

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

FILED 8/15/2018  
DOCUMENT NO. 05308-2018  
FPSC - COMMISSION CLERK

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In the Matter of:

DOCKET NO. 20170086-SU

INVESTIGATION INTO THE  
BILLING PRACTICES OF K W  
RESORT UTILITIES CORP. IN  
MONROE COUNTY.

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PROCEEDINGS: COMMISSION CONFERENCE AGENDA  
ITEM NO. 11

COMMISSIONERS  
PARTICIPATING: CHAIRMAN ART GRAHAM  
COMMISSIONER JULIE I. BROWN  
COMMISSIONER DONALD J. POLMANN  
COMMISSIONER GARY F. CLARK  
COMMISSIONER ANDREW G. FAY

DATE: Tuesday, August 7, 2018

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: ANDREA KOMARIDIS  
Court Reporter and  
Notary Public in and for  
the State of Florida at Large

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TALLAHASSEE, FLORIDA  
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1 P R O C E E D I N G S

2 CHAIRMAN GRAHAM: Okay. Down to the bottom of  
3 the page, No. 11 -- almost to the bottom of the  
4 page.

5 MS. FRIEDRICH: Good morning. I'm Marissa  
6 Friedrich speaking on behalf of Commission staff.

7 Item No. 11 addresses the results of staff's  
8 audit and investigation of KWRU's billing practices  
9 for April 2013 through March of 2016. The purpose  
10 of this audit and investigation was determine- --  
11 was to determine if KWRU violated any Commission  
12 statutes, rules, or orders.

13 Staff recommends the utility be ordered to  
14 show cause in writing within 21 days why it should  
15 not be fined a flat fee of \$1,000 for apparent  
16 violations of Sections 367.081 Subsection 1, and  
17 367.091 Subsection 3, Florida Statutes.

18 KWRU independently refunded \$72,701.12 to  
19 Meridian West; \$25,512.91 to Banyan Grove; and  
20 \$43,402.79 to Flagler Village in efforts to remedy  
21 its billing errors.

22 Staff recommends the utility refund Safe  
23 Harbor Marina \$26,000- -- \$26,408; and Sunset  
24 Marina \$41,034 to further rectify its billing  
25 mistakes.

1           Staff has provided an oral modification which  
2           impacts Issue 1. There has been no customer  
3           contact. And representatives from the utility and  
4           OPC are here to address this item. Staff is  
5           available for questions you have.

6           CHAIRMAN GRAHAM: Thank you, staff.

7           Mr. Friedman, did you want to go before or  
8           after OPC?

9           MR. FRIEDMAN: If I go after, I won't -- I'll  
10          only have to talk once, which I'm sure you would  
11          prefer.

12          (Laughter.)

13          CHAIRMAN GRAHAM: Ms. Morse?

14          MS. MORSE: Okay. Thank you. Stephanie Morse  
15          for OPC.

16          OPC commends the decision to conduct the audit  
17          necessary to investigate the unauthorized billing  
18          outlined in the notice of apparent violation, dated  
19          May 17th.

20          The issue that OPC urges the Commission to  
21          consider is that the audit of some of the issues  
22          did not go back -- or didn't -- not reach back in  
23          time to the period before April 2013, although the  
24          facts indicate that some of the incorrect billing  
25          dated back as far as at least 2009.

1           Staff has indicated that the three-year period  
2           it chose to consider for potential refunds is a,  
3           "... reasonable remedy to mitigate the utility's  
4           incorrect billing practices"; however, OPC believes  
5           that both basic fairness and the operative  
6           administrative rules require that customers be  
7           fully compensated for any and all instances of  
8           billing which violated the rules, including those  
9           that occurred before April 2013.

10           Mere mitigation of the financial harm is not  
11           an adequate substitute for making customers whole.  
12           Our review of the Florida Administrative Code,  
13           Rule 25-30.350, tells us that: In the event of an  
14           overbilling, the rule requires the utility, by use  
15           of the word "shall," to refund the overcharge to  
16           the customer. As such, we encourage the Commission  
17           to seek a full accounting for all years of  
18           overbilling and order refunds in the full amount of  
19           any authorized billing.

20           Thank you.

21           CHAIRMAN GRAHAM: Thank you.

22           Mr. Friedman?

23           MR. FRIEDMAN: Thank you, Mr. Chairman,  
24           Commissioners. Marty Friedman on behalf of KW  
25           Resort Utility Corp.

1           This billing issue has been going on awhile.  
2           And -- and I'll tell you at the outset that KWRU  
3           doesn't intend to drag out this proceeding by  
4           requesting a formal hearing, even if you accept the  
5           staff recommendation.

6           The billing issues all predate the new billing  
7           that KWRU has been doing since it has been able to  
8           obtain billing records from the Florida Keys  
9           Aqueduct Authority. Ever since -- ever since that  
10          occurred, you know, there are no billing issues.

11          The billing issues are all a result of what  
12          the staff -- I think, is an understatement -- calls  
13          "unique billing structure." And they attached as  
14          an example to the staff recommendation a copy of  
15          the -- the bulk rate for Safe Harbor that I will go  
16          into in more detail in a minute.

17          But the point is that this is something  
18          that's -- that's historical, will not happen again  
19          in the future, and -- and the utility is ready to  
20          put it behind it and move on.

21          However, I do -- I do want to make a couple of  
22          points. On the Safe Harbor Marina, the staff is  
23          recommending a refund of the difference between the  
24          \$917.11 flat fee that you see on -- on the tariff  
25          sheet that was attached to the staff

1 recommendation, and the \$1,650.67 that -- rate that  
2 KWRU and Safe Harbor Marina had negotiated.

3 Back in 2009, when they negotiated this rate,  
4 they advised the Commission -- sent a letter to the  
5 Commission; said, here's what -- here's what the  
6 new rate is. Now, they didn't follow up. Granted,  
7 they didn't follow up. They didn't get an approved  
8 tariff for that rate, but they did -- but they did  
9 make a concerted effort to at least bring to the  
10 Commission's attention the fact that they had  
11 negotiated a different rate.

