BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for limited proceeding increase in reuse water rates in Monroe County by K W Resort Utilities Corporation	DOCKET NO. 970229-SU ORDER NO. PSC-97-0850-FOF-SU ISSUED: July 15, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING PETITION FOR LIMITED INTERVENTION, GRANTING INTERVENTION PURSUANT TO RULE, DENYING MOTION TO DISMISS, DENYING REQUEST FOR FORMAL HEARING AND REQUIRING REPORT

BY THE COMMISSION:

BACKGROUND

On February 21, 1997, K.W. Resort Utilities Corporation (hereinafter K.W. Resort or utility) filed, pursuant to the provisions of Section 367.0822, Florida Statutes, its Application for Limited Proceeding Increase in Reuse Water Rates (Application). In the Application, the utility notes that it had originally submitted its request for a new class of service for reuse water on December 23, 1994.

In this current Application, the utility also noted that in the original proceeding it had submitted "a simplified justification for a charge of $.38 per thousand gallons", but that it had only requested a rate for reclaimed water of $.25 per one thousand gallons. This request was approved by Order No. PSC-95-0335-FOF-SU, issued on March 10, 1995, in Docket No. 941323-SU. In the current Application, the utility is now requesting a reclaimed water rate of $1.25 per thousand gallons.

In response to the Application, Key West Country Club (Country Club) filed, on March 17, 1997, its Protest and Motion to Dismiss the Application for Limited Proceeding or in the Alternative Protest and Request for Formal Hearing (Protest). Also, on April 29, 1997, the Country Club (the only reuse customer) filed its Notice of Limited Appearance and Petition to Intervene for the Limited Purpose of Raising the Issues Set Forth in its Protest (Petition for Limited Intervention). Then, on May 6, 1997, K.W. Resort filed it Response to Petition to Intervene and Motion to Dismiss (Response). This Order addresses the two requests for relief set forth in the Country Club's Protest, the Country Club's Petition to Intervene, and K.W. Resort's Response.

INTERVENTION

In support of its Protest and its Petition for Limited Intervention, the Country Club states that it is the utility's only reuse water customer, that K.W. Resort is requesting a substantial reuse water rate increase, and that the Country Club is substantially affected by the matters which are the subject of this proceeding. The Country Club also alleges that, as a protestant, no petition for intervention is required. The Country Club further states that, to preserve its rights if a petition to intervene is ultimately found to be required, it has filed its "notice of limited appearance and its petition to intervene for the limited purpose set forth herein and reserves all its rights herein." Finally, the Country Club states that its "motions and petitions herein are filed based upon, but not limited to, Rule 25-22.037(2), and Rule 25-22.036(4)(a) and (b), F.A.C., respectively."

In its response, acknowledging that the Country Club is a substantially affected party, the utility states that it does not object to the Country Club's intervention as outlined in the Petition for Limited Intervention. The rest of the utility's Response was dedicated to the allegations in the Country Club's Protest purporting to support the motion to dismiss.

Pursuant to Rule 25-22.039, Florida Administrative Code, a motion for leave to intervene must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. A two-part test is applied in evaluating whether a person has alleged a substantial interest sufficient to

entitle such person to intervene in an administrative proceeding. The person must allege (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. den., 415 So. 2d 1359 (Fla. 1982).

The Country Club is the utility's only reuse water customer and the utility seeks to substantially raise its reuse water rate in the instant limited proceeding. It therefore appears that the Country Club's substantial interests could be affected by this proceeding.

The Petition for Limited Intervention also alleges that:

> This notice of limited appearance and petition to intervene for the limited purpose of raising procedural and jurisdictional issues is similar to filing a notice of limited appearance in a Circuit Court proceeding where an entity seeks to challenged [sic] certain procedural or jurisdictional aspects of the Court proceeding without submitting itself to the general jurisdiction of the Court. The golf course does not willingly consent to going forward with the limited proceeding filed by the Utility. Such a proceeding would violate Protestant's Constitutional rights, including but not limited to its rights of due process and equal protection.

