

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Increase)
In Wastewater Rates in Monroe)
County By K W Resort Utilities) DOCKET NO. 150071-SU
Corp.) FILED: July 8, 2016
_____)

**MONROE COUNTY'S RESPONSE IN OPPOSITION TO
K W RESORT UTILITIES CORP.'S MOTION TO COMPEL PRODUCTION
OF DOCUMENTS AND INTERROGATORIES FROM MONROE COUNTY**

Pursuant to Rule 28-106.204, Florida Administrative Code, Rule 1.380, Florida Rules of Civil Procedure ("F.R.C.P."), and the Order Establishing Procedure ("OEP") issued in this docket, Monroe County hereby files its response in opposition to K W Resort Utilities Corp.'s ("KWRU") Motion to Compel Production of Documents and Interrogatories from Monroe County (the "Motion to Compel").

In summary, KWRU's Motion to Compel should be denied. The Motion to Compel is incomplete and conclusory, and fails to specifically and adequately identify how the County's responses are allegedly incomplete. Moreover, the County's responses to KWRU's discovery requests fully complied with all applicable rules and the OEP, and were true and complete when served. The County is not required by any applicable rule or by the OEP to develop its final positions on the issues in this docket until September 9, 2016, the deadline for filing its testimony under the OEP, and the County's discovery responses accurately reflect the status of the County's positions in this docket at the time the responses were made. In addition, KWRU's attempt to conflate the requirements of Section 120.569(1)(e), Florida

Statutes ("F.S."), and the County's obligations to respond to discovery are wholly misplaced. Although not relevant to a motion to compel discovery, the County's Petition Requesting Formal Proceeding Concerning the Protested Portions of PAA Order PSC-16-0123-PAA-SU (the "County's Petition") fully complied with the requirements of Chapter 120, F.S., the Uniform Rules of Procedure, and the Commission's applicable rules, and was filed after the County conducted reasonable inquiry concerning the protested PAA Order. Finally, KWRU's attempt to create a discovery dispute where one does not exist needlessly increases the cost of litigation and the County intends to object to any rate case expense associated with this needless litigation.

Background

1. On March 23, 2016, the Commission issued Order No. PSC-16-0123-PAA-SU (the "PAA Order"). On April 13, 2016, the County timely filed its Petition protesting the PAA Order. The Office of Public Counsel ("OPC") also timely filed a petition protesting the PAA Order. On April 20, 2016, Harbor Shores Condominium Unit Owners Association, Inc., filed a cross-petition protesting portions of the PAA Order, and on April 21, 2016, KWRU filed its Cross-Petition of K W Resort Utilities Corp. for a Formal Administrative Hearing ("KWRU's Cross-Petition") protesting portions of the PAA Order.

2. On May 5, 2016, prior to issuance of the OEP,¹ KWRU propounded K W Resort Utilities Corp's First Set of Interrogatories to Monroe County (Nos. 1-54) (the "Interrogatories") and First Set of Requests for Production to Monroe County (the "Requests to Produce"). (The Interrogatories and Requests to Produce shall be collectively referred to herein as the "Discovery Requests.")

3. Pursuant to agreement of counsel, on June 9 and June 27, 2016, respectively, the County timely responded to the Interrogatories and Requests to Produce.

4. In its responses to the Interrogatories, consistent with the requirements of the OEP and applicable rules, the County raised general and specific objections to all of the Interrogatories, in order to preserve said objections; however, the County responded to each Interrogatory.² Similarly, the County raised general and specific objections to all of the Requests to Produce, in order to preserve said objections; however, the County responded to the Requests to Produce by providing responsive documents, to the extent such documents existed.³

¹ The Commission issued the OEP on May 17, 2016. See Order No. PSC-16-0194-PCO-SU.

² In its response to Interrogatory No. 8, the County inadvertently omitted the answer: "Unknown at this time."

³ The County's responses to the Requests to Produce were accurate and complete when made, and the County stands by those responses. However, upon further consideration, and in the spirit of cooperation the County will produce to KWRU responsive documents that it believes are publicly available or already in the possession of KWRU in the near future.

