continues to raise this issue. One might suggest that is because it has more to do with perception than reality.

This Commission in Order No. PSC-11-0010-SC-WU, page 56, correctly concluded that this Commission does not micromanage the business decisions of regulated companies and has no authority to preclude a utility from investing in associated companies. Importantly, the Commission noted that “despite the difficult financial condition of WMSI .... the customers continue to receive quality service and are satisfied with the responsiveness of Utility employees.”

It is clear from the careful consideration given by this Commission of Account 123 in Order Nos. PSC-11-0010-SC-WU and PSC-11-0156-FOF-WU, that any documents related to Account 123 are irrelevant, immaterial and not calculated to lead to the discovery of admissible evidence.

OPC's sole argument now regarding Account 123 is whether the funds represented by that account "impaired the Utility's ability to meet its financial and operational responsibilities..." Since the Commission has determined that the quality of service being provided by WMSI is satisfactory, including operational matters, and such determination was not protested by OPC, operational issues are not relevant to this proceeding. As the Commission previously found in response to OPC's complaints about Account 123, "despite the difficult financial position of WMSI....customers continue to receive quality service and are satisfied with the responsiveness of Utility employees." PSC Order No. PSC-11-0010-SC-WU.

The Account 123 issue is actually a non-issue in the ratemaking context. OPC is merely using it as a way to attempt to incite customers into believing Mr. Brown took money belonging to them. This Commission rejected OPC's spurious arguments in WMSI's last rate case concluding that "customers have not been penalized by the Utility's actions" with regard to Account 123. PSC Order No. PSC-11-0156-FOF-WU. Account 123 has no impact on customer rates. Once the customers pay rates, the money is no longer theirs. This is no different than what the Commissioners' experience. The law sets the Commissioners' salaries and once the money is received by the Commissioner it is not up to the State of Florida to say how it can be spent. If a Commissioner spends his or her salary foolishly the State has no right to then say the Commissioner's salary should then be reduced. And this Commission has consistently held that it will not micromanage

business decisions of a utility. *id.*, and PSC Order No. PSC-04-0712-PAA-WS. As this Commission found in Order No. PSC-11-0156-FOF-WU :

“... the capital structure is reconciled to rate base, and any interest on the debt instruments to be included in the rates would be limited to that amount included in rate base. Therefore, the customers do not pay for any interest paid by the utility over and above the amount associated with used and useful rate base. Even if the full amount of \$1.2 million was used to pay down the Utility’s debt, the capital structure of WMSI would still consist almost entirely of debt. Finally, we note that if the Utility ever does obtain any equity investment, the current cost of equity is set at 10.85 percent, which is almost three-times the current debt cost and overall cost of capital.”

Thus, as the saying goes, “be careful what you ask for, you just may get it.” If WMSI liquidated BMG for \$1.2 million and paid down debt, customer rates would increase. Makes one wonder if OPC has the customers’ interest at heart or just wants to continue its own personal vendetta against Mr. Brown? It is unfortunate that it is the customers who are the ones who bear the expense of this vendetta and not OPC itself.

#### WITHDRAWN TESTIMONY

Much of the discovery requests arise from pre-filed testimony that was not required to be filed in the first place and which has subsequently been withdrawn. As such, the testimony is not relied upon by WMSI and is irrelevant to the instant proceeding. OPC attempts to bootstrap its argument by addressing prefiled testimony and how parties often serve discovery in response to prefiled testimony. In fact, much of OPC’s third discovery request does just that. However, OPC seeks to take the unprecedented step of serving discovery as to withdrawn prefiled testimony and claiming the same rights. Accusing WMSI of withdrawing the original prefiled testimony in order

to “avoid lawful discovery requests” shows how clueless and paranoid OPC is when it comes to Mr. Brown and this Utility. The original prefiled testimony that was unnecessary in the first place was withdrawn when OPC filed its Protest because it was not relevant to WMSI’s positions in the protest and relevant prefiled testimony would (and has) been forthcoming. What is relevant to WMSI’s request as protested by OPC is contained in WMSI’s prefiled testimony and is fair game for discovery. Anything further than that is a harassing fishing expedition should not be tolerated by this Commission.

