

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

ENVIRONMENTAL UTILITIES, LLC'S NOTICE OF INTENT TO USE DEPOSITION

The Order Establishing Procedure in this case requires that absent agreement by all parties concerning the introduction of depositions into the record of the hearing, any party wishing to introduce all or part of a deposition for any purpose other than impeachment must file a Notice of Intent no later than the last day to conduct discovery. This Notice is timely filed.

By this Notice, EU notices its intent to introduce into evidence, and to use in cross-examination, the deposition of Charlotte County, taken on December 7, 2021, by counsel for Palm Island Estate Association (PIE). PSC staff cross-noticed the deposition. EU seeks to introduce the deposition in its entirety.

Argument in support of the introduction of the deposition

In this case, parties may obtain discovery through the means and in the manner provided in rules 1.280 through 1.400, Florida Rules of Civil Procedure. *See* 28-106.206, Fla. Admin. Code. Rule 1.330 of the Rules of Civil Procedure sets forth when and how depositions may be used in this procedure.¹

The Rule reads, in relevant part:

- (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

...

¹ *In an abundance of caution, EU reserves the right to argue the admissibility and/or use of the deposition based on any basis which occurred or was discovered after the Prehearing Conference, such as the circumstances described under Rule 1.330(3)(B),(D),or(F).*

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(emphasis added)

For each and all of the following reasons, EU submits that the deposition should be allowed to be introduced under Rule 1.330(a)(3)(E):

The relevance and materiality of the subject matter addressed in the deposition is an exceptional circumstance

The subject matters of this deposition are not minor points. Charlotte County, by its support of the project and EU's Application, the interpretation of its own comprehensive planning documents, and by its provision of the wastewater treatment capacity for the project, as information which is inextricably intertwined the project in which should be considered.

This application proposes construction of the wastewater system which will centralize and transport wastewater off of the fragile barrier island to be treated on the mainland as opposed to by septic tanks. At issue is the participation of Charlotte County and the project (Charlotte County has the available capacity and has agreed to accept the wastewater treatment); the Charlotte County Comprehensive Plan; the letter of support written by Charlotte County which is contained in the Docket; and Charlotte County's view of the beneficial environmental impacts of the proposal. Environmental Utilities believes the inclusion of this information in the record is of vital importance in the completion of a complete record. Any opposition to the introduction of this deposition by PIE, PIE would be effectively seeking for the record to remain silent on the testimony of Charlotte County on these critical issues, *even though it was PIE itself who elicited this testimony by conducting this deposition.*

The significance to the completion of the record, and concomitantly the opportunity for the Commissioners to give whatever weight they deem appropriate to the testimony, is undeniably clear from just a few representative excerpts from the transcript:

Q. Does the Coastal Policy prohibit expanding the scope of sanitary sewer in the coastal area?

A. I'm not aware of that.

Q. Okay. Is it Charlotte County's contention that despite the objectives and policies in the Comprehensive Plan that we've gone over that there is a need for sewer service in the Bridgeless Barrier Islands?

A. Yes.

(Tr.6, lines 19-25)

A. As discussed before, the environmental impacts to the Bridgeless Barrier Islands from the onsite disposal systems are well-documented throughout the State and in the area. And the Comprehensive Plan allows for a utility under the PSC to extend services to the Barrier Islands for sewer services.

(Tr. 25, lines 2-7)

A. The letter was written to advise the PSC on Charlotte County's position on the sewer expansion to the islands.

(Tr. 31, lines 20-22)

Q. Prior to writing this letter, did you have to get somebody's approval to submit it as being Charlotte County's position on the application?

A. Yes.

(Tr. 32, lines 9-12)

Q. You write in the letter, during the past decade, the County has made significant progress in studying and understanding the impacts of septic systems. These efforts indicate that negative environmental impacts of septic tanks to coastal Charlotte County are quantifiable.

(T 32, lines 16-21)

Q. Just so we're clear, it's your position that the private utility is the one expanding the sewer service and not the County.

A. Correct. And as indicated by the Comprehensive Plan, authority under PSC can do that.

(Tr. 53, lines 16-25)

Q. Is the County 100 percent behind this project by Environmental Utilities?

A. Yes, sir, 100 percent.

Q. Does the County believe there's a need for central sewer on the Bridgeless Barrier Islands?

A. Very much so. Yes, sir.

Q. And does the County believe that Environmental Utilities' application is consistent with the County's Comprehensive Plan?

