CASE STUDY

CITY OF LONGWOOD AND FLORIDA WATER SERVICES
AN EXPANSION OF UTILITY SERVICES IN A COMPETITIVE MARKET
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INTRODUCTION

In 1998 the Public Service Commission agreed to support the mediation of cases. The Commission approved their addition to the pilot project initiated by the Florida Conflict Resolution Consortium to assist and train state agencies in dispute resolution. The Water and Wastewater Division agreed to participate in the identification of cases that might be amenable to resolution by mediation. The Consortium selected and paid the mediator in the case discussed below. The parties, the Commission and the Consortium think the confidential negotiations resulted in “creative options” being developed by the parties.

The purpose of this case study is to review the procedure and outcome in order to make recommendations related to the selection of the parties and in the use of attorneys in the mediation process. A sound alternate dispute resolution system should be created through conflict assessment. First, this case study will describe the case history, including the parties, their representatives and their relationships. Second, the case study will analyze the post mediation surveys and interviews of the attorneys involved to determine if the participating parties were correctly identified and the participation of attorneys was helpful in the mediation process. Finally this case study will make
recommendations as a result of this analysis in relation to party participation and use of
the attorney in public dispute resolution mediations.

DATA COLLECTION

The data collected in this case study was obtained by reviewing the documentation
maintained by the Public Service Commission (PSC), including the recommendation of
the staff, the Final Order and Settlement Agreement. In addition to this documentation,
the author reviewed the five post mediation surveys conducted by the Consortium.
Additional interviews were held with PSC attorney Jennifer Brubaker, Florida Water
Services attorney, Mathew Feil and City of Longwood attorney, Robert Taylor.

CASE HISTORY

THE PARTIES

The City of Longwood (hereinafter City) is located in Central Florida approximately
twenty miles from Orlando, Florida. The City provides utilities services to the residents
from groundwater wells. The City also has a system of water sewers that collect the
waste water from homes and businesses. The City does not treat the wastewater. It has
in the past contracted with the county (Seminole) for treatment of the sewage. The
contract price for the treatment was billed by the city to the customer and in addition to
the wastewater treatment, the city was given treated effluent (gray water) at favorable
bulk rates to use to water city lands. The use of the water in this manner is inexpensive and an approved method of water conservation.

The Florida Water Service Corporation (hereinafter utility) is a class A water and wastewater utility that provides service to approximately 76,098 water and 37,751 wastewater customers. The utility owns and operates a wastewater processing plant as well as sewer systems. One of the utilities’ sewer systems is utilized by a large business park in the same service area as the City of Longwood’s sewer collection system.

The Public Service Commission (hereinafter PSC) is a governmental regulatory agency charged with oversight if the water and wastewater utilities in the state of Florida. The PSC requires in certain instances that a utility obtain a certificate authorizing expansion of the service area of a water and wastewater utility. If such an application for expansion is submitted to the PSC, other interested parties, including competitive providers can object to the granting of a certificate for expansion. When an objection is raised the PSC will hold a hearing during which the parties may introduce evidence in support of their position. The commission then would determine whether the certificate expansion request would be granted or rejected. The commission acts as a judge in contested proceeding and adjudicates the rights of the parties in accordance with Florida Statutes and Rules.
NON-REPRESENTED PARTIES

The author in reviewing the mediation report and surveys suggests the following persons were parties that were not represented in the proceedings.

The disputed service area is a part of the St. Johns Water District. The District is authorized by Florida Statute and one of its directives is water conservation within a proscribed area of the state. The District has rules and regulations related to the conservation of water. The District did not participate directly in the proceedings, but the prevailing party would be required to follow the District's rules and regulations.

Bennett Commerce Park is the contested service area. Both parties want to deliver water and wastewater services to this service area. Bennett Commerce Park is a potential party, as the settlement will directly affect the cost of wastewater services.

The residents of the City of Longwood would be interested in the settlement of this dispute because it could impact the fees that they will pay for their wastewater services. Generally the citizens are represented by the Public Counsel’s Office. The Public Counsel’s Office declined to participate in the mediation.

