FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Lee County for Declaratory Statement Relative to Sewer Service Certificate Granted to North Ft. Myers Utilities, Inc. in Lee County	DOCKET NO. 920167-SU ORDER NO. PSC-92-0450-DS-SU ISSUED: 06/04/92

The following Commissioners participated in the disposition of this matter:

BETTY EASLEY
J. TERRY DEASON
SUSAN F. CLARK
LUIS J. LAUREDO

ORDER DENYING PETITION FOR DECLARATORY STATEMENT OF LEE COUNTY RELATIVE TO SEWER SERVICE CERTIFICATE GRANTED TO NORTH FT. MYERS UTILITIES, INC. IN LEE COUNTY

BY THE COMMISSION:

BACKGROUND

In 1977, the Commission, in Order No. 8025, granted North Ft. Myers Utilities, Inc. (NFMU) PSC Certificate No. 247-S to provide sewer service within North Ft. Myers, Lee County. That territory was last amended in 1986, by Order No. 15659. That order found that the utility had received numerous requests from potential customers in the area which included several square miles and a population in excess of 10,600 persons. The local County Health Department recognized that the existing septic tanks created a serious health hazard because of the proximity to the Caloosahatchee River. In support of the utility's application for amendment, it proposed to increase its wastewater treatment capacity from .40 MPD to 2 MGD. The utility also proposed a method of effluent disposal which was approved by DER and the South Florida Water Management District. That expansion is now complete.

In 1989, NFMU and Lee County agreed (Attachment 1) to examine the feasibility of a central wastewater system in North Ft. Myers by which NFMU would provide wastewater treatment and Lee County would own and maintain the transmission and collection lines. The collection system would be designed to eliminate as many source points of wastewater discharge as possible in the area by removing existing septic tanks and small wastewater package plants and

interconnecting those customers with the NFMU regional wastewater system. Lee County developed and proposed an assessment to recover the cost of installing the collection system. The assessment was reviewed by a Citizen's Advisory Committee appointed by the Lee County Board of County Commissioners. A group of citizens in the area objected to the project and have proposed forming a cooperative utility within the certificated territory of NFMU. The question raised is whether "the citizens of North Ft. Myers may independently develop their own not-for-profit sewer cooperative to serve the area despite a prior Sewer Service Certificate issued to North Ft. Myers Utilities, Inc. by the Public Service Commission." In order to respond, the County has petitioned for a Declaratory Statement pursuant to Rule 25-22 on the following questions:

1) Whether a newly-created, independent, not-for-profit sewer service cooperative may operate in a previously Public Service Commission-certificated franchise area in light of the provisions of Chapter 367, Florida Statutes, and the April 25, 1991 Appellate Court decision in City of Mount Dora vs. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. App., 5th Dist., 1991)?

2) May such an independent, not-for-profit sewer service cooperative operate without benefit of a franchise from either the State of Florida or Lee County for the purpose of rate setting (tariffs)?

DISCUSSION

We decline Lee County's petition to issue the requested declaratory statement. The territorial dispute that would be engendered by an attempt by a not-for profit cooperative, exempt from Commission jurisdiction under §367.022(7), to operate in NFMU's certificated area would be decided by a court rather than by this Commission. Accordingly, no question directly relating to Commission statutes, rules or orders is presented by the instant petition.

While declining to issue the declaratory statement sought by Lee County, we note that the opinion in Mount Dora, supra, (Attachment 2) addresses an increasingly important issue; i.e., how territorial disputes in the area of water and wastewater utilities are to be resolved consistent with public utility policy of avoiding wasteful duplication of utility facilities. We also note that Commission policy has long embodied the principle that wasteful duplication of public utility facilities is to be avoided:

> The Commission may not grant a certificate of authorization for a proposed system...which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the needs of the public... § 367.045(5)(a) F. S. [e.s.]

Moreover, the reasoning set forth by the Mount Dora court is in accord:

> The statutory scheme of Chapter 367, as well as the concept of a public utility, envisions that the right granted by this Commission to a private utility company is exclusive to the extent that such company has the ability to promptly provide service to the public within its franchised territory. 579 So.2d at 224. [e.s.]

While the ability to serve is a fact-intensive matter, the petition references the contract between the County and NFMU as well as current plans to have NFMU provide waste treatment services throughout its certificated area. Since these factors would appear to meet the main requirement imposed by the Mount Dora case for upholding the exclusive franchise of NFMU to provide such services, an attempt by a not-for-profit cooperative to provide the service described in the petition would appear to challenge the reasoning in Mount Dora and to be inconsistent with that precedent.

In view of the foregoing it is

ORDERED by the Florida Public Service Commission that the Petition of Lee County for a Declaratory Statement Relative To Sewer Service Certificate Granted To North Ft. Myers Utilities, Inc. in Lee County be denied. It is further

ORDERED that this docket is closed.

