



Public Service Commission

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COMMISSION
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DATE: JULY 12, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF APPEALS (CIBULA, MOORE) *SMC CM DS*
DIVISION OF ECONOMIC REGULATION (KYLE, MERCHANT) *PKM JTT 100*

RE: DOCKET NO. 010704-SU - PETITION FOR DECLARATORY STATEMENT
AS TO WHETHER SERVICE AVAILABILITY AGREEMENT WITH UNITED
WATER FLORIDA INC. REQUIRES PRIOR COMMISSION APPROVAL AS
"SPECIAL SERVICE AVAILABILITY CONTRACT" AND WHETHER
CONTRACT IS ACCEPTABLE TO COMMISSION, BY ST. JOHNS COUNTY.
COUNTY: ST. JOHNS

AGENDA: 07/24/01 - REGULAR AGENDA - DECISION ON DECLARATORY
STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S
DISCRETION

CRITICAL DATES: 08/06/01 - BY STATUTE, ORDER MUST BE ISSUED BY
THIS DATE

SPECIAL INSTRUCTIONS: CANNOT BE DEFERRED

FILE NAME AND LOCATION: S:\PSC\APP\WP\010704.RCM

CASE BACKGROUND

Pursuant to section 120.565, Florida Statutes, and Rules 28-101, 28-102, and 28-103, Florida Administrative Code, St. Johns County (County) filed a petition for a declaratory statement on May 8, 2001. The County requests that the Commission issue a declaratory statement as to whether the facts set forth in the County's petition would constitute a special service availability contract between the County and United Water Florida Inc. (UWF or utility) and, if so, whether the contract would be acceptable to the Commission. The County states that the statutes, rules, and orders at issue are: sections 367.111(1) and 367.101, Florida Statutes; Rules 25-30.515(17), 25-30.515(18), 25-30.525, and 25-

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30.550, Florida Administrative Code; and In re: Complaint of Naples Orangetree, Ltd. against Orange Tree Utility Company in Collier County for Refusal to Provide Service, (Orange Tree Utility Order), 95 F.P.S.C. 2:342 (1995), all of which govern service availability charges and special service availability contracts. Notice of the petition was published in the Florida Administrative Weekly on May 25, 2001.

On July 10, 2001, UWF filed a response to the County's petition. On July 11, 2001, UWF filed a Motion for Leave to Intervene in this docket. The response period for the Motion for Leave to Intervene had not yet expired at the time this recommendation was filed.

Along with its petition for declaratory statement, the County also filed a Motion for Expedited Ruling. The County's petition, UWF's response, and the County's Motion for Expedited Ruling are the subject of this recommendation. The Commission has jurisdiction to consider this matter pursuant to section 120.565, Florida Statutes.

DISCUSSION OF THE ISSUES

ISSUE 1: Should the Commission grant St. Johns County's Motion for Expedited Ruling?

RECOMMENDATION: Yes.

STAFF ANALYSIS: As stated in the case background, the County filed a Motion for Expedited Ruling along with its Petition for Declaratory Statement. In support of its motion the County states that the process the County will have to commence in response to the Commission's declaratory statement takes significant time. This process includes securing the consent of the County Property Appraiser and County Tax Collector, executing contracts with the County Property Appraiser and Tax Collector, holding a series of public hearings, preparing a bid package for the design and construction of the wastewater collection facilities, and securing financing. The County further states that all these activities must be completed prior to October 2001, which is the date that ad valorem tax invoices must be in the hands of the residents discussed in the County's petition. Thus, the County requests that the Commission act as quickly as possible on the County's petition.

Pursuant to section 120.565(3), Florida Statutes, the Commission shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. As the County filed its petition for declaratory statement on May 8, 2001, the Commission has until August 6, 2001, to issue a declaratory statement or deny the petition. United Water Florida Inc. (UWF) filed its response to the petition on July 10, 2001. Staff's recommendation was filed for the Commission's consideration at the next available agenda conference. As stated above, the County requested that the Commission act as quickly as possible on this petition. Thus, staff recommends that the Commission grant the County's Motion for Expedited Ruling as staff has acted as quickly as possible to bring this matter to the next available agenda conference.

ISSUE 2: Should the Commission issue a declaratory statement as to whether the facts set forth in St. Johns County's petition constitute a special service availability contract and, if so, whether the contract complies with the Commission's rules and orders?

RECOMMENDATION: No. The Commission should deny St. Johns County's petition to issue a declaratory statement.

STAFF ANALYSIS: As stated in the case background, the County requests that the Commission issue a declaratory statement as to whether the facts set forth in the County's petition constitute a special service availability contract between the County and UWF, and, if so, whether the contract is acceptable to the Commission. The County asserts that the statutes, rules, and orders at issue are: sections 367.111(1) and 367.101, Florida Statutes, Rules 25-30.515(17), 25-30.515(18), 25-30.525, and 25-30.550, Florida Administrative Code, and the Orange Tree Utility Order.

