BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ'S MOBILE HOMES, INC.	DOCKET NO. 921237-WS
In Re: Investigation Into Provision of Water and Wastewater Service by JJ'S MOBILE HOMES, INC. to its Certificated Territory in Lake County.	DOCKET NO. 940264-WS ORDER NO. PSC-95-1319-FOF-WS ISSUED: October 30, 1995

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

APPEARANCES:

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RICHARD BELLAK and PRENTICE PRUITT, ESQUIRE, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0862
On behalf of the Commissioners

ORDER ON INVESTIGATION INTO JJ'S MOBILE HOMES, INC.'S PROVISION OF SERVICE, CORRECTING TERRITORY DESCRIPTION, RESERVING RULING AS TO UTILITY'S CAPACITY TO PROVIDE SERVICE TO ITS TERRITORY, REQUIRING UTILITY TO FILE MASTER PLAN, REQUIRING UTILITY TO SUBMIT PROPOSED BULK RATE AGREEMENT AND INITIATING SEPARATE INVESTIGATION INTO EXEMPT STATUS OF THE COUNTRY CLUB OF MOUNT DORA HOMEOWNER'S ASSOCIATION

BY THE COMMISSION:

BACKGROUND

JJ's Mobile Homes, Inc., (JJ's or Utility) is a Class C utility located in Lake County, Florida. JJ's provides water and wastewater service to customers in Mt. Dora, Florida. As of December 31, 1993, the Utility served approximately 300 water and wastewater customers.

On December 7, 1992, the Utility filed an application to amend its water and wastewater certificates to include two parcels of land which were part of the Country Club of Mt. Dora. That application was assigned Docket No. 921237-WS. Several homeowners filed objections to the application and the matter was set for a May 5, 1993 hearing. The Office of Public Counsel (OPC) and the City of Mt. Dora intervened in the docket. The hearing was continued upon motion of the parties, on the grounds that a sale of the utility to the city was pending. The sale was not consummated, and the matter was set to be heard on December 13, 1993. George Wimpey of Florida, Inc., (Wimpey or Developer), the developer of the Country Club of Mt. Dora, intervened in the docket. The December 15, 1993, hearing was cancelled when the parties again informed us that a sale of the utility was likely. When the sale was not completed by March 1, 1994, the matter was again scheduled for hearing.

On July 22, 1993, Wimpey filed a complaint against JJ's for failure to provide service to its development in the Country Club. By Order No. PSC-94-0272-FOF-WS, issued March 9, 1994, we dismissed the complaint, but initiated an investigation docket (Docket No. 940264-WS) in order to address JJ's provision of service in its entire territory. Because Dockets Nos. 921237-WS and 940264-WS address similar issues, we consolidated the dockets. These matters were set for hearing on July 13-14, 1994. A Prehearing Conference

was held on June 27, 1994. On July 1, 1994, JJ's filed a motion for continuance, on the grounds that because an issue was raised at a relatively late date, it required additional time to file rebuttal testimony and prepare for the hearing. The parties stipulated that they would not object to a continuance. Order No. PSC-94-0858-PCO-WS, issued July 15, 1994, granted the motion to continue and reestablished key dates. The formal hearing was then set for October 13-14, 1994, in Lake County, Florida. On October 6, 1994, JJ's and Wimpey filed an emergency motion to continue the hearing. The motion was made on the grounds that JJ's and the Mount Dora Country Club Community Development District has entered into an agreement for the sale of the utility. The agreement contained a 90 day closing period and required approval by local government. Following an October 7, 1994, motion hearing, the continuance was granted. The order granting continuance required status reports as to the progress of the sale. When the sale of the utility was not completed by January 1, 1995, the matter was set for hearing for February 8-9, 1995. On February 2, 1995, OPC filed a motion for a continuance of the hearing, on the grounds that the hearing location was unsatisfactory, new issues and positions had arisen, and that discovery matters had not been completed. On February 7, 1995, the motion was granted, and the formal hearing was rescheduled for May 11-12, 1995.

We held a formal hearing on May 11, 1995, in Leesburg, and on May 12, 1995, in Mount Dora.

ABBREVIATIONS

The following abbreviations are used in this Order:

Name	Abbreviation
Country Club of Mount Dora	CCMD or Country Club
Dora Pines Mobile Home Park	DPMHP or Dora Pines
JJ's Mobile Homes, Inc.	JJ's or Utility
George Wimpey of Florida, Inc.	Wimpey or Developer
Office of Public Counsel	OPC
City of Mount Dora	Mount Dora or City
Contributions-in-Aid-of-Construction	CIAC
Department of Environmental Protection	DEP
Country Club of Mount Dora Homeowner's Association	Association
Equivalent Residential Connection	ERC
Brown & Caldwell Report	Brown & Caldwell
Hartman & Associates	Hartman
Mock, Roos & Associates	Mock, Roos

Professional Engineering Consultants, Inc. PEC

FINDINGS OF FACT, LAW AND POLICY

This proceeding encompasses the Utility's application to amend its territory and our investigation into the Utility's provision of service to its entire territory. Having heard the evidence presented at the hearing in this proceeding and having reviewed the recommendation of our staff, as well as the briefs of the parties, we have made findings herein on several of the issues addressed at hearing. However, as detailed more specifically below, we find it appropriate to reserve ruling on several issues, primarily those concerned with the Utility's provision of service to its territory on a going-forward basis.

WIMPEY'S POST-HEARING PARTICIPATION

By Order No. PSC-93-0147-PCO-WS, issued January 28, 1993, we required parties in this docket to file a post-hearing statement. Briefs were due to be filed with the Commission on June 29, 1995. Wimpey did not file a brief or any other post-hearing statement.

Pursuant to Rule 25-22.056(3)(b), Florida Administrative Code, a party that does not file a post-hearing statement shall be deemed to have waived its issues, and the party may be dismissed from the case. Wimpey has offered no explanation for its failure to file a post-hearing statement. Therefore, we find it appropriate to deem Wimpey's issues to be waived. Moreover, pursuant to Rule 25-22.056(3)(a), its positions on other parties' issues shall also be considered waived.

While it is within our discretion to dismiss Wimpey, we find that the waiver of Wimpey's issues and positions sufficiently addresses its failure to file a post-hearing statement. Therefore, we will not dismiss Wimpey from these proceedings.

JJ'S CAPACITY TO SERVE ITS TERRITORY

The Utility is already serving one of the two parcels it has requested in its application. All parties agree, and we hereby find, that the Utility's present plant capacity for both water and wastewater is insufficient to serve both the Dora Pines and the Country Club at build-out. As to the possibility of expansion, the record demonstrates that the utility is physically capable of expansion. There are no physical limitations, such as lack of additional land or regulatory or environmental concerns which would prevent the expansion of JJ's facilities.

Mr. Bibb contended that the Utility has insufficient land available for additional holding ponds and that homeowners are concerned that wastewater may be disposed of through irrigation on the golf course or stored in neighborhood storm water retention ponds. Additionally, he alleged that JJ's has transported effluent to the Eustis area for disposal. The record does not support Mr. Bibb's position. Additional land is available to expand the facilities. Effluent storage within the Country Club would be subject to DEP rules. It is sludge, and not effluent, that is being disposed of in the Eustis area.

OPC's arguments, that the Utility has not demonstrated the technical and financial commitment towards expansion have been addressed below in the section on Reserved Rulings.

The Utility has not reached 50 percent of its present plant capacity which would trigger formal planning for expansion pursuant to DEP. The record contains three separate engineering studies which confirm that JJ's treatment facilities can be expanded: the initial Hartman and Associates engineering study, commissioned by the Utility, and dated January 7, 1993; an investigation by Mock, Roos and Associates done at the request of Wimpey, and dated March 5, 1993; and the Brown and Caldwell completed in December, 1994 at the request of Wimpey.