12 And this negotiated rate was really based upon  
13 the application of what's going on on that property  
14 to the tariff sheet. I think that the -- the  
15 staff's recommendation is more -- form over  
16 substance.

17 In other words, although there's a flat rate  
18 of 917.11 in here, it goes about telling you how we  
19 came up with that 917- -- or how the Commission  
20 came up with that 917.11 charge.

21 And for instance, this says 13 residential  
22 units at one ERC each. Now, it happens to be that  
23 this -- this development expanded from more than 13  
24 residential to some number greater than that.

25 So, it would lead a rational person to

1 believe, okay, if there's twice as many residential  
2 units, then maybe this 343.66 ought to be twice as  
3 high. That certainly would be the intent of making  
4 sure that every customer paid their fair share for  
5 the wastewater-service burden that they placed on  
6 the utility.

7 And the same with these -- you know, these  
8 change -- says a commercial business -- the  
9 business expanded. You know, all of this occurred  
10 with the expansion of this property; the utility  
11 recognizing that that expansion of the property  
12 created a greater demand on the system than was  
13 included in this tariff sheet; worked with the --  
14 the customer, property owner. And they agreed to  
15 that \$1600 back in 2009 -- \$1600-and-something, and  
16 then -- then they started paying it. They've been  
17 paying it ever since.

18 And so, I think that the staff recommendation  
19 is putting form over substance. I mean, I think  
20 that any rational person would -- would understand  
21 that the intent of the tariff is to make sure that  
22 every customer pays their fair share.

23 And by the utility and the property owner  
24 agreeing that, because of expansion in usage on  
25 that property, that fair share meant that the

1 numbers that they should pay every month should be  
2 higher than the flat fee of 917, and they -- they  
3 negotiated -- business people negotiated and agreed  
4 to that -- that we believe that it at least follows  
5 the intent of the tariff sheet, if not the strict  
6 letter of the tariff sheet.

7 So, we really don't believe that the -- the  
8 \$26,000 refund Safe Harbor Marina is appropriate.

9 As to OPC's --

10 CHAIRMAN GRAHAM: The 26- --

11 MR. FRIEDMAN: -- comments --

12 CHAIRMAN GRAHAM: \$26,000?

13 MR. FRIEDMAN: I'm sorry?

14 CHAIRMAN GRAHAM: You said 2600. \$26,000?

15 MR. FRIEDMAN: Yeah, I'm a lawyer, not an  
16 accountant. Thank you, though.

17 The alleged -- I was going to make note of the  
18 comment that Ms. Morse made about going back  
19 farther. You know, I think the records-retention  
20 period is for six years or something. So, I'm not  
21 sure we can go back much farther and have  
22 information to that effect.

23 And like I said, to a large extent, it's all  
24 historical. It's done. It's over with and -- and  
25 because of the new billing, based upon the FKAA

1 meters, we don't have to worry about this sort of  
2 unique billing structure having any impact on  
3 customers or the utility in the future.

4 My final point is that these rates were  
5 collected -- if, in fact, you agree that there  
6 needs to be a refund -- these rates were collected  
7 over a period of three years. And so, what the  
8 utility would request would be, if -- if, in fact  
9 you are going to require a refund, that you allow  
10 the utility, for cash-flow purposes, to be able to  
11 make that refund with interest, in equal monthly  
12 installments over a 12-month period.

13 And I have -- I have brought that -- my  
14 request to the staff's attention. And my  
15 understanding is that staff does not oppose it.

16 Thank you very much.

17 CHAIRMAN GRAHAM: I think your request for 12  
18 months is rational. The rest of it -- it's up for  
19 debate.

20 I -- I think a lot of things fell through the  
21 cracks on this. I had a long conversation with  
22 staff specifically about the letter, the letter  
23 that was sent back in '09, and why we didn't  
24 address it back then. Now, granted, that doesn't  
25 mean that there wasn't conversations back and

1           forth. I just didn't see a letter coming from us  
2           going back out that direction.

3           Of course, it is a little concerning, reading  
4           some of the e-mails that went back and forth back  
5           then between Dave -- I'm sorry -- between Doug  
6           Carter and Dave -- from Safe Harbor: As we  
7           discussed earlier, we can touch base later this  
8           week, after looking at this information. We can  
9           come to a conclusion to keep you out of the -- we  
10          can keep your rates about the same and keep you  
11          from -- without going through the long, drawn-out  
12          process of the Public Service Commission.

13          I mean, so, these people knew that there was  
14          more to this that they had to do than just send the  
15          letter in saying that we're changing it.

16          MR. FRIEDMAN: I -- I don't -- I do not  
17          interpret that statement that you read as being  
18          what you said.

19          CHAIRMAN GRAHAM: Okay. But we have a  
20          process. And we can't just willy-nilly just decide  
21          we're going to change a tariff.

22          MR. FRIEDMAN: Then you -- again, it's intent.  
23          What is -- what does the tariff mean? The \$917  
24          number is a sum of all of these numbers. And so,  
25          if the numbers -- if this number changed, who's to

1 say that's not following the -- what you just said,  
2 not following the tariff.

3 This says 13 mobile -- if there are 13  
4 residential units, they should pay 343.66. What if  
5 there's 26 units?

6 CHAIRMAN GRAHAM: Is that --

7 MR. FRIEDMAN: Wouldn't that mean -- wouldn't  
8 that mean that the tariff says they should pay  
9 twice that much?

10 CHAIRMAN GRAHAM: Is that how we change  
11 tariffs here in the Public --

12 MR. FRIEDMAN: No, I --

13 CHAIRMAN GRAHAM: -- Service Commission?

14 MR. FRIEDMAN: You and I understand that.  
15 Believe me.

16 CHAIRMAN GRAHAM: Okay.

17 MR. FRIEDMAN: I've been doing this for 37  
18 years. I understand that. Whether I think it's --  
19 we ought to go to that or not -- and they should  
20 have followed up on the 2009 letter.

