

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of East Central Florida Services, Inc. for an original certificate in Brevard, Orange and Osceola Counties.)	DOCKET NO. 910114-WU
)	ORDER NO. 25149
)	ISSUED: 10-01-91
)	

Pursuant to notice, a prehearing conference was held on September 26, 1991, before Commissioner J. Terry Deason, as Prehearing Officer, in Tallahassee, Florida.

APPEARANCES: F. MARSHALL DETERDING, Esquire, and JOHN L. WHARTON, Esquire, Rose, Sundstrom & Bentley, 2548 Blairstone Pines Drive, Tallahassee, FL 32301
On behalf of East Central Florida Services, Inc.

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PREHEARING ORDER

I. Case Background

On February 6, 1991, East Central Florida Services, Inc. (ECFS) filed an application for an original water certificate in a tri-county area. ECFS seeks certification for the provision of residential, agricultural, and raw water services. On March 8, 1991, Orange County filed an objection to ECFS's notice of the above-referenced application. On March 15, 1991, Brevard County filed an objection to ECFS's notice of application. Three days later, on March 18, 1991, South Brevard Water Authority filed its objection to the notice, and the next day, March 19, 1991, both the City of Cocoa and Osceola County filed their respective objections.

This case is scheduled for an administrative hearing on October 2 and 3, 1991. October 4, 1991, has also been reserved if needed.

II. Prefiled Testimony and Exhibits

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

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III. Order of Witnesses

<u>Witness</u>	<u>Appearing for</u>	<u>Issues #</u>
<u>Direct</u>		
Gerald Hartman	ECFS	1,2,3,4,5,6, 14,15,16,17,18,19
William H. Stephenson	Cocoa	3,4,5,6,16
John A. Mayer	Cocoa	3,4,16,17

(ECFS has agreed to produce one of the following adverse party witnesses, Mr. John L. King. The remainder are apparently unavailable for the hearing. The parties may introduce the depositions of those adverse party witnesses not present at the hearing as is provided for in the Florida Rules of Civil Procedure. Such depositions shall be subject to evidentiary objections.)

R. Bruce Wright (Adverse Party Witness)	Cocoa	
Wayne G. Facer (Adverse Party Witness)	Cocoa	
Fred A. Baker (Adverse Party Witness)	Cocoa	
John W. Creer (Adverse Party Witness)	Cocoa & Orange	
John L. King (Adverse Party Witness)	Cocoa & Orange	
Paul L. Genho (Adverse Party Witness)	Cocoa & Orange	
Alan Ispass	Orange	3,4,6,16
Edward J. Williams	Orange	6,16

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<u>Witness</u>	<u>Appearing for</u>	<u>Issues #</u>
<u>Direct</u>		
George Raftelis	Orange	16,17
Chuck Bliss (Adverse Party Witness)	Orange	
(ECFS has agreed to make Mr. Bliss available at the hearing if it is determined that his testimony is needed.)		
Robert J. Massarelli	SBWA	3,4,6,16
<u>Rebuttal</u>		
Gerald Hartman	ECFS	6,16,17
Howard M. Landers	ECFS	6,16
Bob Nixon	ECFS	2,16,17,18,19

IV. Basic Positions

ECFS: There is a need for potable, agricultural/irrigation, and there is expected to be a need for bulk raw water services throughout the territory applied for by ECFS. The applicant is ready, willing and able from both a technical and financial standpoint to provide those services currently needed and to meet additional needs as they arise. No other utility can provide service to the territory as economically or efficiently as ECFS. The proposed certification of ECFS is in the public interest and is in no way inconsistent with the Comprehensive Plans of any of the protestants or intervenors in this case developed pursuant to §§ 163.3161-163.3211, Florida Statutes. In fact, the certification of ECFS will facilitate effective and orderly growth management and resource allocations within the proposed territory comprised of lands owned by ECFS affiliated entities.

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COCOA: The application for original water certificate filed by applicant ECFS should be denied.

ORANGE: Orange County opposes the petition ECFS, for original certification of authorization to operate a water utility in Brevard, Osceola and Orange Counties, Florida.

Orange County does not believe that ECFS has shown that a need for service exists or that it would be in the public interest for the Public Service Commission to grant the certificate. The ostensible reasons presented by ECFS for the certification are: (1) to enhance administrative efficiency within the business entity which owns the land in the proposed service area; (2) to provide for the water users within the proposed service area; and (3) to provide bulk sale of water to purchasers outside the proposed service area.

Any desire by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints to restructure its internal business affairs does not equate to a showing that it would be in the public interest to grant the certificate.

Insofar as the existing users of the water within the proposed service area, the testimony will show that there are two categories of users. The predominant use is and will be agricultural use by Farm Management Company, a wholly owned subsidiary of Proprietary Holdings, Inc., responsible for the farming operations on the property. The secondary use is by the residences on the property which house the farm employees. The testimony is that there are ten homes in Orange County being served by four or five wells. According to testimony, (see deposition of Paul Genho, page 54), there are 77 homes in the total service area. Land use plan densities restrict future development of the service area to agricultural use or residential of one dwelling unit per ten acres. There is no master plan on the part of the owner of the land to develop its property. The testimony is that if the utility application is denied, water service will continue in its present format. None of the present residential users have requested that they be billed in

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a manner different that the current arrangement, which is a set-off against their wages.