All three engineering studies provide preliminary conceptual plans. Many details will not be determined until planning reaches the design stage. However, none of the studies perceived any fatal obstacles regarding the ability to expand JJ's facilities. Utility Witness Hochuli noted that the Brown and Caldwell Report presents as a preliminary plan, an alternative to providing service to both the Dora Pines Mobile Home Park and the Mount Dora Country Club. Mr. Hochuli further acknowledged that the report represents a plan to expand JJ's facilities to serve the Country Club which could be implemented by any party which owned the utility. Both the Hartman and Brown and Caldwell studies conclude that JJ's facilities can be expanded on its existing site to serve Dora Pines as well as the Country Club. Differing from the previous studies, the Brown and Caldwell offers the alternative of either effluent reuse or effluent disposal through the construction of additional percolation ponds.

In light of these considerations, we find that there are no limitations to JJ's ability to expand its facilities. As set forth below, we have reserved ruling as to JJ's technical and financial ability to serve its territory.

QUALITY OF SERVICE

The record reflects that JJ's provides predominantly residential service throughout its territory. The territory consists of three areas: the Dora Pines Mobile Home Park, and Phases I and II of the Country Club of Mount Dora. JJ's provides bulk service to Phase I through a master meter. Pursuant to Section 367.022(7), Florida Statutes, we granted the Homeowner's Association an exemption from Commission jurisdiction for this phase by Order No. PSC-92-0745-FOF-WS, issued on August 3, 1992.

JJ's contended that its quality of service was satisfactory. OPC, Mt. Dora, and Mr. Bibb argued that the Utility's quality of service was unacceptable. We heard customer testimony on quality of service and other issues on May 11, 1995, in Leesburg and on May 12, 1995, in Mt. Dora.

Those homeowners who reside in Phase I testified about the problems with water pressure and water quality. Many stated that the water was discolored and had an unpleasant odor and poor taste. The water also caused stains on appliances and fixtures. Some residents noted that the water was clear for a while after the lines had been flushed. Residents made the following additional statements or expressed the following concerns: the water quality problems affect the market value of their homes; the City's utility services were preferable; homebuyers were told by a representative of the developer that the City would provide their utility services; the condition of the wastewater treatment plant; the preference for aerated water; the Utility owner's commitment to provide quality water; the fact that customers pay City taxes but do not receive water and wastewater from the City; and that customers did not object to the use of effluent on the golf course. Mr. Bibb also provided testimony regarding poor water quality in Phase I.

The customers in Phase II were mainly concerned with the cost of service. They stated that the cost for service by the City was lower than the cost for service provided by JJ's. One customer also testified that he was aware of the impact fees which might be imposed by the City and that he did not object to them. The customers expressed some reservations as to water quality, but less than those experienced in Phase I.

Customers from Dora Pines stated that the quality of their water was satisfactory. Two customers who live in the mobile home park stated concerns with the Utility's wastewater plant operation. On one occasion, a customer noticed a strong unpleasant odor. When

he observed the wastewater plant, he believed that it was not operational.

Roberto Ansag, a supervisor for the drinking water section in DEP's Central district, testified that the Utility maintained the required minimum pressure and has an adequate auxiliary power source. The wells are located in compliance with Rule 62-555.312, Florida Administrative Code. The treatment plant and distribution facilities are satisfactorily maintained and sufficiently staffed with certified operators. The Utility has established a cross-connection control program, maintains the required chlorine residual or its equivalent throughout the distribution system, and monitors the organic contaminants listed in Rule 62-550.410, Florida Administrative Code. Mr. Ansag found that the water meets the state and federal maximum contaminant levels for primary and secondary water quality standards. Recent chemical analysis of raw and finished water, when compared to regulations, did not suggest the need for additional treatment. The plant and distribution systems were in compliance with all applicable law, and have not been the subject of any DEP enforcement action within the past two years. Mr. Ansag also testified that the designation of Class A, B, or C utility has no significance in terms of the quality of water provided by a utility and that this classification is based strictly on gross revenues for utility service as designated by this Commission.

Clarence Anderson, as environmental specialist in DEP's domestic wastewater section, testified that DEP has not required the Utility to take any action so as to minimize possible adverse effects resulting from odors, noise, aerosol drift or lighting. The pump stations and lift stations meet DEP requirements with respect to location, reliability and safety. The Utility is sufficiently staffed with certified operators, and the overall maintenance of the treatment, collection and disposal facilities is satisfactory. The facility meets all applicable technology-based effluent limitations and water-based effluent limitations, and the effluent disposal requirements of Rules 62-6.055 and 62-6.080, Florida Administrative Code. In 1992, DEP issued a warning letter regarding to pond maintenance and other violations. JJ's complied with DEP's directives, and the matter was resolved. JJ's has cooperated with DEP to resolve matters in a timely fashion.

Both the Utility and the Developer have conducted water quality tests. The Developer began a water sampling program within the last several years. These tests have all met the requirements of DEP or the Department of Health and Rehabilitative Services. The Utility has conducted water quality tests twice, once upon completion of the second well at the water treatment plant and once

within the Homeowners Association Phase I facilities. Both tests indicated that the water quality was within the maximum contaminant levels established by the State. The Utility conducts bacteriological analyses on a monthly basis as required under state law. These tests indicate that the Utility is well within state requirements. JJ's has also conducted water pressure tests which revealed no water pressure problems in either the system owned and maintained by JJ's or the distribution system within Phase I owned by the Homeowners Association.

In its late-filed testimony, the Utility responded specifically to customers' complaints regarding water quality. The Utility acknowledged that it must, under state standards, maintain certain chlorine residuals at the extremities of the system operated. A system with "dead-end" lines such as those in Phase I tends to dissipate the chlorine residual much more rapidly and frequently than a looped system, especially when the system is not near build-out. As more customers continue to come on line, this potential dissipation of chlorine will decrease as the demands increase within the system and therefore increase circulation within the system. In order to achieve this, higher levels of dosage of chlorine must occur at the front end of the system at the Utility's plant and wells. From time to time, there may be a noticeable chlorine odor within the systems. However, the chlorine content is maintained within state standards.

The Utility also asserted in its late-filed testimony that the concentration of hydrogen sulfide, the primary chemical constituent which may cause odor problems, was below detectable limits. Due to this low concentration, the Utility and DEP determined that no further treatment was necessary or appropriate. The City's water source is the same as that utilized by JJ's. The City aerates the water which probably helps to dissipate some of the hydrogen sulfide from the water. The most recent analysis conducted of JJ's water supply well revealed that the color of the raw water supply was ten Color Units, which is significant below the fifteen Color Units at which further treatment is required. The Utility maintained that sediment problems are likely the result of construction activities and/or improper line flushing within the area. While there may be periods when the system pressure is lower due to variations in pressure, the Utility has always maintained system pressures well in excess of the state minimum of 20 pounds per square inch.

The Utility also addressed the issue of green stains in its testimony. Green stains can only be caused by a copper tubing, and neither JJ's system nor the systems within any phases of the CCMD are constructed utilizing copper. Many utilities within the

central Florida area have the same problem due to the customer's internal plumbing facilities and the slightly acidic Ph of all source ground water within the area.

JJ's contended that despite the customer testimony, the Utility has provided satisfactory service. Only 16 individuals testified regarding the quality of service and only some of these individuals had questions or concerns regarding the water quality. JJ's noted that the City and the Developer did not object to JJ's quality of service. JJ's did not have an opportunity to inspect the installation of the distribution and collection system in Phase I, and does not have formal access to the collection and distribution facilities in Phase I. The service which the customers receive in Phase I of the CCMD is provided by the Homeowners Association, which receives bulk service from JJ's. When water is delivered through a master meter to a bulk water customer, it is difficult for the bulk service provider to address the complaints which occur on the other side of the master meter.

We conclude that, based upon evidence received at hearing, JJ's is in compliance with all state standards with regards to the quality of its water and wastewater service. However, we recognize that several areas of concern remain. Most of the difficulties originate in the Phase I distribution system which is owned and operated by the Association. JJ's does not own or have access to these lines, nor did it approve the design and construction of the distribution system within Phase I of the CCMD. After the point of connection it is the responsibility of the Association to provide quality service and address the concerns of its customers. As members of the Homeowners Association which is providing the water service, the residents could seek recourse with the Board of the Homeowners Association to evaluate possible internal corrective action.

