

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the billing practices of
K W Resort Utilities Corp. in Monroe County.

DOCKET NO. 20170086-SU

FILED: September 21, 2018

**PETITION BY THE OFFICE OF PUBLIC COUNSEL REQUESTING EVIDENTIARY
HEARING ON THE PROTESTED PORTIONS OF THE PROPOSED AGENCY ACTION**

The Citizens of the State of Florida (Citizens), by and through the Office of Public Counsel (OPC), pursuant to Section 120.57, Florida Statutes, and Rules 25-22.029 and 28-106.201, Florida Administrative Code (F.A.C.), file this protest of the Florida Public Service Commission's (PSC's) Order No. PSC-2018-0444-PAA-SU, issued August 31, 2018, (PAA Order). In the PAA Order, the PSC found that K W Resort Utilities Corp. (KWRU or Utility) engaged in incorrect billing practices, ordered KWRU to issue refunds to certain customers for a portion of the time period during which KWRU engaged in unauthorized billing, and imposed a penalty of \$10,000. However, the PSC failed to order KWRU to issue refunds for the entire time period that KWRU incorrectly billed customers. Rule 25-30.350, F.A.C., requires that customers shall be refunded the full amount of unauthorized billing. The Rule does not allow the PSC discretion to arbitrarily choose time periods for which some unauthorized billing must be refunded, while denying customers any remedy for unauthorized billing which occurred during other time periods. In support of their Petition, Citizens state as follows:

1. The name and address of the agency affected and the agency's file number:

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Docket No. 20170086-SU

2. The Citizens include all the customers of KWRU whose substantial interests are affected by the PAA Order because the PAA Order unlawfully authorizes the Utility to limit the timeframe for

which refunds are to be paid to customers for the Utility's admittedly improper billing, contrary to the unequivocal requirements of Rule 25-30.350, F.A.C. The Citizens also include the customers of all water and wastewater utilities in the state who may be affected by the improper application of Rule 25-30.350, F.A.C.

3. Pursuant to Section 350.0611, F.S., the Citizens who file this Petition are represented by the Office of Public Counsel with the following address and telephone number:

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
Telephone No. (850) 488-9330

4. The Citizens obtained a copy of the PAA Order via email on August 31, 2018.

5. At this time, the disputed legal and policy issues, the disputed issues of material fact, including a concise statement of the ultimate facts alleged, and those specific facts which Citizens contend warrant reversal and/or modification of the PAA Order, are discussed below.

The Citizens' protest is primarily about whether the PSC properly applied Rule 25-30.350, F.A.C., when it failed to order the Utility to issue refunds to customers for the *entire* period of time during which the Utility admitted that it had engaged in unauthorized billing practices. The OPC proposes a two-stage process for resolving this protest. Citizens submit that the PSC should treat the legal issue as a threshold issue that can be briefed and decided first. If OPC prevails on the legal issue, then the PSC should determine any factual issues related to the calculation of the refunds KWRU owes its customers. The calculation of the refunds should be a straightforward process by which the PSC simply directs its audit staff to include the period of 2009 through April 2013 in its audit of KWRU's billing practices. Resolution of the legal issue first will minimize the costs of the proceeding, and thus minimize any financial exposure for the customers.

By way of background, KWRU was previously caught engaging in unauthorized billing in a separate case several years before the instant docket and order. *See* PAA Order, p. 2, *citing*, Order Nos. PSC-02-1165-PAA-SU and PSC-02-1711-TRF-SU. As such, KWRU is a repeat offender.

As to the instant matter, Safe Harbor Marina was not billed in compliance with the Commission's approved flat rate tariff of \$947 per month, but instead was billed a "negotiated" flat rate of \$1,650.67 per month. *See* Order No. PSC-17-0091-FOF-SU. KWRU does not dispute that it charged the higher rate. KWRU claims to have reached a settlement with Safe Harbor Marina which resolved all billing disputes and claims, including improperly charging Safe Harbor Marina the incorrect rates. However, that alleged settlement was apparently entered into before the Final Order in the last rate case was issued *and has never been submitted to the Commission for review*. Further, the amount of the refund calculated for Safe Harbor Marina by staff does not go back to the date the improper billing began on or about April 20, 2009; therefore, pursuant to Rule 25-30.350, F.A.C., Safe Harbor Marina is owed refunds for the entire time period from April 2009 through March 2016.

Additionally, KWRU has a "pool tariff" which is applicable to pools located within the Key West Golf Club Homeowners Association (KWGC HOA). The tariff expressly and exclusively applies only to pools owned by the KWGC HOA. However, KWRU charged the "pool tariff" to two additional customers, Sunset Marina and Carefree Property, contrary to its tariff. As such, pursuant to Rule 25-30.350, F.A.C., KWRU owes refunds to those customers for the entire time that it improperly charged them outside the authorizations of a tariff.