By Order of the Florida Public Service Commission this 4th day of June, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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Attachment 1

LEE CO. CONTRACT NO. C89 0510

SANITARY WASTEWATER SYSTEM CONNECTION AGREEMENT

This Agreement, made and entered into this 10th day of May, 1989, by and between LEE COUNTY, FLORIDA, a political subdivision of the state of Florida (the "County"), and NORTH FORT MYERS UTILITY, INC., a Florida corporation (the "Utility"), as follows:

RECITATIONS OF FACT:

WHEREAS, the County is a political subdivision of the state of Florida having governmental responsibility and authority for an area of Florida in which the increase of resident and vacationing visitor population is high; and,

WHEREAS, North Fort Myers has and is experiencing a high rate of growth; and,

WHEREAS, large segments of unincorporated North Fort Myers have been developed without benefit of central sanitary sewer service, requiring those developments within the area to provide for treatment and disposal of sewage through septic tanks and on-site package sewage treatment plants; and,

WHEREAS, the Lee County Health Department has identified several such areas as health hazards, as well as potential sources of contamination of the underlying groundwater; and,

WHEREAS, because of the rapid population growth, and the concern of the County for the health, safety and welfare of its citizens, the County desires to eliminate such health hazards within its political boundaries; and,

WHEREAS, the Board of County Commissioners of Lee County did, on March 22, 1989, authorize the Lee County staff and the Utility to work in concert towards developing a plan to provide central sanitary sewer service to such areas; and,

WHEREAS, the County, pursuant but not limited to its powers and authorities set forth in those provision of Chapter 125, Florida Statutes, and subject to the general public welfare and its financial and administrative capabilities, desires to control and reduce the introduction of domestic sewage pollutants into the land and groundwaters of the County, and with regard to the general health, safety, welfare and quality of life of its citizens and its guests desires to provide domestic sewage collection facilities which will enable the owners and operators of inefficient and ineffective on-site septic systems and small sewage treatment plants to discontinue the operation of such facilities and the discharge of effluent from such facilities to the extent that the County's undertaking in this project is not injurious to its financial and managerial abilities to provide other services deemed by the County to be more necessary for its citizens; and,

WHEREAS, the County, in its Comprehensive Land Use Plan, declared that it shall encourage and promote connection to central wastewater sewage facilities utilizing water re-use methods of effluent disposal; and,

WHEREAS, the Utility was granted Certificate No. 247-S by Order No. 19059 of the Florida Public Service Commission authorizing it to provide sanitary sewer service to the public and lands within the County's political boundaries, which encompass approximately 24 square miles, bounded by the Caloosahatchee River on the south, Highway I-75 on the east, lying approximately

one mile south of Charlotte County on the north and Highway U. S. 41 and the limits of the City of Cape Coral on the west (the "Territory"); and,

WHEREAS, the Utility owns and operates a sanitary sewage treatment plant and effluent reuse and disposal system within the Territory, which has been designated by the County as a regional system for such areas; and,

WHEREAS, located within this Territory are numerous mobile home parks, travel trailer parks, single-family residences, businesses or other structures for which sanitary sewer service is provided by septic tanks or on on-site sewage treatment package plants which are, in may cases, incapable of consistently meeting sewage treatment requirements; and,

WHEREAS, at the request of the Lee County Health Department, representatives of the Health Department, the County, and the Utility have conferred, seeking a mutually satisfactory solution to the sanitary sewage service problem within the territory by means of which will involve the cooperative efforts of both the County and the Utility.

NOW, THEREFORE, in consideration of the premises and mutual benefits to the County, its citizens and the Utility, the sufficiency of which is hereby acknowledged, the County and the Utility do hereby agree as follows:

1. Incorporation. The foregoing recitations are true, correct and incorporated herein by specific reference;

2. Construction Program. Lee County will finance, construct and own gravity collection systems throughout areas of North Fort Myers and the Territory which will be identified in an engineering master plan now being prepared by Hole, Montes & Associates, or its successors and assigns, which will be utilized to collect raw sewage influent from enclaves or territories located within North Fort Myers and the Territory which are in need of such systems. The County will, in concert with its objective of eliminating as many source points of sewage discharge as possible within the Territory, at its expense finance, construct and own such additional sewage collection and transmission systems within the Territory as may be useful or necessary to eliminate as many source points of sewage discharge or sewage related health risks as possible in an effort to achieve as great an economy of scale as possible in the overall program described herein. The County's collection and transmission system shall be so constructed that it shall contain such pump stations or other facilities as are needed to transmit raw sewage from travel trailer parks or other developments, subdivisions, residences, businesses and other structures within the Territory to the transmission or treatment facilities of the Utility. The interconnection of the County's sewage transmission system with the facilities of the Utility shall be at one or more mutually acceptable locations based upon the accepted engineering plan.

3. Feasibility Study. Utility will prepare, at its cost and expense, a detailed engineering feasibility study which

shall take into consideration all issues necessary to be considered relative to areas within the Territory requiring central sanitary sewer service, the best method of providing such service, and the cost of such service and all engineering work related to the revolving state loan program. Such engineering feasibility study will be prepared in coordination with the state and local offices of the Florida Department of Environmental Regulation, the Florida Department of Health and Rehabilitative Services (Lee County Health Department), and the Lee County Utility Department. Said engineering feasibility study will consider all of the elements on the state of Florida Department of Environmental Regulation list of requirements for such studies, including, but not limited to, an analysis of the on-site septic systems and package sewage treatment plants within the study area and the need or advisability of diversion of flow from such facilities to the regional sanitary sewage treatment and disposal system. The engineer shall be cost conscious during each phase of said feasibility study. Prior to the publication of such study, a comprehensive meeting shall take place between representatives of the Utility and the County in order to finalize the contents thereof.

