

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 010704-SU
ORDER NO. PSC-01-1611-FOF-SU
ISSUED: August 3, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING MOTION FOR EXPEDITED
RULING AND DENYING PETITION FOR
DECLARATORY STATEMENT

BY THE COMMISSION:

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 we 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 25-30.550, Florida Administrative Code; and In re: Complaint of Naples Orangetree,

DOCUMENT NUMBER-DATE

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FPSC-CC. JONCHON CLERK

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 also filed a Motion for Leave to Intervene in this docket, which was granted by Order No. PSC-01-1531-PCO-SU, issued July 24, 2001.

Along with its petition for declaratory statement, the County also filed a Motion for Expedited Ruling. We have jurisdiction to consider this matter pursuant to section 120.565, Florida Statutes.

MOTION FOR EXPEDITED RULING

In support of its motion the County states that the process the County will have to commence in response to the 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 we act as quickly as possible on its petition.

Pursuant to section 120.565(3), Florida Statutes, we must 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, we have until August 6, 2001, to issue a declaratory statement or deny the petition. UWF filed its response to the petition on July 10, 2001. We considered the petition at our next available agenda conference. As stated above, the County requests that we act as quickly as possible on this petition. Thus, we hereby grant the County's Motion for

Expedited Ruling, as we acted as quickly as possible to consider this matter.

PETITION FOR DECLARATORY STATEMENT

In its 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 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 we 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 our prior approval, and if so, whether we 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 we 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 the term 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 we "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 we cannot issue the declaratory statement, UWF states that we 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 not comport with 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 our prior 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.

CONCLUSION

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.

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, this matter is not proper for a declaratory statement. Thus, we hereby deny the County's petition to issue a declaratory statement.

Based on the foregoing, it is

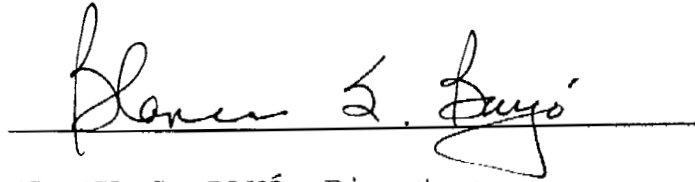
ORDERED by the Florida Public Service Commission that St. Johns County's Motion for Expedited Ruling is hereby granted. It is further

ORDERED that the Petition for Declaratory Statement filed by St. Johns County is hereby denied. It is further

ORDERED that this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 3rd
day of August, 2001.

A handwritten signature in cursive script, reading "Blanca S. Bayó", is written over a horizontal line.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

SMC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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 the Commission Clerk and Administrative Services, 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 the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be

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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.