21 I think that's great in a perfect world, but  
22 unfortunately, there's very little perfection in  
23 this world. None of us are perfect.

24 CHAIRMAN GRAHAM: I underst- --

25 MR. FRIEDMAN: And -- and that's why our

1 suggestion is to -- to take substance over form  
2 on -- with regard to Safe Harbor and let's just,  
3 you know, move on.

4 CHAIRMAN GRAHAM: Well, once again, my other  
5 concern is the -- the penalty of a thousand  
6 dollars. I mean, I thought that was -- if you're  
7 going to knowingly disregard the rules and then  
8 you're just going to get smacked on the wrist a  
9 thousand dollars -- I'm done -- if you're just  
10 going to get smacked on the wrist a thousand  
11 dollars, I don't think that's sending a clear  
12 message.

13 Now, if staff can kind of walk me through --  
14 and they did this at briefing tod- -- yesterday,  
15 and they made some legitimate points, but I'll let  
16 Mary Anne start with that because she's the one  
17 that made a legitimate point in briefing.

18 MS. HELTON: Mr. Chairman, after the  
19 discussion we had yesterday and -- actually,  
20 Dr. Polmann raised some of the same concerns -- I  
21 went back and pulled our APM that guides the staff  
22 and is what the staff looks at when we are looking  
23 at whether to show-cause a utility or looking at  
24 whether -- what action to take if we think that a  
25 utility is not following a statute, rule, or order.

1           And in that APM, it says that compliance --  
2           this is directions to the staff, "Compliance is the  
3           first objective. Emphasis should be placed on  
4           obtaining compliance as opposed to levying  
5           penalties for isolated instances of non-  
6           compliance." So, the Commission uses penalties to  
7           inc- -- increase compliance with rules, orders, and  
8           statutes, when other efforts have failed.

9           And I -- I heard you say -- and I understand  
10          that maybe they might have done this once, twice,  
11          and even three times; however, it's my  
12          understanding that, today, we have clear tariffs.  
13          And it's my understanding that they have agreed to  
14          refund customers. And it's my understanding that  
15          they are now following the tariffs.

16          So, it seems to me that they are in -- in  
17          compliance; that the thousand-dollar fine is a  
18          recognition that they have -- could have done  
19          better in the past, but I believe that they are  
20          going forward, doing what they need to do.

21          CHAIRMAN GRAHAM: But -- so, they're in  
22          compliance because they got caught, not because it  
23          became in compliance.

24          MS. HELTON: I don't think that the -- the  
25          directions to us makes that distinction. They're

1 in compliance now, after conversations with -- with  
2 the staff. And I think that's probably true for  
3 most utilities that are out of compliance; that  
4 it's -- the question is whether -- when the staff  
5 informs the utility that they are out of  
6 compliance, what actions they take at that point in  
7 time.

8 CHAIRMAN GRAHAM: Well, and my concern is, if  
9 there's no penalty coming with lack of compliance,  
10 all you have to do is become in compliance, then  
11 why would you ever be in compliance until you get  
12 caught?

13 MR. HETRICK: Maybe I could add something to  
14 this discussion, Commissioner. I think you have to  
15 look at the degree of penalties on a spectrum. And  
16 I think we've had situations in this Commission  
17 where -- and I'm not going to name names -- but  
18 since I've been here, where you can look at a  
19 utility and see an intentional pattern, a disregard  
20 for Commission rules that rises to the level of  
21 almost a fraudulent pattern, an intentional cover-  
22 up of activities, conduct that continually reoccurs  
23 where they not only knew -- should have known, but  
24 they did know and it -- it was an intentional  
25 cover-up and an ongoing pattern of activities that

1           occurred.

2           I don't think this situation has risen to that  
3           level. We don't find an intentional pattern of  
4           disregard for the rules and trying to cover up  
5           actions and -- and continue this conduct.

6           At the other end of the spectrum, I think you  
7           have to look at negligence and whether a duty --  
8           breach of a duty of care was violated. There could  
9           have been a misunderstanding. There's a gray  
10          area.

11          I think, as Mary Anne pointed out, that having  
12          a penalty in this case and nominal penalty is  
13          recognition for the violation of the rules, but is  
14          not, in this instance, deserved -- at least from  
15          staff's perspective -- of an ongoing patt- --  
16          pattern of intentional disregard for the rules, or  
17          it doesn't rise to the level of fraudulent cover-  
18          up-type activities.

19          CHAIRMAN GRAHAM: Thank you.

20          I thought you just wanted to add something. I  
21          just wanted for staff to -- to articulate that  
22          because this is part of the debate that came out.  
23          And I'll go to the -- to the -- all the lights are  
24          lit up here.

25          Commissioner Fay?

1           COMMISSIONER FAY: Thank you, Mr. Chairman.

2           And I'll follow up on your -- your comments.

3           I had the same questions with staff. And I  
4           just wanted to get clarification, Mr. Friedman,  
5           based on your initial statements -- so, you do get  
6           to talk more than once.

7           MR. FRIEDMAN: (Inaudible.)

8           COMMISSIONER FAY: You -- you stated -- stated  
9           some different points, but I was trying to get  
10          clarification if you -- if you believe the penalty  
11          component of the recommendation is appropriate or  
12          not.

13          It sounded like you were saying, outside of  
14          the reimbursements, if -- whatever is moved forward  
15          by the Commission, there's not an appetite to -- to  
16          challenge that any further, but I wasn't quite  
17          clear if that meant that you thought the thousand  
18          dollars was sufficient or insufficient or -- or  
19          would even help with compliance.

20          MR. FRIEDMAN: I -- well, like the staff  
21          pointed out, we don't need help with compliance  
22          because those were historical issues -- billing  
23          issues related to the unique nature of the tariffs  
24          at the time.

25          The tariffs now are -- are standard, you know,

1 water -- water-meter tariffs. You know, nothing --  
2 nothing unusual about them. And there's not -- has  
3 not -- has not been any billing issues since we  
4 went to billing rates based upon the KWAA water  
5 meters.

