

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: February 21, 2019

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Schrader, Crawford, Nieves) *JSC KS*

RE: Docket No. 20170086-SU – Investigation into the billing practices of K W Resort Utilities Corp. in Monroe County.

AGENDA: 3/5/2019 – Regular Agenda – Oral Argument Requested – Participation at Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

K W Resort Utilities Corporation (KWRU or Utility) is a Class A utility providing wastewater service to approximately 1,865 customers in Monroe County. Water service is provided by the Florida Keys Aqueduct Authority (FKAA). During KWRU’s 2015 rate case, the Commission found that KWRU had engaged in billing practices that appeared to be inconsistent with its tariff.¹ Subsequently, in that rate case docket, the Commission ordered this docket opened and ordered Commission staff to conduct a full audit of KWRU’s billing practices to determine if KWRU had violated any of the Commission’s orders, rules, or statutes.² Staff subsequently conducted an audit and investigation of KWRU’s billing practices for the period of April 2013

¹ 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.*

² 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.*

through March 2017.³ This audit found several instances where KWRU charged rates inconsistent with its tariff.

On May 17, 2017, Commission staff sent KWRU a Notice of Apparent Violation (NOAV). The NOAV identified several instances where KWRU was in apparent non-compliance with regard to Commission statutes, rules, and orders. Specifically, the Commission staff identified instances where it appeared KWRU charged an unauthorized flat rate, charged unauthorized pool charges, and violated base facility charge (BFC) billing practices. In KWRU's response to the NOAV, filed July 17, 2018,⁴ KWRU stated that it mistakenly believed that its revision to a bulk wastewater rate had been accepted by the Commission, similar to a developer's agreement for service. Additionally, in its response, KWRU pointed out that at the end of 2009, management was moved in-house and has since routinely brought all matters before the Commission. Further, KWRU indicated it believed the pool charges were implemented reasonably under the tariff and were only implemented after consulting with Commission staff. KWRU responded to the apparent violation of BFC billing practices by admitting it had billed several general service customers incorrect BFCs and stated it was an error that occurred in switching KWRU's billing system after the 2009 rate case. KWRU also asserted that "KWRU did not over earn based on this error." KWRU also addressed the billing discrepancy with Roy's Trailer Park in its response, and explained that KWRU had engaged in numerous discussions to mitigate the customer's outstanding balance owed to the Utility consistent with KWRU's approved tariffs.

Proposed Agency Action Order and Order to Show Cause

On August 31, 2018, the Commission issued its Proposed Agency Action Order and Order to Show Cause No. PSC-2018-0444-PAA-SU. The Order had two portions, the first was a Show Cause Order directing KWRU to show cause why it should not be fined a penalty in the amount of \$10,000.00 for its apparent violation of Sections 367.081(1) and 367.091(3), Florida Statutes (F.S.). The PAA portion of the Order (PAA Order) found that (1) the April 2013 through March 2017 audit period utilized by Commission staff was reasonable; (2) the appropriate time period for the refunds was April 2013 through March 2016; (3) KWRU should refund Safe Harbor \$26,408 with interest in accordance with Rule 25-30.360, Florida Administrative Code (F.A.C.); (4) KWRU should refund Sunset \$41,034 with interest in accordance with Rule 25-30.360, F.A.C.; (5) KWRU was not required to refund rates charged for pools because KWRU believed that an approved tariff for pools the Utility had for Key West Golf Club-HOA "was applicable to any additional customers with pools;" (6) KWRU did not have to refund general service customers that were billed BFCs based on units instead of Florida Keys Aqueduct Authority (FKAA) metered rates because KWRU had corrected its billing practices following the implementation of 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.*; and (7) that KWRU's settlement with Roy's Trailer Park was a

³ Order No. PSC-17-0091-FOF-SU, pg. 82, directed "a new docket be opened, and a full audit and investigation conducted in regard to KWRU's billing practices in order to determine if any orders, rules, or statutes were violated by the Utility." The Commission did not fix a particular time period for the full audit. The 2013-2017 audit dates were selected by Commission staff.

