

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. 150071-SU
FILED: October 28, 2016

MOTION TO STRIKE PORTIONS OF REBUTTAL TESTIMONY AND EXHIBITS FILED BY KW RESORT UTILITIES, CORP.

The Citizens of the State of Florida, by and through the Office of Public Counsel (“OPC”), file this Motion to Strike portions of Rebuttal Testimony filed October 10, 2016 by KW Resort Utilities, Corp. (“KWRU” or “Utility”) on the grounds that it addresses issues or injects new facts which were not addressed or discussed by the Utility or Intervenors in their direct testimonies. As grounds in support of this Motion, Citizens state as follows:

1. On June 30, 2015, KWRU filed its initial rate increase request, seeking a revenue requirement of approximately \$2,931,759 to recover costs related to expanding its treatment plant, and increased operations and maintenance (O&M) costs.
2. On July 1, 2016, KWRU increased its requested revenue requirement to \$3,345,357. As part of the July 1, 2016 requested increase, KWRU is seeking to recover additional costs related to expanding its treatment plant, replacing a vacuum tank, and even more O&M costs. (See Debbie Swain’s direct testimony Exhibit DDS-2).
3. The Intervenors filed their direct testimony and exhibits on September 14, 2016 supporting lower Phase I and Phase II revenue requirements for KWRU.
4. KWRU filed rebuttal testimony and exhibits on October 10, 2016. In its rebuttal, the requested revenue requirement increased to \$3,440,501 and the cost of the 350,000 GPD wastewater treatment plant expansion project increased to \$5,164,748. As detailed below, portions

of KWRU's rebuttal testimony and exhibits improperly introduce issues and costs that were not addressed in KWRU's direct testimony or the testimony of the Intervenor witnesses. The Utility is attempting to improperly supplement its direct testimony. Therefore, the portions of testimony and exhibits referenced herein should be excluded from the record. *Driscoll v. Morris*, 114 So. 2d 314 (Fla. 3d DCA 1959).

5. The following testimony and exhibits from the rebuttal testimonies of Christopher A. Johnson and Edward R. Castle should be struck:

- a. Page 5, lines 5-11 of the rebuttal testimony of KWRU witness Johnson ("updated and estimated costs for completion")
- b. Exhibit CAJ-9 to the rebuttal testimony of KWRU witness Johnson ("Total costs for Completion of Plant and Vacuum Tank Expansion")
- c. Page 2, lines 22-25 of the rebuttal testimony of KWRU witness Castle ("engineering supervision costs" not included in the \$4.3 million Wharton Smith contract)
- d. Page 10, line 19 through page 11, line 2 ("engineering supervision costs")

Legal Standard For Striking Rebuttal Testimony

6. As a general rule, "it is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief." *Driscoll v. Morris*, 114 So. 2d at 315. "[R]ebuttal testimony which is offered by the plaintiff is directed to new matter brought out by evidence of the defendant and does not consist of testimony which should have properly been submitted by the plaintiff in his case-in-chief." *Id.* Therefore, where a party seeks to use rebuttal to present new facts beyond the scope of the Intervenor's direct case, a motion to strike should be granted.

7. Striking the portions of KWRU's supplemental direct testimony identified in paragraph (4) above, which the Utility improperly characterized as rebuttal, is consistent with the Commission's prior decisions where utilities attempted to inject new facts into evidence through rebuttal testimony. For example, Aloha Utility presented evidence in rebuttal which did not rebut any Intervenor or staff testimony, and which was beyond the scope of the Intervenors' direct case. As a result, the Commission properly struck it from the record. Order No. PSC-00-0087-PCO-WS at 4-5, issued January 10, 2000, in Docket No. 960545-WS, *In re: Investigation of Utility Rates of Aloha Utilities, Inc. in Pasco County*.

Argument

8. In witness Johnson's testimony and Exhibit CAJ-9, witness Johnson purports to provide "updated estimated costs for completion" of the plant expansion and vacuum tank replacement projects. (Johnson Rebuttal at 5) In witness Castle's rebuttal testimony and Exhibits ERC-5 & ERC-6, he clearly states he is providing rebuttal testimony to support the inclusion of "engineering supervision costs" for the plant expansion which were not included in the \$4.3 million Wharton Smith contract. (Castle Rebuttal at 2, 10-11) KWRU is improperly using the rebuttal testimony of these two witnesses as a vehicle to introduce additional costs not originally included in its direct testimony in order to increase its overall requested revenue requirement. In addition, the costs both witnesses are purporting to update, other than the cost of the vacuum tank itself, were not challenged by the Intervenors in their direct testimonies. In its direct testimony, KWRU asserted that the plant expansion was projected to cost approximately \$4.3 million and the vacuum tank project would cost approximately \$610,000 for a total of \$4.91 million in pro forma plant additions. In rebuttal, the updated cost, including the vacuum tank, is now over \$5.16 million, without any explanation of why those costs increased. This is especially troubling because the estimated cost

of the vacuum tank has purportedly decreased to approximately \$407,000. Therefore, the testimony of both witnesses as it relates to “updated and estimated costs for completion” and “engineering supervision costs” should be stricken.