6 The thousand dollars -- I -- it's fine. I  
7 mean, I don't think there needs to be any, but I  
8 recognize there needs to be something. And you  
9 know, we're willing to -- to pay the thousand-  
10 dollar fine and move on.

11 You know, like I say, this is all historical;  
12 isn't going to happen anymore, so -- so, there's no  
13 reason to drag it out further.

14 COMMISSIONER FAY: So, I guess, in the -- in  
15 the future -- it sounds like, going forward,  
16 there's not an expectation that any of this would  
17 continue, based on -- on the changes that have been  
18 made, but if it does move forward, the statute  
19 makes it clear that there's a penalty -- a  
20 potential penalty of \$5,000 a day for that  
21 violation. I think what you're saying is you don't  
22 have any specific objection to that penalty or the  
23 range of it; you just don't believe it's going to  
24 be needed going forward.

25 MR. FRIEDMAN: Correct.

1 COMMISSIONER FAY: Okay.

2 MR. FRIEDMAN: That's why we're willing to  
3 accept the thousand-dollar penalty and move on.

4 COMMISSIONER FAY: Okay. So, if we see you  
5 again, it's a different analysis.

6 MR. FRIEDMAN: Yes.

7 COMMISSIONER FAY: Okay.

8 CHAIRMAN GRAHAM: Commissioner Polmann.

9 COMMISSIONER POLMANN: Thank you,  
10 Mr. Chairman.

11 Since we're talking about the penalty, I also  
12 had quite a bit of discussion in briefing about  
13 this. And I think that the violation puts that on  
14 record; the point being that there is a violation  
15 where, yes, we're identifying that. And the  
16 penalty basically affirms that.

17 To Commissioner Fay's point, if there was  
18 another violation, then a thousand dollars is not a  
19 thousand dollars. Then -- then, it's a real fine.  
20 So, don't come back here with another violation, is  
21 the point.

22 MR. FRIEDMAN: Point taken.

23 COMMISSIONER POLMANN: And to the Chairman's  
24 point on that, what came out in my discussion  
25 with -- with staff in -- and with our executive

1 director was the point of -- of a fine, distinct  
2 from the -- from the refund back to the customers,  
3 is that what we're looking for is a benefit to the  
4 customers. And -- and refunding the money provides  
5 that. The fine doesn't because the fine goes to a  
6 different place. You know, that -- that really  
7 hurts the company.

8 But providing the refund hurts the company  
9 also because that's the company money. And all  
10 that has to go back to the customers. And if our  
11 intent is to make the customers whole, getting the  
12 refund really does that.

13 I don't have any problem with a 12-month  
14 repayment plan either. What I do want and -- and  
15 Mr. Friedman did acknowledge that, you know, there  
16 have been problems by an extended period of time.  
17 And that's -- you know, we're looking for a change  
18 in behavior going forward.

19 Just a quick comment to Mr. Friedman's  
20 argument to the rational person's thinking, and so  
21 forth -- I -- I'm a big fan of that. I've tried  
22 that so many times in my career. I just love that  
23 argument. And I always lose, so --

24 MR. FRIEDMAN: Continue to make it.

25 COMMISSIONER POLMANN: -- it -- it never

1 works, so --

2 MR. FRIEDMAN: Don't give up.

3 COMMISSIONER POLMANN: Yeah. But don't have  
4 high --

5 MR. FRIEDMAN: One of these days, the light is  
6 going to come on --

7 COMMISSIONER POLMANN: Don't have high  
8 expectations. Don't have high expectations.

9 Thank you.

10 CHAIRMAN GRAHAM: Well, you go back to OPC,  
11 Ms. Morse's argument that the customers aren't  
12 whole. And this goes back to what I initially  
13 said, where is the motivation for them to do the  
14 right job up front if there's really no penalty for  
15 doing what you choose to do, other than you have to  
16 do what you should have done in the very beginning.

17 I know that sounds very cyclical there, but  
18 they're not paying any more out than they would  
19 have done if they had done their job correctly.  
20 So, where -- where is the stick?

21 Commissioner Brown.

22 COMMISSIONER BROWN: Well, I agree with you,  
23 Mr. Chairman. Where is the stick? Do you have any  
24 suggestions? Because I absolutely agree, but I  
25 don't have a recommendation on it.

1           I do want to know a little bit more about this  
2 oral modification, though, which strikes language,  
3 strong language, and replaces it with less-strong  
4 language. Can you elaborate on why you have made  
5 that -- yesterday, I guess, we got this.

6           MS. MAPP: Yes. The oral modification is a  
7 clarification of the willfulness standard because,  
8 in order to show cause, a utility must be found to  
9 have willfully violated a Commission order, rule,  
10 or statute. And willfulness is a question of fact.  
11 And that wasn't previously clear in the standard  
12 that was originally used in this recommendation,  
13 and staff wanted to make that clarification.

14           COMMISSIONER BROWN: But -- but you struck  
15 language that, I think, was very important that  
16 should have been included in the order including  
17 that the -- on Page 2, the second paragraph, the  
18 last sentence and -- where you're citing the  
19 Florida Administrative Code relating to tax savings  
20 refund for 1998 -- 1988 and '89, for GTE.

21           You say that: The Commission, having found  
22 that the company had not intended to violate the  
23 rule, nevertheless found it appropriate to order it  
24 to show cause why it should not be fined, stating  
25 that, in our view, willful implies an intent to do

1 an act.

2 And that is the -- a distinct -- it is  
3 distinct from an intent to violate a statute or  
4 rule. I think that language is important if we're  
5 giving the utility -- if we're making a  
6 recommendation here of a modest fine because I  
7 think that is part of the reason why you're  
8 recommending in this staff recommendation that we  
9 should give them -- fine them only a thousand  
10 dollars. I -- so, I was confused why you -- why  
11 you took it out.

12 MS. HELTON: You can blame me. At one point  
13 in time, the Commission did include that as  
14 standard -- standard language with respect to  
15 whether someone was acting willfully when violating  
16 the statute, rule, or order.