As to the third reason for certificate, i.e., sale of raw water to purchasers outside the service area, no such purchasers have been identified. It is merely the utility's hope that this will eventuate. Notwithstanding the lack of a bulk sale customer, the application includes the costs of installing fourteen wells and a raw water transmission line with a 36 inch water meter.

Finally, operation of the proposed utility would also violate the Orange County Comprehensive Policy Plan. The Comprehensive Policy Plan prohibits "central water systems" from being located in the Rural Service Area of Orange County. The evidence will show that the proposed utility would constitute a "central water system" as that term is defined by Orange County Land Use Regulations.

SBWA: It is the position of the SBWA that there is not currently, nor will there be in the reasonable foreseeable future, a need for service in the proposed service area which would support the granting of a certificate of authorization. Further, the application is predicated upon the sale of five million gallons a day of bulk water to an unidentified customer located outside the proposed service area. The SBWA maintains that there is no reasonable likelihood of the applicant locating such a customer for its water in the near future. The SBWA would also assert that the granting of this application would be inconsistent with the Comprehensive Plans of Brevard County, Cocoa and Orange County. For the foregoing reasons, inter alia, ECFS cannot carry its burden of showing that the certificate should be issued.

OSCEOLA: Osceola supports the issuance of a certificate to ECFS provided that the issuance of that certificate does not impose any obligation on the part of the utility to service bulk water customers who are located outside of the certificated service area or impose an obligation on the utility to provide bulk water to non-territorial entities whose transmission lines are located within the utility's certificated area.

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STAFF: The application of East Central Florida Services, Inc., (ECFS) for an original water certificate in a tri-county territory meets the minimum filing requirements of the Commission. Based on the information reviewed by staff at this time, it appears that ECFS has the technical and financial ability to provide the proposed service, that there is a need for the residential and agricultural service, and that service is not available from any other source. Therefore, the Commission should grant ECFS's request for an original water certificate as to the residential service. However; Staff has no position as to whether the Commission has jurisdiction over the provision of non-potable water service. In addition, in light of the apparent lack of need for raw water service, Staff has no position as to whether the Commission should issue a certificate as to the raw water service if the Commission finds that it has jurisdiction over non-potable water service.

V. Issues and Positions

For convenience, the issues appearing below have been segregated into three categories: "Issues of Fact" and "Issues of Law," and "Issues of Policy." Issues which may be considered to be a combination of any of the three or which are conclusory appear in the "Issues of Policy" category.

A. Issues of Fact.

ISSUE 1: Does the utility have the technical ability to provide the proposed services?

POSITIONS

ECFS: ECFS has the technical ability to operate the proposed utility. The very best evidence of this fact is that facilities which ECFS has contracted to acquire to provide service to existing customers are already being operated in an efficient manner servicing those customers by the same operations personnel who will continue to operate them under ECFS' control. (Hartman)

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COCOA: ECFS has not demonstrated that it has the technical ability to provide bulk raw water service.

ORANGE: ECFS has not demonstrated that it has the technical ability to operate a utility providing residential, agricultural or bulk sale water service.

SBWA: ECFS has failed to demonstrate that it has the technical ability to provide the proposed water service.

OSCEOLA: Yes.

STAFF: Yes.

ISSUE 2: Does the utility have the financial ability to provide the proposed services?

POSITIONS

ECFS: ECFS has the financial resources necessary to operate the proposed utility. The utility is sufficiently capitalized for that purpose as is its parent company, Magnolia Management Corporation. (Hartman, Nixon)

COCOA: ECFS has not demonstrated that it has the financial resources necessary to provide and operate the proposed bulk raw water service.

ORANGE: No. ECFS has not shown that either it or its parent Magnolia Management has the financial ability to provide service. (Raftelis)

SBWA: ECFS has failed to demonstrate that it has the financial ability to provide the proposed service. The projected cost of the proposed system are unrealistic.

OSCEOLA: Yes.

STAFF: Yes.

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ISSUE 3: Are the services proposed to be provided by the applicant needed within the proposed territory?

POSITIONS

ECFS: The certification of ECFS will fulfill a present and future need for service in the proposed territory. There is certainly an existing need as demonstrated by wells constructed within the confines of the outer boundary of the proposed service territory and by existing customers of such service within that territory. Some increased demand for service within the proposed territory is anticipated and the utility also anticipates that there will be demands for bulk raw water service other than for agricultural purposes in the future. (Hartman)

COCOA: ECFS has not demonstrated a need for the agricultural, potable or bulk raw water service within the proposed service area, and has not demonstrated a need for the proposed bulk raw water service to provide bulk raw water outside of the proposed service area. On December 19, 1990, after administrative hearing in which an ECFS affiliated entity participated, the St. Johns River Water Management District issued Consumptive Use Permit No. 2-095-0005UGMR to the City of Cocoa for the withdrawal of 11.32 billion gallons of water by the year 1997, from wells located and to be located within the area proposed for certification. On August 1, 1991, the St. Johns River Water Management District published a Notice of Intended Agency Action to issue Consumptive Use Permit No. 2-097-0024ANG to the City of Cocoa for the withdrawal of 12 million gallons of water per day from a surface water body known as Taylor Creek Reservoir located wholly within the area proposed for certification. An ECFS affiliated entity has contested issuance of the Taylor Creek Consumptive Use Permit and requested administrative hearing. (Stephenson, Mayer)

ORANGE: No. ECFS has not demonstrated a need for any of the proposed types of water service within the proposed territory, and there is no need for bulk raw water outside the proposed territory. (Ispass)

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SBWA: No. ECFS has not demonstrated a sufficient customer base for the proposed sale of water to retail customers, and no customer currently exists to justify the representation of the proposed sale of five million gallons per day of bulk water in the service area. (Massarelli)

OSCEOLA: Yes.

