

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

**In re: Application for increase in  
Wastewater rates in Monroe County  
by KW Resort Utilities Corp.  
Docket No. 070293-SU**

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**Docket No. 070293-SU**

**October 15, 2007**

**CITIZENS' RESPONSE TO KW RESORT UTILITIES CORPORATION'S REQUEST  
FOR EXTENSION OF TIME, REQUEST FOR CLARIFICATION, AND OBJECTIONS  
TO OPC'S  
AMENDED FIRST REQUEST FOR PRODUCTION OF DOCUMENTS  
AND FIRST SET OF INTERROGATORIES  
AND THE CITIZENS' MOTION TO COMPEL**

The Citizens by and through their undersigned counsel, hereby file this Response to KW Resort Utilities Corp's ("KWRU", "Utility", or "Company") request For Extension of Time, Request for Clarification, and Objection to OPC's Amended First Request for Production of Documents ("PODs") and First Set of Interrogatories ("Motion"). The Citizens also file a Motion to Compel KWRU to respond to Citizens' First Amended Request for Production of Documents and First [Amended]<sup>1</sup> Set of Interrogatories and states as follows:

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<sup>1</sup> The Citizen's Amended its First Set of Interrogatories and forwarded these to the Company; however, the title did not include the word "Amended".

## **I. Response to KWRU Request for Extension of Time**

### **A. Correction of Misstatements**

1. Unfortunately, KWRU has misstated and overstated factual information in its request for an extension of time. The Citizens are compelled to respond to and correct the errors and exaggerations made by KWRU. The first error in KWRU's motion is its failure to correctly set forth the sequence of events and dates leading up to its current request. The correct sequence of events and dates are set forth below:

- September 17, 2007, Citizens filed a Motion to Permit Additional Interrogatories and Production of Documents.
- September 17, 2007, Citizens filed its First Set of Interrogatories and First Request for Production of Documents;
- September 24, 2007, KWRU filed its Response to OPC's Motion to Permit Additional Interrogatories and PODs, and it filed a Motion for Protective Order;
- September 27, 2007, (erroneously stated as September 17, 2007 by KWRU) the Commission issued Order PSC-07-0786-PCO-SU First Order Revising Order Establishing Procedure; Order Granting in Part and Denying in Part OPC's Motion to Permit Additional Interrogatories and Production of Documents; and Order Granting in Part and Denying in Part the Utility's Motion for Protective Order ("Amended Procedural Order");
- September 27, 2007, Citizens submitted an Amended First Set of Interrogatories and Amended First Request for Production of Documents to KWRU;

- September 27, 2007, at KWRU's request, Citizens submitted an Amended First Set of Interrogatories and Amended First Request for Production of Documents to KWRU that contained the strike and edits from the original First Set of Interrogatories and First Request for Production of Documents.

Establishing the correct sequence of events is important to address the request for an extension of time and allegations made by KWRU.<sup>2</sup>

2. Second, KWRU suggests that the Prehearing Officer's acceptance of the Citizens' concerns about the complexity of this case is somehow unfounded. Nothing could be further from the truth. As set forth, at length, in its Motion to Permit Additional Interrogatories and Production of Documents, the Citizens consider this case to be extremely complex due to many factors, including but not limited to:

- the significant and questionable affiliate relationships of the Company;
- the Grand Jury investigation into the relationships and substantial money transfers between the Company, its numerous affiliates, and other entities;
- the fact that the Commission has not established rates since 1985 for KWRU;
- the necessity of the examination of the capital investments and associated dollars for the period since the Commission last established rate base in 1985;
- the proposed rate increase of 58%;
- the proposed addition of over \$1.5 million of new plant to rate base; and
- the proposed expense increases of \$288,625 related to the conversion of its wastewater system to Advanced Wastewater Treatment (AWT).

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<sup>2</sup> See KWRU's Motion, paragraph 1.

To suggest that the Prehearing Officer accepted the Citizens' characterization of the rate case as being complex for some unsubstantiated reason is simply without merit.

