

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by the Town of Indian)
River Shores for Modification of) DOCKET NO. 160049-EU
Territorial Order Based on Changed)
Legal Circumstances Emanating from)
Article VIII, Section 2(c) of) FILED: April 14, 2016
the Florida Constitution.)
_____)

CITY OF VERO BEACH’S RESPONSE IN
OPPOSITION TO TOWN OF INDIAN RIVER SHORES’
MOTION TO STRIKE

The City of Vero Beach (“Vero Beach” or the “City”), pursuant to Rule 28-106.204(1), Florida Administrative Code (“F.A.C.”), hereby files this response in opposition to the Town of Indian River Shores’ (the “Town”) Motion to Strike (the “Motion to Strike”) which was filed with the Florida Public Service Commission (the “Commission”) on April 7, 2016. In summary, the Commission should deny the Town’s Motion to Strike for the following reasons:

a. Rule 1.140(f), Florida Rules of Civil Procedure (“F.R.C.P.”) provides for striking certain material from pleadings – a motion to dismiss is not a pleading, thus, no basis exists under Rule 1.140(f), F.R.C.P., to strike any material from Vero Beach’s Motion to Dismiss.

b. A motion to strike material alleged to be immaterial should only be granted if “the material is wholly irrelevant, can have no bearing on the equities, and no influence on the decision.” Rice-Lamar v. City of Fort Lauderdale, 853 So. 2d 1125, 1134-35 (Fla. 4th DCA 2003). The material the Town seeks to strike from the Motion to Dismiss is clearly relevant to the equities, issues, and decision in this case and is therefore not subject to being stricken.

c. The Motion to Strike fails to identify with sufficient specificity the portions of the Motion to Dismiss the Town seeks to strike.

In support of this response in opposition to the Motion to Strike, Vero Beach states:

Background

1. The Town initiated this docket on March 4, 2016, by filing its Petition for Modification of Territorial Order Based on Changed Legal Circumstances Emanating from Article VIII, Section 2(c) of the Florida Constitution. On March 24, 2016, Vero Beach timely filed its Petition to Intervene. Also on March 24, 2016, Vero Beach timely filed its Motion to Dismiss Indian River Shores' Petition for Modification of Territorial Order and Alternative Complaint (the "Motion to Dismiss").

2. On April 7, 2016, after the Commission granted the Town's unopposed motion for enlargement of time, the Town timely filed a Joint Response in Opposition to, and Motion to Strike Portions of, City of Vero Beach's Motion to Dismiss. The Town did not file any objection to the City's Petition to Intervene. This response timely responds to the Town's Motion to Strike. For the reasons set forth below, the Commission should deny the Town's Motion to Strike.

3. As a threshold issue, the Town asserts that "[t]o the extent the City is granted leave to intervene, it must take the case as it has found it, and it must accept the allegations of the Petition as true." Motion to Strike at 26-27 (emphasis supplied). The emphasized portion of the quoted language represents a clear misstatement of law. While it is true that an intervenor "takes the case as it has found it," it is patently untrue that Vero Beach accepts the allegations in the Petition as true for all purposes. While it is correct that the Commission must accept the Town's allegations as true for the purpose of deciding whether to dismiss the Town's Petition, Vero Beach has expressly stated that, if the Petition is not dismissed, it will dispute many of the Town's factual allegations. The purpose of the evidentiary hearing that will be held in this docket if Vero Beach's Motion to Dismiss is not granted will be to take evidence to establish the facts on which the

Commission will base its decision. None of the facts alleged by the Town will be assumed true, unless stipulated by the parties.

Rule 1.140(f), FRCP Does Not Authorize Striking Material from a Motion to Dismiss

4. The Town's Motion to Strike relies on Rule 1.140(f), F.R.C.P., as the authority for striking portions of Vero Beach's Motion to Dismiss. See Motion to Strike at 27. Rule 1.140(f), F.R.C.P.¹ provides:

A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.

(Emphasis supplied.) Rule 1.100(a), F.R.C.P., defines "pleadings" as follows:

There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned as a third-party defendant; and a third-party answer if a third-party complaint is served. If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed.

Rule 1.100(b), F.R.C.P., separately defines a "motion" as "an application to a court for an order."