A special or limited appearance is one in which a party appears for the purpose of objecting to the jurisdiction of the court over him, and confines his appearance solely to that question. 1 Fla. Jur. 2d, Actions § 88 (1996). In Florida, the distinction between a limited and general appearance has been abolished; the method of raising the question of jurisdiction over the parties is by a responsive pleading or motion under Fla. R. Civ. P. 1.140(b). First Wisconsin National Bank of Milwaukee v. Donian, 343 So. 2d 943, 945 (Fla. 2d DCA 1977); Ward v. Gibson, 340 So. 2d 481, 482 (Fla. 3d DCA 1976). Under Rule 1.140(b), the defense of lack of in personam jurisdiction is not waived by the fact that it is joined with other defenses or objections in a responsive pleading or motion. However, case law clearly establishes that the defense of a lack of personal jurisdiction must be raised at the first opportunity or it is waived. Romellotti v. Hanover Amgro Ins. Co., 652 So. 2d 414 (Fla. 5th DCA

1995); Hubbard v. Cazares, 413 So. 2d 1192 (Fla. 2d DCA), rev. den. 417 So. 2d 329 (Fla. 1981); White v. Nicholson, 386 So. 2d 74 (Fla. 2d DCA 1980).

Through its Protest and its Petition for Limited Intervention, the Country Club indicates that the matters raised by the utility in its Application for this limited proceeding need to be addressed in a full wastewater rate case and that it is wrong for the Commission to continue to process the utility's Application as a limited proceeding. By protesting the Application itself, the Country Club believes that pursuant to Rule 25-22.026(1), Florida Administrative Code, it is already a party. That rule states in pertinent part:

> Parties in any proceeding conducted in accordance with s. 120.57, F.S., are . . . petitioners, protestants, or intervenors. Parties shall be entitled to receive copies of all motions, notices, orders and other matters filed in a proceeding . . .

However, we believe that the protest of the Country Club is premature since it was filed before the issuance of a Proposed Agency Action (PAA) Order. Therefore, we do not believe that the provisions of Rule 25-22.026(1), Florida Administrative Code, are applicable. However, if we grant intervention, the Country Club will have party status.

Based on our understanding of the Florida Statutes, our own rules, and the applicable decisional law, we do not find that intervention for a limited purpose as the Country Club requests is warranted. However, the Country Club has demonstrated that its substantial interests could be affected by this limited proceeding.

Based upon the foregoing, we find that the Country Club's Petition for Limited Intervention shall be denied. However, Key West Country Club, because it has shown that its substantial interests could be affected by this proceeding, shall be granted intervenor status pursuant to the provisions of Rule 25-22.039, Florida Administrative Code. Pursuant to that rule, the Country Club takes the case as it finds it. All parties to this docket shall furnish copies of all pleadings and other documents that are hereinafter filed in this proceeding to counsel for the Country Club.

MOTION TO DISMISS

As stated above, the utility has filed its Application for a limited proceeding to increase its reclaimed water rates to $1.25 per thousand gallons (an increase of $1.00 per thousand gallons). In that Application, the utility attaches a special report which alleges that their costs for reclaimed water per thousand gallons is now $1.60 (and not $.38 as stated in a prior proceeding). Further, the utility notes that the cost for potable water from the Keys Aqueduct Authority is $5.68 per thousand gallons. Finally, the utility says that the rate increase will increase their revenues by $39,259, but that they will still be incurring an annual loss of $80,281.

In filing its protest, the Country Club argues that since we have never considered this utility's rate base, costs, or other matters relevant and necessary to be considered in a general rate proceeding, that the filing of an application for a limited proceeding is improper. Specifically, the Country Club alleges that we cannot properly assess the costs of the utility, and consider the burdens which each class of customers should bear, without having a general rate proceeding. Further, the Country Club argues that the utility should not try to load the wastewater costs onto one customer.