3. Third, the Company complains and would have the Commission believe that it is a small unsophisticated utility. Again, this is simply untrue. As set forth in its rate application, the Company's 2006 operating revenue is over \$1 million, making it a Class A utility. A Class A utility is the largest utility regulated by the Commission. Out of the nearly 190 water and wastewater companies the Commission regulates, only 25 percent are Class A. To provide further comparison, just 31 of the nearly 190 regulated companies provide only wastewater, and of these only four are Class A. Therefore, KWRU's claim that it is a small unsophisticated utility is baseless and should not be used to grant it additional time to respond to the Citizens' discovery nor to reduce the time period of the data requested in the Citizens' discovery.

4. Fourth, KWRU's allegation that the Citizens' discovery is boilerplate, excessive, and a fishing expedition is simply untrue. All of the discovery requests contained in the Citizens' first and second sets were carefully scrutinized to ensure that they are absolutely necessary given the nature and complexity of this case. While some interrogatories and document requests would be applicable to many different water and/or wastewater companies, such questions are absolutely necessary in the absence of an affirmative statement by the utility that certain expenditures are not included as an expense for rate setting purposes. For example, questions about penalties, association dues, chamber of commerce dues, charitable contributions, and similar expenses, which are typically disallowed by the Commission, must be asked in every rate case to ascertain whether or not such costs are being passed on to ratepayers.

5. While such questions might be characterized as "boilerplate" by KWRU, they cannot be characterized as inappropriate or unnecessary. Clearly, if the Company feels that any question

asked or document requested is unnecessary, it is entitled to object to said request. Since KWRU has not objected to such requests, the Commission should conclude that the Company's characterization of the Citizens' discovery is nothing more than hyperbole. Moreover, the majority of the questions and documents requested by the Citizens were very specific to the Company's operations. Such questions and document requests included asking about anomalous data in the Annual Reports filed with the Commission, requesting supporting information for expense data reflected in the MFR schedules, and asking for documentation for rate case expenses, used and useful, and proforma adjustments. Other interrogatories and document requests focused on the relationships between the Company and its affiliates—these questions would not have been required were it not for these problematic affiliate relationships. Additional discovery focused on the Grand Jury matters and related issues that could have a direct impact on this Company and its customers. Again, were it not for the questionable transactions between the Company, its affiliates, and other entities, these questions and documents would not have been sought. To suggest that the Citizens' discovery is without merit is simply unfounded.

6. Similarly, the Commission should reject KWRU's assertion that the discovery issued by the Citizens will significantly raise rate case expense. As stated above, were it not for the complicated affiliate relationships of the Company and the questionable transactions that were raised in the Grand Jury investigation, the Citizens' discovery would be significantly less. Both of these complexities are the result of the Company's actions, not its customers. Interestingly, after all of its complaining, KWRU seeks "clarification and/or objects to only a minimal number" of the Citizens' Requests for Production of Documents and Interrogatories.<sup>3</sup>

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<sup>3</sup> See KWRU's Motion, paragraph 2.

B. Specific Request for Extension of Time

7. The Company asks that any Interrogatory or POD for which clarification is sought and for any objection to which OPC files a Motion to Compel, that the response to that Interrogatory or POD (if any such objection is ultimately denied) only be required to be made within ten days after the date of the Prehearing Officer's Order. The Citizens disagree with this request. The Citizens have already been put at a disadvantage with respect to its first set of discovery, which was originally due on or before October 17, 2007. To continue to extend the due date of responses presents a significant hardship to the Citizens. Even if the Company were to respond to the Citizens' discovery on the due date of October 22, this will barely allow the Citizens enough time to examine the responses, send out a follow-up set of discovery, receive answers, and review the responses such that they could be used in OPC's prefiled direct testimony, which is scheduled to be filed on or before December 3, 2007. The time frame in the proceeding is very short, and to place the Citizens' at a further disadvantage by giving the Company more time to respond than the current October 22<sup>nd</sup> deadline is unfair.

