FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

JANUARY 9, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (CYRUS-WILLIAMS)
DIVISION OF WATER & WASTEWATER (REDEMANN)

RE: DOCKET NO. 960907- WS - APPLICATION FOR AMENDMENT OF CERTIFICATES NOS. 306-W AND 255-S BY SOUTHERN STATES UTILITIES, INC.
COUNTY: CHARLOTTE AND LEE COUNTIES

AGENDA: JANUARY 21, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\960907.RCM

CASE BACKGROUND

On August 12, 1996, Southern States Utilities, Inc. (SSU) filed an application for amendment of Certificate Nos. 306-W and 255-S to add territory in Charlotte and Lee Counties. The utility proposed to provide service to two separate areas. The first area is known as the Burnt Store Colony (the Colony), a mobile home park with approximately 190 current residents and the potential for an additional 50 residents. The Colony area would be added to SSU's water territory only. The second area is the Burnt Store Marina Hotel (the Marina Hotel), a planned hotel development of 100 units. SSU would provide both water and wastewater service to the Marina Hotel. On September 9, 1996, the City of Cape Coral (the City or Cape Coral), a municipality located within Lee County, filed a timely objection to SSU's application. On September 30, 1996, SSU filed a Motion to Dismiss the City's Objection, and on October 10, 1996, the City filed a Memorandum in Opposition to SSU's Motion to Dismiss.

In its Motion to Dismiss, SSU argues that the City only has standing to object to that portion of the proposed territory additions which is within the City's municipal limits because 1) the laws the City invokes apply only to water and wastewater utilities within municipal limits, 2) absent standing granted by Section 367.045, Florida Statutes, the City may only be granted standing to assert its own interest, 3) the City does not allege it intends to or can provide service to all of the proposed territory additions, and the City is not, and will not be as a result of the proposed amendment, an SSU customer, and 4) in Commission certification proceedings, a governmental entity may only pursue inconsistencies with its own comprehensive plan. As stated previously, SSU's application requests two distinct areas to be added to SSU's Burnt Store territories in Charlotte and Lee Counties, the Colony and the Marina Hotel. Only a small area to the south and west of the Marina Hotel site is within Cape Coral's municipal city limits.

On November 12, 1996, the City filed a Clarification of Objection, wherein it states that its objection is limited to the extent that the proposed territory addition encroaches upon its municipal boundaries.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant SSU's Motion to Dismiss the Objection filed by the City of Cape Coral?

RECOMMENDATION: With regard to the City of Cape Coral's objection on the basis that a grant of SSU's application would violate Chapter 71-585, Laws of Florida, and the City's Code of Ordinances, including provisions pertaining to franchise fees developed pursuant to Chapter 180, Florida Statutes, SSU's Motion to Dismiss should be granted. With regard to the City's objection that a grant of SSU's application would violate its local comprehensive plan, SSU's Motion to Dismiss should be denied. (CYRUS-WILLIAMS)

STAFF ANALYSIS: As stated previously, the City timely filed an Objection to SSU's application for amendment on September 9, 1996. SSU filed a Motion to Dismiss the City's Objection on September 30, 1996, and on October 10, 1996, the City filed a Memorandum in Opposition to SSU's Motion.

In its Objection, the City states that, as a governmental authority, as defined by Section 367.021(7), Florida Statutes, and as a municipality with Home Rule Powers under Chapter 166, Florida Statutes, and Section 2(b), Article VIII of the State of Florida Constitution, it has standing to object in this case. The City also asserts standing on the basis that a grant of SSU's application would violate Chapter 71-585, Laws of Florida, and the City's Code of Ordinances, including provisions pertaining to franchise fees developed pursuant to Chapter 180, Florida Statutes. Finally, the City asserts standing on the grounds that a grant of SSU's application would violate its local comprehensive plan developed pursuant to Section 163.3161-163.3211, Florida Statutes. The City, among other things, asserts that SSU has not provided assurance of its ability to meet certain standards or requirements, or provided assurance of its compatibility with adopted levels of service as required by the comprehensive plan. The City is seeking a grant of all attorney's fees and costs associated with the bringing and maintaining of this objection, to be paid by SSU. The matter of attorney's fees and costs will be addressed in Issue 3 of this recommendation.

