

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: September 30, 2021

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Osborn, Crawford) *JSC*
Division of Engineering (Kistner, Ellis, King, Thompson) *TB*
Division of Accounting and Finance (Norris, Thurmond) *ALM*
Division of Economics (Bruce, Hudson) *JGH*

RE: Docket No. 20200226-SU – Application for certificate to provide wastewater service in Charlotte County, by Environmental Utilities, LLC.

AGENDA: 10/12/21 – Regular Agenda – Request for Oral Argument (Issue 1), Motion for Partial Summary Final Order (Issue 2), Motion to Dismiss Application (Issue 3) – Oral Argument Requested for Motion for Partial Summary Final Order and Not Requested for Motion to Dismiss - Participation is at the Commission's Discretion

COMMISSIONERS ASSIGNED: ~~All Commissioners~~ *Clark, La Rosa, Passidomo*

PREHEARING OFFICER: La Rosa *At 9/30/21*

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On October 13, 2020, Environmental Utilities, LLC (EU or Utility) filed its application for an original wastewater certificate in Charlotte County (County). The proposed service area includes the barrier islands of Little Gasparilla Island, Don Pedro Island, and Knight Island. With its application, EU filed a petition for temporary waiver of portions of Rule 25-30.033, Florida Administrative Code (F.A.C.), so that the Utility's initial rates and charges might be set at a date subsequent to the granting of the certificate of authorization. The petition for temporary rule waiver was denied by Order No. PSC-2021-0066- PAA-SU, issued February 2, 2021.

Docket No. 20200226-SU

Date: September 30, 2021

Pursuant to Rule 25-30.030, F.A.C., EU both published notice in the proposed service area, and provided notice by mail to property owners in the service area EU proposes to serve. Timely objections to EU's application have been filed with the Commission; therefore, this matter is set for an administrative hearing on February 8-9, 2022, by Order No. PSC-2021-0323-PCO-SU, issued August 25, 2021. On January 19, 2021, Mr. Guy Hurst filed a Motion to Dismiss the Application (Motion to Dismiss). EU responded to this Motion to Dismiss on January 20, 2021.

On August 9, 2021, EU filed a Motion for Partial Summary Final Order (Motion) regarding the need for service. Concurrent with the Motion, EU filed a Request for Oral Argument on its Motion. Two parties, Ms. Linda Cotherman and Palm Island Estates Association, Inc. (Palm Island), timely filed responses to EU's Motion.

Staff addresses EU's request for Oral Argument and Motion in Issues 1 and 2, respectively, and Mr. Hurst's Motion to Dismiss in Issue 3. The Commission has jurisdiction pursuant to Sections 367.011, 367.031, 367.045, and 367.081, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Utility's request for oral argument be granted?

Recommendation: No, staff recommends that the pleadings are sufficient on their face for the Commission to render a decision on the Motion for Partial Summary Final Order (Issue 2) and Motion to Dismiss (Issue 3). However, if oral argument would aid the Commission in evaluating the issues to be decided, the parties should be allowed five (5) minutes each for oral argument for the respective pending motions. (Osborn, Crawford)

Staff Analysis:

Rule 25-22.0021(3), F.A.C., specifies that informal participation is not permitted on dispositive motions, and participation on such is governed by Rule 25-22.0022, F.A.C. Rule 25-22.0022(7), F.A.C., states that oral argument at an Agenda Conference will only be entertained for dispositive motions, such as a motion for summary final order or a motion to dismiss. The Commission may grant oral argument if the request: 1) is contained in a separate document; 2) is filed concurrently with the motion on which argument is requested; and 3) states with particularity why oral argument would aid in understanding and evaluating the issues to be decided. Rule 25-22.0022(3), F.A.C., provides that granting a request for oral argument is solely at the Commission's discretion.

Motion for Partial Summary Final Order

On August 9, 2021, EU timely requested oral argument concurrent with its Motion for Partial Summary Final Order. EU states that since granting Summary Final Orders are uncommon but are granted in appropriate circumstances, the Commissioners would benefit by hearing oral argument on the issue from the various parties. EU requests oral argument of ten (10) minutes for each party be permitted.