4. User Rates. The engineering feasibility study referenced hereinabove, in order to determine the rates and charges to the ultimate beneficiaries of this Agreement, shall also prepare a preliminary and final assessment roll showing those lots or parcels of land to be assessed in order to satisfy the County indebtedness created for purposes of funding those improvements within the MSBU. When and where appropriate the

engineering feasibility study shall further delineate an amortization schedule for such capital costs at appropriate rates of interest, including necessary and related soft costs, fees and expenses. It is recognized that the engineer may employ the services of a financial advisor or public financial analyst for assistance in this regard. An objective of the engineering feasibility study and the creation of the preliminary an final assessment roll, broken down by lots and parcels, will be to establish a special assessment roll which will amortize the cost of the indebtedness so incurred by the County, which indebtedness will provide the funds to construct the facilities and pay the capacity charges to the extent such systems are dedicated to the benefit of the users identified herein.

5. MSBU. In order to construct the facilities identified in the engineering feasibility study needed in order to achieve the goals and objectives hereof, the County hereby agrees to create a Municipal Service Benefit Unit ("MSBU") or units ("MSBU's") within the Territory and to levy such appropriate assessments against the lands located within the Territory that are specially benefited by the sanitary sewage collection system as referenced herein. The County will endeavor to obtain low interest loans through the Florida Department of Environmental Regulation for the purpose of paying all or a portion of the costs involved in the construction of the collection, pumping and transmission facilities described hereinabove, as well as defraying the pro rata cost of the plant capacity needed in order to service such territories. The County hereby agrees to create the MSBU and to levy the appropriate

assessments necessary in order to achieve the goals and objectives as identified herein, subject only to a determination in the engineering feasibility study referenced hereinabove, that the advancement of the central sanitary sewer service program herein described, is financially feasible to the user. If, during the course of the completion of the engineering feasibility study, it is determined that some method of financing other than utilization of the state loan program might be, on balance, equally feasible, such as the County's issuance of sewer revenue or assessment bonds, County agrees to proceed in that regard. In determining "feasibility", the parties hereto shall take into consideration, among other things, the likelihood of securing state low interest loan money, and the timing thereof. If the program envisioned herein can be significantly advanced from a timing point of view, without a corresponding significant increase in cost, then the parties hereto agree to proceed in that regard.

6. Payment for Feasibility Study. If, at the time of the completion of the engineering feasibility study or any major component thereof, it is determined that the creation of the Municipal Service Benefit Unit is not financially feasible, or if state loan or other proceeds are not available to advance the program referenced herein, County agrees to reimburse 50% of Utility's actual out-of-pocket expenses for the engineering feasibility study from the time of the execution hereof until the time of the termination of the program referenced herein. County will reimburse such funds to the Utility within 60 days of Utility providing to the County Utility Department its statement

in that regard and the appropriate supporting documentation. The Utility shall be reimbursed for its cost of the Engineering Feasibility Study referenced hereinabove at closing from loan or bond proceeds, and if not fully funded by the loan or bond proceeds, then from the assessments, if the County goes forward with the MSBU program envisioned hereinabove. Any excess revenues over and above requirements to meet the state loan program shall be used to reimburse the Utility. For purposes hereof, County and Utility agree that Utility's engineers are engaged in the preparation of an overall engineering master plan for the 26 square mile service area of the Utility, and the County shall not be required to reimburse Utility for Utility's expenses attributable to such master plan. However, County shall reimburse Utility for its expenses attributable to the increased scope of work necessary to fulfill the terms and conditions of this Agreement.

7. Operation and Maintenance Agreement. Upon the completion of the design, construction and activation of the collection, pumping and transmission facilities referenced herein, Utility agrees, should County elect, that Utility will operate and maintain such facilities, and render and collect customer bills thereon, pursuant to a separate operation and maintenance agreement to be executed between the parties. In all cases, the parties acknowledge and agree that the Internal Revenue Code of 1986 repealed the utility exemption provisions of the former Section 118(b) of the prior Code, which currently renders the Utility's actual or constructive receipt of

contributions-in-aid-of-construction a taxable event. The parties agree to endeavor together to lawfully avoid creating a taxable event to the Utility by the application of the terms hereof, which all parties acknowledge is not in the best interest of the County, its citizens, or the users.

8. Treatment and Disposal: Expansion of System. The Utility agrees to accept, treat and dispose of all of the sewage transmitted to it by the County in the Territory and such treatment and disposal shall be in accordance with all applicable governmental rules, regulations and laws. The parties hereto acknowledge that, throughout the life of this Agreement, there may be times when the Utility will be required to expand its treatment plant and disposal capability in order to add units or projects to the Utility system. The Utility agrees to proceed with such expansions, subject only to matters of economic feasibility. In order to achieve such economic feasibility County agrees, when lawfully possible, to assist Utility in securing as much new incoming flow as possible from point sources of sewage discharge within the Territory so as to adequately amortize the cost of such expansion over a reasonable period of time.

