

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of billing practices of
KW Resort Utilities Corp. in Monroe County

Docket No.: 20170086-SU

**KW RESORT UTILITIES CORP.'S MOTION TO DISMISS OR IN THE
ALTERNATIVE MOTION TO STRIKE**

KW RESORT UTILITIES CORP., a Florida corporation (“Utility”), by and through undersigned counsel and pursuant to Rule 28-106.204, F.A.C., moves to dismiss for (1) failure to state a cause of action upon which relief can be granted for lack of standing or, in the alternative, to (2) strike Petitioners’, OFFICE OF PUBLIC COUNSEL (“OPC”), Petition Requesting Evidentiary Hearing on the Protested Portions of the Proposed Agency Action (“Petition”) and, in support thereof, states as follows:

FACTS AND PROCEDURAL HISTORY

1. On August 31, 2018, the Public Service Commission (“PSC”) issued Order No. PSC-2018-044-PAA-SU (“PAA Order”).
2. The PAA Order required a refund of “\$26,408 with interest” to Safe Harbor Marina. PAA Order at 10.
3. The PAA Order required a refund of “\$41,034 with interest” to Sunset Marina. PAA Order at 10.
4. On September 21, 2018, OPS filed a protest to the PAA Order on behalf of the “Citizens of the State of Florida.” Petition at 1.
5. OPC, on June 12, 2018, had requested that the PSC attempt to discern if the Utility has followed not just the law, but “the spirit of the law[.]” Petition Ex. A at 5.

6. As such, OPC has requested advisory opinions on legal and policy issues that would not require an evidentiary hearing, and are beyond the scope of the instant proceeding regarding a billing audit. *See* Petition at 4, delineating two legal and policy issues.
7. Moreover, the sole salient factual issue before the Commission is the amount refunded to Safe Harbor Marina and Sunset Marina. *See* Petition at 4 (Statement of Disputed Facts and Issues); *accord* PAA Order at 9-10.¹
8. On information and belief, OPC has not contacted or otherwise sought the approval of either Sunset Marina or Safe Harbor Marina before filing the petition.
9. The undersigned has contacted Sunset Marina which rejects OPC's attempts to litigate on their behalf as Sunset Marina is agreeable to settle the matter for the amount awarded by the PSC.² *See id.* The undersigned has attempted to contact Safe Harbor Marina to ascertain its desire to be represented by OPC or litigate this issue or if it desires to settle as well.

MEMORANDUM OF LAW IN SUPPORT OF UTILITY'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STRIKE

In its Petition, OPC is demanding an evidentiary hearing in order to challenge the specific findings of refunds to two customers. However, it is evident that OPC is seeking an extended evidentiary hearing so that OPC can determine, to OPC's sole satisfaction, if Utility is following OPC's "spirit of the law." The Petition as discussed herein, fail to state claims upon which relief

¹ Assumedly accidentally, OPC refers to "all affected customers," which would be Sunset Marina and Safe Harbor Marina. To the extent that OPC is improperly attempting to have an evidentiary hearing and another full round of fact-finding for all ratepayers of the Utility to determine if the OPC's understanding of the "spirit" of the law is being correctly construed at this stage, OPC does not appreciate the status of this proceeding.

² Whether litigating a position to the detriment of, and over the protests of, the interested ratepayers in a specific petition to, theoretically, advance the interests of the "Citizens of the State of Florida" represents an ethical violation is beyond the scope of this Motion.

may be granted as OPC lacks standing and should not be provided an evidentiary hearing, and should be dismissed or, in the alternative, stricken.

The purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted, and, if it does not, to enter an order of dismissal. *See Huet v. Mike Shad Ford, Inc.*, 915 So.2d 723 (Fla. 5th DCA 2005). In deciding a motion to dismiss, the trial court confines its review to the four corners of the complaint, draws all inferences in favor of the pleader, and accepts as true all well-pleaded allegations. *Id.* The question for the trial court to decide is whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested. *Id.* A party does not state a cause of action by asserting bare legal conclusions without supporting factual allegations. *See Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 501 (Fla. 3d DCA 1994).

