

**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  
FILED: January 6, 2025

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

Little Gasparilla Island Preservation Alliance, Inc. (“LGIPA”), Palm Island Estates Association, Inc., and Linda B. Cotherman (collectively, “Intervenors”), through undersigned counsel and pursuant to Rules 28-106.204 and 28-106.211, Florida Administrative Code, and the Order Establishing Procedure (Aug. 12, 2024) (Doc. No. 08379-2024 / Order No. PSC-2024-0324-PCO-SU), as amended by the First Order modifying Order Establishing Procedure (Oct. 14, 2024) (Doc. No. 09502-2024 / Order No. PSC-2024-0443-PCO-SU) (together, “Orders Establishing Procedure”), file this Motion to Strike Rebuttal Testimony (“Motion”).

**I. BACKGROUND**

Environmental Utilities, LLC (“EU”) filed its Application for Original Certificate of Authorization (Doc. No. 00672-2024) (“Application”), requesting a certificate from the Public Service Commission (“PSC”) for a new wastewater system and service on Little Gasparilla Island, Don Pedro Island, and Knight Island (collectively, “Bridgeless Barrier Islands”) in Charlotte County, Florida. Intervenors all have substantial interests in the disposition of the Application and therefore requested a formal administrative hearing before the PSC pursuant to sections 120.569 and 120.57, Florida Statutes.

In accordance with the deadlines set forth in the Orders Establishing Procedure, EU filed its direct testimony and exhibits on August 23, 2024, Intervenors filed their direct testimony and exhibits on November 1, 2024, and EU filed its rebuttal testimony and exhibits on December 6,

2024.<sup>1</sup> The Prehearing Conference in this matter is scheduled for January 14, 2025. The Final Hearing in this matter is scheduled for January 28–30, 2025.

The rebuttal testimony of two of EU’s witnesses contains testimony and exhibits not related to issues raised in Intervenors’ testimony and exhibits, and therefore is not permissible rebuttal testimony. First, the December 6, 2024 Prefiled Rebuttal Testimony of Jonathan H. Cole includes several *significant* engineering design modifications to the project proposed in EU’s Application. These modifications include, but are not limited to, the following major system design modifications: (1) a different system type; (2) a new force main routing consisting of two new directional drills along new routes; (3) a drastically altered pipe sizing analysis; and (4) a different pump type, horsepower, and electrical connection on each homeowner’s property. Second, the December 6, 2024 Prefiled Rebuttal Testimony of Deborah D. Swain contains costing and financial changes to the project to account for Cole’s engineering design changes.

Neither Cole’s engineering modifications to the project nor Swain’s resultant changes to the costing and financial projections for the project are permissible rebuttal testimony. Accordingly, Intervenors jointly move to strike this testimony and the related exhibits.

## **II. LEGAL STANDARD**

Section V.D. of the Order Establishing Procedure provides: “Motions to strike any portion of the prefiled testimony and related portions of exhibits of any witness shall be made in writing no later than seven days prior to the Prehearing Conference, and identify with specificity the page and line numbers of the information to be stricken.”

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<sup>1</sup> LGIPA was also granted leave to file additional direct testimony on the issue of standing, which LGIPA filed on November 20, 2024. That testimony is unrelated to the issues set forth in the instant Motion.

For the purpose and scope of rebuttal testimony, the PSC has adopted the definition of rebuttal testimony as described by federal courts—“It is well settled that the purpose of rebuttal testimony is ‘to explain, repel, counteract, or disprove the evidence of the adverse party . . . .’” *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, 2017 Fla. PUC LEXIS 111, at \*7–8 (PSC May 2, 2017) (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))); *In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department*, Docket No. 090539-GU, 2011 Fla. PUC LEXIS 144, at \*7 (PSC Apr. 22, 2011); *In re: Application for increase in water rates in Franklin County by Water Management Services, Inc.*, Docket No. 100104-WU, 2010 Fla. PUC LEXIS 716, \*4–5 (PSC Oct. 4, 2010).

Under federal law, rebuttal testimony may “not be used to advance new arguments or present new evidence.” *WhereverTV, Inc. v. Comcast Cable Communs., LLC*, No. 2:18-cv-529-JLB-NPM, 2022 U.S. Dist. LEXIS 159537, at \*8 (M.D. Fla. Sep. 4, 2022); *see In re: Joint petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone*, Docket Nos. 050119-TP, 050125-TP, 2006 Fla. PUC LEXIS 160, at \*8 (PSC Mar. 28, 2006) (“It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief . . . .” (quoting *Driscoll v. Morris*, 114 So.2d 314, 315 (Fla. 3rd DCA 1959))). Rather, “[r]ebuttal testimony is permitted *only* when it directly addresses an assertion raised by an opponent’s experts.” *Eannario v. Bayer Corp. (In re Trasylol Prods. Liab. Litig. -MDL-1928)*, No. 1:09-MD-01928, 2010 U.S. Dist. LEXIS 166334, at \*5 (S.D. Fla. Aug. 4, 2010) (emphasis added) (citations omitted); *see In re: Joint petition by TDS Telecom*, 2006 Fla. PUC LEXIS 160, at \*8 (explaining that “rebuttal

testimony should be limited in its response to issues brought out by the opposing party’s direct case” (citing *Driscoll*, 114 So.2d at 315)).