9. Discontinuance of Service. In the event a customer receives water service from Lee County Utilities and sewer service from the Utility, the County shall disconnect and otherwise cause the water service to that customer to be discontinued within ten (10) business days after receiving written, official notice from the Utility that the Utility's sewer service bill is unpaid and therefore requires such action

on the part of Lee County to secure such payment. County and Utility shall cooperate and develop any additional notification or administrative procedures for the effective implementation of this provision as may be deemed necessary, appropriate or expedient. Utility shall pay County a five dollar ($5.00) administrative fee for each disconnect.

10. No Objection. The Utility will not object to any of the various agencies having jurisdiction over the matters, including the Florida Public Service Commission, due to the fact that the County will construct, install and own sanitary sewage collection and transmission systems within the Utility's certificated service territory provided, however, that such County facilities shall deliver raw sewage flow to the Utility for treatment and disposal, and the Utility shall be compensated therefore, in accordance with its tariff.

11. Rates and Charges. In the event that the County does not, in whole or in part, exercise its option to have the Utility maintain such lines and facilities and bill for such service to existing projects, travel trailer parks, or other developments, the County will charge and collect or cause others to charge and collect, and pay to the Utility, the rates for such sewage transmitted by the County to the facilities of the Utility as are set forth in the Utility's tariff on file with the regulatory agency having jurisdiction to set such rates. The parties hereto will insure that in all cases the Utility and County shall be advised as to the total number of equivalent residential connections being serviced by the Utility from any facilities delivering sewage flow to the Utility for treatment

and disposal pursuant to the terms and conditions hereof. In the event of non-payment, the Utility shall exercise its rights under its tariff as to various manners and methods of enforcing payment obligations.

12. Future Service. The County may offer its sanitary sewer collection service and will accept sewage from mobile home parks, travel trailer parks, residential subdivisions, individual residences, business or industrial locations within the Territory, which exist and which are producing sanitary sewage at the time of entering into this Agreement and at locations which are not, at the date of this Agreement, being served directly by the Utility. Sanitary sewer service to other locations within the Territory thereafter may be served directly by the Utility or the County in accordance with letter agreements drawn pursuant to this Agreement, or directly by the Utility in accordance with its tariff and rules and regulations.

13. Construction. The County agrees that the Utility may have representatives present during all phases of construction of the facilities by the County as referenced herein. Upon the completion of all or any major component of the facilities to be constructed by the County hereunder, the project engineer for the County shall certify that the said facilities have been constructed substantially in accordance with the plans and specifications previously authorized. Such certification shall include submission to the Utility of two sets of as-built drawings, consisting of one set of reproducible vellums and one set of regular blue line prints. Prior to the commencement of

such construction, County or its engineer shall submit such plans to Utility's engineer for review and approval, which approval shall not be unreasonably withheld. This provision exists for the benefit of both parties hereto and to insure the overall integrity of the entire utility system.

14. Indebtedness. The County indebtedness created for purposes of financing the construction of the collection and transmission systems and the purchase of plant capacity referenced herein shall be an obligation solely of the County and nothing herein contained shall be construed to create any obligation or pledge of the credit, direct, indirect, or contingent, on the part of the Utility to pay any part of the cost of the facilities to be constructed by the County, or any of the County's expense in the operation of the system, or of such financing, or to pay the principal of or interest on any such proposed state loan or bond program. Likewise, the existing and future indebtedness of the Utility is and shall remain only the indebtedness of the Utility and nothing contained herein shall be so construed as to render the County responsible for any of the present or future financial obligations of the Utility, other than the County's duty to pay rates and charges as delineated hereinabove.

15. Pretreatment. In cases where the character of the sewage from any manufacturing or industrial plant, or any building or premises is such that it imposes an unreasonable burden upon the system, an additional charge may be made therefore, or the Utility may, in its discretion, require such manufacturing or industrial plant, or such building or premises,

to treat or pretreat such sewage in such manner as shall be specified by the Utility before discharging such sewage into the system of the Utility.

16. No Free Services, Discrimination or Competing Service. The parties hereto shall neither allow the provision of free sanitary sewer service nor service at discriminating rates among persons of equal class of service. Moreover, to the fullest extent permitted by law, the County will not grant, cause, consent to, or allow the granting of any building permit or permit to any person, firm, corporation or body, or agency of instrumentality whatsoever for the furnishing of sewer service to or within the boundaries of the Utility's certified service area or Territory, except as to the extent that such service is being provided by existing facilities, as of the date of execution hereof, or may be provided by temporary interim facilities until such time as Utility or County can extend central facilities to such user.

17. Indemnification. The County shall indemnify and hold harmless the Utility, its agents and employees from any claim, demand, compensation, or damage resulting from the exercise of the privileges granted by or from the operation of the County's pipes and facilities prior to their interconnection to those of the Utility. The Utility shall indemnify and hold harmless the County, its agents and employees from any claim, demand compensation, or damage resulting from the exercise of the privileges granted by or from the operation of the Utility's sewage collection, treatment and disposal systems, independent of or after accepting raw sewage from the facilities of the County.