5. On the afternoon of June 28, 2016, KWRU's counsel sent an e-mail to undersigned counsel purporting to be a "good faith" attempt to resolve a discovery dispute. In the e-mail, KWRU's counsel unilaterally and unreasonably attempted to require the County to provide additional discovery responses by noon on July 1, 2016 (less than 3 days from the time of the e-mail). On July 1, 2016, undersigned counsel responded to KWRU's e-mail and explained that the County's responses and objections fully complied with the OEP and applicable rules. KWRU did not request a meeting with the County to resolve the purported discovery dispute and no such meeting occurred.

6. On July 1, 2016, KWRU filed its Motion to Compel. The Motion to Compel alleges in pertinent part:

On June 9 and 27, 2016, Monroe County responded to the above requests and in its responses to KWRU's respective First Set of Interrogatories and First Request for Production, Monroe County utilized a blanket objection to a majority of requests. The County stated that "the final issues to be decided at hearing have not yet been determined." Monroe County utilized this objection to KWRU's First Set of Interrogatories in responses: 65 [sic]⁴, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 39, 41, 42, 43, 48, 50, 52, and 53. Additionally, Monroe issued the same response to KWRU's First Request for Production in responses: 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 45, 47, 48, 49, 50, 51, and 52.

⁴ No Interrogatory No. 65 exists.

Motion to Compel at ¶ 12 (footnote added). The Motion to Compel contains no other discussion or analysis of KWRU's alleged basis for claiming that the County's responses to KWRU's Discovery Requests are deficient. The Motion to Compel also fails to acknowledge that the County provided substantive responses to all of the Discovery Requests.

I. The County's Responses to the Discovery Requests were Complete and True at the Time They were Made

7. The Motion to Compel asks the Commission to enter an order variously described as compelling "better responses" and "responses" to the Discovery Requests. Motion to Compel at 1, 5. What the Motion to Compel fails to acknowledge is that the County has already provided substantive responses to the Discovery Requests that were complete and true at the time provided. Nothing more is required by the OEP or the applicable rules. The fact that KWRU is not satisfied with the responses is not a valid basis for granting the Motion to Compel.

8. As noted above, the Motion to Compel does not provide a specific or detailed analysis or discussion for each Interrogatory and for each Request to Produce for which KWRU is attempting to compel discovery, explaining how the responses are allegedly deficient. This lack of specificity makes it difficult for the County to respond to the Motion to Compel and is sufficient basis for denying KWRU's Motion to Compel. However, in an attempt to resolve this dispute, the County

provides the following representative examples of its responses to the Discovery Requests and describes why its responses are sufficient.

a. Interrogatory No. 6. Interrogatory No. 6

states:

Please state with specificity the basis for your statement that "the proposed treatment of already-paid Plant Capacity Charges under the PAA Order would potentially create significant questions about the administration of the County's existing and ongoing assessment program," as stated in paragraph 7 of your Petition, and identify all documents, information and/or other evidence, which support your contention.

The County provided the following specific objections and answer to Interrogatory No. 6.

SPECIFIC OBJECTIONS:

Monroe County objects to this Interrogatory. This Interrogatory is premature in that the answers - i.e., the evidence that the County will present on the issues in the case - are the subject of ongoing discovery and are not yet known. Moreover, neither KWRU nor the other Parties to this docket, including the Citizens of the State of Florida, have submitted their prefiled testimony and exhibits, and the information contained in such filings is likely to inform Monroe County's position as to the appropriate amount of the costs (both investments and expenses) and other factors that determine the proper rates to be charged by KWRU. Further, while the PAA Order addressed a number of issues, the final issues to be decided at hearing have not yet been determined, indeed there has not yet been even a preliminary issue identification meeting of the Parties, and some of the issues may be dropped or stipulated as the result of discovery or further discussions among the Parties.

ANSWER:

Subject to and without waiving its general and specific objections, Monroe County responds to this Interrogatory as follows.

