



Public Service Commission

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DATE: FEBRUARY 5, 2004

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (GERVASI) *REL*
DIVISION OF ECONOMIC REGULATION (BRADY, REDEMANN) *RRR* *Wlet* *Pb* *PO* *JDT* *TGR*

RE: DOCKET NO. 020745-SU - APPLICATION FOR CERTIFICATE TO
PROVIDE WASTEWATER SERVICE IN CHARLOTTE COUNTY BY ISLAND
ENVIRONMENTAL UTILITY, INC.

AGENDA: 02/17/04 - REGULAR AGENDA - DECISION ON MOTION FOR
RECONSIDERATION - ORAL ARGUMENT NOT REQUESTED, BUT MAY BE
ENTERTAINED AT THE DISCRETION OF THE COMMISSION, IN
ACCORDANCE WITH RULE 25-22.0376, F.A.C.

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020745.RCM

CASE BACKGROUND

Because of objections filed by Ms. Linda Bamfield and by Mr. Ronald Koenig, in opposition to Island Environmental Utility, Inc.'s (IEU) application to provide wastewater service, this matter is currently set for an administrative hearing on April 27-28, 2004. Both parties are appearing *pro se*. By Order No. PSC-03-1415-PCO-SU, issued December 15, 2003, the Prehearing Officer, among other things, granted Ms. Bamfield and Mr. Koenig's Motions to Compel certain responses to discovery propounded by them upon IEU. On December 23, 2003, IEU timely filed a Motion for Reconsideration of that portion of the Order. This recommendation addresses the Motion for Reconsideration. The Commission has jurisdiction pursuant to Section 367.121, Florida Statutes, and Rule 25-22.0376, Florida Administrative Code.

DOCUMENT NUMBER-DATE

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DISCUSSION OF ISSUES

ISSUE 1: Should IEU's Motion for Reconsideration of Order No. PSC-03-1415-PCO-SU be granted?

RECOMMENDATION: No, IEU's Motion for Reconsideration should be denied. IEU should be ordered to fully respond to the discovery requests at issue within 30 days from the Commission's vote on this item. (GERVASI)

STAFF ANALYSIS:

Overview

The discovery to which IEU objected, and to which Order No. PSC-03-1415-PCO-SU required IEU to respond, is comprised of requests for all documentation that relates to the financial resources of IEU's shareholders, including their personal financial statements. IEU objected to the discovery requests on the grounds that there is no requirement that such confidential information become public record, and that there is no Commission decision requiring that such confidential information be turned over to pro se litigants. Additionally, IEU argued that Ms. Bamfield has directed a course of extreme antagonism toward one of IEU's shareholders, and that her conduct has shown that she will not respect any of the Commission's protective orders or any confidentiality obligations toward the confidential information that she may undertake.

Motion

In the Motion for Reconsideration, IEU requests that the Commission reconsider its decision to require its shareholders to disclose the confidential information, and deny the intervenors' motions to compel the production thereof. IEU argues that the Commission failed to adequately consider the potential for harassment, prejudice and personal harm that its shareholders would suffer by the disclosure to Ms. Bamfield of the confidential information. According to IEU, Ms. Bamfield's history of antagonism and violence toward Mr. Beckstead, an IEU shareholder, and his family, and her extreme opposition to development in the area which IEU seeks to serve gravely upsets the balance between the needs of the intervenors and the privacy interests of the shareholders of IEU, which balance the Commission must attempt to

achieve.¹ The confidential information is not merely sensitive and highly personal material; it is a weapon in the hands of untrustworthy and unscrupulous persons who have ulterior motives in procuring its possession. No protective order that could be issued by this Commission would adequately protect IEU's shareholders against the harm that would be caused by its disclosure to the intervenors.

Moreover, IEU argues that although the intervenors may have alluded to their right to inspect the confidential information, neither has adequately demonstrated a sufficient, convincing need to review it.²

Finally, IEU argues that neither intervenor has shown that this Commission is unable or unqualified to carry out its legislative duty to determine the financial ability of IEU to provide wastewater service to the area it seeks to serve. As the applicant, IEU is required to provide its financial information to Commission staff pursuant to Rule 25-30.033, Florida Administrative Code. However, there is no rule requiring the provision of the financial information of the shareholders of an applicant. In fact, the confidential information may not even be relevant if the issue of the financial ability of IEU is resolved. The Commission should consider alternatives that would adequately serve the interests of the intervenors regarding the confidential information, such as loan commitments from financial institutions and similar undertakings that demonstrate IEU's financial resources.