Section 367.111, Florida Statutes, pertains to service and states that "each utility shall provide service to the area described in its certificate of authorization at a reasonable time." Section 367.101, Florida Statutes, pertains to charges for service availability and states that "the [C]ommission shall set just and reasonable charges and conditions for service availability."

Rule 25-30.515(17), Florida Administrative Code, defines a "service availability policy" as "the section of the utility's tariff which sets forth a uniform method of determining the system capacity charge or other charges to be paid and the conditions to be met, by applicants for service in order to obtain water and wastewater service." Rule 25-30.515(18), Florida Administrative Code, defines a "special service availability contract" as "an agreement for charges for the extension of service which is not provided for in the utility's service availability policy." Rule 25-30.525, Florida Administrative Code, sets forth what must be contained in an application for extension of service. Rule 25.30.550, Florida Administrative Code, states that "each special service availability contract shall be approved by the Commission prior to becoming effective" and that the special service availability contract or developer's agreement shall be accompanied by a statement from the utility affirming the utility's current plant connected load, the current treatment plant capacity, and the

amount of capacity reserved under the agreement or contract or, in lieu of this information, a copy of the utility's Department of Environmental Protection permit application.

In the Orange Tree Utility Order the Commission addressed service availability charges. In that Order, the Commission found that the developers were responsible for the payment of the applicable service availability charges in effect at the time of actual connections, pursuant to H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913 (Fla. 1979). Id. at 16. The court further found that even though the developers may have reserved capacity through pre-payment of CIAC, if the charges are subsequently increased, the developers would be responsible for paying the amount of the increase for any unconnected ERCs at the time they are connected. Id. at 17.

The County's Petition:

The County states that the Ponte Vedra Beach Municipal Service District (MSD) was created in 1982 to provide services to the residents of the district independent of, as well as supplemental to, those services provided by the County and in cooperation with the County. According to the County, the MSD is authorized to construct water and wastewater facilities, but funding for such facilities cannot be accomplished by special property assessments. The County, however, does have the authority to levy special property assessments for the construction of such facilities.

The County states that the MSD is located entirely within the certificated service territory of United Water Florida Inc. (UWF). The County states that UWF provides centralized water service to the MSD, but wastewater service is provided by individual septic tanks. According to the County there are approximately 715 customers, the vast majority of whom are residential, within the MSD. The County states that "failing septic tanks within the MSD have contributed to the pollution and degradation of the Guana River" and that "[p]roviding centralized sewer services to the MSD would significantly reduce the further pollution of this area." (Petition at 3) The County contends that due to the location of the MSD it is not legally possible nor economically practicable for the County or the MSD to provide wastewater service to the MSD customers.

The County asserts that based on UWF's current tariffs, customers in the MSD would have to pay approximately \$10,000 each for wastewater service because a force main and the associated wastewater facilities would have to be constructed to serve the MSD and the location of the MSD is such that the force main and facilities would not be capable of providing service to other developments. The County also asserts that the customers in the MSD would have to convey the force main and the associated off-site facilities to UWF at the time of connection to the UWF system. The County states that "while UWF does not dispute that the retirement of the septic tanks in the MSD is environmentally beneficial, it takes the position that the cost of extending its sewer system to the MSD must be borne by the MSD property owners or their agents." (Petition at 5)

The County states that based on a survey of the MSD residents which showed that a majority of them favored the construction of off-site facilities and the imposition by the County of a property assessment sufficient to fund such, the County passed Resolution No. 2000-07 on January 18, 2000. This resolution instructed the County Administrator to take the steps necessary to levy the special assessments needed to fund the MSD main extensions and off-site facilities. The County states that it intends to incur a long term debt estimated to cover 30 years, secured by annual property assessments over the same financing period, to construct the needed facilities and pay UWF's service availability and connection charges. The County further states that after hearings pursuant to sections 125.3401 and 125.35, Florida Statutes, it intends to enter into a lease-purchase agreement with UWF whereby "UWF will lease the wastewater collection facilities to be constructed by the County for the length of the financing term at the end of which UWF would purchase the facilities for a nominal sum." (Petition at 7) The County states that during the finance period, UWF would be responsible, at its sole expense, for the maintenance and operation of the wastewater collection facilities and that UWF would provide retail wastewater service to the MSD customers at UWF's retail service tariff rates and charges, with the exception that UWF would not impose any service availability charges on the MSD customers.

The County states that it will remit to UWF the current wastewater service availability charges and the currently approved wastewater connection fees for all residential and commercial customers within the MSD prior to the connection for the MSD force main to UWF's system. The County further states that under its

special service availability contract with UWF the MSD property owners would not be required to pay any additional wastewater service availability or connection fees at the time of connection nor would they be required to connect within any specified period of time. The County stresses that "the connection fee and wastewater service availability charge would be levied and collected by UWF and paid by the County at the time the force main is connected to UWF's system, not at the time each property owner/resident is connected to UWF's system." (Petition at 8) The County states that other fees associated with applying for wastewater service, such as the application fee and deposits, would be paid by the MSD customers at the tariff rates approved and in effect at the time of connection.

