

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Increase)
In Wastewater Rates in Monroe) DOCKET NO. 20170141-SU
County By K W Resort)
Utilities Corp.) FILED: April 23, 2018
_____)

**OFFICE OF PUBLIC COUNSEL'S AND MONROE COUNTY'S
JOINT MOTION TO STRIKE PORTIONS OF K W RESORT UTILITIES
CORP.'S REBUTTAL TESTIMONY AND EXHIBITS, OR IN THE
ALTERNATIVE, MOTION TO RESCHEDULE THE TECHNICAL HEARING
AND FOR LEAVE TO FILE SURREBUTTAL TESTIMONY**

The Citizens of the State of Florida ("Citizens"), by and through the Office of Public Counsel ("OPC"), and Monroe County (the "County"), pursuant to the Order Establishing Procedure in this docket (Order No. PSC-2018-0039-PCO-SU) and Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby move to strike portions of K W Resort Utilities Corp.'s ("KWRU" or the "Utility") rebuttal testimony and exhibits, because the subject testimony and exhibits are, in fact, supplemental direct testimony. In the alternative, the Citizens and the County move the Florida Public Service Commission (the "Commission" or the "PSC") to reschedule the technical hearing scheduled for May 15-17, 2018, and grant OPC and Monroe County the opportunity to file surrebuttal testimony addressing KWRU's improper "rebuttal" testimony. In support of this motion, OPC and the County state as follows:

Background

1. On June 9, 2017, KWRU initiated this docket by requesting approval of an historical test year ending June 30, 2017. On June 21, 2017, OPC and the County filed a joint response in opposition to the Utility's proposed test year. On June 30, 2017, Chairman Brown approved the Utility's proposed test year. In the letter approving KWRU's test year, Chairman Brown stated:

The Utility is instructed to file all information it wishes the Commission to consider when arriving at a decision on its rate case application with its original filing. Because of the time limitations contained in Section 367.081, F.S., and the lengthy auditing and investigation required, the Commission may disregard any information not filed with the original application. Approval of the test year is only for filing purposes and any party may raise an issue regarding the appropriateness of the test period at any time during the pendency of this proceeding.

(Emphasis supplied.)

2. On November 21, 2017, KWRU filed direct testimony of three witnesses (Christopher Johnson, Deborah Swain, and Frank Seidman) along with supporting exhibits and Minimum Filing Requirements ("MFRs"). Based on the information included in its direct testimony and MFRs, KWRU was initially requesting a rate increase of approximately 58% above the Utility's claimed adjusted test year revenue.

3. On March 14, 2018, OPC filed the direct testimony of two witnesses (Andrew Woodcock and Helmuth W. Schultz, III) and the County filed the direct testimony of three witnesses (Terry Deason, Kevin Wilson, and Jeffery Small).

4. On April 10, 2018, KWRU filed the rebuttal testimony of three witnesses (Edward Castle, Robert Pabian and Deborah Swain) and on April 11, 2018, KWRU filed the rebuttal testimony of one additional witness (Christopher Johnson). Based on the new information included in its rebuttal testimony, KWRU is now requesting a rate increase of approximately 61.3%. This motion addresses portions of the rebuttal testimony and exhibits of Mr. Johnson and Ms. Swain that increase the rate increase beyond what KWRU requested in its MFRs.

5. Section VI. D. of the Order Establishing Procedure in this docket provides that "[m]otions to strike any portion of the prefiled testimony and related portions of exhibits of any witness shall be made in writing no later than the Prehearing Conference." Accordingly, this motion is timely.

6. In summary, the portions of Mr. Johnson's and Ms. Swain's rebuttal testimony and exhibits identified below are not proper rebuttal testimony. Rather, the testimony identified below is untimely supplemental direct testimony that does not rebut any testimony offered by OPC or the County's witnesses. As such, the testimony and exhibits should be stricken. In the alternative,

the technical hearing scheduled for May 15-17, 2018, should be continued and rescheduled for a later date, and OPC and the County should be allowed the opportunity to file surrebuttal testimony addressing the new, supplemental direct testimony improperly included in KWRU's rebuttal testimony.