Pursuant to the County's Capacity Reservation and Infrastructure Contract with KWRU, the County paid up to \$4.6 million in return for 1,500 EDUs of capacity. The County's support of KWRU's plant and the purposes for the County's efforts and support were recognized extensively in the Commission's final order in KWRU's last rate case. In re: Application for Increase in Wastewater Rates in Monroe County by K W Resort Utilities Corp., Docket No. 070293-SU, Order No. PSC-09-0057-FOF-SU (Fla. Pub. Serv. Comm'n, January 27, 2009). See especially the following passages from the Commission's Order.

In July 2002, Monroe County and KWRU entered into a Capacity Reservation and Infrastructure Contract (Contract) which contained provisions for the County to purchase capacity from KWRU to provide service to the remaining 1,500 equivalent dwelling units (EDUs) on Stock Island that were on individual septic tanks or small package plants that could not be upgraded to AWT standards. KWRU agreed to convert its wastewater plant to AWT standards by January 1, 2007, in order to comply with Chapter 99-395. Further, the County agreed to advance funds to KWRU for the construction of the wastewater collection system on South Stock Island (SSI) in an amount not to exceed \$4,606,000, and the Utility agreed to complete the system in 16 months from the commencement of the contract. The agreement further provided that KWRU would collect its authorized plant capacity charge of \$2,700 per EDU from new connections and remit \$2,100 per EDU back to the County in repayment of the construction advances. The \$600 per EDU retained by the Utility was designed to offset the cost associated with upgrading

the wastewater treatment plant to AWT standards.

Order No. 09-0057 at 4-5.

Although not all of the potential customers located within the environmentally sensitive area have connected, the Utility has included Monroe County's advance payments as a reduction to rate base for rate making purposes.

Id. at 18.

Monroe County provided funding for the expansion by paying the capacity fees of all the Stock Island residents under a repayment agreement with the Utility. The Utility has included these advances as a reduction to rate base for ratemaking purposes, thus eliminating the need for a non-used and useful adjustment. In addition, the plant is designed and built to provide reuse and will be an AWT plant as mandated by Monroe County.

Id. at 20.

Although not all of the potential customers located within the environmentally sensitive area have connected, it appears that Monroe County's advance payment for these customers clearly reserves that remaining capacity. In addition, the record shows that the facility is 100 percent used and useful because the plant is designed and built to provide reuse and will be an AWT plant, as mandated by Monroe County.

Id. at 20-21.

All property owners until now who are connected or capable of being connected to the Utility's vacuum system have paid the same Plant Capacity Charges. The Charges have been paid either in the form of an outright payment, or a Charge in the form of a special assessment, placed on the tax bill. By stating that Plant Capacity Charges will no longer be collected by the Utility, and if refunds of previously paid Plant Capacity Charges are required for customers who have paid but have not yet

physically connected to KWRU's system, the proposed PAA Order creates a situation in which similarly situated property owners are inherently treated differently, in that prior owners will have funded both the existing plant and plant expansion (either through outright payments or special assessments), whereas future owners will not make the same contributions in aid of construction. The Proposed PAA Order therefore creates a situation that is unfair, unjust, and unreasonable.

The County's answer was complete and accurate at the time it was provided. Nothing more is required by the OEP or the applicable rules. Moreover, with the exception of noting that the County utilized a blanket objection, the Motion to Compel fails to explain why this is allegedly deficient. The mere fact that the County raised similar objections to KWRU's numerous similar Interrogatories does not render the objections invalid, nor does the fact that the County gave the same truthful answer, "Unknown at this time," to a number of the Interrogatories provide any basis to compel the County to produce more specific answers at this time. Accordingly, the Motion to Compel should be denied.

b. Interrogatory No. 12.⁵ Interrogatory No. 12

states:

Please state with specificity what you believe the appropriate amount of rate base to be used in setting Phase I and Phase II rates should be, and identify all documents, information and/or other evidence, which support your contention.

⁵ The County provided similar specific objections and answers to Interrogatories Nos. 12-29.

The County provided the following specific objections and
answer to Interrogatory No. 12.