STAFF: As to the proposed residential and agricultural services, yes. No position as to the need for raw water service.

ISSUE 4: Will the ECFS system be in competition with or a duplication of any other system? If so, is such other system inadequate to meet the reasonable needs of the proposed territory or is the person operating such other system unable to or has the person refused or neglected to provide reasonably adequate service?

POSITIONS

ECFS: ECFS would not be in competition with, or a duplication of, any existing system. Other than the system currently operated by ECFS' related party, which will soon be transferred to ECFS, no existing system currently serves the needs of the customers of the proposed ECFS' service territory. Analogously, the utility operated by ECFS would not compete with any existing system in providing service to the utility customers found within the proposed service territory.

In any case, even if contrary to the great weight of evidence it is found that one of the protesting parties operates an existing system in competition with, or which is a duplication of, the proposed ECFS' utility, that system is inadequate to meet the needs of the proposed territory and/or has refused to provide reasonably adequate service within the proposed territory and/or is not best able to provide service to the existing and future customers in the proposed territory.

None of the intervenors or protestants in this docket are currently serving or have present intentions to serve the

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territory for which ECFS seeks a certificate. The City of Cocoa has denied a request for service. Orange County has refused service at this time and has refused service in the future for those areas outside of the Urban Services Area. All of the proposed territory is outside of Orange County's current Urban Services Area. Osceola County, who has de facto discontinued its protest to ECFS' application, does not provide utility services. Brevard County has no plans to provide water and/or wastewater service on the west side of the St. Johns River. The South Brevard Water Authority has no construction funding, no permits for water and/or wastewater service, no facilities, no operation and maintenance personnel, and is limited to south Brevard County for its service area. (Hartman)

COCOA:

ECFS has failed to demonstrate how and that the proposed bulk raw water service, which contemplates the bulk sale of five million gallons a day of untreated water for use outside of the proposed service area, will not be in competition with other utilities. ECFS' application depicts the approximate location of fourteen raw water production wells and a manifold system between those wells for delivery of the raw water to a treatment plant at an undetermined location. The location of these wells is in close proximity to the City of Cocoa's Dyal Water Treatment Plant in the northeastern portion of the area to be certificated. Pursuant to contract, the City of Cocoa currently provides potable water to residents of the Cities of Cocoa, Cocoa Beach, Cape Canaveral and Rockledge; to unincorporated Brevard County; and to government installations Patrick Air Force Station, Cape Canaveral Air Force Station and the Kennedy Space Center. In the event, the proposed system is put into operation for the purpose of selling bulk raw water for use outside the certificated area, it will be in competition with the City of Cocoa for users.

ECFS has failed to demonstrate that its proposed facilities (system) necessary to produce and transport the bulk raw water will not be a duplication of any other system located or to be located within or adjacent to the area to be certificated. The City of Cocoa has an existing wellfield and raw water collection lines leading

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from its existing wells to its Dyal Water Treatment Plant and has received a Consumptive Use Permit from the St. Johns River Water Management District authorizing the withdrawal of ground water from both existing wells and future wells located within the proposed service area. Condemnation proceedings to acquire the well sites for the new wells from the land owner (an ECFS affiliated entity) have been authorized by the City Council of Cocoa and three well sites have been condemned for emergency wells. Further, the City's existing wellfield is, and its expanded wellfield will be, comprised of wells on well sites surrounded by the area to be certificated. In preparing the legal description for the area to be certificated, ECFS excluded Cocoa's existing well sites but included both Cocoa's existing collection lines located on easements within the certificated area and Cocoa's future well sites which are identified in both the approved Consumptive Use Permit and the City's resolutions authorizing condemnation of the future well sites. ECFS's application identifies fourteen future wellsites for wells to be used to produce the proposed five million gallons of bulk raw water per day. These wellsites are shown on ECFS's facilities exhibit in approximately the same location as the wellsites approved under Cocoa's Consumptive Use Permit. In the event ECFS's proposed wells were constructed, they would constitute duplicative facilities for raw water production within the area to be certificated.

ECFS has failed to demonstrate a lack of availability of water service from other sources and has failed to demonstrate the inability, neglect or refusal of other utilities to provide service. In fact, the City of Cocoa and ECFS affiliated entities, during negotiations for the City to acquire additional wellsites within the Orange County portion of the area proposed for certification, discussed the sale of potable water to ECFS' affiliated entities. The City of Cocoa has never refused to serve the area to be certificated. Further, the City of Cocoa is ready to provide potable water service to that portion of the proposed service area which overlaps with the City's existing service area in Brevard County. (Stephenson, Mayer)

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ORANGE: ECFS will be in competition with Orange County for service provision in the unincorporated areas of Orange County that are eligible for central water service. ECFS will be in competition with Orange County for the sale of bulk raw water to areas outside the service area.

SBWA: Yes. The ECFS system will be in competition with or a duplication of other systems. (Massarelli)

OSCEOLA: The ECFS system would not be in competition with or a duplication of any other system.

STAFF: There would be no duplication or competition as to the residential or agricultural systems. No position as to the proposed raw water service.