Staff believes that the pleadings are sufficient on their face for the Commission to render a decision on EU's Motion, and recommends that oral argument is not necessary in this case. However, if oral argument would be helpful for the Commission to better evaluate EU's Motion, staff believes that 5 minutes for each party is sufficient.

Motion to Dismiss

Staff notes that there was no request made for oral argument on the Motion to Dismiss. While participation is at the discretion of the Commission, staff believes that the Motion to Dismiss is sufficient on its face for the Commission to render a decision. If the Commission would like to hear from the parties, staff believes that 5 minutes for each party is sufficient.

Issue 2: Should EU's Motion for Partial Summary Final Order be granted?

Recommendation: No. Based on staff's review of EU's Motion, it appears that the Motion does not establish an absence of any genuine issue of material fact as to the need for service. Therefore, EU's Motion for Partial Summary Final Order should be denied. (Osborn, Crawford)

Staff Analysis:

Standard of Review for Motion for Summary Final Order

Section 120.57(1)(h), F.S., requires that, in order to grant a motion for summary final order, it must be determined from "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order." The Commission has previously stated that "the standard for granting a summary final order is very high."¹

In general, "a summary judgment should not be granted unless the facts are so crystalized that nothing remains but questions of law," and "must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985); see also City of Clermont, Fla. v. Lake City Util. Servs., Inc., 760 So. 2d 1123, 1124 (Fla. 5th DCA 2000), and Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977). If the record "raises even the slightest doubt" that an issue of material fact may exist, a summary final order would not be appropriate. Albelo v. S. Bell (Albelo), 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996). Even if the parties agree as to the facts, "the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts." Albelo, 682 So. 2d at 1129. The Commission has also previously found that "it is premature to decide whether a genuine issue of material fact exists when [a party] has not had the opportunity to complete discovery and file testimony."²

In addition, the Commission has acknowledged that the purpose of summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts.³ The record is reviewed in the light most favorable toward the party against whom the summary judgment is to be entered. The movant carries a heavy burden to present a showing that there is no genuine issue as to any material fact. Subsequently, the burden shifts to the party against whom summary judgment is sought to demonstrate the falsity of the showing. If they do not do so, summary judgment is proper and should be affirmed. Even if the

¹ Order No. PSC-11-0244-FOF-GU, issued June 2, 2011, in Docket No. 090539-GU, 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, p. 4.

² Order No. PSC-01-1554-FOF-WU, issued July 27, 2001, in Docket No. 991437-WU, In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc., p. 2, citing Brandauer v. Publix Super Markets, Inc., 657 So. 2d 932, 933-34 (Fla. 2d DCA 1995).

³ Order No. PSC-11-0291-PAA-TP, issued July 6, 2011, in Docket No. 110071-TP, In re: Emergency Complaint of Express Phone Service, Inc. against Bellsouth Telecommunications, Inc. d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement, p. 5.

facts are not disputed, a summary judgment is improper if different conclusions or inferences can be drawn from the facts.⁴

EU's Motion for Partial Summary Final Order

On August 9, 2021, EU filed a Motion for Partial Summary Final Order. Attached to its Motion is a copy of the Charlotte County Sewer Master Plan (Sewer Master Plan). EU states that per Section 367.045(1)(b), F.S., and Rule 25-30.033(1)(k), F.A.C., the threshold issue in a certificate proceeding is a need for service. EU claims that the Sewer Master Plan satisfies the determination for need for service. EU argues that the Sewer Master Plan “concluded that the septic tanks in [the] proposed service area are having significant adverse environmental impacts and recommended that the proposed service area be converted to central wastewater by 2022.” According to EU, the Sewer Master Plan is the basis for the County entering into a Bulk Wastewater Agreement with the Utility to convert septic tanks to central sewer.

EU argues that as recently as January of this year,⁵ the Commission discussed a motion to strike, a motion for summary final order, and a motion for partial summary final order; that those pleadings were decided on the merits and not dismissed on procedural grounds; and that each of those pleadings can be an appropriate vehicle for resolving issues to which no outstanding facts attach. EU states that in that referenced docket, the Commission also acknowledged “the purpose of summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts.” EU claims that absent a partial summary finding that the Sewer Master Plan satisfies a determination of need for service in the proposed service area, there would be substantial time, and expense in testimony and evidence by the parties as to the underlying facts behind the Sewer Master Plan.

