

State of Florida



Public Service Commission

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

DATE: August 26, 2022

TO: Office of Commission Clerk (Teitzman)

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

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

AGENDA: 09/08/22 – Regular Agenda – Decision on Motion for Reconsideration – Oral Argument Requested - Participation is at Discretion of the Commissioners

COMMISSIONERS ASSIGNED: Clark, La Rosa, Passidomo

PREHEARING OFFICER: La Rosa

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 Utility seeks to provide central sewer service to residents of the barrier islands of Little Gasparilla, Don Pedro, and Knight, which are currently served by septic tanks, with the exception of parts of Knight Island which is served by a central sewer system. The proposed service territory includes an estimated 860 existing equivalent residential connections (ERCs) and 388 potential future ERCs, for a total of 1,248 ERCs at buildout. The Utility seeks to begin serving customers by the end of 2023. 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 would be set at a date

subsequent to the granting of the certificate of authorization. The Commission denied the petition for temporary rule waiver.¹

Prior to the Commission addressing the application, timely objections were filed on behalf of Palm Island Estates Association, Inc. (PIE) and Linda Cotherman (LC). The Office of Public Counsel (OPC) intervened on September 24, 2021.²

On February 8, 2022, the Commission held an evidentiary hearing in Venice, Florida. This hearing included two customer service hearings: one on February 8, 2022, and one the following morning on February 9, 2022. A total of 53 customers spoke at the service hearings and over 1,000 written customer comments were received by the Commission and placed in the correspondence side of the docket.

On June 7, 2022, the Commission voted to deny EU's application for a certificate to provide wastewater service in the County, predicated largely upon a finding that EU failed to demonstrate a need for the proposed Utility. Final Order No. PSC-2022-0267-FOF-WS (Final Order), commemorating the Commission's vote, issued on July 8, 2022.³

EU filed a timely motion for reconsideration of the final order on July 22, 2022, along with a request for oral argument on its motion for reconsideration.⁴ On July 25, 2022, EU filed a "Notice of Filing Attachments to its Motion for Reconsideration," consisting of a letter dated June 28, 2022, from the Charlotte County Board of Commissioners.⁵ That letter itself references and attaches another letter dated September 27, 2021, authored by former County Utilities Director Craig Rudy⁶ and County Water Quality Manager Brandon Moody, supporting EU's project.⁷ OPC, PIE, and LC timely filed responses to EU's motion for reconsideration and request for oral argument.

Staff's recommendation addresses EU's request for oral argument (Issue 1) and the appropriate disposition of EU's motion for reconsideration (Issue 2). The Commission has jurisdiction pursuant to Sections 367.031 and 367.045, Florida Statutes (F.S.).

¹ Order No. PSC-2021-0066-PAA-SU, issued February 2, 2021, in Docket No. 20200226-SU, *In re: Application for certificate to provide wastewater service in Charlotte County, by Environmental Utilities, LLC.*

² Order No. PSC-2021-0376-PCO-SU, issued September 28, 2021, in Docket No. 20200226-SU, *In re: Application for certificate to provide wastewater service in Charlotte County, by Environmental Utilities, LLC.*

³ Order No. PSC-2022-0267-FOF-SU, issued July 8, 2022, in Docket No. 20200226-SU, *In re: Application for certificate to provide wastewater service in Charlotte County, by Environmental Utilities, LLC.*

⁴ Document Nos. 04918-2022 and 04920-2022, filed on July 22, 2022, in Docket No. 20200226-SU, *In re: Application for certificate to provide wastewater service in Charlotte County, by Environmental Utilities, LLC.*

⁵ Document No. 04945-2022

⁶ As discussed in the Final Order at p. 5, Charlotte County was not a party to this docket, but its designated representative Mr. Craig Rudy provided testimony via a deposition resulting from a subpoena by PIE. Pursuant to the Prehearing Order, EU was permitted to utilize the deposition at hearing.

⁷ The September 27, 2021 letter was placed in the correspondence side of the docket on September 28, 2021 (see Document Nos. 11672-2021, 11627-2021, 11623-2021, 11622-2021, and 11620-2021).

Discussion of Issues

Issue 1: Should the Commission grant Environmental Utilities, LLC’s Request for Oral Argument?