ISSUE 5: Has ECFS met all of the filing and noticing requirements of the Commission?

POSITIONS

ECFS: ECFS has satisfied all the statutory and rule criteria such that it should be granted a certificate by the Florida Public Service Commission. (Hartman, Nixon)

COCOA: Despite written request made to the PSC for Notice in the event this application was filed, ECFS failed to provide notice to the City of Cocoa. The proposed service area overlaps the City's existing service area in two locations. Further, the City currently has a system, work, project or utility adjacent to the area proposed for certification and is planning the expansion of its wellfield and associated appurtenances within the area to be certificated. The existing wellfield well sites, which have been omitted from the legal description of the proposed service area, are also adjacent to the proposed service area.

ECFS has failed to file all information required to be filed in support of its Application. (Stephenson)

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ORANGE: ECFS did not comply with the notice requirements of Chapter 25-30, Florida Administrative Code, insofar as notice to Orange County.

SBWA: No.

OSCEOLA: Yes.

STAFF: Yes.

ISSUE 6: Is the certification of ECFS inconsistent with the Comprehensive Plans of Orange County, Brevard County, Osceola County, the City of Cocoa or the East Central Florida Regional Planning Council?

POSITIONS

ECFS: The issuance of a certificate to ECFS as requested is not inconsistent with any of the local government comprehensive plans, Orange County, Brevard County, Osceola County, the City of Cocoa or, the East Central Florida Regional Planning Counsel. (Hartman, Landers)

COCOA: ECFS has failed to demonstrate how the operation and impact of the utility proposed to be certificated is consistent with the applicable Comprehensive Plans. (Stephenson)

ORANGE: The certification of ECFS is inconsistent with the Comprehensive Plan of Orange County. The Commission should not facilitate the violation of a comprehensive land use plan by certifying this proposed utility. Upon certification, an unlawful use will have been created. (Ispass, Williams)

SBWA: Yes. (Massarelli)

OSCEOLA: The certification of ECFS is not inconsistent with the Comprehensive Plans of Orange County, Brevard County, or the City of Cocoa.

STAFF: No position at this time.

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B. ISSUES OF LAW.

ISSUE 7: Whether the certification of ECFS by the Florida Public Service Commission would be a violation of the State Growth Management Act, Chapter 163, Florida Statutes?

POSITIONS

ECFS: The certification of ECFS would not be a violation of Chapter 163, Florida Statutes. Chapter 163 explicitly acknowledges the significance and, in some cases, pre-eminence of other state agencies. Chapter 367, on the other hand, explicitly preserves to the Commission the exclusive authority over each utility with respect to its authority, service, and rates and also explicitly provides that Chapter 367 supersedes all other laws on the same subject and that subsequent and inconsistent laws will supersede Chapter 367 only to the extent that they do so by express reference. Chapter 163 does not and cannot provide any regulatory role to local governments in utility service area designations.

COCOA: Florida Statutes, Chapter 163, Part II, legislatively mandates and directs the preparation and adoption of Local Government Comprehensive Plans in accordance with specific criteria and objectives as implemented in Florida Administrative Code, Rule 9J-5. To the extent the Certification of this utility will frustrate the local governments' efforts to implement their respective Comprehensive Plans, the Certification will render the Local Government Comprehensive Plans inconsistent with this statute.

Florida Statutes, Chapter 163, Part II, does not grant to local governments jurisdiction over the regulation over a private utility. However, as stated above, this provision does impose a duty on the local government to ensure that adequate public services will be available for growth as it occurs.

ORANGE: ECFS is requesting the Commission to approve certification of a central water system. Immediately upon certification, a prohibited use will exist in a

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rural service area. Chapter 367 does not empower the Commission to act as a super zoning authority allowing uses that the local government has prohibited.

SBWA: Yes.

OSCEOLA: No position on at this time. This issue should be addressed in the post-hearing briefs.

STAFF: This is not a relevant consideration for this proceeding.

ISSUE 8: Whether an original water certificate issued by the Commission pursuant to Chapter 367, Florida Statutes, authorizes the certificated utility to prohibit or impede the use of the certificated area's water resources by other persons?

POSITIONS

Rather than taking positions on this issue at this time, the parties will address this legal issue in post-hearing briefs.

ISSUE 9: Does a county or municipality which has objected to an application for an original certificate have standing to assert that certification is inconsistent with the comprehensive plan of another county or municipality?

POSITIONS

Rather than taking positions on this issue at this time, the parties will address this legal issue in post-hearing briefs.

ISSUE 10: When a county or municipality has objected to an application for an original certificate, does the applicant have the burden of proving that certification is not inconsistent with the pertinent comprehensive plan or does the county or municipality have the burden of proving that certification is inconsistent with the pertinent comprehensive plan?

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POSITIONS

Rather than taking positions on this issue at this time, the parties will address this legal issue in post-hearing briefs.

ISSUE 11: Does the Public Service Commission have jurisdiction to regulate the sale of non-potable water such as irrigation water for agriculture and raw water?

POSITIONS

ECFS: Bulk service by a water provider to private or public entities falls under the jurisdiction of the Florida Public Service Commission in that the same constitutes the provision of water service to the public. It is in the public interest for an interested regulatory authority to oversee the management of utility services and administration of the water resources which are available within the proposed service area such that service is ultimately delivered to the public in an efficient, non-discriminatory, fair and reasonable manner. The provision of bulk raw water service, whether that water is to be and made potable, or not treated and used for agricultural or irrigation purposes, falls under the jurisdiction of the Florida Public Service Commission as that jurisdiction is clearly established in Chapter 367, Florida Statutes. Commission oversight of the same would be in the best interest of the direct customer, the ultimate users, and the public generally.

