BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for amendment of Certificates Nos. 359-W and 290-S to add territory in Broward County by SOUTH BROWARD UTILITY, INC.	DOCKET NO. 941121-WS ORDER NO. PSC-96-1527-FOF-WS ISSUED: December 16, 1996

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON

ORDER GRANTING ORAL ARGUMENT, GRANTING MOTION TO STRIKE AND DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

South Broward Utility, Inc. (SBU or utility) provides water and wastewater service in Broward County and services approximately 1,853 water and wastewater customers. The annual report for 1993 shows that the consolidated annual operating revenue for the system is $1,319,408 and the net operating income is $30,802. The utility is a Class B utility under our jurisdiction.

On October 18, 1994, pursuant to Section 367.045, Florida Statutes, SBU applied for an amendment of its water and wastewater Certificates Nos. 359-W and 290-S to add additional territory in Broward County, in Docket No. 941121-WS. The proposed additional territory would consist of the "Carr Property" (97.95 acres) and "Imagination Farms" (900 acres). In its application, SBU stated that the property owners plan to create single-family developments, totalling 1,200 units within the two properties.

On November 17, 1994, the City of Sunrise (Sunrise or City) filed an objection to SBU's application and requested a formal hearing before this Commission pursuant to Section 120.57, Florida Statutes. On April 8-9, 1996, we held the technical hearing in Fort Lauderdale, Florida. By Final Order No. PSC-96-1137-FOF-WS, issued September 10, 1996, we granted SBU's amendment application.

On September 25, 1996, Sunrise timely filed a Motion for Reconsideration of the Final Order Amending Certificates Nos. 359-W and 290-S to Include Additional Territory. Along with its motion for reconsideration, Sunrise filed a Request for Oral Argument on its motion for reconsideration and a Motion for Stay Pending Consideration of Reconsideration. On October 8, 1996, SBU filed its response to Sunrise's motion for reconsideration. On October 10, 1996, Sunrise filed a Notice of Filing Supplemental Authority in support of its motion for reconsideration. On October 22, 1996, SBU timely filed its Objection and Motion to Strike City of Sunrise's Notice of Filing Supplemental Authority. By Order No. PSC-96-1403-FOF-WS, issued November 20, 1996, we granted Sunrise's motion for stay pending our consideration of Sunrise's motion for reconsideration.

ORAL ARGUMENT

Rule 25-22.058(1), Florida Administrative Code, permits us to grant oral argument, provided, among other things, that the request states "with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it."

In its request, Sunrise stated that oral argument would aid us in comprehending and evaluating the issues before us and provide Sunrise an opportunity to respond to any questions that we might have regarding its motion. Sunrise's motion for reconsideration appears to contain sufficient argument for us to render a fair and complete evaluation of the merits without oral argument. Nevertheless, we granted Sunrise's request for oral argument, but limited argument to five minutes for each party who wished to speak.

MOTION TO STRIKE

As discussed earlier in this Order, on October 10, 1996, Sunrise gave notice of filing supplemental authority in support of its motion for reconsideration. Sunrise's supplemental authority consists of the transcript of the September 16, 1996, Commission Agenda Conference in Docket No. 941429-SU, IN RE: Application for Amendment of Certificate No. 379-S in Seminole County by Alafaya Utilities, Inc.

On October 22, 1996, SBU timely filed a motion to strike Sunrise's notice of filing supplemental authority. In support of its motion, SBU asserts the following:

1. Sunrise's notice contains no authority permitting it to file supplemental authority and the Commissions rules do not provide for the filing of supplemental authority.

2. Sunrise's notice refers to a quote by a member of the Commission staff as the type of authority to be considered. Sunrise's attempt to enter the staff member's statement and the agenda transcript from a different docket is inappropriate and improper. Neither Sunrise nor SBU participated in the Alafaya docket. The transcript is not a part of the record in the Alafaya docket and is not part of the record in a formal proceeding under Section 120.57(1)(b)(6), Florida Statutes (1995) (Now Section 120.57(1)(f), Florida Statutes (1996).

3. The statement by the staff member is not a decision by an agency and should not be considered as supplemental legal authority. The agenda transcript is not legal authority and should not be considered as such. The Commission has issued Order No. PSC-96-1281-FOF-WS in the Alafaya docket. Its legal authority is set forth in that order.

Although our rules do not provide for the filing of supplemental authority, we find that we have implicit authority to consider such. It stands to reason that if a party requesting reconsideration alleges that we overlooked some point of law, it may be necessary to consider supplemental authority on that point.

