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: March 28, 2017

CITIZENS' AND MONROE COUNTY'S JOINT RESPONSE IN OPPOSITION TO KW RESORT UTILITIES CORP.'S MOTION FOR RECONSIDERATION

The Citizens of the State of Florida (Citizens) and Monroe County (Monroe County), pursuant to Rule 25-22.060(1)(b), Florida Administrative Code (F.A.C.), hereby file their Joint Response in Opposition to KW Resort Utilities Corp.'s Motion for Reconsideration.[1] In summary, the Motion for Reconsideration filed by K W Resort Utilities Corp. (KWRU or the Utility) consists of legally impermissible requests that the Commission re-weigh the evidence, equally impermissible efforts to reargue the evidence, further impermissible efforts to supplement the record, still further impermissible efforts to supplement KWRU's post-hearing brief, and legally ineffective attempts to rely on the Commission's Proposed Agency Action Order (PAA Order) in this docket, which is, by operation of law, a legal nullity. Accordingly, the Commission should deny KWRU's motion for reconsideration as to each claim raised by KWRU.

In further support of their Joint Response, the Citizens and Monroe County state the following:

1. The Commission held a full evidentiary hearing on this matter on November 7 through November 8, 2016. The official Hearing Transcript consists of 855 pages, including the

[1] KWRU's Motion for Reconsideration is referred to herein as "KWRU's Motion." The Citizens' and Monroe County's Joint Response in Opposition to KWRU's Motion is referred to as their "Joint Response." References to the Hearing Transcript are in the form TR abc, where abc designates the page number cited, and references to hearing exhibits are in the form EXH jkl, xyz, where jkl designates the exhibit number and xyz designates the page or pages of the exhibit cited.

testimony and cross-examination of KWRU's four witnesses, the Citizens' two witnesses, and Monroe County's three witnesses. A total of 115 exhibits were proffered, of which it appears that 109 exhibits were entered into the record. (None of the six exhibits that appear not to have been admitted are relevant to the issues raised in KWRU's Motion.)

2. As required by the Prehearing Order, Order No. 16-0509-PHO-SU, issued on November 3, 2016, and as amended by Order No. PSC-16-0509A-PHO-SU, issued on November 15, 2016, the Parties' post-hearing statements of issues and positions (Briefs) were due and were filed on December 9, 2016. The amended Prehearing Order provides "a party's post-hearing statement, and brief, shall together total no more than 50 pages." Order No. PSC-16-0509A-PHO-SU at 1.

3. On March 13, 2017, Order No. PSC-17-0091-FOF-SU (Final Order) was issued in this case. On March 14, 2017, KWRU filed its Motion for Reconsideration Pursuant to Rule 25-22.060, F.A.C. On March 15, the Citizens and Monroe County filed separate motions requesting extensions of time to respond to KWRU's Motion until March 28, 2017, and on March 17, 2017, by Order No. PSC-17-0103-PCO-SU, the Commission granted both motions for extension of time. Accordingly, this Joint Response is timely filed.

4. In its Motion, KWRU seeks reconsideration of four issues decided by the Commission in the Final Order. Those issues, numbered following the section and subheading numbering system in the Final Order, are:

a. Issue VI.(D) Plant in Service

b. Issue VIII.(U) Annual Levels of O&M Expenses for Implementing AWT

c. Issue X. Rates and Rate Structure

d. Issue IV.(B) Appropriate Test Year for Establishing Rates

Each of KWRU's arguments will be addressed in turn.

Standard of Review and Legal Standards for Reconsideration

5. The Commission's well-settled standard of review for analyzing motions for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Final Order. *See* Order No. PSC-12-0400-FOF-EI, Issued August 3, 2012, In re: Petition for increase in rates by Gulf Power Company (citing *Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King,* 146 So. 2d 889 (Fla. 1962); *Pingree v. Quaintance,* 394 So. 2d 161 (Fla. 1st DCA 1981)). It is not appropriate to reargue matters that have already been considered by the Commission. *Id.* (citing *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959); *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958)).[2]

State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958) clearly sets forth the limited nature of motions for reconsideration:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.

