

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-2022-0267-FOF-SU
ISSUED: July 8, 2022

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK
MIKE LA ROSA
GABRIELLA PASSIDOMO

FINAL ORDER DENYING APPLICATION FOR AN ORIGINAL CERTIFICATE
TO PROVIDE WASTEWATER SERVICE IN CHARLOTTE COUNTY
BY ENVIRONMENTAL UTILITIES, LLC.

BY THE COMMISSION:

APPEARANCES:

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BACKGROUND

Section 367.011(3), Florida Statutes (F.S.), provides that regulation of water and wastewater utilities is in the public interest as an exercise of the police power of the state for the protection of the public health, safety, and welfare. The provisions of Chapter 367, F.S., are to be liberally construed for accomplishment of this purpose. Section 367.031, F.S., gives us the authority to issue a utility a certificate of authorization to serve a specific service area. Section 367.045(1)(b), F.S., authorizes us to require each applicant for an initial certificate to provide all information required by our rules or orders, which may include a detailed inquiry into the ability of the applicant to provide service, the area and facilities involved, the need for service in the area involved, and the existence or nonexistence of service from other sources within geographical proximity.

On October 13, 2020, Environmental Utilities, LLC (EU or Utility) filed its application for an original wastewater certificate in Charlotte County (County). The Utility sought 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 are 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 sought 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), Linda Cotheman (LC), and several other customers. The

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.*

Office of Public Counsel (OPC) intervened on September 24, 2021.² At the January 26, 2022 Prehearing Conference one objecting party, Barb Dwyer, voluntarily withdrew and pro se parties Deric Flom, Joseph Bokar, Laurie Tremblay, Rhonda Olson, Richard Leydon, Roy Petteway, and Robert Lee Williams were dismissed as parties from this proceeding for failure to appear at the Prehearing Conference as required by the Order Establishing Procedure.³

On February 8, 2022, we held an evidentiary hearing in Venice, Florida. This hearing was followed by two 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. EU, OPC, PIE, and LC filed post-hearing briefs on March 16, 2022.

We have jurisdiction pursuant to Sections 367.011, 367.031, 367.045, 367.081, and 367.101, F.S.

DECISION

I. EU's Motion to Reopen the Record

On February 23, 2022, the Utility submitted an unopposed motion requesting that the record be reopened for the limited purpose of admitting EU witness Swain's prefiled direct testimony. On February 8, 2022, we held an evidentiary hearing in this docket. Witness Swain was one of several witnesses who testified. Inadvertently, the Utility never moved to have witness Swain's prefiled direct testimony entered into the record during the hearing. Witness Swain was subject to cross-examination by all parties, staff, and the Commission as if her testimony had been admitted. Further, the parties cited to witness Swain's testimony in their post-hearing briefs.

Granting the motion will complete the record in this proceeding. No party is prejudiced by reopening the record, and no party opposes reopening the record for the limited purpose of admitting witness Swain's prefiled direct testimony into the record. We find that the Utility's motion shall be granted, and the record in this proceeding shall be reopened for the limited purpose of admitting witness Swain's prefiled direct testimony.

II. Filing and Noticing Requirements

A. Parties' Arguments

EU asserted that the Utility provided notice to all customers as required, for both the initial filing and the subsequent hearings. EU argued that the intervenors provided no evidence on this issue, and the Utility presented sufficient evidence that confirms that the noticing

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.*

³ Order No. PSC-2022-0046-PCO-SU, issued January 28, 2022, in Docket No. 20200226-SU, *In re: Application for certificate to provide wastewater service in Charlotte County, by Environmental Utilities, LLC.*

requirements were met. While neither OPC nor PIE took a position on this issue, LC argued that EU did not meet its filing and noticing requirements.

LC argued that notice was required for both the application submission and the Customer Service Hearings. Although EU twice published a formal notice in a weekly newspaper, on both occasions the timing of the publication and the applicant's actions taken to notify the community were misleading and incorrect. LC argued that many residents did not receive the notice of EU's application in a timely manner. LC also contended that the newspaper notice was published in a non-local newspaper and held inaccurate information regarding the application.

B. Analysis

For original certificates, Rule 25-30.030, F.A.C., requires the utility to notice relevant local government authorities, nearby utility entities, and each owner of property within the proposed service territory. The notice must contain a description of the proposed service area, contact information, and instructions on how potential customers could file objections with us. Witness Boyer testified that EU sent a written notice of its application to appropriate parties and potential customers in accordance with the noticing requirements identified in the rule. Our staff reviewed EU's draft notice of application prior to its distribution and determined it contained the information required by Rule 25-30.030, F.A.C. Several potential customers, including PIE and Linda Cotherman, objected to the Utility's application for an original certificate after receiving this notice.⁴ Based on our review of the record, it appears that EU has met the noticing requirements of Rule 25-30.030, F.A.C.

Rule 25-30.033(1), F.A.C., requires a utility to file with its application certain information, including a description of the proposed utility, technical and financial information, a description of the proposed service territory, need for service, and other documentation. On October 13, 2020, the Utility filed its application pursuant to the rule. EU witness Boyer testified that several modifications were made subsequent to the filing of the initial application, including deleting Cape Haze, Hideaway Bay Beach Club (Hideaway Bay), and Placida Harbor from the proposed service territory.

