

**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. 150071-SU

FILED: December 15, 2016

**OPC'S AND MONROE COUNTY'S JOINT RESPONSE IN OPPOSITION TO KW  
RESORT UTILITIES CORP.'S AMENDED MOTION FOR LEAVE TO FILE LATE-  
FILED EXHIBIT**

The Citizens of the State of Florida (Citizens) and Monroe County (County), pursuant to Rule 25-22.0376, Florida Administrative Code, hereby file their Joint Response in Opposition to KW Resort Utilities Corp.'s (KWRU or the Utility) Amended Motion for Leave to File Late-Filed Exhibit. In support thereof, Citizens and County state as grounds the following:

1. The Commission held a hearing on this matter on November 7 through November 8, 2016. At the end of the hearing, all the exhibits were entered into the record and the hearing was adjourned by the Chairman. (TR 852-855) The Post-Hearing Briefs were filed on December 9, 2016.
2. On December 9, 2016, more than one month after adjournment of the technical hearing in this case, KWRU filed its Amended Motion for Leave to File Late-Filed Exhibit (Amended Motion). On December 8, 2016, KWRU filed its original Motion for Leave to File Late-Filed Exhibit.
3. On October 14, 2016, Prehearing Statements were filed by the parties. As part of the issues included in the docket, Issue 26 addressed: "What is the appropriate amount of rate case expense?" KWRU stated its position in the Prehearing Order on Issue 26 as follows: "Actual rate case expense excluding the cost to respond to deficiencies through completion of the case. The amount expended through October 23, 2016 was \$396,993.84." See Order

No. PSC-16-0509-PHO-SU, issued November 3, 2016. At the Prehearing Conference, the Prehearing Officer stated: “And additionally, as it relates to the Prehearing Order, if any party has any changes to their position, issue positions, basic positions, or any other typos that they have discovered, that they email to all parties and staff a type and strike word version of their changes no later than 5:00 p.m. Tuesday, November 1st.” (Prehearing TR 80) KWRU did not submit any changes to its position on Issue 26 that was included in its Prehearing Statement.

4. In addition, Citizens and the County submit the following facts:
  - a. Commission Staff served multiple discovery requests in this docket that sought not only KWRU’s actual rate case expense, but also KWRU’s estimated rate case expense to complete the rate case.
  - b. On August 17, 2016, Staff propounded its First Set of Interrogatories Nos. 1-33 upon KWRU. Interrogatory No. 1 asked for the following: “Please provide the most recent actual and estimated rate case expense, in addition to detailed explanations and calculations to justify the **estimated expense to complete this rate case.**” (Emphasis added) On September 6, 2016, KWRU responded to Interrogatory No. 1: “RESPONSE: Actual invoices have been utilized for historical data, and future projections are based upon each related professional’s expected expense to close out the rate case, including travel to Key West as necessary and work related to the final order. All information requested is included within provided file “#1”. Actual rate case expense as of September 5, 2016 is \$288,306.52.”

c. On October 7, 2016, Staff propounded its Second Set of Interrogatories Nos. 34-67 upon KWRU. Interrogatory No. 47 asked for the same information as Interrogatory No. 1: “Please provide the most recent actual rate case expense, in addition to detailed explanations and calculations to justify the **estimated expense to complete this case.**” (Emphasis added) On October 27, 2016, KWRU’s response to Interrogatory No. 47 stated: “Please see file “#47”, produced herewith, for the most recent rate case expense breakdown.” The attached Excel spreadsheet entitled: “Rate Case Expenditures Oct2016.xlsx” reflected total rate case expense of \$396,994, which is the same amount reflected in KWRU’s position for Issue 26 in the Prehearing Order.

5. It is well-settled that KWRU has the burden of proof to establish that it is entitled to its requested rate case expense, including providing sufficient information to justify its estimated rate case expense to complete the rate case. See Florida Power Corp. v. Cresse, 413 So. 2d 1187 (Fla. 1982).
6. In this docket, KWRU retained counsel who has more than 30 years of experience with the PSC process and procedures, and has regularly provided actual and estimated to complete rate case expense in numerous prior dockets. Moreover, KWRU had several opportunities to provide, and should have provided, that information to the Commission in discovery when Commission staff requested it. KWRU’s failure to provide updated “estimated expense to complete” information responsive to Staff’s discovery request should not now be rewarded, after the hearing in this docket has been completed and the record closed since November 8, 2016.
7. KWRU, in its Amended Motion, included \$483,776 of rate case expense, an increase of \$86,782, which it acknowledged it failed to include in its responses to discovery. Its stated

reason for the substantial increase, according to its Amended Motion, was that KWRU failed to provide an estimated expense to complete this case for counsel Smith Oropeza Hawks, P.L, Milian Swain & Associates, P.A., Weiler Engineering Corp., and Jeffery E. Allen, P.A. However, KWRU conceded that it managed to provide estimates of rate case expense through completion of the case for Friedman and Friedman, P.A. and Management & Regulatory Consultants, Inc. (See Amended Motion at p. 1)

