

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Original Certificate of) DOCKET NO. 20190168-WS
Authorization and Initial Rates and Charges)
for Water and Wastewater Service in Duval,) FILED: January 31, 2022
Baker and Nassau Counties, Florida by)
FIRST COAST REGIONAL UTILITIES,)
INC.)
_____)

MOTION TO RECONSIDER

First Coast Regional Utilities, Inc. (“First Coast”), pursuant to Rule 25.22.0376, Florida Administrative Code, request the Prehearing Officer to reconsider its decision to deny First Coast’s Notice of Use of Deposition in Order No. PSC-2022-0045-PHO-WS (“Order”). First Coast would also request oral argument of this issue during the hearing. In support First Coast states as follows:

On January 19th, 2022, First Coast filed a Notice of Intent to Use Depositions called by JEA of five of First Coast’s witnesses pursuant to both Florida Rules of Civil Procedure, Section 1.330 as well as the Commission’s Order Establishing Procedure, which allows for such notice. On January 24, 2022, JEA filed its Objection to First Coast’s Notice of Intent to Use Depositions, and arguments were presented at Prehearing Conference by both parties on the issue.

The Prehearing Officer subsequently denied First Coast’s request for use of depositions at hearing. In denying this request it is important to note that the Prehearing Officer did not hold that First Coast did not meet the criteria of Fla. R. Civ. P. Section 1.330, or the procedures laid out in the Order Establishing Procedure, but rather held that the PSC had the discretion to deny such a request. And further cited the Commission’s use of Prefiled testimony rather than presenting witnesses, as well as “fairness and efficient administration of Commission hearings”

in support of this decision. It is First Coast's position that these are not proper reasons to deny the use of depositions at hearing. The Order states that "any party adversely affected by this order...may request reconsideration within 10 days pursuant to Rule 25.22.0376."

It is important to note that there is no question that First Coast meets the statutory criteria for the use of depositions at hearing stated in Rule 1.330. Rule 1.330, Florida Rules of Civil Procedure, states that all or part of a deposition may be used against a party that was at the deposition or had notice of the deposition, as long as the transcript is admissible under the laws of evidence and one of the following situations applies:

1. Deponent is an adverse party.
2. Deponent was, at the time of the deposition, an officer, director, managing agent, or person delegated to respond for an organization that is an adverse party.
3. Deponent is dead.
4. Deponent is more than 100 miles from the place of the hearing.
5. Deponent is out of state.
6. Deponent is unable to attend, because of age, infirmity, illness, or imprisonment.
7. Appearance of deponent cannot be obtained by subpoena.
8. Deposition is being used to impeach the deponent/witness in accordance with the rules on impeaching witnesses.
9. Exceptional circumstances require use of the deposition; or
10. **Deponent is an expert or skilled witness.**

In Re Dade Cty. Cir. Ct. Referral, No. 951232-TI, 1998 WL 650832, at *3 (July 23, 1998) (quoting Fla. Civ. Pro. Rule 1.330) (Emphasis added).

The rule is unambiguous, in stating that the depositions of skilled or expert witnesses may be used by any party admissible for any purpose at hearing. *Id.* Further, the PSC has previously held that it is Commission's practice to presume a witness to be an expert in the field to which he or she is testifying. In Re Fla. Mun. Power Agency, No. 060635-EU, 2007 WL 143098, at *3 (Jan. 9, 2007). Here, all five witness depositions are by witnesses who are proficient in the field in which they are testifying to. Moreover, the Prehearing Officer has all but conceded that we correctly stated this rule, and only denied the order based on the Commission's discretion.

The Prehearing Officer's argument that the statutes use of the word "may" allows for its denial is misplaced. In Castaneda ex rel. Cardona v. Redlands Christian Migrant Ass'n, Inc , the Fourth District opined on a trial courts discretion to allow the use of a deposition at trial. 884 So. 2d 1087, 1092-93 (Fla. 4th DCA 2004) (Holding that Florida does not allow such discretion on the part of the trial courts to ignore the Rules of Evidence or the Rules of Civil Procedure. Failure to follow the Rules constitutes an error of law, not an abuse of discretion.). The Court further stated that, while the application of the Rules to a particular fact pattern may require discretion, the interpretation of the rule does not, ultimately holding that the failure to permit the use of deposition testimony when authorized pursuant to the Rule is reversible error. *Id.* Here, although we agree the Commission is unique in nature, this does not exempt it from following the applicable Rules of Civil Procedure

Further, in the Order the Prehearing Officer also speaks to issues of fairness and efficiency to support its decision. In considering, the Prehearing Officer's point in accounting for fairness it is worth noting that Rule 1.330 carves out its own solution for this consideration by stating that "if only part of a deposition is offered in evidence by a party, an adverse party may

require the party to introduce any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts.” Fla. R. Civ. P. 1.330. It is also worth noting that JEA itself is the party that requested these depositions be taken and opened the door for their potential use during hearing pursuant to the Rules of Civil Procedure, and JEA even stated in its Amended Notice of Deposition that the depositions were being taken for possible use at trial. There should be no different result in the application of the rule because it is First Coast that seeks to admit the depositions. Surely, if it were the staff who wanted these depositions entered into the record, one would suspect they would be put into the record. Previous depositions in the record are no more unfair or unusual than the other discovery responses in the record such as typically done and is being done in this case.

It also worth mentioning that one of the fundamental considerations for the taking of deposition testimony is the passage of time. In this case, some of the prefiled testimony is almost two years old. In cases such as this one where substantial time has passed between the time the case began and when it is actually heard, it is not unusual for facts to change. The use of depositions in this case is necessary to account for these changes and ensures that fair and accurate result are reached in relation to all the facts. Moreover, one of factors that led to the substantial delay in this case was JEA’s decision to take this case to an interlocutory appeal. Therefore, there is simple no merit to the Prehearing Officer’s argument that the entering of such depositions into evidence would prejudice JEA in anyway.

In considering, the Prehearing Officer’s point on the efficient administration of the Commission and the use of prefiled testimony over live testimony, the Commission has previously held that use of deposition at trial can be used in addition to prefiled testimony if the requirements of the rule are met. In Re Dade Cty. Cir. Ct. Referral, No. 951232-TI, 1998 WL

650832, at *4 (July 23, 1998). Further, the Commission at least considered such use of depositions at hearing because they incorporated this option in its Order Establishing Procedure. Accordingly, any reasoning that such proper use of depositions at trial are inhibited by the efficient administration of the proceeding do not hold weight.

WHEREFORE, for the following reasons above the Commission should reconsider its decision to deny First Coast's use of depositions at hearing.

Respectfully submitted this 31th day of January 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

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