BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide wastewater service in Charlotte County, by Environmental Utilities, LLC
_____/

Docket No. 20200226-SU

ENVIRONMENTAL UTILITIES, LLC'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-2022-0267-FOF-SU

Environmental Utilities, LLC ("EU" or the "Company"), by and through its undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, respectfully files this motion (the "Motion") requesting that the Florida Public Service Commission ("Commission") reconsider its denial of a wastewater certificate by Order No. PSC-2022-0267-FOF-SU ("Order"), and in support states:

1. The standard of review for reconsideration of a Commission Order is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering the order. *See, Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. of Miami v. King,* 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance,* 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96, 98 (Fla. 3d DCA 1959) (citing *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958)). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made but should be based upon specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse*, 294 So. 2d at 317.

2. On the primary issue of need for service, the Commission concluded: "The evidence in this docket does not contain any requests for service from existing property owners or potential developers. In addition, no evidence was presented to demonstrate that any state or local environmental regulator has mandated the installation of central sewer wastewater service in the proposed service territory at this time…." In doing so, as discussed

below, the Commission has created a new standard for granting a certificate that has never been applied previously. In light of the Mandatory Connection Ordinance, of particular mystery is the relevance of the statement that "noting the level of opposition to EU's proposal by its prospective customers, staff believes that customers are highly unlikely to voluntarily connect to EU's system." When the wastewater system is installed the record reflects that they will connect, whether voluntarily or not. There is no evidence in the record to the contrary. Granted that PIE had a well organized letter writing campaign, and while vocal, they are still a substantial minority of the property owners in the proposed service area. Of particular concern is the Commission's misunderstanding of the Board of County Commissioner's support for the septic to sewer project, totally overlooks or ignores the testimony of the County representative that the County Commission directed to testify as to its position on EU's Application, as well as the September 27, 2021, letter from the County that was admitted into evidence (Ex. 42). After reading the Order, the Board of County Commissioners took the extraordinary action of writing this Commission reiterating that the September 27, 2021, letter unequivocally represented the position of the Board of County Commissioners. This was done at an open meeting that PIE was aware of and its attorney wrote the Board regrading it.

Requests for Service.

Requests for service is but one of four criteria to consider when determining need. Rule 25-30.033, F.A.C. The other three criteria have been met. While the Order may be technically correct that EU's application did not include any requests for service, the evidence in the record clearly shows such requests since support for the septic to sewer conversion is tantamount to requesting service. In fact, as noted in the Order, a number of PIE members supported the application, and others testified that they supported central sewer service, but

wanted it provided by the County. The Commission Rules do not define what constitutes "request for service", and the Order takes a very constrained interpretation. What apparently swayed the decision was the well-organized letter writing campaign opposing the application. Most of the time the letters were written separately to all three Commissioners so the letters in the Docket are significantly inflated. Testimony at the hearing was often given by several members of a household making it appear as if the opposition was greater than it actually was. The proposed service area will consist of 1,248 properties. PIE's membership of 160 properties is 12.8% of the total number of affected properties. Of the 51 PIE members who testified at the hearing in opposition to the application almost one half were members of the same family, resulting in opposition from only approximately 25 separate properties, or a mere 2% of the prospective properties affected. The same is true of the written comments. There were about 100 different authors of letters in opposition and 20 of letters in support of the application[1]. The Order inconsistently states that while customer preference is not an appropriate basis to deny an application it candidly notes the "overwhelming" opposition and obviously was based its denial upon that opposition.[2] The Commission has never before applied a standard for need that consisted of a vote of the affected property owners and in doing so in this case has created a dangerous precedence where a vocal minority can defeat the will of the silent majority and the will of local government.

Environmental Need.

This analysis was where the never before adopted standard of requiring a local government mandate to install central wastewater as being required to support a certificate application. While there was no "mandate" for the septic to sewer conversion, the Charlotte

[1] This not include the PIE members who supported central sewer service if it was from the County. These persons agreed there was a need, but wanted a different provider.
[2] "Overwhelming" is a relative term since it would not be accurate if one considering all of the potential customers, and not just those PIE members who participated in this proceeding.

County Commission has clearly and unequivocally indicated that central sewer on the islands was its goal and gave 100% support for the conversion project by EU. Further, Mr. Rudy and Mr. Moody authored as letter that was admitted into evidence that the Order completely ignores as the County's support for the septic tank conversion. The County Commissioners have reiterated the positions taken in that letter by its most recent letter to this Commission. This Commission has misunderstood or overlooked that that letter, while authored by County staff, represented the position of the County Commission (as discussed below).

