

BEFORE THE 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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**KW RESORT UTILITIES CORP.'S RESPONSE TO OFFICE OF PUBLIC COUNSEL
AND MONROE COUNTY'S JOINT MOTION TO STRIKE PORTIONS OF REBUTTAL
TESTIMONY AND EXHIBITS, OR IN THE ALTERNATIVE, MOTION TO
RESCHEDULE THE TECHNICAL HEARING AND FOR LEAVE TO FILE
SURREBUTTAL TESTIMONY**

Applicant, KW RESORT UTILITIES CORP. ("KWRU") by and through its undersigned counsel, files this Response to the Office of Public Counsel's ("OPC") and Monroe County's ("County") (collectively "Movants") Motion to Strike Portions of Rebuttal Testimony and Exhibits of KWRU witnesses Christopher Johnson ("Johnson") and Deborah Swain ("Swain") (collectively, the "Witnesses"), and states as follows:

1. In Witness Johnson's and Witness Swain's Prefiled Direct Testimony filed on November 21, 2017, the Witnesses identified various pro forma projects and the known and measurable costs therefor at that time. To the extent contracts and documentation were in existence those were provided as Exhibits to the direct testimony.

2. Over the course of the next several months, KWRU provided documentation in response to the numerous discovery requests propounded by Movants and the Florida Public Service Commission staff ("PSC") in this docket as it became available. Additional information, offered for the sole purpose of rebutting testimony by OPC and Monroe County witnesses, was

provided within the Pre-filed Rebuttal Testimony of the Witnesses, which was filed in this docket on April 10, 2018.

3. On April 23, 2018, the Movants filed the instant Motion to Strike on the grounds that “the testimony identified [in the Motion] is ultimately supplemental direct testimony that does not rebut any testimony offered by OPC or the County’s witnesses” and, as such, the specified testimony should be stricken or, in the alternative, the technical hearing currently scheduled for May 15 – 17, 2018, should be continued and rescheduled, and OPC and the County should be allowed the opportunity to file surrebuttal testimony addressing the “new, supplemental direct testimony improperly included in KWRU’s rebuttal testimony.”

4. The Movants, in an apparent effort to delay the rate increase and increase the expense of this case, have filed this motion to strike updates of costs, while at the same time employing this same strategy, utilizing updated costs that lower pro forma projects, when made available, to reduce the pro forma project costs. “[C]hutzpah is when a man kills both his parents and begs the court for mercy because he’s an orphan.” *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 509 n.14 (Fla. 2006) (internal quotations and citations omitted).

5. In all cases but one, these costs of pro forma projects and other issues came to light after the filing of the Witnesses’ Pre-Filed Direct Testimony.

6. Moreover, these additional costs were disclosed to the Movants during the course of this proceeding through discovery. A full 100 days, during which discovery was vigorously conducted, elapsed between the filing of KWRU’s Pre-filed Direct Testimony (November 21, 2017) and the filing of Movants’ Pre-filed Direct Testimony (March 14, 2018). By way of example, during this period OPC served and KWRU responded to 139 interrogatories (by KWRU’s

calculation, 341 interrogatories, including subparts) during which the majority of this information was disclosed and examined. After the filing of the Witnesses' Pre-filed Rebuttal Testimony, rather than examine these cost changes through additional probative discovery requests, the Movants chose to squander their discovery opportunities on issues (such as insurance) which are not at issue in this docket. Movants have had at least twelve days since the filing of the Witnesses' Pre-filed Rebuttal Testimony to examine the statements made within the rebuttal testimony through discovery requests. Movants also have conducted extensive deposition of the Witnesses subsequent to the filing of Pre-filed Rebuttal Testimony, with regard to all of the issues presented.

7. It should also be noted that while KWRU has included information which was not available at the time of filing Pre-Filed Direct Testimony in its discovery responses and Pre-filed Rebuttal Testimony, that this information is presented for the purpose of responding to the direct testimony of OPC Witness Andrew Woodcock and Helmuth Schultz and County Witness Kevin Wilson and Jeffrey Small, explaining the status of the bids received, status of projects, and providing additional information in order to address the contentions of Movants' witnesses that certain costs are unsupported or are not properly documented.

8. OPC's due process rights have not been infringed upon. All of the proforma projects were identified and described in Johnson's Direct Testimony.¹ Mr. Woodcock was afforded an opportunity to visit all of KWRU's systems, including those with proforma projects. He does not question the reasonableness or prudence of these projects, so the bottom line is whether the costs of those projects are reasonable. Mr. Woodcock has correctly articulated this

¹ With the exception of the plant rehabilitation pump-down costs, which are addressed in paragraph 21 herein. These costs were not identified in Witness Johnson's direct testimony, but are necessary for the plant rehabilitation to occur.