SPECIFIC OBJECTIONS:

Monroe County objects to this Interrogatory. This Interrogatory is premature in that the answers - i.e., the evidence that the County will present on the issues in the case - are the subject of ongoing discovery and are not yet known. Moreover, neither KWRU nor the other Parties to this docket, including the Citizens of the State of Florida, have submitted their prefiled testimony and exhibits, and the information contained in such filings is likely to inform Monroe County's position as to the appropriate amount of the costs (both investments and expenses) and other factors that determine the proper rates to be charged by KWRU. Further, while the PAA Order addressed a number of issues, the final issues to be decided at hearing have not yet been determined, indeed there has not yet been even a preliminary issue identification meeting of the Parties, and some of the issues may be dropped or stipulated as the result of discovery or further discussions among the Parties.

ANSWER:

Unknown at this time.

The County's answer, "Unknown at this time," was complete and accurate at the time it was provided. Nothing in the OEP or the applicable rules requires the County to calculate a specific rate base value or any other specific number at this point in the proceeding, i.e., prior to the time set forth in the OEP for KWRU to file its direct testimony (July 1, 2016) and over two months prior to the time set forth in the OEP for the County to file its direct testimony (September 9, 2016).

See Order Denying Emergency Request for Oral Argument and Motion to Compel and Granting Motion for Protective Order, Docket No. 060635-EU, Order No. PSC-07-0032-PCO-EU (Jan. 9, 2007) (noting that discovery does not impose a duty to "create new documents, undertake new analysis, or create new studies or reports.").

9. In summary, KWRU opted to propound its Discovery Requests prior to the time required in the OEP for the County to develop its litigation positions in this docket. Accordingly, the responses in the Discovery Responses reflect a complete and accurate description of the County's position at the time the responses were due. The OEP and the applicable provisions of the Uniform Rules of Procedure, the Florida Rules of Civil Procedure, and Chapter 120, F.S., require nothing more. Accordingly, the Motion to Compel should be denied.

II. KWRU Bears the Burden of Proof in this Rate Case Proceeding and KWRU's Attempt to Require the County To Fully Develop its Case-in-Chief Prior to the Controlling Dates in the OEP is Inappropriate

10. The Motion to Compel fails to acknowledge that as a utility seeking a substantial rate increase, KWRU bears the burden of proof in this de novo proceeding. See Florida Public Service Com'n v. Florida Waterworks Ass'n, 731 So. 2d 836, 841 (Fla. 1st DCA 1999) ("[t]he burden of proof in ratemaking cases in which a utility seeks an increase in rates rests on the utility."); see also S. Fla. Natural Gas Co. v. Pub. Serv. Com., 534 So. 2d 695, 697 (the filing of a rate case "creates

issues of material fact for all factors comprising the justification for the increase"). The fact that this formal evidentiary proceeding pursuant to the Commission's PAA proceedings was initiated by parties protesting the PAA Order does not shift this burden. Moreover, none of the documentation or information submitted by KWRU prior to the protest of the PAA Order constitute evidence in this docket. Accordingly, the OEP properly required KWRU to file its direct testimony first (on July 1, 2016) and requires the County and OPC to file their direct testimony on September 9, 2016.

11. Consistent with this orderly presentation of evidence provided for by the OEP, the County is still developing its final, specific, numeric litigation positions concerning the issues raised in its Petition. The County's final positions will be informed by KWRU's direct testimony (filed on July 1, 2016), KWRU's responses to pending discovery and KWRU's responses to future discovery. KWRU's apparent suggestion that the County is required to have developed its final, specific, numeric litigation positions at this nascent stage of the proceeding is completely misplaced, is inconsistent with established practice at this Commission, is inconsistent with the OEP, and would impose an unfair burden on the County. Accordingly, the Commission should reject KWRU's attempt to hijack the orderly development of issues and evidence in this docket and deny the Motion to Compel.

III. KWRU Improperly Conflates the Requirements of Section 120.569, F.S., with the County's Discovery Obligations

12. Section 120.569(1)(e), F.S., provides in pertinent part:

[a]ll pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation.