#### INTERROGATORIES

Interrogatory No. 4 - This interrogatory relates to the withdrawn testimony of Gene Brown and to a “cash flow audit” that was conducted by WMSI and has not been relied upon by WMSI in this proceeding. Thus, at the outset we have irrelevance on top of irrelevance. OPC tries to devise a relevance argument by pointing out “a few documented instances which confirm that the Utility performed its own cash flow audit”. So what? WMSI does not deny that it prepared a cash flow audit but that doesn’t make it relevant since it is not being relied upon. If OPC obtains WMSI’s cash flow audit it is not going to have an epiphany and agree that Account 123 is irrelevant. The better bet based upon a review of the subparts to this Interrogatory is that OPC would then attack the validity of the cash flow audit. What relevance could a cash flow audit have that WMSI is not relying upon and that OPC will challenge the validity? In fact OPC contradicts its need for the cash flow audit by asserting that it “differs significantly from Audit Staff’s

cash flow audit". If OPC knows what the cash flow audit prepared by WMSI says then why do they need to harass WMSI by questioning WMSI about it when it is not being relied upon by WMSI. Merely because a cash flow audit was prepared by WMSI does not make it relevant. Nor could there be any relevance to any of the interrogatories about it.

Interrogatory No. 5 - This interrogatory refers to the withdrawn testimony of Gene Brown and is interposed purely for harassment. WMSI is not relying upon this withdrawn testimony. OPC's argument for needing this information lacks any specificity as to what bearing it has on the current rate case. There must be some detail in what OPC expects this information to affect in the ratemaking process. This interrogatory requests personal information referenced in the withdrawn testimony of Mr. Brown. Since the information is not being relied upon by WMSI, it has no relevance and is nothing short of harassment. It adds no new justification for the information, and certainly no specificity to such justification. The fact that Mr. Brown has liquidated personal resources and endorsed personal loans to keep WMSI in business should come as no surprise to OPC but it has no relevance to the instant case. Owners of all types of businesses, including utilities, utilize personal resources to keep their businesses going. However, that is not a principle of ratemaking and is irrelevant to this proceeding. Whether Mr. Brown did or did not liquidate personal assets to keep the Utility's operations going has absolutely no impact on rates. Unless and until OPC can articulate what impact this information has on rates, such information is irrelevant to this proceeding.

Interrogatory No. 6 - This interrogatory refers to the withdrawn testimony of Gene Brown and is interposed purely for harassment. WMSI is not relying upon this withdrawn testimony. OPC's argument for needing this information lacks any specificity as to what bearing it has on the current rate case. There must be some detail in what OPC expects this information to affect in the ratemaking process. This interrogatory requests personal information referenced in the withdrawn testimony of Mr. Brown. Since the information is not being relied upon by WMSI, it has no relevance and is nothing short of harassment. It adds no new justification for the information, and certainly no specificity to such justification. The fact that Mr. Brown has liquidated personal resources and endorsed personal loans to keep WMSI in business should come as no surprise to OPC but it has no relevance to the instant case. Owners of all types of businesses, including utilities, utilize personal resources to keep their businesses going. However, that is not a principle of ratemaking and is irrelevant to this proceeding. Whether Mr. Brown did or did not incur personal debt to keep the Utility's operations going has absolutely no impact on rates. Unless and until OPC can articulate what impact this information has on rates, such information is irrelevant to this proceeding.

Interrogatory No. 7 - This interrogatory, based upon withdrawn testimony of Mr. Brown, requests information regarding Brown Management Group. The added attempted justification is that for some unexplained purpose OPC seeks to determine the assets transferred to Account 123. The OPC thinks this information is relevant to "support statements by the Utility that Brown Management Group was a prudent use of the

Utility's \$1.2 million." First, WMSI is not relying upon such a statement in this proceeding. Second, as acknowledged by OPC, it is the Utility's money and thus has no impact on customer's rates. OPC admits that WMSI is providing satisfactory quality of service, so whether WMSI is spending its money on the stock of BMG or the casino's of Las Vegas is of no concern to the customers as it does not affect the customer rates and has not adversely impacted the quality of service. OPC's position is contrary to the Commission's admonition in Order No. PSC-11-0010-SC-WU, that the Commission should not micromanage the operations of utilities.

Interrogatory No. 8 - This interrogatory, again based upon withdrawn testimony of Mr. Brown, requests financial information from Mr. Brown regarding assets which Brown Management Group sold to finance WMSI. OPC's sole explanation of any relevance this information has to the ratemaking process is to "trace the proceeds from those liquidated assets to the Utility's books." The PSC has audited WMSI's books in the two recent rate cases and OPC has access to those audits. It is still unexplained what impact this statement has on the rates customers pay and unless and until that nexus is made, the information is irrelevant.