¹IEU summarily cites to the following cases in support of this contention: Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533 (Fla. 1987); CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So. 2d 434 (Fla. 3rd DCA 1994); and Higgs v. Kampgrounds of America, 526 So. 2d 980 (Fla. 3rd DCA 1988). These cases are discussed on pages 6-8 of this recommendation.

²In support of this argument, IEU summarily cites again to CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So. 2d at 436; and Higgs v. Kampgrounds of America, 526 So. 2d at 981.

Response

Ms. Bamfield timely filed a response to the Motion on January 2, 2004. Mr. Koenig did not file a response. In her response, Ms. Bamfield argues that the discovery to which IEU objects was made to evaluate and determine the financial ability and stability of the applicant (shareholders) to construct, operate, and maintain a wastewater system. In a March 20, 2003 letter to the Commission, IEU stated that since IEU is not yet in operation, it does not have any financial statements, and that the financial ability of IEU is based upon the financial ability of its shareholders.

Moreover, Ms. Bamfield argues that because there has been no change in the relevant facts from the original objections to discovery filed by IEU on October 3, 2003 that would be germane to the present Motion for Reconsideration, there is nothing to reconsider. It appears to her that the sole reason for the Motion is the misplaced, untrue and improper personal attack against her, which has no role in these proceedings.

Further, Ms. Bamfield argues that the shareholders have not requested that their personal financial statements be classified as specified confidential material, and it is presumptuous of IEU to assume that that determination would be meaningless if granted. The discovery requests are reasonably calculated to lead to the discovery of admissible evidence, and it has not been shown that disclosure of the information would harm the applicant. For these reasons, Ms. Bamfield requests that the Motion be denied.

Analysis/Recommendation

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order.³ In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.⁴

³See 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).

⁴Sherwood 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

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."⁵

By Order No. PSC-03-1415-PCO-SU at page 5, the Prehearing Officer found that IEU does not dispute that the financial information sought may be relevant to the Commission's decision whether to issue it a wastewater certificate, that the discovery questions at issue are reasonably calculated to lead to the discovery of admissible evidence, and that the information is therefore discoverable by the parties requesting it, regardless of the fact that they are appearing *pro se*.

Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that

[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The rule does not provide a different standard for parties appearing *pro se*. See also, Kohn v. City of Miami Beach, 611 So. 2d 538, 539-40 (Fla. 3rd DCA 1992) (concluding that it is a mistake to hold a *pro se* litigant to a lesser standard than a reasonably competent attorney, and that Section 454.18, Florida Statutes, clearly provides that any person may conduct his own cause in any court of this state, subject to the lawful rules and discipline of such court).

Nor does IEU's argument that there is no Commission rule requiring the provision of the financial information of the shareholders of an applicant have merit. As Ms. Bamfield points out in her response to the Motion, IEU has indicated that since it is not yet in operation, it does not have any financial statements,

DCA 1958).

⁵Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d at 317.

and the financial ability of IEU is based upon the financial ability of its shareholders. The Prehearing Officer correctly determined that Rule 1.280(b)(1), Florida Rules of Civil Procedure, requires that the information at issue be produced.

IEU summarily relies on Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533 (Fla. 1987); CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So. 2d 434 (Fla. 3rd DCA 1994); and Higgs v. Kampgrounds of America, 526 So. 2d 980 (Fla. 3rd DCA 1988) in arguing that the Commission must balance the needs of the intervenors to obtain the financial information with the privacy interests of the shareholders of IEU.

In Rasmussen, the petitioner, an AIDS victim, requested the names and addresses of non-party blood donors. His interest was in establishing that one or more of the donors had AIDS or was in a highrisk group. The Blood Service moved for a protective order barring disclosure. The court concluded that the disclosure sought implicated constitutionally protected privacy interests, and that society's interest in a strong and healthy blood supply would be furthered by the denial of the discovery. Rasmussen v. South Fla. Blood Serv. at 537-38. The discovery at issue here is distinguishable in that it does not seek information pertinent to non-parties to the action, but instead seeks financial information concerning the very shareholders of IEU, which information IEU asserts will provide evidence of IEU's financial ability to provide the service which IEU's application requests this Commission to authorize it to provide.

Higgs v. Kampgrounds of America follows Rasmussen in determining that when courts are confronted with discovery questions, especially those involving confidential information, they decide the questions by balancing the competing interests to be served by granting or denying the discovery. The Court states that thus, the party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information. Id. at 981. The Court quashed the order compelling the discovery at issue without prejudice to allow the respondent the opportunity to serve other interrogatories, provided a proper showing was made that such are needed. Higgs v. Kampgrounds of America at 981-982. This case is inapplicable to the facts here because IEU does not dispute that the information sought may be relevant to the case, and because the Commission has procedures in place whereby parties

may seek to maintain the confidentiality of the information. IEU could have responded to the discovery under the Commission's confidentiality rules and sought a protective order.