Commission's policy of considering proforma projects based upon actual invoices and signed contracts based upon competitive bids. All of the proforma projects in this case meet one of those requirements.

9. The table below list all portions which Movants seek to strike. While in its Motion Movants only discussed select portions of the testimony which they request be stricken (evidently intending this Commission to assume the facts regarding the other projects), KWRU has addressed each portion in turn in order to clearly demonstrate the unreasonableness of Movants' argument. Much of the documentation Movants argue is at issue was provided in discovery prior to Movants' direct testimony, but Movants apparently chose to ignore it.

NEW INFORMATION	WITNESS	PAGE	LINES	EXHIBITS
JOHNSON				
Lift Station	CAJ	4	11-23	CAJ-27
Chlorine Contact Chamber	CAJ	4	24-25	
Chlorine Contact Chamber	CAJ	5	1-20	CAJ-28
WWTP Rehab	CAJ	5	21-25	
WWTP Rehab	CAJ	6	1-25	
WWTP Rehab	CAJ	7	1-15	CAJ-29
Back-up Generator	CAJ	7	16-25	
Back-up Generator	CAJ	8	1-25	CAJ-30

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Back-up Generator	CAJ	9	1-7	
Portable Generator	CAJ	10	5-7	
New Modular Office	CAJ	15	14-18	CAJ-32
New Modular Office	CAJ	16	25	
New Modular Office	CAJ	17	1-12	CAJ-35
Salaries and Wages	CAJ	21	22-25	
Salaries and Wages	CAJ	22	1-3	
Hurricane Expense	CAJ	22	4-14	
Telephone System	CAJ	23	12-25	CAJ-38
Telephone System	CAJ	24	1-9	
Purchased Power	CAJ	28	5-8	CAJ-40
SWAIN				
New Modular Office	DDS	8	9-12	
Portable Generator	DDS	17	19-23	
Cost of Debt	DDS	33	16-25	DDS-6
Cost of Debt	DDS	34	1-10	
Exhibit DDS-2	DDS	All	All*	DDS-2

*All portions of DDS-2 that changed as a result of KWRU's rebuttal testimony.

10. **Lift Station.** Movants request the striking of Witness Johnson's testimony with regard to the additional panel which is necessary for the lift station L2A replacement. The need for a new panel was detailed in response to PSC's Second Set of Interrogatories to KWRU, served on February 13, 2018, nearly a month prior to the deadline for Movants' direct testimony. Additionally, the cost of the new panel was included in the Direct Testimony of Witness Johnson, at P. 6, L. 21, in the total cost of the project.

11. **Chlorine Contact Chamber.** Movants challenge the increased cost of the chlorine contact chamber work due to Work Directive 2018-02, which increased the cost by \$6,200. This

work directive was issued March 21, 2018 (after the filing of Movants' direct testimony) and was promptly disclosed in KWRU's response to PSC's Second Set of Interrogatories to KWRU, No. 28, on March 26, 2018. Similarly, increased housing costs for housing due to the delay of the chlorine contact chamber rehabilitation project were not foreseen – until a start date for the project was determined, the availability (and price) of housing could not be determined.² KWRU received a Critical Path Management Schedule from the contractor on February 1, 2018, and could not determine housing prices until that time. OPC Witness Woodcock found the initial costs for the rehabilitation prudent, but these additional costs were simply not known until after the filing of Movants' rebuttal testimony.

12. **Wastewater treatment rehabilitation project.** Movants challenge the \$43,128 in pump-down expenses for the final four feet³ of the tanks, an expense necessary in order for the plant rehabilitation to take place which is outside the scope of the Evoqua contract. While KWRU should have included this cost in its direct testimony (as it is a prerequisite for the rehabilitation) KWRU did not have cost information on hand at that time. Movants do not challenge the necessity of the plant rehabilitation, and this expense is required in order for it to occur. This is a necessary and reasonable cost based on the actual cost of sludge hauling from Key West.

13. **Back-up Generator.** Movants further challenge the increased cost of the pad for the new generator (C. Johnson Testimony, P. 7 – 9). As stated in Witness Johnson's rebuttal testimony, KWRU could not finalize plans for the foundation design – and thus obtain bids – until

² The increased cost still represents a cost savings over the original Wharton Smith bid, wherein they provided housing, of more than \$38,000.00.

³ KWRU Staff will perform the pump down of the plants other than the last four feet in house, at a significant cost savings.

the dimensions were known. KWRU selected and paid the initial invoice for the selected generator on January 24, 2018, and promptly disclosed the selection in its discovery responses. The Wharton Smith bid for the pad was not received until March 20, 2018, and was revised on April 6, 2018.⁴ Witness Johnson initially estimated the cost for the pad at \$20,000 based on the generator pad being capable of being utilized as is, which it turns out, due to the age of the prior generator, modern generators are not designed in a similar shape. As Mr. Johnson did not know the cost, an actual cost could not be derived until the requisite bids were received. Similarly, the specific purchased generator required increased electric installation costs. A firm bid was not received until March 14, 2018, after the filing of Movants' direct testimony, and was promptly disclosed in discovery.