⁴ DN 04700-2018.

reasonable solution to address that customer's corrected outstanding balance from being billed by KWRU based on units instead of FKAA meters.

In the PAA Order, the Commission also discussed a letter, sent by the Office of Public Counsel (OPC) on June 12, 2018, which argued that the audit of KWRU did "not go back to the final order issued in the 2009 rate case when KWRU started incorrectly billing" customers.⁵ In its order, the Commission disagreed and stated that it found the "time period covered by the audit is a reasonable remedy to mitigate the Utility's incorrect billing practices" and that KWRU had already corrected its billing practices.⁶

Motions Subsequent to Proposed Agency Action Order and Order to Show Cause

On September 21, 2018, OPC filed a petition requesting an evidentiary hearing protesting portions of the PAA Order (OPC Petition). Specifically, OPC protested the portions of the order limiting the time period for the audit of KWRU and the time period for which KWRU would be responsible for issuing refunds. OPC argues that KWRU should have been required "to issue refunds for the entire time period that KWRU incorrectly billed customers" and that Rule 25-30.350, F.A.C., "requires that customers shall be refunded the full amount of unauthorized billing."⁷

In response, on October 1, 2018, KWRU filed a Motion to Dismiss, or in the Alternative to Strike, OPC's Petition (Motion to Dismiss or Strike) arguing, in part, that OPC lacks standing in this case and is not entitled to a hearing. Also, on October 1, 2018, KWRU filed a cross-petition seeking a formal administrative hearing protesting the PAA Order (KWRU Cross-Petition). KWRU's Cross-Petition argues that (1) while the PAA Order required refunds to certain customers, it failed to require other customers to pay back over-refunds previously made by KWRU, thus such customers erroneously benefitted from the PAA Order, (2) the Commission failed to consider mitigating circumstances in imposing on KWRU an unreasonably high penalty, and (3) the rate KWRU charged to Safe Harbor was in compliance with the intent of KWRU's approved tariff and the negotiated amount between the KWRU and Safe Harbor (of which the Commission was aware in 2009) evidenced that intent.⁸ KWRU's argument disputing the amount of the penalty addresses the show cause portion of this docket, which will be addressed at a later date and is not part of this recommendation.

On November 19, 2018, OPC filed a Motion for Partial Summary Final Order to the Protested Portions of the PAA Order and a Memorandum in Support of the Motion (OPC Motion for Partial Summary Final Order). In its Motion, OPC asserts that because its protest of the PAA Order hinges on a straightforward legal issue, the resolution of that issue may be dispositive of OPC's Petition of the PAA Order.

⁵ Order No. PSC-2018-0444-PAA-SU, issued August 31, 2018, in Docket No. 20170086-SU, *In re: Investigation into the billing practices of K W Resort Utilities Corp. in Monroe County*, pg. 6.

⁶ *Id.*

⁷ OPC Pet. for Hr'g, pg. 1.

⁸ KWRU Cross-Pet. for Hr'g, pg. 2.

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On November 29, 2018, KWRU filed its response in opposition to the OPC Motion for Partial Summary Final Order, included its own Cross-Motion for Summary Final Order, and separately filed a request for oral argument on the OPC Motion for Partial Summary Final Order, KWRU's own Cross-Motion for Summary Final Order, and KWRU's Motion to Dismiss or Strike.

Issue 1 addresses KWRU's request for oral argument. Issue 2 addresses KWRU's Motion to Dismiss or Strike. Issue 3 addresses OPC's Motion for Partial Summary Final Order, and KWRU's Cross-Motion for Summary Final Order. The Commission has jurisdiction over these matters pursuant to Sections 367.081, 367.091, and 367.161, F.S.

Discussion of Issues

Issue 1: Should KWRU's request for oral argument be granted?