17 And a year or two ago, we did some extensive  
18 research on that and determined, based on current  
19 law, that we were going too far, and that the  
20 standard that's in the modification today is the  
21 correct standard to apply.

22 And when we were go- -- when this  
23 recommendation was going through the evaluation  
24 process by management, quite frankly, I just missed  
25 that, and should have -- that should never have

1           been filed that way.

2           So, this is a correction to -- the  
3           modification you received yesterday is a correction  
4           to make it consistent with what I believe is the  
5           current state of the law.

6           COMMISSIONER BROWN: So, the current state of  
7           the law is Fugate, and not these two other -- well,  
8           obviously, Barlow is precedent, but you're saying  
9           that the GTE case is not precedential for purposes  
10          of finding willful.

11          MS. HELTON: Yes, ma'am.

12          COMMISSIONER BROWN: I still want a little bit  
13          more understanding -- for this thousand-dollar  
14          fine -- I mean, this is a period of activity that  
15          occurred over an extensive period of time of  
16          failing to -- I mean, looking at the e-mails going  
17          back and forth between this --

18          CHAIRMAN GRAHAM: Safe Harbor.

19          COMMISSIONER BROWN: This -- Doug -- Safe --  
20          yeah, Safe Harbor and Doug -- I mean, they --  
21          they -- it's pretty strong language that they  
22          understood that they didn't -- that there was a PSC  
23          process, and that it was a long, drawn-out PC --  
24          PSC process -- I mean, this was back in 2009.

25          To me, that is clearly willful to circumvent

1           our -- our laws and rules. So, I just don't  
2           understand how a thousand dollars seems like a  
3           reasonable fine.

4           MS. HELTON: Madam -- Commissioner Brown, if  
5           you disagree, you have the discretion to put out a  
6           different fine. The thousand-dollar fine is what  
7           staff believed was appropriate based on where we  
8           are today, with respect to them now being in  
9           compliance and when looking at previous violations  
10          by other utilities.

11          If you think that the fine should be higher,  
12          then you have the discretion to make the fine  
13          higher.

14          COMMISSIONER BROWN: Well, our general counsel  
15          was referencing a case which I -- I think I know  
16          which one you were -- you're talking about, but you  
17          didn't name names, where this Commission found a  
18          fine -- I believe it was in a range of a couple  
19          million, for intentional -- similar -- not similar.  
20          It dealt with the public-safety issue.

21          So, what would be reasonable? Because a  
22          thousand dollars seems like a nom- -- a drop in the  
23          bucket for intentional disregard of our rules.

24          MR. HETRICK: And maybe Patti Daniel can also  
25          provide some --

1 COMMISSIONER BROWN: Of course she can.

2 MR. HETRICK: -- at least technical insight on  
3 this.

4 COMMISSIONER BROWN: Patti always comes to the  
5 rescue.

6 MS. DANIELS: Commissioners, I -- I do not  
7 want to speak to the legal decisions that you're  
8 making about this, but what I do want to reiterate  
9 and emphasize to you is that Mr. Friedman is  
10 absolutely correct that the -- the tariff lacked  
11 clarity for many, many years. And in the 2015 rate  
12 case, when I saw that lack of clarity --

13 COMMISSIONER BROWN: "We."

14 MS. DANIELS: -- we -- well, we all saw it,  
15 but we -- we made recommendations, and the  
16 Commission accepted them, to develop rates that  
17 were based on meter sizes, as Mr. Friedman  
18 described. There is no more how many widgets are  
19 there.

20 So, there -- the prior tariff -- and you have  
21 one example here in the recommendation, but there  
22 are other examples in the prior tariffs where  
23 similar types of tariffs were provided.

24 If the staff had just -- once the Commission  
25 had with voted on that \$917 amount -- had put \$917

1 flat rate in the tariff, there would have been  
2 clarity, but instead, staff chose to put in the  
3 components of it.

4 So, this is one example -- and there are  
5 numerous examples that we can see as we look  
6 through the prior cases. We looked into the  
7 billing determinants for the 2009 rate case and --  
8 and we're not at all clear that staff was using  
9 meter sizes as opposed to units to develop the  
10 recommended and approved rates back then.

11 So, that's --

12 COMMISSIONER BROWN: Are you -- Patti, are you  
13 saying, though, that -- that staff had a role in  
14 some of the confusion that occurred?

15 MS. DANIELS: Absolutely, Commissioner.

16 COMMISSIONER BROWN: Is that why staff is  
17 recommending a nominal fee of a thousand-dollar  
18 fine?

19 MS. DANIELS: Absolutely.

20 COMMISSIONER BROWN: Thank you.

21 CHAIRMAN GRAHAM: Commissioner Clark.

22 COMMISSIONER CLARK: I -- I'm not --  
23 Mr. Friedman, I'm not condoning what happened, but  
24 I do want a -- a little, at least, understanding of  
25 what would have transpired had the proced- -- had

1 the rate procedure gone through back during this  
2 time period when you made the agreement with Safe  
3 Harbor.

4 Had you actually -- I guess my question is:  
5 Did Safe Harbor receive the benefit of your  
6 services at a discounted price over that period of  
7 time? Does that make any sense?

8 MR. FRIEDMAN: Let me see if I understand. I  
9 think that if -- if they would have continued to  
10 pay 917.11 for that period of time, sure, they  
11 would have gotten a tremendous benefit; certainly  
12 better than -- than other customers in the same  
13 situation.

14 COMMISSIONER CLARK: And would that have put a  
15 burden on your other customers as well for having  
16 to pay additional costs?

17 MR. FRIEDMAN: Well, it would certainly -- I  
18 don't know if there would be additional costs  
19 because the bucket of costs is the same, but  
20 certainly --

21 COMMISSIONER CLARK: But when you have less --

22 MR. FRIEDMAN: -- when you spread those costs,  
23 it --

24 COMMISSIONER CLARK: -- units to divide it by,  
25 the other costs should go up.

1           MR. FRIEDMAN: Exactly. And that's the point  
2 I was trying to make, is that, if they had more  
3 residential units and more usage on this particular  
4 piece of property than is indicated on here, then  
5 they would not be paying their fair share.