Rule 25-30.033(1)(k)(3), F.A.C., requires the applicant to provide the current land use designation as described in the local comprehensive plan, and if a change in designation is required, to detail steps taken to facilitate that change. EU's application identified the proposed service territory's current land use designation as Compact Growth Mixed Use. However, PIE witness Hardgrove testified that the proposed service territory is located in the Bridgeless Barrier Island Overlay District (BIOD), and identified it as part of the County's designated Rural Service Area. LC argued that the proper designation is Coastal Residential. In cross-examination, EU witness Boyer was uncertain of the land use designation, but agreed that the land was in the Rural Service Area. The Charlotte County 2050 Comprehensive Plan (Comp Plan) Future Land Use (FLU) Map 3 and FLU Map 9 clearly indicated the proposed service territory is within the Rural Service Area and the BIOD, respectively.

⁴ The objections included that a need for service had not been shown, the proposed service is not in the public interest, and a belief that EU does not have the financial or technical ability to provide wastewater service.

C. Conclusion

We find that the Utility properly notified potential customers of its application and met the noticing requirements of Rule 25-30.030, F.A.C. EU's application erroneously identified the proposed service territory's current land use designation as Compact Growth Mixed Use. Although the application as filed noted the incorrect land use designation, this error has no meaningful impact on whether or not EU's application should be granted. The application meets all other noticing requirements of Rule 25-30.033, F.A.C.

III. Need for Service

A. Parties' Arguments

EU argued that central wastewater service is needed at this time and the Charlotte County Sewer Master Plan identifies the islands as a priority for central wastewater service by 2022. EU expected to have the wastewater system operational by the end of 2023. EU stated that the County has determined the septic to central sewer conversion is needed. According to EU, evidence of the County's support for the project is provided by its designated representative's testimony in response to PIE's subpoena, the letter in support, dated September 27, 2021, and the County's approval of the Bulk Sewer Treatment Agreement (Bulk Agreement). EU argued that, based on the statement made by County deponent Rudy, it is the County's opinion that EU's application was consistent with the Comp Plan.⁵ EU asserted that the 2017 Charlotte County Sewer Master Plan (Sewer Plan) identifies the proposed service territory as a priority for conversion from septic to central sewer. EU contended the County has performed numerous studies showing the positive impact of central sewer conversions. EU argued the County's connection ordinance and its implementation encourages septic to sewer conversions such as the Utility's and is consistent with local and statewide trends.

Further, EU witness Boyer asserted that his personal experiences with older and/or failing septic systems demonstrates the need for central sewer. EU argued that not only is there a current need for service in the proposed service territory; but, there are undeveloped areas where service will be needed in the future.

EU further argued that PIE witness Weisberg had no expertise on the adverse impacts of septic tanks or the appropriateness of septic tanks versus central sewer in the proposed service territory. EU contended that the intervenors' interpretation of the Comp Plan failed to acknowledge other existing utilities on the island, including bulk water agreements by the County with at least three utilities and two other central wastewater facilities. EU also argued the intervenors misunderstood the Comp Plan, which prohibits public utilities, but does not prohibit private utility service.

⁵ Charlotte County was not a party to the instant 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.

PIE argued that EU did not show a need for service in the proposed service area. PIE asserted that its witness Hardgrove demonstrated that the proposed development was contrary to the Comp Plan, as part of the Rural Service Area, which FLU Policy 3.2.4 states will rely on septic systems. PIE further noted that FLU Policy 3.2.4 allows exemptions only when the developer has “clearly and convincingly demonstrated” health problems for which there are no other feasible solutions, and that EU did not meet this standard of evidence. PIE argued that EU did not meet this standard based on deponent Rudy’s deposition, and that EU offered no testimony establishing a health problem, nor testing, nor evidence of failed systems, nor any witnesses from the County for the same.

PIE highlighted that the proposed service territory is within the BIOD per the Comp Plan, which states that the County “shall not” expand infrastructure, including wastewater service to the bridgeless barrier islands. PIE argued that EU inappropriately took the position that the Bulk Agreement was evidence of consistency, when the County’s representative testified that whether a comprehensive plan amendment was necessary had not yet been determined.

PIE also highlighted Potable Water & Sanitary Sewer (WSW) Policy 3.2.4 which states that the County “shall discourage expansion of the service areas of utility companies regulated by the [Commission].” Furthermore, PIE noted that FLU Policy 1.1.6 states that all county regulations must be subordinate to the Comp Plan and, given the above policies, EU has not demonstrated a need for service.

PIE observed that during the service hearings, only one potential customer expressed a desire for the application’s approval out of 53 speakers, and no elected officials, including County officials, spoke in support of the application.⁶ PIE contended that if the County felt there was a compelling need it would have been a participant in the service hearings instead of solely providing County deponent Rudy.

LC argued that EU’s application was inconsistent with the Comp Plan as the service territory is within the Rural Service Area and the BIOD, both of which are restricted from wastewater infrastructure development. LC noted that FLU Policy 3.2.4 has specific exemptions to allow the construction of sewer infrastructure in the event of health problems, but that the County deponent Rudy was unaware of any health problems that would justify sewer infrastructure, and EU witness Boyer was unaware of any water quality testing that would serve as evidence of a public health issue. LC contended that EU’s claim of environmental need, based on red tide, is rebutted by PIE witness Weisberg’s statements regarding the lack of supporting evidence that the barrier islands’ septic systems are responsible. LC asserted that as EU witness Cole acknowledged, new septic systems are designed to meet current standards and any issue with individual septic tanks is one of code enforcement.

LC highlighted that EU did not provide any requests for service in its application and that PIE witness Schaffer testified that none of PIE’s members have requested service by EU.

