BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Application for certificate to provide wastewater service in Charlotte County, by Environmental Utilities, LLC
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DOCKET NO. 20200226-SU

PALM ISLAND ESTATES ASSOCIATION, INC.'S RESPONSE TO ENVIRONMENTAL UTILITIES, LLC'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-2022-0267-FOF-SU

PALM ISLAND ESTATES ASSSOCIATION, INC. ("PIE"), pursuant to F.A.C. Rule 25-22.060(3), requests the Public Service Commission to deny Environmental Utilities, LLC's Motion for Reconsideration of Order No. PSC-2022-0267-FOF-SU ("Final Order"), and states as follows:

INTRODUCTION

Although Environmental Utilities, LLC's ("EU") motion purports to not reargue those contentions made at the technical and service hearings, that is exactly what the motion does. Not only does EU improperly attempt to argue "need for service" based upon a letter from Charlotte County that is wholly and undeniably **outside** of the record, its motion simply reiterates positions rejected by the Public Service Commission in its lengthy and well-reasoned Final Order. Simply put, EU failed to establish a need for service, failed to submit requests for service with its application, failed to establish an environmental need, failed to have testimonial support that its application complies with the comprehensive plan and makes argument based upon supposition, glossing over the facts as established in the actual record. The Final Order is fully supported by competent substantial evidence and the motion is not well taken and should be denied.

LEGAL STANDARD

PIE agrees that the standard of review is whether the motion identifies a point of fact or law the Public Service Commission overlooked or failed to consider in rendering the order. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974). It is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96, 98 (Fla. 3d DCA 1959). The motion 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.

ARGUMENT

Despite EU's protestations, the record is replete with evidence and testimony supporting the Public Service Commission's determination that there was no "need for service." As an initial matter, EU concedes that the Final Order is "technically correct" that EU's application did not include any requests for service. This was a mandatory requirement of F.A.C. Rule 25-30.033(1)(k). There were no requests for need for service and there is no citation to any authority by EU that would render verbal testimony at a service hearing to be the same as a written request for service contemplated by F.A.C. Rule 25-30.033(1)(k). This alone is fatal to the contention that a "need" exists. Moreover, the record establishes that the application incorrectly identified the land use designation for the proposed service area and failed to establish that the current land use designation would require a revision. F.A.C. Rule 25-30.033(1)(k)(3). Further, the proposed service area *did* have land use restrictions as it was located in the BIOD (as more fully described in the Final Order) in the Rural Service Area. F.A.C. Rule 25-30.033(1)(k)(4).

Addressing the latter two points, since it has been conceded that no requests for service were included in the application, as the Final Order points out, the correct land use designation

was BIOD, in the Rural Service Area. According to the County's Comprehensive Plan, FLU Policy 3.2.4 states, specifically, that the service area will rely on septic systems *unless* there is clear and convincing evidence of health problems that would require a sewer connection. The testimony in the actual record—unrebutted—from the *only* Charlotte County witness, Craig Rudy, was that there were no health problems and that he was unsure as to whether a comprehensive plan amendment was needed. Testimony at the service hearing revealed that, of the 53 members of the public who testified, only <u>one</u> person spoke in support of the sewer system proposed by EU. It is a complete misrepresentation to say that anybody else "supported [EU's] application." This re-branding of the actual record is astoundingly disingenuous and overtly misleading.

To falsely minimize "PIE's membership" to be only 12.8 % of the total service area (and EU cited no record evidence or testimony to support this and ignored the extensive testimony from non-PIE members) only highlights the fact that, of the "other" 87.2% of potential ERCs EU claims to exist, EU still could not drum up support for its application by way of testimony or written support as was required at the time of the application's filing and as was presented at the hearings. In other words, EU wants to re-write the administrative rule to make it inapplicable to EU only after EU failed to meet its burden.

Findings of fact by the Public Service Commission cannot be disturbed if there is competent substantial evidence in the record. *Citizens v. Brown*, 269 So. 3d 498 (Fla. 2019). The record, for the reasons stated in the Final Order, is supported by competent substantial evidence. EU, however, has the unmitigated gall to request the Public Service Commission to entertain a letter authored by the Board of County Commissioners for Charlotte County written and submitted months after the technical and service hearings concluded as "support" for its position. By way of analogy, requesting a judicial body to entertain matters outside the record is so inappropriate that

it could subject the offending party to sanctions. *Bank of New York Mellon v. Bontoux*, 2022 WL 790435 (Fla. 3d DCA March 16, 2022)(*quoting Altchiler v. Dep't of Prof'l Reg.*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983): "That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court"). EU made the tactical decision to rely upon Craig Rudy's testimony that established the absence of *any* health concerns and demonstrated a complete lack of knowledge of whether the proposed application was consistent with the County's comprehensive plan. This was a choice that EU made, and it is stuck with the record that supported the Public Service Commission's findings that there was a "lack of need."