Noting that it has never received any notice of the application, the Country Club moves the Commission to dismiss the application, or, in the alternative, requests a formal hearing. The utility did not initially file a response to the Country Club's Protest. However, upon the Country Club filing its Petition to Intervene, the utility filed its combined "Response to Petition to Intervene and Motion to Dismiss".

In Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Court went on to say that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, . . . nor consider any evidence likely to be produced by the other side." See also, Holland v. Anheuser Busch, Inc., 643 So. 2d 621 (Fla. 2d DCA 1994)(stating that it is improper to consider information extrinsic of the complaint).

In considering this motion to dismiss, we shall not look beyond the four corners of the utility's Application. Also, we will view the facts set forth in the Application in a light most favorable to the utility in order to determine whether the utility's request for a limited proceeding is appropriate pursuant to the provisions of Section 367.0822, Florida Statutes.

In its Response, the utility argues that we are fully capable of reviewing the costs proposed for inclusion in establishing a rate for reclaimed water without fully considering the cost for wastewater service and any need for a rate increase therein. The utility further argues that we have, in the past, used a limited proceeding to review costs related to one service provided by a utility without review and rate setting for another service provided by that same utility. Finally, the utility argues that just because we may have previously considered the costs related to the provision of a service, that this does not preclude us from readdressing the cost for such service some three years later.

We note that in the application of Broadview Park Water Company for a limited proceeding (Docket No. 860344-WU), we, through Order No. 16216, did deny the request for a limited proceeding. In that proceeding, the utility had contended: 1) that its cash flow condition was insufficient to permit payment of competitive salaries; 2) that maintenance of existing facilities had been unduly deferred because of insufficient resources; 3) that additional revenues were needed for payment of increased insurance and water testing charges; 4) that construction of additional facilities and replacement of major plant components were necessary for compliance with regulatory agency directives; and 5) that these several matters and other concerns were deserving of consideration in a limited proceeding. We determined that the application, under these conditions, would more properly be handled as a general rate increase request under the provisions of Section 367.081, Florida Statutes, and denied the request for a limited proceeding.

In the case at hand, the utility is not seeking, at this time, to change its rates to its general wastewater customers. Rather, it is seeking to recover a portion of what it alleges to be the greater costs of providing reclaimed water service. The Country Club alleges that this can not be done without going into a full wastewater rate case. We note that Section 367.0822, Florida Statutes, specifically provides: "The commission shall determine the issues to be considered during such a proceeding and may grant or deny any request to expand the scope of the proceeding to

include other related matters." Also, the reuse statute provides that: "The commission shall allow a utility to recover the costs of a reuse project from the utility's water, wastewater, or reuse customers or any combination thereof as deemed appropriate by the commission."

However, we do not believe that it is appropriate at this time to expand this limited proceeding into a full wastewater rate case. If portions of the costs the utility is attributing to reuse should be apportioned to the wastewater customers, this could still be determined in a limited proceeding. We believe that this application is more similar to other limited proceedings that have been allowed (see Docket No. 901000-WU, where we allowed a limited proceeding for an increase in bulk-water rates), and is limited enough to proceed as a limited proceeding.

In the last paragraph of its Protest, the Country Club alludes to the fact that it has never received proper notice about this limited proceeding. However, it does not refer to any rule or statute which the utility might have violated by failing to provide notice at this stage of a limited proceeding. We note that in Docket No. 891114-WS, by Order No. 23123, and in Docket No. 930770-WU, by Order No. PSC-93-1735-FOF-WS, we dismissed rate cases for Sailfish Point Utility Corporation and St. George Island Utility Corporation, respectively, based, at least in part, on improper notice. However, in each of those cases, Rule 25-22.0406, Florida Administrative Code, was applicable and had been violated. Further, in the Sailfish Point case, the utility had, just before the hearing, filed testimony which essentially revised its minimum filing requirements. We found that the two together were fatal to the continued processing of the rate case and dismissed the rate case.