In its Motion to Dismiss, SSU states that in order for the City to establish standing to object for other than an alleged comprehensive plan violation, it must demonstrate substantial interest pursuant to the test set out in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). SSU argues further that the City cannot meet the second part of the test set forth in Agrico by alleging Chapter 180

concerns because the Commission does not have authority to enforce or interpret Chapter 180, or any other law or ordinance invoked which the Commission does not have authority to enforce or interpret.

Additionally, SSU argues that the City's objection with regard to Chapter 180, the Laws of Florida, and the City's Code of Ordinances should be dismissed for several reasons. First, states the utility, Chapter 71-585, Laws of Florida, is superseded by Section 367.011, Florida Statutes. The utility cites Town of Palm Beach v. Palm Beach Local 1866 of the Int'l Ass'n of Fire Fighters, 275 So. 2d 849 (Fla. 2d DCA 1976) as controlling, wherein the court states:

> [W]here the general act is an overall revision or general restatement of the law on the same subject, the special act will be presumed to have been superseded and repealed.

According to the utility, since the 1971 passage of the special law, the Legislature has twice reenacted Chapter 367, and each of those reenactments represented an "overall revision or general restatement of the law on the same subject" as the special law. Therefore, it concludes, the special law is superseded by Chapter 367. Second, the utility states that Section 180.14, Florida Statutes, cited by the City, conflicts with Chapter 367, as to both rate setting authority and territorial authority over water and wastewater utilities, and is therefore, superseded by Chapter 367. The utility relies on Fla. Pub. Serv. Comm'n v. Fla. Cities Water Co., 446 So. 2d 1111, 1114 (Fla. 2d DCA 1984) for this conclusion.

SSU, in its Motion, also disputes that the City has standing to object on an alleged violation of its local comprehensive plan. SSU states that standing on this basis, according to Section 367.045(4), Florida Statutes, is predicated both on a violation of the plan and a causal relationship: that the violation will occur by the amendment. According to SSU, almost all of the City's alleged bases for a plan violation pertain not to SSU's providing the service, but to facility design, permitting, and environmental considerations which are apparently not yet ripe for consideration, but based completely on speculation as to facility development. SSU argues that the City should not be allowed to base an allegation of a violation of a plan on such uncertainties and that the Commission will be forced to adjudicate whether the design and permitting of the utility facilities in the extension are inconsistent with the City's comprehensive plan, not whether the amendment itself is inconsistent with the comprehensive plan.

In its Memorandum in Opposition to SSU's Motion to Dismiss,

the City states that, based upon its reading of Rule 25-22.036, Florida Administrative Code, SSU's motion, filed pursuant to Rule 25-22.037(2), Florida Administrative Code, is not permitted in response to a written objection, filed pursuant to Rule 25-30.031, Florida Administrative Code. Rule 25-22.036(1), Florida Administrative Code, states:

> This rule shall not apply to the extent that a proceeding is governed by rules or statutes that prescribe **alternative procedures**. (emphasis added)

The City claims that because Rule 25-30, Florida Administrative Code, in general, prescribes such an "alternative procedure," SSU's motion is impermissible. The City further argues that a motion to dismiss, such as the one filed by SSU, is reserved only for dismissal of initial pleadings, as enumerated in Rule 25-22.036, Florida Administrative Code, and its objection can in no way be construed as an initial pleading because it does not fit the definition set out in Rule 25-22.036, Florida Administrative Code.

The City also argues, in its Memorandum, that its objection is governed by Section 367.045, Florida Statutes, which mandates that a proceeding be held when a municipality brings to the Commission's attention violations of its comprehensive plan and any other provision of law. Section 367.045, Florida Statutes states, in pertinent part:

> If, . . . the commission receives from the Public Counsel, a governmental authority, or a utility or consumer who would be substantially affected by the requested certification or amendment a written objection requesting a proceeding pursuant to s. 120.57, the commission **shall** order such proceeding . . . Notwithstanding the ability to object on any other ground, a county or municipality has standing to object on the ground that the issuance or amendment of the certificate of authorization violates established local comprehensive plans developed pursuant to Sec. 163.3161-163.3211 F.S. (emphasis added).