COCOA: The City takes the position that certification of agricultural water service is not required by Chapter 367, Florida Statutes or by Chapter 25-30, Florida Administrative Code and that agricultural water service should not be certificated where the service is provided to an affiliated land owner. With respect to the certification of the bulk raw water service proposed in ECFS's application, the City takes the position that certification of the proposed bulk raw water service for use outside the certificated area should be denied.

ORANGE: Orange County concurs with DCA Opinion #0-89-014 that the Commission lacks jurisdiction over the sale of non-

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potable water. Even if the Commission had jurisdiction, it would be bad policy for it to lend its imprimatur to an effort to own and control a resource that the Florida Supreme Court has decided belongs to the people of the state.

SBWA: The SBWA concurs with DCA Opinion #0-89-014 that the Commission lacks jurisdiction over the sale of non-potable water. Assuming *arguendo* that it possesses jurisdiction, it should decline from exercising it in this instance as a matter of public policy.

OSCEOLA: Yes.

STAFF: On April 5, 1990, the Commission's Office of General Counsel issued an intra-agency opinion, DCA Opinion #0-89-014, concerning the Commission's jurisdiction over non-potable water. In that opinion, the Office of General Counsel concluded that the Commission did not have jurisdiction over the sale of non-potable water. Staff, however, takes no position on this issue at this time. The Commission itself has not directly considered this question before.

ISSUE 12: Under what circumstances, if any, does the issuance of a certificate to ECFS and the establishment of a bulk raw water rate by the Florida Public Service Commission impose upon ECFS an obligation to provide bulk water service to persons or entities requesting such service for use outside of the proposed service territory of ECFS?

POSITIONS

ECFS: The issuance of a certificate cannot impose upon the utility an obligation to service any water needs outside the territory certified since the imposition of such an obligation could become untenable and almost limitless. However, the utility should have the authority to provide such bulk raw water service outside its certificated territory as appropriate in the public interest based upon approved and non-discriminatory terms and rates.

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- COCOA: The City takes the position that the certification of ECFS for the provision of bulk raw water service for use outside of the certificated area will impose an obligation upon ECFS to provide bulk raw water to persons outside the certificated area in the event the certification of ECFS denies, frustrates or impedes the ability of others, such as the City of Cocoa, to produce and withdraw raw water from within the certificated area.
- ORANGE: If ECFS is asking for a certificate to sell bulk water outside the certificated area, then, yes, ECFS would have the duty to sell it.
- SBWA: No position.
- OSCEOLA: Pursuant to Chapter 367, Florida Statutes, a water utility as defined in Section 367.021(12), Florida Statutes, is only obligated to serve the customers within its service territory. To require ECFS, or any other water utility, to provide bulk water service to entities located outside of its service territory would result in the imposition of an unquantifiable obligation on the part of the utility and one for which the utility could not reasonably plan. However, the utility does have the authority to provide bulk water service at FPSC-approved and non-discriminatory rates outside its certificated area provided that such service does not impair the ability of the utility to adequately serve its territorial customers.
- STAFF: Section 367.111(1), Florida Statutes, states that a utility must provide service to the area described in its certificate. The Commission has interpreted this Section to mean that the utility has to provide service to customers in the area. A certificated utility has no obligation to serve a customer located outside its certificated territory. No certificated utility can serve a customer outside its territory without the Commission's prior approval.

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ISSUE 13: What effect, if any, does the location of a proposed bulk service customer's line have on the obligation of the utility to provide bulk raw water service to persons located outside of the proposed water service territory?

POSITIONS

ECFS: The location of such a line can have no effect on such an obligation without imposing an untenable and boundless burden upon the utility. There can be no obligation to provide service outside the certificated service territory.

COCOA: The City takes the position that the location of such a line, whether constructed by the customer or the by the utility, may not impose an obligation upon the utility within the certificated area to provide service. However, the location of such a line could be deemed to be violative of the PSC's efforts to end economic waste and inefficiency and contrary to the exclusivity of the certificated area. The City takes the position that an obligation to provide service outside the certificated area would nonetheless be in the public interest in the event the certification would deny, frustrate or impede the ability of others to produce and withdraw water from within the certificated area.

ORANGE: The utility seeks to be certified to sell bulk raw water to customers outside its service area yet it wants no affirmative duty to do so. The utility should not ask to be certificated for bulk sale if it doesn't intend to provide the service.

SBWA: Agree with Staff.

OSCEOLA: The location of such a line can have no effect on the utility's obligation to provide bulk water service. To allow the location of non-territorial customer lines to confer an obligation to serve eviscerates the whole concept of certificated service areas. See: Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987)

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STAFF: The location of a line inside the certificated territory, by itself, imposes no obligation on the utility to provide service to said line.

C. ISSUES OF POLICY.

ISSUE 14: If ECFS's proposed potable water service qualifies for an exemption under Section 367.022(6), Florida Statutes, should the Commission deny ECFS's request for certification and find that service to be exempt?

