

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: October 22, 2018

**OFFICE OF PUBLIC COUNSEL'S RESPONSE TO KW RESORT UTILITIES CORP.'S
MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STRIKE**

The Citizens of the State of Florida (Citizens), by and through the Office of Public Counsel (OPC), pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), hereby respond to the Motion to Dismiss or in the Alternative Motion to Strike (Motion) filed by K W Resort Utilities Corp. (KWRU), regarding Citizens' Petition Requesting Evidentiary Hearing on the Protested Portions of the Proposed Agency Action (Petition) and state the following:

Facts

The Commission opened this docket in order to conduct a "full audit and investigation" of KWRU's billing practices after it found reason to believe the utility's billing practices over time had been inconsistent with its approved tariff. PAA Order, at 1.

The Commission found that, since at least 2009, KWRU charged rates which were inconsistent with its approved tariff. PAA Order, at 3, 4, 6, 7, 8.

In this docket, the Commission limited its audit and investigation period to April 2013 through March 2016. PAA Order, at 6. In the PAA Order, the Commission found that "the time period covered by the audit is a reasonable remedy to mitigate the Utility's incorrect billing practices ..." *Id.*

Rule 25-30.350(2), F.A.C., states "In the event of an overbilling, the utility **shall** refund the overcharge to the customer based on available records. If the commencement date of the

overbilling cannot be determined, then an estimate of the overbilling shall be made based on the customer's past consumption." (Emphasis added).

The PAA Order references twelve customers who were subjected to unauthorized billing in this case. PAA Order, at 3-4.

In its Petition, Citizens stated the PAA Order unlawfully limited the timeframe for the audit, and thus the potential refunds, contrary to Rule 25-30.350, F.A.C., and that the Citizens 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. (Petition, at 1-2).

In its Petition, OPC also stated that "all customers who were incorrectly billed should receive refunds covering the **full time period** from the date the unauthorized billing started in or about 2009 ..." Petition, at 4-5 (emphasis added).

Statutory Authority Grants OPC Standing

KWRU alleges that the Public Counsel lacks standing in this case, and for that reason, claims OPC's protest of the PAA Order should be dismissed. KWRU misapprehends both the statute governing the Public Counsel, and the legal principle of standing in administrative proceedings.

The Public Counsel bears the statutory duty and authority "... to appear, in the name of *the state or its citizens*, in any proceeding or action before the commission or counties and urge therein *any position which he or she deems to be in the public interest ...*" Fla. Stat. § 350.0611(1) (emphasis added).

In the Petition, OPC raised a fundamental issue of due process, i.e., whether the Commission must follow the rules it promulgates.

Standing cannot simply “disappear” based on the outcome of a given proceeding. *Peace River/Manasota Reg'l Water Supply Auth. V. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009). Moreover, “the concept of ‘standing’ in an administrative proceeding depends on whether the particular entity at issue qualifies as a ‘party.’” *Id.*, citing, Fla. Stat. §120.52(12)(b).¹ Pursuant to Fla. Stat. §120.52(13)(b), there are several grounds upon which a person is considered a “party” to an administrative proceeding, including but not limited to (1) whether there is a statute granting the entitlement to participate, (2) whether there is an agency regulation granting the right to participate, or (3) whether the facts demonstrate a person’s substantial interests will be affected by the agency’s action.² *Id.* The statute which entitles OPC to participate in the Commission’s proceedings is Fla. Stat. § 350.0611(1). As such, OPC is a “party” in this proceeding because it is entitled by statute to participate.

The only case KWRU presented in support of its position on standing is wholly inapplicable to the instant case because its holding relates to corporate entities who did not have an independent statutory authority separate from Ch. 120, Fla. Stat., to participate in the action. *Agrico Chem. Co. v. Dep't of Env'tl. Regulation*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981)(rejecting corporate competitors’ attempt to participate in another company’s permitting process). Rather, in *Agrico*, the corporate entities’ attempt at standing was based upon an

¹ Fla. Stat. §120.52 has since been amended and renumbered, such that the former 12(b) is now (13)(b); the text of this subsection remained the same. For the remainder of this Response, OPC will refer to the 2018 numbering, which is Fla. Stat. §120.52(13)(b).

² The full text of Fla. Stat. 120.52(13)(b) (2018) follows:

Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by the proposed agency action, and who makes an appearance as a party.

interpretation of the definition of “party” contained within §120.52(13)(b). Unlike OPC, whose standing is granted by Fla. Stat. § 350.0611(1), the companies at issue in *Agrico* relied on a provision within Fla. Stat. §120.52(13)(b) by which persons whose substantial interests will be affected may participate in an agency’s proceeding. As explained above, OPC’s statutory authority is based on Fla. Stat. § 350.0611(1), thus, the Legislature granted OPC standing in Commission proceedings separate and apart from the tests which govern the standing of entities which lack separate statutory authority. The phrase in Fla. Stat. §120.52(13)(b) which recognizes standing based on a separate statutory right is distinct from the subsequent phrase which conditions standing on a substantial interests analysis. As such, the *Agrico* test is wholly inapplicable and irrelevant to OPC’s standing in this case, and KWRU’s argument for dismissal based on the alleged lack of standing must be denied.

