

State of Florida



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** May 24, 2017

**TO:** Office of Commission Clerk (Stauffer)

**FROM:** Office of the General Counsel (Mapp) *ALM*  
Division of Accounting and Finance (Norris) *CAS*  
Division of Economics (Johnson) *NOH*  
Division of Engineering (Graves, Hill) *AS*

**RE:** Docket No. 150071-SU – Application for increase in wastewater rates in Monroe County by K W Resort Utilities Corp.

**AGENDA:** 06/05/17 – Regular Agenda – Post-Hearing Motion for Reconsideration – Oral Argument Not Requested – Participation is at the Commission’s Discretion

**COMMISSIONERS ASSIGNED:** Brown, Graham, Patronis

**PREHEARING OFFICER:** Patronis

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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## Case Background

K W Resort Utilities Corporation (KWRU or Utility) is a Class A Utility providing wastewater service to approximately 2,061 customers in Monroe County. Water service is provided by the Florida Keys Aqueduct Authority (FKAA). Prior to the current case, rates were last established for this Utility in 2007.<sup>1</sup> According to the Utility’s 2014 Annual Report, KWRU had operating revenues of \$1,479,307 and operating expenses of \$1,199,672. On July 1, 2015, the Utility filed its application for the rate increase at issue. KWRU requested that the application be processed using the Proposed Agency Action (PAA) procedure. The test year established for final rates was the 13-month average period ended December 31, 2014.

<sup>1</sup> Order No. PSC-09-0057-FOF-SU, issued January 27, 2009 in Docket No. 070293-SU, *In re: Application for increase in wastewater rates in Monroe County by K W Resort Utilities Corp.*

On February 24, 2016, the Office of Public Counsel (OPC) filed a Notice of Intervention in this docket, and Order No. PSC-16-0114-FOF-SU acknowledging intervention was issued on March 18, 2016. Subsequently, the Commission approved a two-phased rate designed to recover a wastewater revenue requirement of \$2,238,046 in Phase I and \$2,485,904 in Phase II.<sup>2</sup> On April 13, 2016, OPC and Monroe County (County) timely filed protests of the PAA Order. By letter dated April 18, 2016, KWRU gave notice that it elected to put the Phase I rates approved in the PAA Order into effect during the pendency of the administrative hearing pursuant to Section 367.081(8), Florida Statutes (F.S.).<sup>3</sup>

On April 18, 2016, Harbor Shores Condominium Unit Owners Association, Inc. (Harbor Shores) timely filed a cross-petition. On April 21, 2016, KWRU timely filed a cross-protest. On April 26, 2016, the Harbor Shores' representative was granted qualified representative status.<sup>4</sup>

A formal evidentiary hearing and service hearing were held November 7-8, 2016, in Key West. The parties filed briefs on December 9, 2016. On February 7, 2017, the Commission voted to approve new rates and charges for the Utility. Following the Commission's vote, a computational error was discovered within the approved miscellaneous service charges. The Commission corrected this error, by vote, on March 7, 2017. The Commission approved a rate increase designed to recover a wastewater revenue requirement of \$2,436,418.<sup>5</sup> The Final Order codified the results of both votes.<sup>6</sup>

On March 14, 2017, KWRU filed its Motion for Reconsideration seeking reconsideration of the Commission's decision regarding plant in service, operation and maintenance (O&M) expense for implementing advanced wastewater treatment (AWT), rate structure and rates, and the appropriate test year for establishing rates. The Utility did not file a request for Oral Argument. Subsequently, Harbor Shores filed its Motion for Reconsideration on March 24, 2017 seeking reconsideration of the Commission's decision to classify Harbor Shores as a general service customer. It did not file a request for Oral Argument. On March 28, 2017, the OPC and County, (jointly Intervenors) filed their response in opposition to KWRU's Motion for Reconsideration. Intervenors did not request Oral Argument. On March 29, 2017, KWRU filed its response in opposition to Harbor Shores' Motion for Reconsideration.

The Commission has jurisdiction pursuant to Sections 367.081, F.S. The Commission is authorized to consider Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code (F.A.C.).

