

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of billing practices of
KW Resort Utilities Corp. in Monroe County

Docket No.: **20170086-SU**

**KW RESORT UTILITIES CORP.'S RESPONSE TO OFFICE OF PUBLIC COUNSEL'S
MOTION FOR PARTIAL SUMMARY FINAL ORDER AND CROSS-MOTION
FOR SUMMARY FINAL ORDER AND MEMORANDUM OF LAW IN
SUPPORT OF THE CROSS-MOTION**

KW RESORT UTILITIES CORP., a Florida corporation (“Utility” or “KWRU”), by and through undersigned counsel and pursuant to Order No. PSC-2018-0560-PCO-SU, responds to OFFICE OF PUBLIC COUNSEL’s (“OPC”), Motion for Partial Summary Final Order (“OPC Motion”) and further files its Cross-Motion for Summary Final Order and Memorandum of Law in Support of the Cross-Motion (“Utility Motion”), and in support thereof, states as follows:

PRELIMINARY STATEMENT

OPC has now identified the legal issue in its Petition – specifically, OPC is demanding that the Public Service Commission (“Commission”) re-visit a concluded audit using the timeframe that OPC desires. This is not a claim by customers seeking a refund of alleged over billings. The basis for OPC’s demand is not the Florida Administrative Code provision¹ as relied upon in Order No. PSC-2018-0444-PAA-SU (“PAA Order”), but, instead, a separate Rule that is inapplicable to audits. OPC has also not addressed the threshold issues in this action, such as OPC’s complete failure to confer with the few affected ratepayers, or addressed why OPC believes that its statutory authority to represent the general body of ratepayers takes precedence over its obligations as attorneys to have the consent to represent individual ratepayer clients.

¹ Rule 25-30.360, F.A.C.

FACTS AND PROCEDURAL HISTORY

1. Pursuant to Order No. PSC-2017-0071-FOF-SU, issued March 13, 2017, Commission “staff was ordered to open a new docket and conduct a full audit and investigation into KW Resort Utilities Corp.’s (KWRU or Utility) billing practice in order to determine if any orders, rules, or statutes were violated by the Utility.” *See* Notice of Apparent Violation, May 17, 2018, at 1.
2. These alleged violations were due to an audit of billing tariffs, alleging violations of Fla. Stat. §§ 367.081(1), 367.091(4). *Id.* 1-3.
3. Specifically, the Commission was not investigating any customer complaints, or issues of improper overcharging by specific customers, but was determining, pursuant to its statutory authority, if the Utility was imposing and collecting those rates and charges approved by the Commission for the particular class of service involved, and if the Utility had charged “customers in a manner inconsistent with its Commission-approved tariffs[.]” *Id.* at 2.
4. Penalties, if any, were to be assessed by the Commission pursuant to Fla. Stat. §§ 367.161. *Id.* at 3.
5. OPC, on June 12, 2018, requested that the Commission attempt to discern if the Utility had followed not just the law, but “the spirit of the law[.]” Petition Ex. A at 5.
6. On August 31, 2018, the Commission issued Order No. PSC-2018-044-PAA-SU (“PAA Order”).
7. The PAA Order found, pursuant to the Commission’s audit, a violation for charging an improper tariff rate, for example, charging an incorrect negotiated rate instated of an approved bulk flat rate. PAA Order at 7.