The Commission clearly misapplied or ignored the law when gauging the County's support of septic to sewer conversion on the islands. This was made clear by Commissioner La Rosa's comments at the Commission Conference when he stated that he did not believe the County "really spoke up" and concluded that "the County was kind of silent when there could have been some clarification."

PIE served a subpoena on Commission Chairman Truex for the deposition of a County witness and the County Commission designated Mr. Rudy to provide the testimony on the County's position. It is not often that this Commission is called upon to consider testimony presented pursuant to Rule 1.310(b)(6), Fla.R.Civ.P., and the Commission has overlooked the significance of the testimony of Mr. Rudy which was presented pursuant to that Rule. His testimony provided the type of clarification to which Commission La Rosa refers. It appears that the Commission believes that the County's support should have been presented by a County Commissioner appearing at the hearing and repeating Mr. Rudy's testimony. Pursuant to law, from an evidentiary standpoint this Commission must accept Mr. Rudy's testimony as if it came from the highest authority in the County. PIE's attorney even made that concept clear at the deposition of Mr. Rudy.

Q. Do you understand that you are here today as the mouthpiece of Charlotte County?

A. Yes.

Q. You understand that your testimony is designed to bind the County to a position in this proceeding?

A. Yes.

Somehow, this whole concept of a witness speaking on behalf of, and binding on the County Commission has been overlooked by this Commission. Further, the County Commission's support for the septic to sewer project which was overlooked by the Commission, was that the County Commission approved the Bulk Sewer Treatment Agreement entered into with EU.[3] That Agreement specifically recites as a basis for the County entering into it that it is necessary to implement the Sewer Master Plan. The County also wrote a letter to this Commission that was admitted into evidence advising of its 100% support for central wastewater service on the islands. The Order's total misconception of the County Commission's support for this project has lead to the County Commission having to take the unprecedented action of writing to the Commission, including attaching the letter referenced above to reiterate at the highest level of government, its prior support for EU's application. This action was taken as a separate agenda item, not on the consent agenda, and all Commissioners voted to send the letter[4].

Another red herring is that apparently believing that the fact that the County issues septic tank permits on the island provides support for the lack of need, the Commission overlooked the fact that those permits include the statement that when central wastewater service is available they will be required to connect. Until the alternative of central wastewater service is available it would be an unconstitutional "taking" for the County to deny a septic tank permit.[5] This is a basic Constitutional concept that was overlooked.

[3] The Intervenors tried to downplay the significance of this by asserting that it was adopted on the consent agenda. This Commission has a similar "move staff recommendation" process that does not in any way lessen the Commission's action.

[4] A copy of the letter is attached for the Commissioners' convenience.

[5] Article 1, Section 9, Florida Constitution.

In spite of the unrebutted testimony of the County and Mr. Boyer of septic tank smells, sewage on the ground due to inadequate drainfields, and septic tanks being under water, the Order appears to ignore that testimony since photos were not provided. The only response by the Intervenors was that there were supposed to be septic tank inspections. However, in order for a government to require the repair of a septic system pursuant to the inspection provisions in Section 381.00651(6)(c), F.S., the evaluation must identify a "system failure". And as incredulous as it sounds, a septic system drainfield is not a "system failure" even if it does not have any separation from the water table. So even though a septic system relies upon the effluent percolating through soil to remove nutrients and phosphorus before reaching groundwater, a septic tank inspection cannot require a repair even though there is no separation. Since the testimony of septic tank failures is unrebutted why would that testimony be ignored without supporting photos?

Mandatory Connection Ordinance.

The Commission overlooked or misunderstood the significance of Charlotte County's Mandatory Connection Ordinance. The Mandatory Connection Ordinance implements the State policy as set forth in Section 381.0065, Florida Statutes, to eliminate septic tank systems whenever possible. This would be particularly true in the instant case where the septic tank systems on a barrier island where the soil characteristics do not provide any meaningful treatment for the discharge from the drainfields. When considered in a vacuum the Order is correct, the Ordinance in and of itself does not create need for service. However, when considered in light of the islands being identified as a priority for central sewer service and the goal of eliminating septic tanks, it is one of the group of elements supporting EU's Application.

Local Comprehensive Plan.