POSITIONS

ECFS: No. ECFS' request for a potable water service certificate should not be denied based upon an exemption under Section 367.022(6), Florida Statutes, because the utility does not qualify under this sub-section. (Hartman)

COCOA: The City's position is that an applicant who proposed to provide residential potable water service to 100 or fewer persons is exempt from obtaining an original water certificate pursuant to Section 367.022, Florida Statutes. The City's position is that ECFS proposes to provide residential potable water service to 100 or fewer persons. The City's position is that the portion of ECFS's application for original water certificate requesting permission to provide residential potable water service should be denied, because service to 100 or fewer persons is exempt.

ORANGE: Agree with Cocoa.

SBWA: Yes.

OSCEOLA: Osceola County objects to this issue. It is a statement of Cocoa's position on the merits of ultimate certification.

STAFF: This is not a relevant consideration for this proceeding.

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ISSUE 15: Should that portion of ECFS' application for original water certificate for water service for crop irrigation or livestock watering be denied, because such services are provided initially to an affiliated land owner?

POSITIONS

ECFS: No. Such services are available to all customers who request such service within the service territory of the utility, and it is the intent of ECFS to provide those services to any such customer as needed, as well as to negotiate for the provision of such service to any adjacent property owners requesting such service outside the existing territory, contingent upon the amendment of that territory to include such additional customers. In addition, there is no requirement under either Commission Statutes or Rules that a utility be initially providing service to anyone other than affiliated entities. (Hartman)

COCOA: The City's position is that the Commission should not require an original water certificate for agricultural water services provided by the utility to an affiliated land owner. The City takes the position ECFS's application requests permission to provide water service for crop irrigation or livestock watering to an affiliated land owner. The City's position is that the portion of ECFS's application for original water certificate which requests permission to provide water service for crop irrigation or livestock watering should be denied, because agricultural water services provided by the utility to an affiliated land owner should not require a water certificate.

ORANGE: Agree with Cocoa. There will be no change in substantive service; instead of absorbing the costs as presently done. Farm Management will pay the utility. Both entities remain under the control of the same parent so there is no net effect caused by the payment.

SBWA: Yes.

OSCEOLA: This is a legal issue and should be addressed in post-hearing briefs.

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STAFF: This is not a relevant consideration for this proceeding.

ISSUE 16: Is it in the public interest for the Florida Public Service Commission to grant the applicant a certificate of authorization?

POSITIONS

ECFS: The certification of ECFS is in the public interest. The utility would be authorized to provide service to a large tract of land owned and operated by its affiliated entities and would facilitate the orderly growth and provision of water service to the landowners and residents, present and future, of that property. No other utility currently serves the property or has indicated its willingness to serve the property. In addition, such certification will result in the orderly and efficient management of the scarce water resources by one regulated entity to all those in need of that resource on a fair and non-discriminatory basis. (Hartman, Landers, Nixon)

COCOA: This has not been demonstrated by ECFS. (Stephenson, Mayer)

ORANGE: Orange County contends that it is categorically not in the public interest to grant a certificate on the following bases: (1) it needlessly facilitates the intrusion of a central water system into the rural service area of Orange County which has been designated as such for the purpose of preserving its present character; (2) allegation of need are unsupported; (3) allegations of financial ability are inadequately documented and are not legally binding; (4) Orange County has had to subsidize abandoned utilities on an interim basis in the past pursuant to Section 367.165, Florida Statutes; (5) there is no foreseeable future need in terms of customers; (6) in the event a future need eventuates, Orange County will provide service; (7) the certification fosters needless conflict and confusion between state and local agencies when the division of responsibilities is presently quite clear, but would become uncertain by virtue of certification; (8) it

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lessens the chances of a Regional Water Authority formed as recommended by the Governor's Task Force; (9) it effectively wastes the public funds spent by Orange County, Cocoa, and the St. John's River Water Management District on the hydrogeological study for this region which the study is to be SJRWMD's basis for water allocation; and (10) it unnecessarily restricts Orange County's ability to properly plan for the future water needs of its citizens. (Ispass, Williams, Raftelis)

SBWA: It would not be in the public interest for the PSC to grant the proposed certificate. The application is inconsistent with the Comprehensive Plan of Brevard County. There is no need for the proposed service at this time or in the foreseeable future. The applicant has not demonstrated either the technical or financial ability to operate the utility. The SBWA is prepared to provide service to those areas of the proposed service area which are within its jurisdiction. The application is inconsistent with the legislative mandate to the SBWA to develop and manage a regional water supply for South Brevard County. (Massarelli)

OSCEOLA: Yes, at this time it is in the public interest to grant ECFS a certificate.

STAFF: As to residential service, yes. However, Staff has no position as to whether the Commission has jurisdiction to regulate the provision of non-potable water service. In addition, because of the apparent lack of need for raw water service, Staff has no position as to whether the Commission should include the proposed raw water service as one of the certificated types of service if the Commission finds that it has jurisdiction over non-potable water service.

ISSUE 17: If a certificate is granted, what initial water rates and return on equity are appropriate for the applicant?

POSITIONS

ECFS: The initial water rates utilized should be those as filed in the application after amendment as discussed in Mr.