Recommendation: Yes. KWRU's Request for Oral Argument should be granted. The parties should be allowed 5 minutes, total, per side, to argue all of the motions at issue in Issues 2 and 3. (Schrader)

Staff Analysis: Rule 25-22.0021(3), F.A.C., specifies that informal participation is not permitted on dispositive motions and participation on such is governed by Rule 25-22.0022, F.A.C. Rule 25-22.0022(7), F.A.C., states that oral argument at Agenda Conference will only be entertained for dispositive motions, such as a motion for summary final order.

Rule 25-22.0022(1), F.A.C., provides that a request for oral argument should be timely filed and must state with particularity why oral argument would aid the Commission in understanding and evaluating the issues to be decided. The request must also state the amount of time requested for oral argument. Failure to file a timely request for oral argument constitutes waiver of that request. Rule 25-22.0022(3), F.A.C., provides that granting or denying a request for oral argument is within the sole discretion of the Commission.

KWRU's Request for Oral Argument on OPC's Motion for Partial Summary Disposition and KWRU's Cross-Motion for Summary Disposition (Request for Oral Argument) was timely filed and did state why oral argument would aid the Commission in understanding the issues to be decided in this case. However, the request does not specify the amount of time requested for oral argument. KWRU also acknowledges that neither party timely requested oral argument regarding KWRU's Motion to Dismiss or Strike, but KWRU "believes the Commission can benefit for oral argument on that Motion as well."

Staff recommends that, due to the complexity of this case, oral argument would be helpful for the Commission to better understand the entirety of the series of events and legal issues. Thus, staff recommends that the Commission allow 5 minutes per side for oral argument on all outstanding motions in this case (OPC's Motion for Partial Summary Final Order, KWRU's Cross-Motion for Summary Final Order, and KWRU's Motion to Dismiss or Strike).

Issue 2: Should the Commission grant KWRU's Motion to Dismiss or Strike?

Recommendation: No. The Commission should deny KWRU's Motion to Dismiss or Strike. (Schrader)

Staff Analysis:

Motion to Dismiss

From KWRU's Motion to Dismiss or Strike it is unclear what type of dismissal KWRU seeks. KWRU argues that OPC's Petition "fail[s] to state claims upon which relief may be granted as OPC lacks standing and should not be provided an evidentiary hearing, and should be dismissed."⁹ KWRU's Motion also cites *Huet v. Mike Shad Ford, Inc.*, 915 So. 2d 723, 725 (Fla. 5th DCA 2005). *Huet* involves the dismissal of a claim that fails to sufficiently state a cause of action. KWRU also cites *Ginsberg v. Lennar Fla. Holdings Inc.*, 645 So. 2d 490, 501 (Fla. 3d DCA 1994), to support the idea that "a party does not state a cause of action by asserting bare legal conclusions without supporting factual allegations."¹⁰ Despite its citations to *Huet* and *Ginsberg*, KWRU's main arguments are based upon OPC allegedly lacking standing, and KWRU seeks the dismissal of OPC on those grounds. Given these circumstances, staff is unclear whether KWRU asserts a Motion to Dismiss for Failure to State a Cause of Action or if KWRU asserts a Motion to Dismiss for Lack of Jurisdiction. Therefore, staff analyzed KWRU's Motion on both bases below.

Motion to Dismiss for Failure to State a Cause of Action

In making a Motion to Dismiss for Failure to State a Cause of Action, the burden is on the moving party to show that even if the facts in a complaint (in this case, OPC's Petition) are true, the complainant would not be entitled to the relief requested.¹¹ In ruling on such a motion, the well-pled allegations of the complaint (or the petition in this case) must be taken as true, and any allegations must be construed in the light most favorable to the non-moving party.¹² A motion to dismiss is not a substitute for a motion for summary judgment and a ruling on a motion to dismiss should be based solely upon the "four corners" of the complaint.¹³ Such a ruling may not be based upon any speculation of what is true or may be ultimately proven.¹⁴

KWRU, by citing to *Ginsberg* and *Huet*, appears to argue that OPC's Petition failed to properly allege facts to support its legal conclusions; thus KWRU is arguing that OPC's allegations are not "well-pled." However, KWRU does not specify which legal conclusions of OPC are not supported by alleged facts. OPC responded to KWRU by stating that all of the requisite facts at issue are clearly outlined in OPC's Petition.¹⁵ OPC alleges the Commission arbitrarily cut off the

⁹ KWRU Mot. to Dismiss or in Alt. to Strike, pg. 2-3.