While recognizing that the Association should address its members' concerns, we find it appropriate to require the utility to address problems relating to the source of the water, particularly odor and green stains. In a later portion of this Order, we have directed the Utility to provide a master plan. We find it appropriate to require the utility to evaluate the need for and cost of addressing water quality concerns. In this evaluation, the Utility shall address the treatment processes suggested in the Mock, Roos Report, as well as any additional measures that can be taken to address the concerns raised by customers.

PHASE I MASTER METER RATES

The Association is a bulk customer of JJ's, and receives service at a master meter under the Utility's general service rate. The customers of Phase I of the Country Club receive service in turn from the Association. While we do not regulate the Association's billing of its members, we find it necessary to address the bulk rate that JJ's charges the Association.

Phase I is served by an eight-inch master meter. Based upon meter equivalents, an eight-inch meter equals 80 ERCs for determination of the base facility charge. However, in this situation, in excess of 150 homes are behind the master meter. The Utility therefore under-recovers revenue associated with the base facility charge. Conversely, the wastewater gallonage charge is based upon all water which goes through the master meter without a cap to recognize irrigation and other outdoor usage, leading the Utility to over-recover gallonage revenue.

Both Mr. Bibb and OPC contended that the present bulk rates do not recognize that JJ's does not incur the cost of reading meters and billing individual customers, and that all water used is not returned to the wastewater system. Utility witness Robert Nixon stated that JJ's recognized inequities to both the Utility and its customers and offered three alternatives to address the problems: the Developer could pay the gross-up charge, donate the lines, and eliminate the need for bulk service through the Association; the Association could contract with JJ's to operate and maintain its system and conduct billing; and the bulk rate base facility charge could be modified in conjunction with a gallonage cap.

The first two alternatives are not feasible. While it may be preferable for the lines to be donated and the bulk rate situation eliminated, we do not have the authority to require the Developer to take such action. Details of the second option, including cost and the applicable rate are not in the record. Furthermore, such an arrangement could lead to the imputation of taxable CIAC to the Utility.

We find the most viable option to be a modification of the bulk rate. The utility has proposed to base the base facility charges on 80 percent of the residential base facility charge per connected home behind the master meter and to cap the wastewater gallonage on a maximum of 10,000 gallons per connected home. This addresses the Phase I residents' main concern of wastewater being billed based upon 100 percent of water usage.

Therefore, within 90 days of the date of this Order, JJ's shall file for our approval a proposed agreement modifying the Association's bulk rate as set forth above. Upon approval of the agreement, JJ's shall make a good faith effort to enter into the contract with the Association. While we recognize that we do not have the authority to order the Association to execute an agreement modifying the bulk rate, the Utility's proposal addresses the parties' concerns and a revised agreement would benefit the Association.

JJ'S APPLICATION FOR AMENDMENT OF TERRITORY

We have reviewed JJ's amendment application pursuant to Section 367.045, Florida Statutes, and Rule 25-30.036, Florida Administrative Code. In Docket No. 910956-WS[1], we discovered that a portion of the Developer's property was not in JJ's approved territory, even though it had entered into an agreement to serve those parcels, in violation of Section 367.045. In Order No. PSC-92-0778-FOF-WS, issued on August 10, 1992, we approved a permanent service agreement between JJ's and the Developer. A provision of the agreement required JJ's to apply for an amendment of territory.

With the exception of the fact that JJ's is serving territory not currently approved by this Commission, the application is in compliance with the governing statute, Section 367.045, and other pertinent statutes and administrative rules concerning an application for amendment of certificate. The application contains a check in the amount of $300, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. The Utility has provided a copy of the warranty deeds which provide for the continued use of the land on which the water and wastewater treatment facilities are located as required by Rule 25-30.036(3)(d), Florida Administrative Code. Adequate service territory, system maps and a territory description have been provided as prescribed by Rule 25-30.036(3), (e), (f), and (i), Florida Administrative Code.

The Utility has submitted an affidavit consistent with Section 367.045(2)(d), Florida Statutes, that it has tariffs and annual reports on file with the Commission. In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code. There are no outstanding DEP notices of violation regarding the Utility.

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[1] In re: Complaint for entry of an order directing JJ's Mobile Homes, Inc. to provide permanent service in Lake County to George Wimpey of Florida, Inc. d/b/a Morrison Homes.

While we find that the Utility's application is in compliance with our rules, statutes, and non-rule policies, our determination as to whether to grant JJ's the additional territory is dependant upon the filing of the master plan. Therefore, we have reserved ruling as to whether we find it appropriate to grant JJ's the additional territory.

DUPLICATION OF TERRITORY

Pursuant to Section 367.045(5)(a), Florida Statutes, this Commission will not grant an amendment if the requested territory will be in competition with or duplication of an existing system "unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public..." Mount Dora argued that it has a long-range plan to serve the entire Chapter 180 district, and if JJ's expands, this would be in direct competition with the City. OPC contended that the City can serve the territory at a much lower incremental cost to the CCMD customers than JJ's can and that it would duplicate the service available from the City, which is adequate to meet the needs of the proposed extension of territory. JJ's contended that the City's nearest facilities are too distant and inadequate to serve the Country Club, and would in fact be a duplication of JJ's facilities.

The record shows that Mount Dora has excess water and wastewater treatment plant capacity which would allow it to provide service to the Country Club. The wastewater plant currently has 700,000 gallons per day excess capacity and the water plant has 7 million gallons per day excess capacity. However, the lines the City has located along Highway 441 are not sufficiently sized to serve the entire Country Club at buildout. Further, the City obviously does not have lines within the Country Club since all such lines and other facilities are owned by JJ's, with the exception of those in Phase I which are owned by the Association. Therefore, in order to provide service to the requested territory, the City would have to upgrade its mains along Highway 441 and duplicate or obtain use of JJ's lines within the Country Club. There is no indication in the record that JJ's and the City have entered into negotiations in this regard. Even if this occurred, the amendment application is for only a portion of the Country Club. Therefore, in order to extend its lines to serve the territory requested in the amendment, the City would have to duplicate at least some of JJ's lines which would be contiguous.

Therefore, we find that the granting of the additional territory in the amendment docket would not result in competition with or a duplication of another system.

MT. DORA'S CHAPTER 180 DISTRICT

Chapter 180, Florida Statutes, addresses the provision of public works by municipalities within their corporate limits. The additional territory sought by JJ's in its application for amendment of certificate is within the City's Chapter 180 utility district.

Mount Dora argued that the Commission does not have the authority to prevent a municipality from serving a portion of its Chapter 180 utility district which was not a part of a certificated area prior to the adoption of the utility district by the municipality. The expansion areas are clearly within its Chapter 180 utility district, while the areas are only contiguous to JJ's claimed area. The City cited City of Mount Dora v. JJ's Mobile Homes, Inc, 579 So. 2d 219, 223 (5th DCA 1991), stating that Section 180.06, Florida Statutes, prevents a utility from encroaching upon an area already served by another. The City further cites Ortega Utility Co. v. City of Jacksonville, 564 So. 2d 1156, (1st DCA 1990), where that court stated that Section 180.06, Florida Statutes, is expanded to include certificated areas as areas already served if the certificate holder is ready, willing, and able to serve that area.

OPC argued that while the Commission can allow an extension of territory into a Chapter 180 utility district if the city does not object, litigation between JJ's and the city established the principle that where two parties have lawful claims, the first one there is authorized to serve.

The Utility contended that the Commission may authorize a utility to extend its certificated territory into a municipality's 180 district. Section 180.06(9), Florida Statutes, prevents service to the Country Club by the City because JJ's operates a utility or system in the territory adjacent thereto and has not consented to service by the City. JJ's argued that Section 367.011, Florida Statutes, supersedes all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference.