Seminole County had been the sole provider of services to the City of Longwood and would be interested in the introduction of a competitor. The final agreement did expand the City’s use of a private utility to a private firm. The county needs to plan to meet the county’s capacity needs. The entry of the private firm could impact the planning process.
BACKGROUND

On December 22, 1997, the utility filed an application for amendment of their Certificate in Seminole County to provide wastewater service to an additional territory designated as Bennett Commerce Park. Bennett Commerce Park is a business park located within the St. John’s Water District and adjacent to a business park, Florida Commerce Industrial Park, served by the utility. The business park is also close to the wastewater service lines of the City of Longwood (City). The utility’s certificate is issued as part of a regulatory program administered by the Public Service Commission (PSC). On January 21, 1998, the City filed an objection with the Public Service Commission. As a result of this objection, the PSC ordered a hearing to take place on October 12 and 13, 1999 in Seminole County.

The PSC as part of a pilot program with state agencies identified this dispute as a potential case for a mediation conference. On March 18, 1999, the mediation was held in Longwood, Florida. The City was represented by a utility manager and an attorney. The utility was represented by a vice president and an attorney. The PSC was represented by a manager and an attorney.

At the mediation the parties met for four hours and reached a “verbal” agreement. No writing was produced at the meeting. The settlement was reduced to writing and produced to the PSC on August 21, 2000. The PSC approved the settlement agreement on October 17, 2000.
This case study will focus on the representatives of the parties present at the mediation and their role in the mediation process. Matthew Feil, an attorney, and a vice president represented the utility. Jennifer Brubaker, an attorney, and John Williams, a bureau chief, represented the PSC. Ms. Brubaker attended via a conference phone as her transportation was canceled. Robert E. Taylor, an attorney, and a mid level manager for the city represented the city. Each party’s attorney was empowered to participate in the mediation as equals with their management representative. There was no delineation of tasks or power between the attorney and management. All three attorneys thought their role included not only providing legal advice, but also policy advice and possible strategies for resolution of the dispute. Ms. Dedekorkut interviewed the attorneys in the summer of 1999 using a Consortium post mediation survey document. The author interviewed the attorneys in March 2001 regarding their role in the mediation and their opinions related to an attorney’s role in general in governmental/technical disputes.

The PSC attorney, Ms. Brubaker, in her initial interview in June 1999 with Ms. Dedekorkut of the Consortium, explained that she thought the mediation would be difficult because there appeared to be a “win/lose only” solution in the dispute. She acknowledged that she thought the tentative agreement reached by the utility and city was unexpected and she described it as a “compromise.” Ms. Brubaker did not have any power to agree to the settlement on behalf of the PSC. The regulatory process is
constrained by statutes and rules that allow the attorney to make recommendations regarding the settlement to the commissioners. The commissioners, appointed by the governor, then determine whether to accept the recommendation of the commission staff.

In a second interview of Ms. Brubaker in March 2001, Ms. Brubaker expanded on her role in the mediation. She stated that as the attorney she thought she contributed legal advice and knowledge of the policies of the commission that were essential to the crafting of an acceptable agreement. She stated while the PSC did not have a bottom line goal in regard to the results of the mediation, the agreement would need to be approved by the commission. Ms. Brubaker observed that her bureau chief was extremely knowledgeable of the commission policies and of the technical requirements of the dispute. She stated in cases of a technical nature the attorney’s role could and possibly should be as an advisor of the law instead of a full-fledged participant in the mediation.

Ms. Brubaker was asked about her perception of the role that the other parties’ attorney took in the mediation. Ms. Brubaker noted that the utilities attorney was deferential to the vice president and contributed generally only on the legal issues related to settlement suggestions. The attorney for the city was perceived to be the more active member of the city’s mediation team. The city attorney essentially negotiated for the city, asking the city utility manager’s impute in regard to technical matters. Ms. Brubaker identified only the utility customers as a non-represented party.
The utility attorney, Mr. Feil, in his initial interview with Ms. Dedekorkut stated he thought the mediation would not be successful. He thought his utility did not have a “bottom line” and had sufficient resources to litigate, if necessary, to resolve the dispute. The utility was intending to pursue their desired outcome, service to the disputed area, if the mediation was not successful. Mr. Feil said the vice president that attended with him did have the power to resolve the dispute.