Recommendation: No. Staff recommends that the pleadings are sufficient on their face for the Commission to evaluate and decide EU’s motion for reconsideration. However, if the Commission wishes to hear oral argument, staff recommends that 10 minutes per side is sufficient. (Sandy, Crawford)

Staff Analysis:

Parties’ Arguments

EU’s Motion

EU filed a request for oral argument on its motion for reconsideration.⁸ As discussed in its motion, EU contends that the Commission incorrectly applied a new standard for determining need in this docket, and that oral argument would help the Commission understand the ramifications of the new standard and whether it is good public policy. EU requests that each party have fifteen minutes for oral argument to address whether the Commission “overlooked, ignored, and misapplied certain statutory requirements concerning the need and public interest issues.”

OPC Response

In its response, OPC took no position on EU’s request for oral argument.

PIE Response

PIE argues that EU’s motion for reconsideration should be denied on its face, thereby rendering oral argument unnecessary. PIE contends that requiring oral argument would create a significant financial burden to PIE when the record has been set, EU’s arguments have already been rejected, and the motion for reconsideration is an attempt to re-argue resolved positions in the proceedings.

LC Response

LC contends that EU’s pleadings are sufficient on their face for the Commission to render a decision on the motion for reconsideration. Furthermore, LC argues that if EU’s request for oral argument is granted, EU should not be given further opportunity in oral argument to rely upon the County letter that was submitted subsequent to both the closing of the record and the posting of the final order.

⁸ Rule 25-22.0022(3), F.A.C., states that the Commission has the sole discretion to grant or deny oral argument.

Staff Analysis

Staff recommends that the pleadings are sufficient on their face for the Commission to evaluate and decide EU's motion for reconsideration. Staff does not believe that oral argument would aid the Commission in understanding and evaluating the issues presented in EU's motion for reconsideration. Thus, staff recommends that EU's request for oral argument be denied. However, if the Commission, in its discretion, chooses to hear oral argument, staff recommends 10 minutes per side is sufficient.

Issue 2: Should EU’s Motion for Reconsideration of Order No. PSC-2022-0267-FOF-SU be granted?

Recommendation: No. Staff believes that EU’s motion fails to raise a point of fact or law that the Commission overlooked or failed to consider in rendering its decision. (Sandy, Crawford)

Staff Analysis:

Standard of Review

The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that Commission overlooked or failed to consider in rendering the order.⁹ In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.¹⁰ 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.”¹¹

Parties’ Arguments

EU’s Motion

EU alleges numerous points of fact and law that it believes the Commission overlooked or failed to consider in denying EU’s application. The majority of EU’s arguments touch on whether EU demonstrated there was a need for service in its proposed service area. EU relies on the following text of the order to argue that the Commission created a new standard for determining need for service:

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...

(Final Order at p. 10). According to EU, the Commission disregards how its decision will promote an anti-environmental precedent that will make it virtually impossible for private utilities to implement septic-to-sewer projects along Florida’s coastline. The motion goes on to propose several ways in which the Commission ignored or failed to consider the County’s support of EU’s application, concluding that the Commission totally overlooked the testimony of the County’s representative, witness Craig Rudy (witness Rudy), as well as the September 27, 2021 letter. EU argues that Commission overlooked or misunderstood the significance of Charlotte County’s Mandatory Connection Ordinance (Ordinance) as it relates to EU’s

⁹ See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 162 (Fla. 1st DCA 1981).

¹⁰ *Sherwood v. State*, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958).

¹¹ *Stewart Bonded Warehouse, Inc.* at 317.

application.¹² EU also suggests that the Commission erroneously overlooked how EU's application for a wastewater certificate is in compliance with the County's Comprehensive Plan (Comp Plan). Likewise, EU suggests that without making a definitive ruling, the Commission ignored, misinterpreted or overlooked the intent of the County's Sewer Master Plan (Master Plan). Moreover, EU posits that the Commission's order completely ignores the significance of the Bulk Sewer Service Agreement entered into between EU and the County. Ultimately, EU concludes that the Commission's decision is not in the public interest.

OPC Response

OPC states that its response is offered "solely for purposes of protecting the record in this case and for preservation of the principles of fairness" in Commission proceedings. Specifically referencing the June 28, 2022 letter from the County provided in EU's "Notice of Filing Attachments to its Motion for Reconsideration," OPC believes that EU's motion is unauthorized since the letter was mailed to the Commission months after the record closed in February and weeks after the Commission took final agency action on June 7, 2022. As such, OPC contends the motion should be denied, as it is predicated primarily - if not entirely - on information that is blatantly outside the record.