When determining that central wastewater service was inconsistent with the County's Comprehensive Plan this Commission overlooked that compliance with the Comprehensive Plan is obvious from the fact that central utility services are already being provided on the islands. The County is providing bulk water to a utility on south portion of the islands, and the Englewood Water District is providing bulk water service to two private utilities on the north portion of the islands. References to the Comprehensive Plan addressing central wastewater service are the same ones addressing central water service. Central water service is being provided to the exact same properties that EU proposes to provide central wastewater service. If central water service is not inconsistent with the Comprehensive Plan than providing wastewater service cannot be inconsistent with the Comprehensive Plan. Central utility services in the islands, even though they are in Urban Services Area, is not going to result in any change in the way the islands are developed. The islands are already platted to their fullest extent and the County has other methods in place to control redevelopment.

The Order asserts that "No County representatives were present at the hearing to opine on any contradictory interpretation of the Comp Plan". Mr. Rudy addressed the alleged conflicts in his deposition, but that testimony was either ignored or overlooked by the Commission. The County Commission has made it clear that EU's Application is consistent with the Comprehensive Plan.

Sewer Master Plan.

Without making a definitive ruling[6], the Commission ignored, misinterpreted or overlooked the intent of the Master Serwer Plan. First, the County Commission believes that central wastewater service to the islands (not just for the two package plants) is encouraged in

[6] The indecisive conclusion used the phrase "does not appear to be."

making that a basis for entering into the Bulk Wastewater Service Agreement with EU, and in the deposition of Mr. Rudy. The Order takes a constrained view of the Master Sewer Plan in concluding it only applies to the two package plants. The Master Sewer Plan contains a significant amount of data regarding the inadequacies of septic tanks generally (Page 1-10 for example). The two package plants are not septic tanks, thus the scoring in the Master Sewer Plan does not even apply to them. The environmental assessment scoring criteria in the Master Sewer Plan applies to the conversion of septic tanks to sewer (not the two package plants). This is clear from a simple review of the maps of the criteria (Figures 4-4, 4-4, 4-5 and 4-6).[7] Those maps show the entire islands, not the areas served by the two package plants.[8] The Sewer Master Plan conclusion shows the highest impact score of 4.0 – 5.0 on the islands. The 5-Year Improvement Plan is shown on Figure 4-7[9] and includes all of the area for which EU is seeking certification. Thus, there is no competent substantial evidence supporting the assertion that EU's application is inconsistent with the Master Sewer Plan. To the contrary, it clears evidences the County Commission's support for the need for septic to sewer conversion on the islands.

Bulk Sewer Treatment Agreement.

The Order completely ignores the significance of the Bulk Sewer Service Agreement entered into between EU and the County (Ex. 2), which includes recitals of the basis for the County Commission entering into it. This Agreement was entered into by the County Commission "in support of, and in anticipation of, approval by the PSC for Environmental Utilities proposed project to provide wastewater service to Knight, Don Pedro, and Little Gasparilla Islands." This support was reiterated in the County Commissioner's June 28, 2022, letter to this Commission

[7] Copies attached.
[8] The area on the maps that does not show adverse impacts is the State Park in the middle of the islands.
[9] Copy attached.

Public Interest.

If the Order is allowed to stand then it will set an anti-environmental precedence that will make it virtually impossible for private utilities to implement septic to sewer projects that are so necessary in areas of Florida adjacent to water bodies. The sole reason for finding that certification by EU is not in the public interest is based upon the flawed reasoning as to whether there is need. Thus, when this Commission corrects its erroneous rulings on the need issue, the Application will be in the public interest. In constrained attempts to support a position of public interest the Order relies on PSC Orders from over 30 years ago. This Commission's reliance on the 1985 Order (Order No. 14536) is perplexing. In that Order the Commission found lack of "need or demand" to certain portions of the requested service area. Importantly, in contrast to the instant case where there are many residences already built, in that case there was no actual or potential development. In the 1990 Order the applicant failed to demonstrate virtually all of the requirements for certification which was opposed by Hernando County (Charlotte County supports EU's application). A reading of the portion of the Order addressing need clearly shows its lack of any similarities to the instant case.

In fact, where there are existing property owners, this Commission has generally presumed need without even specifically addressing it[10]. See, for example: Order Nos. PSC-2001-1792-PAA-SU; PSC-2019-0071-PAA-SU; PSC-2020-0264-PAA-WS; Commission vote at July 7, 2022 Commission Conference in Docket No. 20220057-SU [Order not yet issued].

[10] And these Orders are no antiquated like the two cited in the Order.

WHEREFORE, Environmental Utilities, LLC based upon the above argument respectfully requests the Commission to reconsider its denial of EU's Application for an original wastewater certificate and to issue an Order granting such certificate.

Respectfully submitted this 22nd day of July, 2022, by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-mail to the following parties this 22nd day of July, 2022:

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