

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. 20170141-SU

FILED: April 25, 2018

**OFFICE OF PUBLIC COUNSEL'S AND MONROE COUNTY'S
JOINT MOTION TO COMPEL K W RESORT UTILITIES CORP.
TO CORRECT ITS CONTINUALLY CHANGING MINIMUM FILING
REQUIREMENTS AND TO CONTINUE THE HEARING**

The Citizens of the State of Florida (“Citizens”), by and through the Office of Public Counsel (“OPC”), and Monroe County (the “County”), pursuant to the Order Establishing Procedure in this docket (Order No. PSC-2018-0039-PCO-SU) and Rule 28-106.204, Florida Administrative Code (“F.A.C.”), hereby move to compel K W Resort Utilities Corp.’s (“KWRU” or the “Utility”) to correct its continually changing minimum filing requirements (MFRs) previously deemed complete and continue and reschedule the May 15-17, 2018 technical hearing with an allowance for additional time for discovery and Intervenor surrebuttal. In support of this motion, OPC and the County state as follows:

Background

1. On June 9, 2017, KWRU initiated this docket by requesting approval of an historical test year ending June 30, 2017. On June 21, 2017, OPC and the County filed a joint response in opposition to the Utility’s proposed test year. On June 30, 2017, Chairman Brown approved the Utility’s proposed test year. In the letter approving KWRU’s test year, Chairman Brown stated:

The Utility is instructed to file all information it wishes the Commission to consider when arriving at a decision on its rate case application with its original filing. Because of the time limitations contained in Section 367.081, F.S., and the lengthy auditing and investigation required, the Commission may disregard any

information not filed with the original application. Approval of the test year is only for filing purposes and any party may raise an issue regarding the appropriateness of the test period at any time during the pendency of this proceeding.

(Emphasis supplied.)

2. On November 21, 2017, KWRU filed direct testimony of three witnesses (Christopher Johnson, Deborah Swain, and Frank Seidman) along with supporting exhibits and Minimum Filing Requirements (“MFRs”) pursuant to Rule 25-30.436, F.A.C.

3. On December 7 and 13, 2017, Commission staff sent KWRU deficiency letters, identifying deficiencies with KWRU’s MFRs. Until corrected, KWRU’s petition was not deemed filed or complete.

4. On December 12 and 13, 2017, KWRU sent responses to staff’s deficiency letters with corrections to the identified list of deficiencies pursuant to Section 367.083, Florida Statutes (F.S.), to determine the official date of filing.

5. On December 14, 2017, Commission staff advised KWRU that the MFRs were complete and, pursuant to Section 367.083, F.S., and Rule 25-30.025, F.A.C., December 13, 2017 was established as the official date of filing.

6. Pursuant to Section 367.081(6), F.S., the Commission must make a decision on KWRU’s petition for rate increase within eight (8) months and a final decision within twelve (12) of the official date of filing.

7. Based on the information included in its direct testimony and MFRs deemed complete by the Commission staff, KWRU initially requested an increase of approximately 58% above the Utility’s claimed adjusted test year revenues. Subsequently, on February 11, 2018, KWRU filed revised MFRs to correct an error found by KWRU. The revised MFRs were approved by Order No. PSC-2018-0118-PCO-SU which modified the order establishing procedure.

8. On March 14, 2018, OPC filed the direct testimony of two witnesses (Andrew Woodcock and Helmuth W. Schultz, III) and the County filed the direct testimony of three witnesses (Terry Deason, Kevin Wilson, and Jeffery Small).

9. On April 10, 2018, KWRU filed the rebuttal testimony of three witnesses (Edward Castle, Robert Pabian and Deborah Swain) and on April 11, 2018, KWRU filed the rebuttal testimony of one additional witness (Christopher Johnson). Ms. Swain's exhibit DDS-2 contains several revised MFRs, labeled as "UPDATED SELECT MFR SCHEDULES," including revised MFR Schedules A-2, A-3, B-2, B-3, B-6, B-10, B-14, D-1, D-6, and E-1. These newly revised MFR schedules are different from the MFRs filed previously by KWRU and deemed complete on December 13, 2017. Based on the new information included in its rebuttal testimony and revised MFRs, KWRU is now requesting a revenue increase of approximately 61.3%.