EU contends that its Motion is not dependent upon the resolution of any question of fact, but rather only requests an acknowledgment that the Commission will accept and follow the Sewer Master Plan in determining the need for service for this application. EU claims that the Sewer Master Plan “sets forth the substantial environmental evaluation that took place before deciding that certain areas of the County required converting septic tanks to central sewer including EU’s proposed service area,” and that the facts substantiating the Sewer Master Plan do not need to be litigated.

EU contends that while it may be premature to decide whether genuine issues of material fact exist before testimony and discovery have been filed, acknowledging the Sewer Master Plan as controlling on the issue of need for service does not require that delay. The Utility maintains that granting the Motion would not end the case or deprive the parties a hearing on the merits of the application, and would benefit the parties and the Commission.

⁴ See Trawick’s Florida Practice and Procedure, Section 25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (2020).

⁵ Order No. PSC-2021-0054-PCO-WS issued January 25, 2021, in Docket No. 20190168-WS, In re: Application for water and wastewater service in Duval, Baker, and Nassau Counties, by First Coast Regional Utilities, Inc.

Ms. Cotherman's Response in Opposition to EU's Motion

On August 16, 2021, Ms. Linda Cotherman filed a response to EU's Motion, requesting the Motion be denied. She asserts that there are several threshold issues for the Commission to consider in a certificate proceeding, not just the need for service.

Ms. Cotherman argues that the Sewer Master Plan is not controlling on the issue of the need for service. She claims that the Sewer Master Plan was developed using "outdated data, sourced from outside organizations whose criteria cannot be verified," and that the County actually continues to issue permits for septic systems in the proposed service area. Ms. Cotherman contends that the sewer connection recommendations in the plan only refer to two existing wastewater treatment plants, and does not reference individual connections. The Sewer Master Plan states that, "the priority and sequencing of connecting utilities to the CCUD [Charlotte County Utilities Department] sewer systems depend on the desire of the utility owner and the CCUD to connect their systems and the cost associated with connecting the systems," which Ms. Cotherman believes indicates that the conversions are only for consideration, not mandatory.

Ms. Cotherman contends that there is a material dispute of fact regarding the need for service. She argues that the Sewer Master Plan refers only to connecting two existing wastewater treatment plants to the CCUD and the connection was recommended to be considered within five years, but only when the owners of those plants request connection to CCUD. She also claims that the applicant's proposed service area is already in the CCUD-certificated area.

Palm Island's Response in Opposition to EU's Motion

On August 26, 2021, Palm Island filed a response to EU's Motion, requesting the Motion be denied.⁶ Palm Island first points to Rule 28-106.204(3) which states that "Motions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion." Palm Island was not consulted prior to the filing of the Motion and the referenced statement does not exist. Palm Island also asserts that there not has not been enough time to complete discovery and file testimony, so the Motion is premature.

Palm Island argues that the Sewer Master Plan "is a flawed document, making untrue assumptions, inappropriately designating the barrier islands within the Urban Service Area and making recommendations that are inconsistent with Charlotte County's Comprehensive Plan." Palm Island included affidavits from Ms. Ellen S. Hardgrove, a certified planner, and Mr. Robert H. Weisberg, a professor of physical oceanography.

Ms. Hardgrove opines that the proposed service area is not within the Urban Service Area, as the Sewer Master Plan designates, and that the County's Comprehensive Plan prohibits the provision of sewer infrastructure outside the Urban Service Area unless there is clear and convincing evidence that a health problem exists, for which there is no other feasible solution. Palm Island

⁶ By Order No. PSC-2021-0322-PCO-SU, issued August 24, 2021, Palm Island's unopposed request for an enlargement of time to respond to EU's Motion was granted.

contends that the record shows no such health problem. According to Ms. Hardgrove, the County's Comprehensive Plan states that the County will continue to primarily rely upon individual on-site septic systems in areas outside the Urban Service Area. She claims that the Comprehensive Plan establishes that the County prohibits sewer extension into the Barrier Island Overlay District, which includes the proposed service area, and that the County shall not expand the scope of sanitary sewer service to the bridgeless barrier islands. She also claims that the County's Sewer Master Plan's five, ten, and fifteen year priorities did not include the conversion of septic tanks on the barrier islands.