EU, again, inappropriately attempting to reargue its position set forth at the hearing, contends that the Bulk Service Agreement is dispositive on the issue of need. However, the unrebutted testimony from Ellen Hardgrove was that per FLU Policy 1.1.6, all county regulations are subordinate to the Comprehensive Plan—including the Bulk Service Agreement. CST Policy 3.2.7 states, "the County shall not provide nor allow infrastructure and services to be provided to offshore islands, coastal swamps, marshland and beaches. Infrastructure and services to the Bridgeless Barrier Islands, depicted in FLUM Series Map # 9, are addressed in the Barrier Island Overlay in the FLU Appendix I." WSW Policy 3.2.1 requires new certificated areas to be consistent with and advance the Goals, Objectives and Policies of the Comprehensive Plan. Further WSW Policy 3.2.4 states, "The County shall discourage expansion of the service areas of utility companies regulated by the Florida Public Service Commission (PSC) to any areas outside of the Urban Service Area, in accordance with FLU Policy 3.2.5." Per Craig Rudy, the priority of conversion of septic to sewer was to take place in the Urban Service Area and not the Rural Service Area. Given the above Goals, Objectives and Policies of the comprehensive plan, not only was

EU's application contrary to the Charlotte County Comprehensive Plan, the plan actually supports an absence of need for service. This competent substantial evidence is sufficient to back up the Commission's findings and, importantly, EU offered no planning expert to rebut this testimony and offered no County witness (except Craig Rudy) that could testify whether the proposed certificated use complied with the comprehensive plan. Again, the tactical decision to utilize only Craig Rudy as the county's sole representative belongs only to EU and the shortcomings of that testimony, e.g., that there were no known health concerns and there was no determination of consistency with the comprehensive plan, is exactly why EU is improperly asking the Public Service Commission to rely upon matters outside the record.

EU also takes liberty with facts by contending that it was "unrebutted" that there were septic tank smells, sewage on the ground, etc. This testimony was most certainly rebutted by the service hearings where person after person testified exactly to the contrary. There is a reason EU does not cite to actual record evidence and that is because the record does not support this contention. The Public Service Commission did not overlook this point made by EU; rather, the substantial, competent evidence did not support EU's position.

As it relates to the "Mandatory Connection Ordinance," EU (appropriately) concedes that the Final Oder is correct. EU even states, "the Ordinance in and of itself does not create a need for service." However, EU requests the Public Service Commission to ignore this concession, along with the unrebutted testimony by Ms. Hardgrove on the inconsistency with the Comprehensive Plan, to achieve a different result. EU cannot and did not cite to the record of any facts to substantiate its position; rather, it argues in a conclusory fashion that the result should have been different. This is simply rehashing what has been argued and rejected. As EU cited in its motion, a motion for rehearing 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" (emphasis added). There are no facts in the motion because EU cannot present any.

EU's construction of the Public Service Commission's conclusions regarding inconsistency with the Sewer Master Plan, yet again, is repeating that which has already been argued and adjudicated. The Final Order analyzed the very argument raised in the Motion for Rehearing where the Public Service Commission concluded: "…the Sewer Plan does not require conversion of all similarly scored areas within five years. Furthermore, while EU witness Boyer characterized the Sewer plan as a recommendation, it appears to us to instead be an acknowledgement of potential connections in the proposed service territory." The Commission, after considering the record evidence and testimony found EU's application inconsistent with the Sewer Master Plan. The actual record evidence, from Ellen Hardgrove, supports the Public Service Commission's factual finding of inconsistency which cannot be disturbed because it is supported by substantial competent evidence and EU presented no evidence or testimony to contradict this.

The Public Service Commission appropriately determined there was no need and that, therefore, the public interest would not be served if the application was granted. EU cannot point to anything in the record that would undercut this finding. It provides no facts, only counsel's previously rejected arguments, and its attempt to go outside the record to inject Charlotte County's post-hearing unsworn correspondence as support for the application is wholly improper. The record provides ample competent substantial evidence in support of the Public Service Commission's findings of fact and conclusions of law.

CONCLUSION

For the foregoing reasons, the Public Service Commission should deny the Motion for Reconsideration and grant Palm Island Estates Association, Inc., any other relief deemed just, equitable and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was emailed this 29th day of March 2022 to:

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