As to the Base Facility Charge (BFC), KWRU admitted that it billed several general service customers incorrect BFCs. The evidence shows that KWRU billed numerous customers based on the number of units or individual dwellings present behind a master meter, rather than the appropriate BFC based on the customer's meter size, as provided in its tariff. Additionally, the PSC found that KWRU

overbilled Sunset Marina \$1,139.84 per billing unit. Pursuant to Rule 25-30.350, F.A.C., these customers are due refunds for the entire period of time they were charged unauthorized rates, not merely the limited period of time included in the PSC's audit.

Therefore, Citizens first protest the legal issue regarding whether the PSC properly followed Rule 25-30.350, F.A.C. Next, Citizens protest the determination of the refund amounts ordered in the PAA, any factual issues related to the portions of the PAA Order discussed above, and the disputed issues listed below.

Further, Citizens' reserve their right to fully participate in the hearing process to address any issues identified in any other party's protest or cross-petition. Below is a tentative list of issues identified by Citizens as being ripe for hearing in this protest.

Statement of Disputed Facts and Issues

Legal and Policy Issues

- Issue 1. Is it appropriate under Rule 25-30.350, F.A.C. to order a utility to issue refunds for only a portion of the time during which the utility engaged in improper billing practices?
- Issue 2. Is it appropriate to limit the PSC's audit regarding improper billing practices to a period of time that does not encompass the full period of time during which improper billing occurred?

Factual Issues

- Issue 3. What are the appropriate amounts to be refunded to all affected customers, as calculated from billing records or from an estimate based on the customers' past consumption, pursuant to Rule 25-30.350, F.A.C.?

Statement of the Ultimate Facts Alleged

The ultimate facts from each of the issues discussed above will vary depending upon the testimony and discovery brought forth in this hearing; however, the result should be that all customers who were incorrectly billed should receive refunds covering the full time period from date the

unauthorized billing started in or about 2009, through the date that the Utility concedes it finally corrected its billing in or about 2016.

6. Pursuant to Sections 367.081 and 367.121, F.S., the PSC has the authority and duty to prescribe and fix just and reasonable rates and charges. Pursuant to these statutes, adjustments should be made to the refunds ordered by the PAA Order. In the broadest terms, the Citizens' ultimate factual allegation is that the PAA Order's refund provision is inadequate, unfair, unjust, and unreasonable in that it fails to cover the entire time period during which unauthorized, incorrect billing occurred as required by Rule 25-30.350, F.A.C. The disputed issues of material fact delineated in and by Citizens' protest should be interpreted broadly in order to effectuate full discovery on the disputed issues, thereby allowing the parties to adequately determine the scope of the issues for consideration and determination. Citizens' protest encompasses any additional issues logically arising from the specifically identified areas, including related issues that may arise during the process of discovery issued in this case. Further, Citizens reserve the right to fully participate in the hearing process, take positions and file testimony on any additional issues raised by any other party's protest or cross-petition, and resolve any issues which come to light during the pendency of this docket.

7. Citizens are entitled to a *de novo* proceeding on the disputed legal issues and issues of material fact raised in Citizens' protest of the PAA Order. Citizens maintain that the Utility has the burden of proof in all aspects of the requested evidentiary hearing pursuant to Section 120.57, F.S., and if the burden of proof is not satisfied, the disputed legal issues and issues of material fact must be resolved in the favor of the ratepayers.

8. By Order No. PSC-2018-0444-PAA-SU, protests of the PAA Order shall be filed with the Office of Commission Clerk no later than the close of business on September 21, 2018. This Petition has therefore been timely filed.

9. Rule 25-30.350, F.A.C., and Sections 367.081, 367.0816, and 367.121, F.S., are the specific rule and statutes that require reversal or modification of the PAA Order.

10. Citizens request that the Commission take the following actions with respect to this protest and objection to the PAA Order:

a) Establish a hearing schedule to resolve the threshold disputed legal and/or policy issues as described above relating to the application of Rule 25-30.350, F.A.C., including any additional legal and/or policy issues raised by a party's protest or cross-protest and on any legal and/or policy issues which come to light during the pendency of this docket.

b) Contingent upon the resolution of the above-referenced disputed legal and policy issues, direct the PSC's audit staff to expand its audit of KWRU's billing practices to cover the time period during which the incorrect billing started in 2009 through the date the billing was corrected in 2016.

c) Contingent upon the resolution of the above-referenced disputed legal and policy issues, establish a hearing schedule to resolve the disputed issues of material fact, if any, as described above, including any additional issues raised by a party's protest or cross-protest and on any issues which come to light during the pendency of this docket.

d) Order KWRU to issue refunds to all customers who were incorrectly billed, and order that said refunds shall cover the entire period of any unauthorized, incorrect billing in accordance with Rule 25-30.350, F.A.C. *See* June 12, 2018 Letter from OPC to PSC, Document No. 04176-2018, attached hereto as Exhibit A.