Section 367.045(5)(a), Florida Statutes states:

> The commission may not grant a certificate of authorization for a proposed system, or an amendment to a certificate of authorization for the extension of an existing system which will be in competition with, or a duplication of, any other system or portion of a system,

> unless it first determines 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. (Emphasis added)

Pursuant to Section 367.011(4), Florida Statutes, Chapter 367, Florida Statutes, supersedes all other laws on the same subject, unless it is superseded by express reference in another statute. No section of Chapter 180, Florida Statutes, expressly supersedes any section of Chapter 367, Florida Statutes. Further, we do not administer Chapter 180, Florida Statutes, although we are importuned to consider the duplication of service under Section 367.045(5)(a), Florida Statutes. See Order No. PSC-95-0417-FOF-WS[2], issued March 27, 1995, in Docket No. 940850-WS.

Section 180.06(9), Florida Statutes, states in pertinent part,

> a private company or municipality shall not construct any system, work, project or utility authorized to be constructed hereunder in the event that a system, work, project or utility of a similar character is being actually operated by a municipality or private company in the municipality or territory immediately adjacent thereto, unless such municipality or private company consents to such construction.

The Fifth District Court interpreted the term "immediately adjacent," stated in Section 180.06(9), Florida Statutes, as only prohibiting "direct encroachment by one utility provider into an operating area already served by another." Mount Dora at 223. See also Ortega at 1158. The Ortega decision held that with this interpretation, there would be no duplicative capital investment within the same consumer territory. Id. However, when no entity is providing utility service in a specific territory, and each has the present ability to promptly and efficiently do so, the entity which acquires the legal right first will have the exclusive right to serve the area in question. Mount Dora at 223.

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[2]95 FPSC 3:651 Application for Transfer of Certificates Nos. 481-W and 417-S in Broward County From Colonies Water Company to MHC-DeAnza Financing Limited Partnership d/b/a Colonies Water Company.

Utility witness Hochuli testified that JJ's has the technical ability to provide service to the two areas requested in its application. Additionally, JJ's is presently providing water and sewer service into one of these two parcels through a bulk service agreement. City witness Stroupe testified that the City is ready, willing, and able to serve the Country Club. However, neither Mr. Stroupe nor City Witness Farner testified that the City would only serve the two areas which are the subjects of the application.

In consideration of the above, we find that Chapter 180, Florida Statutes, does not expressly supersede any provision in Chapter 367, Florida Statutes. However, we will look to Chapter 180, Florida Statutes, if there is a chance of duplication of service. We have found herein that there is no duplication of service in either area in JJ's application. The provisions of Chapter 367 and Chapter 180, as well as the Mount Dora decision, demonstrate that we have the authority to grant JJ's application for amended territory in the parcel which it is already providing service. With regard to the second parcel, since both the utility and the City are technically ready, willing, and able to serve the second parcel with neither party providing service, we may grant JJ's application for the second parcel.

MT. DORA'S PROVISION OF BULK SERVICE

During this proceeding we also considered whether Mt. Dora could provide bulk service to the Country Club, instead of JJ's building additional plant. The record indicates that the City has the physical capacity to provide bulk service to the Country Club. The Utility contended that the City cannot provide bulk service because the Utility has the right to serve the territory.

Because the costs of this option are unknown, we cannot determine at this time whether an interconnection with the City is the optimal solution to provide the capacity needed to serve the Country Club through buildout. We have already addressed the issue of Mt. Dora's Chapter 180 territory and the potential duplication of territory. We have reserved ruling as to whether any of JJ's territory should be deleted and have stated below that the Utility shall file a master plan concerning its future provision of service to its territory. As part of its master plan, the Utility shall address the option of interconnection with the City to obtain the needed plant capacity to serve the remaining areas of the Country Club. In analyzing the feasibility of an interconnection, JJ's shall address the costs involved in the interconnection, including construction costs, impact fees, and the bulk rate that would be charged to JJ's.

JJ'S CERTIFICATION

During the course of this proceeding, parties raised the issue of whether Certificate No. 298-W and Certificate No. 248-S were properly issued to JJ's predecessor, Dora Pines, Inc., and whether the Utility is authorized to serve beyond the borders of the mobile home park. Error was also discovered in the territory description which was attached to the order granting those certificates. We have addressed these issues specifically below.

Errors in the Territory Description

On, November 16, 1977, we issued Order No. 8044, which granted Dora Pines, Inc., certificates to operate its water and wastewater systems in Lake County. We first find it appropriate to address the technical error in draftsmanship found in the territory description attached to Order No. 8044.

The map of the service territory presented at hearing by the Utility indicated the territory set forth in the legal description of the Utility's certificate. The map contained a minor adjustment to the description to close one of the lines. Initial testimony indicated that there were two errors in the description. However, subsequent testimony by Utility witnesses Hochuli and Collier clarified that there was only one error. After considering the testimony and exhibits as to the territory description, we find that the ninth line from the bottom of the first paragraph of the original territory description contains an incorrect direction. The original description reads "Run thence North 89 degrees 08 minutes 30 seconds East." It should read "Run thence North 89 degrees 08 minutes 30 seconds West," and shall be corrected accordingly. The territory description bearing this correction is attached to this Order as Attachment A and incorporated herein.

The technical errors in the description are not sufficient to render the description inoperative. The error can be clarified without any misinterpretation. When such errors are discovered, we typically issue a corrective administrative order. Therefore, this correction is not fatal to the legal description as a whole. We find that the utility is currently authorized to serve the territory as described in the legal description attached to this Order.

The Issuance of the Grandfather Certificate

Order No. 8044 granted Dora Pines a certificate pursuant to Chapter 367's grandfather provisions. OPC contended that the Commission erred in granting a grandfather certificate for areas

served outside of the mobile home park, and that we should construe JJ's territory as only that area contained in the mobile home park. JJ's argued that while the Commission may have erred in granting the territory under the grandfather provisions of the statute, the Commission had the authority to issue the territory under the statutory provisions for an original certificate.

Our analysis of these issues involves a series of inquiries. First, what type of certificate should this Commission have issued to Dora Pines in 1977? Then, did this Commission have the authority under Section 367.171 to grant the utility the territory listed in the order? Finally, if we determine that Order No. 8044 improperly granted the territory, what action should we take?

I. <u>What type of certificate should have been issued to Dora Pines in 1977?</u>

In 1977, Chapter 367 of Florida Statutes, addressed original certification in Sections 367.041 and 367.051. Pursuant to Section 367.041, an applicant for an original certificate was required to provide information about its ability to provide service, its rates and charges, the utility's facilities, and the existence of other service providers in the area. Section 367.041 also required the applicant to provide notice to the county commission and advertise in a local publication. The requirements of Section 367.041 only applied to those seeking an original certificate. The grandfather systems to which Section 367.171(b) applied were only required to submit a map of the existing system and a description of the area served by the system.

Section 367.171 addressed systems which were grandfathered-in when a county resolved to give the Commission jurisdiction. Section 367.171(b) stated that any utility "engaged in the operation or construction of a system" was entitled to receive a certificate for the area served by the utility on the day that Chapter 367 became applicable in that county, if the utility applied for such a certificate within 90 days. While this Commission initially approved all certification matters, at some point during the mid-1970's our staff was given administrative authority to process grandfather certificates.

Lake County became jurisdictional on June 13, 1972. The utility known as Dora Pines became operational on May 1, 1973. However, the utility did not come under our jurisdiction until several years later, when it began to charge for service.

OPC presented the testimony of Thomas Walden, an engineer with the Commission's Bureau of Economic Regulation in the Division of

Water and Wastewater. During the time that Order No. 8044 was issued, Mr. Walden worked on certification cases and processed grandfather applications. However, Mr. Walden did not take part in the processing of Dora Pines' certificate other than drafting one memorandum, and was not assigned to the docket once Dora Pines filed its application. Mr. Walden testified that with the information presented to him at the hearing, he would have issued a grandfather certificate for the 135 lots that were currently being served by the utility.

The Utility presented the testimony of James Collier, who was a supervisor in the Commission's Division of Water and Wastewater during the times relevant to this proceeding. Mr. Collier testified that he disagreed with the contention that the Commission would have processed Dora Pines' application as a grandfather certificate in 1977. According to the statute in effect, grandfather certificates are for utilities which are in existence within 90 days of a county becoming jurisdictional. In this instance, Dora Pines filed its application long after the 90 day window.