The most basic rule of pleading a motion to dismiss is that the movant takes the facts pled in the complaint (or in this case, the Petition) as true, and the movant’s burden is to show that, assuming the facts pled are true, the Petition fails to state a cause of action, as a matter of law. *E.g., Huet v. Mike Shad Ford, Inc.*, 915 So. 2d 723, 725 (Fla. 5th DCA 2005).

The unsworn factual allegations KWRU raised in its Motion³ are outside the scope of a motion to dismiss, and cannot be considered by the Commission, according to Fla. R. Civ. P. 1.140(b)(6) and binding precedent, including but not limited to the very authority cited by KWRU, *i.e., Huet, supra* (“[t]he trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not

³ In its Motion, KWRU alleges that one of the twelve customers listed in the PAA Order agreed to settle the incorrect billing, and that one other customer would “most likely” settle with KWRU on the issue of being incorrectly billed. Motion, at 5. No purported settlement has been presented to the Commission for review or approval.

for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them”).

KWRU improperly attempts to bootstrap a purported “settlement” (which was never presented to or approved by the Commission, and thus is not part of the record) into dismissal of this case, and thus dismissal of the fundamental right of all Citizens to due process. Dismissal of the Citizens’ Petition on this ground would be incorrect and constitute reversible error.

KWRU cites *Ginsberg v. Lennar Fla. Holdings Inc.*, 645 So. 2d 490, 501 (Fla. 3d DCA 1994) to support its criticism of the facts pled by OPC in its Petition. However, all of the requisite facts at issue are clearly outlined in OPC’s Petition, which references the PAA Order: the Commission arbitrarily cut off the time frame covered by its audit, rather than including the full time frame of the incorrect billing, in spite of the fact that Rule 25-30.350, F.A.C., requires that the entirety of any incorrect charges must be refunded. The Rule does not state that anything less is appropriate, or that “mitigation” instead of full compensation for all overcharges is lawful or appropriate.

Moreover, KWRU was incorrect to suggest in its Motion that OPC’s Petition relates solely to two customers. Motion, at 2, para. 7 and fn. 1. In its Petition, OPC stated that “numerous customers” *in addition to* Sunset Marina had been subjected to both the incorrect billing and the failure of the Commission to audit the entire timeframe of the incorrect billing. Petition, at 3. The Commission’s discussion of the Base Facility Charge error alone lists ten customers for whom the audit period was improperly limited. PAA Order, at 4. Due to the limitation the Commission placed on the investigation, it is impossible for the Commission to confirm that all overbilling has been refunded, as required by the plain terms of Rule 25-30.350, F.A.C.: “in the event of an

overbilling, the utility **shall refund** the overcharge.” The language of the Rule is neither permissive, nor conditional, but rather it states an unequivocal mandate.

The Purported “Settlement” Referenced in KWRU’s Motion Has Not Been Filed or Approved by the PSC, and thus has No Bearing on OPC’s Petition

The PAA Order does not reference or adopt any alleged “settlement” concerning either Sunset Marina or Safe Harbor Marina. More importantly, for purposes of KWRU’s Motion to Dismiss, OPC’s Petition does not allege the existence or validity of such a settlement. Instead, OPC’s Petition alleges the **exact opposite**: that the alleged settlement was never filed with the Commission and never approved by the Commission. As such, there is no competent evidence that it exists for purposes of the record in the instant case.

The allegation in OPC’s Petition, which must be accepted as true for purposes of the Motion to Dismiss, is that there is no operative settlement in this case as it relates to Sunset Marina or Safe Harbor Marina because the PSC never approved one via an Order. Therefore, KWRU’s citations to case law regarding settlements which were explicitly approved by the Commission are completely inapposite and immaterial to this case. *See, South Fla. Hosp. v. Jaber*, 887 So. 2d 1210, 1212 (Fla. 2004)(“[t]he settlement agreement was reviewed by PSC staff and submitted for approval at an agenda conference ... the PSC issued an order approving the settlement agreement ...”). KWRU incorrectly construed the holding in *Jaber* because it ignored the key aspect of the Commission’s ruling, i.e., the reason the Commission found it was not required to conduct an evidentiary hearing in that case was because it had already “acted in accordance with Florida law and its own policies and procedures in approving the negotiated settlement.” Contrary to the facts of *Jaber*, there has never been a PSC Order approving the alleged Sunset Marina settlement in this case. At most, any purported settlement agreement may in the future be considered during the

expanded audit and investigation requested by OPC in its Petition, should KWRU ever provide such a settlement document to the Commission and the parties.

KWRU similarly misconstrued *Citizens v. Fla. PSC*, 146 So. 3d 1143 (Fla. 2014)(PSC held a special agenda conference regarding the merits of a proposed settlement agreement and later issued an order approving the settlement). Again, there is no allegation in this case, nor could there be, that any PSC policies or procedures were followed, much less that the Commission did hold, or could have held, a hearing and issued an order retroactively approving an un-filed purported settlement involving Sunset Marina. Therefore, the alleged existence of such a settlement is not a fact which must be considered in KWRU's Motion, and it and cannot form the basis of either a dismissal or striking any part of OPC's Petition.

WHEREFORE, OPC requests the Commission enter an Order denying KWRU's Motion to Dismiss or in the Alternative Motion to Strike.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the Citizens' RESPONSE TO KW RESORT UTILITIES CORP.'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STRIKE has been furnished by electronic mail to the following parties on this 22nd day of October, 2018:

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