

Brandy Butler

From: Asha Maharaj-Lucas
Sent: Monday, August 06, 2018 10:57 AM
To: Kyesha Mapp; Mark Laux; Mary Anne Helton; Greg Shafer; Judy Harlow; Ashley Quick; Brandy Butler; Carlotta Stauffer; Hong Wang; Nickalus Holmes; Tiffany Brown; Commission Clerk; Commission Suite
Cc: Kate Hamrick; Jennifer Crawford; Braulio Baez
Subject: RE: Staff's Request for Oral Modification on Item 11 on the 8/7/2018 Agenda - Investigation into K W Resort Utilities Billing Practices

From: Braulio Baez
Sent: Friday, August 03, 2018 4:22 PM
To: Kyesha Mapp; Mark Laux; Mary Anne Helton; Greg Shafer; Judy Harlow
Cc: Asha Maharaj-Lucas; Kate Hamrick; Jennifer Crawford
Subject: Re: Staff's Request for Oral Modification on Item 11 on the 8/7/2018 Agenda - Investigation into K W Resort Utilities Billing Practices

Approved. Thanks.

Sent from my T-Mobile 4G LTE Device

----- Original message -----

From: Kyesha Mapp <KMapp@psc.state.fl.us>
Date: 8/3/18 4:11 PM (GMT-05:00)
To: Braulio Baez <BBaez@PSC.STATE.FL.US>, Mark Laux <MLAUX@PSC.STATE.FL.US>, Mary Anne Helton <MHelton@PSC.STATE.FL.US>, Greg Shafer <GShafer@PSC.STATE.FL.US>, Judy Harlow <JHarlow@PSC.STATE.FL.US>
Cc: Asha Maharaj-Lucas <AMaharaj@psc.state.fl.us>, Kate Hamrick <KHamrick@psc.state.fl.us>, Jennifer Crawford <jcrawfor@psc.state.fl.us>
Subject: Staff's Request for Oral Modification on Item 11 on the 8/7/2018 Agenda - Investigation into K W Resort Utilities Billing Practices

Staff requests approval to make an oral modification to Item 11 scheduled for the August 7, 2018, Commission Conference (Docket No. 20170086-SU, In re: Investigation into the billing practices of K W Resort Utilities Corp. in Monroe County). Modifications are necessary to clarify the "willfulness" standard utilized by the Commission in recent orders. The modification occurs in Issue 1. Staff's proposed modifications are shown below.

Corrections to Issue 1, specifically on pages 6-8 are shown below:

KWRU responded to staff's NOAV on July 16, 2018, and addressed the negotiated flat rate, pool charges, and BFC billing practices identified by staff. In its response, the utility stated that it mistakenly believed that its revision to Safe Harbor's bulk wastewater rate had been accepted by the Commission, similar to a developer's agreement for service. Additionally, in its response, KWRU pointed out that at the end of 2009, management

was moved in-house and has since routinely brought all matters before the Commission. Further, KWRU indicated it believed the pool charges were implemented reasonably under the tariff and were only implemented after consulting with staff. KWRU responded to staff's NOAV in regards to BFC billing practices by admitting it had billed several general service customers incorrect BFCs and stated it was an error that occurred in switching KWRU's billing system after the 2009 rate case. The utility also addressed Roy's Trailer Park in its response, and explained that it had engaged in numerous discussions with the owner to mitigate the customer's outstanding balance owed to the utility consistent with KWRU's approved tariffs. In addition, KWRU has made refunds to three of its general service customers to correct incorrect billing practices that occurred prior to the implementation of Order No. PSC-16-0123-PAA-SU (PAA Order) in April 2016. Staff believes it is also important to note that the utility's billing practices appear to be consistent with its approved tariff following the implementation of the PAA Order.

~~Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that "ignorance of the law" will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled, In re: Investigation into the Proper Application of Rule 25-14.003, Florida Administrative Code, Relating to Tax Savings Refund for 1988 and 1989 for GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, "willful" implies an intent to do an act, and that this is distinct from an intent to violate a statute or rule."~~

