

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the billing practices of
K W Resort Utilities Corp. in Monroe County.

DOCKET NO. 20170086-SU
ORDER NO. PSC-2019-0338-PAA-SU
ISSUED: August 21, 2019

The following Commissioners participated in the disposition of this matter:

JULIE I. BROWN
DONALD J. POLMANN
ANDREW GILES FAY

NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING STIPULATION AND SETTLEMENT
AND SETTLEMENT OFFER

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

BACKGROUND

This docket was opened to investigate the billing practices of K W Resort Utilities Corporation (KWRU) to determine if KWRU had violated any Commission order, rule or statute.¹ An audit was conducted by Commission staff for the period of April 2013 through March 2017, in which KWRU was found to have charged rates inconsistent with its tariffs. Based on this audit, Order No. PSC-2018-0444-PAA-SU (Order No. PSC-2018-0444) was issued on August 31, 2018.²

The proposed agency action portion of Order No. PSC-2018-0444 found that:

- The April 2013 through March 2017 audit period utilized by Commission staff was reasonable.
- The appropriate time period for the refunds was April 2013 through March 2016.

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 Corporation.

² Order No. PSC-2018-0444 has two parts. The first part is proposed agency action (PAA) regarding the calculation of refunds for KWRU customers, which will be referenced herein as the PAA Order. The second part is a show cause order as to why KWRU should not be penalized \$10,000 which shall be referenced herein as the Show Cause Order.

- KWRU was required to refund Safe Harbor (Safe Harbor) \$26,408 with interest in accordance with Rule 25-30.360, Florida Administrative Code (F.A.C.).
- KWRU was required to refund Sunset (Sunset) \$41,034 with interest in accordance with Rule 25-30.360, F.A.C.
- KWRU was not required to refund rates charged for pools due to KWRU's reasonable belief that the approved tariff for pools it had for Key West Golf Club-HOA "was applicable to any additional customers with pools."
- KWRU did not have to refund general service customers that were billed base facility charges (BFC) based on units instead of Florida Keys Aqueduct Authority (FKAA) metered rates for several reasons: 1) the error occurred during the transition from flat to volumetric for residential customers in which a billing software error incorrectly identified these customers as residential units; 2) the billing determinants in KWRU's 2009 rate case may have been based on units rather than meter sizes; and 3) KWRU corrected its billing practices following the implementation of Order No. PSC-16-0123-PAA-SU.³
- KWRU's settlement with Roy's Trailer Park was a reasonable solution to address that customer's corrected outstanding balance from being billed by KWRU based on units instead of FKAA meters.

The show cause portion of Order No. PSC-2018-0444 directed KWRU to show cause why it should not be fined a \$10,000 penalty for violations of Sections 367.081(1) and 367.091(3), Florida Statutes (F.S.).

The Office of Public Counsel (OPC) filed a protest of the PAA Order on September 21, 2018. In its protest, OPC raised the issues of whether Rule 25-30.350, F.A.C., requires that refunds be granted for the entire period that overbilling took place, 2009 through April 2016, and the calculation of customer refunds. KWRU filed a Cross Petition for Formal Evidentiary Hearing (Cross Petition) on October 1, 2018. In its Cross Petition, KWRU protested the \$10,000 penalty (Show Cause Order) and the refunds ordered for Safe Harbor and other customers. On March 14, 2019, Order No. PSC-2019-0101-PCO-SU (OEP) was issued setting a final hearing on the PAA order issues raised by OPC and KWRU for September 17-18, 2019.

On May 17, 2019, KWRU and OPC filed a Joint Motion for Approval of Stipulation and Settlement (Stipulation and Settlement). The Stipulation and Settlement is contained in Attachment A. The Stipulation and Settlement has the following provisions:

- Fourth Avenue, LLC shall be refunded \$1,004.34 and ITNOR Waters Edge shall be refunded \$1,025.49 within 30 days of Commission approval of the Stipulation and Settlement.