⁶ A total of 53 potential customers spoke at the February 8, 2022, (21 speakers) and February 9, 2022, (32 speakers) service hearings.

Furthermore, LC observed that the written correspondence to the docket and participants in the service hearings were generally in opposition.

OPC did not take a position on this issue.

B. Analysis

i. **Need for Service**

Requests for Service

Section 367.045(1)(b), F.S., requires an examination of the need for service in the proposed service territory. Pursuant to Rule 25-30.033, F.A.C., an applicant for original certificate must provide a statement showing the need for service in the proposed territory. Specifically, Rule 25-30.033(1)(k)(2), F.A.C., requires a utility provide all requests for service made by property owners or developers in the proposed service territory. EU's application did not include any requests for service from current property owners or developers.

PIE witness Schaffer testified that no member of PIE, a voluntary homeowners' association, had requested service from the Utility and LC witness Cotherman testified that EU has not provided evidence of requests for service. Of the 53 customers that testified at the service hearings, only 1 indicated support for EU's application based on difficulties with the maintenance of their septic system. Multiple customers testified that their current septic systems are working and that they do not need or want central sewer. The written comments submitted in the docket were largely in opposition to EU's application, with a small minority in support.

Since there have not been any requests for service provided, the record does not support a need for service based upon property owners or developer requests. As discussed below, the need for service is not specifically defined in either statute or rule and therefore may also be based on compliance with environmental or health requirements.

Environmental Need

EU stated that there is a need for service 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 Governor as making the environmental remediation of the area a priority. However, during cross-examination EU witness Boyer testified that no state agency, including the Department of Environmental Protection, nor the County are requiring or mandating the installation of a central sewer system in the proposed service territory. Moreover, the witness acknowledged that Charlotte County continues to issue permits for new septic systems.

PIE witnesses Hardgrove and Schaffer agreed that the Utility provided no water quality testing in the proposed service territory demonstrating elevated pollution, or that there is a public health issue. In deposition, County deponent Rudy stated that the County was unaware of any water quality testing in the proposed service area and there was no evidence of a health problem to justify sewer infrastructure. Regarding contribution to red tide, PIE witness Weisberg testified

that there is no evidence that septic tanks located in the proposed service territory contribute to red tide or reduced water quality, and the residents of bridgeless barrier islands are better off with septic tanks than they would be with central sewer.

EU witness Boyer testified that the need for sewer expansion into the proposed service territory is based in part on an environmental need identified by the County and enacted through the Sewer Plan. EU stated in its application that the Sewer Plan recommends the conversion of all areas within a certain environmental impact score range be converted from septic to sewer within five years, including the proposed service territory.⁷ However, based upon our review, the Sewer Plan does not require conversion of all similarly scored areas within five years.⁸ Furthermore, while witness Boyer characterized the Sewer Plan as a recommendation, it appears to us to instead be an acknowledgement of potential connections in the proposed service territory. As PIE witness Hardgrove attests, the Sewer Plan only included conversion of two existing private wastewater treatment plants, not conversion of septic tanks to central sewer. The Sewer Plan prioritizes connection to private utilities based on the desire of the utility owner and the County Utility Department to connect, rather than prioritizing connection based on environmental considerations.

On rebuttal, EU witness Boyer testified to personal observations of failing septic tanks including the smell of waste, pipes disconnected from the drain field resulting in waste on the ground, and that many of the existing septic tanks are under water during high tide. On cross-examination, witness Boyer stated that he lacked photos or evidence to support his observations, and stated that he had not reported any of his observations to state or county environmental regulators.

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 or identified any immediate health concerns. Therefore, we find that EU has not demonstrated a need for service in the proposed service territory based on compliance with environmental or health requirements.

Mandatory Connection Ordinance

In its brief, EU argued that Charlotte County's mandatory connection ordinance is evidence of a need for service in the proposed service area, in addition to the County showing tacit support of a central sewer system like the one proposed by the utility.⁹ Each request for

⁷ The Sewer Plan used an environmental impact level scoring criteria to identify project areas as part of its methodology to prioritize areas for future capital improvement plans, which also considered infrastructure sequencing, utility input, cost considerations, and other factors. The environmental impact level score is an average of three factors which are each given a score between 1 and 5. Those factors are: (1) proximity to surface waters; (2) age of septic tanks; and (3) nitrogen loading. The impact scores of the areas addressed in this docket are those that range from 4 to 5.

⁸ The Sewer Plan recommends conversion for areas with an average impact score of 4 to 5 during the 5-year, 10-year, 15-year plans, or in the case of at least six areas, no conversion at all.

⁹ Section 3-8-41(a), Charlotte County Ordinances. ("All developed property must connect the plumbing system for 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").

wastewater certification is scrutinized on a case-by-case basis, because no two service areas are the same. There are multiple factors laid out in Rule 25-30.033, F.A.C., which we may consider in deciding whether there is a need for service. Those factors include the number and class of customers that are living or will be living in a proposed service area. Additionally, we may consider what, if any, requests for service exist. We may also consider current land use designations as described in a local comprehensive plan, including any known land use restrictions such as environmental restrictions.

We did not consider the existence of the mandatory connection ordinance dispositive of the issue of need for service. There is ample evidence in this docket that virtually no residents requested service from EU. Furthermore, EU's application conflicts with Charlotte County's Comp Plan, for reasons set forth in the following section. Moreover, Charlotte County continues to issue septic tanks permits to the residents in the proposed service area. Nor did EU present evidence of an environmental need that would demonstrate a need for service. Ultimately, we found this evidence more compelling in weighing the need for service than the existence of a mandatory connection ordinance.