The City cites several cases for the proposition that the word "shall" is mandatory, including Neal v. Bryant, 149 So. 2d 529 (Fla. 1962) and Concerned Citizens of Putnam County for Responsive Government, Inc. v. St. Johns River Water Management District, 622 So. 2d 520 (Fla. 5th DCA 1993). Since the word "shall" is mandatory, the City concludes, a Section 120.57 proceeding must be

held, and a motion to dismiss a request for such a proceeding cannot be granted.

The City also argues that, even assuming that in order to achieve standing outside of a comprehensive plan violation it must show that its substantial interests are affected, it clearly meets this standard. The City states that it meets both prongs of the Agrico test. With regard to the first prong, it meets this test because SSU is attempting to extend utility service into its municipal boundaries. According to the City, Chapter 71-585, Laws of Florida, grants it the authority, procedures, and power to determine, fix and change rates to be charged and collected by a public utility for its water and sewer services within the municipal jurisdiction of the City, and since, pursuant to this law, it has passed ordinances requiring a franchise to be obtained by all utilities prior to providing service within the City, this Commission, by considering SSU's application for amendment, will be taking action which has an immediate effect upon its substantial interests. With regard to the second prong, the City argues that it meets this test as well because Section 367.045, Florida Statutes, was created for the exact purpose of allowing a municipality to object to and participate in a hearing on an applicant's extension of service into municipal areas when such an extension could violate a comprehensive plan provision, or for "any other ground."

Also in its Memorandum, the City disputes that Chapter 71-585, Laws of Florida, is superseded and repealed by Section 367.011, Florida Statutes, and states that SSU's reliance on Palm Beach Local is misplaced. According to the City, the court, in that case, was examining two laws which were not contradictory in nature, but identical. Here, the City states, Chapter 367, Florida Statutes, and Chapter 71-585, Laws of Florida, are contradictory to the extent they both grant exclusive jurisdiction over utilities. The City argues that the standard to be applied when two laws are contradictory was stated in Markham v. Blount, 175 So. 2d 526, 528 (1965):

> The courts in construing a statute must, if possible, avoid such construction as will place a particular statute in conflict with other apparently effective statutes covering the same general field . . . And where courts can, in construing two statutes, preserve the force of both without destroying their evident intent, it is their duty to do so . . . repeal by implication is not favored.

Therefore, concludes the City, both statutes must be read together

to mean that this Commission has jurisdiction over utilities in Florida, with an exception carved out for Cape Coral.

Further, the City refutes SSU's argument that the comprehensive plan concerns are not yet ripe for consideration, and states that there currently exists many inconsistencies. Additionally, the City argues that although it is not the actual grant of the amendment that violates the comprehensive plan, it is the grant which would permit SSU to extend service into an area where inconsistencies exist, and since the two are so closely related, it can be said that the amendment will permit the inconsistency with the comprehensive plan. Finally, the City argues that Section 367.045, Florida Statutes, which states that the Commission "shall consider the local comprehensive plan . . .," mandates that the Commission consider the effect of SSU's extension on the comprehensive plan.

Permissibility of a Motion to Dismiss an Objection filed Pursuant to Section 367.045

As stated previously, the City's argument is that SSU's Motion to Dismiss is impermissible. Staff believes that this argument is without merit for two reasons. First, it is inconsistent with the purpose of Rules 25-22 and 25-30, Florida Administrative Code. Rule 25-22, Florida Administrative Code, governs the Commission's practice and procedures with regard to all of the Commission's regulated industries, including water and wastewater utilities. Part IV, Subpart B sets out prehearing procedures. Rule 25-22.036(1), Florida Administrative Code, relied upon by the City, comes under Subpart B.

Rule 25-30, Florida Administrative Code, is specific to the regulation of water and wastewater utilities. Accordingly, Rule 25-30.011(1), Florida Administrative Code, relating to the scope and application of the rule, states that the rules under this section are:

> intended to define and promote good utility practices, adequate and efficient service to the public at reasonable cost, and to establish the rights and responsibilities of both the utility and the customer.

