

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in wastewater rates in Monroe County by K W Resort Utilities Corp.

DOCKET NO. 070293-SU
ORDER NO. PSC-07-0851-PCO-SU
ISSUED: October 25, 2007

SECOND ORDER REVISING ORDER ESTABLISHING PROCEDURE; ORDER GRANTING IN PART AND DENYING IN PART KW RESORT UTILITIES CORP'S REQUEST FOR EXTENSION OF TIME, REQUEST FOR CLARIFICATION, AND OBJECTION TO OPC'S AMENDED FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND FIRST SET OF INTERROGATORIES
AND
ORDER GRANTING IN PART AND DENYING IN PART THE OFFICE OF PUBLIC COUNSEL'S MOTION TO COMPEL

By Order No. PSC-07-0786-PCO-SU, issued on September 27, 2007, the Commission granted in part and denied in part the Office of Public Counsel's (OPC) Motion to Permit Additional Interrogatories and Production of Documents; and granted in part and denied in part K W Resort Utilities Corp.'s (KW Resort or utility) Motion for Protective Order. Pursuant to that Order, OPC was limited to 300 interrogatories and 150 requests for production of documents (PODs). Also, because its full request was not granted,¹ OPC was directed to advise the utility which of its first interrogatories and PODs would be withdrawn, and the utility was given 25 days from OPC's notice to the utility to respond to those interrogatories and PODs that were not withdrawn.

On that same day, OPC provided the utility with its amended interrogatories and PODs to which it was still requesting responses. Because OPC had renumbered the interrogatories and PODs, the utility requested that OPC advise the utility which specific interrogatories and PODs had been withdrawn. Pursuant to the request of the utility, OPC advised the utility which interrogatories and PODs had been withdrawn. Because OPC advised the utility of the interrogatories and PODs for which it was still seeking discovery on September 27, 2007, the utility's response to those interrogatories and PODs to which it did not object would be due 25 days from September 27, 2007, or October 22, 2007.

On October 8, 2007, the utility filed its Request for Extension of Time, Request for Clarification, and Objection to OPC's Amended First Request for Production of Documents and First Set of Interrogatories. On October 15, 2007, OPC filed its combined response to the utility's motion, and its Motion to Compel. The parties have also reached an agreement as to when the utility should be required to file its responses to OPC's first round of discovery for which there is no objection or dispute.

¹ OPC had requested 400 interrogatories and 200 PODs.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Agreement

Pursuant to Order No. PSC-07-0786-PCO-SU, the utility was required to file its responses to OPC's first round of discovery to which it did not object by October 22, 2007. The utility informed OPC that one of the utility's counsels will be out of the office for the entire week of October 15-19, 2007, and additional time was needed to respond to the discovery requests.

The utility and OPC reached an agreement that if the filing date for all testimony and exhibits could be extended by four days, then the utility could provide responses to the uncontested portion of the initial discovery on October 26, 2007. On October 17, 2007, the utility submitted a letter outlining the agreement reached with OPC.

I find the agreement is reasonable and it is approved.² The utility's responses to the first round of discovery to which it does not object shall be due on October 26, 2007. The controlling dates for the filing of all subsequent prefiled testimony and exhibits shall be extended by four days, as set forth below.

Request for Clarification

In its request for clarification, the utility first seeks clarification for POD Request No. 19 regarding "Operation and Maintenance Performance." A review of OPC's POD requests, however, shows the request for this information from the utility was withdrawn. Therefore, there is no need to address the utility's request for clarification on this POD request.

Also, the utility seeks clarification that POD requests 23, 24, 25, and 39³ are for documents "in the utility's possession" and are intended only to reach those persons or entities for which any time or costs are actually charged to the utility "in this rate case." To the extent this clarification is not given, the utility objects to these POD requests.