Such new evidence may only be presented in rebuttal testimony if the original omission of the testimony or evidence “is substantially justified and causes no prejudice.” *WhereverTV*, 2022 U.S. Dist. LEXIS 159537, at \*9 (citation omitted). And, “[w]hile 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: Joint petition by TDS Telecom*, 2006 Fla. PUC LEXIS 160, at \*7.

### **III. ARGUMENT**

The Prehearing Conference in this matter is scheduled for January 14, 2025, and this Motion is being timely filed no later than seven days prior to the Prehearing Conference.

As described above, the consideration of whether rebuttal testimony is legally proper consists of a two-step analysis. First, the PSC must determine whether EU’s rebuttal testimony presents new testimony and evidence or merely rebuts the testimony of Intervenors. *WhereverTV*, 2022 U.S. Dist. LEXIS 159537, at \*8. Second, if EU’s rebuttal testimony is not limited to a direct response to Intervenors’ testimony—which it is not—the PSC must determine whether EU’s new rebuttal testimony and evidence “is substantially justified and causes no prejudice.” *Id.* at \*9. The burden is on EU to demonstrate that their rebuttal testimony satisfies these factors. *In re: Joint petition by TDS Telecom*, 2006 Fla. PUC LEXIS 160, at \*7.

As to the first step, the above-referenced portions of the Prefiled Rebuttal Testimony and Exhibits of Cole are decidedly new evidence. Indeed, Cole admits as much in his testimony, providing an “Addendum” to its previous Technical Memorandum that outlines the

“modifications” to the project. (Doc. No. 10124-2024, Exhibit JHC-6, at 2). The major substantive engineering modifications include:

- 1) **System Type.** The Addendum in Cole’s rebuttal testimony proposes an entirely different system type than the original proposal, which was “[a] low pressure sewer system, also known as a septic tank effluent pumping (STEP) system.” (*Id.*). EU now proposes a system that utilizes “grinder pump stations . . . to collect all sewage from homes and then grind and pump the effluent through small diameter pressure pipes.” (*Id.*). Appendix I of the Addendum includes engineering details of this system modification, none of which were included with the original proposal (or any direct testimony) because it appears the system had not even been designed yet. (*Id.* at 2 (explaining that “[a]nother wastewater collection alternative has been developed in collaboration with EU), 12–36). This change, as discussed further below with regards to the pumps being used, changes the hydraulics of the entire system.
- 2) **Force Main Routing.** The original design “proposed a singular force main crossing to transport the entirety of the flow from Don Pedro/Knight Island and Little Gasparilla Island to the mainland . . . near the center of the islands at the Don Pedro Island State Park crossing over to the Cape Haze peninsula.” (Doc. No. 10124-2024, Exhibit JHC-6, at 4). Cole’s rebuttal testimony proposes an entirely different design in two different locations than the original crossing—“two separate crossings of the intra-coastal; a northerly crossing near the barge across from Panama Boulevard to serve Don Pedro/Knight Island and a southerly crossing generally parallel to the Boca Grande Causeway to serve Litt[le] Gasparilla Island.”

(*Id.*). The significance of this modification cannot be overstated—it splits the entire network into two separate areas, with two trunklines, directional drills that were not previously proposed, and new connections to a gravity main and force main stub-out—all of which is an entirely new engineering design from the proposal presented by Cole in his direct testimony. Even this modification appears to be an uncertain design, with Cole noting in the Addendum that “other alternatives for the transmission of flow from the islands to the mainland may be found . . . .” (*Id.*).

3) **Pipe Sizing.** The pipe sizing, and resultant cost estimate, are drastically changed from the original proposal. (*Id.* at 2). These changes are shown in the five pages of pipe sizing analysis in the Addendum. (*Id.* at 43–48). The rebuttal cost estimate in the Addendum also shows 27,826 linear feet of piping diameters not used or shown in the original proposal. (*Id.* at 59).

Pressure Sewer Main Lines (Includes Fittings)			
1.5" HDPE Pressure Sewer Main	LF	\$ 34	3,654
2" HDPE Pressure Sewer Main	LF	\$ 34	24,172

In the original proposal, no pipe size smaller than a 3-inch diameter was used.

4) **Pump Type, Horsepower, and Electrical.** The type of pump and horsepower of the pump at each private property changed from the original proposal. (*Id.* at 12–36). This increase in horsepower would change the hydraulics of the entire system, as evidenced by the pipe sizing analysis, which is driven (at least in part) by the change in the pumps. This modification would also impact the electrical connection for each pump, a cost which appears to be each homeowner’s responsibility.