13. **Portable Generator.** Movants move to strike the testimony of Johnson with regard to the additional five months of mobile generator rental expense, and Witness Swain's testimony regarding the inclusion of the additional months of generator expense. In his Direct Testimony, Witness Johnson estimated six months as a reasonable approximation, as the delivery date for the new mobile generator was not known. However on March 22, 2018, after the filing of Movants' testimony, KWRU selected the mobile generator, which had a lead time longer than expected, necessitating the rental of the back-up generator for an additional period. Movant knew of the expense of the rental prior to filing its direct testimony and did not dispute the monthly rental expense was reasonable and prudent. Movant did not contest the reasonableness of the generator acquisitions or that rental generators were necessary until installation of the new generators. All

⁴ Ultimately, three bids were received and have all been provided in discovery and discussed at Mr. Johnson's deposition. Wharton Smith's bid was the bid accepted based on numerous factors including price and already being mobilized.

that has changed is when the generators will be installed and how many months the generator must be rented.

14. **New Modular Office.** Movants move to strike the testimony of Johnson and with regard to the supplier of the modular office and the price per square foot, and of Swain with regard to the inclusion of the costs being proper. After initially providing a contract with a different entity controlled by the same principal as the ultimate modular office vendor, and after the filing of Movants' rebuttal testimony, KWRU and the vendor realized that the inclusion of the prior vendor was a scrivener's error. The contract was corrected. The price has not changed. Movant's were able to depose Mr. Johnson and Ms. Swain on this issue; the correction of the scrivener's error as to the name of the company does not affect the cost of the modular office.

15. **Salaries and Wages.** Movants move to strike the testimony of Johnson with regard to increased salaries and wages. The salary and wage increases were updated in Witness Johnson's testimony to reflect known and measurable conditions occurring after the filing of Movants' testimony, and fallout calculations to pension and benefits, workman's compensation, and payroll taxes. This is actual an interesting request as the total of these expenses was reduced by \$13,162, not increased. See below:

MFRs

Salaries and Wages – Employees	\$752,549
Salaries and Wages – Officers, Etc.	\$261,581
Employee Pensions and Benefits	\$217,557
Total	\$1,231,687

Update to MFRs

Salaries and Wages – Employees	\$719,234
Salaries and Wages – Officers, Etc.	\$262,751
Employee Pensions and Benefits	\$236,540
Total	\$1,218,525

16. **Hurricane Expense.** Movants move to strike the testimony of Johnson with regard to hurricane expense. This testimony directly rebuts Witness Schultz's proposed revisions to Hurricane Expense to accommodate lead time for the new generator, renting the standby generator, and increased insurance costs for the new generator, as discussed herein.

17. **Telephone System.** Movants move to strike the testimony of Johnson with regard to new telephone system costs. These costs have been updated in discovery over the course of the proceeding where known and measurable installation, hardware, and service costs have become available.

18. **Purchased Power.** Movants move to strike the testimony of Witness Johnson with regard to increased purchased power expense. In January 2018, the electric utility, Keys Energy Services, raised its KwH charge approximately 8%. This expense was updated in Witness Johnson's rebuttal using the known and measurable rates for 2018. The 2018 rates were not available upon the filing of Johnson's direct testimony.

19. **Debt Expense.** Movants move to strike the testimony of Witness Swain with regard to increased debt expense. This updated debt expense accounts for known and measurable increases in the interest rate on KWRU's loans as a result of an increase in the Federal prime rate on December 13, 2017 and March 21, 2018, after the filing of Movants' Direct Testimony. This

increase is based on known and measurable changes to KWRU's cost of debt which occurred during the interim period.

20. Movants move to strike Exhibit DDS-2, which incorporates the changes set forth above into the MFRs. As discussed above, all of the adjustments made by Witness Johnson and Witness Swain are a result of known and measurable factors occurring subsequent to the filing of KWRU's Direct Testimony in this matter. The revised MFRs are the manifestation of these changes.

21. Each item addressed above illustrates the nature of the rebuttal testimony and the faults of the instant Motion. Witness Johnson states in his rebuttal testimony that the purpose of the testimony is to respond to the direct testimony filed, explains the status of the projects and explains the justification for the additional costs, as supported by exhibits. Witness Johnson further explains why he has no disagreement or disagrees with the Movants' witnesses' testimony on certain points. The rebuttal testimony is proffered for the specific purpose of rebutting movants' direct testimony.

23. The inclusion of this updated data is not out of the ordinary. The updates in the cost data, debt data, and MFRs do not seek to introduce new projects or fundamentally change the rate case by correcting material errors in KWRU's initial filing, but rather only to bring to light existing facts, based on changes to known and measurable costs which update initial well-founded projections.