¹⁰ KWRU Mot. to Dismiss or in Alt. to Strike, pg. 3.

¹¹ *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 861 (Fla. 5th DCA 1996).

¹² *Huet v. Mike Shad Ford, Inc.*, 915 So. 2d 723, 725 (Fla. 5th DCA 2005), and *Haskel Realty Group, Inc. v. KB Tyrone, LLC*, 253 So. 3d 84, 85 (Fla. 2d DCA 2018).

¹³ *Consuegra v. Lloyd's Underwriters at London*, 801 So. 2d 111, 112 (Fla. 2d DCA 2001).

¹⁴ *Cintron* at 861.

¹⁵ OPC Resp. to KWRU Mot. to Dismiss or in Alt. to Strike, pg. 5.

time frame covered by its audit, rather than including the full time frame of the incorrect billing, arguing that Rule 25-30.350, F.A.C., requires that the entirety of any incorrect charges must be refunded.¹⁶

In reviewing OPC's petition, OPC's primary legal conclusion is that the Commission should have conducted an audit of KWRU that covered a longer period and that Rule 25-30.350, F.A.C., required additional refunds from KWRU. OPC supports this conclusion by alleging that KWRU's irregular billing practices were for a longer period than what was covered in the audit and refunds. Therefore, staff recommends that the Commission find that OPC has alleged sufficient facts to support its legal conclusions.

Given that OPC has alleged sufficient facts to support its legal conclusions, the next question is whether, if OPC's allegations are true, it would be entitled to the relief it requests. In this case, if, as OPC asserts, the time frame of the audit of KWRU should have been longer, and if OPC's application of Rule 25-30.350, F.A.C., is correct, then it is possible that KWRU could owe additional refunds to customers. Therefore, staff recommends that KWRU's Motion to Dismiss should not be granted on the basis of OPC failing to state a cause of action.

Motion to Dismiss for Lack of Standing

As with motions to dismiss for failure to state a cause of action, review of motions to dismiss for lack of standing must be confined to the four corners of the complaint, all inferences must be drawn in favor of the party pleading the complaint, and all well-pled allegations in the complaint must be accepted as true.¹⁷

Florida's Administrative Procedure Act, in Section 120.52(13), F.S., defines "party," in part, as:

- (a) Specifically named persons whose substantial interests are being determined in the proceeding.
- (b) 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 proposed agency action, and who makes an appearance as a party.

KWRU argues that OPC lacks standing in this case because it does not meet the two-part "substantial interest" test as established in *Agrico Chem. Co. v. Dep't of Env'tl. Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).¹⁸ However, as Section 120.52(13)(b), F.S., indicates, one may be a party to an administrative proceeding simply by provision of statute.¹⁹

¹⁶ *Id.*

¹⁷ *Wheeler v. Powers*, 972 So. 2d 285, 288 (Fla. 5th DCA 2008), citing *Payne v. City of Miami*, 927 So. 2d 904, 906 (Fla. 3d DCA 2005).

¹⁸ KWRU Mot. to Dismiss or in Alt. to Strike, pg. 4.

¹⁹ *Agrico Chem. Co. v. Dep't of Env'tl. Regulation*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981). See also Order No. PSC-12-0620-PCO-WU, issued November 19, 2012, in Docket No. 20110200-WU, *In re: Application for the increase in water rates in Franklin County by Water Management Services, Inc.*, pg. 2, which addressed a Motion to

OPC is entitled to party status in Commission proceedings by statute. Section 350.0611(1), F.S., states that OPC has the power “to appear, in the name of the state or its citizens, in any proceeding or action before the commission...and urge therein any position which he or she deems to be in the public interest.” Therefore, staff recommends that KWRU’s Motion to Dismiss should not be granted on the basis of lack of standing.