A. Yes, sir.

(Tr. 53, lines 16-25)

Q. And does the County believe that the Environmental Utilities application is consistent with Charlotte County's Sewer Master Plan?

A. Yes, sir.
(Tr. 54, lines 1-4)

Q. Will the certification of Environmental Utilities result in the creation of a utility that will be in competition or duplication of any system that the County has?

A. No, sir.
(Tr. 54, lines 11-15)

Charlotte County knows this information and the PIE, staff, and every other participant in the deposition knows this information, yet the PIE (if it objects to the introduction of this deposition) effectively seeks that the record not reflect, and the triers of fact not know, this material information.

The fact that this is the deposition of a nonparty, and that the deposition was taken at the request of the PIE, is an exceptional circumstance

The Civil Rule's delineation of six broad categories under which deposition may be used by any party for any purpose is designed to protect party litigants from undue prejudice while allowing supplementation to the record by deposition testimony as and when appropriate. In this case, no undue prejudice to the only parties who object to the introduction of the deposition can reasonably be inferred or supported. This deposition was taken by PIE. PIE chose to set this deposition up as the deposition of Charlotte County, upon designation by Charlotte County of an authorized representative as allowed under the Civil Rules. That authorized representative was selected by Charlotte County to address a delineated set of established issues set forth in the Notice, those issues having been selected and crafted by the PIE – as also allowed under the Civil Rules.

Staff agreed to the introduction of this deposition. OPC agreed to the introduction of this deposition. Only the PIE, whose counsel noticed the deposition and conducted the deposition, and

who had every opportunity to fully explore with the representative of Charlotte County the subject matters of the deposition, did not agree to the introduction of the deposition.²

The use of prefiled testimony in this case is an exceptional circumstance

The PSC's use of prefiled testimony has served the agency well for decades.³ However, one of the challenges of prefiled testimony is analogous to the old saw that 'you can lead a horse to water but you can't make it drink'. Even if a litigant can drag a third-party witness who for whatever reason does not care to participate as a party litigant or to appear voluntarily, you can't force that person to prefile testimony. As argued elsewhere herein, Rule 1.330 when read in its totality stands for the proposition that the introduction and use of the deposition for any purpose is appropriate when securing the attendance of the witness live at the hearing is difficult or problematic. Here, even if the attendance of the individual designated as the representative could be secured, he would not at the time of the hearing be testifying as a representative of Charlotte County – so the deposition couldn't effectively be "re-created". Perhaps an individual could be asked was that you at the deposition and did you have the authority to respond in the deposition in the manner you did – *but the deposition transcript itself already reflects that information.*

The unavailability of the designated representative of Charlotte County in the deposition is an exceptional circumstance

That this was a deposition of Charlotte County, not a deposition the County's designated representative in his individual capacity, is made clear by the rule and was made clear by counsel for the PIEs at the time of the deposition:

Q. Okay. We are here today to take the deposition of Charlotte County, and, as such, we have issued a subpoena to Charlotte County. And I've been advised that you are appearing as

² It is reasonable to infer that the reason the very party who took the deposition opposes its introduction is that the PIE perceives that the very evidence elicited by the PIE itself as reflected in the deposition is harmful to its case.

³ Even when the undersigned was an attorney at the PSC in the 1980s, the PSC utilized prefiled testimony. The PSC is nearly unique in that regard among Florida agencies and the experience of the undersigned.

the representative for Charlotte County on the topic areas of the deposition notice; is that correct?

A. Yes, it is.
(TR.6, lines 19-25)

Rule 1.330(a)(3) clearly stands for the proposition that the witness's unavailability is a principal basis for the introduction of the deposition (the witness is over 100 miles away; the witness is ill or infirm or imprisoned; the attendance of the witness could not be procured; the witness is dead...). In this case, the attendance of the representative of Charlotte County is beyond problematic, because the designated representative of the County no longer works for the County. Thus, even if the attendance of the designated representative of Charlotte County at the deposition could somehow be secured through extraordinary measures, he would not be appearing at the trial as the designated representative of Charlotte County – although it is undisputed that at the time of the deposition he was the designated representative of Charlotte County.⁴

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⁴ Ergo, his subsequent retirement does nothing to change the fact that the deposition which is the subject of this Notice is the deposition of Charlotte County.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing prefiled testimony has been furnished by E-mail to the following parties this 20th day of January, 2022:

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