However, we do not believe that a staff member's statement at agenda constitutes legal authority. If Sunrise wished to cite any decision of law, the proper source would be Order No. PSC-96-1281-FOF-WS, which sets forth our rulings in the Alafaya docket.

The parties in the Alafaya docket did not participate in the present docket. The staff member in the Alafaya docket quoted by Sunrise was not a witness in that docket and his statement was not entered in the record. The agenda transcript is not a part of the record in this docket, nor is it evidence in the Alafaya docket. We do not believe that this type of information constitutes supplemental authority. Based on the foregoing analysis, we find it appropriate to grant SBU's motion to strike Sunrise's notice of filing supplemental authority.

MOTION FOR RECONSIDERATION

As discussed earlier in this Order, on September 25, 1996, Sunrise timely filed a motion for reconsideration of Order No. PSC-96-1137-FOF-WS. In its motion for reconsideration, Sunrise divided its arguments into four areas of discussion: 1) Our decision that granting SBU's application is in the public interest; 2) our determination that there is no duplication by SBU of Sunrise's system; 3) our determination regarding need for service in the Disputed Territory and when need for service will begin; and 4) Sunrise's belief that Commission staff made misrepresentations to us at agenda regarding Sunrise's participation in the hearing process and its presentation of evidence. SBU filed a response to Sunrise's motion on October 8, 1996.

The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). The purpose of a petition for rehearing is merely to bring to the attention of the trial court or the administrative agency some point which it overlooked or failed to consider when it rendered its order in the first instance, and it is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment. Id. at 891. Furthermore, in Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974), the court stated that "granting of a petition for reconsideration should not be based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review."

We applied the foregoing principles in our analysis, and Sunrise's grounds for reconsideration are set forth below, along with discussion of SBU's response.

PUBLIC INTEREST

Sunrise argues the following in support of its request that we reconsider its determination regarding the issue of public interest:

1. The Commission determined the issue of public interest as a fallout of the previous eight issues at hearing and overlooked the separate legal requirement that it consider the interest of the public being served. See City of Margate v. King, 167 So. 2d 852 (Fla. 1964). To make such a determination would require a comparison of service by SBU and Sunrise, which the Commission is

precluded from making based upon Sunrise's Legislative exemption from the Commission's jurisdiction. Therefore, the Commission is incapable of determining if SBU's application is in the public interest. Had the Commission made such a comparison, evidence at hearing supported Sunrise over SBU.

2. The Commission mistakenly relied on staff's erroneous statement that a granting of a certificate to provide water and wastewater service does not grant a property right on the certificate holder. Under City of Mount Dora v. JJ's Mobile Homes, 579 So. 2d 219, 223 (Fla. 5th DCA 1991), the granting of a certificate does grant a property right on the certificate holder.

In its response, SBU asserts that Sunrise's comment that we overlooked the separate finding on the interest of the public merely reargues the statements contained in its Legal Brief on the Issues, and, therefore, is inappropriate on a motion for reconsideration. Furthermore, SBU states that the logical conclusion of Sunrise's argument is that we cannot grant an extension of service area if a governmental utility protests and expresses a desire to serve. Such an approach would give cities an absolute veto over our jurisdiction and regulation. Finally, SBU asserts that, at agenda, staff acknowledged Sunrise's argument regarding the Mount Dora case but stated that other Florida cases hold that a certificate is not a property right. Therefore, staff's statement was not erroneous.

We believe that Sunrise's first argument does not support reconsideration of the public interest issue. Sunrise's suggestion that we must evaluate a separate interest of the public standard reiterates the argument in its brief. Mere reargument is an inappropriate basis for reconsideration. Diamond Cab at 891. Furthermore, Sunrise's notion of this standard as a "separate legal requirement" goes beyond matters set forth in the record and susceptible to review and, for that reason, is also an inappropriate argument for reconsideration.

In reality, Sunrise's argument is nothing more than an attempt to have us state that we lack jurisdiction to make a final determination in this docket. Sunrise's general philosophy in this regard is very flawed. Regulated utilities must apply to this Commission for amendment of certificates. See Section 367.045, Florida Statutes. Sunrise's argument is a variation on a theme repeatedly used by the City in an attempt to remove this proceeding

to the courts and goes well beyond the purpose of reconsideration. The courts have appropriately recognized that the jurisdiction over this matter lies with this Commission. See City of Sunrise v. Hinkley, 675 So. 2d 944 (Fla. 4th DCA 1996).

