

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in
wastewater rates in Monroe County
by KW Resort Utilities, Corp.

Docket No. 070293-SU
December 3, 2007

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**KW RESORT UTILITIES' RESPONSE TO
CITIZENS' MOTION TO COMPEL KW TO RESPOND TO
OPC'S FIRST SET OF INTERROGATORIES AND PODs
AND SECOND SET OF INTERROGATORIES AND PODs;
AND MOTION FOR AN EXTENSION OF TIME TO
PREFILE TESTIMONY OR LEAVE TO FILE
SUPPLEMENTAL TESTIMONY**

KW Resort Utilities ("KW") by and through its undersigned counsel, hereby files this Response to Citizens' Motion to Compel KW to Respond to OPC's First Set of Interrogatories and PODs and Second Set of Interrogatories and PODs ; and Motion for an Extension of Time to Prefile Testimony or Leave to File Supplemental Testimony and would state as follows:

CMP _____
COM _____
CTR _____
ECR _____
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GPC _____
RCA _____
SCR _____
SGA _____
SEC _____
DTH _____

1. The scope, nature and tenor of the Motion; the conduct of OPC at depositions; the breadth and timing of the discovery and OPC's request for relief (all as discussed in more detail hereunder) all strongly indicate that what OPC actually hopes to gain from this manufactured discovery controversy is a strategic advantage, as opposed to access to additional information which is relevant to any of the issues in the proceeding. Stated otherwise, it is the controversy itself, rather than the discovery, which OPC has embraced as a means to improve its position in this

proceeding.

2. Since OPC has chosen to include a long litany of the “background” to its motion (which either misstates or distorts what has actually occurred in several instances) it is important for the Commission to recognize that, in contrast to the broad brush by which OPC seeks to demonize the utility, KW has gone above and beyond, under very difficult circumstances, in its attempt to respond to OPC’s tsunami of discovery. The following are just some of the things KW has done which were beyond what is required by the Uniform Rules with regard to the discovery and related investigations performed by OPC in this case:

- *Rather than require OPC to travel to Key West to review the documents; then to thereafter to select the documents that OPC wanted to be copied; then to pay in advance for those copies; to then have the copies sent off to a copy shop and copied; and to thereafter have them transmitted to Tallahassee (all at OPC’s expense), KW has produced the documents in Tallahassee (or, as was the case today, to provide at OPC’s request the documents directly to OPC’s consultant in Louisiana), without the requirement of prior payment.*
- *Even though KW had an agreement with OPC that the third set of discovery would be due to be answered on December 3, 2007, KW*

transmitted the answers to OPC on November 30, 2007 since they were in fact ready on that day.

- *KW arranged for a visit by OPC's engineer to the facilities without a formal discovery request as required by the Uniform Rules, and accommodated his visit, including the provision of a document which would help him understand the facilities, which is also above and beyond what is required by the rules of discovery.*
- *KW substantially supplemented and clarified our responses to discovery, at OPC's demand, although KW disagreed with several of those demands and felt that OPC had gone farther than allowed by the rules of discovery and/or the wording of the original discovery requests.*
- *KW attempted to arrange in an orderly fashion all of the documents which were provided in response to Requests for Production of Documents, marking which documents went with each request, even though the rules specifically provide that KW may provide the documents as they are kept in the ordinary course of business (without such specific delineation).*
- *KW worked with OPC to arrange for depositions on short notice, even though OPC's voluminous discovery (astonishingly) never contained the*

most fundamental of all interrogatories: “who are your witnesses and what are they going to say?” The names of potential deponents, and the location at which they could be deposed, were provided voluntarily by KW on short notice.

- *KW secured, at the depositions, the attendance of non-parties who have not been utilized as witnesses by KW, for which OPC would normally need to issue subpoenas. KW did this voluntarily and above and beyond what is required by the Uniform Rules.*
- *KW produced Mr. Smith in Key West, at the time of the other depositions, rather than requesting that OPC travel to Chicago, Mr. Smith’s home, to conduct the deposition.*
- *KW voluntarily identified the four individuals who had answered the first and second interrogatories, and even arranged for their depositions (although OPC chose not to take one of those individual’s depositions contemporaneous with the other depositions). This identification was not required by the Uniform Rules, nor required by any of the interrogatories themselves.*
- *KW has accepted filings which have arrived after 5:00 PM (of which there have been several) as if filed that business day, which is more than*

is required by the Florida Rules of Civil Procedure.