WHEREFORE, the Citizens hereby protest and object to Commission Order No. PSC-2018-0444-PAA-SU, as provided above, and respectfully petition the Commission to conduct a formal

proceeding, as required under the provisions of Section 120.57, F.S., to resolve the threshold legal and/or policy issues described above, and to subsequently, if necessary, conduct a formal evidentiary hearing, as required under the provisions of Section 120.57, F.S., at a convenient time within or as close as practical to the Utility's certificated service area.

Respectfully Submitted,

JR Kelly
Public Counsel

/s/ Stephanie A. Morse
Stephanie A. Morse
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the Office of Public Counsel's PETITION REQUESTING EVIDENTIARY HEARING ON THE PROTESTED PORTIONS OF THE PROPOSED AGENCY ACTION has been furnished by electronic mail to the following parties on this 21st day September, 2018:

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RICHARD CORCORAN
Speaker of the House of Representatives

June 12, 2018

Carlotta S. Stauffer, Director
Office of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 20170086-SU, *In re: Investigation into the billing practices of K W Resort Utilities Corp. in Monroe County.*

Dear Ms. Stauffer:

On March 16, 2018, the Public Service Commission staff held an informal meeting with representatives from KW Resort Utilities Corp. ("the Utility or KWRU"), Monroe County and our Office of Public Counsel (OPC). OPC was requested to submit comments concerning staff's investigation into KWRU's billing practices. On May 17, 2018, the Commission issued KWRU a Notice of Apparent Violation (Document No. 03728-2018), noting many of the issues which are addressed herein.

The following is a synopsis of the comments offered by OPC:

1. According to Order No. PSC-17-0091-FOF-SU, Safe Harbor Marina was not billed in compliance with the Commission's approved flat rate tariff of \$947 per month, but instead was billed a "negotiated" flat rate of \$1,650.67 per month. KWRU does not dispute that it charged the higher rate; however, KWRU claims the negotiated rate met the intent of the Commission's approved tariff. Further, KWRU claims to have reached a settlement with Safe Harbor Marina which resolved all billing disputes and claims, including improperly charging Safe Harbor Marina the incorrect rates. However, that alleged settlement was apparently entered into before the Final Order in the last rate case was issued and has never been submitted to the Commission for review. Further, the amount of the refund calculated for Safe Harbor Marina by staff does not go back to the date the improper billing began; therefore, Safe Harbor Marina may still be owed refunds despite any purported settlement.

Based upon KWRU's actions, OPC submits the Commission should order KWRU to show cause why it did not comply with the Commission's approved tariff. The Commission should also investigate the period in which KWRU charged the incorrect rate and calculate the appropriate refund due to this customer for the entire period KWRU was in violation of its tariff.

2. KWRU has only one "pool tariff" which is applicable to pools located within the Key West Golf Club Homeowners Association (KWGC HOA). The tariff expressly and exclusively applies only to pools owned by the KWGC HOA. During staff's investigation, it became apparent that KWRU was also charging the "pool tariff" to other customers as well. Therefore, the Commission must determine whether to order the Utility to show cause why it charged the pool tariff to customers outside the KWGC HOA, whether the Utility was operating in violation of its tariff, and whether and to what extent those other customers with pools are owed refunds.
3. The Commission should examine the settlement agreement between KWRU and Roy's Trailer Park to ascertain whether there are any remaining issues for the Commission to address.
4. Regarding the additional irregular billing practices discovered during the Commission's investigation, it appears that staff calculated refunds by applying the appropriate method for customer charges; however, there are variances between staff's calculation and KWRU's calculation. The residential service tariff approved by the Commission in KWRU's 2009 rate case contains language different from the Utility's current residential service tariff, which went into effect February 26, 2018; however, any difference in the language does not relieve KWRU from its obligation to properly bill its customers. In addition, the "look-back" period in staff's billing analysis in calculating refunds, in some instances, does not appear to go all the way back to the final order issued in the 2009 rate case when KWRU started incorrectly billing these customers.
5. In addition, the Commission's review must determine whether KWRU followed, not only the letter, but also the spirit of the law when determining whether KWRU improperly charged residential service rates to general service customers with private sub-meters. It is axiomatic that ignorance of the law is no excuse for noncompliance, and appropriate action must be taken by the Commission to ensure the affected customers are made whole.
6. Regarding the May 17, 2018 Notice of Apparent Violation, the Notice was silent on the issue of customer refunds and the purported settlements addressing some of those refunds.

Thus, the Commission should determine whether there are any additional refunds owed to KWRU's customers and whether the Utility should be ordered to show cause for any apparent violations of its prior tariffs.

In conclusion, OPC looks forward to reviewing KWRU's response to the Commission's Notice of Apparent Violation and reserves the right to respond accordingly. If there are any questions, please let us know.

Respectfully submitted,

J.R. Kelly
Public Counsel

/s/ Erik L. Saylor

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