BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide wastewater service in Charlotte County by Environmental Utilities, LLC.	DOCKET NO. 20240032-SU ORDER NO. PSC-2024-0450-PCO-SU ISSUED: October 16, 2024

The following Commissioners participated in the disposition of this matter:

MIKE LA ROSA, Chairman
GARY F. CLARK
ANDREW GILES FAY
GABRIELLA PASSIDOMO

ORDER DENYING GUY HURST'S MOTION TO DISMISS AND ENVIRONMENTAL UTILITIES, LLC'S MOTION FOR RECONSIDERATION

BY THE COMMISSION:

Background

On February 12, 2024, Environmental Utilities, LLC (EU) filed its application for an original wastewater certificate in Charlotte County. The proposed service area includes the barrier islands of Little Gasparilla Island, Don Pedro Island, and Knight Island.

On March 28, 2024, EU sent notice of the application by mail to property owners in the proposed service area pursuant to Rule 25-30.030, Florida Administrative Code (F.A.C.). Objections to the application were filed by Linda Cotherman; Palm Island Estates Association, Inc. (PIEA); and Little Gasparilla Island Preservation Alliance, Inc. (LGIPA) during the objection period.

On April 30, 2024, Mr. Guy Hurst filed a Motion to Dismiss the application alleging that EU failed to provide proper service. On May 6, 2024, EU filed a response in opposition to the Motion to Dismiss.

On August 12, 2024, the Order Establishing Procedure[1] (OEP) was issued, setting this matter for an administrative hearing on January 28-30, 2025. On August 19, 2024, EU filed a Motion for Reconsideration requesting that the Commission reconsider a portion of the OEP related to the exchange of cross-examination exhibits. On August 26, 2024, PIEA and LGIPA each filed responses opposing EU's Motion for Reconsideration.

This order addresses Mr. Hurst's Motion to Dismiss and EU's Motion for Reconsideration. We have jurisdiction pursuant to Sections 367.011, 367.031, 367.045, and 367.081, Florida Statutes (F.S.).

[1] Order No. PSC-2024-0324-PCO-SU

Decision

I. Mr. Hurst's Motion to Dismiss

Law

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 the petition states a cause of action upon which relief may be granted if all factual allegations in the petition are taken to be true. 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 April 30, 2024, Mr. Hurst filed a Motion to Dismiss the Application or Alternatively Stay All Proceedings Until Service is Perfected on Owners of Private Property Located on Little Gasparilla Island (Motion to Dismiss). In his motion, 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 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, and appears to be just another mass mailing of an unknown advertiser. According to Mr. Hurst, the notice 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. Consequently, Mr. Hurst alleges that there has been a violation of due process.

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

On May 6, 2024, EU filed a response to Mr. Hurst's Motion to Dismiss requesting that the motion 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 and notices were even mailed to out of state addresses and out of the country. EU states that 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. Finally, EU notes that we have previously considered and denied[2] these same arguments from Mr. Hurst.

[2] Order No. PSC-2021-0405-PCO-SU.

Analysis and Conclusion

In his Motion to Dismiss, Mr. Hurst does not allege that EU's application fails to state a cause of action upon which relief may be granted but rather that EU's notice was insufficient. However, hundreds of prospective customers in the proposed service area filed comments regarding EU's application and three parties filed formal requests for an administrative hearing. At a minimum, Mr. Hurst received constructive notice of the application as he filed the motion to dismiss within the 30-day window that follows the receipt of the notice. As stated in his motion, the purported effective date of the notice was April 3, 2024, and Mr. Hurst's motion was filed on April 30, 2024, well within the 30-day window. Mr. Hurst's concerns that other individuals may not have received notice are speculative in nature and Mr. Hurst is 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 has clearly availed himself. Finally, the notice was prepared in accordance with the requirements of Rule 25-30.030, F.A.C.

For the reasons stated above, we deny Mr. Hurst's Motion to Dismiss.

II. EU's Motion for Reconsideration

Law

The appropriate standard of review for reconsideration of a procedural Commission order is whether the motion identifies a point of fact or law that the prehearing officer overlooked or failed to consider in rendering the order under review. 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). It is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (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, Inc., 294 So. 2d at 317.

EU's Motion for Reconsideration

In its Motion for Reconsideration, EU requests us to reconsider Section V(F) of the OEP which states, in part:

> . . .if a party plans to use exhibits that were not already prefiled with their witnesses' testimony for cross-examination, impeachment, or demonstrative purposes during the hearing, the party must provide a copy of such exhibits to all other parties and the Commission's Office of General Counsel by January 21, 2025.

EU argues that this requirement would "negate the effectiveness of cross-examination by eliminating any element of surprise" and allows the witness to "devise a response" with counsel before the hearing. EU asserts that this advance disclosure amounts to a violation of due process.

