

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Original Certificate of) DOCKET NO. 20190168-WS
Authorization and Initial Rates and Charges)
for Water and Wastewater Service in Duval,) FILED: January 24, 2022
Baker and Nassau Counties, Florida by)
FIRST COAST REGIONAL UTILITIES,)
INC.)
_____)

**JEA’s MOTION TO STRIKE PORTIONS OF
REBUTTAL TESTIMONY OF SCOTT KELLY**

Pursuant to rule 28-106.204, Florida Administrative Code, JEA moves to strike certain portions of the Rebuttal Testimony of Scott D. Kelly filed by the Applicant First Coast Regional Utilities, Inc., (the “Applicant”). In support, JEA states:

1. On July 31, 2020, the Applicant filed the purported Rebuttal Testimony of Scott D. Kelly.
2. As indicated in his deposition testimony in this case, Mr. Kelly is a former employee of JEA who was involuntarily separated from JEA in 2013.
3. Unfortunately, almost half of Mr. Kelly’s supposed “rebuttal” testimony amounts to the unnecessary castigation of JEA on matters which were never raised or discussed by any JEA witness. The testimony must be stricken for multiple reasons:
 - a. In both its Prehearing Statement and Amended Prehearing Statement, the Applicant *only* disclosed Mr. Kelly to discuss issues concerning the “Comp Plan;”
 - b. The testimony rebuts nothing and is instead an effort to introduce belated direct testimony; and
 - c. The testimony amounts to improper expert testimony on matters of accounting or finance (for which Mr. Kelly has no basis to opine).

4. More specifically, JEA requests that Page 2, line 11, beginning with the words “In the first place,” through Page 9, line 23, as well as Page 21 (lines 21-25) of the Mr. Kelly’s Rebuttal testimony (the “Subject Testimony”) must be stricken.

I. The Applicant’s Amended Prehearing Statement Limits Mr. Kelly’s Intended Testimony to Issues Concerning The “Comp Plan.”

5. In an apparent attempt to comply with the Commission’s Order Establishing Procedure, the Applicant originally filed a Prehearing Statement on January 11, 2022. At that time, Applicant listed Mr. Kelly’s only testimony topic to be “Comp Plan.”

6. The next day, Applicant filed an Amended Prehearing Statement. Like the original, the Amended Prehearing Statement also limits Mr. Kelly to topics regarding the “Comp Plan.”

7. Because the Subject Testimony has nothing to do with the Comp Plan, the Subject Testimony should be stricken.

II. The Subject Testimony Should Also Be Stricken Because It Is Not Rebuttal.

8. The Subject Testimony is improper and should be stricken as improper supplemental direct testimony. The Subject Testimony fails to rebut any JEA witness testimony and is, instead, a wandering discussion of Mr. Kelly’s presumably lay opinions on JEA financial matters. Although Mr. Kelly was asked if he reviewed the testimony of JEA witnesses Mr. Orfano, Mr. Zammataro, Susan West and Ms. Crawford (page 2, lines 6-8), none of his “rebuttal” Subject Testimony challenges any statements from those witnesses.

9. For example, neither Mr. Zammataro, Ms. West nor Ms. Crawford discussed JEA’s financial resources. Only one JEA witness, Mr. Orfano, testified that JEA had net capital assets of “approximately 2.75 billion.” *See Orfano Direct Testimony*, p. 4, lines 15-16. In addition, Mr. Orfano discussed JEA’s “\$500 million revolving credit facility.” *Id.*, at p. 4, line 20.

10. Yet, Mr. Kelly's "rebuttal" Subject Testimony does not rebut either sworn statement by Mr. Orfano. The Subject Testimony does not mention JEA's net capital assets, nor does it touch upon the extensive credit facility. Instead, the Subject Testimony amounts a belated effort by the Applicant to file direct testimony that attempts to inject completely new issues or topics, including:

- i. Allegations about whether JEA has reduced or delayed portions of a capital improvement plan (p. 2, lines 17-21; and p. 6, line 14);
- ii. Allegations about an "enterprise fund" which was never mentioned or discussed by any JEA witness (p. 3, line 21 through p. 4, line 8);
- iii. Allegations about JEA's consumptive use permit, none of which was discussed by any JEA witness (p. 4, line 16 through p. 5, line 6); and
- iv. Allegations about whether JEA has entered into a consent order with DEP stemming from certain storm events (p. 5, line 19 through p. 6, line 16).