**II. Response to Request for Clarification, Objections to Requests for Production of Documents and Objections to Interrogatories**

A. Affiliate Issues

8. In its first request for clarification of the Citizens' Document Request No. 19, KWRU asks the Citizens to explain what is being requested by the phrase "Operation and Maintenance Performance." The question pertaining to Operation and Maintenance Performance was withdrawn in the Amended First Set of Production of Documents. There is no Document Request No. 19 that seeks information concerning the Company's "Operation and Maintenance Performance" Report in the Amended First Set of Production of Documents.

9. KWRU's second claim is that the discovery sought in Document Requests 27, 28, 29, and 43 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. The Document Request Numbers being used by KWRU are erroneous and fail to take into consideration the questions that were withdrawn by the Citizens as a result of the Commission's Amended Procedural Order. The correct numbers are 23, 24, 25, and 39. For reference, the numbers used by KWRU will be put in parentheses after the correct numbers. In addition, while the Company refers to POD 25 (29) above in its opening sentence, it never again addresses any problem with this POD. The Citizens' POD 25 requested that the Company: "Please 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). Please provide for the years 2005, 2006, and year-to-date 2007." As this POD appears to be different in nature than the others objected to by KWRU, the Citizens believe that POD 25(29) was erroneously included in the Company's motion. However, to the extent the Company believes this POD constitutes improper discovery, the Citizens respond that a request for variance reports are useful in understanding the reasons for changes in capital, expenses, and revenue. This information is commonly used to make adjustments to test year

data. Accordingly, the Commission should dismiss the Company's objection to this document request.

10. With respect to PODs 23(27), 24(28), and 39(43), KWRU claims that such documents are confidential. A request for confidential treatment can be made at the appropriate time and is not the subject of the instant motion.

11. Next, the Company's concern is that PODs requested will reach entities and individuals who have never charged any time to and have no practical connection to KWRU. The Company states that it is willing to produce those documents in its possession that actually relate to any entity or individual whose time or costs have been charged to the utility as a part of this rate case. KWRU seeks clarification from the Citizens that PODs 23(27), 24(28), and 39(43) are only intended to reach those persons or entities for which any time or costs are actually charged to the utility.

12. There are several problems with the Company's request that essentially precludes the Citizens from working with the Company in a mutual resolution on these PODs. First, the Company states that it is willing to produce documents "in its possession." This is clearly unsatisfactory. As the Company has no direct employees, it is quite possible that the Company will claim that certain documents are not in its possession—but in the possession of its affiliates. The Commission must reach beyond what is in "the possession" of the Company and require that it produce the documents that are in its possession, custody, or control. To the extent there is common ownership of the affiliates that charge costs to the Company, then the documents requested that may not be in the Company's possession, but would be in its custody or control because of the affiliate relationship, must be produced. According to the Company's 2006 Annual Report, KW Resort Utilities, Corp., is owned by WS Utility, Inc., which is owned by Mr.



William L. Smith, Jr., who also owns (or is a partner with) the law firm of Smith, Hemmish & Burke.<sup>4</sup> It is common practice before the Commission to require that documents of an affiliate be produced by the regulated utility to the extent that the affiliate affects the utility's costs. The Citizens' request that the Commission order the Company to produce all documents in its possession, custody, or control and not allow it to hide behind its affiliate relationships and produce only documents in its possession.

13. Second, the Company states that it will only produce the requested documents if they "actually relate to any entity or individual whose time or costs have been charged to the utility as a part of this rate case." It is not precisely clear what distinction is being made by the Company when it states "as a part of this rate case." It is the Citizens' position that if a cost was incurred by the utility for an affiliate in years prior to the rate case, that information is relevant for at least two reasons: 1) for comparative purposes to the rate case costs and 2) if costs have been capitalized, then they would have been expended in a year prior to the rate case but are obviously relevant because they impact rate base and must be subject to the scrutiny of the Commission. Therefore, the Commission should require that the Company 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.