Our first consideration is what certificate should have been issued to Dora Pines in 1977. Dora Pines' situation did not fit neatly into either the grandfather or original certificate statutes. Section 367.171(b) clearly stated that a utility was entitled to a grandfather certificate for the area being served on the date the county became jurisdictional, if it applied for the certificate within 90 days. In the case of Dora Pines, it appears that the utility was not operational on June 13, 1972, and that even after the mobile home park opened in May of 1973, it did not commence charging for service immediately. As to the 90 day window, Dora Pines' application was filed May 17, 1977, almost five years after Lake County became jurisdictional. Dora Pines did not fit cleanly into the category of original certificate, either. It was already providing service to its customers when it applied. The requirements of Sections 367.041 and 367.051 speak more to a proposed system than one already operational.

We agree with JJ's contention that Dora Pines did not fit into the category of a grandfather certificate. Given the situation today, Dora Pines would likely be required to file under an original certificate, or pursuant to Rule 25-30.034, Florida Administrative Code, file for an original-in-existence certificate. The parameters of the grandfather certificate would be stretched too thin to allow the utility to file almost five years after the jurisdictional date. Additionally, the utility did not exist at the time Lake County ceded jurisdiction to us. In fact, Mr. Walden testified that while there may have been a liberal interpretation

of the 90 day window in the mid-1970's, the Commission is now much stricter in its interpretation.

Our conclusion that the certification would not be processed as a grandfather certificate today, and our view that Dora Pines certification should have been processed as an original certificate does not automatically void Order No. 8044 and JJ's certificates. The next question that must be asked is, did this Commission have the authority to grant territory to a utility pursuant to Section 367.171, when that territory appears to exceed the area actually being served at that time?

II. Authority and Interpretation of Order No. 8044

Dora Pines was serving a small area in 1977; there was no development in area now known as the Country Club. (TR 62-63) OPC argued that the utility should not have received territory beyond the lots being served in Dora Pines at that time. JJ's argued that the Commission had authority to issue an original certificate to Dora Pines, and that we should therefore construe Order No. 8044 as granting an original certificate. The parties have raised several issues which address the propriety of the order and attached territory. OPC's primary arguments focused on the interpretation of the grandfather statute, and several Commission cases which address the issue of excess territory. JJ's concentrated on the doctrines of administrative finality and estoppel. We have addressed each point below.

Developer Agreement

Mr. Collier testified that in either a grandfather or original certificate docket, developer agreements would have been recognized when granting territory, so that a grandfather certificate may have included territory that was not presently being served, but which was included in an agreement to provide service. Mr. Collier testified that the Commission had recognized developer agreements for certificates granted to Jacksonville Suburban Utilities Company and General Waterworks, Inc., but did not provide any reference to a specific decision regarding these utilities.

In this instance, it appears that Dora Pines included a developer agreement and its described territory in its application. The 1974 document, called a utilities agreement, purports to bind Dora Pines to provide service to lands described in an addendum to the agreement. The territory description in the addendum describes the same part of land included in Order No. 8044's territory description and is included in JJ's service territory.

Additionally, the treatment plant permit included capacity beyond the lots not included in the mobile home park area in 1977.

There is no evidence in the record to conclude the Commission staff reviewed the agreement when processing the 1977 application. JJ's contended that the staff did so when it processed Dora Pines' application. OPC argued that Dora Pines was eligible for a grandfather certificate, complied with that law, and was issued a certificate pursuant to that law. While it appears that Dora Pines provided, and Commission staff utilized, the developer agreement in Docket No. 770402-WS, it is not referenced at all in the body of Order No. 8044 or listed as a factor in the issuance of the certificates. The existence of the developer agreement does not control the interpretation of the order, or answer the question of whether we could issue territory beyond that being served.

Filing Fee

OPC offered the testimony of Mr. Thomas Williams, who was employed in the Commission's Division of Water and Wastewater from 1976 through 1987, and worked on Docket No. 800442-WS in which we approved the transfer of Certificates Nos. 248-S and 298-W from Dora Pines to JJ's.

Mr. Williams testified that he calculated the appropriate filing fee by multiplying the number of lots (135) by the average number of persons per lot (1.75), to arrive at the number of persons being served by the utility. A utility serving between 1 and 249 persons would pay a $50 filing fee. The utility paid a filing fee of $50 for water and $50 for wastewater.

OPC referred in its brief to the fact that the utility's filing fee was based on a small number of customers. We find that the amount of a filing fee does not control the size of the utility's territory or the number of customers being served.

The Commission's Authority

It may have been the practice at that time to allow territory beyond what was actually being served at the time as Mr. Collier indicated in his testimony, and the developer agreement may have been relevant to the service territory granted. The possibility also exists that the staff intended to proceed with an original filing, but that a mistake was made and the wrong application was sent to the utility and processed.

Section 367.045(1), Florida Statutes, contemplates issuing a certificate for a utility that is just beginning its operations.

In other words, we have authority, pursuant to the original certificate statute, to grant territory before it is actually being served. JJ's contended that the certificate was actually issued under the provisions of 1977's Section 367.051 as an original certificate. It contended that the Water and Wastewater staff erred in sending Dora Pines the forms for a grandfather certificate and by processing and issuing the order pursuant to Section 367.171. JJ's argued that the staff would have had to ignore two statutory requirements: that the application be made within 90 days of the jurisdiction date, and that it be granted only what it was serving at the time of jurisdiction.

While there is testimony in the record that we could have or should have processed the application as an original certificate, Order No. 8044 was issued pursuant to Section 367.171(b). JJ's contended that Order No. 8044 contains an inappropriate reference to the statutory authority and that we should interpret the order as being an original certificate issued pursuant to our authority to grant such certificates. We do not agree with JJ's that we can construe Order No. 8044 as an original certificate order. We cannot construe the intent of the Commission to issue an original certificate. The order speaks for itself and cites Section 367.171 as the applicable statute. Moreover, there were too many differences between the application required for an original certificate and for a grandfather certificate. The most important distinction is that the utility was not required to give notice under the grandfather statute. Although we may have had authority to issue an original certificate, this authority cannot override the obvious language of the order.

In its brief, OPC reviewed several Commission proceedings which concerned the interpretation of territory and a grandfather certificate. OPC argued that, by citing Section 367.171(b) in Order No. 8044, we were bound to only issue a certificate for the area being served on the jurisdictional date. Therefore, OPC argues, the territory description attached to Order No. 8044 is inconsistent with the order.

St. Johns North

By Order No. 16199[3], issued June 6, 1986, we granted a grandfather certificate to St. Johns North Utility Corporation. The utility's territory description included a general reference to two portions of Township 4 and Township 5, and specific reference to two subdivisions, Cunningham Creek and Fruit Cove Woods. In

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[3]86 FPSC 6:99 (Docket No. 860310-WS)

Order No. 20409[4], issued December 5, 1988, the Commission ordered St. Johns North to show cause why it should not be fined for, inter alia, serving outside of its territory.

St. Johns North contended that the wording of the territory description attached to Order No. 16199 authorized it to serve all of the portions of Township 4 and Township 5, and not just the two subdivisions. St. Johns admitted that it had not been serving any subdivisions outside of Cunningham Creek and Fruit Cove Woods at the time of the issuance of the grandfather certificate, and that it had only begun to serve other subdivisions after the issuance of the certificate.

We found that St. Johns North's interpretation of its service territory was overbroad. This was based on two rationales: the general reference to townships in Order No. 16199 must be interpreted with the specific reference to the two subdivisions, and that because the certificate was issued under the grandfather statute, the service area was limited to the area the utility was serving at the date we received jurisdiction. (Order No. 20409, page 2)

Sebring Country Estates

By Order No. 12846[5], issued January 5, 1984, we granted a grandfather certificate to Sebring Country Estates Water Company. We were later notified by the Sebring Utilities Commission (SUC) that the utility had claimed in its grandfather certificate land that was actually in SUC's service area. SUC did not received notice of the grandfather certificate, or its claimed territory. In Order No. 18592[6], issued December 23, 1987, we ordered Sebring Country Estates to show cause why it should not be fined for supplying false information in its application for a certificate. The utility was also show caused for several service and accounting violations. At the subsequent hearing, the utility claimed that it had included territory from a 1960 developer agreement, even though it admitted that it was not actually being served on the jurisdiction date.

