

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide
wastewater service in Charlotte County by
Island Environmental Utility, Inc.

DOCKET NO. 020745-SU
ORDER NO. PSC-04-0333-PCO-SU
ISSUED: March 30, 2004

ORDER GRANTING INTERVENTIONS AND MOTION TO ABATE PROCEEDING

On February 12, 2004, the Palm Island Estates Association, Inc. (PIE) filed an Amended Motion to Intervene in this proceeding, amending a previously filed letter requesting intervention by its president. On February 16, 2003, James W. Wade (Wade) and the Preserve of Don Pedro Owners Association (PDPOA) filed their Joint Petition for Leave to Intervene.¹ On March 2, 2004, Island Environmental Utility, Inc. (IEU) filed a Motion to Abate Proceeding and to Revise Case Assignment Scheduling Record (CASR). This order addresses those filings and the responses filed thereto.

PIE's Amended Motion to Intervene

As grounds for its Motion, PIE states that it has over 190 members who are owners of real property within IEU's proposed service territory and whose interests will be substantially affected by IEU's application for certificate. In addition to the financial and health concerns of PIE's membership, IEU's application adversely impacts the interests of PIE's members because the issuance of the requested certificate violates the established local comprehensive plan policy (specifically, Infrastructure Policy 9.1.4, which prohibits the expansion of sanitary sewer services outside of Charlotte County's Infill Area Boundaries). Moreover, PIE requests a ten day period within which to prefile its testimony, to assure that its interests will be represented in this proceeding. Intervenor testimony was due on November 14, 2003. Because IEU has indicated that it intends to file a Restated Application to modify certain discovery responses, PIE also requests additional time within which to file its prehearing statement. Prehearing statements were due on February 16, 2004.

On February 17, 2004, IEU filed a Motion in Opposition to Request for Extension of Time to File Direct Testimony and Exhibits (Motion in Opposition). IEU states that it does not contest PIE's request to intervene. However, among other things, IEU argues that PIE was aware of IEU's proposal to provide centralized wastewater service for at least 18 months, yet it failed to take any action whatsoever on the original application until November 2003, and did not amend its request to intervene until February 12, 2004. IEU argues that PIE has had ample time to file its direct testimony in anticipation of being granted intervenor status.

¹ Letters requesting intervention were also previously filed by PIE member Dan Kett and by PDPOA member Andrew N. Nichols, both of whom have since indicated that they no longer wish to represent themselves in this proceeding because PIE and PDPOA have retained counsel to represent them.

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On February 27, 2004, PIE filed a response to IEU's Motion in Opposition, noting that Section 3-8-103 of the Charlotte County Code provides for mandatory connection to available sewer facilities throughout the County, with financial penalties imposed for the failure to connect or for tardy connections. Moreover, as was made clear at the pre-prehearing conference held among the parties and staff on February 24, 2004, significant deficiencies continue to plague IEU's application. The Restated Application filed on February 10, 2004, references a substantial increase in the rates to be charged. As such, the Restated Application is tantamount to a "new" application. Since it appears to be all but impossible for the proceedings to advance to hearing in April 2004, the applicant's position that it will be prejudiced by allowing PIE an extension of time to file testimony and exhibits appears to be without merit. PIE requests either additional time within which to file testimony and exhibits and to obtain intervenor status or that IEU's application be dismissed without prejudice.

Wade/PDPOA's Joint Petition for Leave to Intervene

In their Joint Petition, Wade and PDPOA state that Wade is a resident of the State of Florida and owns a home on Don Pedro Island within the proposed service territory of IEU. The PDPOA is comprised of approximately 35 members who own homes and property on Don Pedro Island and who would be substantially affected by the granting of a certificate to IEU. IEU has not demonstrated that it can or will comply with the applicable legal and regulatory requirements for the issuance of an original certificate under Chapter 367, Florida Statutes, and Rule 25-30, Florida Administrative Code. Like Wade, all PDPOA members have direct and substantial interests in seeing that wastewater services and infrastructure on the barrier islands are reliable, safe, cost-effective, and compliant with federal, state and local environmental, land use, and zoning requirements. PDPOA satisfies the test for associational standing set forth in Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992), and should be allowed to intervene as a party in this proceeding.

On February 23, 2004, IEU filed a response to the Joint Petition, arguing that the primary problem with allowing Wade and the PDPOA to intervene is that their Prehearing Statement discloses that they intend to call four witnesses and to introduce six exhibits. Neither Wade nor the PDPOA have filed any prefiled testimony. Therefore, it would be inappropriate to allow those persons to be witnesses on their behalf in this proceeding. If intervention is allowed, the intervenors must accept the case as they find it and not be allowed to call any witnesses or to introduce any exhibits.²

² On February 27, 2004, Wade and PDPOA filed a Memorandum in Opposition to IEU's Response to Joint Petition for Leave to Intervene. Because this filing is in the nature of an unauthorized reply to a response, it is not considered herein.