³ 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.

- OPC will withdraw its protest of the PAA Order filed on September 21, 2019.
- OPC takes no position on refunds to Safe Harbor or Sunset.
- The Stipulation and Settlement does not address the Show Cause portion of Order No. PSC-2018-0444.
- KWRU will limit its contested issues to refunds to Safe Harbor and Sunset (PAA Order) and the penalty (Show Cause Order).
- The Stipulation and Settlement must be approved by the Commission without modification.

On May 28, 2019, KWRU filed a Motion to Abate Proceedings. In its Motion to Abate, KWRU argued that the Stipulation and Settlement allowed both the PAA and Show Cause portions of Order No. PSC-2018-0444 to be resolved at an Agenda Conference, thereby negating the necessity for a formal evidentiary hearing. On June 4, 2019, KWRU filed the direct testimony of Christopher A. Johnson. The Motion to Abate was granted on June 14, 2019, by Order No. PSC-2019-0235-PCO-SU, suspending the hearing schedule in this docket until further notice.

On June 14, 2019, KWRU also filed an Offer of Settlement (KWRU Offer) to resolve the remaining issues in this docket not addressed in the Stipulation and Settlement. The KWRU Offer is contained in Attachment B. The KWRU Offer contains the following provisions:

- The Settlement Agreement and Release between Safe Harbor and KWRU dated May 12, 2016, Exhibit CAJ-9 to witness Johnson's direct testimony, releases KWRU from any refund which may be due to Safe Harbor in this docket for overbilling and no additional refunds are necessary.
- The Settlement Agreement and Release between Sunset and KWRU dated October 23, 2019, Exhibit CAJ-8 to witness Johnson's direct testimony, states that the payment of \$41,034.00 by KWRU to Sunset is a complete satisfaction of any claim that Sunset is owed any additional refunds for overbilling by KWRU and no additional refunds are necessary.
- KWRU is willing to pay a penalty of \$2,500.00 for improper billing.

Unlike most cases when a settlement is reached by the parties where an evidentiary hearing is scheduled, our staff has made recommendations with regard to Issues 1 and 2, the Stipulation and Settlement and KWRU's Offer, both of which were filed to resolve the unique facts and posture of this case. The protested order involved refunds to customers for which staff is not a party, and a fine for which staff is a party and acts in a prosecutorial role. Because all issues have become so intertwined, we find that it an appropriate and expedient process for our staff to have made substantive recommendations on all settlement and stipulation issues before us.

This order addresses both the Stipulation and Settlement and KWRU Offer. We have jurisdiction pursuant to Section 367.081, F.S.

DECISION

The Stipulation and Settlement filed by the parties on May 17, 2019, proposes to settle several legal and billing issues addressed in Order No. PSC-2018-0444 that were protested by OPC and cross-protested by KWRU. Specifically, the Stipulation and Settlement requires KWRU to issue refunds to two additional KWRU customers: \$1,004.34 to Fourth Ave., LLC, and \$1,025.49 to ITNOR Waters Edge, within 30 days of our approval of the Stipulation and Settlement. These refunds would be paid in addition to any refunds issued up until the time of the filing of the Stipulation and Settlement,

OPC also agrees to withdraw its protest of the PAA Order and take no position regarding further refunds to Safe Harbor or Sunset. The parties also state that the Stipulation and Settlement “is in the best interests of both the Utility and its customers.” In sum, OPC has agreed to waive its right to a hearing on the factual and legal PAA Order issues it protested in exchange for the payment of refunds to two additional customers incorrectly billed by the use of BFCs based on the number of units or individual dwellings present behind a master meter, rather than based on the customer’s meter size.