PIE Response

PIE argues that despite EU's protestations, the record is replete with evidence and testimony supporting the Commission's determination that there was no need for service, and that findings of fact by the Commission cannot be disturbed if there is competent substantial evidence in the record.¹³ According to PIE, the Commission appropriately determined there was no need for service 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. PIE contends that EU's motion should be denied because the record provides ample competent substantial evidence in support of the Commission's findings of fact and conclusions of law.

LC Response

LC argues that the Commission should deny EU's motion. LC posits that EU appears to be testifying after the fact, using words like "intent," "obviously," "apparent," and "tantamount to" – language frequently employed in the absence of evidence. While EU states that reconsideration should be based on "specific factual matters set forth in the record and susceptible to review," the motion introduces elements that were not part of the record and were delivered after the order was posted. And while EU points out that "it is not appropriate to reargue matters that have

¹² Section 3-8-41(a), Charlotte County Ordinances provides that "[a]ll developed property must connect the plumbing system or any structure on the property to an available public or private sewer system within three hundred sixty-five (365) days after written notification by the public or private sewer system that the system is available for connection."

¹³ *Citizens v. Brown*, 269 So. 3d 498 (Fla. 2019).

already been considered," LC maintains that much of the motion consists of relitigating points that were previously made and reviewed.

Staff Analysis

Staff disagrees with EU that there are points of fact or law that the Commission overlooked or failed to consider in denying EU's application for wastewater certification. EU's criticism of the Commission's decision is merely reargument, which is not grounds for reconsideration.

A. New Legal Standard (Need for Service)

EU claims that the Commission derived a new standard for determining need for service. Rule 25-30.033(1)(k), F.A.C, sets forth the information to be filed in order to demonstrate there is a need for service in a proposed service area as follows:

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.

This information may be weighed at the Commission's discretion when determining whether a need for service exists. Exercising that discretion does not itself create a new legal standard as argued in EU's motion. To the contrary, discretion is an essential feature of any request for wastewater certification because no two service areas are ever the same.

The Commission held two service hearings in this docket: one on February 8, 2022, and one the following morning on February 9, 2022. Customers participating at those service hearings were overwhelmingly opposed to EU's application. So too was the correspondence received by the Commission while the record remained open. While EU strenuously argues that this customer communication was the inflated presence of a vocal minority, nothing in the record substantiates that argument.

Giving weight to EU's failure to demonstrate requests for service from EU corresponds with the requirements of Rule 25-30.033(1)(k)(2), F.A.C. Had EU presented evidence of customer support while the record was open, or had supportive property owners been present at service

hearings or written the Commission, then those sentiments could have been weighed by the Commission when deciding whether there was a need for service in the proposed service area.

B. County Support of EU's Application

EU argues at length in its motion that the Commission clearly misapplied or ignored the law when it failed to consider the County's support of EU's application. The different ways in which the Commission allegedly failed to consider the County's position of EU's application are addressed in the following subsections.

I. Craig Rudy's Testimony

EU contends that the Commission ignored the testimony of witness Rudy or failed to weigh his testimony as the County's designated representative. But staff believes EU misstates the clarity and weight to be given to witness Rudy's testimony.

It is true that in his deposition, witness Rudy stated that the County believed EU's application to be consistent with the Comp Plan; but, there is ample evidence in the record to show inconsistencies between EU's application and the Comp Plan, which will be referenced in a subsequent subsection. And witness Rudy's testimony did little to resolve the competing arguments presented by the parties in the course of the formal hearing held in this docket. Importantly, witness Rudy's testimony was but one piece of evidence in an extensive evidentiary record, which the Commission weighed in its entirety. While the Commission received witness Rudy's testimony in his capacity as the County's representative, his deposition offered little substance for the Commission to rely on in making its final decision. Ultimately, his testimony was given the weight the Commission believed it deserved.

The County letter authored by witness Rudy, and Brandon Moody, dated September 27, 2021, placed in the docket as correspondence, mirrored much of the substance of witness Rudy's deposition testimony. Therefore, like witness Rudy's testimony, it was given the weight the Commission believed it deserved. The crux of EU's argument is that the Commission should have relied more on witness Rudy's testimony and the County's correspondence, but such arguments are not grounds for reconsideration.

