

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
ORDER NO. PSC-2022-0333-FOF-SU
ISSUED: September 27, 2022

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK
MIKE LA ROSA
GABRIELLA PASSIDOMO

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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. We denied the petition for temporary rule waiver.¹

Prior to us 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, we 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 us and placed in the correspondence side of the docket.

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.*

On June 7, 2022, we 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 our vote, was 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.

At our September 8, 2022, Commission Conference, upon request and in our discretion we heard oral argument from the parties on EU's motion for reconsideration.

We have jurisdiction pursuant to Sections 367.031 and 367.045, Florida Statutes (F.S.).

Decision

I. Motion for Reconsideration

A. Standard of Review

The standard of review for reconsideration of our order is whether the motion identifies a point of fact or law that we overlooked or failed to consider in rendering the order.⁸ In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.⁹ Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling

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, the 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).

⁸ 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).

⁹ *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).

that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.”¹⁰

B. Parties’ Arguments

1. EU’s Motion

EU alleges numerous points of fact and law that it believes we 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 we 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, we disregard how our 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 we ignored or failed to consider the County’s support of EU’s application, concluding that we 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 we overlooked or misunderstood the significance of Charlotte County’s Mandatory Connection Ordinance (Ordinance) as it relates to EU’s application.¹¹ EU also suggests that we 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, we ignored, misinterpreted or overlooked the intent of the County’s Sewer Master Plan (Master Plan). Moreover, EU posits that our order completely ignores the significance of the Bulk Sewer Service Agreement entered into between EU and the County. Ultimately, EU concludes that our decision is not in the public interest.

2. 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 our 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

¹⁰ *Stewart Bonded Warehouse, Inc.* at 317.

¹¹ 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.”

since the letter was mailed to us months after the record closed in February and weeks after we 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.

3. PIE Response

PIE argues that despite EU's protestations, the record is replete with evidence and testimony supporting our determination that there was no need for service, and that findings of fact by us cannot be disturbed if there is competent substantial evidence in the record.¹² According to PIE, we 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 the 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 our findings of fact and conclusions of law.

4. LC Response

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

C. Analysis

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

1. New Legal Standard (Need for Service)

EU claims that we 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,

¹² *Citizens v. Brown*, 269 So. 3d 498 (Fla. 2019).

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 our 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.

We 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 us 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.

Had EU presented evidence of customer support while the record was open, or had supportive property owners been present at service hearings or written us, then those sentiments could have been weighed by us when deciding whether there was a need for service in the proposed service area.

2. County Support of EU's Application

EU argues at length in its motion that we clearly misapplied or ignored the law when we failed to consider the County's support of EU's application. The different ways in which we 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 we ignored the testimony of witness Rudy or failed to weigh his testimony as the County's designated representative. But we believe 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 we weighed in its entirety. While we received witness Rudy's testimony in his capacity as the County's representative, his deposition offered little substance for us to rely on in making our final decision. Ultimately, his testimony was given the weight we 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 we believed it deserved. The crux of EU's argument is that we 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., we found the absence of a specific environmental restriction or mandate more compelling than the general assertions made by EU. Although EU disagrees with how we weighed evidence of an environmental need, such disagreements are not grounds for reconsideration.

iii. Mandatory Connection Ordinance

EU contends that we 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 our 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 our final order, "We 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 we misunderstand the Ordinance. The words in a statute are the best guide to legislative intent: a statute's text is the most reliable and authoritative expression of the legislature's intent.¹³ 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

¹³ *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006); *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).

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 us to infer motivations of the County from the mere existence of the Ordinance, which we believe 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.”

We are granted the discretion whether to defer to a comprehensive plan when deciding whether to grant a wastewater certificate.¹⁴ In compliance with the statute, we 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. Our order notes the following:

[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 us 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 we overlooked or failed to consider in rendering the order. Therefore, EU’s arguments that

¹⁴ *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.”)

we overlooked EU's compliance with the Comp Plan are without merit, and we believe they are not grounds for reconsideration.

v. Sewer Master Plan

EU suggests that without making a “definitive” ruling,¹⁵ we ignored, misinterpreted or overlooked the intent of the Sewer Master Plan. As noted in our order, we have no statutory or rule requirement to consider the Master Plan. Just as we are 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 our order, we 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, our inclusion of an analysis of the Sewer Master Plan in our 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 our finding as “indecisive,” it is clear that we did not find the Sewer Master Plan as compelling evidence towards the demonstration of need. We find that EU's criticism of our analysis of the Master Plan is reargument and does not merit reconsideration.

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. We find 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, we are still granted discretion in the weight we give to such evidence. We were fully apprised of the existence of the Bulk Sewer Agreement; however, we did not give the existence of the agreement the same weight that EU would urge it 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 reconsideration.

3. 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

¹⁵ In the Final Order at page 12, we 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.”

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, our staff, and us. While we do not take issue with the September 27, 2021 letter any more than we do 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 to the parties, in contravention to the requirements of Section 120.57(1), F.S. We give no consideration, substantive discussion, or weight to the June 28, 2022 letter.

D. Conclusion

The standard of review for reconsideration of our order is whether the motion identifies a point of fact or law that we 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."¹⁶

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 we gave to the record evidence, and instead would urge us to rule in accordance with EU's position. Instead, the matters raised by EU in its motion have been considered, but rejected by us as unpersuasive.. Accordingly, we find that EU's motion for reconsideration shall be denied.

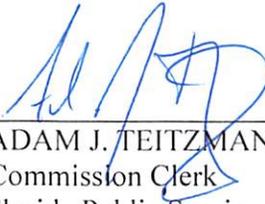
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that for the reasons set forth herein, Environmental Utilities, LLC's motion for reconsideration is denied. It is further

ORDERED that this docket shall be closed.

¹⁶ *Stewart Bonded Warehouse, Inc.* at 317.

By ORDER of the Florida Public Service Commission this 27th day of September, 2022.



ADAM J. TEITZMAN
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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.

RPS

NOTICE OF 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.

Any party adversely affected by the Commission's final action in this matter may request 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 by filing a notice of appeal with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.