10. On April 23, 2018, during the deposition of KWRU witness Swain, counsel for Commission staff learned that KWRU had made an additional error in its MFRs regarding the annualization of depreciation, which error was not reflected in Ms. Swain's UPDATED MFR SCHEDULES, and asked KWRU whether they planned to file an updated MFR. According to the recollection of the undersigned,¹ Ms. Swain indicated that KWRU would file a revised MFR to correct this mistake. Upon questioning by counsel for Monroe County about when KWRU would submit the revised MFR, Ms. Swain said she would have to consult with the two attorneys for KWRU managing this case, and further discussion among counsel for all parties left it unclear as to whether KWRU will submit the revised MFR schedule(s) before the hearing, if at all.

¹ A transcript of the deposition of Ms. Swain has been ordered by the parties, but is not available at this time.

11. Later in the same deposition, counsel for the Citizens learned that the revised MFRs in DDS-2 reflected the cost changes introduced in the rebuttal testimonies of Ms. Swain and Mr. Johnson, and that these cost changes *increased* the proposed rate (BFC and gallonage) charges identified in Revised Schedule E-1 in DDS-2. In addition, it is the recollection of the undersigned that Ms. Swain also testified that any changes to the Utility's case affecting its MFRs could be made up to and including the eve of the hearing.

12. Ms. Swain further testified that the revised MFRs in DDS-2 were only "summary" MFRs and that the changes reflected in Ms. Swain's and Mr. Johnson's rebuttal testimonies also affected the "detailed" MFRs. When asked why the Utility did not file revised "detailed" MFRs with her rebuttal testimony, Ms. Swain testified in her opinion the "summary" MFRs in DDS-2 were sufficient for the Commission to base its decision.

13. Pursuant to Rule 28-106.210, F.A.C., "The presiding officer may grant a continuance of a hearing for good cause shown. Except in cases of emergency, requests for continuance must be made at least five days prior to the date noticed for the hearing." Therefore, the relief requested in this motion to compel and continuance of the hearing is timely.

14. In the interest of due process and protecting the Commission's evidentiary hearing process, the presiding officer or the Commission should grant the relief requested herein which is to compel KWRU to file complete and corrected MFRs and grant a continuance of the hearing to allow the Intervenors and staff sufficient opportunity to conduct additional discovery and file surrebuttal testimony addressing KWRU's changes. It is undisputed that KWRU substantively changed its case in rebuttal, including filing numerous revised MFRs, previously deemed complete and non-deficient on December 13, 2017. With KWRU's substantive change at this late juncture in the process, it is only fair, just, and reasonable to for this Commission to acknowledge that

KWRU's unilateral actions waived the 8-month statutory time frame and to provide the relief requested herein.

Applicable Law

Burden of Proof

15. It is well-settled that the “burden of proof in a commission proceeding is always on the utility seeking a rate change” Florida Power Corp. v. Cresce, 413 So. 2d 1187, 1191 (1982). Accordingly, in this proceeding to increase the rates charged to its customers, KWRU bears the burden of proof “to show that its present rates are unreasonable, fail to compensate the utility for its prudently incurred expenses, and fail to produce a reasonable return on its investment.” Order No. PSC-07-0129-SC-WS. Thus, it is KWRU's burden to demonstrate by a preponderance of evidence in the record in this proceeding that its current rates are unjust, unreasonable or insufficient and that the changes KWRU has requested are necessary and will result in rates that are just, reasonable, compensatory, and not unfairly discriminatory. It is neither the Commission's nor the Commission Staff's responsibility to make KWRU's case, or fill any holes or gaps in KWRU's requested rate increase.² To support its burden of proof, KWRU was required to provide all the necessary information to the parties in its direct case.

16. Rule 25-30.436, F.A.C., setting forth “General Information and Instructions Required of Class A and B Water and Wastewater Utilities in an Application for Rate Increase”, states as follows:

(2) The applicant's petition for rate relief will not be deemed filed until the appropriate filing fee has been paid and all minimum filing requirements have been met, including filing of the applicant's prepared direct testimony unless the

² This is neither a staff-assisted rate case (“SARC”) filed pursuant to Rule 25-30.455, F.A.C., nor a rate case filed pursuant to the Commission's proposed agency action (“PAA”) process. This distinction is important because in both SARC and PAA dockets, a substantially affected party has the opportunity to protest the resulting order.

applicant has filed its petition pursuant to Section 367.081(8), F.S. At a minimum, the direct testimony shall explain why the rate increase is necessary and address those areas *anticipated at the time of filing to be at issue*.

