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 ORDER NO. PSC-12-0222-PCO-WU ISSUED: April 27, 2012

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING OPC'S MOTION FOR FORMAL HEARING

BY THE COMMISSION:

I. Background

On June 8, 2011, Water Management Services, Inc. (WMSI or Utility) filed its test-year letter with this 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 that we schedule its rate case directly for hearing rather than using the proposed agency action (PAA) process set forth in Section 367.081(8), Florida Statutes (F.S.).

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 the minimum filing requirements (MFRs) in support of its rate case.[1] In its application, WMSI changed its mind about going directly to hearing and requested that the rate case be processed using our PAA procedures. WMSI also requested that we refer the case to the Division of Administrative Hearings (DOAH), when and if the PAA Order was protested.[2]

On January 19, 2012, by Order No. PSC-12-0030-PCO-WU, we suspended the proposed rate increase and granted WMSI's request for an interim rate increase. That Order also noted that the Utility had requested its application be processed using the PAA process.

On March 2, 2012, the Office of Public Counsel (OPC), who had intervened earlier, filed its Motion for an Administrative Hearing on Water Management Services, Inc.'s Application for Rate Increase (Motion), i.e., OPC is requesting that the rate application be set directly for

[1] However, it was not until February 17, 2012, that WMSI completed the MFRs and this date was set as the official date of filing.
[2] This request is not being addressed in this Order, and will be addressed when and if there is a protest of the PAA Order.

hearing, and that the PAA procedures not be used.[3] On March 8, 2012, WMSI filed its timely Response opposing OPC's motion. Neither OPC nor WMSI requested oral argument on the Motion. However, we allowed both parties to make oral presentations in regards to OPC's motion.

This Order addresses OPC's Motion and WMSI's Response. We have jurisdiction pursuant to Sections 367.011 and 367.081, F.S.

II. OPC's Motion for Formal Hearing

Set out below are summaries of OPC's argument on its Motion and WMSI's Response, with our analysis and conclusion following.

A. OPC's Argument

OPC notes that Section 367.081(8), F.S., states that "[a] utility may specifically request the commission to process its petition for rate relief using the agency's proposed agency action procedure, as prescribed by commission rule." OPC argues that we have discretion to deny a utility's request for the PAA process on our 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. Citing Sections 120.569, and 120.57(1), F.S., OPC argues that an affected party has the right to request an administrative hearing to decide disputed issues and decisions which affect the substantial interests of a party.

OPC believes that proceeding directly to an administrative hearing will be a more efficient use of time and resources for the parties and our staff, and ultimately reduce rate case expense that WMSI will seek to collect from its customers for the following reasons:

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

[3] After our staff's recommendation was drafted and circulated for approval, we note that we received e-mail filings from customers requesting that the matter be set directly for hearing.

> 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.

(Emphasis supplied by OPC.)

Further, in the instant case, OPC notes that WMSI has again proposed significant capital improvements and pro forma adjustments, but they are not identical to those originally proposed in its 2010 Rate Case.[4] In the 2010 Rate Case, OPC notes that the proposed capital improvements and pro forma adjustments were the subject of a full evidentiary hearing and were very controversial. 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.

Moreover, in the 2010 Rate Case, OPC notes that 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. Based on this dispute, OPC states that we "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)." Subsequent to that vote, and before the audit could commence, OPC notes that Mr. Brown advised the staff auditor that the security interest in BMG was transferred to WMSI. In the WMSI Cash Flow Audit, published on July 29, 2011, our audit staff stated that this transaction had no effect on the conclusions drawn in the report.

OPC states that it intends to participate fully in issues related to Account 123 and the purported transaction. Further, OPC asserts that proceeding directly to an evidentiary hearing would provide the more efficient means for OPC and this Commission to address those issues, and enable OPC and this Commission to investigate and address the subject more efficiently than would the PAA process. Noting that our audit staff determined there was a net receivable from Mr. Gene Brown and associated companies in the amount of $1,175,075 owed to WMSI, as of December 31, 2010, OPC contends that the conclusions of the Cash Flow Audit Report constitute grounds for revisiting the issue of whether we should impute a return on the net accounts receivable that will offset any revenue deficiency that we may determine in the case.

Although OPC notes that minimizing rate case expense is important, it believes that WMSI's new rate case filing is going to be the subject of contentious disputes. That being the

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[4] Docket No. 100104-WU, In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.

case, OPC argues that proceeding first to a PAA Order would add unnecessary time and costs to the rate case for no good purpose or advantage. OPC avows that the protest of a PAA Order is virtually assured, and that the five months spent going to a PAA Order would be inefficient. Given the controversial nature of WMSI's filing, OPC asserts that proceeding directly to hearing would be more efficient, both as to time requirements and limiting duplication of rate case expense. OPC concludes its argument for going directly to hearing by stating: "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."

B. WMSI's Response

WMSI states that pursuant to Section 367.081(8), F.S., a utility may elect to have its petition for rate relief processed using the PAA procedure, and that it has so requested in this case. WMSI argues that OPC misconstrues the meaning of the term "may" in Section 367.081(8), F.S., and that when used in this section, it makes the election discretionary with the utility. In other words, WMSI contends that a utility is not compelled to use the PAA process or the statute would have used the mandatory term "shall." WMSI further argues that OPC, as an intervenor, does not have the statutory authority to dictate the Utility's decision on whether to utilize the PAA process or the direct hearing route. Citing Order No. PSC-96-1147-FOF-WS,[5] WMSI argues that use of the PAA procedures or going directly to hearing is totally discretionary to the utility.