5. Vero Beach's Motion to Dismiss is clearly not a pleading, it is a motion. As such, no legal basis exists under Rule 1.140(f), F.R.C.P. (the only provision cited by the

¹ Vero Beach is mindful of the fact that the Commission is not bound by the Florida Rules of Civil Procedure unrelated to discovery and that Rule 1.140(f), F.R.C.P., is merely "instructional." See In Re: Complaints by Southeastern Utility Services, Inc., on Behalf of Various Customers, against Florida Power & Light Company Concerning Thermal Demand Meter Error, Order Dismissing Southeastern Utility Services, Inc. as Petitioners and Denying FPL's Motion to Strike (Order No. PSC-04-0591-PCO-EI) (Docket No. 030623-EI) (June 11, 2004).

Town in its Motion to Strike), to strike any material from Vero Beach's Motion to Dismiss. Accordingly, the Town's reliance on Rule 1.140(f), F.R.C.P., is wholly misplaced and the Motion to Strike should be denied.

The Material Identified in the Motion to Strike Does Not Meet the Strict Standard for Material Subject to Being Stricken

6. Even assuming that Rule 1.140(f), F.R.C.P., authorizes striking material from a motion to dismiss, which it does not, the Town's Motion to Strike nevertheless fails to meet the applicable standards for granting a motion to strike. It is well settled that:

A motion to strike matter as redundant, immaterial or scandalous should only be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision.

Rice-Lamar, 853 So. 2d at 1133-34 (citing McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So. 2d 214, 216 (Fla. 2d DCA 1998). Moreover, "a motion to strike is not favored and is viewed with skepticism." Borwell v. Borwell, 877 So. 2d 829, 830 (Fla. 4th DCA 2004) (quoting Van Valkenburg v. Chris Craft Indus., Inc., 252 So. 2d 280, 284 (Fla. 4th DCA 1971), quashed on other grounds, 267 So. 2d 642 (Fla. 1972)). The portions of the Motion to Dismiss referenced in the Town's Motion to Strike do meet this strict standard.

7. The only material identified in the Town's Motion to Strike as being "immaterial and impertinent" are the newspaper article attached as Exhibit B (hereafter referred to as "Exhibit B") to the Motion to Dismiss and a general reference by the Town to "various arguments about the Town's 'real issues.'"² See Motion to Strike at 27. In both cases, the material identified by the Town is clearly relevant to the issues in the

² As discussed below, this vague reference to portions of the Motion to Dismiss does not meet the Town's burden of identifying the portions of the Motion to Dismiss subject to being stricken.

docket and will have an “influence on the decision” in this case. See Rice-Lamar, 853 So. 2d at 1133-34. Exhibit B provides relevant and important background as to the Town’s real motivation to initiate this docket, i.e., to obtain lower rates. The Commission is well within its discretion to consider Exhibit B as background information and to give it the weight it is due in ruling on Vero Beach’s pending Motion to Dismiss. Similarly, with regard to the Town’s vague assertion that “various arguments about the Town’s ‘real issue’” should be stricken, no valid grounds exist to strike the material. The “arguments” are just that, legal arguments. They are not factual allegations and they are appropriately included in a motion to dismiss. Accordingly, the Town’s Motion to Strike should be denied.


The Motion to Strike Fails to Identify with Sufficient Specificity the Portions of the Motion to Dismiss the Town Seeks to Strike

8. Again assuming, arguendo, that Rule 1.140(f), F.R.C.P., authorizes striking material from a motion to dismiss, the Town’s Motion to Strike fails to adequately identify the material the Town seeks to strike from the Motion to Dismiss.

9. As the moving party, the Town has the burden of proving entitlement to the relief requested. Here, the Town’s Motion to Strike makes vague references to “[t]hese arguments and allegations of the City, including the article and the various arguments about the Town’s ‘real issue. . . .’” Motion to Strike at 27. These vague references are not sufficient to identify the portions of the Motion to Dismiss that the Town wants stricken or to allow Vero Beach to adequately respond to the Motion to Strike. Accordingly, the Town has failed to meet its burden and the Motion to Strike should be denied.

WHEREFORE, for the reasons stated herein, the Town's Motion to Strike should be denied.

Respectfully submitted this 14th day of April, 2016.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 14th day of April, 2016.

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