8. A cursory review of the invoices attached to the Amended Motion reveals billings for services from the beginning of October through December 2016. The amounts incurred up to the date that the Utility provided its response to Staff's 2<sup>nd</sup> Set of discovery on October 27, 2016, could have easily been presented in response to that discovery. Moreover, KWRU could have supplemented these discovery responses up to and during the hearing. The Utility clearly has the burden to answer the Staff's discovery in a sufficient manner.
9. KWRU apparently attempts to blame the Commission for its own failure to provide the complete "rate case to complete" information. In its Amended Motion, KWRU states that "[a]t final hearing in this matter, the Commission did not request an update to rate case expenses be filed by KWRU. As such, the record does not reflect the actual amounts expended in this action for the period since the late expense update to the Commission." (See Amended Motion p. 2). This assertion is without merit – the Commission has no obligation to assist KWRU in meeting its burden of proof.
10. KWRU was in fact given two opportunities to provide estimated "rate case expense to complete" information in response to Staff's discovery. Furthermore, at the Prehearing Conference, KWRU had the opportunity to update its estimated rate case for a third time. Finally, KWRU could have sought to file updated rate case expense evidence at the hearing

where all parties would have had the opportunity to review this evidence and conduct cross examination. Notwithstanding the fact that KWRU, through its own actions and inactions, failed to meet its burden on this issue, the Utility now pleads in the “interest of justice and fairness” and so the record can accurately reflect the expenses, its desire to enter into the record late-filed invoices for rate case expense incurred since the October 27, 2016 discovery responses. KWRU should not be allowed to submit additional evidence now at the eleventh hour after the hearing has been concluded and the record closed.

11. Further, KWRU should not be given leeway to file a “late-filed” exhibit post-hearing, when another party was denied the opportunity to have the Commission receive a “late-filed” exhibit at hearing. Specifically, during the hearing, Mr. Wright, counsel for Monroe County, asked the Commission to require KWRU to provide an email response as a late-filed exhibit. Mr. Smith, counsel for the Utility, objected to providing such document as a late-filed exhibit because the discovery period had expired. The Chairman also agreed that the discovery period had ended and asked staff counsel to advise the Commission. Ms. Crawford with Commission Staff stated that “Late-filed exhibits are frowned upon for a number of reasons, not the least of which is they tend to be submitted after the record has actually closed.” She continued she had concerns that the discovery period had expired but that if the document could be provided during the hearing, pending a relevance determination, it might be considered. Thus, KWRU objected to the County’s request for a late-filed exhibit during the hearing, but now says that the Utility should be allowed in the “interest of justice and fairness” to file this extremely tardy exhibit. The transcript reads as follows:

MR. WRIGHT: I'll bet that I somehow or other in an e-mail have received that, but I have not seen this document. Madam Chairman, could I ask Mr.

Smith, Mr. Bart Smith, if that is in any of it the stuff that we have, and if not, I would ask that it be furnished in its basic format as a late-filed, and I would like that numbered as 109?

CHAIRMAN BROWN: Mr. Smith.

MR. SMITH: The answer is, no. It was not even done during the discovery period, and so we are -- we state that that is not subject to the discovery in this matter, and we are not agreeing to produce it outside the discovery.

CHAIRMAN BROWN: And the discovery period has -- has run. Staff, I tend to agree with the utility on this. Any suggestion or comment?

MS. CRAWFORD: Late-filed exhibits are frowned upon for a number of reasons, not the least of which is they tend to be submitted after the record has actually closed. If it's a document that can be provided in the course of this hearing, perhaps if -- if Monroe County can demonstrate its relevance to the proceeding -- I am a little concerned that it is past the discovery period, however.

