

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: November 19, 2018

**OFFICE OF PUBLIC COUNSEL'S MOTION FOR PARTIAL SUMMARY FINAL ORDER
IN THE PROTESTED PORTIONS OF THE PROPOSED AGENCY ACTION AND
MEMORANDUM OF LAW IN SUPPORT OF THE MOTION**

The Citizens of the State of Florida (Citizens), by and through the Office of Public Counsel (OPC), pursuant to Section 120.57(1)(h), Florida Statutes (2018), and Rule 28-106.204, Florida Administrative Code (F.A.C.), file this motion for the entry of a Partial Summary Final Order.

SUMMARY OF RELIEF REQUESTED

OPC files this motion in the interest of administrative efficiency. Because OPC's protest hinges on a straightforward legal issue, resolution of the threshold legal issue could prevent any unnecessary cost and delay which would result from a full administrative fact-finding proceeding. As explained below, the PSC's decision on the legal issue could eliminate the need to go forward with further proceedings. As such, OPC requests a Summary Final Order on the legal issue regarding the construction of Rule 25-30.350, F.A.C., as outlined herein.

The sole question presented in this motion is whether the PSC properly interpreted and complied with Rule 25-30.350, F.A.C. (the Rule), when it limited the scope of its audit and investigation of K W Resort Utilities Corp.'s ("KWRU's" or "Utility's") billing practices. Specifically, OPC submits the Rule requires the Commission to order KWRU to refund all overcharges to its customers from the date the overbilling began to the date the overbilling ended, and the plain language of the Rule does not provide PSC discretion to arbitrarily restrict the refund to a shorter time period. Stated otherwise, the issue is whether it is correct to interpret the Rule in a way that allows

KWRU to refund its customers an amount which is less than the full amount KWRU overcharged said customers.

In the instant case, the Utility admitted, and the PSC determined, that KWRU had engaged in improper billing for a period of six to seven years (2009-2016). However, the PSC restricted the time period of its billing investigation and audit to a period of three years (2013-2016), which is approximately four years fewer than the total time period for which the Utility itself admitted that it engaged in incorrect billing practices. As a result of this decision, the PSC decided, **before** conducting the “full” audit that it had ordered in Docket No. 150071-SU, that the scope of any potential refunds would not include the full timeframe during which customers were incorrectly billed.

If the legal question is answered in the affirmative, i.e., that the PSC properly interpreted the Rule, that decision will dispose of OPC’s protest of the PAA Order. If the threshold legal question is answered in the negative, PSC Staff will simply need to initiate and conduct a “full” audit dated back to 2009 to recalculate the correct amount owed to the subject customers.

It is only after the initial legal question regarding Rule interpretation is decided that there will be the potential for disputed issues of material facts, but not before.¹

In support of this motion, OPC states as follows:

BACKGROUND AND FACTUAL SUMMARY

1. The Commission opened this docket upon identifying billing practices that appeared to be inconsistent with KWRU’s approved tariff. Order No. PSC-2018-0444-PAA-SU, (PAA Order), p. 1; see also *In re: Application for increase in wastewater rates in Monroe County by K W Resort Utilities Corp.*, Order No. PSC 2017-0091-FOF-SU (2017 Order), p. 82.

¹ Consistent with this motion, OPC stated on page four of its September 21, 2018 Petition Requesting Evidentiary Hearing on the Protested Portions of the PAA, under the heading “Factual Issues,” the appropriate amount to be refunded is the only factual issue to be determined.

2. The Commission acknowledged that the information available during its investigation showed that KWRU had engaged in unauthorized billing beginning in 2009 and continuing through March 2016. PAA Order at 3-4, 6.

3. KWRU further admitted that it began its unauthorized billing in 2009. PAA Order, p. 4 (stating KWRU “**admitted**” to incorrect billing, and that KWRU rationalized the incorrect billing by stating it was an error that resulted from the utility changing its billing system after its 2009 rate case)(emphasis added).

4. The Commission pronounced that “a **full** audit and investigation is the most effective solution” to rectifying the unauthorized billing. 2017 Order, p. 82 (emphasis added).

5. Instead of conducting a full audit for the identified period of 2009 to 2016, PSC Staff elected to limit its audit of KWRU’s billing to the time period of April 2013 through March 2016. PSC Staff Recommendation, Document No. 04890-2018, p. 9. The Commission approved the truncated audit period, finding that “the time period covered by the audit is a **reasonable remedy to mitigate the Utility’s incorrect billing practices ...**” PAA Order at 6 (emphasis added).

6. Rule 25-30.350(2), F.A.C., provides the following:

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).

7. The record below does not contain any indication that the commencement date of the overbilling in this case could not be determined. Moreover, the Commission recognized that KWRU admitted that it had incorrectly billed its customers since 2009 when it changed its billing system.

PAA Order, p. 4. The record does not contain any indication that the PSC Staff chose the truncated audit dates of April 2013 through March 2016 as an estimate of the actual overbilling.