Conclusion

KWRU’s Motion to Dismiss OPC from this case should be denied because OPC has not failed to state a cause of action and because OPC has statutory authority under Section 350.0611(1), F.S., to appear in any proceeding or action before the Commission.

Motion to Strike

In the alternative to its Motion to Dismiss, KWRU asserts that OPC’s Petition should be stricken as immaterial.²⁰ KWRU also alleges that OPC (1) has no right to an evidentiary hearing, (2) does not require an evidentiary hearing, (3) has petitioned for one without consulting the relevant ratepayers, and (4) is requesting this evidentiary hearing without the approval of the affected ratepayers.²¹

In its Motion to Strike, KWRU alleges that “there is neither a need nor a requirement for an evidentiary hearing, and OPC’s demand for an evidentiary hearing should be stricken as it does not comport with basic elements of due process and the Florida Supreme Court has stated that there is no need for an evidentiary hearing.”²² In support of this allegation, KWRU relies on *S. Fla. Hosp. & Healthcare Ass’n v. Jaber*, 887 So. 2d 1210, 1212 (Fla. 2004), for the proposition that the Commission “is not required to hold an evidentiary hearing for a negotiated settlement,” and *Citizens of State v. Fla. Public Srvc. Com’n.*, 146 So. 3d 1143, 1150 (2014), for the proposition that the Commission “can approve settlement without evidentiary hearings, and non-unanimous settlements.”²³

Staff believes KWRU’s reliance on these cases is not relevant to the matter at hand. Both *S. Fla. Hosp. & Healthcare Ass’n v. Jaber* and *Citizens of State v. Fla. Public Srvc. Com’n.* involve settlement agreements presented to, and approved by, the Commission. KWRU’s argument on dismissing OPC from this case is primarily based upon the allegation that KWRU has privately settled with the “only two affected ratepayers” in this case—Sunset and Safe Harbor.²⁴ In support of this, on October 26, 2018, KWRU filed a copy of settlement agreements it had reached with Sunset and Safe Harbor.²⁵ These settlements purport to resolve any disputes regarding service availability fees and charges, and prior invoices for wastewater service with Sunset and Safe Harbor. Unlike in *S. Fla. Hosp. & Healthcare Ass’n v. Jaber* and *Citizens of*

Dismiss an OPC PAA protest on the basis that OPC did not represent customers of the utility. The Commission denied this Motion on the basis that OPC is authorized by statute to appear as a party.

²⁰ KWRU Mot. to Dismiss or in Alt. to Strike, pg. 5.

²¹ *Id.*

²² *Id.* at 4-5.

²³ *Id.*

²⁴ *Id.* at 4.

²⁵ Doc. No. 06800-2018.

State v. Fla. Public Srvc. Com'n., the settlements with Sunset and Safe Harbor have not been presented for approval by the Commission. Furthermore, OPC alleges in its Petition that more ratepayers than Sunset and Safe Harbor are due refunds in this case. Thus, even if the KWRU “settlements” with Sunset and Safe Harbor were approved by the Commission, OPC’s Petition raises the argument that additional ratepayers may be affected.

As to KWRU’s allegation that OPC does not require an evidentiary hearing, while OPC does ask for a ruling on a preliminary legal issue, OPC also states in its petition that it protests the determination of the refund amounts ordered in the PAA Order and the appropriate amounts to be refunded to all affected customers. OPC also argues that refunds may also be due to customers other than Sunset and Safe Harbor.²⁶

Finally, KWRU’s assertion that OPC has petitioned for an evidentiary hearing without consulting with, or being approved by, the relevant ratepayers is irrelevant. Under Section 350.0611, F.S., the Legislature has vested the Public Counsel with broad powers “to carry out the duties of his or her office.” None of this authority is predicated upon seeking prior approval of the state or its citizens in carrying out those duties. For all the reasons stated above, Commission staff recommends that KWRU’s Motion to Strike OPC’s Petition should be denied.