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<sup>2</sup> Order No. PSC-16-0123-PAA-SU, issued March 23, 2016, in Docket No. 150071-SU, *In re: Application for increase in wastewater rates in Monroe County by K W Resort Utilities Corp.*

<sup>3</sup> Document No. 02205-16

<sup>4</sup> Order No. PSC-16-0168-FOF-OT, issued April 26, 2016, in Docket No. 160008-OT, *In re: Applications for qualified representative status.*

<sup>5</sup> Order No. PSC-10-0381-FOF-SU, issued March 13, 2017, in Docket No. 150071-SU, *In re: Application for increase in wastewater rates in Monroe County by K W Resort Utilities Corp.*

<sup>6</sup> Order No. PSC-17-0091-FOF-SU, issued March 13, 2017, in Docket No. 150071-SU, *In re: Application for increase in wastewater rates in Monroe County by K W Resort Utilities Corp.*

## Discussion of Issues

**Issue 1:** Should KWRU's Motion for Reconsideration be granted?

**Recommendation:** No. KWRU fails to identify a point of fact or law the Commission overlooked in rendering its decision. Accordingly, KWRU's Motion for Reconsideration should be denied. (Norris, Hill, Graves, Johnson, Mapp)

**Staff Analysis:** The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order. In a motion for reconsideration, the alleged overlooked fact or law must be such that if it was considered, the Commission would reach a different decision than the decision in that order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). It is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Further, it is not necessary to respond to every argument and fact raised by each party, and “[a]n opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant.” State ex. Rel. Jaytex Realty Co. v. Green.

In its Motion for Reconsideration, KWRU contends that the Commission erred as to four matters which are properly subject to reconsideration. Staff's analysis and review of the matters put forth in the Utility's motion and the response provided by Intervenors are addressed below.

### Plant in Service

The first issue for which KWRU asks for reconsideration concerns the amount of pro forma plant approved by the Commission. The Utility contends that the Commission overlooked two components of the total pro forma project cost.

The first component that the Utility contends the Commission overlooked is the actual known expenditures classified in Audit Finding 2 as construction work in progress (CWIP). All parties stipulated to the audit adjustment which reclassified \$303,099 of expenditures associated with the wastewater treatment plant expansion (Expansion Project) to CWIP.

In their response opposing KWRU's motion, the Intervenors first note that KWRU devoted five lines of text to its discussion of the plant in service issue in its Brief. The Intervenors additionally assert that the Commission plainly considered the subject amount as it is shown on page 19 of the Final Order.

KWRU witness Swain's direct testimony included a set of minimum filing requirements (MFR) rate base and net operating schedules that illustrate the Utility's original revenue requirement request, as filed in the PAA process, the adjustments and resulting revenue requirement from the PAA Order, and an additional set of adjustments calculated in relation to the PAA Phase I and II revenue requirements. The additional set of adjustments resulted in the Utility's updated revenue requirement request. (EXH 17)

The PAA Phase I revenue requirement did not reflect any monies associated with the Expansion Project, with the exception of the CWIP verified in Audit Finding 2. As such, in order to reflect the updated cost of the Expansion Project being placed into service, Schedule A-3 of witness Swain's direct testimony reflected a total cost of \$4.3 million including a corresponding adjustment to completely remove the CWIP. (EXH 17) This corresponding adjustment is necessary because the CWIP balance represents a component of the total project cost that has already been expended.

Based on the adjustments reflected in Schedule A-3 of witness Swain's direct testimony, the CWIP was accounted for, mathematically, in the \$4.3 million Expansion Project cost that was strictly identified by KWRU. The \$4.3 million total project cost was based on a signed construction contract with Wharton Smith. The Wharton Smith contract was for the Expansion Project and modification of KWRU's WWTP facilities.

Based on evidence in the record as well as the testimony of KWRU witness Johnson, it is apparent that some of the costs were already captured in the signed construction contract with Wharton Smith. The Final Order clearly identified this concern as it states in part:

...KWRU witness Johnson acknowledged, during cross-examination, that some of the additional costs presented in his rebuttal testimony were also included in the Wharton Smith contract

The second component that KWRU requests reconsideration of is the Commission's decision to exclude a total of \$260,274 in plant in service. KWRU's motion states that "[t]he Commission found that Chris Johnson's rebuttal testimony did not provide backup documentation of these costs, but this was incorrect." KWRU asserts that the record contains evidence, including invoices and payments, and KWRU witness Johnson's rebuttal testimony simply summarized this information in an easy format for the Commission's consideration. The exhibits that KWRU asserts the Commission overlooked were listed in an attachment to the Utility's motion. The Utility additionally asserts that the Commission overlooked two change orders from Wharton Smith.