[2] *See also* Order No. PSC-11-0156-FOF-WU, issued March 7, 2011, in Docket No. 100104-WU, In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.; Order No. PSC-09-0571-FOF-EI, issued August 21, 2009, in Docket No. 080317-EI, In re: Petition for rate increase by Tampa Electric Company; Order No. PSC-07-0783-FOF-EI, issued September 26, 2007, in Docket No. 050958-EI, In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company.

> It is not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has "overlooked and failed to consider" from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.
>
> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

Id. at 818-19. Moreover, neither a court nor the Commission is required to respond to every argument advanced by a party.

> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.

Id. at 819; *see also* Order No. PSC-13-0396-PCO-TP, issued August 28, 2013, in Docket No. 090578, In re: Amended Complaint of Qwest Communications Company, LLC, (Order Denying Motion for Reconsideration.

6. As held by the Florida Supreme Court in *Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So. 2d 315, 317 (Fla. 1974), the Commission may not reweigh the evidence in order to come to a different conclusion. In reversing the Commission, the Court held:

> The granting of a petition for reconsideration should not be based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review. Granting of reconsideration is somewhat analogous to a trial court granting a new trial following rendition of a verdict; the reasons for doing so must be set forth so as to be susceptible to review. *See Laskey v. Smith*, 239 So. 2d 13 (Fla.1970); *Hodge v. Jacksonville Terminal Co*., 234 So. 2d 645 (Fla.1970); *Cloud v. Fallis*, 110 So. 2d 669 (Fla.1959). The only basis for reconsideration noted in the instant cause was the reweighing of the evidence discussed above. This is not sufficient.

Stewart Bonded Warehouse, Inc., 294 So. 2d at 317.

7. 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).

8. As the petitioner, it is the Utility's *sole* responsibility to seek to admit evidence in the record to support its requested rate increase. This is not a Staff-assisted rate case. If the Utility fails to do so, then it is proper for the Commission to deny the relief it requested. There must be competent substantial evidence in the record to support a Commission's finding of fact, as such findings support the agency's action. *See* Fla. Stat. § 120,68(7)(b).

9. If a party successfully enters evidence in the record, the party then has the opportunity to explain to the Commission, ***through its post-hearing brief,*** how that evidence supports the action that the party wants the Commission to take. This is exactly the opportunity afforded to all parties under Florida's Administrative Procedure Act by Section 120.57(1)(b), Florida Statutes, to "present evidence and argument on all issues involved" in the case and "to submit proposed findings of facts and orders." The Commission affords parties the opportunity to submit briefs and argument, and proposed findings of fact, supporting a party's requested action and relief. The critical point here is that it is the ***party's*** opportunity – and responsibility – to make its case through presentation of evidence and explanation of its evidence through its post-hearing statement and brief. This is especially important when there is a voluminous record. Given this opportunity, it is the party's responsibility to provide a roadmap to the appropriate evidence in the record during the hearing or in its post-hearing brief; any attempt to provide supplemental briefing, supplemental argument, or supplemental evidence is simply outside the scope of a proper motion for reconsideration, foreclosed both by the Commission's Prehearing Order and fundamental due

process principles. On a related note with the same result, it is ***not*** the Commission's responsibility to comb through the record – like searching for a needle in a haystack – to find record evidence to support or reject a finding requested by a party, and a party cannot elevate its own failure to adequately brief an issue into a cognizable argument that the Commission somehow overlooked the party's evidence.

10. Moreover, if the evidence is in the record, it is prima facie evidence that the Commission considered it when coming to its conclusion, and as the Court opined in *State ex. rel. Jaytex Realty Co. v. Green,* it is improper to point out this evidence after the fact. *Id*. at 818.

11. When seeking reconsideration, it is improper to provide new evidence or new arguments not in the record or in post-hearing brief, or to provide a roadmap to evidence contained in the record.