18. Assignment. This Agreement may be assigned by each of the parties after written notice to the other party.

19. Captions and Headings. Captions and headings contained herein are for the convenience of the parties hereto and not conditions of this Agreement. It is agreed by and between the parties that all words, terms and conditions herein contained shall be read in concert, each with the other, and a provision contained under one heading shall be deemed equally applicable to any other.

20. Term. The term of this Agreement shall be for a period of 20 years from the date of its acceptance by the parties and the filing of this Agreement with the Clerk of the County, or until fulfillment of the terms and conditions herein.

21. Further Assurances. The parties hereto agree that at any time after the execution hereof they will, upon the request of the other, execute and deliver any other documents and further assurances as may be reasonably required by such other party in order to carry out the intent hereof.

22. Severability. If any term, condition or provision of this Agreement, or the application thereof to any person or circumstance shall, at any time or to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each term, condition, or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

Witness

Witness

NORTH FORT MYERS UTILITY, INC.

By: _____
President

Attest: Charlie Green, Ex - Officio Clerk
Board of County Commissioners

By: _____
DEPUTY CLERK

LEE COUNTY, FLORIDA

By: _____
Chairman, Board of County Commissioners

APPROVED AS TO FORM

_____
OFFICE OF COUNTY ATTORNEY

ATTACHMENT 2

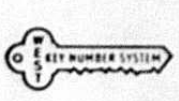
should be accurately formulated and stated to fit the reason for, or purpose to be served by, the rule or exception. Then the facts of a particular case can be examined with the rule (and its reason) in mind and a decision made in the particular case by finding that the given case is either within or without the rule or some exception. The correct statement of the full rule and its exceptions is not dicta and is superior to merely formulating or stating or reformulating or restating a general rule, or exception, in terms of the facts of the particular case wherein the rule or exception is stated or applied because, as in the development and application of principles of law involved in this case illustrates, immaterial facts of the particular case involving the principle may be erroneously taken to be essential breadth or limitation on the application of the rule, or an exception thereto. We hope we now have it correct in stating that:

> The assignee of a special guaranty cannot enforce the special guaranty as to debt the assignee has created by extending credit to the debtor. An assignee of debt and of a special guaranty relating thereto can enforce the guaranty as to debt resulting from credit extended by the original creditor to the debtor, whether or not that assigned debt is due or past due at the time of the assignment.

Accordingly we reverse and remand for determination of the liability of the guarantor for the proper amount of the balance, if any, of guaranteed debt resulting from credit extended by the original named creditor to the debtor and assigned to the assignee.

REVERSED and REMANDED for proceedings consistent with this opinion.

GRIFFIN and DIAMANTIS, JJ., concur.



CITY OF MOUNT DORA, Florida, Appellant,

v.

JJ's MOBILE HOMES, INC., Appellee.

No. 90-733.

District Court of Appeal of Florida, Fifth District.

April 25, 1991.

Private utility that had been granted Public Service Commission certificate to provide water and sewer service brought action against municipality for determination that utility had exclusive right to provide service within certificated area even after municipality's annexation of tract within area. The Circuit Court for Lake County, Ernest C. Aulls, Jr., J., granted summary judgment in favor of utility, and municipality appealed. The District Court of Appeal, Cowart, J., held that: (1) utility had exclusive right to provide service within area given that it was ready, willing, and able to do so; (2) fact that municipality was not subject to regulation by Commission did not mean that it could serve utility's certificated area; and (3) absence of word "exclusive" in utility's certificate did not mean that utility's rights were not in fact exclusive.

Affirmed.

Harris, J., dissented with opinion.

1. Municipal Corporations ⇐710
Waters and Water Courses ⇐198

Public Service Commission water and sewer certificates issued to private utility granted utility exclusive right to provide water and sewer service to certificated area and such right precluded any other entity from having right to serve certificated area with water and sewer utilities.

2. Public Utilities ⇐141

Although municipal utility systems are not subject to regulation by Public Service Commission as utility, neither are munici-

palities given dominion over decisions of Public Service Commission.

3. Municipal Corporations ⇐710
Waters and Water Courses ⇐198

Under statute dealing with operation of competing utility services, municipality had to obtain private utility's consent before construction of water and sewer utilities within private utility's certificated area after annexing tract within certificated area and, without such consent, private utility had exclusive right to provide service within area, notwithstanding municipality's contention that statute did not apply because private utility did not actually provide service to area; private utility was ready, willing, and able to serve utility needs of its service area. West's F.S.A. § 180.06.

4. Municipal Corporations ⇐710

Although municipal utility was not subject to regulation by Public Service Commission, municipality did not have authority to interfere with rights granted by Commission to private utility in area that was subsequently annexed by city. West's F.S.A. § 367.022(2).

5. Franchises ⇐1

When granted, franchise becomes property right in legal sense of the word.