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[4]88 FPSC 12:31 (Docket No. 881425-WS).

[5]84 FPSC 1:47 (Docket No. 830332-W).

[6]87 FPSC 12:410

In Order No. 20137[7], issued October 10, 1988, we found that the utility had wilfully violated or knowingly refused to comply with the grandfather certificate statute by including territory that it was not serving in its grandfather certificate application. We deleted a portion of the utility's territory, but only that territory that was still unserved as of the date of the show cause hearing.

OPC cited the St. John's North and Sebring Country Estates cases to demonstrate that we did not issue territory under a grandfather certificate unless that area was actually being served at the time of jurisdiction. These cases support a literal interpretation of Section 367.171, and demonstrate that, at least in the later portion of the 1980's, we did not authorize our staff to issue grandfather certificates beyond the territory currently being served.

Conclusion

The parties' arguments demonstrate the many ways that an order may be reviewed and interpreted. One can suppose that the Commission meant to issue the order under the original certificate statute, or that the staff had administrative authority to include more territory than was actually being served at the time of jurisdiction. One can contend that the order is invalid, because it exceeds the authority under Section 367.171(b). Every one of these arguments is at least a rational supposition given the evidence presented at hearing.

Looking at the statutory provisions in place at the time of the issuance of Order No. 8044, and the order itself, it certainly appears that the order may not accurately reflect our procedures for issuing a grandfather certificate. Had the utility filed an application for an original certificate, we would have had the authority to grant that territory, because the Commission had authority to issue a certificate pursuant to the original statute for proposed territory. The mistake was not necessarily in the Commission's authority, but whether the Commission or the utility followed the appropriate procedures. Nevertheless, it appears that the Commission, or in this case the staff, did not have the statutory authority to grant a grandfather certificate which authorized the utility to serve more that the actual territory being served at the jurisdictional date.

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[7]88 FPSC 10:206

III. Deletion of JJ's Certificated Territory

Section 367.045(6), Florida Statutes, permits us to revoke, suspend, transfer, or amend a utility's certificate, provided 30 days notice is given. We note initially that we are considering whether it is in the public interest for JJ's to continue to serve its entire territory in terms of the utility's technical and financial ability. In this instance, we are reviewing whether JJ's territory should be deleted in any fashion as a result of the arguments raised concerning Order No. 8044.

Although we find that the Commission did not have the statutory authority to issue the certificate for more than the territory being served, the order granting the territory is not automatically voided. The order may have been improperly issued in its scope, however, on its face it does grant the territory described in its territorial description, with the corrections made herein. In other words, while the Commission did not have the statutory authority to issue a grandfather certificate for territory more than that being served, we will not now construe Order No. 8044 as anything less than what is on its face.

During his testimony, Mr. Walden stated that "all I have is a very small picture of what was in the file, we're missing some things." That statement points out the difficulty and the danger of attempting to reconstruct events so far in the past. Many of the witnesses reviewed and discussed documentation in the docket, but had no personal knowledge of the events in those documents. While testimony on these issues provided insight into the Commission's policies and procedures, the witnesses, even those familiar with Commission practice cannot offer an opinion about the legal validity of an order.

Moreover, neither the individuals who filed the 1977 application, nor the staff members who processed the application or prepared the territory description testified in this docket. In cases where we have deleted territory, we made a finding that the utility had knowingly failed to provide correct information on the application for a grandfather certificate. We cannot make that finding in this docket on this record.

OPC argued that JJ's authorized territory is limited to the lots within the mobile home park. JJ's argued that the doctrines of administrative finality and equitable estoppel should preclude us from revisiting Order No. 8044. JJ's contends that at a certain point, an agency's order must become final and no longer subject to revision, and that even if the Commission does have the authority

to modify the order, the Commission should be equitably estopped from doing so. We have reviewed those arguments below.

Administrative Finality

Florida courts have long recognized that at some point, an agency's order must pass out of its control and become final. However, this precept must be balanced against our authority to correct prior orders. The seminal case on the issue of administrative finality is Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966). In 1960, we approved an agreement between Peoples and City Gas Co. After the parties to the agreement entered into litigation over a purported violation, we issued an order in 1965 withdrawing our approval of the agreement on the ground that we had exceeded its authority in issuing the 1960 order. The Supreme Court found that we did not have the statutory authority to modify an earlier order. The court noted that agencies have inherent power to modify final orders still within their control but that

> orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. Peoples Gas at 339.

The court further noted that the 1965 order was not the result of rehearing or reconsideration, and was issued more than four years after the first order. Additionally, it was not based on a change in circumstance or public need or interest.

The court considered a similar situation in Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979). In a 1972 transfer docket, we found a transportation certificate to be dormant, and denied the transfer. However, in a subsequent order, we determined that the certificate was not, and had never been, dormant, and vacated the first order. The court held that the Commission was bound by its first order to cancel the certificate. The court cited the Peoples Gas decision that there must be a point where an order is final. In Austin Tupler, as in Peoples Gas, there was no change in circumstance or great public interest to cause a reversal of the first order. The court noted that "it would also present an administrative nightmare, for parties to a transfer proceeding would presumably be entitled to relitigate

indefinitely the dormancy issue in successive transfer dockets." Austin Tupler at 681.

In Reedy Creek Utilities Co. v. Public Service Commission, 418 So.2d 249 (Fla. 1982), the court held that we did not err when we issued an order changing its first order on refund amounts two and a half months later. Because we are charged with the statutory duty of regulating rates, we have the power and the duty to amend an order when we find that we had erred to the detriment of the public. The court cited the Peoples Gas and Austin Tupler decisions, but distinguished them on several grounds. It noted that while the Commission's power to modify its orders is inherent by reason of its nature and its functions, it is not without limitation. However, there was only a two and half month time difference, the utility had opportunity to file for reconsideration, and the utility did not change its position in reliance upon the first order.

The court approved our correction of a prior order in Sunshine Utilities v. Public Service Commission, 577 So.2d 663 (Fla. 1st DCA 1991). Sunshine appealed a Commission order which found that the factual premise for a prior order was in error because adjustments to rate base had not been properly made. While acknowledging the doctrine of administrative finality, the court in Sunshine distinguished its decision from Peoples and Austin Tupler. The court found that unlike territorial agreements or certification, "the issue of prospective rate-making is never truly capable of finality." Sunshine at 665.

Florida Power and Light Co. v. Beard, 626 So.2d 660 (Fla. 1993) examined administrative finality from a different perspective. We struck a clause in a contract between FP&L and a co-generator which allowed the utility to terminate or change the contract if the Commission denied cost recovery at some future date. We ruled that because we had already determined that we would allow cost recovery for those types of contracts and had no intention of revisiting that decision, the clause was unnecessary. Florida Power appealed, arguing that despite the doctrine of administrative finality, there could be circumstances which could cause us to reverse the decision on cost recovery. The court denied the appeal, finding that, "by stating that it does not intend to revisit the decision to allow cost recovery, the Commission has endeavored to make its order as final as possible." Florida Power at 663.

Taken together, these decisions provide a distinct framework for applying the doctrine of administrative finality. We must carefully balance our authority and duty to correct prior errors,

with the need for administrative finality. A change in circumstances or great public interest may lead an agency to revisit an order. However, there must be a terminal point where parties and the public may rely on an order as being final and dispositive.

We find the doctrine of administrative finality to be a guiding principle in this docket, and therefore find that Order No. 8044 should not be vacated. We will not delete JJ's territory on the grounds that Order No. 8044 was improperly issued. If a change in circumstance has occurred, it is that JJ's is now serving a portion of the disputed territory. That change supports the need for finality.

