

State of Florida



# Public Service Commission

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

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**DATE:** September 19, 2024

**TO:** Office of Commission Clerk (Teitzman)

**FROM:** Division of Engineering (Watts, King, Ramirez-Abundez, Ramos) *TB*  
Division of Accounting and Finance (Norris, Przygocki, Sowards) *AM*  
Division of Economics (Bruce, Sibley) *ED*  
Office of the General Counsel (Thompson, Dose) *JC*

**RE:** Docket No. 20240032-SU – Application for certificate to provide wastewater service in Charlotte County by Environmental Utilities, LLC.

**AGENDA:** 10/01/24 – Regular Agenda – Motion to Dismiss and Motion for Reconsideration – Oral Argument Not Requested; Participation is at the Discretion of the Commission

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Passidomo

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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## Case Background

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

On March 28, 2024, EU provided 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.

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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 (OEP)<sup>1</sup> 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 recommendation address Mr. Hurst's Motion to Dismiss (issue 1) and EU's Motion for Reconsideration (issue 2). The Commission has jurisdiction pursuant to Sections 367.011, 367.031, 367.045, and 367.081, Florida Statutes (F.S.).

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<sup>1</sup> Order No. PSC-2024-0324-PCO-SU

## Discussion of Issues

**Issue 1:** Should Mr. Hurst's Motion to Dismiss be granted?

**Recommendation:** No. Staff does not believe that Mr. Hurst's Motion to Dismiss demonstrates that EU's application fails to state a cause of action upon which relief may be granted. There is also already an administrative hearing scheduled in this docket. Therefore, Mr. Hurst's Motion to Dismiss should be denied. (Thompson)

### **Staff Analysis:**

#### 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 the Commission has previously considered and denied<sup>2</sup> these same arguments from Mr. Hurst.

Staff 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, staff recommends that Mr. Hurst's Motion to Dismiss be denied.

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<sup>2</sup> Order No. PSC-2021-0405-PCO-SU.

**Issue 2:** Should EU's Motion for Reconsideration be granted?

**Recommendation:** No. Reconsideration should be denied because the Motion for Reconsideration fails to raise a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering their decision. (Thompson)

**Staff Analysis:**

Law

The appropriate standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Commission 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 the Commission 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.

### Staff's 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 the Commission has 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 the Commission’s 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 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. Staff believes 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, staff believes 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, staff recommends that EU's Motion for Reconsideration be denied.

**Issue 3:** Should this docket be closed?

**Recommendation:** No. This docket should remain open pending the Commission's final decision on EU's application. (Thompson)

**Staff Analysis:** This docket should remain open pending the Commission's final decision on EU's application.