6           And like Ms. Daniel pointed out, if your  
7 tariff had just said 917.11, I wouldn't be sitting  
8 here trying to make this argument with -- my  
9 reasonableness argument with a straight face, but  
10 the fact that they showed the components of how we  
11 got to 917 -- that's what leads to the confusion  
12 about should it be 917 if there's more than 13  
13 residential units. And the utility interpreted it  
14 differently than you interpret it. And you're the  
15 final determinant of how you interpret these  
16 things.

17           But certainly, you can't say that this is  
18 something they looked at and said, oh, well, we're  
19 going to increase it and we're doing it and we  
20 don't give a darn about anything. I mean, there  
21 was certainly a rational basis for why they did  
22 what they did and why they negotiated with this  
23 particular customer the way they did. And the  
24 result, I think, was a reasonable one that they --  
25 you know, that that customer paid its fair share.

1 COMMISSIONER CLARK: Thank you.

2 CHAIRMAN GRAHAM: Commissioner Polmann.

3 COMMISSIONER POLMANN: Thank you,  
4 Mr. Chairman.

5 A question I have -- you know, we're looking  
6 at a period of time over which the use of a -- a  
7 different billing amount occurred. But a question  
8 that I have is that the number of what I'll call  
9 the violations or the number of events in which  
10 a -- the utility went outside of what -- what we  
11 intended to be the correct rate.

12 So, can someone answer that for me? You know,  
13 they -- they shifted from one rate to another, the  
14 900 something to the 1600. And then it -- that was  
15 applied for a period of time. But were there other  
16 instances where they changed the customer rate?

17 MS. FRIEDRICH: To our knowledge, Safe Harbor  
18 was the only one that KWRU had renegotiated a rate  
19 offline with them.

20 COMMISSIONER POLMANN: Okay. So, that was one  
21 event. So, essentially one --

22 (Discussion off the record.)

23 MS. FRIEDRICH: Your question is that -- is  
24 this the only instance where KWRU created a  
25 different rate other than what was in the tariff

1 for a customer; is that --

2 COMMISSIONER POLMANN: I'm talking about the  
3 audit period. Is -- does this item deal with the  
4 specific audit period of 2013-'16 or --

5 MS. FRIEDRICH: Yes.

6 COMMISSIONER POLMANN: Okay. So, within that  
7 audit period, how many violations are we talking  
8 about that this fine applies to? You have a fine  
9 of a thousand dollars and you have a refund to  
10 various entities -- how many violations within  
11 that? The number of violations.

12 MS. DANIELS: If you counted each monthly bill  
13 as a violation --

14 COMMISSIONER POLMANN: No, I'm talking about  
15 the --

16 MS. DANIELS: -- entities? We believe that,  
17 for Safe Harbor, that was one entity that was  
18 improperly billed. We also believe that Sunset  
19 Marina was improperly billed.

20 Is that what you were asking, how many  
21 entities?

22 COMMISSIONER POLMANN: What I'm trying to  
23 understand is, you know, we -- we could -- the --  
24 the standard here is \$5,000 per day, per violation.  
25 We put that aside, and you came up with a nominal

1 amount. And then there's a period of time which  
2 gets into the per day.

3 I'm trying to go to the -- back to dollars per  
4 violation. Forget about the period of time. Now,  
5 can you somehow count the number of violations as  
6 this customer, this customer, this customer? Or  
7 we -- we, the utility, recalculated a rate and  
8 applied it to this customer, and we recalculated a  
9 rate and applied it to that customer or -- or we  
10 came off of a tariff and made up our own rate for  
11 X, Y, and Z.

12 Were there one, two, or three of those?

13 MS. DANIELS: It would depend on how you  
14 characterize "violation;" whether you're talking  
15 about, for Safe Harbor -- is that one violation or  
16 is it every time, every month -- is that a  
17 violation.

18 COMMISSIONER POLMANN: No, I'm not talking  
19 about every time, every bill, every month. I'm  
20 talking about Customer A, Customer B, Customer C.

21 MS. DANIELS: Then two customers.

22 COMMISSIONER POLMANN: Two customers.

23 MS. DANIELS: Safe Harbor, Sunset Marina.

24 COMMISSIONER POLMANN: Okay. Mr. Friedman,  
25 are you following my question?

1           MR. FRIEDMAN: I am. I am. And I think they  
2 both fit into the same category we discussed --

3           COMMISSIONER POLMANN: Okay. Forget about the  
4 argument of whether or not there's a rational  
5 person involved here. Do you agree that there are  
6 two customers?

7           MR. FRIEDMAN: I agree that there were --  
8 there were two instances, two customers that the  
9 utility did not bill according to the tariff.

10          COMMISSIONER POLMANN: Thank you.

11          Commissioners, I think there are two  
12 customers, and we could apply some dollar amount  
13 for those two, what I'll call, instances, if you  
14 wanted to come up with something other than \$1,000  
15 for the entire issue.

16          CHAIRMAN GRAHAM: So, it's \$5,000 per day, per  
17 customer, per incident. Since we're dealing with  
18 two incidents -- \$10,000?

19          COMMISSIONER POLMANN: I think Commissioner  
20 Brown asked you for a different number. I created  
21 a basis on which you might want to say two times  
22 some dollar, Mr. Chairman.

23          CHAIRMAN GRAHAM: Ms. Morse, did you have  
24 anything to add before we conclude this?

25          MS. MORSE: As to the point, in terms of

1 making the customers whole and the discussion back  
2 to the -- the refunds and the look-back date, I  
3 just want to respond to one representation about  
4 the lack of available records, or what have you.

5 The rule -- my reading of the rule requires  
6 that where some element is lacking, there's an  
7 obligation to make an estimate. So, it's not  
8 material, in our view, whether, you know, the  
9 utility's personal -- or their individual record-  
10 retention practice is "X" date.

