

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in wastewater rates  
in Monroe County by K W Resort Utilities Corp.

DOCKET NO. 20170141-SU

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**MOTION TO STRIKE PORTIONS OF TESTIMONY OF OPC  
WITNESS HELMUTH W. SCHULTZ**

K W Resort Utilities Corp. (“KWRU”), by and through undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), hereby files this Motion to Strike Portions of the Testimony of Office of Public Counsel (“OPC”) Witness Helmuth W. Schultz, and as grounds therefore state the following:

1. On March 14, 2018, OPC pre-filed the Direct Testimony of Helmuth W. Schultz (the “Testimony”), for the stated purpose of presenting OPC’s overall recommended revenue requirement in this docket, and to recommend adjustments to Petitioner KWRU’s proposed rate base and operating income.

2. Witness Schultz opines on a variety of issues within this docket. Among them are: (1) the reasonable cost per square foot of construction of KWRU’s office, to be constructed to replace the office damaged in Hurricane Irma; and (2) the reasonableness of KWRU’s implementation of a traditional-style pension plan.

3. Section 90.702, Florida Statutes, provides as follows:

90.702 Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

4. With regard to each of the above-referenced issues, Witness Schultz's testimony (1) is not based upon sufficient facts or data, and (2) is not the product of reliable principles and methods.

5. Because the opinions proffered by Witness Schultz do not comply with the standards of Fla. Stat. 90.702, KWRU hereby moves that the testimony cited herein be stricken from the record.

### **LEGAL STANDARD**

Section 90.702, Florida Statutes, provides as follows:

**90.702 Testimony by experts.**—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

To properly perform its gatekeeping function over expert testimony, the court must first determine that the expert is qualified on the matter about which he or she intends to testify; second, that the expert is employing reliable methodology; and third, that the expert's testimony can assist the trier of fact through the application of expertise to understand the evidence or fact in issue. *Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016). Before an expert may render an opinion, the court must make two preliminary determinations: whether the subject matter will assist the trier of fact in understanding the evidence or in determining a disputed fact; and whether the witness is adequately qualified to express an opinion on the matter. *State Farm Mut. Auto. Ins. Co. v. Bowling*, 81 So. 3d 538 (Fla. 2d DCA 2012), *rev. denied*, 97 So. 3d 822. While whether a witness possess adequate qualifications to express an expert opinion is peculiarly

within the discretion of the trial judge, whose decision in that regard will not be reversed absent a clear showing of error, *Huck v. State*, 881 So. 2d 1137 (Fla. 5th DCA 2004), to qualify as an expert witness, the witness must have such skill, knowledge, or experience so as to make it appear that his or her opinion will aid the trier of fact in the search for truth. *See Pettry v. Pettry*, 706 So. 2d 107 (Fla. 5th DCA 1998).

### **TESTIMONY RELATED TO COST PER SQUARE FOOT**

The testimony regarding the reasonable cost of construction of KWRU's new office building is found at 12:14 – 25 of Witness Schultz's pre-filed Direct Testimony, which has previously been filed in this docket. Witness Schultz opines as follows:

**Q. WHY IS THE COMPANY'S REQUEST EXCESSIVE?**

A. While I am not a contractor, I have familiarity with construction projects and the costs in reviewing project costs based upon my 40 plus years of experience in utility accounting. A cost of \$240 per square foot is high. An online review of construction costs indicated costs for office buildings (2-4 stories) of \$140 per square foot to \$240 per square foot. The \$240 per square foot is in New York City. Another cost estimate was for a 2,324 square foot home in Broward County. That cost was \$137 per square foot. On another site, I located a commercial construction cost calculator and requested an estimate for a 1200 square foot building in Miami and in West Palm Beach. The calculator came up with a cost of \$83 per square foot in Miami and \$80 per square foot in West Palm Beach. Clearly, the different cost estimates show the Company's \$240 per square foot is excessive, even for Key West. Ratepayers should not foot the bill for imprudent spending by the Company.

Witness Schultz begins his testimony on this topic with the disclaimer that he is "not a contractor." A review of Witness Schultz's Qualifications, attached as an Appendix to his testimony, reveals that while Mr. Schultz has extensive experience in the fields of accounting, auditing, and taxation, he is not only not a contractor, but has no stated experience *remotely*

*related to* construction or the reasonableness of costs therefor. Further, none of Witness Schultz's qualifications evidence experience within Monroe County of any type. As is evident from un rebutted testimony of KWRU witness and modular vendor Robert Pabian, who has developed hundreds of units in the Florida Keys in the past five years, the Keys are geographically unique and present unique challenges to construction. Witness Schultz has demonstrated no knowledge of these unique market conditions, and does not purport to have performed any work – construction, accounting, or otherwise – in the Florida Keys, notwithstanding this docket. Further, Witness Schultz stated at deposition that he has no experience in the construction industry. Witness Schultz is clearly not qualified on the matter of reasonable construction costs, and his testimony will be of no assistance to the Commission in adjudging the factual disputes in this proceeding.

