

BEFORE THE PUBLIC SERVICE COMMISSION

IN RE: Application for certificate to provide
wastewater service in Charlotte County, by
Environmental Utilities, LLC

DOCKET NO. 20240032-SU

**ENVIRONMENTAL UTILITIES LLC'S RESPONSE TO JOINT MOTION TO STRIKE
PORTIONS OF REBUTTAL TESTIMONY AND EXHIBITS**

Applicant, Environmental Utilities, LLC (“EU”) by and through its undersigned counsel, pursuant to Rule 28-106.204, Florida Administrative Code, files this Response to Little Gasparilla Island Preservation Alliance, Inc.’s (“LGPIA”), Linda Cotherman, and Palm Island Estates Association, Inc.’s (“PIE”) (collectively “Movants”) Motion to Strike Portions of Rebuttal Testimony and Exhibits of EU witnesses Jonathan H. Cole (“Cole”) and Deborah D. Swain (“Swain”) (collectively, the “Witnesses”), and states as follows:

1. The process of an original certificate proceeding requires that the engineering and financial information be based upon construction cost and operating expense estimates¹. Those estimates are then utilized to prepare the financial schedules that result in the establishment of rates and charges. In Witness Cole’s Prefiled Direct Testimony filed on August 23, 2024, Mr. Cole identified and estimated various projected costs of the septic to sewer project at that time. Ms. Swain then utilized those estimates in preparing the financial schedules and recommended rates and charges.² It is important to note that Ms. Swain’s update in her rebuttal testimony reduces the average monthly bill from \$158.71 to \$155.65, and increases the connection charge from \$14,513

¹ This is particularly challenging in a septic to sewer conversion project on a barrier island.

² Since Ms. Swain’s Rebuttal Testimony is really a “fallout” of the construction costs, the real issue revolves around Mr. Cole’s Rebuttal Testimony.

to \$15,587; so Mr. Cole's updates have an immaterial impact on the rates and charges, which is what Movants' objection to the septic to sewer project is really about.

2. On December 6, 2024, Prefiled Rebuttal Testimony was filed by Jonathan H. Cole and Deborah D. Swain. As discussed more fully below, that rebuttal testimony addressed issues raised by some or all of the Movants. It is important to note that Movants chose to wait until the deadline to file a Motion to Strike. They did not make any effort through Interrogatories, Requests for Production of Documents, or Depositions address their complaints about any information in the Rebuttal Testimony of these Witnesses. In fact, both PIE and LGIPA cross-noticed the depositions set by the Staff of EU witnesses, but chose not to ask any questions related to the updates in construction. The Movants have had an adequate opportunity to analyze and conduct discovery and voluntarily chose not to do so. An identical issue was addressed in Order No. PSC-2018-0242-PHO-SU³, wherein the Prehearing Officer reiterated the Commission policy:

Having read the parties' pleadings, and having granted and heard the parties' oral argument on these two motions, I am unpersuaded that the intervenors have not had an adequate opportunity to analyze and conduct discovery upon the updated cost information provided by KWRU. I am therefore denying the intervenors' request to strike testimony, compel MFRs, and requests to continue the Hearing.

3. In that K W Resort Utilities Corp. rate case, as the work progressed on some of the pro forma projects it was determined that additional work was needed. The same is true here, where in addressing comments by Movants it was determined that some updates would be necessary. These types of changes are expected in an original certificate proceeding where the system design is by necessity conceptual, instead of having the benefit of historical construction and construction costs. In fact, EU acknowledges that as this project moves through final design and permitting

³ This policy was effectively upheld on appeal. *Monroe County v. Florida Public Service Commission*, 313 So 3d 87 (Fla. 1 DCA 2021) PCA

other changes may have to be made. The Movants did not want to bifurcate the certification from the ratemaking, which would have eliminated this issue.

4. On January 6, 2025, the Movants filed the instant Motion to Strike on the grounds that the testimony identified in the Motion is new evidence and not rebuttal. As noted above, those updates had no material effect on the ultimate issue which are the rates and charges. To the extent any conceptual construction plans changed, it was the result of comments made by the Movants. Movants do acknowledge that even if the Rebuttal Testimony included new evidence that it would not be appropriate to strike it if it was substantially justified and caused no prejudice. In the instant case, if there is any prejudice, it was caused by Movants in voluntarily deciding to ignore any perceived changes instead of conducting discovery or requesting some other alternative to address them, as has been allowed by the Commission in the past. However, since there are no material changes in the rates and charges, there is no prejudice.

6. The Intervenor's specific objections to the Rebuttal Testimony are insufficient bases to strike the testimony.

- System Type. Both the grinder and STEP systems are pressure sewer systems. For the Movants to say that they are surprised by the use of grinder pumps means that they must not have read the Prefiled Direct Testimony of Randy Bell, which discusses grinder pumps extensively. As is to be expected, the original conceptual engineering report did not include the grinder pumps, but it is to be expected as changes are made as the project moves forward, and was an option identified in the Prefiled Direct Testimony.

