BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: 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	DOCKET NO. 940850-WS ORDER NO. PSC-95-0417-FOF-WS ISSUED: March 27, 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

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

On August 10, 1994, Colonies Water Company (CWC) served notice of its application for transfer, pursuant to Section 367.071, Florida Statutes, from Colonies Water Company to MHC-DeAnza Financing Limited Partnership d/b/a Colonies Water Company. Notice was published on August 15, 1994. On September 12, 1994, the City of Margate (City) and the Colonies of Margate Homeowners Association (CMHA) filed objections to CWC's notice. Both of the objections are worded identically.

The City and CMHA claim that CWC is in violation of the City's service area and ordinances. Under Section 24-75 of the Margate City Code, the City has designated an area in which it has the exclusive right to provide water and wastewater service. In addition, under Section 24-70 of the Margate City Code, water and wastewater service purchased from the City is not to be resold or remetered. The City and CMHA also argue that "[t]he health, safety, welfare, and convenience of the residents of the Colonies of Margate can be better served through regulation of their water service by the City of Margate and its ordinances as further provided in Chapter 723 of the Florida Statutes, and specifically, F.S. 723.045."

On October 21, 1994, CWC filed a motion to dismiss the objections. In its motion, CWC argues: that Commission-issued certificates confer the exclusive right to serve in a certificated area; that municipalities have no authority to interfere with

rights granted to private utilities; that under City of Mt. Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991), when two service providers compete for the same service area, the provider with the earliest acquired legal right to serve has the exclusive right to serve. CWC contends that it is the provider with the earliest acquired legal right to serve.

With regard to the arguments regarding the City's service area and ordinances, CWC argues that Section 24-75(c), Margate City Code, concerning exclusivity of service, states that "[t]he same shall only be to the extent and scope recognized under the laws of the State of Florida and of the United States of America." CWC notes that Section 367.011(4), Florida Statues, states that "[t]his Chapter shall supersede 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." CWC argues that Chapter 367, Florida Statutes, supersedes the Margate City Code and divests the City of authority over CWC's service area.

As for the objectors' arguments regarding Section 723.045, Florida Statutes, which pertains to charges that may be collected for the resale of utility services, CWC notes that section specifically states that "[t]his section does not apply to a park owner who is regulated pursuant to chapter 367. . . ." CWC, therefore, argues that Section 723.045, Florida Statutes, is inapplicable to the proceeding at hand.

On November 2, 1994, the City filed a response to CWC's motion to dismiss. The City argues that it has provided water and wastewater services to all users within the City limits, including the Colonies of Margate as a wholesale water supplier, since the 1950s, and "[t]hat this relationship existed prior to recognition by the Public Service Commission of the Petitioner as a separate water company and, in fact, is the situation contemplated by the constraints against mobile home park owners as contained in F.S. 723.0425 [sic]."

The City also argues that "no consent, pursuant to Chapter 180.06 [sic], has ever been granted by the CITY OF MARGATE to any organization to provide water within the CITY OF MARGATE." Finally, the City argues that it believes that CWC is a wholly owned subsidiary of or that there is not an arms-length relationship with the corporation that owns the mobile home park, and that it wishes to have the Commission consider the propriety of this relationship when the mobile home park "is properly governed, pursuant to F.S. 723.0425 [sic], where a separate utility system has not been approved."

In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the objections as facially correct, the objections still fail to state a cause of action for which relief may be had.

Upon consideration, we agree with CWC's arguments regarding the Margate City Code. Section 24-75 of the Margate City Code states that it is only effective to the extent consistent with the laws of the State of Florida. Section 367.011(4), Florida Statutes, specifically states that Chapter 367 supersedes all other laws on the same subject and that subsequent inconsistent laws shall only supersede Chapter 367 to the extent they do so by express reference. Moreover, even assuming that CWC is in violation of the Margate City Code, this Commission is not the appropriate forum to resolve the alleged conflict.

We also agree with CWC's arguments concerning Section 723.045, Florida Statutes. As noted above, that section specifically states that it does not apply to utilities governed by Chapter 367, Florida Statutes. Further, the City's argument that the mobile home park would be governed under Section 723.045, Florida Statutes, if the utility operations were not parsed out into a separate corporation, is incorrect; the park has operated as a utility under the authority of this Commission since 1987.

In addition, the City's argument regarding its consent under Section 180.06, Florida Statutes, is, at best, moot. This Commission does not administer Chapter 180, Florida Statutes, although we are importuned to consider the duplication of service under Section 367.045(5)(a), Florida Statutes. Nevertheless, to the extent that there may be any duplication, which the City has not demonstrated, under Section 367.045(5)(a), Florida Statutes:

> The commission may not grant a certificate of authorization for a <u>proposed system, or an amendment to a certificate of authorization for the extension of an existing system</u> 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.)

This case does not concern an original certificate for a proposed system, nor an amendment for the extension of an existing system. Accordingly, the City's concerns are unfounded.

Finally, we note that the objections do not meet the test announced in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 1st DCA 1981). In order to meet the Agrico test, a petitioner must demonstrate that it will suffer injury in fact which is of sufficient immediacy to entitle it to an administrative proceeding and that the injury is of the type which the proceeding is designed to protect. Even assuming that this Commission approves the transfer, the objectors will be in the same position as they were before the transfer. Thus, they have not demonstrated that they will suffer injury in fact. Further, none of the concerns raised by the objectors are of the type which a Section 120.57, Florida Statutes, hearing before this Commission is designed to protect.

For all of the reasons stated above, we hereby grant CWC's motion to dismiss.

It is, therefore,

ORDERED by the Florida Public Service Commission that Colonies Water Company's motion to dismiss the objections of the City of Margate and the Colonies of Margate Homeowners Association is granted. It is further

ORDERED that this docket shall remain open pending resolution of the application for transfer.

By ORDER of the Florida Public Service Commission, this 27th day of March, 1995.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

RJP

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 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.