

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Original Certificate of) DOCKET NO. 20190168-WS
Authorization and Initial Rates and Charges)
for Water and Wastewater Service in Duval,) FILED: January 11, 2022
Baker and Nassau Counties, Florida by)
FIRST COAST REGIONAL UTILITIES,)
INC.)
_____)

JEA’s MOTION TO STRIKE TESTIMONY OF ROBERT KENNELLY

Pursuant to rule 28-106.204, Florida Administrative Code, JEA moves to strike certain direct and rebuttal testimony of Robert Kennelly filed by the Applicant First Coast Regional Utilities, Inc. (“Applicant” or “FCRU”). In support, JEA states:

1. On May 15, 2020, FCRU filed the direct testimony of Robert Kennelly (“Kennelly Direct Testimony”).
2. On July 31, 2020, FCRU filed the rebuttal testimony of Robert Kennelly (“Kennelly Rebuttal Testimony”).
3. Certain portions of the Kennelly Direct Testimony and Kennelly Rebuttal Testimony should be stricken because they include inadmissible hearsay statements and improper legal opinions.

Legal Standard

4. The Florida Evidence Code sets forth the rule that an out-of-court statement is generally inadmissible to prove the truth of the matter stated therein, unless the statement falls within an exception to the hearsay rule. §§ 90.801(1)(c), 90.802, Fla. Stat. Ultimately, hearsay is—by definition of the Florida Evidence Code—inherently unreliable. *See Walden v. State*, 17 So. 3d 795, 798 (Fla. 1st DCA 2009) (discussing the unreliability of hearsay and the danger of its use).

5. In an administrative proceeding such as this one, hearsay may be used only for the purpose of supplementing or explaining other evidence; it is not sufficient in itself to support a finding unless it would be admissible over objections in a civil action. *See* § 120.57(1)(c), Fla. Stat.; Admin. Code R. 28-106.213(3). Accordingly, hearsay is only admissible in administrative proceedings if it is corroborated with other admissible, non-hearsay evidence. *Gaudina v. Grand Lifestyle Cmtys., III/LV, LLLP*, Case No. 18-4204 (Fla. DOAH Jan. 18, 2019); *see also Johnson v. Dep't of Health & Rehab. Servs.*, 546 So. 2d 741, 742-43 (Fla. 1st DCA 1989) (noting that hearsay evidence “must be corroborated by non-hearsay evidence or the hearsay evidence must be admissible under some established exception to the hearsay rule”).

6. In addition, the Florida Evidence Code generally prohibits the use of opinion testimony by a lay witness. *See* § 90.701, Fla. Stat.; *see also Nationwide Mut. Fire Ins. Co. v. Vosburgh*, 480 So. 2d 140, 144 (Fla. 4th DCA 1985), *receded from on other grounds by Special v. Baux*, 79 So. 3d 755 (Fla. 4th DCA 2011) (noting that the opinion testimony of a lay witness is permitted only where the opinion is based on what the witness has personally perceived).

7. It is well-settled that opinion testimony as to the legal interpretation of Florida law is not the proper subject of expert testimony. *In re Estate of Williams v. Condon*, 771 So. 2d 7, 8 (Fla. 2d DCA 2000); *see also SDS-IC v. Fla. Concentrates Int'l, LLC*, 157 So. 3d 389, 392-93 (Fla. 2d DCA 2015) (finding the legal opinion was not competent evidence); *Estate of Murray ex rel. Murray v. Delta Health Grp., Inc.*, 30 So. 3d 576, 578 (Fla. 2d DCA 2010) (“An expert may render an opinion regarding an ultimate issue in a case, but he or she is not permitted to render an opinion that applies a legal standard to a set of facts.”); *First Mortg. Corp. of Stuart v. deGive*, 177 So. 2d 741, 747 (Fla. 2d DCA 1965) (finding parts of the affidavits submitted were opinion testimony and legal conclusions that would not be admissible).

8. The Commission has stricken testimony on the grounds that it constituted improper testimony on legal issues. *See, e.g. In re Southern States Utilities Inc.*, Docket No. 930880-WS, Order No. PSC-94-0371-PCO-WS (Fla. P.S.C. Mar. 30, 1994) (striking direct testimony consisting of legal opinions); *In re Request for Arbitration Concerning Complaint of Am. Comm'n Servs. of Jacksonville, Inc.*, Docket No. 981008-TP, Order No. PSC-99-0099-PCO-TP (Fla. P.S.C. Jan. 20, 1999) (striking direct and rebuttal testimony that included legal opinions and legal analysis and noting “[t]he most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument in support of their position on the issue”).

