



KW Resort Utilities Corp

6630 Front Street
Key West, FL 33040
305.295.3301
FAX 305.295.0143
www.kwru.com

TRANSMITTED ELECTRONICALLY AND VIA US MAIL

February 15, 2022

Mr. David Hackworth, P.E.
FKAA Principal Engineer
1100 Kennedy Drive
Key West, FL 33040

Dear Mr. Hackworth:

We have recently reviewed a copy of an Interlocal Agreement (“Interlocal Agreement”) executed between Florida Keys Aqueduct Authority (“FKAA”) and the City of Key West (“City”) relating to FKAA’s election to send excess wastewater flow from its service area to the City’s Richard A. Heyman Environmental Pollution Control Facility in order to avoid the expense of expanding FKAA’s Rockland Wastewater Treatment Plant, which is nearing service capacity. Pursuant to the Interlocal Agreement, FKAA would be required to install additional wastewater lines from its Big Coppitt service area to a connection point at the Duck Ave and South Roosevelt manhole location within the City. Please be advised, as described in greater detail below, KW Resort Utilities Corp. (“KWRU”) would consider the installation of such additional wastewater lines to be an illegal encroachment on our certificated area of service for provision of wastewater management services.

As you are presumably aware, KW Resort Utilities Corp. has been issued a certificate of authorization (Certificate #168-S) by the Florida Public Service Commission (“PSC”) to exclusively provide wastewater management services within a specifically defined territorial service area (“certificated area”) within the lower Florida Keys (“franchise rights”). The Interlocal Agreement proposes the installation of duplicative wastewater lines and equipment within the exclusive service area of KWRU in violation of Fla. Stat. Sec. 180.06 and KWRU’s franchise rights.

Florida law is clear that franchise rights approved by the PSC through its certification process and franchise rights of municipal providers accruing under Chap. 180 are equal rights. *Lake Utility Services, Inc. v. City of Clermont*, 727 So. 2d 984 (Fla. 5th DCA 1999); *See also City of Mount Dora v. JJ’s Mobile Homes, Inc.*, 579 So. 2d 219 (Fla. 5th DCA 1991). In order to avoid harm to the public resultant from competition between and unnecessary duplication of facilities

and equipment of utility providers, the enforcement of such franchise Interlocal Agreements are not subject to state or federal antitrust law. *City of Homestead v. Beard*, 600 So. 2d 450 (Fla. 1992); *see also City Gas Company v. Peoples Gas System, Inc.*, 182 So. 2d 429 (Fla. 1968). So long as there is an ability to serve, the principle of first in time, first in right applies.

Fla. Stat. Sec. 180.06 is designed to avoid the wastefulness of encouraging duplicate capital investments for competing utilities that could not likely be operated without financially jeopardizing each other's operating revenues if erected in the same territory. *State v. Plant City*, 127 Fla. 495, 173 So. 363 (1937). Indeed, Sec. 180.06 prohibits direct encroachment by one utility provide into an operating area already served by another. *See Ortega Utility Co. v. Jacksonville*, 564 So. 2d 1156 (Fla. 1st DCA 1990). Specifically, neither a private company nor a municipality may construct any system, work, project or utility authorized under Fla. Stat. Chap. 180 if a system, work, project or utility of a similar character is being actually operated by a municipality or private company in the territory adjacent thereto, unless such municipality or private company consents to such construction. *Pinellas Park v. Cross-State Utilities Co.*, 205 So. 2d 704 (Fla. 2d DCA 1968). Regardless of whether additional wastewater infrastructure facilities or equipment actually provide services within a franchisee's certificated area, they may not be constructed without the consent of the private or municipal franchisee.

KWRU has the right to seek declaratory and injunctive relief from the PSC in order to enforce the terms of its certificate of authorization and to prevent encroachment of duplicative services within its certificated area. *Roemmele-Putney v. Reynolds*, 106 So. 3d 78 (Fla. 3d DCA 2013); Fla. Stat. Sec. 367.121. Although such legal action is not KWRU's preferred method to resolve this issue, KWRU will take all steps necessary to protect against encroachment into its certificated area.

Upon examination of the terms and conditions of the Interlocal Agreement, KWRU believes that we can offer superior alternatives to address the current wastewater capacity issues with FCAA's Rockland wastewater treatment plant. KWRU currently has sufficient excess capacity to accept wastewater flow from the FCAA Big Coppitt service area as provided in the Interlocal Agreement. Further, KWRU's nearest wastewater treatment plant and associated tie-in infrastructure is in closer proximity than those of the City as identified in the Interlocal Agreement. KWRU may be able to offer significant cost savings to FCAA for the construction costs associated with a tie-in to the City's existing wastewater lines as provided in the Interlocal Agreement. KWRU can also offer advantageous connection fees to FCAA for an initial connection to accept FCAA's excess wastewater flows.

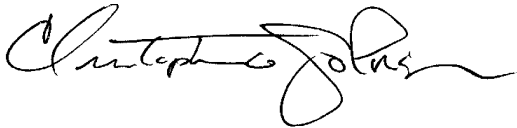
KWRU believes that a connection to KWRU's existing systems would represent a cost benefit to FCAA as well as all customers within the associated service area similar to KWRU's prior discussions with FCAA in 2019 regarding KWRU's acceptance of wastewater flows from the Key Haven service area in order to relieve the amount of wastewater flow to the Rockland

wastewater treatment plant. In order to avoid any potential legal issues arising from the execution of the Interlocal Agreement, please contact our offices to discuss in greater detail the options available to FKAA to address existing capacity issues with FKAA's Rockland wastewater treatment plant in cooperation with KWRU.

This correspondence does not constitute a legal Interlocal Agreement to provide service to FKAA. By law, KWRU may not provide service to FKAA without first receiving approval from the PSC. Upon Interlocal Agreement between KWRU and FKAA as to the terms of a Tariff Sheet, PSC approval of the Tariff Sheet, and payment of all fees; provided these conditions are met, KWRU and FKAA would then enter into a binding Utility Interlocal Agreement.

Please don't hesitate to contact me if you have any concerns or should you require additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher A. Johnson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Christopher A. Johnson
President

Drafted with the assistance of counsel.

CC: Kerry Shelby
Patti McLaughlin
John Paul Castro
Barton Smith