Applicable Law

Burden of Proof

7. It is well-settled that the "burden of proof in a commission proceeding is always on the utility seeking a rate change" Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1191 (1982). Accordingly, in this proceeding to increase the rates charged to its customers, KWRU bears the burden of proof "to show that its present rates are unreasonable, fail to compensate the utility for its prudently incurred expenses, and fail to produce a reasonable return on its investment." Order No. PSC-07-0129-SC-WS. Thus, it is KWRU's burden to demonstrate by a preponderance of evidence in the record in this proceeding that current rates are unjust, unreasonable or insufficient and that the changes KWRU has requested are necessary and will result in rates that are just, reasonable, compensatory, and not unfairly discriminatory. It is neither the Commission's nor the Commission Staff's responsibility to make KWRU's case, or fill any holes or gaps in KWRU's requested

rate increase.¹ To support its burden of proof, KWRU was required to provide all the necessary information to the parties in its direct case.

Scope of Rebuttal Testimony

8. As stated by Chairman Brown in the letter approving KWRU's proposed test year, KWRU was expressly "instructed to file all information it wishes the Commission to consider when arriving at a decision on its rate case application with its original filing." (Emphasis supplied.) This requirement is consistent with the definition of rebuttal testimony adopted by this Commission:

It is well settled that the purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party" and if the defendant opens the door to the line of testimony, he cannot successfully object to the prosecution "accepting the challenge and attempting to rebut the presumption asserted."

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, Docket No. 160101-WS, Order No. PSC-17-0147-PCO-WS (May 2, 2017) (quoting

¹ This is neither a staff-assisted rate case filed pursuant to Rule 25-30.455, F.A.C., nor a rate case filed pursuant to the Commission's proposed agency action ("PAA") process. This distinction is important because in both instances, a substantially affected party would be able to protest the resulting PAA order.

United States v. Delk, 586 F. 2d 513, 516 (5th Cir. 1978)). The Commission's adopted definition of rebuttal testimony is also wholly consistent with the principle that "it is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief." See Driscoll v. Morris, 114 So. 2d 314, 315 (Fla. 3d DCA 1959). In sum, rebuttal testimony is not a vehicle for submitting facts not included in a party's direct testimony, updating facts included in a party's direct testimony, or correcting errors in a party's direct testimony. Such changes in testimony should more appropriately be addressed by requesting leave to file supplemental testimony and allowing adverse parties to file rebuttal to the supplemental testimony. See, e.g., In re: Application for Original Certification to Operate Water and Wastewater Utility in Duval and St. John's Counties by Nocatee Utility Corporation, Docket No. 992040-WS, Order No. PSC-00-1202-PCO-WS (July 3, 2000). KWRU made no request to file supplemental testimony in this docket.

9. OPC and the County recognize that it is well-established law in Florida that the Commission cannot ignore an existing fact that will, if true, affect a utility's future rates. See Gulf Power Co. v. Bevis, 289 So. 2d 401, 404 (Fla. 1974). However, the Commission's charge to consider all existing facts does not mean that a utility seeking a rate increase may simply submit supplemental testimony masquerading as rebuttal testimony without

an opportunity to rebut those purportedly "new" facts. Nor may a utility claim information is "new" when the cost was reasonably foreseeable before it filed its MFRs and supporting direct testimony, but neglected to include that information. Here, KWRU was in complete control of the evidence to be submitted as direct testimony during its case-in-chief. When KWRU realized this evidence was incorrect, incomplete or outdated, it should have requested leave to file supplemental or corrected testimony, and OPC and the County should have been granted leave to rebut the supplemental testimony. None of that occurred here, and KWRU's improper rebuttal testimony filed on April 10 and 11, 2018, will, if allowed to stand without an appropriate remedy, severely prejudice the Citizens and the County because neither OPC nor the County have had, or will have, an opportunity to provide testimony addressing the issues and assertions, as well as increased costs, raised for the first time in rebuttal. It is a fundamental violation of the Citizens' and the County's due process rights to allow KWRU to file supplemental testimony under the guise of being rebuttal testimony. Two remedies would be appropriate: striking the improper testimony and exhibits, or providing the Citizens and the County a real, meaningful opportunity to conduct discovery regarding KWRU's new allegations and the opportunity to address those allegations through surrebuttal testimony (or its

equivalent, e.g., supplemental intervenor testimony), which would require moving the hearing dates.