Therefore, contrary to the assertions of the City, Rule 25-30, Florida Administrative Code, is not an "alternative" procedural rule to Rule 25-22, Florida Administrative Code. Rather, Rules 25-22 and 25-30, Florida Administrative Code, are intended to work in conjunction to effectuate the intent of Chapter 367, Florida

Statutes. Chapter 367, Florida Statutes, is the Water and Wastewater System Regulatory Law.

Second, this Commission has consistently entertained motions to dismiss objections to the issuance or amendment of certificates, such as the one filed in this case. See Order No. PSC-93-0363-FOF-WS, issued March 9, 1993 in Docket No. 921237, In re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc.; Order No. PSC-92-1146-FOF-WS, issued on October 8, 1992 in Docket No. 92057, In re: Application for Amendment of Certificates Nos. 378-S and 447-W in Marion County by Decca Utilities, a Division of Decca; Order No. PSC-92-1034-FOF-WU, issued September 23, 1992 in Docket No. 920174, In re: Application for Amendment of Certificate No. 496-W in Lake County by Lake Utilities Services, Inc..

Application of Agrico to Municipalities

In Agrico, the Court developed a two-pronged test for determining substantial interest: before a person or entity can be considered to have a substantial interest in the outcome of a proceeding, that person or entity must demonstrate 1) injury in fact which is of sufficient immediacy to warrant a formal hearing, and 2) the injury is of a type which the proceeding is designed to protect. In Order No. PSC-95-0062-FOF-WS, this Commission recognized that the Agrico test does not exclude governmental authorities and that the Commission had applied the test in previous cases. See Order No. PSC-93-0363-FOF-WS (where this Commission dismissed the City of Eustis' objection to an application for amendment, where the municipality did not allege a violation of its local comprehensive plan, and did not allege facts specific to demonstrate substantial interest under the Agrico test).

In Order No. PSC-95-0062-FOF-WS, a municipality made an argument similar to the one made by Cape Coral that it did not need to demonstrate substantial interest because its objection, filed pursuant to Section 367.045, Florida Statutes, automatically awarded it the right to a hearing. Again, Section 367.045(4), Florida Statutes, states:

> If, within 30 days after the last day that notice was mailed or published by the applicant, whichever is later, the commission receives from the Public Counsel, a governmental authority, or a utility or consumer who would be substantially affected by the requested certification or amendment a

> written objection requesting a proceeding pursuant to s. 120.57, the commission shall order such proceeding . . .

This Commission recognized that the statute could be interpreted to mean, by virtue of the placement of the comma, that a governmental authority does not have to show that it is substantially affected to participate in a certificate-type proceeding. The Commission, however, decided that even if that was the case, the municipality's objection should still be dismissed because the Commission did not have the jurisdiction to grant the municipality's requested relief. Since the issuance of Order No. PSC-95-0062-FOF-WS, this Commission has continued to apply Agrico to governmental entities. See Order No. PSC-95-0417-FOF-WS, issued on March 27, 1995 in Docket No. 940850, 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.

Staff believes that a correct reading of the statute requires a county or municipality to demonstrate substantial interest in order to object to the issuance or amendment of a certificate on any basis other than an alleged comprehensive plan violation. Therefore, the City's status as a governmental authority and a municipality with Home Rule Powers should not be sufficient to grant the City standing in this case.

Applying Agrico, the first prong requires the City to demonstrate injury-in-fact of sufficient immediacy to warrant a formal hearing. As stated previously, the City argues that it can demonstrate injury-in-fact because 1) Chapter 71-585, Laws of Florida, grants it exclusive jurisdiction over water and wastewater utilities within its municipal boundaries, 2) pursuant to this law and Chapter 180, it passed the City's Code of Ordinances, and 3) by considering SSU's application for amendment, this Commission will be taking action which has an immediate effect upon its substantial interests. Section 367.011, Florida Statutes, states:

> (4) This 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 . . .

Staff agrees with SSU that Section 367.011, Florida Statutes, supersedes Chapter 71-585, Laws of Florida, and the City, therefore, cannot demonstrate injury-in-fact based upon a repealed law, or ordinances passed based upon a repealed law.