We also note that Sunrise's reliance on City of Margate is misplaced. In making a determination of public interest, the court merely stated that, "The regulatory agency must evaluate the interests of both the utility and the public in any situation." 167 So. 2d 852 at 857. We did exactly that. See Order No. PSC-96-1137-FOF-WS at 21. City of Margate sets forth no requirement that the issue of public interest be determined in a vacuum, nor that we must compare service by a regulated and non-regulated utility in reaching our final determination. In fact, there is nothing in the court's opinion to suggest that we cannot make a finding of public interest based upon the applicant utility meeting its burden of proof under Commission rules and statutes, as we did in this docket.

Furthermore, Sunrise's argument regarding staff's advice at agenda, does not support reconsideration of the public interest issue. In its motion, Sunrise suggests that the question of whether the granting of a certificate confers property rights on the certificate holder is "an essential issue of public interest." This question was not a specific matter set forth during the hearing and was not a factor in our decision regarding public interest. As stated on page 21 of our order:

> We find that SBU met its burden of proof to support an amendment of its certificates to add the disputed territory. Therefore, we find that it is in the public interest to grant SBU's amendment application.

Finally, Sunrise's argument regarding staff's advice at the agenda conference goes beyond specific matters set forth in the record and subject to review, and as such, is an inappropriate argument for reconsideration. Regardless staff did acknowledge the Mount Dora case for the proposition set forth by Sunrise. However, as staff indicated, other case law holds that a certificate is not a property right. See Alterman Transport Lines, Inc. v. State, 405 So. 2d 456 (Fla. 1st DCA 1981). Based upon the foregoing, we find it appropriate to deny Sunrise's motion for reconsideration of the public interest issue.

DUPLICATION OF SERVICE

Sunrise argues the following in support of its request that we reconsider its determination regarding the issue of duplication of service:

1. The Commission mistakenly concluded there was no duplication of service by SBU based upon staff's erroneous advice that Sunrise's unconnected lines in the territory did not constitute a system under the definition of "system" set forth in Chapter 367, Florida Statutes. Under Rule 25-30.115, Florida Administrative Code and the NARUC Uniform System of Accounts, Sunrise's lines would be considered part of a regulated utility's used and useful system. Under Rule 25-30.116, Florida Administrative Code and Section 367.081, Florida Statutes, a regulated utility would be allowed to earn a return on similar unconnected lines.

2. The Commission may have overlooked Sunrise's testimony that the lines were planned, designed and constructed to serve the Pownall and Imagination Farms Properties.

3. By making findings that no water or wastewater could or did flow through Sunrise's unconnected lines and that Sunrise's plant expansions, line extensions and budgetary process were conducted in a generic approach, the Commission has created new and unjustifiable requirements for determining duplication of service which are not supported by rule or statute.

In its response, SBU states that Sunrise's arguments regarding including its unconnected lines in plant-in-service under accounting rules and rate base under ratemaking statutory guidelines are new arguments which are inappropriate for reconsideration. Additionally, Sunrise's argument is erroneous, because inclusion of Sunrise's lines in plant-in-service in and of itself does not mean that the lines are used and useful. SBU also asserts that we did not overlook Sunrise's testimony regarding its lines, and there was discussion of its testimony in the final order. Finally SBU states that our statements regarding water and wastewater not flowing through the unconnected lines and Sunrise's generic approach to expansion were merely findings by this Commission. Such findings are simply explanatory statements which support our decision that there is no duplication of service.

We believe that Sunrise's arguments regarding the accounting treatment of its lines and their inclusion in rate base do not support reconsideration. These are new arguments which go beyond matters set forth in the hearing. Furthermore, Sunrise is merely expressing disagreement with our decision and has not demonstrated that we overlooked any points of fact or law.

Further, we disagree with Sunrise's argument. Sunrise challenges staff's statement at the agenda conference that in the absence of flowing water and/or wastewater, Sunrise's lines would not be considered a system under the definition set forth in our statutes. Under Section 367.021(11), Florida Administrative Code, "System" means facilities and land used and useful in providing service. Sunrise contends that the unconnected transmission mains would be considered used and useful under accounting practices for regulated utilities. Sunrise is mistaken. The uniform system of accounts that we prescribe for regulated utilities does not distinguish between used and non-used categories. The used and useful designation is a ratemaking principle, not an accounting principle. The mere classification of an expenditure to a plant-in-service category, a construction-work-in-progress (CWIP) category, or any particular plant account does not dictate how that investment will be considered in a ratemaking proceeding.