Motion to Strike Rebuttal Testimony

10. OPC and the County request that portions of the rebuttal testimony and exhibits of Mr. Johnson and Ms. Swain, identified herein, be stricken as improper rebuttal testimony. To be clear, OPC and the County are not requesting that the rebuttal testimony and exhibits of Mr. Johnson and Ms. Swain be stricken in their entirety -- clearly much of both rebuttal testimonies represents proper rebuttal of testimony presented by OPC's and the County's witnesses. Rather, OPC and the County are requesting that only improper rebuttal testimony and exhibits be stricken.

11. A clear example of such improper rebuttal testimony concerns replacement of KWRU's chlorine contact chamber. Mr. Johnson testified on direct that the replacement cost to the chlorine contact chamber is \$1,071,814. Johnson, Direct Testimony at 6, LL 2-19. In his direct testimony, OPC's witness Mr. Woodcock agreed with Mr. Johnson and found a total for the chlorine chamber of \$1,071,814 "to be adequately supported for including into rate base." Woodcock, Direct Testimony at 10, LL 4-12 (addressed under the heading "Pro Forma Projects with No Adjustments"). No other witness for OPC or the County addressed the cost of replacement of the chlorine contact chamber. Thus, prior to the filing of Mr. Johnson's rebuttal, the parties were in agreement and no dispute

as to this matter existed. However, in what can only be called rebuttal of his own direct testimony, Mr. Johnson stated in his rebuttal testimony:

Q: Witness Andrew Woodcock found \$1,071,814 reasonable for the chlorine contact chamber replacement, including \$935,000 in construction, \$107,489 in engineering and inspection services, and \$29,325 for housing of contractors. Is \$1,071,814 still the anticipated cost for this project?

A: There are additional expenses which have arisen since the submission of the \$1,071,814 figure I presented in my pre-filed testimony. Firstly, the housing expenses have increased from an anticipated \$29,325 to \$61,271. Housing costs are higher than previously anticipated due to the project start up coinciding with the most expensive rental weeks during peak tourist season. This was not anticipated to occur as the anticipated work schedule was pushed back several months due to Hurricane Irma. The rental market is very tight as a result of the number of units still offline after Hurricane Irma, and there were few options that suited the contractor's number of workers and the term of occupancy. This still represents significant cost savings (\$38,729) over the initial proposal where the contractor was to provide housing. Additionally, a cost of \$6,200 has arisen as a result of Work Directive 2018-02, which is included in Exhibit CAJ-28. This additional cost is for a third party to perform low-voltage holiday testing and NACE level III inspection services on the coating systems for the chambers. This testing will provide assurance that the coatings are properly applied and will function as intended. That brings the total cost of the project to \$1,109,960, consisting of: \$935,000.00 base bid, plus engineering costs of \$107,489, plus housing costs of \$61,271, plus \$6,200 work directive. The \$1,071,814 figure did not

include allowance for any change order or other similar costs. I don't anticipate any additional change orders or work directives for this project.

Johnson, Rebuttal Testimony at 4, L 24 - 5, L 20. Mr. Johnson's "rebuttal" testimony concerning the chlorine contact chamber is clearly not appropriate rebuttal testimony. It contains new cost information that KWRU reasonably should have anticipated since KWRU knew the schedule of the chlorine contact chamber replacement would coincide with peak tourist season before filing his direct testimony. Thus, the new cost information should be stricken.

12. A second clear example of improper rebuttal testimony is found in Ms. Swain's rebuttal testimony:

Q: Are there any adjustments to the MFRs you would make to recognize future conditions in this case?

A: Yes, of course. First I would revise any of the proforma adjustments made in the case to reflect additional information that has come to light. This is commonly done, and appropriate. I have identified some in my testimony, and Witness Johnson has provided several as well. These adjustments should be made whether they are increases or decreases. Additionally, changes come to light after filing the right case that should be incorporated into the MFRs. One such example is the increase in debt cost as a result of the increase in the Fed prime rate to 4.75% on March 22, 2018. Exhibit DDS-6 shows the current prime rate and effective date published by the Wall Street Journal. Since KWRU's long term debt is tied to the prime rate, the cost of long debt should be adjusted. Although there is expectation that there will be additional adjustments to the

prime rate this year, I am recommending an adjustment for only the increase effective last month. The impact is to increase KWRU's long term debt interest rate from 4.75% to 5.25%, and increases the overall rate of return to 7.7%.