6. Municipal Corporations ⇐710
Waters and Water Courses ⇐198

Fact that certificate issued by Public Service Commission to private utility did not use word "exclusive" did not mean that utility's right to provide sewer and water services in certificated area was not exclusive insofar as utility had ability to promptly provide service to public within area even after municipality annexed tract within area. West's F.S.A. § 367.011 et seq.

7. Public Utilities ⇐113

Essence of concept of utility serving the public is that it is in best interest of public that entities, governmental or private, providing utility services not be permitted to compete as to rates and service and that each entity be given exclusive service area and monopolistic status.

8. Public Utilities ⇐114

Term "public utility" implies public use with duty on public utility to service public and treat all persons alike.

See publication Words and Phrases for other judicial constructions and definitions.

9. Public Utilities ⇐113

Territorial rights and duties relating to utility services as between prospective suppliers are more properly defined and delineated by administrative implementation of clear legislation than by judicial resolution of actual cases and controversies resulting from lack of clear legislative direction; however, in absence of clear legislative intent, courts must resolve individual disputes by application of principles that appear to best serve public and to be fair and equitable to legitimate competing interests.

10. Public Utilities ⇐113

Basis for right of both governmental and private entities to provide utility services to public is statutory, and franchise right of each is equal and neither entity is, per se, superior or inferior to the other.

11. Public Utilities ⇐113

Franchise granted to entity, either governmental or private, authorized by law to provide utility service to public may be exclusive as to both type of service and territory.

12. Public Utilities ⇐114

Right to provide utility services to public carries concomitant duty to promptly and efficiently provide those same services.

13. Public Utilities ⇐113

Right to provide utility services to public in franchised territory is inherently subject to, and conditioned upon, ability of franchise holder to promptly and efficiently meet its duty to provide such services. West's F.S.A. § 367.045(5)(a).

14. Public Utilities ⇐113

When public service entity, either governmental or private, has earlier acquired legal right to provide services in particular territory but does not have present ability to promptly and efficiently meet its duty to do so, public is entitled to be served by

some other public service entity that does have present ability to provide needed service, although legal claim of right of second entity to provide such service is secondary in time priority to prior legal right of entity without ability.

15. Public Utilities ⇐113

When each of two public service utility entities, whether governmental or private, have legal basis for claim of right to provide similar services in same territory, and each has present ability to promptly and efficiently do so, that entity with earliest acquired legal right has exclusive legal right to provide service in that territory without interference from entity with later acquired claim of right.

Sherri K. Dewitt and Houston E. Short of Graham, Clark, Pohl & Jones, Winter Park, for appellant.

Mary M. McDaniel of Minkoff & McDaniel, P.A., Tavares and Robert Q. Williams of Williams, Smith & Summers, P.A., Tavares, for appellee.

COWART, Judge.

This case involves a territorial dispute between a private utility company with certificates from the Florida Public Service Commission (PSC) authorizing it to provide utilities in a certain geographical territory and a municipality which, subsequent to the acquisition by the private company of its utility franchise, annexed a portion of the private utility company's service area and claims the right to provide similar utility services in the annexed portion of the private utility company's service territory.

In 1981, a private utility company, JJ's Mobile Homes, Inc. (appellee herein, plaintiff below) obtained from the Florida PSC certificates of necessity granting the private utility company the right (franchise) to operate a water and sewer utilities system within a specified geographical territory near, but outside of, the city limits of a municipality (the City of Mount Dora, appellant herein, defendant below). In 1988, the municipality voluntarily annexed into its city limits a tract of land most of which is within the private utility company's certified service territory and by ordinance approved a land developer's proposal that the municipality serve the developer by extending the municipality's water and sewer utilities into a portion of the newly annexed area of the private utility company's certified service territory.

The private utility company, as plaintiff, filed this action against the municipality, as defendant, for a judicial determination that the private utility company had the legal right to provide water and sewer service within all the territory specified in its certificates from the Florida PSC and that the municipality did not have the legal right to provide the same utility service within the territory. The trial court granted summary judgment in favor of the private utility company and the municipality appeals.

[1-3] We adopt the trial court's finding of uncontroverted facts, conclusions of law and results. The trial court found the following facts to be uncontroverted:

1. The Plaintiff (private company) owns and holds Florida Public Service Commission Certificates Number 298-W and 248-S granting the Plaintiff the right to operate a water and sewer utility system within a specified territory.

2. On March 5, 1981, the Florida Public Service Commission entered an order approving the issuance of the foregoing water and sewer certificates to the Plaintiffs and in said order, found that notice as required by law had been given and that the issuance of the certificates to the plaintiff was "in the public interest."

3. Pursuant to that authority, the Plaintiff owns, operates and maintains an approved water and sewer utility system within the certified territory, which utilities have been in operation since the mid-1970's.

4. The Plaintiff's certificated territory encompasses Dora Pines mobile home subdivision, together with a large parcel of currently undeveloped property. The Plaintiff's utilities currently serve the Dora Pines mobile homes subdivision, which consists of approximately one hun-

dred thirty-eight (138) water and sewer customers.

5. At the time the Plaintiff's water and sewer systems were constructed, they were designed and built for the purpose of providing water and sewer utility service to the entire certificated territory. The Plaintiff's utilities have the present ability to provide water and sewer service to the certificated territory.