Review of Local Comprehensive Plan

Section 367.045(5)(b), F.S., provides that, if an objection is made to the issuance of a certificate on the basis of inconsistency with the local comprehensive plan, we shall consider, but are not bound by, the local comprehensive plan of the county or municipality.¹⁰ A separate issue was not identified specifically addressing the Charlotte County Comp Plan; however, pursuant to the requirements of the statute, we find that consideration of the Charlotte County Comp plan is appropriate, and the parties addressed the consistency of EU's proposal with the Charlotte County Comp Plan in the issue regarding need.

EU witness Boyer's testimony repeatedly relied upon the County's approval of the Bulk Agreement or inferring that the County's position that the proposed central sewer system was consistent with the Comp Plan. Witness Boyer stated that since the County entered into the Bulk Sewer Treatment Agreement with EU, the County recognizes the need for service in the proposed territory. However, PIE witness Hardgrove testified that the proposed central sewer system was contrary to the Comp Plan because it is located within the bridgeless BIOD and the Rural Service Area, which both prohibit expansion of central sewer infrastructure through numerous policies in the Comp Plan. Witness Hardgrove further asserted that while the Bulk Agreement may have received approval by the County Commission, there was no discussion of consistency with the Comp Plan. While LC witness Cotherman also argued that EU's proposal is inconsistent and not allowed under the Comp Plan, LC did not outline any policies that demonstrate this.

The Comp Plan designates the proposed service territory as part of the BIOD and the Rural Service Area, which have separate zoning requirements. While PIE witness Hardgrove referenced Coastal Element CST 3.2.7 as prohibiting infrastructure in the proposed service

¹⁰ *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.")

territory by the County or other developers, we note the referenced policy, CST 3.2.7, applies to offshore islands and not the proposed service territory. However, in FLU Appendix I for the BIOD, the Comp Plan states it is not the County's intent to expand wastewater service to the bridgeless barrier islands, and they shall not expand the scope of central sewer service to them. Witness Boyer argued that the Comp Plan limitations on expanding infrastructure only applies to the County, not private utilities such as EU. We agree with witness Boyer that the BIOD language appears to restrict County development, not a private utility regulated by us.

However, the 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." The term used in FLU Policy 3.2.4 includes private utilities "granted a certificate to serve a delineated area by the [Commission]" as well as those approved by the County. In discovery, EU stated that the Sewer Plan constitutes evidence of a public health problem. However, the Sewer Plan does not address a public health issue in the service territory, and instead only recognizes the expectation of two private utilities connecting to the County's system. We agree with witness Hardgrove that these policies appear to be inconsistent with the proposed utility.

In deposition, County deponent Rudy stated that the County believed EU's application to be consistent with the Comp Plan. Although he appeared on behalf of the County in this matter, deponent Rudy's testimony does not resolve with specificity any of the disagreements presented by the parties regarding the Comp Plan. No County representatives were present at the hearing to opine on any contradictory interpretations of the Comp Plan.

We are only required to consider the Comp Plan and are not bound by it; as such, we are granted discretion in deciding whether to defer the Comp Plan. Based on the land designation and policies contained within the Comp Plan, we find EU's application is inconsistent with the Charlotte County's local comprehensive plan. Additionally, while we are not bound by the local comprehensive plan, we find that inconsistency with the Comp Plan supports our finding that granting EU's application is not in the public interest, as set out later in this Order.

C. Conclusion

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 or identified any immediate

health concerns. Based on the record, and especially noting the level of opposition to EU's proposal by its prospective customers, we find that customers are highly unlikely to voluntarily connect to EU's system. Therefore, we find that EU has not demonstrated that there is a need for service in the proposed service territory. Further, we find that EU's application is inconsistent with the Charlotte County Comp Plan.

IV. Consistency with Charlotte County's Sewer Master Plan

There is no statutory or rule requirement that we consider the Charlotte County Sewer Master Plan. Just as we are not bound by a local comprehensive plan in a certificate proceeding, we find that a document such as the Sewer Plan – which is not contemplated in Section 367.045, F.S., or Rule 25-30.033, F.A.C. – is not binding upon us. However, consistency with the Sewer Plan was identified as an issue in this proceeding, and there was substantial evidence and discussion at the hearing regarding this issue. Therefore, we find that a ruling on this issue is appropriate.

A. Parties' Arguments

EU stated that the Sewer Plan highlights issues with septic systems contributing nutrients to the groundwater. Further, EU argued PIE witnesses Suggs' and Weisberg's testimonies support that the soil conditions would make septic systems ineffective at removing nutrients. EU asserted that septic tank repairs are not occurring, and that regulatory limitations regarding older systems allow them to continue operation even when ineffective. Further, EU stated that the Sewer Plan scores the proposed service territory at an average impact level of greater than four out of five, which identifies it for septic to sewer conversion in five years. Also, according to EU, Charlotte County's approval of the Bulk Agreement and deposition of the County's witness support the consistency of the application with the Sewer Plan.

PIE asserted that EU's application is inconsistent with the Comp Plan, and therefore is also inconsistent with the Sewer Plan. PIE emphasized that, as explained by witness Hardgrove, the projects listed in the Sewer Plan are the connection of two existing wastewater utilities using existing central sewer infrastructure, not the proposed project. PIE contended that since FLU Policy 1.1.6 states that all county regulations are subordinate to the Comp Plan, the application is inconsistent with the Comp Plan unless it is amended, and therefore, inconsistent with the Sewer Plan, as infrastructure development is not allowed on the bridgeless barrier islands.

