

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: November 17, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Bellak)
Division of Economic Regulation (Hudson, Rendell)

RE: Docket No. 050694-SU – Petition for declaratory statement regarding service availability charges by KW Resort Utilities Corp.

AGENDA: 11/22/05 – Regular Agenda – Interested Persons May Participate at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: December 29, 2005 – Parties have waived 90-day period provided in Section 120.565, F.S., to allow 10 extra days for resolution

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050694.RCM.DOC

Case Background

On September 29, 2005, KW Resort Utilities Corp. (Utility or Petitioner) filed a Petition for Declaratory Statement. The Petition asked the Commission to declare that the Utility’s service availability charges for connection of its central wastewater service to Roy’s Trailer Park (Development), a 103 unit mobile home park, had to be paid by the Development “up-front”, rather than amortized over a period of at least 8 years. The Utility asserted in support of the Petition that its Commission-approved tariff did not provide for amortization of the payments and that statutes relied upon by the Development were inapplicable. The Development, on

October 7, 2005, and Petitioner, on October 10, 2005, filed legal memoranda in support of their respective contentions.

Discussion of Issues

Issue 1: Should the Commission grant the declaratory statement requested by KW Resort Utilities Corp.?

Recommendation: Yes, the Commission should grant the declaratory statement as requested.

Staff Analysis: In the Memorandum of Law filed by the Development, various sections of Chapter 723, Florida Statutes, are set out to illustrate the legislative mechanism by which mobile home owners are protected from the imposition of certain unanticipated government-initiated charges which are also charges that can be passed through to mobile home owners. See, Section 723.003(10). The main statutory provision presented in the Development's argument to delineate that protective mechanism is Section 723.046, which states as follows:

723.046 Capital costs of utility improvements – In the event that the costs for capital improvements for a water or sewer system are to be charged to or to be passed through to the mobile home owners or if such expenses shall be required of mobile home owners in a mobile home park owned all or in part by the residents, any such charge exceeding \$200 per mobile home owner may, at the option of the mobile home owner, be paid in full within 60 days from the notification of the assessment, or amortized with interest over the same duration and at the same rate as allowed for a single-family home under the local government ordinance. If no amortization is provided for a single house, then the period of amortization by the municipality, county, or special district shall be not less than 8 years. The amortization requirement established herein shall be binding upon any municipality, county, or special district serving the mobile home park. [e.s.]

In view of the above, the further conclusions of the Development on page 7 of its Memorandum are reasonable and supported. As there stated,

Section 723.046 limits the timing of the obligations of both home owners and park owners to pay the costs of utility improvements required by governmental action. The “amortization requirement” of section 723.046 which is binding upon local governments and special districts serving the mobile home park, requires local governments to allow payment to be made over a period of not less than eight years. The obvious intent of this provision is that home owners should be allowed to pay their share of capital costs for utility improvements over the same amount of time the park owner is allowed to make payment. The statute provides that the amortization requirement set forth therein is binding upon any local government serving the mobile home park. [e.s.]

The argument presented by the Development, however, begs the question as to whether the Legislature extended this protective mechanism to mobile home owners served by private utilities regulated by the Commission.¹ As noted by the Utility on p. 2 of its Memorandum,

Petitioner is an investor-owned wastewater utility, subject to the regulatory jurisdiction of the Commission. It is not a municipality, county or special district, and is therefore, not subject to Section 723.046(1), Florida Statutes.

The Development's failure to present any convincing authority demonstrating that the Legislature extended the protective scheme in Section 723.046(1) to mobile home owners served by private utilities appears to be dispositive in favor of the Utility's position in this case. The Development's attempt to rely on Section 723.004(2), preempting local government activity in this area to the state, does not demonstrate any effect on the Commission's exclusive authority as a state agency itself to regulate private water and wastewater utilities pursuant to Chapter 367 generally and Section 367.011 specifically.

It is unconvincing as well for the Development to argue, as it does at page 1 of its Memorandum, that

the instant matter has nothing to do with whether Petitioner will receive payment of such [Commission-approved, tariffed service availability] charges or of the amount of such charges This case addresses only the issue of the time period over which such charges may be collected from a mobile home park owner by the utility. [e.s.]

Section 367.011(2) grants the Commission

exclusive jurisdiction over each utility with respect to its authority, service and rates.

The Development's attempt to distinguish jurisdiction over the amount of the service availability charge from the time period in which the charge must be paid has no support in the statute and misreads the Commission's jurisdictional grant from the Legislature. Where, as here, the Commission has approved a certain charge as necessary for the Utility to provide service, a unilateral decision by the purchaser of the service to invoke the Utility's obligation to provide the service and, notwithstanding that, to keep the Utility waiting eight years to receive the approved charge for connecting the service, would nullify the Commission's exercise of its jurisdiction over the Utility's authority, service and rates. Clearly, that exercise of jurisdiction in approving the tariff at issue authorized the Utility to provide the service and collect the charge. Since Section 723.046(1) has not been extended to service other than that provided by local governments, the Development can no more delay payment of the authorized connection charge

¹ While the need for the Development to connect to KW Resort's central wastewater utility may be "government-initiated", the service availability charge at issue is not. It is a privately initiated charge consistent with the Utility's Commission-approved tariff.

over time than the utility can delay the provision of adequate service over time. See, Section 367.111(2).²

The Development's references to No. PSC-94-0171-WS and United Telephone Company v. Public Service Commission, 496 So. 2d 116 (Fla. 1986), do not alter the analysis. As to Order No. PSC-94-0171-WS, the fact that the Circuit court could adjudicate a contract dispute involving a utility owner's representations to home owners in its development prospectus does not change the fact, referred to in that Order, of the Commission's "exclusive jurisdiction over utilities with regard to their service, authority, and rates pursuant to Section 367.011, Florida Statutes." In this case, the Utility is not claimed to have represented to the Development or pass-through purchasers that they could amortize the service availability charge. Indeed, it is undisputed that the tariff at issue does not provide for amortization. There is, thus, no "contract dispute" at issue, only a lack of any demonstration that Section 723.046(1) extends to private utilities.

As to the United Telephone case, the Commission was found therein to lack the authority to modify a contractual business arrangement entered into by telephone companies between themselves. There is not, in this case, any contractual business arrangement between utilities which the Commission has sought to modify. United Telephone is, therefore, inapposite to the facts of this case.

The limitation on the Commission's jurisdiction which is relevant is the lack of jurisdiction and lack of any attempt to exercise jurisdiction by the Commission over the interaction between the Development and its homeowners. That is the subject matter of Chapter 723 and further evidence that Section 723.046(1) is not correctly read to require the Utility to amortize its service availability charges to its customer, the Development.

To summarize, the Petition should be granted because the Utility's customer, Roy's Trailer Park, Inc., has cited no authority allowing it to demand a differently provisioned charge, an amortized charge, than the unamortized charge approved in the tariff by the Commission. In contrast, neither the granting of the Petition nor the analysis herein in any way forecloses the Roy's Trailer Park Development from amortizing the charge when it passes the charge through to its home owners. That is a matter for decision between the Development and its homeowners which is neither required nor foreclosed by any of the cited authority, or by the Commission's exercise of its jurisdiction.

² In effect, though the Development or its pass-through purchasers may have invoked the Utility's obligation to provide service in order to comply with government requirements, they are not being provided that service by municipal, county or special district utilities so as to qualify for Section 723.046(1) amortization.

Docket No. 050694-SU
Date: November 17, 2005

Issue 2: Should this docket be closed?

Recommendation: Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

Staff Analysis: If the Commission answers the petition, a final order can be issued and the docket closed.