A motion to strike permits a trial court to strike immaterial or impertinent matter from any pleading. Fla. R. Civ. P. 1.140(f). *See also Colwell v. Cracker Barrel Old Country Store*, 2012 WL 2312763 (Fla. Div. Admin. Hrgs. 2012) (entertaining and granting motion to strike in administrative proceeding.) In order to strike material from a pleading, the court must find that the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision. *See Rice-Lamar v. City of Fort Lauderdale*, 853 So.2d 1125, 1133-34 (Fla. 4th DCA 2003) (citing *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So.2d 214, 216 (Fla. 2d DCA 1998)).

I. OPC'S LACK OF STANDING REQUIRES DISMISSAL

OPC's enabling statute, Fla. Stat. § 350.0611, provides in pertinent part that “[i]t shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the commission [.]” (emphasis supplied). In normal actions, the standing of

OPC to represent “citizens,” *id.* at (1), is uncontested, as OPC is providing “legal representation” to all affected ratepayers. *See, e.g., Citizens of State v. Fla. Public Srv. Com’n.*, 146 So. 3d 1143 (2014). Where, as here, there are only two affected ratepayers, and neither was contacted by, and one has confirmed it does not approve of OPC’s intervention on their behalf, then OPC is not providing legal representation to it, but is instead acting as an officious busybody, driving up the costs for the ratepayers and possibly removing a favorable resolution for these ratepayers.

Simply put, OPC does not have standing to intervene where, as here, the affected ratepayer does not want OPC’s intervention. Normally, an intervenor must show (1) he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing, and (2) the substantial injury is of a type or nature which the proceeding is designed to protect. *Agrico Chemical Co. v. Dep’t of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).³ As OPC does not, and cannot, allege any injury in fact that OPC can redress, or that their representation is either required or wanted, OPC lacks standing.

II. OPC’S DEMAND FOR AN EVIDENTIARY HEARING SHOULD BE STRICKEN

In addition to the lack of standing, there is neither a need nor a requirement for an evidentiary hearing, and OPC’s demand for an evidentiary hearing should be stricken as it does not comport with basic elements of due process and the Florida Supreme Court has stated that there is no need for an evidentiary hearing. *S. Fla. Hosp. & Healthcare Ass’n v. Jaber*, 887 So. 2d 1210, 1212 (Fla. 2004) (holding that PSC is not required to hold an evidentiary hearing for a negotiated settlement); *accord Citizens of State v. Fla. Public Srv. Com’n.*, 146 So. 3d 1143, 1150 (2014) (reasoning that PSC can approve settlement without evidentiary hearings, and

³ Utility is only asserting that the *Agrico* test would apply for OPC for the limited fact pattern of OPC attempting to insinuate itself into an action over the protests of a small group of ratepayers.

non-unanimous settlements). As the Florida Supreme Court stated when reviewing the OPC's arguments in a prior case, "adoption of OPC's argument that its powers include the ability to preclude the Commission from approving a settlement agreement over the OPC's objection would render the statutory language in chapters 350 and 366 inconsistent." *Id.* at 1151. Sunset Marina has already agreed to settle the issue, and Safe Harbor Marina most likely would as well, but OPC does not know this, because it has not attempted to contact either and filed a lawsuit on their behalf without their authority.

Moreover, to the extent that OPC has admitted that OPC is seeking legal and policy determinations that are outside of the scope of the proceeding, *see* Petition at 4, OPC has admitted that OPC does not require an evidentiary hearing. As OPC (1) has no right to an evidentiary hearing, (2) does not require an evidentiary hearing, (3) has petitioned for one without consulting the relevant ratepayers, and as OPC is (4) requesting this evidentiary hearing without the approval of the affected ratepayers, OPC's petition for an evidentiary hearing should be stricken as immaterial.

REQUEST FOR RELIEF

For the foregoing reasons, KW RESORT UTILITIES CORP. respectfully requests that the Petition be dismissed or, alternatively, the request for an evidentiary hearing be stricken

CERTIFICATE OF COMPLIANCE

I certify I have conferred with all other parties of record and the Petitioners object to the relief requested.

Respectfully submitted this 1st day of October, 2018,
by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

E-Mail to the following parties this 1st day of October, 2018:

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