LC argued the Sewer Plan has several inconsistencies and inaccuracies regarding the bridgeless barrier islands, and therefore, the Sewer Plan is inadequate support for EU's application. LC contended that the priority ratings developed in the Sewer Plan are flawed because each of the three components contained inaccurate or incomplete assumptions. LC asserted that the proposed Utility is not identified within any of the multi-year plans within the Sewer Plan. LC further asserted that the only two utilities identified are Knight Island Utilities, Inc. (Knight Island Utilities) and Hideaway Bay, and that their inclusion is based on the desire of the owners of Knight Island Utilities and Hideaway Bay. LC noted the Sewer Plan project descriptions and maps are inconsistent and contain numerous errors regarding the two utilities to

be connected. LC highlighted that, excluding County deponent Rudy, who served as the County representative, the County has not been involved in this proceeding, did not intervene, and submitted no documentation in support of EU. LC contended that EU's reliance upon the Bulk Agreement being approved by the County is erroneous, as no evidence of a proper review by the County of the Bulk Agreement regarding consistency with the Comp Plan was submitted. LC argued that the Sewer Plan was not meant to be an arbiter of septic to sewer conversions.

OPC did not take a position on this issue.

B. Analysis

EU stated in its application that according to the Sewer Plan all areas within a certain environmental impact score range should be converted from septic to sewer within five years, including the proposed service territory.¹¹ However, based upon our review, the Sewer Plan does not require conversion of all similarly scored areas within five years.¹² Furthermore, while EU witness Boyer characterized the Sewer Plan as a recommendation, it appears to us to instead be an acknowledgement of potential connections in the proposed service territory. As PIE witness Hardgrove attested, the Sewer Plan only included conversion of two existing private wastewater treatment plants, not conversion of septic tanks to central sewer. The Sewer Plan's 5-year improvement plan identified 12 project areas for conversion, then states: "In addition, two private utilities are expected to connect to the County system during the 5-year plan...." The two utilities are identified as Hideaway Bay and Don Pedro Utility, and involve use of existing collection systems and conversion of existing wastewater treatment plants to pump stations connecting to the County through two separate transmission pipes in five and seven years, respectively. This arrangement is not the one proposed by EU, and in fact, EU removed Hideaway Bay from its proposed service territory.

C. Conclusion

Based on our evaluation, we find that EU's application does not appear to be consistent with Charlotte County's Sewer Master Plan.

¹¹ The Sewer Plan used an environmental impact level scoring criteria to identify project areas as part of its methodology to prioritize areas for future capital improvement plans, which also considered infrastructure sequencing, utility input, cost considerations, and other factors. The environmental impact level score is an average of three factors which are each given a score between 1 and 5. Those factors are: (1) proximity to surface waters; (2) age of septic tanks; and (3) nitrogen loading. The impact scores of the areas addressed in this docket are those that range from 4 to 5.

¹² The Sewer Plan prioritizes conversion for areas with an average impact score of 4 to 5 during the 5-year, 10-year, 15-year plans, or in the case of at least six areas, no conversion at all.

V. Competition with or Duplication of Another System

A. Parties' Arguments

EU stated that since the proposed service territory is being served by septic tanks, the proposed sewer system will not be a duplication or in competition with another system. EU argued that LC witness Cotherman's claim of competition with the County is inaccurate since the County has entered into a Bulk Agreement with EU. EU further asserted that any purported rights the County has to serve the proposed service territory were transferred to EU due to the Bulk Agreement, and therefore, they are not in competition.

LC asserted that the proposed service territory is already designated as part of the Charlotte County Utilities' service area, except for Knight Island Utilities and Hideaway Bay. LC highlighted that per the Utility's map and EU witness Boyer's testimony, some Knight Island Utilities customers would have to disconnect service then connect to EU's service at additional cost. LC further noted that the Utility's maps and territorial description were not properly updated to reflect the removal of Hideaway Bay.

Neither PIE nor OPC took a position on this issue.

B. Analysis

Pursuant to Section 367.045(5)(a), F.S., we may not grant a certificate of authorization for a proposed system that will be in competition with, or duplication of, any other system or portion of a system, unless we first determine that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service. Section 367.021(11), F.S., defines "system" as facilities and land used or useful in providing service.

EU witness Boyer testified that two exempt utilities with package plants provide wastewater service to parts of the bridgeless barrier islands, including Knight Island Utilities. LC witness Cotherman attested that a segment of the northern portion of the service territory is already being served by Knight Island Utilities. At the hearing, EU witness Boyer agreed that a portion of EU's proposed service territory is already served by Knight Island Utilities, and that the Utility planned to disconnect customers from Knight Island Utilities' collection system and attach them to EU's collection system. EU did not provide a statement or evidence that Knight Island Utilities' system is inadequate to meet the reasonable needs of the public or is unable, refusing, or neglecting the provision of reasonably adequate service.

C. Conclusion

A portion of EU's proposed service territory is currently receiving wastewater service from Knight Island Utilities; therefore, certification of EU would result, in part, in the creation of a utility which would be in competition with, or duplication of, another system. Had we granted EU's request for certification, we would require the Utility to file an amended territory

description and map within 30 days of the issuance of our Order, and this docket would remain open for the parties and us to address the amended territory description and map. However, as discussed in Section X of this Order, we are denying EU's application for a certificate.