We find no similar circumstances in this case. Neither the limited proceeding statute nor any rules require notice of the filing of a limited proceeding application. The procedure, in the past has been for our staff to schedule a customer meeting and to require the utility to provide notice to the customers of the application and the customer meeting. In this case, the limited proceeding has barely begun and our staff has not yet scheduled a meeting to discuss the utility's Application (staff has met with the utility and the Country Club to discuss the processing of this case, possible settlement, and the protest of the Country Club). Therefore, we can discern no violation of any notice requirements and see no reason to dismiss this case at this time for improper

notice. Further, as noted in Carr v. Dean Steel Buildings, Inc., 619 So. 2d 392 (Fla. 1st DCA 1993), dismissal is a drastic remedy which should be used only in extreme situations.

In its Response, the utility argues that it is not required to seek recovery of a fair return on its investment from its "sewer" operations in order to seek recovery of a fair return on its investment from those assets and costs related to its reuse customers. The utility referred to Utilities Operating Company v. King, but did not give the specific "So. 2d" citation (the utility is apparently referring to the case cited at 143 So. 2d 854 (Fla. 1962)). In that case, the Florida Supreme Court, at 858, stated:

> [I]n the absence of some showing that the service to the public will suffer by allowing the utility to charge rates which will not produce a fair return, the utility and not the Commission has the right of decision as to the rates it will charge so long as they do not exceed those which would produce a fair return as determined by the Commission.

We do not believe that the Country Club has made any such showing, and do not believe that the situation in this case justifies that the customer of one type of service should be able to force a rate case on customers of another type of service. We realize that reuse can benefit water and wastewater customers as well as reuse customers. However, we believe that we can allocate the costs and the benefits without resorting to a full rate case for the other classes of customers.

Based on a review of the utility's Application, we believe that the utility has stated a cause of action for relief under the provisions of Section 367.0822, Florida Statutes. Also, we believe that the Application of the utility is limited enough to be processed under the limited proceeding statute.

Therefore, we believe that we should continue processing the limited proceeding using the PAA procedures. If the Country Club is not satisfied with our proposed action, it may then protest the PAA Order and request a formal hearing pursuant to the provisions of Rules 25-22.029 and 25-22.036, Florida Administrative Code.

Based on all the above, the Country Club's motion to dismiss is denied.

REQUEST FOR A FORMAL PROCEEDING

The Country Club has requested that we: 1) either grant its motion to dismiss (discussed above), 2) convert the proceeding to a general rate case or allow the utility to withdraw its Application for a limited proceeding; or 3) hold a formal hearing pursuant to Section 120.57, Florida Statutes. As discussed above, we do not think it appropriate or necessary at this time to turn this limited proceeding into a full rate case.

Even in this limited proceeding, the Country Club can make the proper allocation of costs between the reuse customer(s) and the wastewater customers an issue. Also, as in all cases, we must set rates which are "just, reasonable, compensatory, and not unfairly discriminatory." (Section 367.081(1), Florida Statutes)

The Country Club argues that it is unfair to set reuse rates which allow a fair rate of return from the reuse customers, but leave wastewater rates such that the utility continues to earn less than a fair rate of return from those customers. Generally, public utilities cannot unjustly discriminate in offering rates to its consumer. Florida courts, however, have held that offering one class of consumers a lower rate than another is not necessarily discriminatory, provided that the classification chosen is not "arbitrary, unreasonable, or discriminatory, and apply similarly to all under like conditions." Pinellas Apartments Ass'n., Inc. v. City of St. Petersburg, 294 So. 2d 676 (Fla. 1974).