WMSI notes that in the aforementioned Order, the utility chose to go directly to hearing, and that it was OPC who asserted that the PAA process results in lower rate case expense and thus lower rates to customers. WMSI states that in that case, OPC's position was articulated as follows:

> OPC argues that if a PAA order had been entered, the customers could have decided to avoid the cost of hearing. As a result of FCWC avoiding the PAA process, OPC states that customers were deprived of an opportunity to avoid a hearing.[6]

WMSI notes that one of the primary purposes of the PAA process is to reduce rate case expense and thus control customer rates, and is perplexed at OPC's opposition to its use in this case. WMSI argues that using the PAA

[5] Issued September 12, 1996, in Docket No. 951258-WS, In re: Application for a rate increase in Brevard County by Florida Cities Water Company (Barefoot Bay division), p. 33.
[6] Id., p. 33.

> process makes OPC and the utility give careful consideration as to whether to protest a PAA order. In many cases, OPC and/or the utility have chosen not to protest a PAA order with which they disagree because of the additional expense of such a protest. At the very least, a PAA order narrows the scope of a protest, if one is filed, resulting in lower rate case expense than if the case had begun as one set directly for hearing.

WMSI concludes its response by stating that OPC misconstrues its rights pursuant to Sections 120.569 and 120.57, F.S. WMSI argues that these provisions apply to agency decisions which affect the substantial interest of parties, and that there is no agency decision from which a request for a formal hearing can be made until the PAA order is entered. WMSI argues that it is the PAA order which triggers the point of entry into the formal hearing process, and that this is tacitly acknowledged by OPC in its Motion when it admits that it cannot comply with the provision of Rule 28-106.201, F.A.C. Citing Rule 25-22.029, F.A.C., WMSI states that it is clear that the rights afforded interested parties pursuant to Sections 120.569 and 120.57, F.S., arise after a PAA order is entered. Therefore, WMSI argues that neither the customers nor OPC have the "right to ask for a full evidentiary hearing now." (emphasis supplied by the Utility).

C. Commission Analysis and Conclusion

As the Utility notes, Section 367.081(8), F.S., provides that a utility may specifically request this Commission to process the utility's petition for rate relief using our proposed agency action procedure. In the alternative, a utility may instead request that its petition be set directly for hearing. Further, we agree with the Utility that Rule 25-22.029, F.A.C., contemplates that it is after the Agenda Conference and issuance of the PAA action[7] that the provisions of Section 120.569 and 120.57, F.S., become applicable. The plain language of Section 367.081(8), F.S., appears to give the utility the option to choose the process, and we have historically deferred to the utility's selection since the enactment of that section.

We have just completed a full rate case for WMSI with the Final Order being issued on January 3, 2011.[8] That Order allowed only a little over a one percent increase[9] and denied many of the Utility's pro forma requests as not being properly documented. We believe that, in this case, a PAA Order might be crafted such that the parties would not be compelled to protest, or, at least, such that any protest would be narrower in scope and the issues more clearly defined and limited. If OPC is not in agreement with our PAA action concerning the pro forma projects, rate case expense, or the proper handling of the approximate $1.2 million that OPC asserts has been "siphoned" off to either Mr. Brown or his associated companies, then OPC can protest and we can go to hearing on just the issues in controversy.

OPC also argues that because of the controversial nature of WMSI's application, the matter should be set directly for hearing. The last two rate cases of Aqua Utilities Florida, Inc.

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[7] After the Commission proposes to take an action that could affect a person's substantial interests.
[8] See Order No. PSC-11-0010-SC-WU, issued January 3, 2011, in Docket No. 100104-WU, In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.
[9] There would not have been any increase except for the addition of rate case expense.

(AUF) were very controversial. The first AUF rate case (Docket No. 080121-WS) went directly to hearing, had 76 issues identified for hearing, and we ultimately approved a total rate case expense of $1,501,609. However, the latest AUF rate case (Docket No. 100330-WS) was processed using the PAA procedures. Although the PAA Order was protested and the matter still went to hearing, ultimately, only 38 issues were identified to be determined at the final hearing. Further, the total rate case expense approved in Docket No. 100330-WS was $1,409,043, some $92,566 less than that approved in Docket No. 080121-WS. In both dockets there was extensive discovery. We believe that AUF's second rate case (Docket No. 100330-WS) is a good example of where the scope of the protest was narrowed and the number of issues were reduced, and possibly, in spite of a protest, the rate case expense was reduced.

Finally, we note that the mere fact that a PAA case is controversial does not mean a hearing will necessarily result. There have been numerous controversial rate cases where it appeared that there would probably be a protest to the PAA Order. One of these was the application for increase in water rates in Lee County by Ni Florida, LLC (Docket No. 100149-WU). In that case, at the Agenda Conference, we heard presentations from customers, OPC, and the utility, and issued what appeared would be a very controversial PAA Order.[10] However, no protest was filed, and the PAA Order became final agency action.

In conclusion, we find that OPC has not demonstrated why WMSI's choice to use the PAA process goes against the public interest and should be reversed in light of the expressed provisions of Section 367.081(8), F.S. Based on all the above, OPC's motion for an administrative hearing is denied, and the case shall continue to be processed using the PAA process.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion for an Administrative Hearing on Water Management Services, Inc.'s Application for Rate Increase is denied. It is further

ORDERED that the docket shall remain open for the continued processing of Water Management Services, Inc.'s Application for increased water rates.

[10] Issued April 22, 2011, in Docket No. 100149-WU, In re: Application for increase in water rates in Lee County by Ni Florida, LLC.

By ORDER of the Florida Public Service Commission this 27th day of April, 2012.

HONG WANG
Chief Deputy Commission Clerk
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.