Moreover, Sampson v. American National Red Cross, 139 F.R.D. 95, 99 (N.D. Tex. 1991), criticizes Rasmussen, opining that given that the right of privacy is not absolute, but rather involves a weighing of competing interests, an appropriate protective order could adequately protect a blood donor's interest, while giving plaintiffs access to relevant information. The court ordered, among other things, that any papers filed by the parties relating to the donor which identify the donor by name shall be filed under seal.

Nor does CAC-Ramsay Health Plans support IEU's contention that the Commission must balance the needs of the intervenors to obtain the financial information with the privacy interests of the shareholders of IEU. In that case, a former employee of CAC filed an employment discrimination action against CAC, alleging wrongful termination based on his race. He served discovery on CAC asking for files of African-American, Hispanic, and fired employees. CAC sought review of the trial court order compelling the discovery, asserting, among other things, that the request would violate the employees' rights to privacy in their personal records.

The Third DCA quashed the order compelling the discovery, finding that the trial court erred by ordering "the wholesale disclosure of personnel files containing confidential information of employees not related to the pending case. 'Production of those documents implicates privacy rights of persons not aware of the intrusion, and not connected in any way to the transaction at issue.'" CAC-Ramsay Health Plans v. Kampgrounds of America at 435 (citation omitted). "The party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information." Id. (citation omitted).

The Court instructed the trial court, on remand, to "fashion a more narrowly tailored discovery order ensuring Johnson access to the information to which he is entitled while safeguarding the present and former employees' privacy." Id. at 436. In a footnote, the Court noted that both parties had acceded to such measures, including redaction of sensitive information, a confidentiality order, or in camera inspection. Id. Again, the

discovery at issue does not request the disclosure of non-party information. And this Commission has safeguards in place to maintain the confidentiality of sensitive information, which safeguards are triggered by the request for confidential classification of the material, something that IEU has, to date, failed to do.

Furthermore, IEU made this same argument in its response to Ms. Bamfield's Motion to Compel,⁶ and it was fully considered by the Prehearing Officer in rendering the Order. As previously indicated, in a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. At page 6 of the Order, the Prehearing Officer noted that

[t]his Commission is mindful of the necessity to protect confidential information from public disclosure. As noted in Order No. PSC-03-0791-PCO-SU, [issued July 3, 2003, in this docket] the Commission has a process designed to protect a party against the disclosure of confidential information. IEU may seek protection of the financial information requested by Bamfield and Koenig from public disclosure at the hearing pursuant to Section 367.156, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. IEU is free to require the parties to this proceeding to enter into non-disclosure agreements to maintain the confidentiality of the material prior to providing the requested information to them, in accordance with customary practice. IEU is, of course, also free to take whatever legal action it deems appropriate in the event of a breach of any such agreement.

With respect to IEU's argument that no protective order that could be issued by this Commission would adequately protect IEU's

⁶Order No. PSC-03-1415-PCO-SU at page 2 notes that "[a]ccording to IEU, the potential damage to the Becksteads and to Mr. Boyer by disclosure of their personal financial information clearly outweighs any need for that information by the pro se litigants."

shareholders against the harm that would be caused by its disclosure to the intervenors, as Ms. Bamfield points out, the shareholders have not requested that their personal financial statements be classified as specified confidential material, and it is presumptuous of IEU to assume that that determination would be meaningless if granted.

Finally, with respect to IEU's argument that the Commission should consider alternatives that would adequately serve the interests of the intervenors regarding the confidential information, such as loan commitments from financial institutions and similar undertakings that demonstrate IEU's financial resources, IEU has provided no such alternatives to date. As previously noted, according to IEU, the financial ability of IEU is based upon the financial ability of its shareholders.

For the foregoing reasons, staff recommends that because the Prehearing Officer did not overlook any point of fact or law in rendering the Order, the Motion for Reconsideration of Order No. PSC-03-1415-PCO-SU should be denied. IEU should be ordered to fully respond to the discovery requests at issue within 30 days of the Commission's vote on this item.

DOCKET NO. 020745-SU
DATE: February 5, 2004

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open to conduct a hearing on IEU's application for original certificate. (GERVASI)

STAFF ANALYSIS: This docket should remain open to conduct a hearing on IEU's application for original certificate.