Section 120.569(1)(e), F.S., is wholly irrelevant to the issue of whether the County's responses to the Discovery Requests are adequate and the Commission should reject KWRU's attempt to conflate the County's obligations under the OEP and the applicable rules to respond to discovery with Section 120.569(1)(e), F.S.

13. To the extent that KWRU's reference to Section 120.569(1)(e), F.S., is a veiled threat that KWRU believes that the County interposed its Petition for an improper purpose, the County categorically rejects KWRU's erroneous claim. The County conducted reasonable inquiry, including but not limited to consulting with OPC's utility accounting experts, prior to filing its Petition and the County did not file the Petition to cause unnecessary delay or to harm KWRU. Instead, as one of KWRU's largest ratepayers, the County has significant concerns regarding the appropriateness of the substantial rate increase being sought by KWRU. The County's concerns are informed by

the results of KWRU's last rate case in which the Commission denied a significant portion of KWRU's requested rate increase. See In re: Application for Increase in Wastewater Rates in Monroe County by K. W. Resort Utilities Corp., Docket No. 070293-SU; Order No. PSC-09-0057-FOF-SU, (Jan. 27, 2009). The County's concerns are further informed by the issues raised in Staff's February 18, 2016 correspondence to KWRU concerning KWRU's billing practices inconsistent with its tariffs as well as the County's specific concerns related to the proper collection and accounting for Plant Capacity Charges as CIAC.

14. In sum, the County's Petition fully complied with the requirements of Section 120.569(1)(e), F.S., and Section 120.569(1)(e), F.S., is irrelevant to whether the County has provided sufficient responses to the Discovery Requests.

IV. KWRU's Motion to Compel Was Unnecessary and Will Result in All Parties Incurring Unnecessary Costs

15. In the Motion to Compel, KWRU purports to be concerned about increases in the cost of litigation arising from the County's alleged failure to respond to the Discovery Requests. Motion to Compel at 5. The County agrees that unnecessary costs are being incurred by the parties, but the cause of the unnecessary costs is KWRU's unnecessary discovery and unnecessary Motion to Compel. For example, KWRU propounded multiple Discovery Requests (e.g., Interrogatories No. 5, 6, and 7, and Requests to Produce Nos. 3, 4, and 5) concerning KWRU's service availability charges even though KWRU, the

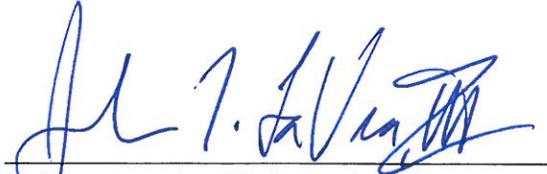
County, and OPC agreed on the record at the Agenda Conference in this docket that KWRU should be allowed to continue to collect its service availability charge, and even though KWRU specifically alleged in its Cross-Petition that "KWRU should be permitted to continue collecting its current service availability charge." KWRU's Cross-Petition at ¶ 10n. Clearly, the parties are in substantial agreement on this issue and KWRU's Discovery Requests propounded to the County concerning the issue were unnecessary and nothing more than make-work.

16. Moreover, the County strongly believes that the Motion to Compel itself was unnecessary and will result in the parties needlessly incurring unnecessary costs. First, KWRU made only a superficial attempt to resolve the dispute prior to filing the Motion to Compel. Second, the Motion to Compel erroneously failed to acknowledge that the County provided responses (which are complete and accurate) to the Discovery Requests. Third, the Motion to Compel was filed prematurely, at a time when the County was under no obligation to have developed its final litigation position. It should be noted that as one of KWRU's largest ratepayers, the County has no desire to increase any of KWRU's costs, especially the cost of litigating this proceeding. Accordingly, the County intends to object to any attempt by KWRU to recover additional rate case expense for its Motion to Compel.

Conclusion

For the reasons stated herein, the Motion to Compel should be denied.

Respectfully submitted this 8th day of July, 2016.

A handwritten signature in blue ink, appearing to read "John T. LaVia, III", written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 8th day of July, 2016.

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