VI. Financial Ability

A. Parties' Arguments

In its brief, EU asserted that the owners have the ability to raise the money necessary to invest in EU. EU further stated that while the Utility does not currently have any loan commitments, it has a party interested in funding the project subject to certification and ratemaking treatment. EU also stated that, due to PIE witness Schultz's lack of utility regulatory accounting experience, she is incorrect in her assessment that EU does not have the financial ability to fund the Utility. Lastly, EU stated that EU witness Swain addressed each error in PIE witness Schultz's testimony and opined that EU is going to be in the position to fully fund the construction and operation of the Utility.

In its brief, PIE stated that EU does not have the financial wherewithal to serve the proposed service area. Witness Schultz stated that the letters from Centennial Bank and Freedom Holdings Manatee, LLC are not proof of the financial ability of EU for several reasons. Regarding the Centennial Bank letter, PIE emphasized that the letter specifically stated that, "this letter is not a commitment to lend." Regarding the Freedom Holdings Manatee, LLC's letter, PIE argued that there were several unknowns such as the loan terms, the lack of an appraisal of the system due to EU not being certificated, and the ability of Freedom Holdings Manatee, LLC to fund a project for which costs have not been fully determined.

According to LC, EU has limited financial history and is currently in debt. LC argues that no funding sources were identified or documented to date outside of the suggestion of equity financing based on personal finances.

In its brief, LC stated that based on the testimony of PIE witness Shultz, who stated that EU and the Boyers will be unable to fulfill their debt obligations, EU has not met its burden to demonstrate the necessary financial ability to provide service to the proposed service area pursuant to Rule 25-30.033, F.A.C. LC also stated that EU has not demonstrated that it has the financial resources to hire, staff, and handle the business management of a public utility on the order of magnitude of that which would be governed by the certificate of authorization.

OPC did not take a position on this issue.

B. Analysis

The Utility provided both the financial statements of the Utility and the personal financial statements of EU's owners. EU also provided letters from Centennial Bank and Freedom Holdings Manatee, LLC, both of whom showed interest in providing loans to the Boyers pending our approval of the wastewater certificate. While we find that these letters do not signify a

guaranteed contract between EU and the lender, they do demonstrate EU's potential ability to raise the necessary capital. In response to discovery, the Utility stated that it would like to be funded with a combination of debt and equity, but until the certificate is granted, it is premature to bring in an investor or obtain a loan; thus the owner is prepared to fund the Utility with an infusion of equity through personal loans.

In response to PIE witness Schultz's opinion that EU would be unable to fulfill its debt obligations, EU witness Swain made two corrections she believed were necessary to witness Schultz's calculations. First, witness Schultz only included contributions in aid of construction (CIAC) charges based on ERCs at year one, without including additional connections that the Utility is anticipating. Second, witness Schultz failed to include extra cash the Utility would have on hand due to depreciation and amortization expenses being non-cash expenses.

C. Conclusion

We find that, based on our analysis of the financial documents provided by the Utility and the owners, EU has met its burden of demonstrating the financial ability necessary to fund the Utility. Therefore, we find that EU has the financial ability to serve the requested territory.

VII. Technical Ability

A. Parties' Arguments

EU noted that one of the Utility's owners, Jack Boyer, has operated a regulated water system in the proposed service territory since 1987. Mr. Boyer also has wastewater experience from previous involvement with Knight Island Utilities and Hideaway Bay, and has shown the ability to retain the necessary professionals to operate the Utility.

PIE argued that EU does not have the technical ability to serve the requested territory. PIE highlighted that Mr. Boyer is not licensed as a wastewater utility operator and that Mr. Boyer himself described his knowledge of statutes and rules for wastewater utilities as that of a "lay person," which demonstrates EU's lack of technical ability.

LC argued that EU did not provide any evidence that the owners of the proposed utility have the technical expertise needed to install and operate a central sewer system on the bridgeless barrier islands. LC highlighted that EU did not provide proof of Mr. Boyer's previous employment at other utilities. LC further contended that running a water utility and a wastewater utility are different due to the severity of the consequences of a malfunction. LC asserted that Mr. Boyer's military experience does not translate well to experience with wastewater, as he had no responsibilities related to system operation, maintenance, and repair.

OPC did not take a position on this issue.

B. Analysis

Section 367.045(1)(b), F.S., and Rule 25-30.033(1)(i), F.A.C., require a utility applying for an original certificate to provide information showing that it has the technical ability to provide service in the territory requested. EU witness Boyer testified that he has owned and operated Little Gasparilla Water Utility, Inc. (Little Gasparilla) for over 30 years. Witness Boyer stated that EU will employ technical professionals to operate the wastewater system. LC witness Cotherman testified that the EU has not shown the technical ability to undertake a project of this scope. At the service hearings, several customers testified that based on the water service provided by Little Gasparilla, they did not have confidence in EU's technical ability to operate a wastewater utility. Witness Boyer stated that he would not personally be the project manager or operator of the system; but instead, he would hire competent professionals for the technical operation of the system.

C. Conclusion

We find that EU has met the requirements of the rule demonstrating that, with the retention of outside professionals for the construction and operation of its systems, it has the technical ability to serve the requested territory.

VIII. Plant Capacity

A. Parties' Arguments

EU stated that it has entered into a Bulk Agreement with the County that would allow EU to transmit the sewage to the County's treatment facilities on the mainland. EU argued that since it has reserved that capacity for 2,200 ERCs, and only anticipates 1,248 ERCs at full capacity, the Utility will have sufficient capacity to serve the proposed territory.