12. If a utility fails to meet its burden of proof and is earning below its authorized range of return, the utility can petition the Commission for a separate proceeding. A motion for reconsideration is not a vehicle for seeking additional rate relief, nor is the possibility that a utility might, hypothetically, earn below its authorized rate of return if it does not receive as much rate relief as it wants within the scope of a proper motion for reconsideration. Of course, that scope, is as stated in many Commission orders, to call to the Commission's attention a ***point of fact or law that the Commission overlooked***, which, had it been recognized, would have produced a different result.

Issue VI.(D) Plant in Service

13. With respect to Plant in Service, addressed in Issue VI.(D) at pages 18-21 of the Final Order, KWRU argues that the Commission failed to include $303,135 of additional plant costs in determining KWRU's plant in service and thus in setting its revenue requirement. KWRU

asserts that this amount was "omitted from Issue VI.(D) of the Final Order." KWRU's Motion at 4. KWRU also argues that the Commission further overlooked an additional $260,273.58 in additional plant costs. KWRU's Motion at 4-5. KWRU further attempts to rely on the PAA Order, KWRU's Motion at 6, for the proposition that it should be allowed to update the costs of pro forma plant items. And finally, in two separate places, KWRU attempts to assert that, if it does not get its way, it will file a limited proceeding. KWRU's Motion at 5, 6. As explained below, KWRU's assertions are impermissible attempts to reargue the evidence, submit additional evidence, and provide additional argument that KWRU could have, and should have, submitted in its post-hearing Brief filed on December 9, 2016. Moreover, KWRU's attempt to rely on the PAA Order issued in this case, Order No. PSC-16-0123-PAA-SU, is legally baseless and meritless because that PAA Order is a legal nullity. All of KWRU's arguments are at best misplaced and legally insufficient to justify reconsideration, and the Commission should accordingly deny KWRU's Motion with respect to the Plant in Service issue.

14. Before proceeding further, the Citizens and Monroe County call to the Commission's attention that the sum total of KWRU's argument on the Plant in Service issue in the case, set forth in KWRU's post-hearing Brief, is as follows:

> **ISSUE 5: What is the appropriate amount of plant in service to be used in setting rates?**
>
> **A. For Phase I, if applicable**
> **B. For Phase II, if applicable**
>
> **Position**: **$16,592,505**
> **Argument**: The parties reached a partial stipulation as to 2014 Plant in Service. Adjustments were made as expansion and AWT costs were fully realized, as set forth in Exs. 75 and 76. Furthermore, no party has testified that the expenditures are either unreasonable or do not qualify for treatment as Plant in Service. See Ex. 79, p. 1 of 11.

KWRU Brief at 9. It is apparent that KWRU devoted the sum total of ***five lines of text*** to its discussion of this issue.

15. The Citizens and Monroe County now address each of KWRU's arguments on the Plant in Service issue in turn. KWRU's first assertion, that the $303,135 amount was "omitted from Issue VI.(D) of the Final Order" KWRU's Motion at 4, is false on its face, as the amount in question – shown in the Final Order as $303,099 – is listed in the table on page 19 of the Final Order, and the Commission plainly considered this amount when, on the same page, it determined the total allowable plant in service for setting KWRU's permanent rates. Final Order at 19. The Commission, therefore, did not overlook the evidence on this issue, which KWRU completely failed to address in its Brief, and the Commission should deny KWRU's Motion with respect to this baseless and false assertion.

16. With respect to KWRU's allegations, at pages 4-5 of its Motion, that the Commission overlooked evidence regarding the $260,273.58 in claimed additional plant costs, such allegations are again impermissible attempts to reargue evidence and to supplement the record with a new exhibit, denominated Exhibit A to KWRU's Motion. KWRU's improper attempts to submit additional briefing – beyond the full opportunity already afforded by the Commission through the Prehearing Order – include rearguing evidence that KWRU itself asserts is already in the record, and further arguing that the evidence was admitted through Chris Johnson's testimony. The Commission fully disposed of Mr. Johnson's testimony in the Final Order, where it stated that "Given the lack of supporting evidence as well as the uncertainties highlighted during the hearing, we find that the updated costs shall not be included in plant in service." Final Order at 20. KWRU's Motion is a transparent attempt to supplement its Brief and the evidentiary record through its now-tardily-proffered Exhibit A, and the Commission should reject these efforts.

