

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide  
wastewater service in Charlotte County by  
Environmental Utilities, LLC.

DOCKET NO. 20240032-SU  
ORDER NO. PSC-2025-0026-PCO-SU  
ISSUED: January 16, 2025

ORDER DENYING LITTLE GASPARILLA ISLAND PRESERVATION ALLIANCE, INC.,  
PALM ISLAND ESTATES ASSOCIATION, INC. AND LINDA B. COTHERMAN'S JOINT  
MOTION TO STRIKE REBUTTAL TESTIMONY

Background

On February 12, 2024, pursuant to Sections 367.031 and 367.045, Florida Statutes (F.S.), and Rule 25-30.033, Florida Administrative Code (F.A.C.), Environmental Utilities, LLC, (EU or Utility) filed an application for an original wastewater certificate in Charlotte County. Little Gasparilla Island Preservation Alliance, Inc.; Palm Island Estates Association, Inc.; and Linda B. Cotherman (collectively, the Intervenors) objected to EU's application. Order No. PSC-2024-0324-PCO-SU, issued August 12, 2024, scheduled a hearing and established controlling dates and procedures for this docket.<sup>1</sup> On August 23, 2024, EU filed the direct testimony of its witnesses. On November 1, 2024, the Intervenors filed testimony of their witnesses. On December 6, 2024, EU filed rebuttal testimony of its witnesses.

On January 6, 2025, pursuant to the requirements of Order No. PSC-2024-0324-PCO-SU, the Intervenors filed a Joint Motion to Strike Rebuttal Testimony (Motion), specifically seeking to strike certain portions of rebuttal testimony from EU witnesses Jonathan Cole and Deborah Swain. On January 10, 2025, EU filed its Response to Joint Motion to Strike Portions of Rebuttal Testimony and Exhibits (Response).

Intervenors' Motion to Strike

The Intervenors seek to strike portions of rebuttal testimony from EU witnesses Cole and Swain as filed on December 6, 2024. The Intervenors claim that the rebuttal testimony of these two witnesses contains testimony and exhibits not related to issues raised in Intervenors' testimony and exhibits and are therefore impermissible rebuttal testimony. Specifically, the Intervenors contend that witness Cole's December 6, 2024 Prefiled Rebuttal Testimony contains significant engineering design modifications to the project proposed in EU's application, including use of a different system type; a new force main routing consisting of two new directional drills along new routes; altered pipe sizing analysis; and a different pump type, horsepower, and electrical connection on each homeowner's property.

Additionally, the Intervenors contend that witness Swain's December 6, 2024 Prefiled Rebuttal Testimony contains costing and financial changes to the projects to account for witness

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<sup>1</sup> Certain controlling dates were revised pursuant to Order No. PSC-2024-0443-PCO-SU, issued October 14, 2024.

Cole's engineering design changes. Intervenors claim that neither the engineering modifications nor the resultant changes to the costing and financial projections are permissible rebuttal testimony. The Intervenors claim that allowing the rebuttal testimony of witnesses Cole and Swain will cause prejudice because it deprives the Intervenors of any level of due process, as they were not being permitted to review, analyze, and submit relevant fact and expert testimony related to the updated projects proposed by EU.

#### EU's Response

In its Response, EU stated that an original certificate proceeding requires that engineering and financial information be based upon construction cost and operating expense estimates which are then utilized to prepare the financial schedules that result in the establishment of preliminary rates. EU contends that the rebuttal testimony of witnesses Cole and Swain continued this process of updating estimates and that the rebuttal testimony addressed issues raised by the Intervenors. EU also notes that the Intervenors could have issued discovery on the witnesses' rebuttal testimony or called depositions of the witnesses, but did not do so. EU contends that changes such as those made in witness Cole and witness Swain's rebuttal testimony are incumbent in the process of an original certificate application because such applications must rely on conceptual plans. Lastly, EU states that these changes have no material impact on the proposed rates and charges.

#### Analysis and Ruling

Rebuttal testimony exists to allow a party "to explain, repel, counteract, or disprove the evidence of the adverse party."<sup>2</sup> In addition, there are several important statutory requirements to consider:

[A]ll parties must be given an opportunity to respond, to present evidence and argument on all issues involved, and to conduct cross-examination and submit rebuttal evidence. Section 120.57(1)(b), F.S. Irrelevant, immaterial, or unduly repetitious evidence must be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in Florida courts. Section 120.569(2)(g), F.S. Further, in every water and wastewater rate proceeding, the Commission is required to consider utility property, including land acquired or facilities to be constructed within a reasonable time in the future . . . as set forth in Section 367.081(2)(a)2., F.S. It is established law that the