## PRODUCTION OF DOCUMENTS

Document Request No. 7 – OPC is not only seeking test year bank statements, but also post-test year bank statements. PSC Staff has conducted an audit of WMSI's books, which audit is available to OPC. Providing even test year bank statements is onerous and unduly burdensome and irrelevant. There are limited issues which have been protested and a broad demand for all bank statements cannot be shown to be relevant to the issues in dispute. Confirming all entries into the general ledger even for the test year cannot be shown to have any bearing on the protested issues, and without doubt post-test year bank statements have double irrelevance.

Document Request No. 8 – The same reasoning applies to reconciliations as apply to the bank statements themselves.

Document Request No. 11 – Since this request is directly related to Interrogatory 6, the reasoning above related to the irrelevance of those questions is equally applicable to the document request for the same information.

Document Request No. 12 – Since this request is directly related to Interrogatory 7, the reasoning above related to the irrelevance of those questions is equally applicable to the document request for the same information. To simplify the irrelevance of this request, whether the value of BMG is \$5 million or nothing has no impact on the rates customers pay. Whether the investment is prudent has no bearing on the customers who admittedly receive satisfactory service.

Document Request Nos. 19 & 20 – OPC asserts it needs these documents to determine “whether the Utility’s cash flow management impaired normal utility operation.” What relevance does that have to any protested issue in light of the OPC admitting that WMSI is providing satisfactory quality of service to its customers? Since the quality of service is satisfactory the Utility’s cash flow management is irrelevant to any of the remaining issues.

Document Request No. 23 – If there is one document request which discloses the personal attack of OPC on Mr. Brown personally it is this one. OPC seeks to give relevance to the request by limiting the documents it requests to those that related to the Utility and Brown Management Group for the purpose of “confirming general ledger entries.” As established above as to Document Request 7, there is no relevance to the confirmation of all general ledger entries when there are a limited number of issues in dispute.

Document Request No. 26 – OPC candidly admits the only purpose of this request is to confirm the value of Brown Management Group which is “key to confirming the Utility’s statements concerning the value of Brown Management Group.” First, no statement has been made by the Utility in any prefiled testimony of the value of BMG. Further, as stated previously, the value of BMG is irrelevant as it has no impact on the customer rates. Whether the value is zero or \$5 million isn’t going to affect customer rates.

Document Request No. 31 – OPC’s attempts to breach WMSI’s attorney-client privilege should not be tolerated. OPC asserts it wants the requested documents in order to

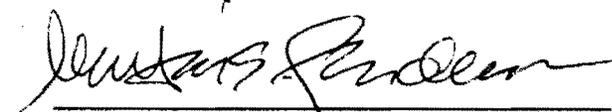
“determine why the Utility ceased making payments to its law firm in November 2010 during the pendency of the last rate case.” What difference does that make in the rate-making process? In response to other OPC discovery WMSI has disclosed payments to attorneys and consultants used in the prior rate case, and readily acknowledged that it still owes such attorneys and consultants. OPC can make its arguments based upon that information and confidential communications (not billing invoices) between WMSI and its attorneys has no bearing on that argument. OPC’s reliance on *Finol v. Finol*, 869 So.2d 666 (Fla. 4<sup>th</sup> DCA 2004) is misplaced. The issue in that opinion was one of the amount of attorney’s fees for which the opposing party was responsible. The information OPC is seeking is communications, not the billing information. It received detailed billing information in connection with WMSI’s last rate case. OPC in its argument admits that it is aware that WMSI is making payments to its former attorneys. Without advising OPC how to practice law, there are other proper methods to determine whether the former law firm agreed to reduce its invoiced fees during the prior rate case without obtaining confidential attorney-client communications. As OPC points out it is really seeking documents to determine whether “the Utility affirmatively communicated to the law firm that it would not pay it for legal services in the last rate case prior to the Commission’s final order.” The OPC documents request is broader than necessary to respond to that question.

WHEREFORE, WATER MANAGEMENT SERVICES, INC., respectfully requests this Commission:

- (1) Deny OPC's Motion to Compel Discovery,
- (2) Any documents ordered produced be produced in accordance with discovery procedures, as there is no legitimate basis for any exception, and
- (3) Deny OPC's request to file supplemental prefiled testimony, as any time issue is the result of OPC's own delay and OPC should not benefit from its own tardy action. WMSI filed objections to discovery on October 22<sup>nd</sup> and OPC waited over a week to file its Motion to Compel.

Respectfully submitted on this 5<sup>th</sup> day of  
November, 2012 by:

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For the Firm

**CERTIFICATE OF SERVICE**  
**DOCKET NO. 110200-WU**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and/or E-mail to the following parties this 5<sup>TH</sup> day of November, 2012:

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