17. Moreover, KWRU's efforts to rely on the PAA Order to support "a true-up to reflect actual amounts within 60 days of the date the Plant is in service" (Motion at 6) are legally baseless. First, the PAA Order carries no weight since the protests by Citizens, Monroe County, KWRU, and Harbor Shores Condominium Unit Owners Association, Inc. (Harbor Shores) rendered that PAA Order a legal nullity. *See* In Re: Determination of Regulated Earnings of Tampa Electric Company Pursuant to Stipulations for Calendar Years 1995 through 1999, Order No. PSC-01-2515-FOF-EI; issued December 24, 2001; Docket No. 950379-EI. Second, KWRU is requesting a new kind of relief – a true-up – not contemplated or litigated as an issue during the evidentiary hearing or requested in its post-hearing Brief. It would violate the due process of the consumer parties to allow a true-up without any point of entry to challenge the validity of the amounts being requested.

18. Finally, KWRU's argument that if the Commission does not give it the money it wants, the alternative would be a limited proceeding, KWRU's Motion at 5 and 6, is wholly outside the scope of a proper motion for reconsideration, and legally incorrect as well. If, hypothetically, KWRU were to find itself earning below its authorized rate of return, it has the right to file for rate relief pursuant to applicable statutes. While the statutes permit limited scope proceedings, it is by no means certain that KWRU would be entitled to rate relief, or that any future proceeding would be confined to a limited scope of KWRU's choosing. (For example, the Citizens and Monroe County believe that, because of load growth on Stock Island, KWRU will likely be over-earning in the very near future.)

19. In summary, KWRU's asserted grounds for reconsidering the Commission's determinations with respect to Plant in Service are merely attempts to reargue the evidence, introduce new evidence (its Exhibit A), and provide a supplemental brief in violation of the

Prehearing Order in this case. KWRU had its opportunity, but decided to only present five lines of argument on this issue. KWRU's arguments based on the PAA Order and its threats to file a limited proceeding are equally baseless and improper, and the Commission should accordingly deny KWRU's Motion on this issue.

Issue VIII.(U) Annual Levels of O&M Expenses for Implementing AWT

20. With respect to the issue of its allowable O&M expenses associated with Advanced Wastewater Treatment, KWRU apparently seeks additional revenues to recover an additional $161,227 in O&M expenses. (KWRU simply states that the O&M expenses it wants is $1,809,080, as opposed to the $1,647,853 granted by the Commission through the Final Order.) KWRU asserts that "the PSC overlooked fixed costs which are incurred in operation of the newly constructed third plant/treatment train, regardless of flow levels." Motion at 6. In addition, KWRU attempts to rely on "attachment 3-19" in its ***supplemental*** response to staff's third data request, filed on January 18, 2016 *during the PAA portion of the rate case* (emphasis added). Motion at 7. First, the information related to fixed costs for a third plant/treatment train is not in the record.[3] Second, but of greater significance in the context of KWRU's Motion, attachment 3-19 discussed at length in the Motion is ***not in the hearing record***. This is a naked and legally improper attempt to induce the Commission to consider new evidence outside the hearing record. If it was important to provide a breakdown of O&M costs for a third plant/treatment train, KWRU had the opportunity to provide and should have provided that information in Witness Johnson's direct testimony and exhibits. Significantly, KWRU apparently had this information in ***January 2016***, when it supplied it in response to a data request. It is therefore reasonable to believe that KWRU had at least this

[3] There is a reference to a third treatment train in the FDEP permits; however, that has nothing to do with the costs KWRU claims it needs to recover from the customers.

much information when it filed its direct testimony in the docket on ***July 1, 2016***, and, in fact, it would be entirely reasonable for the Commission to presume that KWRU filed its case on the basis of the best available information regarding the O&M expenses for its expanded plant. Since KWRU failed to introduce this information into the hearing record, it is improper for KWRU to argue that the Commission should change its decision based upon this new evidence.