(Hearing TR 662-663)

12. Further, KWRU has cited no legal authority in support of its motion to reopen the record. As the Commission noted in Order No. PSC-05-0312-FOF-EI, the courts have held that the relief sought -- reopening the record for the limited purpose of including the PEF stipulation and Order approving that stipulation -- was prohibited. Order No. PSC-0500312-FOF-EI, issued March 21, 2005, in Docket No. 031033-EI, In re: Review of Tampa Electric Company's 2004-2008 Waterborne Transportation Contract with TECO Transport and Associated Benchmark (Tampa Case), citing, Lawnwood Medical Center, Inc. v. Agency for Health Care Administration, 678 So. 2d 421 (Fla. 1<sup>st</sup> DCA 1996) at p. 8. In citing Lawnwood, the Commission summarized that Court's finding that the agency erred in reopening the record of an administrative proceeding to take selective official recognition for the purpose of making additional findings of fact. The Commission further stated that if it wished to reopen the record, it would first need to determine that the

information represented a change in circumstances so significant that the Final Order was no longer in the public interest. Then, to afford due process, the Commission would be required to allow all parties the opportunity to present evidence concerning the relevance of the information offered and the weight to be afforded to it. The Commission also has stated that it is generally hesitant to reopen the record in any proceeding, but may do so in limited circumstances when new evidentiary proceeding are warranted: 1) based on change of circumstances **not** present at the time of the proceeding; or 2) a demonstration that a great public interest will be served. See Order No. PSC-07-1022-FOF-EI, issued December 28, 2007, in Docket No. 070299-EI, In re: Review of 2007 Electric Infrastructure Storm Hardening Plan Filed Pursuant to Rule 25-6.0342, F.A.C., Submitted by Gulf Power Company, at pp. 6-7 (Emphasis added).

13. In the Tampa Case, the Commission found that the information was not significant enough to merit further proceedings in the case. Tampa Case at pp. 8-9. Similarly, KWRU's attempt to reopen the record in this docket for additional rate case expense information it failed to provide in response to numerous Commission Staff discovery requests, after post hearing briefs have been filed, is not so significant that any decision that the Commission makes on the closed record would no longer be in the public interest. Further, the Utility's failure to provide its known and estimated rate case expense prior to the hearing does not rise to the level of "a circumstance that was not present at time of hearing." The numerous discovery requests propounded by Commission staff makes clear that the Utility had ample opportunity to provide this information prior to hearing and in fact provided this information for several of its consultants in response to discovery.

14. Moreover, it would violate OPC's and the County's due process rights to reopen a closed evidentiary record, without any statement of good cause why this information was not available to KWRU and offered as evidence prior to the close of the record. Similar to the requirement that a party must show good cause why it failed to take a position on an issue or otherwise waives its right to do so as set forth in the Prehearing Officer's Order Establishing Procedure in this docket, KWRU has an obligation to show good cause why it failed to provide this information. Yet, there is no good cause that KWRU can show in this docket why it failed to meet its burden when it had ample opportunities to do so prior to the end of the hearing and the closing of the evidentiary record. In fact, KWRU was able to provide estimates for several of its consultants, yet provided no rationale or just cause why it failed to provide similar estimates for its three other consultants. KWRU has not established that it acted diligently and in good faith to provide this information, and should not now be allowed to provide the information as a late filed exhibit.
15. In addition, if KWRU is allowed to provide this information now, it will materially prejudice OPC, the County, and Harbor Shores Condominium Unit Owners Association, Inc. ("Harbor Shores"). Pursuant to Section 120.574(2)(c), Florida Statutes, all parties shall have the opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence. Since the record is closed and the hearing has been adjourned, OPC, the County and Harbor Shores will be significantly prejudiced because there is no opportunity to review these exhibits, conduct any necessary cross-examination to test the veracity of the documents, or to otherwise



challenge these “invoices.” As noted in the Tampa Case, due process would require that all parties be given the opportunity to present evidence concerning the relevance of the additional requested rate case expense and the weight to be afford to it. Tampa Case at p. 9.

16. KWRU’s attempt to claim that this is an issue of “fairness and justice” to allow these invoices to be included in the record on the same day that the post-hearing briefs are due is without merit. KWRU’s counsel was fully aware of its opportunity and obligation to provide this information to Commission Staff as requested in Interrogatories No. 1 and 47, and KWRU’s failure to do so was its own fault. It should not now be rewarded for its failure. Moreover, KWRU’s failure to timely produce this information does not rise to the level of being so significant that reopening the record and setting this matter for further hearing is warranted. Furthermore, to the extent KWRU is relying on any of the additional rate case information in its post-hearing brief, this information should be stricken from KWRU’s post-hearing statement and brief.

Wherefore, OPC and the County request the Commission deny KWRU’s Motion and Amended Motion and not allow this additional information into the evidentiary record in this proceeding or allow the evidentiary record to be otherwise re-opened by implication. Furthermore, to the extent KWRU has used or relied upon any of this extraneous and disallowed information

and evidence in its brief, such argument and evidence should be stricken from its brief.

Respectfully submitted 15th day of December, 2016.

J. R. Kelly  
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and foregoing Motion furnished by electronic mail on this

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