6. The Plaintiff's water and sewer utilities have current operating permits from the Department of Environmental Regulation, which permits are valid through October 15, 1994. The sewer plant is currently permitted for ninety-five thousand (95,000) gallons per day, and current flows going into the plant are only about seventeen thousand (17,000) gallons per day. The plant is designed so as to be expandable up to two hundred ninety-five thousand (295,000) gallons per day.

7. Sometime in 1987, the Plaintiff learned that the Defendant was considering the voluntary annexation of a large tract of property, a significant portion of which was within the Plaintiff's certificated territory. The Plaintiff objected at that time to the City's proposed extension of its municipal utilities into the Plaintiff's certificated territory.

8. In Ordinance 467 (adopted May 3, 1988) and Ordinances 488, 489 and 490 (adopted October 3, 1989), the City voluntarily annexed a tract of contiguous property, most of which lay within the Plaintiff's certificated territory. In Ordinance 529 (adopted October 3, 1989), the City authorized a planned unit development for the annexed property and as a part of that ordinance, adopted a developer's agreement calling for water and sewer utilities to be furnished by the City to the annexed property.

9. On March 31, 1989, the Plaintiff, through its attorney, formally notified the City of its claimed right to provide water and sewer service to its certificated territory.

10. The Plaintiff is currently actually operating its water and sewer utility within its certificated territory. The Plaintiff's existing water and sewer lines extend to a point that is immediately adjacent to the annexed property making them much closer to the annexed property than the Defendant's water and sewer line.

The trial court made the following conclusions of law:

1. The Public Service Commission water and sewer certificates issued to the Plaintiff grant the Plaintiff the exclusive right to provide water and sewer utilities service to the certificated territory. This right precludes any other entity from having the right to serve the certificated area with water and sewer utilities.

2. Although municipal utility systems are not subject to regulation by the Public Service Commission as a utility, neither are municipalities given dominion over decisions of the Public Service Commission.

3. The Plaintiff's actual operation of its water and sewer utility within its certificated territory is in territory which is immediately adjacent to the Defendant. Therefore, pursuant to Section 180.06, Florida Statutes (1989), the Defendant must obtain the Plaintiff's consent before construction of water and sewer utilities within the Plaintiff's certificated area. Without that consent, the Plaintiff has the exclusive right to provide service within its certificated territory.

The trial court declared and adjudicated:

... that the water and sewer certificates issued to the Plaintiff by the Florida Public Service Commission grant the Plaintiff the right to furnish water and sewer utility service to the certificated territory as described in the certificates to the exclusion of all other utilities, including those owned by the Defendant. Accordingly, the Defendant may not extend its water and sewer utility lines into any part of the Plaintiff's certificated territory.

Section 180.06, Florida Statutes, after enumerating activities authorized by municipalities and private companies, provides:

However, a private company or municipality shall not construct any system, work, project or utility authorized to be constructed hereunder in the event that a system, work, project or utility of a similar character *is being actually operated by a municipality or private company* in the municipality or territory immediately adjacent thereto, unless such municipality or private company consents to such construction. [Emphasis added].

The city argues that section 180.06, Florida Statutes, does not apply because the private company does not actually provide services to the disputed area.

The restriction of the statute was designed to avoid the wastefulness of duplicate capital investments for competing utilities that could not likely be operated without financially jeopardizing each other's operating revenues if erected in the same consumer territory. *State v. Plant City*, 127 Fla. 495, 173 So. 363 (Fla.1937) (construing Ch. 17119, § 1, Laws of Fla., predecessor statute to § 180.06, Fla.Stat.).

In regard to section 180.06, Florida Statutes, in *Ortega Utility v. City of Jacksonville*, 564 So.2d 1156 (Fla. 1st DCA 1990), the court held:

> While the statute is not a monument to clarity and draftsmanship, ... we interpret it only to prohibit direct encroachment by one utility provider into an operating area already served by another. Any other interpretation would not seem to comport with logic or reason. Under our interpretation, there would be no duplicate capital investment within the same consumer territory.

In *Ortega*, the private company provided services within a specific (certified) area. The city planned to provide service to an area *outside* but located near the private company's certified area. In addition the private company had neither the capacity nor plans to serve the new area.

This case is distinguished from *Ortega* in that in *Ortega* the area sought to be served by the municipality was outside the private company's certified area and the private utility company did not have the capacity to serve the area the municipality sought to service, while in this case, the area the municipality proposes to serve is within the territory which the private company has the prior legal right to serve and the private company is ready, willing and able to serve the utility needs of its service area.[1]

[4] The municipality argues that it is not subject to regulation by the PSC and interprets this statement to mean that it may serve with utilities an area within the city's boundary whether or not the PSC may have theretofore issued a certificate of necessity authorizing a private utility company to provide similar utility services in the same area.

Chapter 367, the "Water and Wastewater System Regulatory Law" provides the Florida Public Service Commission with exclusive jurisdiction over the authority, service and rates of utilities. Section 367.022(2) provides:

> 367.022 *Exemptions*—The following are not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter except as expressly provided:
>
> . . . . . .
>
> (2) Systems owned, or systems of which the rates and charges for utility service to the public are controlled, by governmental authorities.

