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STEVE CRISAFULLI
Speaker of the House of Representatives

March 18, 2015

Mr. Andrew Maurey
Division of Accounting and Finance
Florida Public Service Commission
2340 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket 140158-WS - Application for increase in water/wastewater rates in Highlands County by HC Waterworks, Inc. – OPC Response to HCWW's Letter

Dear Mr. Maurey,

In response to Mr. Troy Rendell's letter dated March 17, 2015, the Office of Public Counsel ("OPC") would like to address the Commission's ability to correct an error in rate base in the rate case docket for HC Waterworks, Inc. ("HCWW", "Utility", or "Company"). We believe that Mr. Rendell has made an erroneous assumption in his use of the argument of res judicata. We also believe a prior order fully addresses the Commission's ability to correct prior errors.

HCWW's response alleging "that the doctrine res judicata applies to administrative proceedings" is simply incorrect. The response cites a case, *Thomson v. Dep't of Envtl. Reg.*, 511 So. 2d 989, 911 [sic – it should be 991] (Fla. 1987). The citation uses the *see* introductory signal which, according to THE BLUEBOOK,[1] means the authority cited clearly supports the proposition. What the *Thomson* case actually says is "it is now well settled that res judicata may be applied in administrative proceedings," and "perhaps this is why the doctrine of res judicata is applied with 'great caution' in administrative cases." *Id*. at 991. Furthermore, the *Thomson* case focuses on denial of a permit and the application of res judicata when the underlying facts of the permit do not change. Finally, it is inexplicable to cite *Thomson* for the principle that res judicata applies in administrative proceedings, since the Court specifically held that res judicata could not be applied to Thomson.

Clearly, the case does not hold res judicata always applies, nor can the *Thomson* case be used to support that assertion. *Thomson* merely states that res judicata can apply in administrative proceedings; however, it must be applied carefully with particular attention paid to whether facts are the same (res judicata may apply) or facts are different (res judicata would not apply).

[1] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 46 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

Further, the case on point in this instance is *In re: Application of Miles Grant Water and Sewer Company for an Increase in Water and Sewer Rates in Martin County*, Order No. 20066 issued Sept. 26, 1988, 1988 Fla. PUC Lexis 1492, which was affirmed in *Miles Grant Water & Sewer Co. v. Florida Public Service Comm'n*, 545 So. 2d 871, (Fla. 1st DCA 1989). In *Miles Grant*, the Commission found errors that were overlooked in prior audits. The Commission chose to correct previously overlooked errors (see p. 12 of the order starting under the heading The Proposed Adjustment for a discussion of the error). On p. 18 of the order under the heading Estoppel Arguments Rejected, the Commission clearly explains the actual law regarding the application of res judicata to administrative proceedings. Specifically, the Commission found "the overwhelming majority of courts throughout the United States have found it inappropriate to apply the doctrine of res judicata and collateral estoppel to rate proceedings…we find that the Commission may and should exercise its sound discretion to prospectively adjust the utility's rate base to reflect 1972-1976 accumulated depreciation."

In sum, the assertion that res judicata should apply preventing the Commission from correcting an error, which in turn harms customers, is wrong. Res judicata is not applicable in this case, and therefore, any errors found should be corrected. For the reference of all parties, I have emailed three orders (the *Miles Grant* order, the per curiam affirmed order, and the *Thomson* case) to staff and the utility.

Additionally, OPC is opposed to HCWW's alternative treatment of amortizing these negative depreciation balances and including the amortization as depreciation expense in the current rate case. These balances, whether allowed in rate base in the transfer docket or allowed to remain in rate base as part of this rate case, do not support any plant assets that provide utility service to ratepayers. It is the Utility's burden to show that its investment in rate base is reasonable and prudent. The purchase of negative accumulated depreciation balances without corresponding plant accounts should not be allowed to be recovered in rate base on a prospective basis.

If you should have any questions, please feel free to call or e-mail me.

Sincerely,

s/ John J. Truitt

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