Under the terms of the Stipulation and Settlement, KWRU is able to contest the refunds for Safe Harbor and Sunset (PAA Order issues) and the penalty issue (Show Cause Order issue). In its Motion to Abate, KWRU made the representation that approval of the Stipulation and Settlement would enable KWRU to resolve both the PAA and Show Cause Order issues “at the Commission Conference, negating the necessity for a formal administrative hearing.” From this statement, we conclude that if given an opportunity to present oral argument on the PAA and Show Cause Order issues at an Agenda Conference, KWRU envisions waiving its right to an evidentiary hearing on these issues.

Both OPC and KWRU have entered into the Stipulation and Settlement in good faith and represent that it is in the public interest. The Stipulation and Settlement resolves some protested billing issues and provides an administratively efficient means of resolving the issues that remain: Safe Harbor and Sunset refunds and the \$10,000 penalty. Given these unique facts, the parties argue that the Stipulation and Settlement appears to be in the public interest and to fairly and reasonably settle the issues between KWRU and OPC in this docket. The KWRU Offer of Settlement (KWRU Offer) proposes to settle the remaining issues in this docket that were not addressed by the Stipulation and Settlement. The KWRU Offer asks that this Commission approve resolutions to the refund amounts due to Safe Harbor and Sunset and approve a lower amount for the Show Cause penalty.

Regarding the remaining refunds due to Safe Harbor and Sunset, KWRU filed the Settlement Agreement and Release it has reached with each party as exhibits to witness Christopher Johnson’s Prefiled Direct Testimony filed on June 4, 2019. The KWRU Offer asserts that the Settlement Agreement and Release reached with Safe Harbor on May 12, 2016, resolved a number of issues between KWRU and Safe Harbor “including, but not limited to, mutual obligations for refunds between the parties.” Further, the KWRU Offer states that, pursuant to this agreement and release, “any refund which may be due to Safe Harbor in this

docket is deemed satisfied and no additional refunds are necessary.” For Sunset, the KWRU Offer states that the Settlement Agreement and Release, dated October 23, 2018, reached between KWRU and Sunset, provides that in consideration of a payment made by KWRU to Sunset of \$41,034.00, Sunset released KWRU from all claims related to any further refunds due that are addressed in Order No. PSC-2018-0444.

Regarding the Show Cause penalty, KWRU states that Commission staff, during the August 6, 2018 Agenda Conference recommended a penalty of \$1,000; however we increased this penalty to \$10,000. KWRU argues that this penalty “greatly exceeds a reasonable amount based upon the particular circumstances of the KWRU tariff at that time.” In support of this argument, KWRU points to the arguments it previously made at the August 6, 2018 Agenda Conference, pointing in particular to the following discussion from the Conference:⁴

Ms. [Patti] Daniels: ...I do want to reiterate and emphasize to you is that Mr. Friedman is absolutely correct that the –the tariff lacked clarity for many, many years...

Commissioner Brown: Are you – Patti, are you saying, though, that staff had a role in some of the confusion that occurred?

Ms. Daniels: Absolutely Commissioner.

Commissioner Brown: Is that why staff is recommending a nominal fee of a thousand dollar fine?

Ms. Daniel: Absolutely.

In consideration of its arguments, KWRU’s Settlement requests that we approve a penalty of \$2,500 to resolve the Show Cause portion of Order No. PSC-2018-0444.

Regarding the refunds to Safe Harbor and Sunset, it appears that KWRU and those customers have reached a mutually agreeable resolution of the amounts due to those customers. Regarding the Show Cause penalty, it appears that while KWRU did violate its approved tariff, KWRU has reasonably shown that Commission staff had at least some role in the confusion that KWRU asserts it had regarding the interpretation and application of the tariff. Finally, KWRU has corrected its billing practices and is currently billing in accord with its tariff. Given these unique facts, we find that it is reasonable and in the public interest to acknowledge the agreements between KWRU and both Marinas and approve a lower penalty of \$2,500.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Stipulation and Settlement jointly filed by KW Resort Utilities Corporation and the Office of Public Counsel on May 17, 2019, Attachment A to this order, is hereby approved. It is further

ORDERED that KW Resort Utilities Corporation’s Offer of Settlement dated June 13, 2019, Attachment B to this Order, is hereby approved. It is further

⁴ Agenda Conference 25-26, Aug 6, 2018.