While it is not the controlling factor, the length of time that has transpired between the issuance of the orders is an important consideration. Here, 18 years have now passed since the issuance of Order No. 8044, and 14 years have passed since the issuance of Order No. 9853. In Reedy Creek, the court noted that the order before it was only two and half months old when it was changed, whereas the orders from Peoples Gas and Austin Tupler dealt with orders that were four and two years old, respectively.

There is not only a distance in time, but a distance in participation in the 1977 docket. In the cases cited herein, it was the original party to the case who opposed the change in the order. In this docket we are not contemplating Dora Pines' certificate, but the certificate of Dora Pines' corporate successor. JJ's did not take part in the certification proceeding. Had JJ's done so, we would be faced with a much different scenario. Instead, the Utility is in the position of explaining actions which were taken by another entity.

Although not explicitly stated, the cases which address administrative finality incorporate some elements of estoppel. A primary concern is that individuals know at some point that an order is final so that they may act upon it. In Austin Tupler the court noted that it would be inappropriate to allow parties to litigate the same issue in successive dockets. In Reedy Creek, the court stated that "an underlying purpose of the doctrine of finality is to protect those who rely on a judgment or ruling." Id. at 254. In support of its ruling, that court found that the utility had not changed its position in reliance upon the order. This docket presents a situation where consideration should be given to the successor Utility's reliance upon the order.

Equitable Estoppel

JJ's contended that even if we find that the doctrine of administrative finality does not prevent a review of the orders, we should be estopped from revisiting the orders. Equitable estoppel may be applied to a state agency, but only upon a showing of exceptional circumstances. Reedy Creek Improvement District v. Department of Environmental Regulation, 486 So.2d 642, 647 (Fla. 1st DCA 1986); North American Co. v. Green, 120 So.2d 603, 610 (Fla. 1959). The essential requirements of equitable estoppel are: (1) a representation as to a material fact; (2) reliance upon that representation; and (3) a change in position, caused by the representation and reliance. Florida Department of Transportation v. Dardashti Properties, 605 So.2d 120, 123 (Fla. 4th DCA), Tri-State Systems, Inc. v. Department of Transportation, 500 So.2d 212, 215-16 (Fla. 1st DCA 1986). Most case law in this area concerns zoning and permitting by local governments, or licenses and permits granted by state agencies.

JJ's contended that the situation in this docket satisfies the elements of equitable estoppel. First, territorial descriptions in Orders Nos. 8044 and 9853, and subsequent orders requiring JJ's to provide service to that territory constitute a representation of material fact by the Commission. Secondly, the Utility relied upon the orders' territory description when conducting its activities regarding the territory. Thirdly, JJ's substantially changed its position because of its reliance upon the territory in the order. It purchased the utility and conducted activities because of that reliance.

Clearly, we are not estopped from taking action against JJ's certificate within the context of this investigation. One of the issues on which we have reserved rulings is whether JJ's should continue to serve its entire territory. It is within our authority to decide, based upon the present situation, whether the Utility should retain its territory.

JJ's has raised a valid argument regarding estoppel in the context of Orders Nos. 8044 and 9853. However, we need not reach a determination as to whether we are estopped from removing JJ's territory based upon Order No. 8044's apparent inconsistencies. We have found that, based on the doctrine of administrative finality, we shall not vacate or otherwise revisit Order No. 8044, with the exception of making the corrections to the territory descriptions noted herein.

Transfer of Certificate

JJ's did not seek the certificate in 1977. Rather, it was a corporate successor that acquired the rights to the certificate as part of the transfer. JJ's argued that the transfer docket cured any defect of the issuance of the certificate in 1977. It contended that the Commission's rules and procedures allowed an affected party the opportunity to object to the notice of transfer, and that OPC and the city had constructive or actual notice of the territory to be transferred. Mount Dora argued that as a successor in interest, JJ's could not receive more than what Dora Pines actually held. OPC argued that the transfer docket could not have given JJ's more service territory than the mobile home park.

The issues surrounding the issuance of Order No. 8044 cannot be cured by the transfer of the certificate from Dora Pines to JJ's. The same circumstance in the issuance of Order No. 8044 carried over to Order No. 9853. The transfer does further reinforce our finding that administrative finality should preclude a recision of Order No. 8044. Order No. 9853 was but one order in a long progeny of Commission orders which dealt with JJ's and its provision of service to its territory.

Therefore, while recognizing that Order No. 9853 transferred the utility's territory from Dora Pines to JJ's, we find that that order did not remedy the difficulties inherent in Order No. 8044, and is subject to the same concerns and scrutiny as Order No. 8044.

Conclusion

Dora Pines' application should have been processed as an original certificate. Section 367.171 did not grant the Commission or its staff the authority to issue a grandfather certificate for an area greater than the area being served at the jurisdictional date. Despite the errors in issuing Order No. 8044, we have determined, based on the doctrine of administrative finality, not to delete JJ's disputed territory.

Were we to have determined otherwise, the St. Johns North and Sebring Country Estates decisions indicate that we would not have automatically deleted JJ's territory. Moreover, the focus in this docket is properly on the situation in 1995, not 1977. This investigation docket afforded a complete look at the utility and its service. The parties all had an opportunity to assail JJ's service to the territory on a prospective basis.

In the dockets cited above where territory was deleted, there appear to have been no customers currently being served in the

deleted territory. There is little evidence in the record which addresses the impact of deleting JJ's territory outside of the mobile home park. A removal of the Country Club from JJ's territory would result in the very least in excess capacity for the Utility. We must consider the impact such a deletion would have on the customers residing in both the mobile home park and the Country Club.

MASTER PLAN

The Utility has not provided sufficient testimony showing commitment and direction for the needed plant expansions. While we do not believe that a utility should expand its plants until additional capacity is needed, a sound expansion plan is prudent where customer growth and the need for corresponding capacity is imminent. In this case, capacity expansion is totally dependent upon growth within the Country Club, which appears to be a healthy, growing development. A utility serving a single development has a planning advantage in dealing with one developer and not dealing with various growth rates, a mix of residential and commercial property or the uncertainty of future development for raw land.

While there is nothing in the record to indicate that the Utility cannot accomplish a future expansion, JJ's has not been forthcoming with a chosen plan of action or financial commitment to accomplish the expansion. The Utility represented that it will expand on a timely basis, but offered only estimates and alternatives as to how such expansion will be done. The Utility has done a preliminary analysis of the cost of plant expansion. However, this conceptual plan is only the initial step. The Utility must decide how it will expand its facilities and plan ahead for implementing the final plan. Several issues remain unresolved. First, the Utility owner has not indicated how any expansion would be financed or to what level he would commit his personal financial resources. Secondly, the cost data is based only on estimates as opposed to detailed engineering plans. The Utility owner has not determined how the utility will dispose of effluent or address other matters relating to expansion.

In addition, we have determined that the City of Mount Dora has available capacity in its water and wastewater treatment plants to provide service to JJ's remaining territory. An interconnection between JJ's and the City may be a viable option to provide the additional treatment capacity needed to serve the remaining territory in the Country Club. This option should be explored by the Utility.

Therefore, JJ's shall file within 120 days of the issuance of this Order, separate master plans detailing how it will provide both water and wastewater service to the Country Club. Each plan shall include, but not be limited to, the following information:

1) an evaluation of its current percentage of utilized capacity for both its water and wastewater plants;

2) a reevaluation of the capacity needed to serve the entire Country Club, including fire flow;

3) an analysis of the alternatives of providing service contained in the engineering reports filed in this docket;

4) an analysis of the need for and cost of implementing the three water quality strategies contained in the Mock Roos Report and other appropriate measures to address customer concerns regarding water odor and green stains;

5) a cost/benefit analysis of whether the Utility should expand its facilities or interconnect with the City for additional capacity;

6) a timetable for such expansions;

7) what additional land will be needed for expansion;

8) a method of effluent disposal including agreements with the golf course, if needed;

9) selection of an engineer; and

10) a statement of sources of funding the plant improvements, including a financial commitment from the Utility owner.

While we do not have jurisdiction over Wimpey, we hereby place the Developer on notice that its cooperation will be needed in order for JJ's to develop a master plan.