II. Environmental Restrictions and Need

During the hearing and in its post-hearing brief, EU argued that there is a need for its central sewer system due to failing septic tanks in the proposed service territory contributing to red tide and water quality degradation of Lemon Bay and the Gulf of Mexico. EU also cited the Florida Governor as making the environmental remediation of the area a priority. According to EU, all of these factors led the County to support its application. Yet, based on Rule 25-30.033(1)(k)(4), F.A.C., the Commission found the absence of a specific environmental restriction or mandate more compelling than the general assertions made by EU. Although EU disagrees with how the Commission weighed evidence of an environmental need, such disagreements are not grounds for reconsideration.

III. Mandatory Connection Ordinance

EU contends that the Commission overlooked or misunderstood the significance of the Ordinance. Yet, there is no evidence in the record to support this claim.

The County's Ordinance was discussed at length during the formal hearing held in this docket. The parties presented arguments about the Ordinance in their post-hearing briefs. In the Commissioners' deliberations during the June 7, 2022 Agenda Conference, the Ordinance was discussed before voting to deny EU's application for certification. Unlike what is described in EU's motion, the Ordinance and its implications were fully fleshed out. As discussed in the Commission's final order, "[the Commission] did not consider the existence of the mandatory connection ordinance dispositive of the issue of need for service." (Final Order pp. 8-9).

Nor did the Commission misunderstand the Ordinance. The words in a statute are the best guide to legislative intent:¹⁴ a statute's text is the most reliable and authoritative expression of the legislature's intent.¹⁵ Like a statute, an Ordinance's text is the most reliable and authoritative expression of the County's intent. Section 3-8-41(a), Charlotte County Ordinances, states in pertinent part, "[a]ll developed property must connect the plumbing system for any structure on the property to an available public or private sewer system within three hundred sixty-five (365) days after written notification by the public or private sewer system that the system is available for connection." The plain text of the Ordinance shows that it only becomes operative once a system is available for connection. Thus where there is no system to speak of, the Ordinance has no legal effect. Nothing in the text of the Ordinance references whether a sewer system should be present in a service area in the first place. It appears as if EU is asking the Commission to infer motivations of the County from the mere existence of the Ordinance, which staff believes is not supported by the record evidence.

IV. Comprehensive Plan

EU's motion contends that, "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 Commission is granted the discretion whether to defer to a comprehensive plan when deciding whether to grant a wastewater certificate.¹⁶ In compliance with the statute, the Commission considered the plan, and in addressing the relationship between EU's application and the comprehensive plan found inconsistencies between the two. For example, the record reflects that EU's proposed service area is designated as a Rural Service Area, according to the comprehensive plan. The Commission's order notes the following:

¹⁴ *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006).

¹⁵ *Hill v. Davis*, 70 So. 3d 572 (Fla. 2011); *Florida Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815 (Fla. 2007); *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252 (Fla. 2006).

¹⁶ *City of Oviedo v. Clark*, 699 So. 2d 316, 318 (Fla. 1st DCA 1997) ("The plain language of the statute only requires the Commission to consider the comprehensive plan. The Commission is expressly granted discretion in the decision of whether to defer to the plan.")

[T]he Rural Service Area designation has multiple elements that explicitly reference Commission-regulated utilities and does not appear to support the construction of central sewer systems. WSW Policy 3.2.4 states “The County shall discourage expansion of service areas of Utility companies regulated by the [Commission] to any areas outside of the Urban Service area . . .” PIE witness Hardgrove highlighted FLU Policy 3.2.4 which states that the Rural Service Area shall “continue to rely primarily upon individual on-site septic systems as the method of disposal of wastewater.” The same policy further bans new developments in the Rural Service Area from being constructed with central sewer systems, but does allow an exemption if it is “clearly and convincingly demonstrated by the proponents of the system expansion that a health problem exists in a built but unserved area for which there is no other feasible solution.”

(Final Order p. 10). The aforementioned land designation and policies contained within the comprehensive plan led the Commission to conclude that EU’s application is inconsistent with the plan.

This is yet another instance where EU offers reargument instead of a point of fact or law that the Commission overlooked or failed to consider in rendering the order. Therefore, EU’s arguments that the Commission overlooked EU’s compliance with the Comp Plan are without merit, and staff believes they are not grounds for reconsideration.