21. KWRU claims "The record does not reveal any objection by any party to the increased costs necessitated by the operation of the new treatment train." Motion at 8. This is patently misleading and clearly erroneous. First, when KWRU submitted its pro forma O&M expenses to operate at AWT, it included its estimated O&M costs for the new plant expansion (i.e., the third treatment train). Citizens objected to the O&M levels approved in the PAA Order. Second, and more importantly, Citizens disagreed with KWRU's estimated O&M expenses for the new plant expansion, and provided testimony to the contrary. Citizens witness Merchant's testimony and Phase II methodology for O&M expenses clearly contemplated the new plant expansion, but recommended lower levels of pro forma O&M than requested by KWRU. Hearing Transcript TR 369-371. While no party objected to KWRU constructing the plant expansion or obtaining some O&M costs associated with the expanded plant, it is pure sophistry – if not outright misrepresentation of the record – to assert that no one objected to the amount of O&M requested for the expanded plant. Beyond the obvious legal error of KWRU's argument, its assertion that no party objected is legally irrelevant; KWRU has the burden to establish competent, substantial evidence to support its requested relief.

22. Citizens certainly objected to KWRU's requested pro forma O&M expense adjustments and it is disingenuous to now say that the record does not reveal any objection by any party to the increased costs necessitated by the operation of the new treatment train. The language

above regarding a third treatment train was not presented in testimony. The argument that the Commission's methodology overlooked fixed costs of operations for the third treatment train, which are not, or at best are only slightly, affected by variations in flow state, is new rebuttal testimony. The argument that any purported oversight will lead to under-earning is also outside the record and legally irrelevant in the context of KWRU's Motion, as is the statement that any understatement of revenue will require KWRU to file a limited proceeding at significant cost to the rate payers.[4] Quite simply, this is new evidence and re-argument and does not show that an error occurred, just that the Utility disagrees with the adjustment. Therefore, the Commission should deny KWRU's request to reconsider Issue VIII.(U) Annual Levels of O&M Expenses for Implementing AWT.

Issue X. Rates and Rate Structure

23. KWRU claims the Commission erred in using a greater value for reuse service gallonage than KWRU believes is appropriate or justified. KWRU's specific claim is that "for reuse, the PSC used 2015 gallonage (85,571) and escalated the gallonage by 5% in 2016. This methodology is arbitrary and unsupported by any record evidence." Motion at 8. KWRU's argument that there is no evidence to support using a 5% increase in gallons for reuse in 2016 is patently false. Citizens witness Merchant testified that to reach her supported value for reuse service gallonage for 2016, she "increased the gallons sold for 2016 by an additional 5% consistent with my 2016 projection factors." Hearing Transcript TR 358. There is no factual basis to support

[4] As noted above, if, hypothetically, KWRU were to find itself earning below its authorized rate of return, it surely has the right to file for rate relief pursuant to applicable statutes. However, while the statutes permit limited scope proceedings, it is by no means certain that KWRU would be entitled to rate relief, or that any future proceeding would be confined to a limited scope of KWRU's choosing. (For example, the Citizens and Monroe County believe that because of load growth on Stock Island, KWRU will likely be over-earning in the very near future.)

KWRU's request that the Commission reconsider the reuse adjustment. KWRU simply disagrees with the Commission's adjustment. Furthermore, requesting a true-up is also outside the record evidence. Therefore, the Commission should deny KWRU's Motion with respect to Issue X. Rates and Rate Structure.