OPC states that the criterion "in its possession" as proposed by the utility should be expanded to include custody or control. Moreover, OPC states that it is not sure what the utility means by "in this rate case." OPC requests that the utility be made to:

provide the requested information for all entities and persons whose time or costs have been charged to the utility as part of this case, has been charged in prior years (if requested), and/or has been capitalized and is therefore included in rate base or in capital accounts that affect the rate case, i.e. debt, accounts payable, etc. Costs related to capital and rate base should be produced, if requested, as far back as 1985 – the Company's last rate case.

² The parties were advised verbally of this approval on October 19, 2007, and that an order would be forthcoming.

³ The utility's request actually references POD Nos. 27, 28, 29, and 43, but these were the numbers in the original discovery requests filed on September 17, 2007, and OPC filed its amended discovery requests on September 27, 2007, where it deleted four PODs prior to these requests and renumbered these requests as 23, 24, 25, and 39.

Also, OPC requests that, if it is the utility's position that no costs have been charged to the utility, the utility should affirmatively state "that it is not providing the information requested by the Citizens for Affiliate XYZ because Affiliate XYZ did not charge, directly or indirectly through the County or any other entity, costs (expense or capital) to the utility." Additionally, OPC notes that the utility does not specifically list the interrogatories or PODs to which it objects, and that there may be a difference of opinion as to whether or not costs have been charged to the utility by certain companies or firms. Therefore, OPC claims it is necessary that it know on which specific discovery request the utility objects or claims there is no charge to the utility.

OPC's requests appear to be reasonable, and the utility in its responses shall provide the information as requested by OPC. Further, the utility shall provide any such information or documents which may be in its possession, custody, or control as set forth in Rule 1.350, Florida Rules of Civil Procedure.

Objections

Rule 1.280, Florida Rules of Civil Procedure, governs discovery. Subsection (b)(1) of that rule states in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

A. General Objections to Time Periods Going Back Past 2005

KW Resort objects to all requests for information related to non-capital expenditures for calendar year 2004 or earlier. The utility argues that "such requests are not reasonably calculated to lead to the discovery of admissible evidence, are overbroad and will not reach information that would tend to prove or disprove any issue in this proceeding." The utility states that it will provide such information back through 2005 but not earlier.

OPC responds that the time periods were carefully considered and chosen for specific reasons. In considering what the appropriate test year expenses should be, OPC notes that it is standard practice for both OPC and Commission staff to request at least five years' worth of data, and that five years is typically the norm for establishing a pattern or average.

OPC is correct that this Commission regularly uses a five-year average to determine appropriate expenses. Because we are using the test year ending December 31, 2006, any requests concerning expenses going back to and including the year 2002 are appropriate. It appears that OPC has carefully limited its requests to this time period. Therefore, the utility shall respond to all requests for expense data that are from 2002 forward.

B. POD Objections

The utility states that it specifically objects to PODs 23, 24, 25, and 39, as being improper discovery. Moreover, the utility claims that they “are not reasonably calculated to lead to the discovery of admissible evidence, constitute an improper and over-broad fishing expedition, and are vague, ambiguous, and constitute improper discovery, . . . and will reach entities and individuals who have never charged any time to, and have no practical connection to, KW Resort.”

In POD 23, OPC requests the utility provide the tax returns for KW Resort; Key West Golf Club; and Green Fairways, Inc. for the years 2002-2006 and any correspondence on IRS audits conducted on the years 2000-2006. In addition to the reasons listed above, the utility objects to any discovery for calendar year 2004 or earlier.

For this POD Request, OPC argues that the documents sought are appropriate, and, as argued above, it is common practice to look at a five-year period. I find that this data request is reasonably calculated to lead to the discovery of admissible evidence. However, OPC has requested that any correspondence on IRS audits should go back to the year 2000. Because five years is the standard, the utility shall only have to provide such documents going back to the year 2002.