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ORDERED that the provisions of this order, issued as Proposed Agency Action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if no person whose substantial interests are affected by the Proposed Agency Action files a protest within 21 days of the issuance of the Order, this docket shall be administratively closed upon the issuance of a Consummating Order.

By ORDER of the Florida Public Service Commission this 21st day of August, 2019.



ADAM J. TEITZMAN

Commission Clerk

Florida Public Service Commission

2540 Shumard Oak Boulevard

Tallahassee, Florida 32399

(850) 413-6770

www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

SBr

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 11, 2019.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the billing practices of
K W Resort Utilities Corp. in Monroe County.

DOCKET NO. 20170086-SU

FILED: May 17, 2019

STIPULATION AND SETTLEMENT

WHEREAS, K W Resort Utilities Corp. (KWRU or Utility), and the Citizens of the State of Florida, through the Office of Public Counsel (“OPC”), have signed this Stipulation and Settlement (the “Agreement;” unless the context clearly requires otherwise, the term “Party” or “Parties” means a signatory to this Agreement); and

WHEREAS, on March 13, 2017, the Commission ordered its staff to open this docket, No. 20170086-SU, 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. Order No. PSC-17-0091-FOF-SU, in Docket No. 150071-SU, *In re: Application for increase in wastewater rates in Monroe County by K W Resort Utilities, Corp.*; and

WHEREAS, on November 6, 2017, Commission Staff filed in this docket its Audit Report, titled, “K W Resort Utilities Corp. Specialized Billing Audit Forty-Eight Months Ending March 30, 2017;” and

WHEREAS, the Utility filed its response to the Commission Staff's Audit Report on or about January 31, 2018; and

WHEREAS, on May 17, 2018, the Commission Staff issued a Notice of Apparent Violation to the Utility; and

WHEREAS, on August 31, 2018 the Commission entered PAA Order No. PSC-2018-0444-PAA-SU (“PAA Order”) requiring KWRU to refund money to certain customers and to pay a penalty; and

WHEREAS, on September 21, 2018, OPC filed a Petition protesting portions of the PAA Order unrelated to the penalty, and on October 1, 2018, KWRU filed a Cross-Petition for a Formal Administrative Hearing; and

WHEREAS, on March 25, 2019, the Commission entered Order No. PSC-2019-0113-PCO-SU denying KWRU's motion to dismiss or strike; denying OPC's motion for partial summary final order and KWRU's motion for summary final order; and

WHEREAS, the Parties to this Agreement have undertaken to resolve the issues raised in this docket so as to achieve fairness to customers and the Utility and to ensure compliance with the applicable Florida Statutes and Florida Rules of Administrative Procedure; and

WHEREAS, the Parties have entered into this Agreement in compromise of positions taken in accord with their rights and interests under Chapters 350, 367 and 120, Florida Statutes, as applicable, and as a part of the negotiated exchange of consideration among the parties to this Agreement each has agreed to concessions to the others with the expectation that all provisions of the Agreement will be enforced by the Commission as to all matters addressed herein with respect to all Parties upon acceptance of the Agreement as provided herein and upon approval in the public interest;

NOW THEREFORE, in consideration of the foregoing and the covenants contained herein, the Parties hereby stipulate and agree:

1. This Agreement will become effective on the date it is signed by both Parties (the "Effective Date"). The Parties agree that, in addition to any refunds issued to date, KWRU shall issue refunds in the amount of \$1,004.34 to Fourth Ave., LLC, and \$1,025.49 to ITNOR Waters Edge, respectively, within 30 days of the approval of this Agreement in its entirety by the Commission without modification, via entry of a Commission Order. This

Agreement does not address Safe Harbor Marina or Sunset Marina. OPC will take no position as to whether these customers are entitled to any further refund.