All investments must be accounted for in some fashion. During the period of construction, the utility's expenditures for labor, materials, and associated charges will be assigned to a CWIP account. When construction is finished, the plant investment will be assigned to appropriate plant-in-service categories. An investment in transmission mains will be assigned to a particular account, just as an investment in treatment equipment will be assigned to a different plant account. However, there are no separate used and useful versus non-used and useful account groupings under the uniform system of accounts. That distinction is employed solely for ratemaking considerations.

Sunrise refers to Rule 25-30.116, Florida Administrative Code, which refers to the practice of capitalizing an Allowance for Funds Prudently Constructed (AFUDC) element during the construction period, as support for its position that the subject transmission mains would be considered used and useful property. While capitalization of AFUDC may be permitted if certain limiting conditions are met, including our prior approval of the capitalized rate, this allowance is no assurance that the property will be considered used and useful in a rate proceeding. To the extent a

particular project is an imprudent expenditure, the project and its associated AFUDC would be disallowed in a rate proceeding. Construction of transmission lines outside the utility's authorized service area may justify disallowance of the expenditure.

Sunrise also refers to Section 367.081, Florida Statutes, as a basis for finding that the subject transmission mains would be used and useful if those mains were "constructed in the public interest" within two years of the historical test year under review. However, that provision states that the Commission "shall also consider" whether the rate base inclusion of the subject investment is "in the public interest." (Emphasis added.) Generally speaking, rate base inclusion of an out-of-period investment must be preceded by a showing that extraordinary measures justify such treatment. Usually, a substantial investment that is not matched by a corresponding growth in customers is expected for rate base inclusion of an out-of-period expenditure. Also, a showing that the improvement is required by a regulatory agency may be needed to fulfill "the public interest" aspect for test year consideration. Thus, rate base inclusion of the subject transmission mains would not be preordained.

Ratemaking principles will dictate whether an investment is considered used and useful by existing customers or whether that investment will be considered non-used and useful. Usually, if the subject facilities are not used or needed by existing customers, they will be omitted from rate base under appropriate rate design principles, not accounting principles. Whether or not an investment is included in the rate base equation, will depend on various factors. Among matters, this judgement may involve inquiry concerning the selected test year, when a particular plant addition was completed, and whether revenues associated with the added facility are likewise recognized.

Further, we did not overlook Sunrise's testimony regarding Sunrise's lines. At page 19 of the final order, we considered Sunrise's testimony that "the water and wastewater mains built to the area were always a part of the City's master plan, and therefore the system was planned and constructed to provide service to this area." Therefore, we do not find it appropriate to grant reconsideration on this argument.

Sunrise's final argument--that our findings on duplication create new and unjustifiable requirements not supported by rule or statute--is a new argument which goes beyond matters set forth at hearing. As such, the argument is inappropriate for reconsideration. Regardless, these findings are merely supporting rationale for our determination that there was no duplication of

service. We made no express statement in the final order that we established these findings as prerequisites for determining duplication of service. Based upon the foregoing, we find it appropriate to deny Sunrise's motion for reconsideration of the issue of duplication of service.

NEED FOR SERVICE AND WHEN NEED FOR SERVICE WILL BEGIN

In support of reconsideration of this issue, Sunrise argues the following:

1. In determining that a need for service by SBU exists, the Commission overlooked that Sunrise would be providing service to Pownall, explaining in its order that such service is "emergency" in nature and does not constitute a "major initiation of service." The Commission's rules and statutes do not require that an initiation of service amount to a major initiation, nor do they suggest that emergency service does not constitute an initiation of service. However, this is what the Commission's order implies. Such determinations are arbitrary and capricious.

2. The Commission's order also states that "emergency service from one source does not necessarily commit a 'customer' to that source for ongoing, regular service." This finding, that a customer receiving service from one utility may disconnect to receive service from another utility, contradicts Florida case law. See City of Winter Park v. Southern States Utilities, 540 So. 2d 178 (Fla. 5th DCA 1989).

3. The final order acknowledges that Sunrise will be providing service to Pownall, and the evidence indicated that only Sunrise received written requests for service from Imagination Farms. Therefore, with the exception of the Carr property, only Sunrise will be providing service in the disputed territory. SBU will never be requested to provide service to Pownall or Imagination Farms. Therefore, a need for service does not exist.