If the City elects to file a master plan, it should address the same information required of the Utility. Additionally, in order to make a complete evaluation of the City's capability, we find that the following information is necessary:

1) a commitment from the City Council as to the provision of service and specific service area;

2) a determination as to whether impact fees would be charged to JJ's current customers;

3) an analysis of the rates that the City would charge; whether those rates would be different from the City's other customers.

Upon the filing of these master plans, we will conduct a formal hearing in order to address those plans and the issues on which we have reserved ruling.

RESERVED RULINGS

This docket encompassed the utility's provision of service to its entire territory. By Order No. PSC-95-0555-PHO-WS, issued May 8, 1995, we set forth the issues to be addressed in this proceeding. While the utility provided evidence as to its financial and technical ability to serve the territory, the Utility has not demonstrated a commitment by the Utility owner of financial backing or a specific course of action and timetable to expand the facilities. Moreover, the City did not provide a commitment or sufficient information to demonstrate that it should serve the territory. The Utility's lack of commitment is troublesome, and leads us to conclude that at this time we must reserve ruling on several issues and require the Utility to submit a master plan which addresses these concerns. We also find it appropriate to permit the City to submit a master plan. Therefore, for the reasons set forth below, we hereby reserve ruling on the following issues identified in Order No. PSC-95-0555-PHO-WS:

ISSUE 3: Does JJ's have the technical ability to serve the water and wastewater needs of its entire existing territory, as well as the additional territory requested in the application for amendment?

ISSUE 5: Does JJ's have the financial ability to serve the water and wastewater needs of its entire existing territory, as well as the additional territory requested in the application for amendment?

ISSUE 6: What are JJ's anticipated construction and acquisition costs for providing water and wastewater service to the Country Club through build-out?

ISSUE 7: Will the expansion of territory adversely impact the customers in JJ's current certificated territory, either in terms of cost of service or quality of service?

ISSUE 9: Is it in the public interest for JJ's to continue to serve its entire existing territory, or should some of its territory be deleted?

ISSUE 10: Is it in the public interest to grant JJ's the additional territory requested in its application for amendment?

ISSUE 14: Can Mt. Dora serve the Country Club of Mt. Dora at a cost less than JJ's?

HOMEOWNERS ASSOCIATION EXEMPTION

As previously stated, we granted the Country Club of Mount Dora Homeowners Association, an exemption from our regulation pursuant to Section 367.022(7), Florida Statutes. The record indicates that the Association may no longer be exempt from our regulation. According to Order No. PSC-92-0745-FOF-WS, the Homeowners Association was to provide water and wastewater service to the Phase I development which was to include 216 customers once the development of Phase I was completed. Phase II has been approved for 563 units and currently has approximately 120 to 125 homes either constructed or under construction.

We are concerned that the record indicates that the Homeowners Association is comprised of members from Phase II who are not customers of the water and wastewater system, and may outnumber the Phase I customers. We also recognize the possibility that once control does turn over to the nondeveloper members, members who do not receive service from the Association can make decisions regarding its operation. Moreover, Developer witness Bowles' testimony indicates that the Developer can retain control of the Homeowners Association until complete buildout of the Country Club, which includes not only Phase I but also Phase II. Because buildout is not supposed to occur for at least five more years in Phase II, there is a possibility that the control of the Homeowners Association will not turnover to the nondeveloper members within the five year period required by Rule 25-30.060(3)(g), Florida Administrative Code.

In light of these concerns, we find it appropriate to open a separate docket in order to investigate the status of the Association's exemption. This docket shall also remain open pending further action on the master plan ordered herein.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction to consider and determine the matters regarding JJ's amendment of territory and provision of service to its entire territory, and other matters at issue in this docket pursuant to Sections 367.011, 367.045, and 367.121, Florida Statutes.

2. Based upon the doctrine of administrative finality, we shall not vacate or otherwise revisit Order No. 8044, with the exception of the corrections made herein to the territory description.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that, within 90 days of this Order, the JJ's Mobile Homes, Inc., shall file for our approval a proposed agreement modifying the bulk rate provided to the Country Club of Mount Dora Homeowner's Association. It is further

ORDERED that, upon approval of the proposed agreement, JJ's Mobile Homes, Inc., shall make a good faith effort to enter into the contract with the Country Club of Mount Dora Homeowner's Association. It is further

ORDERED that while we have reserved ruling as to whether it is in the public interest for JJ's Mobile Homes, Inc., to serve its territory, we find that JJ's is currently authorized to serve the territory as set forth in the corrected legal description attached to this Order as Attachment A, and incorporated herein. It is further

ORDERED that we shall reserve ruling on the issues set forth in this Order. It is further

ORDERED that within 120 days of the issuance of this Order, JJ's Mobile Homes, Inc., shall submit a master plan as required in the body of this Order. It is further

ORDERED that a separate docket shall be initiated in order to investigate the exempt status of the Country Club of Mount Dora's Homeowner's Association.

By ORDER of the Florida Public Service Commission, this 30th day of October, 1995.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

MEO

DISSENTS:

Commissioner Garcia dissented on the issue of quality of service.

Commissioner Deason and Commissioner Garcia dissented as to the finding that the granting of the Utility's territory would not be in competition with or duplication of another system.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 Director, Division of Records and Reporting, 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 Director, Division of Records and Reporting 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.

APPENDIX A

JJ's Mobile Homes, Inc.

Township 19 South, Range 27 East, Lake County, Florida

Section 20 and 21

Beginning at the Southeast corner of the Southwest quarter of the Southwest quarter of Section 21, run South 89° 56 minutes 45 seconds West along the South line of Section 21, a distance of 1,328.65 feet, more or less, to the Southwest corner of Section 21, (said corner also being the Southeast corner of Section 20);

thence Westerly along the South line of Section 20 a distance of 695 feet, more or less, to the Northeasterly right-of-way of U.S. Highway No. 441;

thence North 40° 26 minutes 21 seconds West along the Northeasterly right-of-way of U.S. Highway No. 441, a distance of 1,947 feet, more or less, to the West line of the East three-quarter of the Southeast quarter of said Section 20;

thence North 01° 30 minutes 26 seconds East along the West line of said East three-quarter of Southeast quarter of said Section 20, 1,111.26 feet to the Northwest corner of the East three-quarter of the Southeast quarter;

thence North 89° 09 minutes 45 seconds East a distance of approximately 980.00 feet, along the North line of the East three-quarter of the Southeast quarter to the Southwest corner of the Southeast quarter of the Northeast quarter.

From said Southwest corner of the Southeast quarter of the Northeast quarter continue North 89° 09 minutes 45 seconds East along the South line of the Southeast quarter of the Northeast quarter a distance of 278.03 feet;

thence North 03° 30 minutes 00 seconds East 1,990.0 feet;

thence South 89° 10 minutes 01 seconds West 490 feet more or less, to the waters of Loch Leven Lake and a point hereby designated as Point "A".

Return to the POINT OF BEGINNING and run North 00° 06 minutes 52 seconds East along the East line of the West half of the Southwest quarter, 2,630 feet, more or less, to the Northeast corner of said West half of the Southwest quarter;

thence South 89° 34 minutes 23 seconds West along the North line of said West half of the Southwest quarter a distance of 165.0 feet;

thence North 01° 16 minutes 45 seconds East parallel to the East line of the West half of the Northwest quarter, 2632 feet, more or less, to the North line of Section 21;
thence North 89° 08 minutes 30 seconds West along the North line of said Section 21, a distance of 1,102.95 feet to the Northwest corner of Section 21 (said corner also being the Northeast corner of Section 20),

thence Westerly along the North line of said Section 20, a distance of 1,200 feet, more or less, to the waters of Loch Leven Lake;

thence run Southwesterly along and with the said waters of Loch Leven to intersect the aforementioned Point "A".

also

The East 165 feet of the West half of the Northwest quarter of Section 21;

plus the Northeast quarter of the Northwest quarter and the Southeast quarter of the Northwest quarter of Section 21;

plus the Northeast quarter less the North 1,064 feet of the East 615 feet thereof of Section 21.