2. OPC agrees to withdraw its Petition protesting the PAA Order.
3. KWRU agrees to withdraw its Cross-Petition and request for administrative hearing in this docket, except as it relates to Safe Harbor Marina and Sunset Marina.
4. This Agreement is silent on KWRU's right to advocate on matters in this docket related to the penalty outlined in the PAA Order.
5. No Party to this Agreement will request, support, or seek to impose a change in the application of any provision hereof.
6. The provisions of this Agreement are contingent on approval of this Agreement in its entirety by the Commission without modification. The Parties agree that approval of this Agreement is in the public interest. The Parties further agree that they will support this Agreement and will not request or support any order, relief, outcome, or result in conflict with the terms of this Agreement in any administrative or judicial proceeding relating to, reviewing, or challenging the establishment, approval, adoption, or implementation of this Agreement or the subject matter hereof. No party will assert in any proceeding before the Commission or any court that this Agreement or any of the terms in the Agreement shall have any precedential value, except to enforce the provisions of this Agreement. Approval of this Agreement in its entirety will resolve all matters and issues which are the subject matter of this Agreement in Docket No. 20170086-SU pursuant to, and in accordance with, Section 120.57(4), Florida Statutes. No Party shall seek appellate review of any order pertaining to this Agreement.

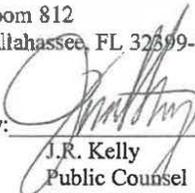
7. This Agreement is dated as of the date the last signature is affixed. It may be executed in counterpart originals, and a scanned .pdf copy of an original signature shall be deemed an original.

In Witness Whereof, the Parties evidence their acceptance and agreement with the provisions of this Agreement by their signature.

K W Resort Utilities Corp.
Mr. Christopher Johnson
C/O K.W. Resort Utility
6630 Front Street
Key West FL 33040-6050

By: 
Christopher Johnson
Title: President
Date: 05-17-2019

Office of the Public Counsel
J.R. Kelly, Esq.
The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

By: 
J.R. Kelly
Public Counsel
Date: 05-17-2019

FILED 6/14/2019
DOCUMENT NO. 04901-2019
FPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the billing practices of
K W Resort Utilities Corp. in Monroe County.

DOCKET NO. 20170086-SU

KW RESORT UTILITIES CORP.'S OFFER OF SETTLEMENT

K W Resort Utilities Corp. (KWRU or Utility), makes the following offer of Settlement to resolve the issues that were not addressed in the Stipulation and Settlement entered into between KWRU and Office of Public Counsel previously filed in this Docket.

RECITALS

WHEREAS, on March 13, 2017, the Commission ordered its staff to open this docket, No. 20170086-SU, and to conduct a full audit and investigation of KWRU's billing practices to determine if KWRU had violated any of the Commission's orders, rules, or statutes. Order No. PSC-17-0091-FOF-SU, in Docket No. 150071-SU, *In re: Application for increase in wastewater rates in Monroe County by K W Resort Utilities, Corp.*; and

WHEREAS, on November 6, 2017, Commission Staff filed in this docket its Audit Report, titled, "K W Resort Utilities Corp. Specialized Billing Audit Forty-Eight Months Ending March 30, 2017;" and

WHEREAS, the Utility filed its response to the Commission Staff's Audit Report on or about January 31, 2018; and

WHEREAS, on May 17, 2018, the Commission Staff issued a Notice of Apparent Violation to the Utility; and

WHEREAS, on August 31, 2018 the Commission entered PAA Order No. PSC-2018-0444-PAA-SU ("PAA Order") requiring KWRU to refund money to certain customers and to pay a penalty; and

WHEREAS, on September 21, 2018, OPC filed a Petition protesting portions of the PAA Order unrelated to the penalty, and on October 1, 2018, KWRU filed a Cross-Petition for a Formal Administrative Hearing; and

WHEREAS, on March 25, 2019, the Commission entered Order No. PSC-2019-0113-PCO-SU denying KWRU's motion to dismiss or strike; denying OPC's motion for partial summary final order and KWRU's motion for summary final order; and

WHEREAS, on May 17, 2019, KWRU and OPC entered into a Stipulation and Settlement which settled OPC's concerns, but provided that OPC "will take no position as to whether these customers [Safe Harbor Marina and Sunset Marina] are entitled to any further refunds", and was silent as to the penalty.