11 The point is the refund is supposed to be  
12 made, shall be made, pursuant to the statute, even  
13 if it has to be estimated, based on the customer's  
14 past billing -- past usage, for all of these  
15 elements.

16 CHAIRMAN GRAHAM: Thank you.

17 Well, as staff has said earlier, the utility  
18 has already either paid or agreed to pay about  
19 \$143,000 on top of the recommendation that's in  
20 front of us, which is for about another 41 -- 26 --  
21 another -- 4- -- 30 -- sorry -- \$67,000; is that  
22 correct?

23 MS. FRIEDRICH: Close- -- closer to \$80,000.

24 CHAIRMAN GRAHAM: Okay. So, I think the  
25 customers are pretty much whole. I -- or will be.

1 Safe Harbor went into this knowingly. As far as we  
2 can tell, Sunset has not necessarily gone into this  
3 knowingly, but we're looking to make those guys  
4 whole.

5 I kind of like Commissioner Polmann's thought  
6 process on what the penalty should be. And I think  
7 that a penalty of \$10,000 is probably -- it's still  
8 nowhere close to where I want it to be, but it's  
9 more in line or sends a better message than a  
10 thousand dollars does.

11 But I can't make that motion from sitting  
12 here. If somebody would care to give it a shot --  
13 and we do have an oral mod as well.

14 Commissioner Clark.

15 COMMISSIONER CLARK: Yeah, I just want to go  
16 back and -- and clarify, make sure I -- I'm not  
17 missing something here. We're talking about making  
18 the customer whole. Again, I am not condoning what  
19 occurred, but these customers received a benefit of  
20 service at an extremely discounted price from what  
21 would have been charged had they gone through the  
22 correct procedure.

23 So, I don't want to -- I don't want to make it  
24 look like, you know, they -- they got some -- you  
25 know, they were grossly overcharged. They bore

1           some cost. They -- they create some of the cost  
2           that the utility is incurring in this case. So,  
3           just keep that in perspective when we look at it.

4           CHAIRMAN GRAHAM: Commissioner Polmann.

5           COMMISSIONER POLMANN: Commissioner Clark, I  
6           don't understand how you came to that conclusion  
7           because they did not go through a rate case. We  
8           don't know what their actual rate would have been.  
9           I -- maybe I'm confused. I don't understand how  
10          you know that they got a discounted rate even  
11          though they paid some other negotiated rate.

12          COMMISSIONER CLARK: Based on the fact that  
13          the customer negotiated that rate with the utility  
14          company. They perceived the value that was there.

15          COMMISSIONER POLMANN: So, you --

16          CHAIRMAN GRAHAM: Just -- just Safe Harbor,  
17          though.

18          COMMISSIONER CLARK: Just Safe Harbor,  
19          correct.

20          COMMISSIONER POLMANN: They paid a rate higher  
21          than was in the tariff, but you think that they  
22          paid a rate that they agreed to.

23          COMMISSIONER CLARK: Correct.

24          COMMISSIONER POLMANN: That would have been  
25          something they -- they wouldn't have negotiated

1           against themselves --

2           COMMISSIONER CLARK:   Correct.

3           COMMISSIONER POLMANN:  -- in principle, a  
4           rational person's argument.

5           CHAIRMAN GRAHAM:   All right.  Does someone  
6           want to give a shot at a motion?

7           COMMISSIONER POLMANN:  I -- Mr. Chairman, I  
8           think, from all of this discussion, I think the  
9           only thing that we talked about changing, other  
10          than the staff recommendation -- the only thing  
11          outside of the staff recommendation that we  
12          contemplated changing was the amount of the  
13          dollar -- the dollar amount of the fine.

14          CHAIRMAN GRAHAM:   That is correct.

15          COMMISSIONER POLMANN:  Okay.  I would move  
16          staff recommendation, and I think we're talking  
17          about all issues.  Is -- okay.  I would move staff  
18          recommendation on all issues with a change to the  
19          dollar amount on the fine; rather than \$1,000, make  
20          it \$10,000.

21          CHAIRMAN GRAHAM:   That's the motion.

22          COMMISSIONER BROWN:  Second.

23          CHAIRMAN GRAHAM:   It's been seconded.  Any  
24          further discussion on that motion?

25          Commissioner Fay --

1           COMMISSIONER CLARK: Mr. Chairman, could I  
2           move to divide the question?

3           CHAIRMAN GRAHAM: Sure.

4           COMMISSIONER POLMANN: I'm sorry.

5           CHAIRMAN GRAHAM: Commissioner Fay.

6           COMMISSIONER FAY: I just wanted to add to the  
7           clarification of that motion, the utility asked for  
8           a --

9           CHAIRMAN GRAHAM: 12 months.

10          COMMISSIONER FAY: -- a period of time to pay  
11          back that -- that fee. And so, I just -- I would  
12          be inclined to include that, but it -- it's  
13          Commissioner Polmann's motion, so I just --

14          COMMISSIONER POLMANN: Let me --

15          CHAIRMAN GRAHAM: Let's let Mr. --  
16          Commissioner Polmann -- see if he can't bifurcate  
17          that motion and add that 12 months.

18          COMMISSIONER POLMANN: My motion is -- let  
19          me -- for clarification purposes, I make the motion  
20          to approve Item 11, staff recommendation, changing  
21          the dollar amount of the fine from \$1,000 to  
22          \$10,000, including all oral modifications and  
23          allowing refunds to the customers to be made over a  
24          12-month period, including interest --

25          CHAIRMAN GRAHAM: I --

1           COMMISSIONER POLMANN:  -- and all of the  
2           administrative authority to apply whatever is  
3           necessary.

4           CHAIRMAN GRAHAM:  Before we get a second, I  
5           think what Commissioner Clark's request was --  
6           let's make a motion just on Issue 1, which is the  
7           penalty, and then close out the rest of the issues.