LC asserted that since the number of ERCs to be treated has changed multiple times and there is inconsistency in the gallons-per-day of usage assumptions, it is unknown if EU has sufficient capacity. LC further argued that the closest County wastewater treatment facility is recommended for decommissioning in the Sewer Plan.

Neither PIE nor OPC took a position on this issue.

B. Analysis

In order to provide wastewater service to the proposed service territory, EU entered into a Bulk Agreement with the County on July 14, 2020. Under the terms of the Bulk Agreement, EU would deliver wastewater to a lift station on the mainland and the wastewater would then be treated in the County's treatment facilities. The Bulk Agreement reserves capacity for up to 2,200 ERCs. The Bulk Agreement has a 30-year term, where the County would send a monthly invoice to EU for wastewater treatment based upon the sewer flow meter readings taken at the

connection point between EU and the County. No other witness addressed this issue during the evidentiary hearing.

C. Conclusion

The Bulk Agreement with the County reserves adequate capacity to serve the proposed service territory and demonstrates that EU has properly planned for the estimated needs of the proposed service area.

IX. Continued Use of Land

A. Parties' Arguments

EU stated that it will only have treatment facilities through the Bulk Agreement. EU noted that Rule 25-30.033(1)(m), F.A.C., only applies to land where treatment facilities are located and not to land associated with the collection system, such as easements and pump stations. EU argued that since it only operates a collection system and does not own treatment facilities the rule is either inapplicable or deemed satisfied through the Bulk Agreement.

PIE argued that EU does not have continued use of the land upon which the utility treatment facilities are or will be located. PIE argued EU has insufficiently budgeted for the purchase of easements for its wastewater collection system, which are necessary for its operation. PIE asserted that the budgeted value of \$250,000 is arbitrary, as other utilities on the island have paid up to \$7,000 per easement and/or had to go through eminent domain. PIE noted that part of the Bulk Agreement requires EU to obtain easements through Don Pedro Park, and that EU did not provide testimony or evidence on this being completed.

LC contended that EU had not provided evidence to show that they would have continued use of the land where the County's treatment facilities are located. LC argued that EU has not provided any evidence of their access to the easements and rights of way, including through Don Pedro Island State Park. LC also argued that the wastewater tariff contained in the application requires customers to grant easements without cost to the Utility, and that this represents potential violations of private property rights. LC asserted that the acquisition of easements will be met with resistance and will require costly eminent domain procedures.

OPC did not take a position on this issue.

B. Analysis

Section 367.1213, F.S., and Rule 25-30.033(1)(m), F.A.C., require evidence that a utility has the right to access and the continued use of the land upon which the utility treatment facilities are or will be located. EU will utilize the County's treatment facilities through the Bulk Agreement. The Bulk Agreement, which has a term of 30 years, grants EU the ability to send wastewater to the County's treatment facilities located on the mainland.

EU witness Cole described the proposed system as a Septic Tank Effluent Pumping system where a septic tank and effluent pump would be located on a customer's private property. The effluent waste would be pumped out while the remaining sludge is stored in the tank. The Utility would need access to customer's private property to remove existing septic tanks, as well as connect a new septic tank and effluent pump. EU witness Cole testified that the pumps would need to be connected to the customer's electric service in order to operate. The Utility would then need continued periodic access to the customer's property in order to empty the tanks. EU witness Cole testified that in his experience a typical easement runs between 15 and 20 feet wide on private property. During the service hearing, a resident testified that EU does not have the needed easements and doubts EU's ability to obtain them. EU witness Boyer acknowledged the possibility that the Utility would need to claim eminent domain and compensate property owners for use of land. Witness Boyer testified that EU has set aside \$250,000 for eminent domain cases. Staff notes the issue regarding the granting of easements is not before us at this time. However, since easements are not yet secure and residents have expressed no desire for service, if we granted the application, the provision of service could be substantially delayed as EU acquires the legal rights to access customer property.

C. Conclusion

The Utility's proposal of siting a septic tank and effluent pump on each customers' private property appears to be a novel arrangement. Based on the record evidence, we have concerns regarding the efficacy of such an arrangement that (1) presumes easements will be obtainable for all customers; (2) depends on connection with and continued operation of a customer's electric service, at the customer's cost; and (3) requires routine and continued access to the customer's property in order to properly maintain the system. We acknowledge that approval of the system design is under the purview of the DEP.

Notwithstanding these concerns, wastewater treatment would occur pursuant to a Bulk Service Agreement. As such, EU does not own or operate the treatment facilities; therefore, we find that evidence of continued use of the land upon is not required or applicable in this instance.

X. Public Interest

A. Parties' Arguments

EU argued that the County has established that converting the proposed service territory from septic to sewer is a priority and in the public interest, and we should defer to the County. EU asserted that public interest is not determined by the opinions of property owners as expressed by number of letters or vote of property owners. EU also stated that the County has considered the broader public interest and has articulated its support by signing the Bulk Agreement and the statements of its designated witness, County deponent Rudy, testifying that the County is "100% behind" the project.

PIE argued that the public interest will not be served if a wastewater certificate for the territory proposed is issued to Environmental Utilities. PIE asserted that EU did not demonstrate

a need, with no testimony provided showing water quality issues, no expert witnesses establishing a need, and its application being inconsistent with the Comp Plan. PIE further argued that EU has failed to provide proof of financial ability to support the Utility.