NOW THEREFORE, KWRU offers the following in settlement of the issues of further refunds to Safe Harbor Marina and Sunset Marina and the \$10,000 penalty:

1. Safe Harbor Marina. KWRU and Safe Harbor Marina entered into a Settlement Agreement and Release, dated May 12, 2016, which has been filed in this docket, and is Exhibit CAJ-9 to witness Christopher Johnson's Prefiled Direct Testimony filed on June 4, 2019. That Agreement resolved a number of issues between them including, but not limited to, mutual obligations for refunds between the parties. Thus, pursuant to that Agreement, any refund which may be due to Safe Harbor Marina in this docket is deemed satisfied and no additional refunds are necessary.

Sunset Marina. KWRU and Sunset Marina entered into a Settlement Agreement and Release, dated October 23, 2018, which has been filed in this docket, and is Exhibit CAJ-8 to witness Christopher Johnson's Prefiled Direct Testimony, filed on June 4, 2019. In consideration of payment by KWRU to Sunset Marina in the amount of \$41,034.00, Sunset Marina released KWRU from all claims related to any further refunds due that are

addressed in PAA Order [Order No. PSC-2018-0444-SU]. Thus, all refund issues with respect to Sunset Marina in this docket are resolved and no additional refunds are necessary.

Penalty. Although for the reasons discussed below, Commission staff recommended a penalty in the amount of \$1,000, the Commission increased that penalty to \$10,000 which greatly exceeds a reasonable amount based upon the particular circumstances of the KWRU tariff at that time. There was much discussion at the August 7, 2018, Agenda regarding the unique nature of the tariff rates for KWRU during the time in question¹ and there is no need to reiterate them at this time. The following from the transcript at the August 7, 2018, Agenda points out the reasonableness of KWRU's interpretation and application of its tariff:

Ms. Daniels:I do want to reiterate and emphasize to you is that Mr. Friedman is absolutely correct that the –the tariff lacked clarity for many, many years...(p. 25)

Commissioner Brown: Are you – Patti, are you saying, though, that staff had a role in some of the confusion that occurred?

Ms. Daniels: Absolutely Commissioner.

Commissioner Brown: Is that why staff is recommending a nominal fee of a thousand dollar fine?

Ms. Daniel: Absolutely (p.26)

Based upon foregoing, KWRU offers a penalty of \$2,500.

2. KWRU believes that approval of this Agreement is in the public interest.
3. The approval of this Offer, and the Stipulation and Settlement entered into between OPC and KWRU, will resolve all matters and issues raised in Docket No. 20170086-SU.

¹ KWRU's rates are now based on the traditional meter size and gallonage charges and are consistent with KWRU's current tariffs.

Respectfully submitted as of the 13th day of June, 2019, by:

Barton W. Smith
Smith Law Firm
138 Simonton Street
Key West, Florida 33040
bart@smithhawks.com

/s/ Martin S. Friedman
Martin S. Friedman
Dean Mead
420 South Orange Ave., Suite 700
Orlando, FL 32801
mfriedman@deanmead.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 13th day of June 2019, to the following:

Stephanie Morse
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street; Room 812
Tallahassee, FL 32399-1400
morse.stephanie@leg.state.fl.us

Suzanne Brownless
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
sbrownle@psc.state.fl.us

/s/ Martin S. Friedman
Martin S. Friedman