Issue IV.(B) Appropriate Test Year for Establishing Rates

24. Although KWRU asserts in its Summary of Argument, Motion at 3, that the PSC "in effect created a projected test year, while purporting not to do so," in its discussion of Issue IV. (B), it is not clear exactly what error KWRU asserts the Commission committed that KWRU would claim should be corrected via reconsideration, or what KWRU asserts the Commission overlooked, except perhaps Section 367.081(2)(a)1., Florida Statutes, discussed below. Regardless, with respect to KWRU's overriding assertion, namely that the Commission created a 2016 projected test year, that assertion is incorrect and readily disposed of by the Commission's Order, which provides as follows:

> Ratemaking is prospective in nature, and it is this Commission's practice to recognize known and measurable changes.[5] Thus, if necessary, adjustments are made for known and measurable changes to test year amounts. Therefore, we find that adjusting the Utility's 2014 test year based on known and measurable information is a reasonable approach to establish a revenue requirement and rates that are representative of KWRU's current operations.
>
> Both KWRU and OPC support making adjustments to the 2014 test year. The point of deviation lies in what information should be updated. We agree with County witness Deason that if rates are not based upon the most appropriate test year information, a utility could quickly experience either underearnings or overearnings soon after the new rates are implemented. Although underearnings or overearnings may occur after final rates are set, we find that making consistent

[5] Order Nos. PSC-13-0197-FOF-WU, p. 8, issued May 16, 2013, in Docket No. 110200-WU, In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.; PSC-12-0179-FOF-EI, pp. 11-12, issued April 3, 2012, in Docket No. 110138-EI, In re: Petition for increase in rates by Gulf Power Company; PSC-11-0199-PAA-WU, p. 9, issued April 22, 2011, in Docket No. 100149-WU, In re: Application for increase in water rates in Lee County by Ni Florida, LLC.

> adjustments based on known and measurable information, to the 2014 test year is the most appropriate approach to determining just, fair, and reasonable rates. Our approach is similar, though not identical, to the approach recommended by OPC. The specific adjustments made by OPC and KWRU, as well as additional adjustments supported by the record, are discussed where appropriate within this order.

Final Order at 12 (footnote in original). From this language, it is abundantly clear that the Commission was rightly concerned with its mandate to ensure that KWRU's rates for service would be fair, just, and reasonable at the time those rates would be in effect. That is simply what the Commission did; as the Commission indicated, it made "consistent adjustments" to achieve that result. Among other things, the Commission used updated billing units to match KWRU's investment and costs during the time that the rates would be in effect. With respect to CIAC, the Commission fully complied with the applicable statutes, because all the Commission did was to "include actual collections of CIAC from 2015 and 2016" consistent with the Commission's "pro forma treatment of 2015 and 2016 routine plant additions" for the Utility. Final Order at 25. The Commission further explained that "inclusion of collected, non-prepaid CIAC does not violate Section 367.081(2)(a)1, F.S." and is "not prospective," (Final Order at 25) and for KWRU to assert otherwise is simply inaccurate. The Commission fully considered and complied with Section 367.081(2)(a)1, F.S., and there is nothing that the Commission either overlooked or misconstrued. Accordingly, the Commission should deny KWRU's Motion with respect to this issue as well.

25. Attempting to address KWRU's further arguments, the Citizens and Monroe County begin by noting that KWRU mistakenly argues that "The utilization of Used and Useful to project billable gallons and meters has no basis in a historic test year and is not known and measurable. No record evidence suggests a direct correlation between billable gallon [sic] and meters and Used and Useful." Motion at 9. In determining the appropriate test year, the

Commission rejected Citizens' request for a pro forma 2016 test year, and instead found "that adjusting the Utility's 2014 test year based on known and measurable information is reasonable and appropriate to determine a revenue requirement and rates that are representative of KWRU's current operations." Final Order at 12. Nowhere in the Commission's discussion of the appropriate test year does the Commission discuss, let alone make any finding, that used and useful factors should be used to project billable gallons, or that there was some correlation between billable gallons, meters, and the used and useful adjustment. *See* Final Order at 7-12.