- Force Main Routing. The Movants, especially Cotherman, questioned the ability of the Utility to use the single route to the mainland believing that EU would not be able to get an easement across the State Park, and in light of the County not going forward with the Cape Haze project at this time; which was the point where the EU wastewater collection line was going to connect to the County system on the mainland. Partially in response to this, EU decided to go forward with the option that the County approved, and which is provided for in the Bulk Sewer Service Agreement, of two connection points. The April 2019 “Sewer Interconnection” report mentioned in the Bulk Sewer Treatment Agreement only focused on how to get sewage off the island, showing two potential options: a single crossing through the state lands at Cape Haze, OR a dual crossing at the north and south. The single crossing at that time was more cost effective however both options were referenced as being viable in the Bulk Sewer Treatment Agreement with Charlotte County. The July 2020 Bulk Sewer Treatment Agreement references the 2019 report and allowed for either option. “The route of the transmission main shall be one of the two proposed routes contained in the “Preliminary Engineering Report for Sewer Interconnection to Mainland from Knight Island /Don Pedro/Gasparilla island” prepared by Giffels Webster Engineers inc. dated April 10, 2019.” The 2021 report (that was used for the initial application) assumed the one crossing through the State lands connecting to the Cape Haze project. (By the way, the 2021 report was really an alternative analysis as to which type of system (pressure, vacuum or gravity) to use and the pricing estimates for each one.) That report concluded that a pressure

pipe system would be most appropriate and not a vacuum system or gravity system. It (in general) assumed the Cape Haze project would provide the master pump station to accept flows from the island as well as permission to install the force main through the State lands would be granted. The 2024 addendum addressed the problem of the State not allowing the single crossing if there was an alternate, the easement cost questions, the master pump station question and the unit pricing questions raised by the Movants. The estimates were updated, plus a hydraulic model was included making it far more accurate as to line sizing and costs. The intent was to address the questions and deal with the new reality that the State would not allow the singular crossing if there was an alternate, which there is, the dual crossing.

- Pipe Sizing: The Movants complained about EU's projected costs, and whether all costs were included. Mr. Cole considered these comments and in connection with its conceptual design prepared revisions to costs and materials. So, how can Movants now complain when EU did what they sought to have EU do, to wit, update pricing?
- Pump Type, Horsepower, and Electrical: Again, Randy Bell's Prefiled Direct testimony addresses this. Based upon the Movants' testimony, Mr. Cole updated the conceptual plan.

7. As discussed above, all of the adjustments made by Witness Cole are related to a single project and are a result of updating the conceptual plan partially based upon the Movants'

testimony and occurring subsequent to the filing of Witness Cole's Direct Testimony in this matter. The revised financial schedules prepared by Witness Swain are the manifestation of these changes.

8. Each item addressed above illustrates the nature of the rebuttal testimony and the faults of the instant Motion. Witness Cole states in his rebuttal testimony that the purpose of the testimony is to respond to the direct testimony filed by Movants, explains the status of changes to the project and explains the justification for the additional changes and costs, as supported by his updated Report. Witness Cole further explains why he disagrees with the Movants' witnesses' testimony on certain points. The rebuttal testimony is proffered for the specific purpose of rebutting Movants' direct testimony.

9. The inclusion of this updated information is not out of the ordinary. The updates in the design and cost do not seek to fundamentally change the case, but rather only to bring to light existing facts, based on changes to estimated costs which update initial well-founded projections. This is the nature of an original certificate application that must rely upon conceptual plans. And importantly, such changes have no material impact on the proposed rates and charges.

10. This Commission routinely considers updated information on projects included in original filings. In re: *Application for increase in water rates in Franklin County by Water Management Services, Inc.* (Commission denied OPC's motion to strike portions of WMSI's rebuttal testimony); *see also* Order No. PSC-2011-0563-PCO-EI, issued December 8, 2011, Docket No. 110138-EI, *In re: Petition for increase in rates by Gulf Power Company* (denying motion to strike portions of rebuttal); and Order No. PSC-2009-0640-PCO-EI, issued September 21, 2009, in Docket No. 090079-EI, *In re: Petition for increase in rates by Progress Energy Florida, Inc.* (denying intervenors' motion to reschedule evidentiary hearings and not allowing the

updated load forecast study provided in rebuttal to result in additional revenue requirements). The Commission's consideration of updated information that is provided in Rebuttal Testimony and during discovery is important to setting fair and reasonable rates and charges, and may result in the cost of a project either being increased or decreased from the cost shown in the original Application. See Order No. PSC-2017-0147-PCO-WS, issued May 2, 2017, *In re: Application for increase in rates by Utilities, Inc. of Florida* (denying intervenors motion to strike portions of rebuttal testimony and exhibits). This process has been upheld on appeal several times. See, *Citizens v. Public Service Commission*, 294 So.3d 961(Fla. 1 DCA 2019), and *Monroe County v. Public Service Commission*, 313 So. 3d 87 (Fla. 1st DCA 2012) PCA

Legal Standard for Striking Rebuttal Testimony

11. In Order No. PSC-2011-0563-PCO-EI (December 8, 2011) this Commission refused to strike rebuttal testimony of studies that were available when the witness' direct testimony was filed since it was in rebuttal of an intervenor's witness, and in addressing the due process complaint pointed out that the intervenor had an opportunity to cross examine the witness.

The Order Noted:

A trial court has broad discretion to admit rebuttal testimony. See *Dale v. Ford Motor Co.*, 409 So. 2d 232 (1st DCA 1982). However, a trial court abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense. See *Young-Chin v. City of Homestead*, 597 So. 2d 879 (3rd DCA 1992)

Mendez v. Caddell Construction Co., 700 So. 2d 439, 440-441 (3rd DCA 1997).

The rebuttal testimony of witness Alexander fits within the definition of rebuttal testimony as described by the Federal Courts, and 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.”

Also see Commissioner Graham’s Order in Order No. PSC-2011-0203-PCO-GU (April 22, 2011).

In the instant case the Movants also has been able to depose Witness Cole and Witness Swain and serve discovery but chose not to do so.

WHEREFORE, based upon the argument and authorities set forth above, Environmental Utilities, LLC, respectfully requests this Commission follow the Commission precedent and deny Movants’ Motion.

Respectfully submitted this 10th day of January, 2025.

/s/ Martin S. Friedman
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the following parties this 10th day of January, 2025:

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