Dr. Weisberg notes that there is no evidence in the Sewer Master Plan that septic tanks contribute to the degradation of water quality. According to Dr. Weisberg, "EU's application cites no scientific or other data which would amount to a 'Need for Service' on any environmental basis."

Palm Island concludes that accepting the Sewer Master Plan as definitive and dispositive would be to allow infrastructure in violation of the County's Comprehensive Plan, and that the County's Sewer Master Plan is not authoritative since its premise is flawed. Palm Island argues that EU has not demonstrated an absence of any genuine issue of material fact, that consideration of the Motion would require an impermissible weighing of the evidence, and that it is premature to grant summary final relief because discovery has not sufficiently been developed for a determination to be made that no genuine issue of material fact exists. Palm Island maintains that, "[a]s a general rule, 'a court should not enter summary judgment when the opposing party has not completed discovery.'" Anson Street, LLC v. Rosado, 100 So. 3d 1270, 1271 (Fla. 4th DCA 2012).

Staff Analysis and Conclusion

A. Need for Service

Per Section 367.045(1)(b), when a utility applies for an initial certificate of authorization from the Commission, it shall provide all information required by rule or order of the commission, which information may include a detailed inquiry into the ability of the applicant to provide service, the area and facilities involved, the need for service in the area involved, and the existence or nonexistence of service from other sources within geographical proximity to the area in which the applicant seeks to provide service.

Per Rule 25-30.033(1)(k), F.A.C.:

- (k) To demonstrate the need for service in the proposed area, the applicant shall provide:
1. The number of customers currently being served and proposed to be served, by customer class and meter size, including a description of the types of customers currently being served and anticipated to be served, i.e., single family homes, mobile homes, duplexes, golf course clubhouse, or commercial. If the development will be in phases, this information shall be separated by phase;
 2. A copy of all requests for service from property owners or developers in areas not currently served;

3. The current land use designation of the proposed service territory as described in the local comprehensive plan at the time the application is filed. If the proposed development will require a revision to the comprehensive plan, describe the steps taken and to be taken to facilitate those changes, including changes needed to address the proposed need for service; and,
4. Any known land use restrictions, such as environmental restrictions imposed by governmental authorities[.]

EU's Motion for Partial Summary Final Order asks that the Commission find that, based upon Charlotte County's Sewer Master Plan, there is a need for central wastewater service in the proposed service area. Rule 25-30.033(1)(k), F.A.C., lists four factors that must be met to demonstrate the need for service in a proposed service area. EU's Motion did not address all of these factors: it did not address the number of customers currently being served and proposed to be served, by customer class and meter size, including a description of the types of customers currently being served and anticipated to be served; a copy of all requests for service from property owners or developers in areas not currently served; the current land use designation of the proposed service territory as described in the local comprehensive plan at the time the application is filed; and, any known land use restrictions, such as environmental restrictions imposed by governmental authorities.

A Motion for Partial Summary Final Order should not be granted unless "the facts are so crystalized that nothing remains but questions of law" and "must show conclusively the absence of any genuine issue of material fact." As shown in the conflicting interpretations of the Sewer Master Plan in the Motion and responses, different inferences can be drawn from the Sewer Master Plan, and there is not an absence of any genuine issue of material fact.

The Commission has found that "it is premature to decide whether a genuine issue of material fact exists when [a party] has not had the opportunity to complete discovery and file testimony." The parties have not had the opportunity to complete discovery and file testimony. The Order Establishing Procedure for this docket was issued on August 25, 2021. Intervenor Testimony is not due until November 2021, and discovery actions are not complete until January 21, 2022. The Utility is the only party who has filed testimony, and the only discovery that has been served in the case thus far is a set of requests for admissions served by EU on the parties on June 30, 2021, prior to the issuance of the Order Establishing Procedure.

B. Conclusion

The standard for granting a summary final order is very high. For the reasons stated above, staff recommends that EU's Motion be denied.

Issue 3: Should Mr. Hurst's Motion to Dismiss be granted?