(3) The applicant shall state any known deviation from the policies, procedures and guidelines prescribed by the Commission in relevant rules or in the company's last rate case.

(4) In the rate case application:

...
(e) Whenever the applicant proposes any corrections, updates or other changes to the originally filed data, 20 copies shall be filed with the Office of Commission Clerk with copies also served on all parties of record at the same time.

(Emphasis added.)

KWRU has continued to update and revise its MFRs throughout the rate case process in this docket, including substantively revising its MFRs *after* Intervenor testimony was filed. Moreover, KWRU acknowledges that the current, revised MFRs submitted with its rebuttal testimony on April 10, 2018, are not even correct.

Good Cause Shown

17. It is undisputed that KWRU substantively changed its case in rebuttal, including filing numerous revised MFRs, previously deemed complete and non-deficient on December 13, 2017. Ms. Swain testified to this fact in her April 24, 2018 deposition. Moreover, it is unclear from her testimony whether KWRU will provide corrected and revised MFRs missing from Ms. Swain's exhibit DDS-2 filed in rebuttal. Therefore, KWRU has not presented all the revised detailed MFR schedules to the Commission and parties for review in this rate case.

18. The Joint Movants incorporate the facts and arguments from their April 23, 2018 Joint Motion by reference as to the need to grant the relief requested herein.

19. As stated by Chairman Brown in her letter approving KWRU's proposed test year, KWRU was expressly "instructed to file all information it wishes the Commission to consider

when arriving at a decision on its rate case application with its original filing.” (Emphasis added.)

In addition, Chairman Brown stated: “Because of the time limitations contained in Section 367.081, F.S., and the lengthy auditing and investigation required, the Commission may disregard any information not filed with the original application.” (Emphasis added).

20. KWRU has blatantly ignored Commissioner Brown’s test year approval letter by continually supplementing its rate case filing and by substantively amending its MFRs in rebuttal after the Intervenors’ testimony was filed.

21. OPC and the County recognize that it is well-established law in Florida that the Commission cannot ignore an existing fact that will, if true, affect a utility’s future rates. See Gulf Power Co. v. Bevis, 289 So. 2d 401, 404 (Fla. 1974). However, the Commission’s charge to consider all existing facts does not mean that a utility seeking a rate increase may simply submit revised MFRs in its rebuttal testimony, thereby increasing its initially requested rate relief. Moreover, KWRU’s accounting witness, Deborah Swain testified on April 24, 2018 that its current MFRs still contain errors and that KWRU failed to provide in rebuttal all the revised detailed MFR schedules supporting the revised summary schedules provided in Exhibit DDS-2. This is a serious material deficiency, which should not be ignored or allowed to transpire in a Commission proceeding.

Relief Requested

22. It is a clear departure from the requirements of law to set rates based on unreliable MFRs revised through rebuttal testimony filed after the Intervenors filed their testimony, and this departure is further compounded by the admitted fact that KWRU’s MFRs are still in error. To protect the Commission’s hearing process set forth in Section 367.081(6), F.S., and the Customers’ due process rights from abuse, the Commission must grant the relief requested herein, or grant the

relief requested by the Joint Movants in their April 23, 2018 Motion to Strike Rebuttal testimony. If the April 23, 2018, Joint Motion to Strike is granted, it will render this Motion moot. Only such relief as requested in these two timely Motions will protect the due process rights of the Customers and prevent the abuse of the Commission's hearing process.

23. For the good cause shown herein, the prehearing officer has the authority to grant a continuance pursuant to Rule 28-106.210, F.A.C.

24. Pursuant to Rule 28-106.204(3), F.A.C., undersigned counsel contacted the parties to this docket concerning this Motion. KWRU's counsel objects to the motion and will file a response. Staff takes no position on the motion.

Respectfully submitted this 25th day of April, 2018.

/s/ Erik L. Sayler

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 25th day of April, 2018.

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