²⁶ OPC Pet. for Hr’g, pg. 4.

Issue 3: Should the Commission grant the Office of Public Counsel's Motion for Partial Summary Final Order or KWRU's Cross-Motion for Summary Final Order?

Recommendation: No, OPC's Motion for Partial Summary Final Order and KWRU's Motion for Summary Final Order should be denied. (Schrader)

Staff Analysis:

Standard for Motion for Summary Final Order

Section 120.57(1)(h), F.S., requires that, in order to grant a motion for summary final order, it must be determined from "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order." The Commission has previously stated that "the standard for granting a summary final order is very high."²⁷

In general, "a summary judgment should not be granted unless the facts are so crystalized that nothing remains but questions of law," and "must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); see also *City of Clermont, Fla. v. Lake City Util. Servs., Inc.*, 760 So. 2d 1123, 1124 (Fla. 5th DCA 2000), and *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977). If the record "raises even the slightest doubt" that an issue of material fact may exist, a summary final order would not be appropriate.²⁸ Even if the parties agree as to the facts, "the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts."²⁹ The Commission has also previously found that "it is premature to decide whether a genuine issue of material fact exists when [a party] has not had the opportunity to complete discovery and file testimony."³⁰

Issues of Law in Dispute

The disputed issues of law raised in the parties' Motions relate to the application of Rule 25-30.350(2), F.A.C., to the Commission ordered refunds under Rule 25-30.360, F.A.C. OPC argues that Rule 25-30.350, F.A.C., Underbillings and Overbillings for Water and Wastewater Service, is controlling in this case. Rule 25-30.350(2), F.A.C., states that "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."

²⁷ Order No. PSC-11-0244-FOF-GU, issued June 2, 2011, in Docket No. 090539-GU, *In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department*, pg. 4.

²⁸ *Albelo v. S. Bell*, 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996).

²⁹ *Id.*

³⁰ Order No. PSC-01-1554-FOF-WU, issued July 27, 2001, in Docket No. 991437-WU, *In re Wedgefield Utilities, Inc.*, citing *Brandauer v. Publix Super Markets, Inc.*, 657 So. 2d 932, 933-34 (Fla. 2d DCA 1995).

KWRU argues that Rule 25-30.360, F.A.C., Refunds, is controlling in this case. Rule 25-30.360, F.A.C., states, in part, that:

With the exception of deposit refunds, all refunds ordered by the Commission shall be made in accordance with the provisions of this Rule, unless otherwise ordered by the Commission....Where the refund is the result of a specific rate change, including interim rate increases, and the refund can be computed on a per customer basis, that will be the basis of the refund. Where the refund is not related to specific rate changes, such as a refund for overearnings, the refund shall be made to customers of record as of a date specified by the Commission. In such case, refunds shall be made on the basis of usage. Per customer refund refers to a refund to every customer receiving service during the refund period. Customer of record refund refers to a refund to every customer receiving service as of a date specified by the Commission.

OPC asserts that by electing not to audit the full time period for which the Commission 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. Instead, the Commission should have made an effort to determine what, if any, overbilling was committed by KWRU from 2009 through March 2013.

OPC also asks whether it was correct for the Commission to “interpret [Rule 25-30.350, F.A.C.] in a way that allows KWRU to refund its customers an amount which is less than the full amount KWRU overcharged said customers.”³¹ OPC argues that the plain language of the rule does not afford the Commission with discretion to “arbitrarily” order refunds for a shorter period and contends that Rule 25-30.350, F.A.C., requires the Commission to order KWRU to refund all overcharges to its customers from the date overbilling began to the date overbilling ended.