24. Further, while KWRU contends it is entitled to a \$3,761,710 revenue requirement, the utility stipulates that the maximum amount of revenue that may be awarded is \$3,682,216, as set forth in the initial MFRs.

25. This Commission routinely considers updated cost information on pro forma projects included in water and wastewater MFRs. 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-11-0563-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-09-0640-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 cost information that is provided during discovery is important to setting fair and reasonable rates, and may result in the cost of an individual pro forma project either being increased or decreased from the cost shown in the MFRs. See Order No. PSC-17-0147-PCO-WS, issued May 2, 2017, in Docket 160601-WS, *In re: Application for increase in rates by Utilities, Inc. of Florida* (denying intervenors motion to strike portions of rebuttal testimony and exhibits).

There is No Due Process Violation

26. It is interesting, and somewhat contradictory, for OPC to argue that changes in the cost of some pro forma projects that decrease are not fundamental changes for which it asserts a due process violation, but it is so when the cost increases. All of the proforma projects were identified and described in Witness Johnson's Prefiled Testimony. Mr. Woodcock did not disagree with the prudence or necessity of the projects. What is being done through the discovery process is to refine those costs, not to create new projects.

27. This Commission considered an almost identical fact situation in Order No. PSC-17-0147-PCO-WS, issued May 2, 2017, in Docket 160601-WS, *In re: Application for increase in rates by Utilities, Inc. of Florida* and rejected OPC's similar arguments. In that case, OPC and other intervenors sought to strike testimony of a UIF witness when through rebuttal testimony UIF sought to present known and measurable updates. As in the instant case, OPC argued that its due process rights had been violated. As in the instant case OPC argued that it needed an opportunity to respond, present evidence and argument. In spite of the evidence UIF presented in its rebuttal testimony of the revenue increase, it made clear that it was not seeking any more in revenues than the amount requested in the original MFRs. This Commission denied OPC's Motion. Even though in this case the actual cost of the proforma projects exceed the amount requested in the MFRs resulting in approximately \$79,494 of additional revenue required, KWRU is not seeking more revenues than those set forth in its MFRs, and the Commission may accept this statement as that affirmation. Unlike cases cited to by the Movants, KWRU does not seek to include additional plant that existed at the time of filing (the plant in the instant case is proforma), and does not seek to increase its revenue requirement above that in its original MFRs. OPC in the UIF case also offered the same alternative that has been offered in the instant case to strike the stated portions of the rebuttal testimony. That request was also denied, noting that the testimony rebutted that of an intervenor witness, and that such testimony could not be used to increase the revenue requirement above the amount in its original request. This Commission made a similar ruling in Order No. PSC-96-0279-FOF-WS, because the utility was not seeking an increase in its original request.

Burden of Proof

28. KWRU acknowledges that it carries the burden of proof and that such burden can be met by documentation presented through the duration of the proceeding. The burden is to prove entitlement to the revenue requirement requested in the original MFRs.

Legal Standard for Striking Rebuttal Testimony

29. OPC's assertion that Witness Johnson's Rebuttal Testimony is not in rebuttal of any Monroe County or OPC witness is erroneous. His testimony directly rebuts Mr. Woodcock's testimony regarding various proforma projects in which Mr. Woodcock believed were not supported. As previously discussed, such argument was rejected by this Commission in various prior cases.

30. In Order No. PSC-11-0563-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. In the instant case the OPC also has been able to depose Witness Johnson and Witness Swain. Also see Commissioner Graham's opinion in Order No. PSC-11-0203-PCO-GU (April 22, 2011).

31. An analogous factual situation (which incidentally involved Mr. Woodcock) in Order No. PSC-10-0610-PCO-WU (October 4, 2010) includes a detailed analysis of the law regarding striking rebuttal testimony. That Order points out that in that case the rebuttal testimony sought to introduce a regulatory expense that was not included in the utility's case-in-chief nor addressed by testimony of another party. In the instant case all of the proforma projects were included in the Prefiled Direct Testimony, and Witness Johnson's Rebuttal Testimony rebutted

Witness Woodcock's and Witness Schultz's testimony that certain costs were not adequately supported.

32. Finally, KWRU offered Movants the opportunity to file surrebuttal prior to the hearing on May 7 – 9. Movants have not stated they cannot file surrebuttal prior to the hearing and did not agree to KWRU offer to file surrebuttal prior to the final hearing. It is apparent Movants do not desire to actually file surrebuttal but want to delay this case anyway possible.

WHEREFORE, based upon the argument and authorities set forth above, KW Resort Utilities Corp., respectfully requests this Commission follow the Commission precedent and deny OPC and Monroe County's 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 26th day of April, 2018:

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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 this 25th day of April, 2017, to:

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