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Hartman's rebuttal testimony and with adjustment for the changes in the Commission's most recent leverage formula. The return on equity to be utilized should be that contained in the Commission's most recent leverage formula order, as of the date of the Commission's final order in this proceeding. (Hartman, Nixon)

COCOA: The City takes the position that it is not appropriate for the PSC to establish rates, through tariff, for the provision and use of bulk raw water service outside of the certificated area for which no customer can be identified. The City takes the position that if such a customer were to be located, rates should be negotiated on a case-by-case basis and subsequently approved by the PSC. (Mayer)

ORANGE: Concur with Cocoa that bulk raw water rates for service outside the service area should not be set at this time. Assert that the cost projections do not constitute reasonable accurate cost projections. (Raftelis)

SBWA: The proposed costs of the proposed system do not constitute reasonable accurate cost projections as required by State Law and Administrative Rule. The proposed rate structure filed by the applicant is not equitable to all category of users. The petition filed by the applicant specifically violates the provisions of Section 367.0812(a), Florida Statutes.

OSCEOLA: Agree with ECFS.

STAFF: If a certificate is granted, the initial water rates filed by ECFS are appropriate, but the return on equity should be that adjusted for the appropriate return on equity contained in the Commission's current leverage graph formula.

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ISSUE 18: If a certificate is granted, what are the appropriate miscellaneous service charges and initial customer deposits for applicant?

POSITIONS

ECFS: Those contained in the application. (Hartman, Nixon)

COCOA: ECFS has not demonstrated the appropriateness of the charges and deposits for bulk raw water service. The City takes no position on the amount of the miscellaneous service charges and initial customer deposits. However, as to the proposed bulk raw water service, the charges described in the application appear to be inadequately supported.

ORANGE: Agree with Cocoa.

SBWA: If a certificate is granted the proposed service charges are inequitable and should be adjusted.

OSCEOLA: Agree with ECFS.

STAFF: Those requested in the application are appropriate.

ISSUE 19: If a certificate is granted, what are the appropriate service availability charges for the applicant?

POSITIONS

ECFS: Those contained in the application. (Hartman, Nixon)

COCOA: ECFS has not demonstrated the appropriateness of the service availability charges. The City takes no position on the amount. However, as to the proposed potable and agricultural services, the facilities are existing, owned by an affiliated land owner and no expansions are planned. Charges, if any should be minimal. As to bulk raw water service, an appropriate charge is impossible to establish for the reasons that ECFS has failed to identify potential customers, has failed to undertake studies to determine the costs of and availability of raw water, and has failed to identify these costs.

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ORANGE: Agree with Cocoa.

SBWA: Agree with Cocoa.

OSCEOLA: Agree with ECFS.

STAFF: Those requested in the application are appropriate.

ISSUE 20: If a certificate is granted, should a separate certificate be issued for each county?

POSITIONS

ECFS: No. One multi-county certificate should be granted.

COCOA: Agree with ECFS.

ORANGE: Agree with ECFS.

SBWA: Yes.

OSCEOLA: Yes.

STAFF: Agree with ECFS.

VI. Proposed Stipulations

At the prehearing conference, the parties and Staff stipulated as to the following: that the present recipients of potable water service, farm employees who live on the property, have their salaries offset for rent and utilities as part of a compensation package.

VII. Rulings

1. ECFS's May 1, 1991, motion to amend its application is granted.
2. ECFS's September 4, 1991, motion to strike portions of Cocoa's prehearing statement or, in the alternative, to allow additional prefiled testimony, live testimony, etc., is

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granted in part and denied in part as follows. Cocoa will not be allowed to file surrebuttal. Live testimony of those adverse party witnesses listed in the "Order of Witnesses" above section will be allowed. The parties may introduce the depositions of those adverse party witnesses not present at the hearing, as is provided for in the Florida Rules of Civil Procedure. Such depositions shall be subject to evidentiary objections. ECFS withdrew the continuance request which it made in this motion, so no ruling is required as to that request.

3. Cocoa's September 11, 1991, motion to compel Staff to identify its positions is denied.
4. Cocoa's September 12, 1991, motion to allow live testimony or, in the alternative, motion for continuance and new procedural deadlines is granted as is indicated above: live testimony of those adverse party witnesses listed in the "Order of Witnesses" section will be allowed.
5. Cocoa's September 12, 1991, motion to strike the rebuttal of ECFS is denied; however, Cocoa is not precluded from making similar objection at hearing.
6. ECFS's September 23, 1991, motion to restrictively amend the proposed certificated territory is granted. ECFS undertook this amendment to fulfill its obligation under a settlement entered into with Brevard County. See ruling on Brevard's motion for conditional withdrawal below.
7. Cocoa's September 24, 1991, motion for reconsideration of the hearing location is denied.
8. ECFS's September 25, 1991, motion for extension of discovery cut-off is granted.
9. Cocoa's September 26, 1991, motion to allow supplemental prefiled testimony and to substitute identified expert witness is denied.
10. Cocoa's September 26, 1991, motion for continuance is denied.
11. SBWA's oral motion to be allowed to adopt Brevard County's prefiled direct testimony is denied.

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12. Cocoa's oral motion to be allowed to present the live testimony of those witnesses who prefiled testimony on behalf of Brevard County is denied.
13. ECFS's oral motion to strike from the witness list the six adverse party witnesses who are officers or directors of ECFS is denied.
14. Brevard County's motion for conditional withdrawal of its objection, submitted September 26, 1991, is granted. The condition stated was the Commission's acceptance of ECFS's restrictive amendment, granted above. Brevard County is therefore, no longer a party to this proceeding. The Commission need not rule on any of Brevard's pending motions.