In its response, SBU basically states that Sunrise attempts to reargue or raise new arguments, all of which are inappropriate for reconsideration. Further, SBU asserts that Sunrise's reliance on Winter Park is misplaced, because in Winter Park, the issue was

whether a City could require the public to disconnect from a utility company and accept service from the City. 540 So. 2d 178 at 180. The issue was not whether a customer connected to one utility could voluntarily disconnect to receive service from another utility.

Finally, SBU asserts that Sunrise is attempting to have us reweigh the evidence, which is inappropriate on reconsideration. Sunrise's statement that Pownall and Imagination Farms will never request service from SBU is speculative and goes beyond the bounds of the record in this case and is, likewise, an inappropriate argument for reconsideration.

We believes that the common theme of Sunrise's arguments is that SBU had to show a need for service by SBU, and that we overlooked evidence that Sunrise had requests for service. This is illustrated in Sunrise's argument that we overlooked Pownall's request for service from Sunrise. Not only is this reargument, but in addition, we did consider this evidence, as stated on pages 7, 8, 19, 20 and 25 of the order. Furthermore, Sunrise's suggestion that we acted in an arbitrary and capricious manner based upon "implications" in the order merely illustrates Sunrise's disagreement with our rationale. Sunrise has not demonstrated that we overlooked any point of fact or law. Therefore, Sunrise's arguments regarding the Pownall property are inappropriate for reconsideration.

We did consider the evidence presented by both parties regarding requests for service from Imagination Farms. We stated at page 7 of the order: "While the [parties'] positions indicate a diametric difference of opinion, the testimony is unanimous in presenting the fact that a need for service exists." We clearly addressed the issue on need for service and need not reconsider it.

Finally, we agree with SBU's assessment of the Winter Park case. Not only does this case not support Sunrise's position, but the argument it allegedly supports goes beyond matters considered on the record and is, therefore, inappropriate for reconsideration. Based on the foregoing, we find it appropriate to deny reconsideration of the issue of need for service and when the need for service will begin.

MISREPRESENTATIONS BY COMMISSION STAFF

Sunrise's final argument for reconsideration is that staff "unfairly and, contrary to evidence, advised the commission that Sunrise was not forthcoming in its participation in the proceeding

. . . " and " chose not to present evidence or go forward with evidence." Such misrepresentations allegedly prejudiced Sunrise, shifting the burden of proof onto the City.

In its response, SBU states that Sunrise's allegation of prejudice is inappropriate for reconsideration, because it sets forth no point which we failed to consider or overlooked at hearing. Furthermore, SBU states that we were present at the hearing and heard the testimony and cross-examination.

SBU also states that staff correctly advised us that SBU had met the burden of proof, and that it was up to another party to overcome or rebut SBU's evidence. Staff simply explained that Sunrise's evidence was not sufficient to overcome SBU's evidence. Sunrise did present evidence, which is acknowledged throughout staff's final recommendation and our order.

We agree that Sunrise's argument goes beyond specific matters set forth in the record and susceptible to review. Therefore, reconsideration is inappropriate. Furthermore, we note that staff's role is advisory. Sunrise's comments place undue emphasis on our staff by suggesting that we are unable to evaluate hearing facts for ourselves and determine the weight of the evidence. As SBU states, we were present at the hearing to hear testimony and cross-examination, review evidence and make rulings. The final order sets forth numerous examples of Sunrise's presentation of evidence. Our decision is clearly based on the evidence in the record.

We do not believe that staff made statements at agenda which prejudiced Sunrise. On the contrary, staff advised us that the burden of proof was on SBU. We found that the burden of proof was on SBU and SBU met its burden. Therefore, we disagree with Sunrise's assertion that the burden of proof was shifted to the City. Based on the foregoing, we find it appropriate to deny reconsideration on this point.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the City of Sunrise's Request for Oral Argument is hereby granted. It is further

ORDERED that South Broward Utility, Inc.'s Motion to Strike City of Sunrise's Notice of Filing Supplemental Authority is hereby granted. It is further

ORDERED that the City of Sunrise's Motion for Reconsideration of the Final Order Amending Certificates 359-W and 290-S to Include Additional Territory is hereby denied.

By ORDER of the Florida Public Service Commission, this 16th day of December, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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Commissioner Joe Garcia dissented from the Commission's decision in this docket.

NOTICE OF 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 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 or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.