In the second interview in March 2001, Mr. Feil explained his role in the mediation was subordinate to the vice president in attendance. He said he recognized that the vice president had the knowledge and power to resolve the dispute and that his role as in house counsel was to advise the vice president on the legal issues presented. Mr. Feil opined that the traditional mediation model with the attorney as the negotiator and legal advisor was not essential in regulatory mediations. He thought the technical issues required the primary mediator to be a technically savvy person familiar with the policy issues. He thought reason the attorneys are present is not only to advise legally, but because the mediation process intimated non-attorneys. He thought the process was incorrectly identified with the court process probably because many mediators are also attorneys and retired judges. He thought a capable corporate representative could adequately act as the primary negotiator. Mr. Feil viewed the attorney for the city as controlling. He thought the city’s written proposal received in July 1999 was not consistent with the agreement reached in the mediation. He thought the PSC attorney did
not represent an interested party and therefore was not as adversarial in her approach. He agreed with the PSC attorney that the only non-represented party was the utility customer. Mr. Feil is no longer employed by the utility and it was not clear whether he was party to the final resolution of the mediation.

Mr. Taylor, the attorney for the city, was not interviewed by Ms. Dedekorkut. In the interview conducted in March 2001, he recalled that he did not encourage the city to mediate because he did not see any possible compromise. He said he was very pleased that the mediator suggested the resolution that was agreed upon. He agreed that Mr. Feil’s perception that he was leading the negotiation was correct. He said the negotiation was a team effort because of the need to share the information. He thought the mediation might actually have slowed up the resolution as the money and “gray water” issues were not resolved and the negotiations dragged on for over a year after the mediation was completed. He agreed that in more technical cases the primary negotiator should be the technical person, not the attorney. He went so far as to suggest in technical issues, such as mediations regarding construction matters, an attorney was not needed. He offered as an example that he did not attend a recent mediation regarding a construction dispute with his client, the City of Longwood. Mr. Taylor did not identify any person or group as non-represented.

CONCLUSIONS
The two participating attorneys that identified an additional party agreed that the customers of the utility should have been represented. Ms. Brubaker explained that the
customers are generally represented by the Office of the Public Counsel. She stated that the Counsel refused to mediate. The other potential parties identified by the author were not considered by the parties attending the mediation. It did not appear that the potential parties were at any time consulted or offered an opportunity to review the settlement. The authors of Meet me inside\(^iv\) suggest that a key principal in alternative dispute resolution is allowing the necessary stakeholders including complainants, respondents, and bystanders to participate. The failure to identify a potential party in this case does not appear to have been critical. It is possible that at a later time a potential party may express concerns with the settlement that could lead to disputes and litigation. At no time in the process were additional parties discussed except in the post mediation interviews. The inclusion of all interested parties should be considered and specifically decided as part of the pre mediation planning procedure.

All three of the participating attorneys agreed that the attorney’s role in technically orientated mediations regarding public policy could, and possibly should, be limited. The perception of the non-attorney participant would need to be changed and attorneys would need to allow clients to mediate without being present. The participating attorneys seemed to recognize that the attorney in a mediation can get so involved in the win-lose agenda they hinder the parties ability to collaborate rather than compromise.\(^v\) Attorneys do not want to change this perspective because they are hired to advocate for a client, not to compromise the client. Bush and Folger’s\(^vi\) TM (Transformative Mediation) theory
identifies empowerment as a key issue. They think the power should be restored to the individual. This would support the theory that the use of the attorney should be limited to one of advise on legal issues alone.

RECOMMENDATION

The selection of parties to the mediation should be made after consultation with all the first identified parties. The race to conclude that the only parties to the dispute are the litigants is limiting and could have a negative effect on the outcome of the mediation. Some parties may not want to include additional parties or include them because they think there could be an unfavorable shift in power. The mediator must consider with all parties the advantages and disadvantages to additional parties.

The design of mediations in public disputes should consider a rule restricting the attorney’s role to one of legal advisor. The parties are more likely to agree to this arrangement if they understand all parties will have the same restriction. Approved meeting facilities should allow the party representatives to sit at the table without counsel, but with counsel in the same room for easy consultation. Critical to this suggestion is the training and consultation with the party representatives prior to the actual mediation so that their level of comfort at the mediation will be maximized.
End Notes


ii Rainees, Susan Summers, ADR program checklist: what government agencies need to know. _Dispute Resolution Journal_. V. 55 no 3 (August/October 2000) p. 66-71

iii Kaufman, Sandra, Duncan, George. A formal framework for mediator mechanisms and motivations, _Journal of Conflict Resolution_. December 1992 v 36 n4 p688 “…(2) active mediators seek efficient outcomes.”

iv Downie, Bryan, Coates, Mary Lou, and Furlong, Gary. _Ivey Business Quarterly_, Summer 1998, v 62 i4, p 56


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