Swain, Rebuttal Testimony at 33, L 16 - 34, L 5. This testimony, along with Exhibit DDS-2, is not tied to and in no way rebuts - or even addresses - any testimony offered by OPC's or the County's witnesses. Instead, it clearly represents new information which should have been addressed by KWRU in supplemental direct testimony. KWRU made no such request to file supplemental direct testimony and, accordingly, this testimony should be stricken.

13. The above examples are illustrative of the improper rebuttal filed by KWRU. The following table represents a comprehensive list of all of Mr. Johnson's and Ms. Swain's testimony and exhibits containing new cost information that KWRU provided only in its rebuttal. Therefore, the testimony and exhibits identified below are improper rebuttal testimony that should be stricken.

NEW INFORMATION	WITNESS	PAGE	LINES	EXHIBITS
JOHNSON				
Lift Station	CAJ	4	11-23	CAJ-27
Chlorine Contact Chamber	CAJ	4	24-25	
Chlorine Contact Chamber	CAJ	5	1-20	CAJ-28
WWTP Rehab	CAJ	5	21-25	
WWTP Rehab	CAJ	6	1-25	
WWTP Rehab	CAJ	7	1-15	CAJ-29
Back-up Generator	CAJ	7	16-25	
Back-up Generator	CAJ	8	1-25	CAJ-30

Back-up Generator	CAJ	9	1-7	
Portable Generator	CAJ	10	5-7	
New Modular Office	CAJ	15	14-18	CAJ-32
New Modular Office	CAJ	16	25	
New Modular Office	CAJ	17	1-12	CAJ-35
Salaries and Wages	CAJ	21	22-25	
Salaries and Wages	CAJ	22	1-3	
Hurricane Expense	CAJ	22	4-14	
Telephone System	CAJ	23	12-25	CAJ-38
Telephone System	CAJ	24	1-9	
Purchased Power	CAJ	28	5-8	CAJ-40
SWAIN				
New Modular Office	DDS	8	9-12	
Portable Generator	DDS	17	19-23	
Cost of Debt	DDS	33	16-25	DDS-6
Cost of Debt	DDS	34	1-10	
Exhibit DDS-2	DDS	All	All*	DDS-2

*All portions of DDS-2 that changed as a result of KWRU's rebuttal testimony.

14. In summary, the orderly and fair conduct of this proceeding requires that the portions of Mr. Johnson's and Ms. Swain's testimony and exhibits identified above be stricken from the record in this docket.

**Alternative Motion to Reschedule
Technical Hearing and Grant OPC and Monroe County
Leave to File Surrebuttal Testimony**

15. Due process and fundamental fairness require that either KWRU's supplemental allegations be stricken or that the Citizens and the County have a meaningful opportunity to address the new information. The motion to strike set forth above requests the first form of relief; this alternative motion requests the second form of relief. Due process and the provisions of the Florida

Administrative Procedure Act require that the Citizens and the County, as parties whose substantial interests will be determined in this case, be afforded a meaningful opportunity to respond to the new information, to conduct discovery on KWRU's newly alleged information (including allowing Citizens to propound additional interrogatories and requests to produce), and to present testimony addressing it. Fla. Stat. § 120.57(1)(b). For the Citizens and the County to have a meaningful opportunity to respond to the Utility's new allegations, must include a continuance of the hearing dates for a reasonable time, within which the Citizens and County can conduct discovery and prepare and file responsive testimony.

16. Pursuant to Rule 28-106.204(3), F.A.C., undersigned counsel contacted the parties to this docket concerning this Motion. KWRU objects to the motion to strike the testimony. KWRU does not oppose surrebuttal testimony limited to any rebuttal testimony of the pages and lines of testimony identified in the motion. Staff takes no position on the motion.

Respectfully submitted this 23rd day of April, 2018.

/s/ Erik L. Saylor

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 23rd day of April, 2018.

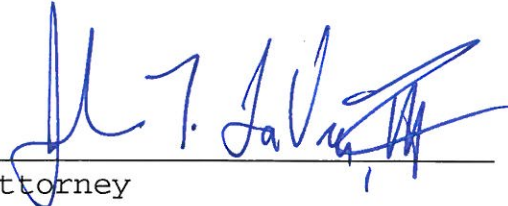
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