The Intervenors argue that KWRU's allegations are attempts to reargue evidence and to supplement the record with a new exhibit. The Intervenors additionally characterize the Utility's motion as an attempt to supplement its Brief.

Staff believes that the evidence which KWRU contends was overlooked, including the two change orders, does not address the reasons the relevant costs were excluded. The Final Order states:

Information provided by KWRU witness Johnson supporting the increase only contained costs with minimal explanation as to why the additional expenditures were necessary. Furthermore, KWRU witness Johnson acknowledged, during cross-examination, that some of the additional costs presented in his rebuttal testimony were also included in the Wharton Smith contract. Witness Johnson additionally acknowledged that costs associated with the vacuum tank replacement were included in the additional costs. Given the lack of supporting

evidence as well as the uncertainties highlighted during the hearing, we find that the updated costs shall not be included in plant in service.

Based on the above passage, the Commission expressed that the Utility did not provide adequate explanation as to the necessity of the additional costs and there was uncertainty regarding the costs. The Commission did not raise a concern as to whether the costs were incurred. The basis for excluding the costs for which KWRU seeks reconsideration of was reiterated in the following paragraph of the Final Order which states:

Unlike the other additional costs presented by witness Johnson, the estimates for additional engineering costs were supported by KWRU witness Castle, who is the engineer of record for the pro forma plant expansion. Witness Castle provided estimates for hours and tasks that would be performed for the time period October 2016 through March 2017.

Given the testimony of witness Castle, the Commission was provided an explanation of why the additional costs (\$113,680) were necessary to be incurred.

As an additional point of comparison, the Commission included \$4.3 million in plant in service for the Plant Expansion. With regard to the \$4.3 million, the Final Order states:

The Utility's estimate of \$4.3 million was supported by a signed construction contract with Wharton Smith. OPC witness Woodcock testified that the cost of \$4.3 million does not appear to be unreasonable given the location (Florida Keys) of the project and the crowded conditions at the WWTP site. Witness Woodcock further testified that it appears that KWRU was prudent in receiving three bids for the project prior to its award.

Staff believes that the statement above further demonstrates that the Commission's decision was based, not only on documentation of costs, but also on supporting testimony.

In addition as mentioned above, the Commission, as previously cited, expressed uncertainty regarding the costs presented by witness Johnson. Witness Johnson acknowledged during cross-examination that some of the additional costs presented in his rebuttal testimony were also included in the Wharton Smith contract. The invoices and payments presented in the Utility's motion do not provide clarification as to whether or not costs have already been accounted for in the Wharton Smith contract. Therefore, approval of the costs that the Utility seeks reconsideration of could result in double recovery by the Utility.

Based on the review described above, staff believes that the Commission did not overlook or fail to consider the matters regarding plant in service set forth in KWRU's motion. Therefore, staff recommends that the Commission should not reconsider its decision to exclude the costs for which the Utility is seeking reconsideration.

### **AWT O&M Expenses**

In its Final Order, the Commission determined that the appropriate level of O&M expenses to reflect the implementation of AWT operations should be \$1,647,853. KWRU asserts that the

Commission, in its determination of appropriate levels of O&M expenses for implementing AWT, overlooked certain fixed costs. Specifically, the Utility's motion states that the Commission "overlooked fixed costs which are incurred in operation of the newly constructed third plant/treatment train, regardless of flow levels."

The Utility's motion additionally stated that its "Supplemental Response to Third Data Request" provides a breakdown of O&M expenses associated with the existing facilities, as well as the incremental amount of O&M expenses related to the new treatment train and new wells. The Utility further claims that the record does not reveal any objection by any party to the increased costs necessitated by the operation of the new treatment train.

With respect to the issue of its allowable O&M expenses, the Intervenors argue that KWRU attempts to rely on its supplemental response to staff's third data request which is not in the record. The Intervenors state that this is a naked and legally improper attempt to induce the Commission to consider new evidence outside the hearing record.

The Intervenors additionally address KWRU's assertion that "[t]he record does not reveal any objection by any party to the increased costs necessitated by the operation of the new treatment train." The Intervenors state that this statement is patently misleading and clearly erroneous. The Intervenors continue that OPC objected to KWRU's requested pro forma O&M expense adjustments and it is disingenuous to now say that the record does not reveal any objection by any party to the increased costs necessitated by the operation of the new treatment train.