KWRU argues that the Commission has the discretion to determine the proper time frame for an audit and the amount of refunds.³² KWRU further argues that Rule 25-30.350, F.A.C., would not apply to this case since it is a rule that applies to overbilling in regards to individual complaints and customer service, and not Commission ordered refunds issued pursuant to Rule 25-30.360, F.A.C.³³ KWRU states that the 2013 revisions to Rule 25-30.350, F.A.C., that added the new provisions for overbilling, were part of a number of rule amendments related to individual customer service³⁴ and that Rule 25-30.360, F.A.C., states that “all refunds ordered by the Commission shall be made in accordance with the provisions of this Rule.”³⁵ Finally, KWRU argues that Florida Supreme Court found in *Citizens of State v. Fla. Public Srvc. Com’n.*, 146 So. 3d 1143 (Fla. 2014), that the Commission “acts in the public interest, and is accorded deference.”

³¹ OPC Mot. for Partial Summ. Final Order pg. 2.

³² KWRU’s Resp. to OPC Mot. for Partial Summ. Final Order, pg. 8

³³ *Id.*

³⁴ KWRU cites to *In re: Revision to Rule 25-30.335 et al.*, 2013 WL 1628235 (P.S.C. 2013).

³⁵ KWRU’s Resp. to OPC Mot. for Partial Summ. Final Order, pg. 9.

Thus, KWRU argues, based on this deference, the Commission is allowed to determine the relevant time period for an audit.³⁶

Facts in Dispute or in Need of Further Development

In its Motion for Partial Summary Final Order, OPC asserts that there are no material facts in dispute as whether KWRU overbilled customers.³⁷ OPC further states that the utility admitted in its response to Commission staff's NOAV that KWRU began its unauthorized billing in 2009.³⁸ OPC also disputes the appropriate amount to be refunded to KWRU customers and that the Commission "may have deprived numerous customers of the opportunity for refunds of the entire amounts overbilled" by limiting the audit and refund period.³⁹ OPC states that the Commission acknowledged that the available information during the Commission's investigation showed KWRU engaged in unauthorized billing from 2009 through March 2016.⁴⁰

In its Cross-Motion for Summary Final Order, KWRU asserts that "there are no issues of material fact now that OPC has identified [its] legal theory" in regards to the application of 25-30.350, F.A.C., and that this case does not involve "a claim by customers seeking a refund of alleged [overbillings]."⁴¹ In its Cross-Petition for hearing, KWRU states that while the PAA Order required refunds to certain customers, it failed to require other customers to pay back over-refunds previously made by the Utility. Further, KWRU asserts that the rate charged to Safe Harbor Marina was in compliance with the intent of the approved Tariff, and the negotiated amount between the Utility and Safe Harbor Marina (of which the Commission staff was aware back in 2009) evidenced that intent.⁴² KWRU also states that one of the purposes of its Cross-Petition is for the Commission to acknowledge by order that no refund is owed to Safe Harbor Marina. Finally, KWRU asserts that there are only two parties, Sunset and Safe Harbor, which should be due refunds in this case (and KWRU asserts that it has already resolved these refunds).

As shown above, both KWRU and OPC argue that no issues of material fact exist in regards to the issues identified in OPC's Motion for Partial Summary Final Order.⁴³ However, staff cannot concur with this opinion. Staff agrees that KWRU has admitted to improper billing in KWRU's billing of Safe Harbor and some of KWRU's general service customers in KWRU's response to Commission staff's NOAV.⁴⁴ However, there does appear to be some dispute between the parties over whether *overbilling*, as opposed to improper billing, occurred, and when and how much overbilling may have occurred. KWRU does not appear to have clearly admitted that it overbilled customers during the time period of 2009-2013 (the time period in question prior to the audit conducted by Commission staff). KWRU and OPC also appear to disagree as to the

³⁶ KWRU's Resp. to OPC Mot. for Partial Summ. Final Order, pg. 9. KWRU also argues that *Citizens of State v. Fla. Public Svc. Com'n.* allows for the Commission to accept non-unanimous settlements over OPC's objections.

³⁷ OPC Mot. for Partial Summ. Final Order pg. 2.

³⁸ *Id.* at 3.

³⁹ *Id.* at 2 and 6.

⁴⁰ *Id.* at 3.

⁴¹ KWRU Cross-Pet. for Hr'g, pg. 1.

⁴² *Id.* 2.