Importantly, these modifications are more than mere adjustments for time or updated costs that would be typically seen in the course of a PSC proceeding. *See 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, 2017 Fla. PUC LEXIS 111, at \*10 (PSC May 2, 2017) (noting that “the Commission routinely considers updated cost information on pro forma projects included in water and wastewater MFRs”). Both individually and cumulatively, these engineering modifications are entirely new evidence—of a completely redesigned system—that should have been admitted as direct testimony and are improper on rebuttal. *See In re: Joint petition by TDS Telecom*, 2006 Fla. PUC LEXIS 160, at \*8 (“It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief . . . .” (quoting *Driscoll*, 114 So.2d at 315)).

Therefore, the PSC must move to the second step of the analysis, which requires it to determine whether EU’s new rebuttal testimony and evidence “is substantially justified and causes no prejudice.” *WhereverTV*, 2022 U.S. Dist. LEXIS 159537, at \*9. The burden is on EU to demonstrate that their rebuttal testimony is substantially justified and causes no prejudice. *In re: Joint petition by TDS Telecom*, 2006 Fla. PUC LEXIS 160, at \*7. EU cannot possibly meet this burden. If the rebuttal testimony is not stricken, Intervenors are essentially deprived of any level of due process in this proceeding, not being permitted to review, analyze, and submit relevant fact and expert testimony related to the new system now proposed by EU. For example, both of LGIPA’s engineering experts, Jadon Hull and John Shaw, based their expert opinions and pre-filed testimony on the original system proposed by EU; neither has been permitted to opine on the newly designed system. As a result, Intervenors would be severely prejudiced by the rebuttal testimony. The new system design and the testimony related thereto—along with the entirety of Exhibit JHC-6, which presents the new engineering design—must be stricken.<sup>2</sup>

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<sup>2</sup> It would be impossible to dissect the Addendum, Exhibit JHC-6, as to permit the small portions that may include proper rebuttal testimony because the entire Addendum accounts for a new

Cole then testifies in his rebuttal that these engineering modifications caused EU's cost estimates to be "updated based on a revised layout." (Doc. No. 10124-2024, at 2:8–11). While this is a gross understatement of the massive system design modifications, it makes clear that Swain's rebuttal testimony is tied to the new system design. Therefore, the portions of Swain's testimony and her updated cost estimate exhibit, Exhibit DDS-2, based on the new system design must be stricken as well. (Doc. No. 10120-2024, Exhibit DDS-2).

If the above referenced rebuttal testimony is permitted to stand, Intervenors contend that EU has presented an entirely different project than that proposed in its Application (and through its direct testimony). Essentially, the referenced "rebuttal" testimony is tantamount to an entirely new application before the PSC. This would deprive Intervenors of their rights in this proceeding under section 120.57(1)(b), Florida Statutes, which provides that "[a]ll parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence."

#### **IV. CONCLUSION**

Wherefore, Intervenors request an Order from the PSC granting this Motion to Strike Rebuttal Testimony and striking the following testimony and exhibits from the Prefiled Rebuttal Testimony of Jonathan H. Cole and Deborah D. Swain:

- 1) Rebuttal Testimony of Jonathan H. Cole, Doc. No. 10125-2024:
  - a) page 2, lines 8–11;
  - b) page 2, lines 15–17, strike references to Exhibit JHC-6;
  - c) page 2, line 21, strike reference to Exhibit JHC-6;

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system. If Cole has rebuttal testimony regarding items such as multipliers or markups, he may testify to that at hearing without the Addendum containing the new system design.



- d) page 2, line 23, strike reference to Exhibit JHC-6;
  - e) page 3, lines 7–8, strike reference to Exhibit JHC-6;
  - f) page 3, line 10, strike reference to Exhibit JHC-6; and
  - g) Exhibit JHC-6.
- 2) Rebuttal Testimony of Deborah D. Swain, Doc. No. 10120-2024:
- a) page 5, lines 23–25, “Yes, . . . construction costs.”
  - b) Page 6, lines 8–9, strike reference to Exhibit DDS-2; and
  - c) Exhibit DDS-2.

Intervenors further request any further relief that the PSC finds just and proper.

Dated: January 6, 2025

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*Pro se*

**CERTIFICATE OF CONFERRAL**

Pursuant to Rule 28-106.204(3), the undersigned has conferred with all other parties of record regarding their position on this Motion. Palm Island Estates and Ms. Cotherman join in the Motion. EU opposes the Motion.

*/s/ Valerie L. Chartier-Hogancamp*  
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**CERTIFICATE OF SERVICE**

I certify that on January 6, 2025, a true and correct copy of the foregoing has been furnished by electronic mail to the following:

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