LC emphasized that as FLU Policy 3.2.4 prohibits sewer infrastructure in the Rural Service Area, the County cannot extend central sewer service to the bridgeless barrier islands, or allow EU to do so, without an amendment to the Comp Plan. LC further argues an amendment to the Comp Plan to allow such would not be in the public interest due to increased development that would follow. LC asserted that the rates and charges for the proposed service fail to take into account additional expenses with the installation and that EU has made no provision for alternative payments to address these. LC noted that a central sewer system may result in environmental damage in the event of a spill, and environmental damage may occur to wildlife habitat during installation. LC also argued that additional concerns, such as tariff terms that appear burdensome, a failure to address how the system would be serviced in a storm, a lack of consideration for property owners with new septic systems, and disruption of traffic caused by construction.

OPC did not take a position on this issue.

B. Analysis

Sections 367.021 and 367.031, F.S., gives us the authority to issue a utility a certificate of authorization to serve a specific service area. To implement these statutes, Rule 25-30.033(1)(h), (i), and (k), F.A.C., require statements showing the financial and technical ability of the applicant to provide service, the need for service in the proposed service area, the identity of any other utilities within the proposed service area that could potentially provide service, and the steps the applicant took to ascertain whether such other service is available.

Section 367.045(5)(a), F.S., provides that we may grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest, or we may deny a certificate of authorization or an amendment to a certificate of authorization, if in the public interest. In prior proceedings, we have made determinations regarding the public interest based upon whether a utility's application demonstrates there is a need for service, that the application is not in competition with or duplication of another system, that the utility has the financial and technical ability to provide service, and the utility has sufficient plant capacity or will construct the plant when needed.¹³

¹³ See Order No. PSC-08-0243-FOF-WS, issued April 16, 2008, in Docket No. 20070109-WS, *In re: Application for amendment of Certificates 611-W and 527-S to extend water and wastewater service areas to include certain land in Charlotte County by Sun River Utilities, Inc. (f/k/a MSM Utilities, LLC)*, pp. 11-13; Order No. PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 20021256-WU, *In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farnton Water Resources LLC*, p. 26; Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 19910114-WU, *In re: Application for water certificate in Brevard, Orange and Osceola Counties by East Central Florida Services, Inc.*, pp. 33-34.

We have found that EU's application is inconsistent with the Charlotte County Comp Plan, and is inconsistent with the provisions of the Sewer Plan. As previously discussed, we are not bound by the provisions of either document. We do not believe that, in isolation, the inconsistencies should cause us to deny EU's application. As previously discussed, a portion of EU's proposed service territory would be in competition with or in duplication of another system currently providing wastewater service. If we were to grant EU's certificate, it would be granted only for the territory not currently served by another utility. Additionally, we found that EU has demonstrated that it has the financial and technical ability to serve the proposed service area. We have also found that EU's application proposes sufficient plant capacity to serve the requested territory. Furthermore, due to the unique system configuration proposed by EU, evidence of continued use of the land on which the utility treatment facilities are or will be located is not applicable.

We have found that the Utility has not demonstrated a need for service in the proposed service territory, which is of significant concern. The Utility has not provided any request for service from existing residents of the proposed service territory, and written correspondence has indicated that the existing residents are largely opposed to EU's application. EU has not provided evidence that any environmental regulator mandated the conversion of septic systems to central sewer, and no evidence has been provided substantiating EU's claim of an environmental or health-related need. Nor were any County leaders present during the hearing to clarify the needs of the County. Finally, although customer preference is not an appropriate basis for granting or denying a certificate application, in terms of demonstrating a need for the service, the overwhelming majority of prospective customers who testified before us stated they were in opposition to the application.

Since EU has not demonstrated a need for service, we find that EU's financial and technical capability is irrelevant. Since no need for service exists, we find that the Utility's application is not in the public interest. Therefore, we find that EU's application for a wastewater certificate shall be denied.

C. Conclusion

EU has not demonstrated that a need for service exists; therefore, its request for certification is not in the public interest and shall be denied. This is consistent with precedent where we have denied a portion of territory where the need for service was not demonstrated.¹⁴ With our denial of EU's application, the issues identified in this proceeding addressing EU's proposed initial rates and charges are rendered moot.

¹⁴ See Order No. 14536, issued July 3, 1985, in Docket Nos. 19840387-WS and 19850072-WS, *In re: Application of Gulf Utility Company for Amendment of Water Certificate No. 72-W and Sewer Certificate No. 64-S in Lee County, Florida* (Utility failed to demonstrate a clear need for service in presenting the testimony of only one witness who demonstrated a need for service within a portion of the area in contention. Accordingly, the application was approved only with respect to the area where a clear need for service had been demonstrated.); Order No. 22847, issued April 23, 1990, in Docket No. 19890459-WU, *In re: Objection to notice of Conrock Utility Company of intent to apply for a wastewater certificate in Hernando County* (Certification denied where, among other things, the applicant failed to demonstrate the need for the proposed utility).

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Environmental Utilities, LLC's motion to reopen the record in this proceeding for the limited purpose of admitting witness Swain's prefiled direct testimony is granted. It is further

ORDERED that for the reasons set forth herein, we find that it is not in the public interest to grant Environmental Utilities, LLC's application for a certificate to provide wastewater service in Charlotte County. The application is therefore denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 8th day of July, 2022.



ADAM J. TEITZMAN

Commission Clerk

Florida Public Service Commission

2540 Shumard Oak Boulevard

Tallahassee, Florida 32399

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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 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.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, 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.