Pursuant to Section 367.161(1), F.S., the Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$5,000 for each day a violation continues, if such entity is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission, or any provision of Chapter 367, F.S. Each day a violation continues is treated as a separate offense. Each penalty is a lien upon the real and personal property of the utility and is enforceable by the Commission as a statutory lien. If a penalty is also assessed by another state agency for the same violation, the Commission's penalty will be reduced by the amount of the other agency's penalty. As an alternative to the above remedies, Section 367.161(2), F.S., permits the Commission to amend, suspend, or revoke a utility's certificate for any such violation. Part of the determination the Commission must make in evaluating whether to penalize a utility is whether the utility willfully violated the rule, statute, or order. Section 367.161, F.S., does not define what it is to "willfully violate" a rule or order. ~~In making similar decisions, the Commission has repeatedly held that utilities are charged with the knowledge of the Commission's Rules and Statutes.¹⁴¹ In other words, a utility cannot excuse its violation because it "did not know."~~

~~Willfulness is a question of fact. (Fugate v. Fla. Elections Comm'n, 924 So. 2d 74, 75 (Fla. 1st DCA 2006)) The plain meaning of "willful" typically applied by the Courts in the absence of a statutory definition, is an act or omission that is done "voluntarily and intentionally" with specific intent and "purpose to violate or disregard the requirements of the law." Fugate at 76.~~

The procedure followed by the Commission in dockets such as this is to consider the Commission staff's recommendation and determine whether or not the facts warrant requiring the utility to respond. If the Commission agrees with staff's recommendation, the Commission should issue an Order to Show Cause (show cause order). A show cause order is considered an administrative complaint by the Commission against the utility. If the Commission issues a show cause order, the utility is required to file a written response, which response must contain specific allegations of disputed fact pursuant to Rule 28-106.2015, F.A.C. If there are no disputed factual issues, the utility's response should so indicate. The response must be filed within 21 days of service of the show cause order on the respondent.

In recommending a penalty, staff reviews prior Commission orders. While Section 367.161, F.S., treats each day of each violation as a separate offense with penalties of up to \$5,000 per offense, staff believes that the general purpose of the show cause penalties is to obtain compliance with the Commission's rules, statutes, and orders. If a utility has a pattern of noncompliance with a particular rule or set of rules, staff believes that a higher penalty is warranted. If the rule violation adversely impacts the public health, safety, or welfare, staff believes that the sanction should be the most severe.

The utility has two options if a show cause order is issued. The utility may respond and request a hearing pursuant to Sections 120.569 and 120.57, F.S. If the utility requests a hearing, a further proceeding will be scheduled before the Commission makes a final determination on the matter. The utility may respond to the show cause order by remitting the fine. If the utility pays the fine, this show cause matter is considered resolved, and the docket closed.

In the event the utility fails to timely respond to the show cause order, the utility is deemed to have admitted the factual allegations contained in the show cause order. The utility's failure to timely respond is also a waiver of its right to a hearing. If the utility does not timely respond, a final order will be issued imposing the sanctions set out in the show cause order. It should be noted that if the Commission commences revocation or suspension proceedings, the Commission must follow very specific noticing requirements set forth in Section 120.60, F.S., prior to revocation or suspension of a certificate.

By billing rates that are not in the utility's approved tariff, KWRU appears to be in violation of the statutes. While staff believes occasional mistakes may be made by any utility, staff believes that making excessive and repeated mistakes demonstrates a "willful" disregard for of the utility's obligation to charge its approved rates in the sense contemplated by Section 367.161, F.S., and by Fugate. As discussed in subsequent issues, although the utility corrected these billing problems following the issuance of the PAA Order, Order No. PSC-16-0123-PAA-SU, in 2016, given the utility's pattern of failure to bill customers in accordance with its Commission-approved tariffs and the number of violations discovered within the three-year audited period, KWRU's mistakes are excessive and, therefore, appear to violate Sections 367.081(1) and 367.091(3), F.S. Staff believes that this situation warrants more than just a warning and recommends that KWRU should be ordered to show cause, in writing within 21 days, as to why it should not be fined a flat fee in the amount of \$1,000 for its apparent violation of Section 367.081(1) and 367.091(3), F.S., for charging unauthorized rates.

¹¹Order Nos. PSC-11-0250-FOF-WU, issued June 13, 2011, in Docket No. 100104-WU, *In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.*; PSC-07-0275-SC-SU, issued April 2, 2007, in Docket No. 060406-SU, *In re: Application for staff-assisted rate case in Polk County by Crooked Lake Park Sewage Company*; PSC-05-0104-SC-SU, issued January 25, 2005 in Docket Nos. 020439-SU and 020331-SU, *In re: Application for staff-assisted rate case in Lee County by Sanibel Bayous Utility Corporation*; *In re: Investigation into alleged improper billing by Sanibel Bayous Utility Corporation in Lee County in violation of Section 367.091(4), Florida Statutes.*