⁴³ See KWRU's Resp. to OPC Mot. for Partial Summ. Final Order, pg. 6 and OPC Mot. for Partial Summ. Final Order pg. 2.

⁴⁴ KWRU Response to Notice of Apparent Violation (DN 04700-2018).

effect of KWRU's private settlements reached with Sunset and Safe Harbor, and whether additional refunds are due to those customers. Arguably, the purported settlements entered into by KWRU with Sunset and Safe Harbor may have some impact on amounts that may or may not be due to KWRU customers—the parties appear to have disagreement as to, at the very least, what inferences may be drawn from these settlements. KWRU's belief that it should not have to pay any additional amounts to Sunset and Safe Harbor is based, at least in part, on the settlements KWRU reached with these customers.

Finally, there appears to be disagreement between OPC and KWRU as to whether there are any additional customers who may be owed refunds, and what the amount of those refunds should be.

In the current docket, parties have not yet conducted, let alone completed, discovery in regards to the PAA Order. Furthermore, staff believes, despite the parties' assertions, that neither party has carried its burden to demonstrate, conclusively, the absence of any genuine issue of material fact in regards to whether Rule 25-30.350, F.A.C. would require additional audits or refunds in this case. Staff also believes that additional facts may be developed at hearing that would help the Commission determine if KWRU "overbilled" pursuant to Rule 25-30.350, F.A.C.

In regards to whether any issues have been stipulated to in this case from the PAA Order, Section 120.80(13)(b), F.S., states that "notwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated." Further, Rule 25-22.029, F.A.C., provides that issues in a proposed action that are not identified in the petition or cross-petition protesting the proposed action are deemed stipulated. In this case, OPC states that it protests (1) whether the Commission properly followed its rules in setting the time period for refunds, and (2) the amount for refunds due to KWRU customers. As such, staff interprets OPC's protest of the PAA Order to be every issue in the PAA Order. The issues in the PAA Order set out the appropriate time period for refunds and identify any refunds that may be due to KWRU customers.⁴⁵ Thus, pursuant to 120.80(13)(b), F.S., and Rule 25-22.029, F.A.C., the Commission should find that the entirety of the PAA Order has been protested, and none of the issues in the PAA Order have been stipulated.

OPC Lack of Standing and Right to a Hearing

KWRU reiterates in its Cross-Motion for Summary Final Order the argument raised in its Motion to Dismiss or Strike that OPC lacks standing in this case and is not entitled to a hearing.⁴⁶ For the reasons set forth in Issue 2, staff recommends that OPC does have standing in this matter and is entitled to request a hearing. Therefore, staff recommends that the Commission deny this part of KWRU's Cross-Motion.

⁴⁵ See No. PSC-2018-0444-PAA-SU, pg. 6-9.

⁴⁶ KWRU's Resp. to OPC Mot. for Partial Summ. Final Order, pg. 9-10.

Conclusion

For the reasons stated above, staff does not believe that the facts of this case are “so crystalized” that it is clear that no genuine issue as to any material fact exists in regards to potential overbilling by KWRU. A review of KWRU’s and OPC’s pleadings indicates that neither party has conclusively demonstrated, at this point, that no issues of genuine fact remain in regards to overbilling in this case. Furthermore, staff believes that additional facts may be developed at hearing that would help the Commission decide the matter of whether KWRU overbilled pursuant to Rule 25-30.250, F.A.C. Therefore, staff recommends that the granting of a partial summary final order is premature at this time, and OPC’s and KWRU’s motions should be denied.

Issue 4: Should this docket be closed?

Recommendation: If the Commission denies KWRU's Motion to Dismiss or Strike, and denies both parties' Motions for Summary Final Order, this docket should remain open to address OPC's and KWRU's respective requests for hearing on their protests of the PAA Order. (Schrader)

Staff Analysis: If the Commission denies KWRU's Motion to Dismiss or Strike, and denies both parties' Motions for Summary Final Order, this docket should remain open to address OPC's and KWRU's respective requests for hearing on their protests of the PAA Order.