- *KW had one of its consultants travel to Tallahassee to help sort through the voluminous documents and discovery, in response to OPC's supplemental demand, so that KW could make a full and complete response to that supplemental demand (which was what occurred).*
- *KW offered to produce documents at deposition (despite the fact that such requests for documents contemporaneous with a deposition under the Uniform Rules requires 30 days notice, and that deadline had passed). OPC chose not to request such production.*
- *KW made arrangements for staff to participate by telephone at the deposition and made sure that a speakerphone was in the room where the depositions occurred.*
- *KW supplied a location for the deposition so that OPC did not have to do so.*
- *KW offered to produce Mr. DeChario in Clearwater where he resides and where his office is located, and indicated that he was the only individual not being deposed who had participated in answering the interrogatories. OPC chose not to take the deposition.*
- *KW offered to come to OPC's offices and bate stamp or number the*

documents. The offer was never accepted.

- *KW agreed, without any order of the Prehearing Officer, to expedite responses to OPC's Third Set of Interrogatories, at OPC's request.*
- *KW has voluntarily agreed to provide several "late-filed exhibits" to the depositions even though no such exhibits are contemplated by the Florida Rules of Civil Procedure or the Uniform Rules, despite the Commission's tradition of utilizing such exhibits.*

3. One must struggle in order to strip OPC's motion to its essence. A close examination of the 22 page motion, which has attachments not included in that total, reveals that what OPC is really complaining about (and KW disagrees with those complaints as set forth below) is that the utility has somehow failed to adequately respond to 4 requests for production of documents out of 80 requests (and numerous subparts) tendered on the utility (which have resulted in the copying and transmission to OPC of approximately **8,503** pages), and an alleged failure to adequately respond to 12 interrogatories or interrogatory subparts (mostly interrogatory subparts) of the well over 200 interrogatories (including subparts) which OPC served in its first and second set of discovery on KW. Even if KW has not attained perfection in responding to all this discovery, it has hardly flaunted the Uniform Rules or the Procedure Order in this case. On the contrary, KW has strained its resources while

providing more information in response to such discovery than any utility of similar size in the memory of counsel for KW.

4. KW is a company with only about 2400 connections and no employees. OPC sought in this case the right to serve 400 interrogatories, and was granted the right to serve 300 interrogatories (*10 times the number of interrogatories allowed under the Florida Rules of Civil Procedure and the Uniform Rules*) and has literally pounded the company with interrogatories and request for production of documents (which have yielded **8,503** pages of documents). This voluminous, burdensome, and often nonsensical discovery must be contrasted with the information required by the minimum filing requirements, which are obviously designed to gather the information which the Commission believes is necessary for the review of any requested rate increase. Additionally, as in any such case, the staff has the right to file discovery, and in this case, they have filed only six numbered interrogatories and only four numbered requests to produce. The volume of discovery (and OPC's feigned concerns about the responses) is particularly disturbing in light of OPC's predictable position, at the end of this case, that the time KW spent responding to the discovery should be disallowed, in all or part, from the utility's rate case expense.

5. The very best of example that it is the controversy OPC embraces, rather than the information which it seeks, is the fact that it has now taken sworn

depositions of numerous KW witnesses and non-witnesses alike, and that it made little attempt to either clarify the information that it purports to be confused about or to gain responses to interrogatories or requests for production of documents which it purports to have not received. What better opportunity to follow-up on an interrogatory than to inquire of the appropriate person and have them respond with the information on the spot?

6. The Florida Rules of Civil Procedure, as incorporated by the Uniform Rules, allow documents to be produced “as they are kept in the usual course of business”. In this case, that would mean in Key West, without specific identification of which documents correspond to which categories in the request (Rule 1.350(b)). Rule 1.340(c) allows the option, when responding to interrogatories, to “specify the records from which the answer may be derived or ascertained and offering to give the party serving the interrogatories a reasonable opportunity to examine, audit or inspect the records”. In no case was OPC ever required to go to Key West to review the documents as they were kept in the ordinary course of business nor to travel to Key West to review documents from which an interrogatory answer could be derived, but rather the documents were produced and sent to Tallahassee. This saved OPC thousands of dollars and the time involved in arranging such document production and traveling one thousand miles round trip to review the documents (and thereafter

ordering that they be copied at a local copy shop).

7. While OPC's Motion is replete with a lack of specificity, generalizations, and misrepresentations, the following specific responses to OPC's apparent points are offered¹:

a. **Interrogatory 30(b)**

This information was conveyed to OPC as a part of the November 20, 2007 supplemental production.

b. **Interrogatory 7(f)**

In its Response to Extension of Time dated October 15, 2007, at Paragraph 4, OPC states that it "carefully scrutinized" its discovery requests. Therefore, with the understanding that OPC was asking exactly for what it wanted, the Utility provided the response to the question posed by Interrogatory 9, which asked the Utility to provide "With respect to costs directly charged to the Company by Green Fairways, Inc., Key West Golf Course, WS Utility, Inc...the total dollars *by NARUC account* number and name *from* which a direct charge is made..." [Emphasis added] It is not up to KW to determine what OPC is asking for, but to attempt to provide a response to the question asked. Since the non-regulated entities

¹Sometimes, supplemental information is included herein to even further clarify previous responses.

do not utilize the NARUC USOA, it cannot tell OPC from which NARUC account such charges originate.