8           COMMISSIONER POLMANN:  I withdraw that motion.

9           Commissioner Fay, would you like to make a  
10          motion on Issue 1?

11          COMMISSIONER FAY:  I would love to make a  
12          motion, Commissioner Polmann.

13          Mr. Chairman, I would motion on -- on Item 1  
14          to accept staff's recommendation with the mod- --  
15          modification of the penalty to two separate \$5,000  
16          penalties; in addition, allow the utility to pay --  
17          well -- I guess I would get clarification from  
18          staff, from a penalty-repayment period, is there  
19          typically a time period allowed for that payment  
20          back or is it -- is it done in whole?

21          MS. MAPP:  Usually it's one payment.

22          COMMISSIONER FAY:  Okay.  So, that payment  
23          would be made in whole.

24          And I would also give staff any administrative  
25          authority to make changes as needed.

1           CHAIRMAN GRAHAM: That's been moved and  
2           seconded for Issue No. 1. Any further discussion  
3           on that motion?

4           Commissioner Clark.

5           COMMISSIONER CLARK: Hold on, Mr. Chairman  
6           (examining document).

7           CHAIRMAN GRAHAM: The only concern I may have  
8           is if 21 days is going to be enough time for them.

9           Ms. Daniels, you have anything to add?

10          MS. DANIELS: I've not heard Mr. Friedman have  
11          a complaint about 21 days, so I would assume it  
12          works.

13          MR. FRIEDMAN: Well, when it was a thousand  
14          dollars, I was going to write you a check today,  
15          but --

16          COMMISSIONER BROWN: Personal?

17          COMMISSIONER FAY: Bitcoin?

18          MR. FRIEDMAN: They're good for it.

19          (Laughter.)

20          MR. FRIEDMAN: I mean, obviously, if you're  
21          talking about \$10,000, you know, the longer the  
22          better. That's a lot of money for a utility like  
23          this. So, if we could get 60 days -- or 90 days  
24          would be better.

25          CHAIRMAN GRAHAM: Mary Anne, do we have a

1 problem going with 60 days?

2 MS. HELTON: I think the 21-day period is just  
3 for them to respond to the order to show cause.  
4 So, I think he could -- the utility -- if I  
5 understand the law correctly -- and hopefully  
6 there's a lawyer here that, if they understand the  
7 law better than me, can jump in, but -- I think  
8 they can respond that they will pay back the money.

9 And then, if we give them 60 days from the  
10 date of the order to pay back the money, I think  
11 that would be appropriate.

12 COMMISSIONER POLMANN: To pay the fine.

13 CHAIRMAN GRAHAM: Okay. So, when they respond  
14 to 21 days, then we tell them how long they have to  
15 pay it back; is that correct?

16 MS. HELTON: Well, perhaps, if they responded  
17 in 21 days and say they will pay the \$10,000 fine  
18 and give us a date certain, and if it's beyond that  
19 60 days, then we will -- the staff would come back  
20 to you with direct -- asking for direction, if that  
21 was acceptable or not.

22 CHAIRMAN GRAHAM: Was that your motion,  
23 Commissioner Fay?

24 COMMISSIONER FAY: That -- that is my motion,  
25 with the understanding that the 60-day toll will

1 begin concluding the 21-day window to challenge.

2 CHAIRMAN GRAHAM: Okay. And that's been  
3 seconded. Any further discussion on the Fay  
4 motion, Issue No. 1?

5 Seeing none, all in favor, say aye.

6 (Chorus of ayes.)

7 CHAIRMAN GRAHAM: Any opposed?

8 By your action, that motion passes.

9 Now, Commissioner Fay, would you like to  
10 continue?

11 COMMISSIONER FAY: Mr. Chairman, I would -- I  
12 would like to potentially give deference to  
13 Commissioner Polmann, who I think had some  
14 specifics on these issues.

15 CHAIRMAN GRAHAM: Commissioner Polmann.

16 COMMISSIONER POLMANN: You're doing a great  
17 job. If you would like to continue, please do so.

18 COMMISSIONER FAY: Mr. Chairman, I would like  
19 to move on Issue 2 -- well, actually, I guess I  
20 could do --

21 CHAIRMAN GRAHAM: All the remaining issues?

22 COMMISSIONER FAY: I would like to move all  
23 remaining issues -- move with staff recommendation  
24 and allow any administrative authority to make any  
25 changes as needed.

1                   CHAIRMAN GRAHAM:   And allow them 12 months  
2                   to --

3                   COMMISSIONER FAY:   And allow them 12 months.

4                   CHAIRMAN GRAHAM:   That's been moved and  
5                   seconded.   Any further discussion?

6                   COMMISSIONER FAY:   And just to be clear, 12  
7                   months with interest.

8                   CHAIRMAN GRAHAM:   Yes.

9                   COMMISSIONER FAY:   Thank you.

10                  COMMISSIONER POLMANN:   Are oral modifications  
11                  in that?

12                  CHAIRMAN GRAHAM:   Yes, that includes oral  
13                  modifications.

14                  Was that good, staff?

15                  MS. MAPP:   Yes.

16                  CHAIRMAN GRAHAM:   Okay.   No further  
17                  discussion?

18                  All in favor, say aye.

19                  (Chorus of ayes.)

20                  CHAIRMAN GRAHAM:   Any opposed?

21                  By your action, you have approved the second  
22                  Fay motion.

23                  Okay.   So, that concludes Item No. 11.   Thank  
24                  you, Mr. Friedman, Ms. Morse, staff.

25                  We're going to take a five-minute break.

1           We're going to come back for Item No. 12.

2                   COMMISSIONER POLMANN: That will be ten  
3 minutes.

4                   CHAIRMAN GRAHAM: We're going to take a ten-  
5 minute break. We're going to come back to Item No.  
6 12. And, then, immediately following, Item No. 12,  
7 we're going to have IA over in the IA room.

8                   (Agenda item concluded.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA )  
COUNTY OF LEON )

I, ANDREA KOMARIDIS, Court Reporter, do hereby  
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DATED THIS 15th day of August, 2018.



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ANDREA KOMARIDIS  
NOTARY PUBLIC  
COMMISSION #GG060963  
EXPIRES February 9, 2021