8. In its PAA Order, the PSC ordered KWRU to issue refunds to certain customers for the time period between April 2013 and March 2016, and imposed a penalty of \$10,000 on KWRU. PAA Order at 6-10. Separate from the aforementioned customers, KWRU reportedly issued refunds to numerous additional customers for the time period April 2013 through March 2016 because of the findings in the Staff Auditor's Report dated September 5, 2017.² See PSC Document No. 00788-2018, Letter from Barton W. Smith dated January 30, 2018, and PSC Document No. 01516-16 Letter from Martin S. Friedman dated March 21, 2016. Based on the documentation, it appears those additional customers did not receive refunds for the time period 2009 through March 2013.

9. By electing not to audit the full time period for which it determined unauthorized billing occurred, and instead choosing to audit a shorter time period of April 2013 through March 2016, the Commission failed to comply with its own Rule 25-30.350(2), F.A.C., and make any effort to determine what, if any, overbilling was committed by KWRU from 2009 through March 2013.

MEMORANDUM OF LAW

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. Fla. Dep't. of Transp. v. J.W.C. Co., 396 So. 2d 778, 785 (Fla. 1st DCA 1981).

Section 120.57(h), F.S., provides in pertinent part, "[a]ny party to a proceeding in which an administrative law judge has final order authority may move for a summary final order when there is no genuine issue as to any material fact." Section 120.57(1)(h), F.S. The Commission has previously

² FPSC Document No. 09533-2017.

recognized that “the purpose of a summary final order is to avoid the expense and delay of trial.” *In Re: Wedgefield Utilities, Inc.*, Order No. PSC-01-1554-FOF-WU, at 8.

A summary final order is similar in many aspects to a summary judgment under the Florida Rules of Civil Procedure. *See Thomas v. Eckerd Drugs*, 987 So. 2d 1262, 1263 (Fla. 1st DCA 2008),³ see also *National Airlines, Inc. v. Florida Equipment Co.*, 71 So. 2d 741, 744 (Fla. 1954)(“the function of the rule authorizing summary judgments is to avoid the expense and delay of trials ...”). Moreover, the Rules of Civil Procedure provide that a summary judgment “may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” Fla. R. Civ. P. 1.510(c). 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. However, simply requiring a refund is not just or reasonable if said refund does not include all overpayments which can be determined based on records or from estimations based on past consumption. Within its statutory authority, the PSC has great discretion; however, the PSC may not ignore the strictures of clear statutory language in a manner that results in rates and outcomes that are unjust, unreasonable, or arbitrary.

In this case, the PSC unilaterally, and with a merely conclusory assertion rather than an explanation, elected to limit the time frame of its audit and investigation into the incorrect billing it detected. However, Rule 25-30.350, F.A.C., does not allow the PSC discretion to arbitrarily choose or limit time periods for which some unauthorized billing must be refunded, and thereby deny customers any remedy for unauthorized billing which occurred during other time periods. The plain language of the Rule states that in the event of an overbilling, a utility “shall” refund the overcharge based on available records. Rule 25-30.350(2), F.A.C. The word “mitigate” does not appear anywhere in the Rule. If anything, the Rule clearly states an intent to take all measures necessary to capture

³ *See also Wedgefield* at 7-9, for an analysis of the application of the summary judgment procedures, burdens, and standards to actions for summary final orders under Ch. 120, Fla. Stat.

and refund the full scope of overbilling, not to err on the side of cheating customers of their full refunds for purposes of expediency or leniency to the utility. This is clear in the Rule's mandate that, if the exact commencement date of overbilling cannot be determined, then an estimate of the overbilling must be made based on past consumption. *Id.*

There are no material facts in dispute – KWRU admitted that it billed customers incorrectly starting in 2009 when it changed its billing system. The Staff Auditor's Report and the PAA Order are devoid of any indication that records dating back to the admitted 2009 start of the overbilling are not available. In this case, the PSC simply elected to deny customers the full audit and investigation ordered by deciding not to set the billing audit and investigation period back to the 2009 start date of the overbilling. As a result, the PSC may have deprived numerous customers of the opportunity for refunds of the entire amounts overbilled, contrary to the plain language of the Rule. As such, any calculation of refunds which starts the refund date from 2013 rather than 2009 is clearly in violation of the plain language of the Rule.

In its Petition, OPC proposed a two-stage process for resolving its protest. Citizens hereby submit that the PSC should treat the legal issue on what, if any, discretion is provided by Rule 25-30.350, F.A.C., as a threshold issue that can be briefed and decided first, pursuant to the instant motion. If OPC prevails on the legal issue, then the PSC should retain jurisdiction to calculate the correct refunds due under the Rule. If OPC loses the legal issue, then the matter ends. Resolution of the simple, straightforward legal issue first will minimize the costs of the proceeding, and thus minimize any financial exposure for the customers.

OPC has conferred with all other parties of record. Counsel for KWRU informed OPC that, until the Commission rules upon KWRU's Motion to Dismiss, he believes OPC's Motion is premature. Staff informed OPC that Staff does not take a position on motions filed by the parties.

WHEREFORE, OPC hereby respectfully requests the Commission to issue a Summary Final Order holding that Rule 25-30.350, F.A.C., requires overcharges by a utility to be refunded to customers, that “mitigation” via partial refund of overbilling is not a remedy allowed under the Rule, and that all amounts overcharged by KWRU must be refunded to customers for the full time period 2009 through March 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the Office of Public Counsel's MOTION FOR PARTIAL SUMMARY FINAL ORDER has been furnished by electronic mail to the following parties on this 19th day of November, 2018:

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