11. "While a presiding officer has significant discretion in allowing testimony, the party filing testimony has an obligation to show that the testimony it has presented is legally proper upon a challenge by another party to the case." *In re TDS Telecom*, Docket No. 050125-TP, Order No. PSC-06-0261-PCO-TP (Fla. P.S.C. Mar. 28, 2006).

12. With respect to rebuttal testimony, it "should be limited . . . to issues brought out by the opposing party's direct case." *Id.* "It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief unless such facts are required by the new matter developed by the defendant." *Id.*; *see also In re Aloha Utilities, Inc.*, Docket No. 960545-WS, Order No. PSC-00-0087-PCO-WS (Jan. 10, 2000) (finding that rebuttal testimony directed to a new matter impermissibly expanded direct testimony).

13. In *In re TDS Telecom*, the Commission determined that some of the witness's rebuttal testimony was "clearly direct" and therefore was stricken. Similarly, in *In re Aloha*

Utilities, Docket No. 991643-SU, Order No. PSC-00-1779-PCO-SU (Fla. P.S.C. Sept. 29, 2000), the Commission granted a motion to strike rebuttal testimony finding that it was testimony that “could have or should have” been filed in direct testimony.

14. Similarly, in this matter, the Commission should strike the Applicant’s effort to introduce whole new topics and belated direct testimony under the label of “rebuttal.” The litigation of each of these extraneous topics would amount to mini-trials which would only further elongate this proceeding.

III. Mr. Kelly Is Not Qualified To Render Expert Testimony Opinions On Financial and Accounting Matters.

15. In his discovery deposition, Mr. Kelly admitted that he has provided expert testimony on only three occasions, all of which presumably dealt with wastewater concerns. Indeed, in the Rebuttal Testimony, no foundation is laid to support Mr. Kelly’s tender as an expert on finance or accounting issues.

16. Yet, in the Subject Testimony, the Applicant calls upon Mr. Kelly to opine on such matters as JEA’s “financial wherewithal.” *See, e.g., Rebuttal Testimony of Scott Kelly*, p. 6, starting at line 17). Simply put, Mr. Kelly is an engineer and is not competent to offer testimony on financial or accounting matters.

17. Florida courts have long considered testimony regarding accounting and financial matters to be expert testimony from witnesses with the necessary education and background in the testimony topics. These opinions recognize that testimony about accounting matters like earning ability and “cumulative profit” is not proper as a lay opinion:

- *Doctors Co. v. Dep’t of Ins.*, 940 So. 2d 466 (Fla. 1st DCA 2006) (finding that proffered expert testimony concerning cumulative profit of a company was properly excluded when witness was not timely identified as expert, and witness derived opinion from conversations with counsel, actuary at expert’s consulting

firm, inadmissible hearsay, and expert merely had suspicion that calculations did not account for bulk reserves).

- *All Am. Pool Surface, Inc. v. Jordan*, 870 So. 2d 885, 886 (Fla. 3d DCA 2004) (finding that testimony of forensic accountant concerning plaintiff's loss of future earning ability was so based on speculation, conjecture, and incorrect assumptions that it should have been excluded).
- *Sys. Components Corp v. Fla. Dep't of Transp.*, 14 So. 3d 967 (Fla. 2009) (finding that both parties "should be permitted to present the opinions of qualified experts based upon generally accepted accounting principles" when calculating lost profits and business damages in an eminent domain action).