8. The PAA Order also specifically found that “[w]e find that time period covered by the audit [April 2013 through March 2017] is a reasonable remedy to mitigate Utility’s incorrect billing practices prior to the implementation of the PAA Order while considering that KWRU has corrected these billing practices following the implementation of the PAA Order.” *Id.* at 6.
9. The Commission specifically considered and rejected OPC’s objection that the audit did not go back eight years, to 2009, but still found the time period employed by PSC was reasonable to mitigate any incorrect practices given the Utility’s actions and corrections. *Id.*
10. The Commission’s Order required a refund of “\$26,408 with interest” to Safe Harbor Marina. PAA Order at 10.
11. The Commission’s Order required a refund of “\$41,034 with interest” to Sunset Marina. PAA Order at 10.
12. The basis for the refunds ordered is Rule 25-30.360, F.A.C. (“Refunds”). *See* PAA Order at 7 (“[W]e hereby order KWRU to refund ... in accordance with Rule 25-30.360, F.A.C., to Safe Harbor Marina [W]e hereby order KWRU to refund ... in accordance with Rule 25-30.360, F.A.C., to Sunset Marina[.]” Notably, there is no reference in the PAA Order to Rule 25-30.350, F.A.C., which is OPC’s sole claimed basis for relief.
13. Both Safe Harbor Marina and Sunset Marina reached full and fair settlements and releases with the Utility and the issue of their refunds has been resolved. *See* Notice of Filing, October 26, 2018. Despite such releases, OPC persists in alleging that these customers should get additional refunds, without seeking or obtaining any authority from these

customers to protest the PAA Order and to represent them in such protest. No other pending refunds remain from the PAA Order.

14. On September 21, 2018, OPC filed a protest to the PAA Order on behalf of the “Citizens of the State of Florida.” Petition at 1.
15. On October 1, 2018, the Utility filed a Motion to Dismiss or in the Alternative Motion to Strike (“Motion to Dismiss”) OPC’s Petition as (1) OPC lacked standing, (2) OPC did not represent the affected ratepayers, and (3) OPC’s demand for an evidentiary hearing was against the settled law in Florida regarding the Commission and negotiated settlements. The Utility incorporates the facts and arguments previously made in the Motion to Dismiss as if recited herein.
16. On November 19, 2018, OPC filed the OPC Motion requesting a partial summary final order.
17. In the OPC Motion, OPC has identified the specific legal issue that OPC believes entitles OPC to an evidentiary hearing. *See* OPC Motion at 1-2, Summary of Relief Requested.
18. Specifically, OPC is arguing that Rule 25-30.350, F.A.C., allows OPC to overrule the Commission’s determination of the appropriate timeframe for an audit, and, at OPC’s discretion, require an additional audit for any time frame determined by OPC. *Id.* This is identical to the argument that OPC had made prior to the PAA Order, and that the Commission had previously considered and rejected. *See* PAA Order at 6.
19. Rule 25-30.350, F.A.C. is the rule regarding individual customer refunds and is not relevant to the time period for audits; as noted in the previously filed Motion for Extension of Time, “OPC made no assertion it had the consent of the particular customers, or that they even had knowledge of such purported representation. In fact, apparently in response to

KWRU’s attorneys pointing this omission out to OPC, KWRU understands that OPC then contacted the affected customer in the unsuccessful attempt to convince them to allow OPC to represent them.” Motion for Extension of Time ¶ 2.

20. OPC does not address that the refunds in this action are pursuant to Rule 25-30.360, F.A.C. (refunds), and not to individual customer overbilling pursuant to Rule 25.30-350, F.A.C.
21. The OPC Motion refers to the “subject customers;” the only “subject customers”² who were ordered a refund are Sunset Marina and Safe Harbor Marina, both of whom have reached full and fair settlements filed with KWRU and both of whom have explicitly released KWRU and rejected the representation of OPC.

MEMORANDUM OF LAW IN SUPPORT OF UTILITY’S CROSS-MOTION FOR SUMMARY FINAL ORDER

Standard of Review

The Utility concurs with OPC that “Section 120.57(1)(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 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.” OPC Motion at 4-5.

The standard for summary final order is similar to that of summary judgment. *See Thomas v. Eckerd Drugs*, 987 So. 2d 1262, 1263 (Fla. 1st DCA 2008) (“In the absence of case law offering guidance regarding summary final orders, we evaluate [summary final orders] using the summary

² See OPC Motion at 2 (stating that Commission staff will initiate and conduct a full audit to 2009 “to recalculate the correct amount owed to the subject customers[;]” as only two customers were owed refunds, those are the only two customers subject to “recalculat[ion]”).

judgment standard.”). Summary judgment is appropriate where, as a matter of law, it is apparent from the pleadings, depositions, affidavits or other evidence that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000); Rule 1.510, Fla. R. Civ. P.