14. Third, the Company proposes to simply not provide the information requested if it believes that no costs have been charged to KWRU. This proposal, however, is troubling. If the

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<sup>4</sup> KW Resort Utilities, Inc., Annual Report, 2006, p E-5.

Company simply decides not to supply the requested information because it is the Company's position that no costs have been charged to KWRU, the Citizen's request that the Commission order KWRU to affirmatively so state, rather than remaining silent on the subject. In other words, the Company must 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.

15. Fourth, the Company has not identified each interrogatory and POD to which it believes its proposed solution would apply. This is problematic because there may be a difference of opinion as to whether or not costs have been charged to the utility by certain companies or firms.

For example, in paragraph 5 of its Motion, the Company states that:

“the request for audited financial statements or financial statements of the law firm of "SHB" (as described in Request 28 [sic]) would require the production of documents by a law firm who has not charged any of its time or costs to the utility, would require the production of sensitive, financial documents by individuals who have nothing to do with the utility in any way, shape or form, and would require the production of documents which may and likely would have attorney-client implications. The mere fact that a lawyer at SHB is a principal of the utility does not somehow throw open the entire law firm's sensitive and private financial documents to discovery and no purpose is served by such a request.”

While the Company claims that this law firm “has not charged any of its time or costs to the utility,” the Citizens beg to differ. Attached as Exhibit A to this response is a copy of a check for \$25,000 written by KWRU to the law firm of SHB. Likewise, the report issued by the Fall Term 2004 grand jury empanelled by the Sixteenth Judicial Circuit Court of Florida raises considerable controversy over SHB fees. According to the grand jury report, KWRU was charged \$347,000 in construction and management fees (9.9% of the construction value) for the Stock Island Project,

which were paid to SHB and Green Fairways, Inc.<sup>5</sup> At this point it is not clear whether or not these costs are included in rate base. But clearly, the Commission needs to know if they are. If the Company had chosen, or chooses not to respond to questions about this issue, or related matters, it could go unnoticed if the Company simply does not respond. Therefore, in responding to the Citizen's questions, the Company must specifically identify the situations where its proposed solution would be relevant. Otherwise, the Citizens' cannot determine if it would be an appropriate solution.

16. If the Commission does not require the Company to identify each Interrogatory and POD to which it intends to apply this proposed solution, the Citizens would be forced to address such omissions in subsequent motions to compel that would not only waste valuable time and money but would also seriously jeopardize the Citizens' ability to file appropriate testimony in a timely fashion. Therefore, the Company's failure to appropriately identify the Interrogatories and PODs to which it proposes to invoke this solution creates a serious obstacle to discovering potentially relevant information. Given the significant deficiencies in the Company's offered solution, the Citizens request that the Commission order the Company to produce the information requested, and in doing so require that it apply the criteria outlined in paragraphs 13, 14, 15 and 16.

#### B. Time Period Issues

17. KWRU next objects to all requests for information related to non-capital expenditures, presumably expenses, for calendar year 2004 or earlier. The Company claims that "such requests are not reasonably calculated to lead to discovery of admissible evidence, are overbroad, and will not reach information that would tend to prove or disprove any issue in this proceeding." The

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<sup>5</sup> Final Report of the Fall Term Grand Jury to the Honorable Sandra Taylor of the Circuit Court of the Sixteenth Judicial Circuit of the State of Florida, 2004 Fall Term.

Company further complains about the Citizens' requests reaching back to different time periods and in some cases back to several years beyond 2005. The time periods requested by the Citizens were carefully considered and chosen for specific reasons. To the extent that the Citizens requested a time period shorter than five years, this was done in recognition of reducing the requirements imposed upon the Company. Information requested for the time period 2002 through 2006 was typically requested to look for a pattern and five years is typically the norm for establishing a pattern or average. Certainly, if the Citizens' recommend disallowances of test year expenses by looking only at the year preceding the test year (as suggested by the Company with its 2005 proposed cut off), the Company would complain that the time period examined was not representative. When the Citizens requested information concerning 2001, this was specially done because the 2001 information was required to be submitted by the Company in its Minimum Filing Requirements. (See Citizens' Interrogatory 17, which requests further information about information supplied on Schedule B-8.) It is standard practice in rate proceedings for the Citizens and the Staff to request at least five years' worth of data. The Commission should reject the Company's request to limit the time period of the information requested by the Citizens. To do so would otherwise severely limit the Citizens', the Staff's, and the Commission's ability to evaluate the reasonableness of the expenses included in the test year.