The courts in other jurisdictions have held that differences in rates being offered to consumers are not discriminatory and unlawful where the differences are based upon a "reasonable classification corresponding to actual differences in the situation of the consumers or the furnishing of the service," for example, see, Bilton Mach. Tool Co. v. United Illuminating Co., 110 Conn. 417, 148 A. 337 (1930), Robbins v. Bangor R. & Electric Co., 100 Me. 496, 69 A. 136 (1905); St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N.W. 262 (1915); Smith v. Public Service Comm'n., 351 S.W. 2d 768 (Mo. 1961); New York Tel. Co. v. Siegel-Cooper Co., 202 N.Y. 502, 96 N.E. 109 (1911); Elk Hotel Co. v. United Fuel Gas Co., 75 W. Va. 200, 83 S.E. 922 (1914). Also, see, Mahoning County v. Public Utilities Comm'n., 58 Ohio St. 2d 40, 388 N.E. 2d 739 (1979). To determine the appropriate reuse rate in this docket, we will consider the cost of providing reuse and other factors, such as alternative sources of water and the utility's alternative methods of effluent disposal.

Again, we do not believe that we must expand this limited proceeding into a full rate case to properly set the rate for reclaimed water. We realize that the utility anticipates substantial expenditures in the very near future in order to expand its existing wastewater treatment facilities (approximately $900,000 in capital costs), and that even with this increase (in reclaimed water rates), the utility anticipates that it will incur an annual loss of $80,281. Therefore, while it appears that the utility may have to file a wastewater rate case in the near future, we believe that this is a business decision to be made by the utility and should not be forced upon the utility at this time.

Also, we note that this Application is being processed pursuant to the PAA procedures. Pursuant to Rule 25-22.039, Florida Administrative Code, intervenors take the case as they find it. Although we could set this matter directly for a formal hearing, we believe that our staff should be allowed to complete their analysis and present their recommendations before we consider setting this matter for hearing. Therefore, at this time, the Country Club's alternative motion for a formal proceeding shall be denied.

However, based on the motions filed by the customer and discussions with the customer's attorney, it is apparent that the likelihood of a protest to the PAA Order is great. Recognizing the magnitude of the utility's proposed increase and the unique nature of this case given that there is only one reuse customer affected, we believe that it would be beneficial if the utility and customer attempted to negotiate an acceptable rate for reclaimed water. Such negotiations could avoid a protest and the need for a formal hearing. Therefore, the utility is encouraged to meet with the customer and attempt to reach a mutually acceptable agreement.

Accordingly, the utility shall file a status report indicating the progress of the negotiations no later than sixty days from the date of this Order. The status report shall contain the number of meetings held between the utility and the customer, a list of the participants in the meetings, the outcomes of the meetings and the negotiated rate, if an agreement is reached. If an agreement is not reached, the report shall contain an explanation of the factors that prevented an agreement.

CLOSING OF DOCKET

Because we have denied the Country Club's motion to dismiss and have determined that this proceeding may continue as a limited proceeding, the docket shall remain open for the continued processing of the utility's application.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the request of Key West Country Club for limited intervention is denied. It is further

ORDERED that, pursuant to the provisions of Rule 25-22.039, Florida Administrative Code, Key West Country Club shall be granted intervenor status. It is further

ORDERED that all parties to this proceeding shall furnish copies of all pleadings and other documents that are hereinafter filed in this proceeding to Ben E. Girtman, Esquire, 1020 E. Lafayette Street, Suite 207, Tallahassee, Florida 32301-4552, counsel for the Key West Country Club. It is further

ORDERED that Key West Country Club's Motion to Dismiss the Application for a Limited Proceeding is denied. It is further

ORDERED that Key West Country Club's request for a formal hearing is denied at this time. It is further

ORDERED that K.W. Resort Utilities Corporation shall submit within 60 days of the date of this Order a report on the status of any negotiations containing the information set forth in the body of this Order. It is further

ORDERED that this docket shall remain open for the continued processing of the application of K.W. Resort Utilities Corporation for a limited proceeding.

By ORDER of the Florida Public Service Commission, this 15th day of July, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn, Chief
Bureau of Records

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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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, 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.