In POD 24, OPC requests that the utility provide the audited financial statements, including footnotes, of KW Resorts; Smith, Hemmesch, & Burke and/or Smith, Hemmesch, Burke, Brannigan, & Guerin (collectively SHB); Green Fairways, Inc.; and Key West Golf Club for the years 2003-2006, and if audited financial statements were not available, then unaudited financial statements for the same years and companies. The utility claims that this request is not reasonably calculated to lead to the discovery of admissible evidence, constitutes an improper and over-broad fishing expedition, is vague, ambiguous, improper, and will reach entities and individuals who have never charged any time to, and have no practical connection to, KW Resort.” The utility notes that the law firm has not charged any of its time or costs to the utility, and argues that the mere fact that a lawyer at SHB is a principal of the utility does not throw open the entire law firm’s sensitive and private financial documents to discovery.

OPC disputes the utility’s statement that the SHB law firm has not charged any of its time or costs to the utility. Specifically, OPC attached a copy of a \$25,000 check to SHB from KW Resort, and refers to a grand jury report whereby KW Resort was charged \$347,000 in construction and management fees for the Stock Island Project that were paid to SHB and Green Fairways, Inc.

As reflected in Volume IV of its filing, Key West Golf Club and Green Fairways, Inc. have allocated costs to the utility. However, SHB (the law firm) has direct legal costs charged to the utility. Thus, it is not necessary to obtain the audited financial statements of SHB in order to ensure that non-utility charges are not included in the utility’s capitalized and expensed amounts. Therefore, for this POD, the utility shall respond for the entities and times requested, except for the portion regarding SHB, for which no response is necessary. If SHB has submitted invoices

to KW Resort for services, those specific invoices may be reviewed for the appropriateness of the expenses.

In POD 25, OPC requests the utility provide a copy of all variance reports and variance explanations and summaries of variance reports and variance explanations used to monitor and control the Company's budgets (capital, expense, and revenue) for the years 2005 through year-to-date. The utility claims that this request is not reasonably calculated to lead to the discovery of admissible evidence, and constitutes an improper and over-broad fishing expedition. However, the utility makes no other specific argument concerning this POD request.

In reviewing this objection, OPC notes that this request appears to be different from the other request for which the utility has objected, and surmises that it was erroneously included. In any event, OPC notes that this type of information is useful in understanding the reasons for changes in capital, expenses, and revenue, and is commonly used to make adjustments to test year data. The information requested by OPC appears reasonably calculated to lead to the discovery of admissible evidence. Thus, OPC's Motion to Compel a response to POD 25 is granted.

In POD 39, OPC requests the utility provide the 2005 and 2006 W2 forms for each person employed by Key West Golf Club/Course; Green Fairways, Inc.; WS Utility, Inc.; and KW Resort. The utility claims that this request and similar requests "are not reasonably calculated to lead to the discovery of admissible evidence, constitute an improper and over-broad fishing expedition, and are vague, ambiguous, and constitute improper discovery, . . . and will reach entities and individuals who have never charged any time to, and have no practical connection to, KW Resort." In the absence of clarification by OPC that POD 39 will be limited to companies or persons who "charges cost to the Company," the utility objects.

OPC did not directly address this POD request. However, it appears that this issue is resolved by my ruling on the utility's request for clarification. Therefore, the utility shall reply to this POD request pursuant to the requirements set forth in the Request for Clarification section of this Order.

C. Interrogatory Objections

The utility specifically notes Interrogatory 7(k) in which OPC requests the utility to identify all affiliated companies that SHB "owns and/or provide services and or products to, and describe the ownership and/or services/products provided to these companies." The utility argues that such a request is not reasonably calculated to lead to the discovery of admissible evidence in that SHB has no connection with KW Resort, has not charged any of its time to KW Resort, nor are any of its costs included in the calculation of rates in this case. To the extent that this interrogatory, or any other interrogatory, requests information about persons or employees of other companies (whether affiliated or not), who are not attempting to charge any portion of their time or costs to KW Resort, the utility objects.

OPC did not directly address this interrogatory. However, it appears that this issue is resolved by my ruling on the utility's request for clarification. Therefore, the utility shall reply to this interrogatory pursuant to the requirements set forth in the Request for Clarification section of this Order.