18. Further, ALJ's have likewise limited a litigant's attempts to offer expert opinions in the form of lay opinion testimony:

- *See Logisticare Solution, LLC v. Comm'n for the Transp. Disadvantaged, et al.*, No. 06-2393BID, 2006 WL 2826970 (DOAH Recommended Order Sept. 29, 2006) (Judge Kilbride excluded Exhibits 6 and 7 stating, "TMSB objected to select portions of Petitioner's Exhibit 7 on the grounds of relevance, improper lay witness testimony offering opinions on how the proposals should have been scored and improper expert testimony about a topic that is not a recognized field of expertise. The objections are sustained and the testimony is excluded. § 90.401-402, Fla. Stat.; § 90.701, Fla. Stat.").
- *Dr. Peyton Z. Peebles, Jr., Petitioner, v. State of Fla., Dep't of Env't Regul.*, No. 89-3725, 1990 WL 749431 (DOAH Recommended Order Feb. 28, 1990) ("Whether the proposed project and the cumulative impact of reasonably expected future similar projects will have a minimal or significant impact on fishing and the lake is an area requiring specialized knowledge, skill, experience or training. Although the lay opinion of Dr. Peebles may be helpful in supporting expert testimony, lay opinion standing alone may not under law establish what the impacts would be. Dr. Peebles acknowledges that he is not an expert in ecology or the environment, and admits that expert testimony is needed to determine whether granting the permit will adversely affect the conservation of fish and wildlife. (Tr. at 19) Therefore, Dr. Peebles' opinion that there will be no adverse effect on conservation of fish and wildlife (Tr. at 19) and that the filling of '14.3 percent' of the shoreline for the use of the owners will not have 'any far reaching serious impacts' (Tr. at 75) is not supported by expert testimony and is not sufficient evidence to support the finding of fact. Section 90.701(2), Florida Statutes; Ehrhardt, Florida Evidence 387 (2d ed. 1984); *Husky Industries v. Black*, 434 So. 2d 988, 992 (Fla. 4th DCA 1983) ('Expert testimony is not admissible at all unless the witness has expertise in the area in which his opinion is sought.'). The final order reversed the recommended order and rejected testimony as lay opinion.

19. Throughout the Subject Testimony, Mr. Kelly attempts to testify about whether JEA has the “financial wherewithal” to provide services to the Applicant’s proposed territory. In addition, Mr. Kelly attempts to offer opinions as to whether JEA must generally increase its rates. *See, e.g., Rebuttal Testimony of Scott Kelly*, p. 2, line 16 (borrowing would “put pressure on JEA to increase its rates”); p. 6, line 10 (events “would require JEA to increase rates”).

20. Mr. Kelly, however, is not competent to render an expert opinion on these matters and there is no foundation laid in the Rebuttal Testimony or otherwise to show that Mr. Kelly is an expert qualified to render opinions on these subjects. As a result, the Subject Testimony must be stricken.

WHEREFORE, JEA requests that Page 2, line 11, beginning with the words “In the first place,” through Page 9, line 23, as well as page 21 (lines 21-25) of the Mr. Kelly’s Rebuttal testimony be struck for all the foregoing reasons

Respectfully submitted this 24th day of January, 2022.

/s/ Thomas A. Crabb
Thomas A. Crabb, FBN 25846
Susan F. Clark, FBN 179580
Christopher B. Lunny, FBN 8982
Radey Law Firm
301 South Bronough Street, Suite 200
Tallahassee, FL 32301
(850) 425-6654
tcrabb@radeylaw.com
sclark@radeylaw.com
clunny@radeylaw.com
Attorneys for JEA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail to the following this 24th day of January, 2022.

Melinda Watts
Bianca Lherisson
Jennifer Crawford
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
mwatts@psc.state.fl.us
BLheriss@psc.state.fl.us
jcrawfor@psc.state.fl.us

Office of Public Counsel
Mary Wessling
The Florida Legislature
111 W. Madison Street, Room 812
Tallahassee, FL 32399
wessling.mary@leg.state.fl.us

William E. Sundstrom
Robert C. Brannan
Sundstrom & Mindlin, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
wsundstrom@sfflaw.com
rbrannan@sfflaw.com

John L. Wharton
Dean Mead and Dunbar
215 South Monroe Street, Suite 815
Tallahassee, FL 32301
jwharton@deanmead.com
hschack@deanmead.com

/s/ Thomas A. Crabb