26. KWRU again attempts to induce the Commission to consider new information outside the hearing record by providing Exhibit "B" which purports to contain KWRU's actual billing determinants for 2016. Motion at 9. KWRU makes the unsupported claim that "overstatement of billing determinants at the end of 2016, including General Service and Residential customers as well as re-use gallonage, together with the actual costs of investment for plant construction, will cause under earnings and force KWRU to pursue a limited proceeding to address such under earnings." Motion at 10. KWRU is simply rearguing the evidence that is in the record, asking the Commission to come to a different conclusion.

27. Moreover, claims that KWRU will under-earn, while hypothetical in nature, are wholly outside the scope of a motion for reconsideration. If KWRU's claims are to be considered at all, they must be considered in light of the fact that KWRU's own growth rate estimate is 7.06% per year in additional gallons of service provided. Final Order at 29. Once the new plant is placed in service in 2017, KWRU should benefit from additional customer growth and gallons, thus alleviating its claimed concern that it will under-earn.

28. KWRU argues again for a true-up relief which it did not request in this docket. Motion 10. This relief should therefore be rejected.

29. Last, KWRU asserts that "the Final Order adjusts the historical test year to include prospective future CIAC against the utility's investment in property used and useful in the public service, accumulated depreciation on CIAC, and amortization." Motion at 10. KWRU claims the Commission erred in its interpretation and application of Section 367.081(2)(a)(1), Florida Statutes, as it relates to CIAC. First, the Commission did not project or impute any CIAC. Second, the Commission was able to determine the "known and measurable" CIAC collected by KWRU in 2015 and 2016, and increased CIAC to reflect the amounts collected in 2015 and 2016. Final Order at 25 ("Consistent with our pro forma treatment of 2015 and 2016 routine plant additions, we find it appropriate to reflect this additional CIAC as a year-end amount. Accordingly, based on the information provided by KWRU, CIAC shall be increased by $372,032 to reflect CIAC *collected* in 2015 and 2016." Emphasis added.). The Commission did not "impute prospective future contributions-in-aid-of-construction against the utility's investment in property used and useful in the public service," nor did it impute CIAC on the used and useful growth allowance; the Commission used actual CIAC collected in 2015 and 2016. Similarly, consistent with the matching principle, which is well-supported in the testimony of Citizens witness Merchant and Monroe County witness Deason,[6] if the Commission updates CIAC with known and measurable changes, other aspects of rate base must likewise be updated. The threat of appeal is meritless because there is no error that was made in updating the test year CIAC, accumulated depreciation of CIAC, and amortization. Therefore, the Commission should deny KWRU's Motion with respect to Issue IV.(B) Appropriate Test Year for Establishing Rates.

[6] Merchant, TR 305; Deason, TR 523-34.

Conclusion

30. KWRU has failed to meet its burden of establishing any basis upon which the Commission should grant reconsideration of its Final Order in this docket. KWRU's arguments are nothing more than improper attempts to reargue evidence already in the record, to introduce new evidence and exhibits, and to make arguments that KWRU should have made in its Brief filed on December 9, 2016. KWRU's attempts to rely on the PAA Order are legally misplaced, and its repeated assertions that it will "have to file a limited proceeding" to address hypothetical revenue shortfalls are legally irrelevant to a motion for reconsideration (in addition to being highly speculative), and finally its allegations that the Commission failed to follow the requirements of Section 367.081, Florida Statutes, are entirely baseless.

Wherefore, for all of the foregoing reasons, the Citizens of the State of Florida, representing all of KWRU's customers, and Monroe County respectfully request that the Commission deny KWRU's Motion for Reconsideration in its entirety.

Respectfully submitted 28th day of March, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing CITIZENS' AND MONROE COUNTY'S JOINT RESPONSE IN OPPOSITION TO KW RESORT UTILITIES CORP.'S MOTION FOR RECONSIDERATION was furnished by electronic mail on this 28th day of March, 2017, to the following:

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