Here, there are no genuine issues of material fact now that OPC has identified the legal theory that animates OPC’s desire to have the utilities of Florida follow OPC’s conception of the “spirit of the law.” Specifically, OPC is now arguing that the proper period for a billing audit to determine compliance with F.S. §§ 367.081 and 367.091 cannot be determined by the discretion and expertise of the Commission, and that the Commission has no discretion whatsoever with regard to billing audits. Before a full explanation as to why this is incorrect as a matter of law, the breathtaking application of OPC’s argument must be made apparent- OPC’s argument would allow OPC to determine, *at OPC’s discretion*, the proper period of an audit and refunds ordered for that audit. If, for example, OPC argued that the proper audit period was 30 years, then OPC could demand a 30 year audit for all ratepayers, *at OPC’s discretion*.

The Statutory and Rulemaking Scheme for the PAA Order

The Utility is regulated pursuant to the rules of Chapter 25-30, F.A.C. Specifically the audit was conducted under the auspices of the following provisions:

Rule 25-30.110 (2) (Records and Reports; Annual Reports). Each utility shall furnish to the Commission at such time and in such forms as the Commission may require, the results of any required tests and summaries of any required records. The utility shall also furnish the Commission with any information concerning the utility’s facilities or operation that the Commission may request and require for determining rates or judging the practices of the utility. (emphasis supplied).

Rule 25-30.135 (2) (Tariffs, Rules, and Miscellaneous Requirements). No utility may modify or revise its rules or regulations or its schedules of rates and charges until the utility files and receives approval from the Commission for any such modification or revision. (emphasis supplied).

Rule 25-30.145 (1) (Audit Access to Records). This rule addresses the reasonable access to utility and affiliate records provided for in Section 367.156(1), F.S., for the purposes of management and financial audits. ... The audit scope, audit program and objectives, and audit requests are not constrained by relevancy standards narrower than those provided by Section 367.156(1), F.S. (emphasis supplied).

In order to divine the legislative (or, here, the Commission's) intent, the "doctrine of *in pari materia* ... require that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." *Sierra Club v. Brown*, 243 So. 3d 903, 911 n.8 (Fla. 2018) (internal quotations and citations omitted). Here, the overall rulemaking scheme shows that there is no set time period that an audit must be undertaken, and that, instead, the audit scope, time, and objectives are left within the general discretion of the Commission.

Moreover, and as specifically stated in the PAA Order, refunds in this action were made pursuant to 25-30.360, F.A.C. "With the exception of deposit refunds, all refunds ordered by the Commission shall be made in accordance with the provisions of this Rule." *Id.* (1). (emphasis supplied). There is no requirement that the refunds be for a time certain, go back 5 years, 8 years, or some other pre-determined time, or otherwise remove the time period of the refunds out of the discretion of the Commission. *Id.*

The OPC Motion candidly admits that it is seeking a summary final order, and further evidentiary hearings, pursuant to Rule 25-30.350, F.A.C., and not Rule 25-30.360. Rule 25.30-350 was most recently amended in 2013 as part of a number of amendments related to individual customer service, *see In re: Revision to Rule 25-30.335 et al.*, 2013 WL 1628235 (P.S.C. 2013). As is clear from the context of the rule changes, these are all related to individual customer

complaints and to customer service; the specific rule in Rule 25-30.350, F.A.C., is not a general grant of authority for OPC to determine the proper timeframe for audits.

Moreover, OPC may not substitute its choice for an appropriate audit time, and what is in the public interest, for that of the Commission. The Florida Supreme Court has repeatedly stated that “the determination of what is in the public interest rests exclusively with the Commission.” *Sierra Club v. Brown*, 243 So. 3d 903, 910 (Fla. 2018) (internal quotations and citations omitted). Moreover, the Florida Supreme Court has long held that the Commission has discretion regarding refunds; *see, inter alia, Harris Corp. v. Johnson*, 711 So. 2d 526, 529-30 (Fla. 1998) (holding that the Commission was within its discretionary authority to not order a refund “even if it determined that a refund were warranted.”).