Argument

9. Page 3, line 18 through page 4, line 1 of Mr. Kennelly’s Rebuttal Testimony must be stricken because it constitutes inadmissible hearsay. Specifically, when asked whether the PUD Ordinance requires the developer to gift the water, wastewater, and reuse facilities to JEA, Mr. Kennelly answered no, explaining that it was not the intent or understanding of the parties that legal title would be transferred to JEA. However, Mr. Kennelly’s testimony here is not based on his personal knowledge, but on what representatives of ICI Villages, LLC (the prior owner of the development property) apparently told Mr. Kennelly. Such testimony plainly falls within the definition of hearsay. *See* § 90.801, Fla. Stat.; *see also Dep’t of Health & Rehab. Servs. v. C.M.*, Case No. 92-0131C (Fla. DOAH Nov. 9, 1992) (Recommended Order) (“Testimony describing what somebody else said is hearsay and inadmissible in these proceedings except to corroborate admissible evidence . . .”). Moreover, the testimony does not corroborate any admissible, non-hearsay evidence regarding the transfer or dedication of water, wastewater and reuse facilities to JEA. Such testimony should therefore be stricken.

10. Additionally, the following portions of Kennelly’s Direct Testimony and Rebuttal Testimony should be stricken as providing impermissible legal opinion:

- (a) Page 5, lines 7-11 of the Kennelly Direct Testimony;
- (b) Page 2, line 4 through page 4, line 12 of the Kennelly Rebuttal Testimony;
- (c) Page 7, lines 2-11 of the Kennelly Rebuttal Testimony; and
- (d) Page 8, line 7 through page 10, line 5 of the Kennelly Rebuttal Testimony.

11. At page 5, lines 7-11 of the Kennelly Direct Testimony, Mr. Kennelly provided his opinion on whether the provision of water and wastewater services to the proposed territory was consistent with the comprehensive plans of Duval, Nassau, and Baker counties. Mr. Kennelly further testified regarding his interpretation of the comprehensive plans and about section 367.045(5)(b), Florida Statutes.

12. At page 2, line 4 through page 4, line 12 of the Kennelly Rebuttal Testimony, Mr. Kennelly gave his opinion that JEA’s “demand that JEA provide water and wastewater service to the development” is not in compliance with the Ordinance and/or Comprehensive Plan. Mr. Kennelly also testified that FCRU’s plan conforms with the conditions of the Comprehensive Plan and provided his opinion on what was required and allowed under the Ordinance.

13. Similarly, Mr. Kennelly provides legal opinion testimony at page 7 lines 2-11 of the Kennelly Rebuttal Testimony, specifically opining on the Commission’s jurisdiction over the Application based on the proposed service territory.

14. Lastly, at page 8, line 7 through page 10, line 5 of the Kennelly Rebuttal Testimony, Mr. Kennelly testifies that: (a) JEA’s demands to relocate the proposed First Coast wastewater facilities and turn over ownership to JEA violate the Ordinance; (b) JEA is unconstitutionally

exacting property; and (c) JEA's proposal to serve the applied for service area constitutes a taking. Mr. Kennelly further provided his interpretation of the Ordinance and the Comprehensive Plan.

15. It is clear that all of the above referenced testimony constitutes impermissible legal opinion testimony. Specifically, Mr. Kennelly provides his interpretation and opinion of Florida law and what may or may not be permitted under Compressive Plans and the Ordinance. Accordingly, the above referenced provisions from the Kennelly Direct Testimony and Kennelly Rebuttal Testimony should be stricken.

WHEREFORE, JEA requests that this motion be granted and that the referenced portions of Mr. Kennelly's Direct and Rebuttal Testimony be struck.

Respectfully submitted this 24th day of January, 2022.

/s/ Thomas A. Crabb
Thomas A. Crabb, FBN 25846
Susan F. Clark, FBN 179580
Christopher B. Lunny, FBN 8982
Radey Law Firm
301 South Bronough Street, Suite 200
Tallahassee, FL 32301
(850) 425-6654
tcrabb@radeylaw.com
sclark@radeylaw.com
clunny@radeylaw.com
Attorneys for JEA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail to the following this 24th day of January, 2022.

Melinda Watts
Bianca Lherisson
Jennifer Crawford
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
mwatts@psc.state.fl.us
BLheriss@psc.state.fl.us
jcrawfor@psc.state.fl.us

Office of Public Counsel
Mary Wessling
The Florida Legislature
111 W. Madison Street, Room 812
Tallahassee, FL 32399
wessling.mary@leg.state.fl.us

William E. Sundstrom
Robert C. Brannan
Sundstrom & Mindlin, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
wsundstrom@sfflaw.com
rbrannan@sfflaw.com

John L. Wharton
Dean Mead and Dunbar
215 South Monroe Street, Suite 815
Tallahassee, FL 32301
jwharton@deanmead.com
hschack@deanmead.com

/s/ Thomas A. Crabb