

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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**KW RESORT UTILITIES' RESPONSE TO  
CITIZENS' MOTION TO COMPEL AND REQUEST  
FOR EXTENSION OF TIME**

KW Resort Utilities ("KW") by and through its undersigned counsel, hereby files this Response to Citizens' Motion to Compel and Request for Extension of Time and would state as follows:

1. The Citizens' Motion to Compel is so specious, so unsupportable, and so incorrect that it only merits the briefest response.<sup>1</sup>
2. The Motion to Compel acknowledges that KW's Response to the Amended First Request for Production of Documents was timely filed on October 26, 2007 (see 1(h) of the Motion to Compel).

3. KW has not "failed to respond" and the Citizens "dismay" is completely misplaced. It is no coincidence that the feigned umbrage of the Citizens never once manifests itself in a recitation of the rule or the proper process for the production of documents. Quite simply, that is because the applicable discovery rules reveal that

<sup>1</sup>This response, which may be based under the Uniform Rules within seven days of the Citizen's Motion being made the next business day after the end-of-the-day service of the Citizen's Motion, so that this issue may be expedited.

CMP \_\_\_\_\_  
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 CTR \_\_\_\_\_  
 ECR \_\_\_\_\_  
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 OPC \_\_\_\_\_  
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 SGA \_\_\_\_\_  
 SEC \_\_\_\_\_  
 OTH \_\_\_\_\_

it is the Citizens apparent disregard of those rules that has lead to the fact that the Citizens do not yet have the documents they seek.

4. Rule 28-106.206, Florida Administrative Code, provides that parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. *Rule 1.350(b), Florida Rules of Civil Procedure* only requires “responses” within 30 days after service of a production request and gives the producing party the option of producing the documents “as they are kept in the usual course of business” and provides only an opportunity to permit “inspection”. *Rule 1.380, Florida Rules of Civil Procedure*, one of the Civil Rules which the Uniform Rules state parties “may obtain discovery through the means and in the manner” of, provides that any sanctions for failure to make discovery (which OPC’s motion to extend the time to file its prefiled direct testimony certainly is) shall only be granted after a “failure to respond” that inspection will be permitted as requested or a failure *to permit inspection as requested*. KW has not failed to respond, and has not failed to permit inspection.

5. OPC has chosen to file its screeching motion rather than to send an e-mail requesting the documents be produced for inspection or a letter requesting the documents be produced for inspection or to make a phone call requesting the documents be produced for inspection. The Uniform Rules also provide that all motions, other than a Motion to Dismiss, shall include a statement that the movant

must confer with all other parties of record and shall state as to each party whether the party has any objection to the motion. *Rule 28-106.204(3), Florida Administrative Code*. OPC has ignored not only the requirement of the Uniform Rule but also the clear requirement in Rule 1.380(a) that any motion for an order compelling discovery should provide a certification that the movant, in good faith, has conferred or attempted to confer with the party or parties failing to make the discovery, in an effort to secure the information or material without court action in an attempt to demonize KW and to reduce KW's time to respond to OPC's testimony. No request for inspection was made until November 1, 2007, much less such an effort to confer.

6. Had OPC not ignored this condition precedent to the filing of its motion, and its duty to confer under the Uniform Rules and the applicable Civil Rules, prior to filing of its motion, it would have learned that the documents were available for inspection.

7. KW had originally intended to produce those documents as they exist in the ordinary course of business in Key West, over 500 miles from Tallahassee, but since the Citizens had not requested inspection of the documents (and therefore no mutually available time for the same had been arrived at) counsel for KW, prior to the receipt of OPC's motion (and in an effort to be courteous to OPC and to expedite production) had requested the documents be sent to Tallahassee. This is the way

responses to Request for Production always work (particularly in the case of such a voluminous request as this) and the way which the Uniform Rules and Rules of Procedure contemplate the discovery should work. This is the document production method used in every case in front of DOAH, and the state and federal courts. OPC's assumptions that the boxes of documents would merely be delivered, without any request to inspect the documents (and without any opportunity to provide to OPC a chance to narrow the number of documents which OPC actually wants copied) or without any pre-payment for the copies, shows an ignorance of how the discovery rules work. In that regard, it is certainly not surprising that OPC's motion never once cites the rules establishing and controlling the procedure for the production of documents.

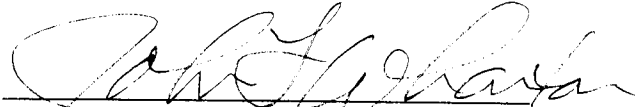
8. There is no need for the Commission to enter an Order compelling discovery, since the documents are being made available (and would have been made available prior to now if OPC had requested the same, pursuant to the proper procedure).<sup>2</sup> Therefore, OPC's Motion should be denied. Accordingly, its request for an extension of time to file prefiled direct testimony should also be denied, since any extension would be based on OPC's own lack of due diligence in requesting

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<sup>2</sup>Today was the first day OPC had inquired about the documents. OPC declined the opportunity to inspect and requested the documents be copied in total. On this date, counsel for KW indicated to counsel for OPC that, as a courtesy, the documents could be copied and transmitted to OPC by Tuesday, November 6, 2007.

inspection of the documents, rather than on any act of KW. The documents are now being brought to Tallahassee for the convenience of OPC and will be copied and transmitted per OPC's November 1, 2007 request.

Respectfully submitted this 1<sup>st</sup> day of  
November, 2007, by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail and fax to the following this 1<sup>st</sup> day of November, 2007:

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