IEU's Motion to Abate Proceeding and to Revise CASR

In its Motion to Abate, IEU states that it wishes to restate and refile its original certificate application in order to reflect certain changes in its proposal to provide wastewater service to the area and to clarify certain issues raised by Commission staff. Other parties should be afforded adequate time to consider the restated application and an opportunity to file testimony responsive to it. IEU will be prejudiced if it is not afforded adequate time to consider and respond to the intervenors' testimony if the intervenors are allowed to file direct testimony so close to the currently scheduled hearing dates of April 13 and 14, 2004. IEU has attempted to contact all of the intervenors and other interested persons, and intervenors Charlotte County, Wade, and the PDPOA do not object to abating this proceeding. The other intervenors had not responded as of the date of filing of the Motion. IEU believes that the interests of all parties and justice will be served if the proceeding is abated and the CASR revised to permit all parties who so desire to file testimony and other responsive pleadings. Abating the proceeding will also allow the County time to amend its Comprehensive Plan to permit the implementation of IEU's proposal to provide centralized wastewater service. IEU requests that this matter be abated for 60 days from the date of issuance of this order and that Commission staff be instructed to revise the CASR accordingly.

Ms. Linda Bamfield (Bamfield), Wade/PDPOA, and PIE timely filed responses to the Motion on March 8, 9, and 12, respectively. Little Gasparilla Island Property Owners Association (LGIPOA) filed a response to the Motion on March 19, 2004. Because LGIPOA's response was untimely filed, it is not considered herein.³ Bamfield states that she is opposed to the Motion, preferring instead that the docket be closed without prejudice for IEU to file a new application, start clean, and not have conflicting information on file. Moreover, a new notice to the public could be issued containing a correct legal description. Parties would then have adequate time to respond to the issues based upon correct information, instead of having to make assumptions based on ever-changing, amended, revised, and corrected information. Wade/PDPOA and PIE state that they do not object to the abatement of this proceeding to allow IEU to file a new application in this docket, provided that i) a new procedural schedule is established after the application is deemed complete and ii) such schedule gives them full and fair opportunity to obtain discovery, prefile testimony, and otherwise participate as parties. Wade/PDPOA and PIE further state that by filing their responses, they in no way agree or stipulate that IEU has satisfied the Commission's noticing requirements for an original wastewater certificate application.

Intervention Requests and Motion to Abate Proceeding Granted

It would be a waste of the parties' and this Commission's time and resources to advance to hearing on an incomplete application. Even if the Restated Application fully complied with Rule 25-30.033, Florida Administrative Code, Application for Original Certificate of

³ The time for filing a response ran on March 15, 2004. See Rules 28-106.204 and 28-106.103, F.A.C.

Authorization and Initial Rates and Charges, it would not accord with the principles of due process, nor would it be fair to all parties, to advance to hearing on a Restated Application filed after the filing of intervenor and staff testimony, particularly when the Restated Application contains material changes to the Amended Application. Upon consideration of the foregoing, and being fully advised on the premises, IEU's Motion to Abate is granted. IEU shall file, within 60 days of the issuance date of this Order, an application which fully complies with all of the requirements of Rule 25-30.033, Florida Administrative Code, including the noticing requirements contained therein. If the application is deemed complete, new prehearing and hearing dates will be scheduled and new controlling dates will be established to afford all parties a full and fair opportunity to obtain discovery, prefile testimony, and otherwise participate as parties. Considering that this docket has been open since July 2002, when the first Application for Original Certificate was filed, requests for extension of the 60-day abatement period are strongly discouraged.

Further, because their substantial interests may be affected by actions taken in this proceeding, PIE's Amended Motion to Intervene and Wade/PDPOA's Joint Petition for Leave to Intervene are granted. PIE's Request for Extension of Time to File Direct Testimony and Exhibits is mooted by the granting of the Motion to Abate, and therefore need not be ruled upon.

Based on the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that PIE's Amended Motion to Intervene in this proceeding is granted. It is further

ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings, and other documents that are hereinafter filed in this proceeding, to Gary L. Wilkins, Esquire, Wilkins, Frohlich, Jones, Hevia, Russell, Hanaoka & Mizell, P.A., 18501 Murdock Circle, 6th Floor, Port Charlotte, Florida 33948. It is further

ORDERED that Wade and PDPOA's Joint Petition for Leave to Intervene in this proceeding is granted. It is further

ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings, and other documents that are hereinafter filed in this proceeding, to D. Bruce May, Jr. and Lawrence E. Sellers, Esquires, Holland & Knight LLP, P.O. Drawer 810, Tallahassee, Florida 32301, and to James W. Wade, P.O. Box 950666, Lake Mary, Florida 32795-0666. It is further

ORDERED that IEU's Motion to Abate Proceeding and to Revise CASR is granted. IEU shall file, within 60 days of the issuance date of this Order, an application which fully complies with all of the requirements of Rule 25-30.033, Florida Administrative Code, including the noticing requirements contained therein. If the application is deemed complete, new prehearing

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and hearing dates will be scheduled and new controlling dates will be established to afford all parties a full and fair opportunity to obtain discovery, prefile testimony, and otherwise participate as parties. Requests for extension of the 60-day abatement period are strongly discouraged.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 30th day of March, 2004.



CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

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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 Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, 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.