The substance of Witness Schultz's testimony is that he performed "an online review of construction costs" in New York City and Broward County, and that he "located" online a "commercial construction cost calculator" which provided snapshot costs of construction in Miami and West Palm Beach. At deposition, Witness Schultz testified that in preparing his testimony he did not review any actual construction costs for projects in the Florida Keys. There is no indication that perusing online historical construction costs for areas outside of the Florida Keys, or plugging locations or other parameters into an online "cost calculator" are reliable methodologies for developing an opinion on market construction costs in a unique market. Furthermore, the sum and substance of this testimony is pure hearsay, and OPC has presented absolutely no corroborative information whatsoever.

## TESTIMONY RELATED TO PENSION PLAN

The testimony regarding the reasonableness and prudence of KWRU's implementation of a restructured pension plan is found at 26:13 – 25, and 27:1 – 20. Witness Schultz opines as follows:

**Q. DO YOU AGREE WITH THE COMPANY'S REQUEST FOR A MORE TRADITIONAL PENSION PLAN?**

A. No, I do not. First, companies are replacing traditional pension plans with 401K arrangements. It is not appropriate for a public utility to offer gold-plated benefits to its employees so far above and beyond those received by the average ratepayer. Thus, the Company should not be allowed to buck the trend and move towards traditional benefit plans.

Second, the Company has not offered sufficient support for either the claim that its high turnover rate is due to its benefit package or the claim that a pension plan will solve its employee retention problems. KWRU was asked to support the former claim in OPC Request for Production of Documents No. 73. The Company's response provided only email exchanges with the project manager at CH2M and employees at FKAA discussing

salary ranges, health and vacation benefits and standby time. This information alone does not substantiate the claim that benefits are causing the Company's turnover issues.

The Company was also asked in OPC Request for Production of Documents No. 72 to support its claim that the proposed traditional pension plan would improve retention and reduce turnover. KWRU's response states that pension plans for various comparable utilities in the Florida Keys had been reviewed online. However, the fact that KWRU reviewed other company's pension plans does not support its claim that retention and turnover would be improved. The bottom line is that the Company's request is both unsupported and inappropriate.

The Company overlooks the fact that other companies are able to hire and retain employees without a traditional pension plan. If that were not the case, businesses would not be turning away from traditional pension plans. Although the cause of the Company's hiring and retention issues is not clear, the Company claims in its response to Citizens' Interrogatory No. 43 that it is due to overtime.

Once again, Witness Schultz opines on an issue with which he has no experience – namely, the competitiveness of the pension plan implemented by KWRU with other utilities who compete for employees. Witness Schultz makes the bald-faced, unsupported statements that KWRU's pension plan is “far above and beyond those received by the average ratepayer” (which has no probative value in this proceeding) and that the pension plan is “gold plated” with absolutely no methodology or support therefor. He states that KWRU “overlooks the fact that other companies are able to hire and retain employees without traditional pension plans,” however he identifies no such companies. Witness Schultz's qualifications do not reveal any expertise with regard to pension plans, and he does not purport (other than the statements above) to have any experience with comparable employers in the Florida Keys. The unsupported statements KWRU seeks to strike are based on no discernable methodology whatsoever, are not based on facts or data, and appear to be presented merely for an inflammatory purpose. The

above-referenced testimony will be of no assistance to the Commission in weighing the factual issues in this Docket.

### **CONCLUSION**

The cited testimony of Witness Schultz should be stricken as it does not comply with the requirements of § 90.702, Florida Statutes, and will not assist this Commission in determining the issues of fact before it in this docket.

WHEREFORE, KW Resort Utilities Corp. respectfully requests the cited testimony of Witness Helmuth W. Schultz be stricken, and for such other relief deemed just, equitable, and proper.

### **CONFERRAL STATEMENT**

KWRU contacted counsel for the parties via e-mail on April 27, 2018, at 9:15 a.m., requesting the parties' respective positions on the above motion. PSC has no position. OPC and Monroe County oppose the relief requested in the Motion.

### **CERTIFICATE OF SERVICE** **DOCKET NO. 20170141**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-mail to the following parties this 27th day of April, 2018:

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