Recommendation: No. Based on staff's review of Mr. Hurst's Motion to Dismiss, it appears that the Motion to Dismiss does not address whether EU's application states a cause of action upon which relief may be granted. There is also already an administrative hearing scheduled in this docket. Therefore, Mr. Hurst's Motion to Dismiss should be denied. (Osborn, Crawford)

Staff Analysis:

Standard of Review for Motion to Dismiss

The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The applicable standard for disposing of a motion to dismiss is whether, with all factual allegations in the petition taken to be true, the petition states a cause of action upon which relief may be granted. Id. In making this determination, all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id. Consideration of a motion to dismiss "may not properly go beyond the four corners of the complaint in testing the legal sufficiency of the allegations set forth therein." Stubbs v. Plantation Gen. Hosp. Ltd. P'ship, 988 So. 2d 683, 684 (Fla. 4th DCA 2008) (internal quotation omitted). All of the elements of a cause of action must be properly alleged in a pleading to seek affirmative relief. If the elements are not properly alleged, the pleading should be dismissed. Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957).

Mr. Hurst's Motion to Dismiss the Application

On January 20, 2021, Mr. Hurst filed a Motion to Dismiss the Application or Alternatively to Hold This Matter in Abeyance Until the Applicant Serves Proper Notices and Copies of the Application on all Property Owners. Mr. Hurst claims that residents in the proposed service area did not receive proper and adequate notice. He asserts that mail is not delivered to the physical addresses on Little Gasparilla Island. He argues that the notice does not comply with agency rules because it was sent as junk mail, was not post-marked, was not signed, appears to be just another mass mailing of an unknown advertiser, and provided no physical return address. According to Mr. Hurst, the notice has no caption, does not clearly inform the reader that there is a legal matter pending before the Commission and that the resident may be a party, and does not include a certificate of service. He claims there has been a violation of due process. Mr. Hurst also argues that EU's application is incomplete and does not state any costs or tariffs.

EU's Response to Mr. Hurst's Motion to Dismiss

On January 21, 2021, EU filed a response to Mr. Hurst's Motion to Dismiss, requesting that the Motion to Dismiss be denied. EU asserts that the notices were mailed to property owners at the mailing addresses as reflected on the records of the Charlotte County Property Appraiser, the envelopes clearly had the name of EU in the return address, and notices were even mailed to out of state addresses and out of the country. EU states that because over 1,300 notices were mailed, the notices were sent by a third party as bulk mail and there are no prohibitions against sending notices in this manner. EU further states that the notice was prepared in accordance with the requirements of Rule 25-30.030, F.A.C., and was approved by staff as required by Rule 25-

30.030(4), F.A.C. Mr. Hurst complained in his Motion to Dismiss of lack of notice of EU's Motion to Bifurcate, but EU claims that there is no requirement that such notice be provided, and EU contends that no such notice has been required or provided in any prior case in which bifurcation has been considered by the Commission. Also, because EU's request for bifurcation was denied, EU refiled its application with the rates and charges.

Staff Analysis and Conclusion

In his Motion to Dismiss, Mr. Hurst does not address whether, with all factual allegations in EU's application taken to be true, the application does or does not state a cause of action upon which relief may be granted. Mr. Hurst argues that notice was insufficient in this case. However, pursuant to notice, he, and a number of others, timely filed objections to EU's application, and requested an administrative hearing, which has been scheduled for February 8-9, 2022. Mr. Hurst's concerns that other individuals may have not received notice, or may have not understood the notice they received, are speculative in nature, and Mr. Hurst is further not authorized to represent any such others' interests in this proceeding. The essence of due process is notice and the opportunity to be heard, to which Mr. Hurst clearly has availed himself. Finally, the notice was prepared in accordance with the requirements of Rule 25-30.030, F.A.C. and was approved by staff as required by Rule 25-30.030(4), F.A.C. On December 18, 2021, EU filed an Affidavit of Mailing of the Notice of Application to all property owners in the proposed service area.

For the reasons stated above, staff recommends that Mr. Hurst's Motion to Dismiss be denied.

Issue 4: Should this docket be closed?

Recommendation: No. The docket should remain open pending the Commission's action on the Utility's application for an original wastewater certificate. (Osborn, Crawford)

Staff Analysis: The docket should remain open pending the Commission's action on the Utility's application for an original wastewater certificate.