The County states that UWF has not agreed to waive the administrative, inspection, or legal fees set forth in its service availability tariff. Nevertheless, the County states that these fees have not been included in the special service availability contract submitted with its petition.

The County cites to Sutton v. Department of Environmental Protection, 654 So. 2d 1047 (Fla. 5th DCA 1995), which states that declaratory statements, like declaratory judgments, are appropriately issued where: 1) there is an actual, present and practical need for the declaration; and 2) the declaration deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts. The County requests that the Commission issue a declaratory statement because it is unclear whether the facts set forth above are significant enough to necessitate the use of a special service availability contract requiring prior Commission approval, and if so, whether the Commission would approve such a contract. The County further states that before it commences the long and expensive special assessment process, the County needs to know that the Commission would approve the arrangement outlined above.

UWF's Response:

In its response to the County's petition, UWF states that it does not object to the general arrangement whereby the County will fund the extension of UWF's wastewater system and the County will lease the extended facilities to UWF for a nominal rental amount. UWF also states that it does not object to a lease which includes a bargain purchase option to be exercised at the conclusion of term

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for the County's financing instruments or to UWF maintaining and operating the extended facilities to provide wastewater service to the residents of the MSD at the rate set forth in its tariff.

UWF, however, states that it does not intend to enter into the lease agreement and the special service availability contract as proposed by the County. UWF states that any agreement between the County and UWF will be "basically United Water Florida's standard developer agreement with as few revisions as possible." (Response at 2)

UWF cites to Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 404 (Fla. 1996), which states that a party seeking declaratory relief under Florida law must show: 1) there is a bona fide, actual, present practical need for the declaration; 2) that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; 3) that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; 4) that there is some person or persons who have or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; 5) that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. UWF asserts that since UWF does not intend to enter into the agreement as proposed by the County, "there are no 'present, ascertained or ascertainable state of facts or present controversy as to a state of facts' for a declaratory statement regarding the terms of the agreement." (Response at 4)

UWF further cites to Santa Rosa County v. Department of Administrative Hearings, 661 So. 2d 1190, 1193 (Fla. 1995), for the proposition that courts should not issue a declaratory judgment when a party merely shows the possibility of legal injury on the basis of a hypothetical set of facts which have not arisen and are only contingent, uncertain, and rest in the future. Thus, UWF states that the Commission "should not answer a hypothetical question regarding the specific terms of agreements which will not occur." (Response at 5)

In addition to the reasons why the Commission cannot issue the declaratory statement, UWF states that the Commission should not

approve the terms of the agreement as set forth by the County. UWF states that the cap on the amount of the service availability charges set forth in the County's petition would be in violation of H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913 (Fla. 1979), Christian and Missionary Alliance Foundation, Inc. v. Florida Cities Water Company, 386 So. 2d 543 (Fla. 1980), and the Orange Tree Order. UWF states that these cases stand for the proposition that the amount of service availability charges to be paid is to be determined at the time of connection. UWF states that a cap on the service availability charges should not be approved, regardless of whether the agreement is deemed a special service availability contract..

UWF also states that the proposed lease arrangement will not require prior Commission approval as a special service availability contract because it does not change UWF's charges for the extension of service. UWF asserts that the County will pay the full charge for the line extension as set forth in UWF's service availability policy.

UWF further states that there are a number of inaccuracies in the County's petition, including the County's contention that UWF is obligated to provide wastewater service upon written application of either the property owners or their duly authorized agents. UWF states that its service availability policy requires that a property owner must first enter into an agreement with UWF and then satisfy the provisions of UWF's service availability policy and the agreement.

UWF also states that the list of costs to be paid by the property owners or their authorized agents in paragraph 4(f) of the County's petition is incomplete. UWF states that this list should include, among other things, the cost of administrative fees, inspection fees, and legal fees.

The utility states that it has not yet received from the County the final plans for the force main, which would enable UWF to confirm its understanding of the location of the force main, the status of the neighboring property, and the estimated cost of the force main. UWF states, however, that it does agree with the County's statement that the cost of extending the wastewater system to the MSD must be borne by the MSD property owners or their authorized agent.

Analysis:

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

In addition to the threshold requirements for a declaratory statement set forth in section 120.565, Florida Statutes, the Sutton case cited by the County and the Chiles and Santa Rosa cases cited by UWF require that a party petitioning for declaratory relief demonstrate that there is a present, ascertained or ascertainable state of facts or a present controversy as to a state of facts and that the facts set forth in the petition are not merely a hypothetical situation.

Staff believes that in light of UWF's statement that it has not entered into the agreement set forth in the County's petition and that it does not intend to enter into the agreement as proposed by the County in its petition, the circumstances set forth in the County's petition constitute a mere hypothetical situation. As such, staff believes this matter is not proper for a declaratory statement. Thus, staff recommends that the Commission deny the County's petition to issue a declaratory statement.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

STAFF ANALYSIS: A declaratory statement is issued as a final order and the docket may be closed.