VIII. Exhibits

<u>Witnesses</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Hartman	ECFS	GCH-1	Document defining "central water system" attached to the "Well Construction Permit Application" from the Orange County Public Health Unit
Hartman	ECFS	GCH-2	Thirteen tables for potable water and ten tables for irrigation water indicating the revisions to the cost of service models for those services.
Hartman	ECFS	GCH-3	Application for certificate
Landers	ECFS	HML-1	A copy of the witness' professional resume

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<u>Witnesses</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Landers	ECFS	HML-2	A series of three maps
Stephenson	Cocoa	WHS-1	Curriculum vitae
	Cocoa	WHS-2	Map of City of Cocoa water supply system
	Cocoa	WHS-3	Map of approximate location of existing and proposed wells in the Cocoa wellfield
	Cocoa	WHS-4	Warranty Deed from Deseret Ranches of Florida, Inc. to the City of Cocoa dated July 22, 1968 and Corrected Warranty Deed dated October 7, 1970
	Cocoa	WHS-5	Warranty Deed dated August 10, 1956 from Magnolia Ranch, Inc. to the City of Cocoa
	Cocoa	WHS-6	Option Agreement between Magnolia Ranch, Inc. and the City of Cocoa dated May 4, 1956
	Cocoa	WHS-7	Agreement dated February 8, 1962 between Magnolia Ranch, Inc. and the City of Cocoa

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<u>Witnesses</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Stephenson	Cocoa	WHS-8	Warranty Deed dated February 8, 1962 from Magnolia Ranch, Inc. to the City of Cocoa
	Cocoa	WHS-9	Contract between Deseret Ranches of Florida, Inc. and the City of Cocoa dated June 25, 1981
	Cocoa	WHS-10	Grant of Easement dated September 25, 1981 from Deseret Ranches of Florida, Inc. to the City of Cocoa
	Cocoa	WHS-11	June 30, 1983 letter from William Stephenson to John King of Deseret Ranches of Florida, Inc.
	Cocoa	WHS-12	January 7, 1985 letter from William Stephenson to John King
	Cocoa	WHS-13	September 9, 1985 letter from William Stephenson to John King
	Cocoa	WHS-14	February 18, 1988 letter from William Stephenson to John King

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<u>Witnesses</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Stephenson	Cocoa	WHS-15	April 22, 1988 letter from William Stephenson to John King
	Cocoa	WHS-16	Draft agreement between the City of Cocoa and Deseret Ranches dated September, 1986
	Cocoa	WHS-17	Draft agreement between the City of Cocoa and Deseret Ranches dated June, 1988
	Cocoa	WHS-18	Draft agreement between the City of Cocoa and Deseret Ranches dated June, 1988
	Cocoa	WHS-19	Draft agreement between the City of Cocoa and Deseret Ranches dated November, 1988
	Cocoa	WHS-20	Draft agreement between the City of Cocoa and Deseret Ranches dated February, 1989

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<u>Witnesses</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Stephenson	Cocoa	WHS-21	City's Consumptive Use Permit No. 2-095-0005UGMR dated December 12, 1990 St. Johns River Water Management District on April 30, 1991
	Cocoa	WHS-22	City's Consumptive Use Permit Application for Taylor Creek Reservoir dated April 30, 1990
	Cocoa	WHS-23	Potable Water Sub-Element of the City's Comprehensive Plan
	Cocoa	WHS-24	Interlocal Agreement and Stipulation and Joint Motion for Dismissal dated July 27, 1989
Mayer	Cocoa	JAM-1	Curriculum Vitae
	Cocoa	JAM-2	Schedule titled "Depreciation & Return on Investment"
	Cocoa	JAM-3	Schedule titled "Principal & Interest Loan Repayment"
	Cocoa	JAM-4	Schedule titled "Calculation of Revenue & Fees under Proposed Rates"

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<u>Witnesses</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Ispass	Orange	AI-1	Utility Facility Ordinance
Williams	Orange	EW-1A	Potable Water Element
		EW-1B	Potable Water Element
		EW-1C	Potable Water Element
		EW-2	Future Land Use Map
		EW-3	Ordinance adopting Orange County Comprehensive Policy Plan
		EW-4	Well Digging Ordinance
Massarelli	SBWA	RJM-1	Curriculum vitae
Massarelli	SBWA	RJM-2	Chapter 83-375 Laws of Florida, sponsor self-authenticating
Massarelli	SBWA	RJM-3	Map of Boundaries of the SBWA
Massarelli	SBWA	RJM-4	Brevard County population projections (composite)
Massarelli	SBWA	RJM-5	East Central Florida Regional Planning counsel population projections for Osceola County

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<u>Witnesses</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Massarelli	SBWA	RJM-6	Water Supply Agreement between SBWA and the City of Melbourne
Massarelli	SBWA	RJM-7	SBWA District Water Supply Plans
Massarelli	SBWA	RJM-8	Simulated ground water level draw down and solute transport for proposed Bull Creek Wellfield
Massarelli	SBWA	RJM-9	Floridian Aquifer Testing and Analysis Report for Bull Creek Wildlife Management Area
Massarelli	SBWA	RJM-10	Technical Staff Report on the Bull Creek Wellfield
Massarelli	SBWA	RJM-11	Letter J. King to SBWA April 1986


Parties and Staff reserve the right to identify exhibits for the purpose of cross-examination.

Based upon the foregoing, it is

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings unless modified by the Commission.

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By ORDER of Commissioner J. Terry Deason, as Prehearing
Officer, this 1st day of OCTOBER, 1991.



J. TERRY DEASON, Commissioner
and Prehearing Officer

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