18. Likewise, the Commission should not limit the time period for any requests related to capital items, unless the time period precedes the last rate case. The Citizens should not be prevented from examining the reasonableness of all capital improvements made since the Commission last established rate base. Further, if the Commission accepts the Company's proposal, the Commission will essentially remove the Citizens' ability to examine substantial capital expenditures that the Company proposes to include in rate base.

19. The Commission should reject, for several reasons, the Company's contention that to "recreate" information for years prior to 2005 will dramatically increase rate case expense and will adversely affect the ability of KWRU to prepare for this proceeding. First, if the Company maintained its books and records in an orderly and appropriate manner, it would not have to "recreate" information for years prior to 2005. Second, any dramatic increase in rate case expense should be borne by the Company's stockholders not ratepayers as the cause of such an increase is due to the poor record keeping of the Company. Third, preparing the information requested by the Citizens should not prevent the Company from preparing for this proceeding but should enhance its ability to prepare for the proceeding. Fourth, it is questionable that substantial "preparation" by the Company would be conducted prior to the filing of the Citizens' testimony in this proceeding, which is dependent upon sufficient and timely responses to discovery. Finally in paragraph 8, the Company makes the same objection it did in paragraphs 4 and 5; however, it relates to interrogatories. The Citizens have already addressed the Company's unfounded objections in paragraphs 12 through 17; therefore, they will not be repeated here.

WHEREFORE and in consideration of the above, the Citizens respectfully request that the Prehearing Officer reject the extension of time requested by KWRU and that it reject KWRU's objections to the Citizens' Interrogatories and Production of Documents. The Citizens have demonstrated that the Company's objections are without merit. In addition, the Company failed to specifically identify which interrogatories and PODs its objections apply. Therefore, the Citizens cannot identify those for which it requests the Prehearing Officer to issue an order compelling the Company to respond. In the absence of such specificity, the Citizens request the

Prehearing Officer to issue an Order compelling KWRU to respond to all Interrogatories and  
PODs propounded by the Citizens as specified herein, on or before October 22, 2007.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Stephen C. Reilly", is written over a horizontal line. The signature is stylized and cursive.

Stephen C. Reilly  
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Office of Public Counsel  
c/o The Florida Legislature  
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(850) 488-9330

Attorney for the Citizens  
of the State of Florida

**CERTIFICATE OF SERVICE**  
**DOCKET NO. 070293-WS**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Citizens' Response to KW Resort Utilities Corporation's Request For Extension of Time, Request For Clarification, and Objections to OPC's Amended First Request for Production of Documents and First Set Of Interrogatories and the Citizens' Motion to Compel has been furnished by E-mail and by U. S. Mail to the following parties this 15th day of October 2007:

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Stephen C. Reilly  
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# APPENDIX A



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OPERATING ACCOUNT  
P. O. BOX 2125  
KEY WEST, FL 33045

K39 02216

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63-088/631-488

10-01-02 DATE

PAY TO THE ORDER OF SMITH HENNESCH BURKE + BLANNIGAN \$ 25,000.00

~~Twenty~~ Five Thousand Only DOLLARS



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1010 KENNEDY DRIVE  
KEY WEST, FL 33040-4010  
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FOR Maximum Sewer Contract Negotiation *Jillie Siff*  
⑆00101⑆ ⑆000250000⑆

THIS IS PAYMENT LEGAL FEES / CONTRACT NEGOTIATIONS  
SSI - NEEDS TO BE REIMB TO MCDC  
afc + WILL BE WHEN MAURICE ELY  
REIMBURSES US ON INFRASTRUCTURE CONTRACT  
FOR SSI