OPC's Interrogatory 11 (as well as Interrogatories 12 and 13) specifically asks to "...provide the following information for 2004, 2005, 2006 and for each month of 2007..." [Emphasis added], and OPC specifically states herein that such information was provided ("the data provided only covers 2004, 2005, 2006, and 2007 to-date"). Now OPC is asking the Commission to compel a response to something for which it did not ask. It is not up to the Utility to determine what OPC really means, but to respond to the question asked.

OPC Interrogatory 9 (and Interrogatory 10) asks for information for non-regulated NARUC accounts from which such a charge is allocated or direct charged, as discussed herein. Now OPC is asking the Commission to compel the Utility to provide to which NARUC accounts such amounts are charged, something for which it has not yet asked the Utility to provide.

The response to Interrogatory 7(f) is adequate. OPC just doesn't care for the response. This is a classic example of information that could have been followed up on, in depth and in detail, at deposition (and, in fact, could still be followed up on with additional discovery in the future).

c. **Interrogatory 28(c)**

This information has adequately been conveyed to OPC, in the form of the document indicating Mr. Smith's minimum compensation for the last several years, such that OPC can relate Mr. Smith's total income and compare it to the time that he spends on KW business. Additionally, Mr. Smith has already sat for a deposition in this case.

d. **Interrogatory 41(b)**

This information was conveyed to OPC in response to Request for Production No. 6 provided on November 1, 2007.

e. **Interrogatory 49(a)**

This is another area for which OPC has had ample opportunity to inquire about in deposition. However, by way of further explanation, as the Company continues the conversion to AWT, chemical expenses have been increasing through the latter half of 2006 and through 2007.

f. **Interrogatory 51**

Again, OPC had every chance to inquire into this at deposition, but by way of further explanation, KW would state that Green Fairways charged for construction management as provided for in the contracts with Monroe County, to wit: Monroe County Detention Facility \$32,198; South Stock Island Expansion

\$242,007; Collection System Expansion \$12,370. All such costs are capitalized. As overhead activity, the specific assets identifiable to the projects were charged with these costs.

g. **Interrogatory 57**

The change orders do set forth the status of the project. This is an answer OPC is simply not satisfied with, and one into which it could have delved more deeply at the time of deposition.

h. **Interrogatory 58(b)**

The answer is responsive. This is also, obviously, a subject into which OPC could have inquired at deposition. However, by way of further response, Monroe County sought to have all wastewater treatment facilities converted to AWT by 2010, and KW Resort Utilities by 2007. No cost saving analysis was performed by the Utility, since AWT Conversion is a requirement of a Monroe County Ordinances and any such analysis would have been moot. While Monroe County may or may not have performed such an analysis, the Utility believes that the environmental concerns rather than cost savings is the driving force in the Ordinances enacted.

i. **POD 7**

KW believes it has produced the documents responsive to the request for production. If OPC believes other documents exist, which were not produced, it should so specify.

j. **Interrogatory 77**

KW's response to the interrogatory is responsive, and KW's records reflect that the check was attached. However, another copy will be provided to OPC. This, again, is an area into which OPC would have been free to inquire at deposition or is free to engage in further discovery with regard to.

k. **Interrogatory 78(b)**

The information regarding amounts paid to KW by Monroe County is reflected in the various documents, and the response to Audit Request No. 14, all of which has been provided to OPC. Additionally, this is a matter that could easily have been inquired into in deposition.

l. **Interrogatory 78(i)**

To the extent the documents exist, they have been provided.

m. **POD 68**

To the extent the documents exist, they have been provided.

n. **POD 73**

To the extent the documents exist, they have been provided, as OPC seems to acknowledge in its response. Additionally, it would have been simple to have determined whether any documents which OPC asserts were not produced in fact exist with a few questions at deposition.

o. **POD 75**

In its arguments above, OPC chastises the Utility for a lack of specificity as to the locations of responses to its questions. Yet, in the question above, OPC states: “. . . it is perfectly clear that the Company uses electronic means . . .” and yet provides no information on which documents it believes to exist in electronic format. KW is under no duty to create documents to respond to OPC’s request for production. If the documents existed and were available, they were produced. Here is another example of a matter that could have been followed up on at deposition.

p. **Lack of Affidavits**

The issue about the Affidavits is a red herring. Today, an Affidavit will be given to OPC which covers all three sets of interrogatories. Clearly, the two individuals who have signed the Interrogatories (Mr. Smith for OPC interrogatory sets 1 and 2 and Mr. Carter for OPC interrogatory set 3) could have been asked extensive questions about the interrogatories at deposition. It is clear that it is not the

Affidavit which OPC really seeks, but rather a delineation of which persons responded to which interrogatories. OPC relies upon its own instructions for its position that the information is required. However, nothing in the instructions can impose upon KW any obligation not otherwise required by the Uniform Rules. OPC's instructions could require the documents to be delivered by camel, but that would hardly impose upon KW a duty to actually make delivery of the documents in that fashion.