V. Sewer Master Plan

EU suggests that without making a “definitive” ruling,¹⁷ the Commission ignored, misinterpreted or overlooked the intent of the Sewer Master Plan. As noted in its order, the Commission has no statutory or rule requirement to consider the Master Plan. Just as the Commission is not bound by a local comprehensive plan in a certificate proceeding, a document such as the Master Plan – which is not contemplated in Section 367.045, F.S., or Rule 25-30.033, F.A.C. – is not binding either. All the same, as set out in its order, the Commission chose to address the Master Plan because it was identified as an issue in this docket, and there was substantial evidence and discussion at the hearing regarding this issue.

Contrary to EU’s contention, the Commission’s inclusion of an analysis of the Sewer Master Plan in its own order is evidence that it was considered. Moreover, the Master Plan was interpreted based on the evidence presented at the final hearing. Although EU characterizes the Commission’s finding as “indecisive,” it is clear that the Commission did not find the Sewer Master Plan as compelling evidence towards the demonstration of need. Staff recommends that EU’s criticism of the Commission’s analysis of the Master Plan is reargument and does not merit reconsideration.

¹⁷ In the Final Order at page 12, the Commission found that “Based on our evaluation, we find that EU’s application does not appear to be consistent with Charlotte County’s Sewer Master Plan.” EU characterizes this finding as “indecisive.”

VI. Bulk Sewer Service Agreement

As it argued in its post-hearing brief, EU's motion contends that the County's approval of the Bulk Sewer Agreement infers the County's support of EU's application for wastewater certification. EU appears to be conflating the existence of the Bulk Sewer Agreement with the intent behind the Bulk Sewer Agreement's existence. Staff believes that the mere existence of such an agreement is insufficient, without more, to support a finding of the County's support for EU's application.

But even if the Bulk Sewer Agreement made clear the County's intent, the Commission is still granted discretion in the weight it gives to such evidence. The Commission was fully apprised of the existence of the Bulk Sewer Agreement; however, it does not appear it gave the existence of the agreement the same weight that EU would urge be given. As with virtually all of the other points raised by EU, a disagreement over the weight which evidence should be given is not enough to warrant a reconsideration.

C. Evidence Not Present in the Record

In advocating for reconsideration, EU provided in its July 25, 2022 "Notice of Filing Attachments to its Motion for Reconsideration" a letter from the Charlotte County Board of Commissioners, dated June 28, 2022. This letter was never introduced – indeed, it did not exist – while the record in this docket was open. The Board's letter attaches and incorporates by reference a September 27, 2021, letter by County employees Rudy and Moody. While EU did not offer the September 2021 letter into evidence at the February 8, 2022 evidentiary hearing, the document was placed in the correspondence side of the docket, along with other items of correspondence, where it was available for review by the parties to the proceeding, Commission staff, and Commissioners. While staff does not take issue with the September 27, 2021 letter any more than it does with letters filed by potential customers of the Utility, the June 28, 2022 letter by the County Board is clearly outside the scope of the record, and appears to be an after-the-fact attempt by EU to bolster its claim of County support for its application. As correctly pointed out in the intervenors' responses, reliance on this extra-record material would be improper, as no opportunity to cross-examine, challenge, or rebut the material has been afforded, in contravention to the requirements of Section 120.57(1), F.S. Staff therefore strongly recommends that the Commission give no consideration, substantive discussion, or weight to the June 28, 2022 letter.

Conclusion

The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that Commission overlooked or failed to consider in rendering the order. The lack of a particular discussion of one item in a document or proceeding is not presumptive proof that the item or matter was not considered by the tribunal. 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.”¹⁸

EU, who has the burden of proof in this matter, has offered only reargument to support its claims. In other words, EU disagrees with the weight the Commission gave to the record evidence, and instead would urge the Commission rule in accordance with EU’s position. Instead, the matters raised by EU in its motion have been considered, but rejected as unpersuasive, by the Commission. Accordingly, staff recommends that EU’s motion for reconsideration should be denied.

¹⁸ *Stewart Bonded Warehouse, Inc.* at 317.

Issue 3: Should this docket be closed?

Recommendation: Yes, the docket should be closed. (Sandy, Crawford)

Staff Analysis: If the Commission denies EU's motion for consideration, no further action is required by the Commission and staff recommends that the docket should be closed.