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<sup>2</sup> Order No. PSC-17-0147-PCO-WS, issued May 2, 2017, in Docket No. 160101-WS, *In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida* quoting *United States v. Delk*, 586 F.2d 513, 516 (5th Cir. 1978), quoting *Luttrell v. United States*, 320 F.2d 462, 464 (5th Cir. 1963); Order No. PSC-11-0203-PCO-GU, issued April 22, 2011, in Docket No.090539-GU, *In re: Petition for Approval of Special Gas Service Agreement by Miami-Dade County*; Order No. PSC-10-0611-PCO-WU, issued October 4, 2010, in Docket No. 100104-WU, *In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.*

Commission cannot ignore an existing fact that admittedly will affect the future rates. Gulf Power Company v. Bevis, 289 So. 2d 401, 404 (Fla. 1974).<sup>3</sup>

The Commission routinely allows for updated project and cost information in order to set fair and reasonable rates.<sup>4</sup> However, the Commission does not allow such information where a utility is seeking to fundamentally change its case by correcting what appear to be material errors in the utility's initial filings.<sup>5</sup> In the instant case, EU is not attempting to correct insufficient filings, but rather to provide the most current information on projects, and their associated costs, that are conceptual and estimate-based. Further, as argued in the Response, the rebuttal appears to respond to criticisms raised in the Intervenor testimony.

While the Intervenors are correct that witness Cole does provide a revised engineering plan, the analysis does not end there. Rule 25-30.033, F.A.C., establishes the requirements a utility must demonstrate in order to obtain an original wastewater certificate. The Commission's decision on the application for certification, pursuant to the requirements of Chapter 367, F.S., and Rule 25-30.033, F.A.C., centers on the financial and technical ability of the applicant, the need for service in the proposed service area, the continued use of land upon which treatment facilities will be located, whether the system will be in competition with or duplication of another system, and whether the system will have sufficient plant capacity to serve the requested area. The Commission does not determine the appropriateness of the proposed system design; that determination is under the jurisdiction of the Florida Department of Environmental Protection, and can proceed only after an original certificate is granted, pursuant to Section 367.031, F.S. However, initial rates and charges are set based upon the system design proposed by the applicant, and it is appropriate to have the most up-to-date information possible when setting initial rates and charges.

Having the most updated information possible available at hearing must, of course, be balanced against parties' rights to due process under Chapter 120, F.S., as discussed above. It is important to note that the Intervenors' due process rights are not violated by allowing the rebuttal testimony of EU witnesses Cole and Swain. EU filed rebuttal testimony on December 6, 2024. Discovery by the parties continued until January 6, 2025, giving the Intervenors sufficient time to issue discovery on the rebuttal or call depositions relating to EU witnesses' rebuttal testimony.

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<sup>3</sup> Order No. PSC-17-0147-PCO-WS, issued May 2, 2017, in Docket No. 20160101-WS, *In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida* (Motion to strike updated cost information provided in rebuttal was denied, finding the updated information did not fundamentally change the rate case. Further, due process was not violated where discovery would afford an opportunity to determine the reasonableness of the updated costs, and cross-examination of rebuttal witnesses could be conducted at hearing.).

<sup>4</sup> *Id.*

<sup>5</sup> Order No. PSC-96-0279-FOF-WS, issued February 26, 1996, in Docket No. 950495-WS, *In re: Application for Rate Increase by Southern States Utilities, Inc.*, citing to Order No. 18335, issued October 22, 1987, in Docket No. 870239-WS, *In re: Application of General Development Utilities* (Motion to reestablish official filing date was denied because updated information from the utility was not related to material defects in the initial application. Additionally, the utility's updated information did not constitute a change in its requested final revenue requirement.).

Furthermore, at hearing, the testimony of all witnesses will be subject to cross-examination, and the Commission will give the testimony and evidence in the record the weight that it is due.

In this instance, where Intervenors have had the opportunity to conduct discovery or depose the rebuttal witnesses, and will have the opportunity to conduct cross-examination of those witnesses at hearing, the interests in having current cost information and the Intervenors' due process rights are adequately balanced. Further, having reviewed the pleadings of the parties, the rebuttal testimony largely responds to issues raised in the Intervenors' testimony and exhibits. Accordingly, the Intervenors' Motion is denied.

Therefore, it is

ORDERED by Commissioner Gabriella Passidomo Smith, as Prehearing Officer, that the Joint Motion to Strike Rebuttal Testimony is denied, as set forth herein.

By ORDER of Commissioner Gabriella Passidomo Smith, as Prehearing Officer, this 16th day of January, 2025.



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

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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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review 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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.