9. Exhibit CAJ-9 includes nine pages of unsupported costs, and purports to be the “Total costs for Completion of Plant and Vacuum Tank Expansion;” however, witness Johnson testified it is only an estimate. Johnson Rebuttal at 5. Page 1 of the exhibit contains a list of additional, but unsupported, costs related to the now combined plant expansion/vacuum tank project. Pages 2-4 of the exhibit purport to contain apparent journal entries for costs allegedly associated with this project. Page 5 is apparently identical to ERC-5, and purports to include engineering oversight or supervision costs that were not included in the Wharton Smith plant expansion contract. Page 6 is the revised estimate for the vacuum tank project. Page 7 is apparently identical to ERC-6, and purports to include engineering oversight or supervision costs for the vacuum tank project. It should be noted that witness Castle referenced engineering oversight costs in his direct testimony, but only related to the vacuum tank project; he included no supervisory costs whatsoever for the plant expansion project in his direct testimony. About \$25,000 in vacuum tank supervision costs included in his exhibit ERC-4 (belatedly provided to the parties after witness Johnson’s deposition). However, page 7 of CAJ-9 and ERC-6 in the rebuttal testimony appears to add an additional \$24,030 in supervision costs for the vacuum tank replacement project.

10. Exhibit ERC-5 to witness Castle’s rebuttal testimony also introduces new costs related to the treatment plant, including over \$113,000 in engineering supervision costs not discussed or included in KWRU’s direct testimony. In Mr. Castle’s direct testimony, he stated that the purpose of his testimony was to “discuss the design capacity of the plant expansion” and the vacuum tank, specifically the need and reason for the replacement vacuum tank and costs involved, as well as

why “the manufacture of the replacement vacuum tank and rental of the temporary vacuum tank was not bid out.” Castle Direct at 3. In his rebuttal testimony, however, he introduced new testimony regarding “engineering supervision costs associated with the wastewater treatment plant project” that were not part of his direct testimony. Castle Rebuttal at 2, 10-11. This additional testimony is not responsive to any Intervenor challenge, and is not remotely addressed in KWRU’s direct testimony; therefore, this supplemental direct testimony should be excluded from the record.

11. KWRU’s Exhibit ERC-6 to witness Castle’s rebuttal testimony introduces additional engineer supervision costs related to the vacuum tank project. Unlike his expansion plant supervision costs, he mentions engineering supervision costs in his direct testimony. Castle Direct at 3. However, those costs were not challenged, and therefore those costs should not be “updated” in rebuttal. Thus, it is supplemental direct testimony and should be excluded from the record.

12. All of the above-referenced additional costs are supplemental costs constituting new facts that KWRU is attempting to improperly introduce into the record. These are in addition to the costs already presented in KWRU’s direct testimony, exhibits, and MFRs. Therefore, these extra costs are not cumulative evidence, but represent instead new evidence of cost related facts not contemplated in the direct case of either KWRU or the Intervenors. Nowhere in KWRU’s direct testimony did it indicate it would update these costs, nor did it even mention engineering supervision costs for the wastewater treatment plant expansion project. With the exception of the vacuum tank project cost, none of the other costs were directly or indirectly challenged by the Intervenors. These additional “new” costs are clearly supplemental direct testimony in the guise of “updated and estimated costs to completion.” Thus, these supplemental costs should be stricken from the record.

13. KWRU is represented by two skilled attorneys in this proceeding, who are more than capable of putting on a direct case that includes all of the Utility's known and measurable costs, including estimated costs to completion, for each aspect of its case. All of the costs requested by KWRU must be included in its direct testimony, exhibits, and MFRs. If those costs were not included in direct testimony, there is no second bite of the apple allowed; thus, it is too late and improper to allow KWRU to "update" those costs through rebuttal testimony. Moreover, it is unfair to the Intervenors, to the process, and would be a violation of the customers' due process rights.

14. The rebuttal testimony and exhibits identified herein are clearly supplemental direct testimony, do not address issues raised in KWRU's or the Intervenors' direct testimony, and instead raise new issues relating to "updated" cost factors. The significant difference in the costs at issue, \$4.3 million to \$5.1 million, demonstrates that there is a huge discrepancy between KWRU's original representations when it filed its direct case, as compared to its recently filed rebuttal testimony.

15. In addition, if this motion is granted, the portions of the rebuttal testimony and exhibits of KWRU witness Debbie Swaine that incorporate these additional, supplemental costs, should also be stricken.

16. Pursuant to the rules, Counsel for the Citizens has conferred with the representatives of the other parties. KWRU objects to the motion. Monroe County and Harbor Shores support the motion.

17. By separate motion, OPC has requested oral argument.

WHEREFORE, the Citizens of Florida respectfully request that the Prehearing Officer strike the portions of rebuttal testimony and exhibits identified herein, due to the improper introduction of new facts and costs that were not addressed in KWRU's direct testimony or in the Intervenors' direct testimony.

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CERTIFICATE OF SERVICE
Docket No. 150071-SU

I HEREBY CERTIFY that a copy of the foregoing MOTION TO STRIKE PORTIONS OF REBUTTAL TESTIMONY AND EXHIBITS FILED BY KW RESORT UTILITIES, CORP. has been furnished by electronic mail to the following parties on this 28th day of October, 2016 to the following:

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