Agrico's second prong is the zone of interest test. The City argues that it meets this test because Section 367.045, Florida Statutes, was created for the exact purpose of allowing a municipality to object to and participate in a hearing on an applicant's extension of service into municipal areas when such an extension could violate a comprehensive plan provision, or for "any other ground." The "any other ground" relied upon by the City is the alleged violations of Chapter 71-585, Laws of Florida, and the Code of Ordinances the City passed pursuant to this law and Chapter 180, Florida Statutes. As discussed previously, the City cannot demonstrate substantial interest based upon Chapter 71-585, Laws of Florida, because it is superseded by Chapter 367, Florida Statutes.

Further, we agree with SSU that this Commission does not have jurisdiction to remedy a violation of Chapter 180, or any other law or ordinance which the Commission does not have authority to enforce or interpret. See Order No. PSC-95-0062-FOF-WS ("Section 367.045, Florida Statutes, does not require us to address or attempt to remedy a Chapter 180 concern."); Order No. PSC-95-0417-FOF-WS ("This Commission does not administer Chapter 180 . . ."). Therefore, Chapter 180 concerns are not within the interests this Commission was designed to protect.

Even assuming that governmental authorities do not have to meet the Agrico test, Staff believes that the City's objection with regard to alleged violations of Chapter 180, the Laws of Florida, and the City's Code of Ordinances, should be dismissed. The standard for a motion to dismiss is as follows:

> When addressing a motion to dismiss, it is first appropriate to examine if, assuming that all allegations in the objection are facially valid, the objection fails to state a cause of action for which relief may be granted.

Order No. PSC-94-1132-FOF-SU, issued September 14, 1994 in Docket No. 931111, In re: Application for certificate to operate wastewater utility in Franklin County by Resort Village Utility, Inc.. Staff agrees with the utility that since Chapter 71-585, Laws of Florida, and the City's Code of Ordinances is superseded by Chapter 367, Florida Statutes, and the Commission does not have the authority to remedy a violation of Chapter 180, the City's Objection fails to state a cause of action for which relief may be granted. Therefore, with regard to the City's objection on the basis that a grant of SSU's application would violate Chapter 71-585, Laws of Florida, and the City's Code of Ordinances, including provisions pertaining to franchise fees developed pursuant to Chapter 180, Florida Statutes, SSU's Motion to Dismiss should be granted.

With regard to the local comprehensive plan, Staff believes that the City's argument is persuasive. Although Section 367.045(5)(b), Florida Statutes, states that the Commission is not bound by the local comprehensive plan of a county or municipality, the City is entitled to present its case regarding a potential violation, so that the Commission can consider it. See Order No. PSC-92-0104-FOF-WU, issued on March 27, 1992 in Docket No. 910114, In re: Application of East Central Florida Services, Inc. for an original certificate in Brevard, Orange and Osceola Counties ("Pursuant to our statutory obligation, we have considered . . . [the] comprehensive plan . . . [O]ur obligation to consider local comprehensive plans extends only to the plans of governmental entities who object to certification."). Therefore, with regard to the City's objection that a grant of SSU's application would violate its local comprehensive plan, SSU's Motion to Dismiss should be denied.

In consideration of the foregoing, Staff recommends that the Commission grant in part and deny in part SSU's Motion to Dismiss the City of Cape Coral's Objection. Accordingly, this docket should be set for hearing.

ISSUE 2: Should the Commission grant the City's request for all attorney's fees and costs associated with the bringing and maintaining of its objection, to be paid by SSU?

RECOMMENDATION: No. The Commission should not rule on this issue at this time. (CYRUS-WILLIAMS)

STAFF ANALYSIS: In its Objection, the City requested a grant of all attorney's fees and costs associated with the bringing and maintaining of this objection, to be paid by the utility. In its Motion to Dismiss, SSU states that attorney's fees and costs may only be awarded in an administrative proceeding where the nonprevailing adverse party has participated for an improper purpose. The utility denies that its participation in this case is for an improper purpose.

Staff does not believe that a motion to dismiss is the appropriate vehicle to resolve a request for attorney's fees and costs. The City could raise this matter as an issue in the hearing. Accordingly, staff recommends that the Commission not rule on this issue at this time.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No, the docket should remain open pending the final disposition of the amendment application. (CYRUS-WILLIAMS)

STAFF ANALYSIS: The docket should remain open pending Staff's completion of the review of the amendment application and final disposition of the case.