While several documents in CAJ-4, sponsored by KWRU witness Johnson, make note of the fact that the Utility filed supplemental responses to staff's third date request, the Intervenors are correct in that neither the supplemental document nor the responses contained therein were included within the exhibit and therefore were not entered into the evidentiary record. Further, staff believes that the Utility's assertion that the Commission "overlooked fixed costs which are incurred in operation of the newly constructed third plant/treatment train, regardless of flow levels" is not accurate and the Commission should not reconsider its decision regarding KWRU's O&M expenses. The Final Order demonstrates that the Commission gave consideration to the matter asserted by KWRU in its motion. Staff believes that the following statement from the Final Order precisely describes the argument that the Utility claims the Commission did not consider:

KWRU asserted that the expanded plant will necessitate additional costs regardless of flow levels and regardless of the causes of those flow levels. KWRU contended that simply calculating a cost per gallon, does not take into account the fixed costs associated with operating the expanded plant, including minimum chemical inputs and power.

The O&M expenses approved in the Final Order were not based on O&M expenses associated with the operation of the expanded plant; however, this was not an oversight as asserted by KWRU. Both OPC witness Merchant and KWRU witness Swain provided testimony that the Utility's test-year request letter specified that the pro forma expenses were non-growth related. Therefore, the Utility's O&M expenses were not evaluated based on operation of the expanded

plant; rather, the O&M expenses were based on the Utility upgrading its existing facilities and operations to meet AWT standards. The Final Order states:

[W]e find that witness Merchant's methodology for determining Phase I O&M expenses, which relies on known information for 2016, is adequate to evaluate the Utility's pro forma O&M expense request, as characterized in its test year letter.

Additionally, based on review of the Final Order, the record evidence, and the Utility's Motion for reconsideration, staff does not believe that the Commission overlooked or failed to consider the matters regarding O&M expenses set forth in KWRU's motion. Therefore, staff recommends that the Commission should not reconsider its decision as sought by the Utility.

### **Rate Structure & Rates**

KWRU claims that, for reuse, the Commission used 2015 gallons of 85,571,000 and escalated the gallonage by five percent for 2016 growth. KWRU states that this methodology is arbitrary and unsupported by any record evidence. KWRU requests that the reuse gallonage adjustment conform with either the actual gallonage in evidence, or the same methodology with regards to used and useful. In the Intervenor's joint response, they state that there is no factual basis to support KWRU's request that the Commission reconsider the reuse adjustment.

KWRU is incorrect in its claim that the Commission used actual 2015 reuse gallons and escalated the gallonage by five percent. The Commission annualized actual gallons for January through September of 2016, as provided in Exhibit 51 BSP 0093. This calculation resulted in annualized reuse gallonage of 45,211,000. This calculation is shown on page 67 of the Final Order when the annualized miscellaneous revenues from reuse are \$60,583 ( $45,211 \times \$1.34$ ). Based on the above, the Commission used a methodology consistent with KWRU's request for reconsideration. Since the Commission did not overlook or fail to consider the evidence in the record, KWRU's motion for reconsideration on this issue should be denied.

### **Test Year**

The final issue raised by KWRU relates to adjustments made to the 2014 historical test year. The Utility contends that the Commission's adjustments to billing determinants and CIAC for known and measurable changes were in derogation of PSC Rule and ultimately created a projected test year. Ultimately, KWRU asserts that the Commission does not have the authority to adjust a historic test year to projected.

In response to interrogatory No. 67 requesting actual 2016 billing determinants, KWRU provided a schedule showing revenues by month, customer class, and meter size for January through September of 2016 (EXH 51, BSP 96). The Commission was unable to calculate actual billing determinants due to KWRU's change in rate structure during 2016 when the Utility implemented the PAA rates after they were protested.

The Commission-approved billing determinants were based on the 2014 test year and increased for known and measurable growth, consistent with OPC's proposed methodology and staff's used and useful calculation. Therefore, the Commission's decision was fully supported by record evidence.

Additionally, KWRU contended that the Commission erred in its interpretation and application of Section 367.081(2)(a)(1), F.S., by making an adjustment to include CIAC that was collected and documented after the historical test year. By taking issue with the Commission's interpretation, the Utility is validating the fact that the Commission did not overlook or fail to consider the statute in its decision. Further, the Final Order provided clear guidance, as shown below:

We find that the inclusion of collected, non-prepaid CIAC does not violate Section 367.081(2)(a)1., F.S. Documented CIAC collected by customers actively receiving service in a future period beyond the test year is clearly demonstrated and not prospective. However, we agree that potential CIAC shall not be imputed.