Put simply, OPC is stating that, as a matter of law, and contrary to binding judicial precedent, the Commission has no discretion in determining the proper audit time, no discretion in determining the amount or propriety of refunds, and no ability to discern, as the Commission did here, what is in the public interest. Moreover, such argument flies in the face the statutory scheme, as OPC does not refer to the misclassification under Fla. Stat. § 367.081(1), nor does OPC explain why Rule 25-30.350, F.A.C., which has never been used to vary the time of an audit, applies.

OPC May Not Vary the Time in Order to Avoid Binding Precedent

As the OPC is aware, as they were an intervenor in the action, the Florida Supreme Court recently ratified the discretion of the Commission. *See Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018). “When reviewing an order of the Commission, this Court affords great deference to the Commission's findings. Commission orders come to this Court clothed with the presumption that they are reasonable and just.” *Id.* at 907 (internal citations and quotations omitted).

Moreover, the Florida Supreme Court reiterated, citing an earlier decision, that even a non-unanimous settlement agreement, as a whole, could be in the public interest. *Id.* at 909. Florida's Supreme Court, twice in the last four years, has rejected OPC's positions, either as a party or as an intervenor, that OPC can overrule negotiated settlements, even non-unanimous settlements. *See Citizens of State v. Fla. Public Srv. Com'n.*, 146 So. 3d 1143 (Fla. 2014) (rejecting OPC's contention that the Commission was incorrect in approving non-unanimous settlement agreement); *accord Sierra Club*, 243 So. 3d 903 (reiterating standard that the Commission acts in the public interest, and is accorded deference). As OPC is aware of the settlement agreements that have been filed in this action, it might appear that OPC is attempting to circumvent those clear instructions and standards of the Florida Supreme Court by arguing that OPC is allowed to determine the relevant time period of an audit, thus vitiating the work and the expertise of the Commission and the resources put into negotiated settlements by the Utility and the ratepayers.

As A Matter of Law, OPC Is Not Entitled To An Evidentiary Hearing

The Utility reiterates the arguments previously stated in the Motion to Dismiss; specifically, that pursuant to its enabling statute and case law, OPC lacks standing. *See Motion to Dismiss; accord Fla. Stat. § 350.0611; Agrico Chemical Co. v. Dep't of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

In addition to the lack of standing, the Utility reiterates that as a matter of law OPC is not entitled to an evidentiary hearing. *See S. Fla. Hosp. & Healthcare Ass'n v. Jaber*, 887 So. 2d 1210, 1212 (Fla. 2004) (holding that Commission is not required to hold an evidentiary hearing for a negotiated settlement); *accord Citizens of State v. Fla. Public Srv. Com'n.*, 146 So. 3d 1143, 1150 (2014) (reasoning that Commission can approve settlement without evidentiary hearings, and non-unanimous settlements). As the Florida Supreme Court stated when reviewing the OPC's

arguments in a prior case, “adoption of OPC's argument that its powers include the ability to preclude the Commission from approving a settlement agreement over the OPC's objection would render the statutory language in chapters 350 and 366 inconsistent.” *Id.* at 1151.

As OPC, as a matter of law, is not entitled to an evidentiary hearing, the OPC Motion should be denied and a final summary order in favor the Utility should be granted.

REQUEST FOR RELIEF

For the foregoing reasons, KW RESORT UTILITIES CORP. respectfully requests the Commission deny the OFFICE OF PUBLIC COUNSEL’S Motion for Partial Summary Final Order and issue a Summary Final Order that the Public Service Commission has the discretion to determine the time frame of an audit and that Rule 25-30.350 does not apply.

Respectfully submitted this 29th day of November, 2018,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

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