The utility also states that Interrogatory 16, which would "require W2s for every employee of a certain company," is improper discovery. In Interrogatory 16, OPC requests in subpart a. that the utility "identify each employee of WS Utility, Inc., Green Fairways, Inc., Key West Golf Course," and KW Resort, by name and title, for the years 2003-2007, but for the rest of the subsections only requires information for each employee that provides services to the Company (utility). As reflected in Volume IV of its filing, Key West Golf Club and Green Fairways, Inc. have allocated costs to the utility. However, it is unclear whether WS Utility, Inc. allocates such costs. Therefore, the utility shall respond to this interrogatory, and in regard to WS Utility, Inc., the response shall be pursuant to the requirements set forth in the Request for Clarification section of this Order.

Request for Extension of Time

The utility has requested that it be allowed 10 days from the date of the Prehearing Officer's Order to file any responses to interrogatories or PODs to which it objected or sought clarification, if such clarification or objection was denied. The utility argues that KW Resort is a small utility⁴ with no direct employees and only two full time contract personnel, and yet it has been directed to respond to 62 PODs and 160 interrogatories (including subparts). The utility argues that if it is given 10 days from the decision on its objections to respond, that unnecessary work will be avoided.

OPC initially opposed this request. However, OPC states that if the testimony filing dates are extended as set forth in the agreement discussed earlier in this Order, it requests that the utility have up to and including Monday, October 29, 2007, to provide discovery for those items of discovery for which its Motion to Compel was granted. As discussed above, the agreement is approved. Upon consideration of the arguments, I find that the discovery for which OPC's Motion to Compel was granted shall be provided on November 1, 2007.

Controlling Dates

Based on the above, the following Controlling Dates shall govern this matter:⁵

⁴ The utility is now classified as a small Class A.

⁵ The filing date for the Prehearing Statements shall only be extended by two days to January 16, 2008.

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| (1) Intervenors' testimony and exhibits | December 7, 2007 |
| (2) Staff's testimony and exhibits, if any | December 21, 2007 |
| (3) Rebuttal testimony and exhibits | January 15, 2008 |
| (4) Prehearing Statements | January 16, 2008 |
| (5) Prehearing Conference | January 24, 2008 |
| (6) Discovery deadline | January 30, 2008 |
| (7) Hearing | February 6-7, 2008 |
| (8) Briefs | February 28, 2008 |

Based on the foregoing, it is

ORDERED by Commissioner Nancy Argenziano, as Prehearing Officer, that K W Resort Utilities Corp's Request for Extension of Time, Request for Clarification, and Objection to OPC's Amended First Request for Production of Documents and First Set of Interrogatories is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's Motion to Compel is granted in part and denied in part as set forth in the body of this Order, and the utility shall have up to and including November 1, 2007, to provide the discovery for which the Motion to Compel was granted. It is further

ORDERED for the initial discovery of the Office of Public Counsel, to which K W Resort Utilities Corp. does not object, the agreement of the parties is approved, and the utility shall have until October 26, 2007, to file responses. It is further

ORDERED that the Controlling Dates set forth in Order No. PSC-07-0729-PCO-SU, the Order Establishing Procedure, for the filing of testimony and exhibits, and the Prehearing Statements, are modified as set forth in the body of this Order. It is further

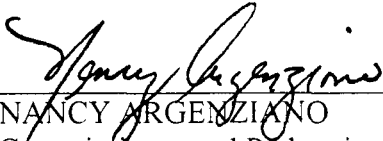
ORDERED that all other aspects of Order NO. PSC-07-0729-PCO-SU are hereby reaffirmed.

ORDER NO. PSC-07-0851-PC0-SU

DOCKET NO. 070293-SU

PAGE 8

By ORDER of Commissioner Nancy Argenziano, as Prehearing Officer, this 25th day of October, 2007.



NANCY ARGENZIANO
Commissioner and Prehearing Officer

(S E A L)

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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; 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 25-22.060, 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.