Moreover, the Commission's discretion to make adjustments is described in Section 367.081(3), F.S., which provides that:

The commission, in fixing rates, may determine the prudent cost of providing service during the period of time the rates will be in effect following the entry of a final order relating to the rate request of the utility and may use such costs to determine the revenue requirements that will allow the utility to earn a fair rate of return on its rate base.

KWRU does not raise any new fact or point of law not considered by the Commission it making its final determination in this case, the Utility merely states its disagreement with the Commission's interpretation of certain statutory provisions made within the Final Order.

The Commission did not overlook or fail to consider any fact or matter of law; therefore, staff recommends that KWRU's Motion for Reconsideration be denied.

**Issue 2:** Should Harbor Shores' Motion for Reconsideration be granted?

**Recommendation:** No. The Commission considered and evaluated all the record evidence in reaching its conclusion that Harbor Shores should be classified as a general service customer, but continue to be billed a base facility charge (BFC) based on 69 equivalent residential connections (ERCs) and a gallonage charge with a 10,000 gallon cap per ERC. Because the Commission did not overlook or fail to consider the evidence in the record, Harbor Shores' Motion for Reconsideration should be denied. (C. Johnson)

**Staff Analysis:** Harbor Shores is a home owners association, which contains 69 residential homes within its community. The Commission ordered that Harbor Shores should be classified as a general service customer of KWRU, but should continue to be billed a BFC based on 69 ERCs. Harbor Shores argues that the rates approved by the Commission are unfairly discriminatory because Harbor Shores is treated differently than other general service customers like Meridian West and Flagler Village, whom Harbor Shores' contends are similarly situated. Harbor Shores states that no analysis of Harbor Shores' actual demand was done, but instead the decision was made to base Harbor Shores' rates on the 69 ERCs of capacity it originally reserved. Harbor Shores asserts that there is record evidence that Harbor Shores more consistently places 23 ERCs of demand on the system, instead of the 69 ERCs on which their rate is based on (EXH 89). Harbor Shores also contends that the ownership of the sub-meters has no impact on the demand that meter places on KWRU.

In its response opposing Harbor Shores' motion, KWRU argues that there is testimony within the record that distinguish Meridian West and Flagler Village from Harbor Shores, because Meridian West and Flagler Village have only one master meter owned and maintained by the Florida Keys Aqueduct Authority and their submeters are owned, controlled, and operated by the properties' respective management companies.

The Commission based Harbor Shores' base facility charge on the 69 ERCs of capacity it reserved. In addition, Harbor Shores' demand is consistent with the demand of 69 single family homes. The 23 ERCs of capacity that Harbor Shores claims it uses were not calculated correctly. Harbor Shores' total average monthly water usage, divided by the 69 individual homes in Harbor Shores, was 3,200 gallons. This is consistent with the average usage of KWRU's residential customer base. Additionally, the ownership of the sub-meters strictly differentiates Harbor Shores from other general service customers and allows the Commission to directly assess the ERCs of Harbor Shores' residents.

The Commission considered and evaluated all the record evidence in reaching its conclusion that Harbor Shores should be a general service customer but continue to be billed a BFC based on 69 ERCs and a gallonage charge with a 10,000 gallon cap per ERC. Because Harbor Shores fails to identify a point of fact or law that the Commission overlooked or failed to consider when rendering its decision, Harbor Shores' Motion for Reconsideration should be denied.

**Issue 3:** Should this docket be closed?

**Recommendation:** If the Commission approves staff's recommendation on Issues 1 and 2, this docket should remain open for staff's verification that the Utility has completed the required refunds and that KWRU has notified the Commission in writing that the adjustments for all applicable NARUC USOA primary accounts have been made. Once these actions are complete, this docket should be closed administratively. (Mapp)

**Staff Analysis:** If the Commission approves staff's recommendation on Issues 1 and 2, this docket should remain open for staff's verification that the Utility has completed the required refunds and that KWRU has notified the Commission in writing that the adjustments for all applicable NARUC USOA primary accounts have been made. Once these actions are complete, this docket should be closed administratively.