Finally, EU alleges that although the disclosure of cross-examination exhibits may make the proceedings more orderly, the administrative convenience is outweighed by the damage done to the parties.

PIEA and LGIPA's Responses to EU's Motion for Reconsideration

PIEA's response alleges that EU is conflating a negated effectiveness of cross-examination with due process. PIEA also notes that prevailing case law in Florida disapproves of "trial by ambush" for both witness testimony and exhibits.

Similarly, LGIPA noted that the purpose of the rules of discovery is to assist in the "truth-finding function" and to avoid trial by surprise.

Analysis

The Uniform Rules applicable to administrative proceedings – Chapter 28, F.A.C. – give the presiding officer broad authority and discretion to resolve legal issues and procedural questions. Pursuant to Rule 28-106.102, F.A.C., a Commissioner serving as the Prehearing Officer is a "presiding officer" in cases set for hearing at the Commission. Rule 28-106.209, F.A.C., specifically allows the presiding officer to direct the parties to confer for the purpose of examining documents and other exhibits, which means the presiding officer has the authority to require the parties to list and exchange all exhibits in advance of the hearing.

In addition, Rule 28-106.211, F.A.C., states that the presiding officer "may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." Prehearing disclosure requirements are, in essence, tribunal mandated discovery.

As we have previously noted:

> The purpose of discovery is to "eliminate surprise, to encourage settlement, and to assist at arriving at the truth." Spencer v. Beverly, 307 So. 2d 461, 462 (Fla. 4th DCA 1975); Binger v. King Pest Control, 401 So. 2d 1310, 1313 (Fla. 1981); Elkins v. Syken, 672 So. 2d 517, 522 (Fla. 1996) ("Pretrial discovery was implemented to simplify the issues in a case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balanced search for the truth to ensure a fair trial.").

Order No. PSC-2022-0194-PCO-EI. The same justifications apply to the listing and exchange of all potential exhibits in advance of hearing. As stated by the Florida Supreme Court:

> Revelation . . . of the strength and weaknesses of each side before trial encourages settlement of cases and avoids costly litigation. Each side can make an intelligent evaluation of the entire case and may better anticipate the ultimate results.

Surf Drugs, Inc. v. Vermette, 236 So. 2d 108, 111 (Fla. 1970).

A ruling from the Florida Public Employee Relations Commission held that a prehearing order requiring full disclosure and exchange of exhibits comports with basic due process. See Henderson v. Dep't of Child. & Fams., 2011 WL 13486273 (PERC June 15, 2011). Also, in an "Order to Exchange Exhibits," an administrative law judge at the Division of Administrative Hearings (DOAH) noted that the failure to exchange exhibits leads to trial by ambush which is not permitted in Florida. See Nelson v. Ag. for Health Care Admin., Case No. 19-1562 (DOAH June 28, 2019).

The standard prehearing procedure at DOAH, including punitive proceedings, is for the presiding officer to issue both an Order of Prehearing Instructions – akin to our OEP – and a Notice of Hearing. In accordance with due process considerations, standard practice at DOAH requires a list of and exchange of all exhibits.

The Florida Supreme Court has held:

> [T]he general policy of full and open disclosure underlying the decision has been carried forward in Florida's rules of discovery. The goals of these procedural rules are "to eliminate surprise, to encourage settlement, and to assist in arriving at the truth." We recently reiterated those goals.
>
> > A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics.

Binger, 401 So. 2d at 1313 (internal citations omitted) (quoting Dodson v. Persell, 390 So. 2d 704, 707 (Fla 1980)).

All parties are governed by the same requirements. There are no due process violations from requiring parties to exchange all potential exhibits in advance of hearing, including cross-examination exhibits. The requirement to list and exchange all exhibits promotes due process, transparency, and judicial economy. The failure to do so impedes these objectives.

Consequently, we find that the prehearing officer did not make a mistake of fact or law when issuing the OEP or Section V(F) requiring disclosure of cross-examination exhibits. Therefore, EU's Motion for Reconsideration is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Mr. Hurst's Motion to Dismiss is denied as it fails to demonstrate that Environmental Utilities, LLC's application fails to state a cause of action upon which relief may be granted. It is further

ORDERED that Environmental Utilities, LLC's Motion for Reconsideration is denied as it fails to raise a point of fact or law that the prehearing officer overlooked or failed to consider in rendering their decision. It is further

ORDERED that this docket shall remain open pending our final decision on Environmental Utilities, LLC's application.

By ORDER of the Florida Public Service Commission this 16th day of October, 2024.

ADAM J. TEITZMAN
Commission Clerk
Florida Public Service Commission
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

MRT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.