Since OPC asked for and received the right to serve 300 interrogatories in this case, it could have easily crafted an actual interrogatory which would have called for this information, and that would have been a different matter. Professor Trawick, in his Florida Practice and Procedure treatise, and our Supreme Court, in their standard interrogatory forms in the Civil Rules, routinely include *separate interrogatories* in which the individual answering the interrogatories is requested to be revealed. To try to sneak in additional interrogatories, or interrogatory subparts, in the form of instructions is not consistent with the Uniform Rules or the Florida Rules of Civil Procedure. Either way, KW voluntarily revealed to OPC (several times) the names of the four individuals who had worked on the interrogatory responses, and OPC could easily have inquired at deposition "Tell me which interrogatories in which you

assisted in the response” and then inquired appropriately.² Despite OPC’s failure to specifically pursue this line of questioning at deposition, KW agreed, in several cases, to provide as a “late-filed exhibit” which interrogatories a particular witness responded to or assisted in the response to.

q. **Bates Stamp Issue**

The whole “Bates stamp” issue is another non-issue. While there is absolutely no argument to explain how OPC has been prejudiced by this alleged omission (such lack of stated prejudice is actually a consistent theme in OPC’s Motion) and while such a process is not part of the normal discovery requirements under the Uniform Rules or the Florida Rules of Civil Procedure, KW acknowledges the requirement of the Procedure Order and stands ready, at the request of OPC, to come to OPC’s offices and number each and every of the thousands of pages produced, should OPC so request. This offer has been made to OPC previously.

8. OPC states that the requested information for interrogatories 34(e) and (f) and 38 “has not been provided”. Supplemental information responsive to

²OPC was repeatedly informed that William Smith, Paul DeChario, Doug Carter, and Gillian Seifert were the four individuals who had worked collectively on the interrogatories. The signing of the Affidavit was being delayed until the supplement was complete, so that one Affidavit could be done for the first two sets and the supplement, and OPC set three of those individuals for deposition. For whatever reason, OPC decided not to depose Paul DeChario.

interrogatories 34(e) and (f) was provided to OPC under cover letter of November 27, 2007. As to interrogatory number 38, the change orders were provided, as acknowledged on page 14 of OPC's motion.

The request for relief is inappropriate:

This small company has struggled with the voluminous discovery which OPC has served upon it and in no way (particularly given its efforts to voluntarily cooperate with OPC's discovery efforts) has KW responded in bad faith to the discovery served upon it. No extension of time for the Citizens' Prefiled Testimony, nor leave to file supplemental testimony, is appropriate in this case, particularly given OPC's complete lack of any explanation whatsoever how the very limited information which it asserts it does not have (and KW does not agree with those assertions) has prejudiced its ability to prepare for its case. KW has responded appropriately and adequately to the Citizen's first and second set of interrogatories, and first and second set of requests for production (and for that matter, also to the third set of discovery tendered upon it by OPC); it has agreed, as a late-filed deposition exhibit, to identify those persons who were requested at deposition to identify which interrogatories they participated in the response to – even though there was no such requirement that KW do so under the Uniform Rules; the company has produced the affidavits; and the company has offered, long ago, to come over to OPC's offices and paginate the

thousands of pages produced, although such pagination will serve no purpose in this case and will seem particularly attenuated given the fact that the pagination requirement only pertains to those documents produced pursuant to request for production of documents and many of the documents produced in this case were in fact produced (entirely consistently with the Uniform Rules), in response to Interrogatories. The Commission should also consider OPC's own inattention to detail, such as serving discovery after 5:00 PM and failure to follow up on e-mail discovery requests by hard copy, as required by the Procedure Order. OPC is attempting to generate controversy and prejudice to KW, without any real, tangible basis which relates to its ability to prepare its case.

If the Commission determines that KW should further clarify a response, or tender an additional set of documents (if, in fact, any are left untendered), then KW will comply. But what OPC has requested in its relief is, at least in part, a request for sanctions, which are totally inappropriate in this case and which would prejudice KW in its ability to receive and collect the rates for which it is constitutionally entitled.

KW requests that OPC's Motion be denied in its entirety.

Respectfully submitted this 3rd day of
December, 2007, by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail and fax to the following this 3rd day of December, 2007:

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