[5] The certificates issued to the private company by the PSC are a granting of a privilege generally referred to as a franchise. A franchise is defined as "a special privilege conferred by the government on individuals or corporations that does not belong to the citizens of a country generally by common right (citations omitted.)" 12 McQuillin, *Municipal Corporations*, § 34.03 (3d Ed.). When granted, a fran-

1. In *City of Winter Park v. Southern States Utilities, Inc.*, 540 So.2d 178 (Fla. 5th DCA 1989), this court held that where a city did not have the present ability to serve the public the city had no legal right to prevent a private company certified to provide services to an area within the city's territorial limits, from serving the public where the private company had the present capability to provide services.

chise becomes a property right in the legal sense of the word. *Leonard v. Baylen Street Wharf Co.*, 59 Fla. 547, 52 So. 718 (1910); *West Coast Disposal Service, Inc. v. Smith*, 143 So.2d 352 (Fla.2d DCA 1962), *cert. denied*, 148 So.2d 279 (Fla.1962). *But see, Alterman Transport Lines, Inc. v. State*, 405 So.2d 456 (Fla. 1st DCA 1981) where the court rejected the argument of holders of certificates of public convenience that the deregulation of the trucking industry took away a valuable property right of the holders (the certificates) and impaired existing contracts.

In *Pahokee Housing Authority v. South Florida Sanitation Co.*, 478 So.2d 1107 (Fla. 4th DCA 1985), *rev. denied*, 491 So.2d 280 (Fla.1986), a dispute arose between a housing authority and the holder of an exclusive garbage franchise from the county over garbage collection in the area controlled by the authority. The authority decided to collect and dispose of its own garbage, claiming it was exempt from the exclusive franchise granted by the city. The trial court found that the authority's intrusion violated the private company's exclusive franchise. The district court affirmed but reversed the damages awarded to include the holder's costs of operation.

Southern Gulf Utilities, Inc. v. Mason, 166 So.2d 138 (Fla.1964) is cited by the city for the broad proposition that the PSC has no authority whatsoever over utilities operated by governmental agencies. *Mason* must be read more narrowly. In *Mason*, a private company with an exclusive certificate issued by the PSC sought the PSC to issue a stop order for a municipal utility which invaded the private company's service area. The PSC dismissed the private company's complaint on the grounds that the PSC had no authority to restrain a governmental agency from invading the service area of the private company. The supreme court agreed but specifically noted it did not rule on the rights of the parties which rights were being litigated in an action for injunction in the circuit court which was not the subject of the appeal. This case presents no question as to the PSC's authority, as distinguished from the circuit court's subject matter jurisdiction, to restrain the city from invading the private company's area.

Although governmental utilities are exempt from the authority of the PSC this does not mean that the governmental unit has the authority to interfere with rights granted a private utility company by the PSC. The PSC certificates issued to the private company represent a valuable property right and the city is not authorized to interfere with those preexisting rights by the mere subsequent annexation of a portion of the private company's territory.

[6] The municipality further argues that the trial court erred in finding as a matter of law that the certificates issued to the private utility company granted an exclusive right to provide utilities to the service territory because the certificates as issued do not use the word "exclusive."

In this case the PSC issued the private utility company certificates of necessity authorizing the private utility company to provide the public with water and sewer in the questioned territory before the municipality, which has the general legal authority to provide similar services within its municipal limits, annexed the area. The private utility company not only had the prior legal right but, more importantly, also had the ability to meet its duty to provide such services. The statutory scheme of Chapter 367,[2] as well as the concept of a public utility, envisions that the right granted by the PSC to a private utility company is exclusive to the extent that such company has the ability to promptly provide service to the public within its franchised territory.

[7, 8] The essence of the concept of utilities serving the public is that it is in the best interests of the public that the entities, governmental or private, providing utility services not be permitted to compete

2. Section 367.011(2), Florida Statutes, provides: The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service and rates.

as to rates and service and that each entity be given an exclusive service area and monopolistic status. This unusual economic advantage is given a utility in our free market economy in exchange for the utility relinquishing its usual right to determine the level of service it provides and to set its own competitive rates and submitting those two matters to a governmental authority which regulates the quality of service to be provided and sets rates to provide the utility a reasonable return on its investment. The term public utility implies a public use with a duty on the public utility to service the public and treat all persons alike. *See*, 73 C.J.S., *Public Utilities* § 2 (1983) and 78 Am.Jur., *Waterworks and Water Companies*, § 2 (1975).

[9] Territorial rights and duties relating to utility services as between prospective suppliers are more properly defined and delineated by administrative implementation of clear legislation than by judicial resolution of actual cases and controversies resulting from the lack of clear legislative direction. However, the problem is currently a controversial political matter in the State of Florida and in the absence of clear legislative intent, courts must resolve individual disputes by the application of principles which appear to best serve the public and to be fair and equitable to legitimate competing interests. Some such principles are:

[10] (1) In Florida the basis for the right of both governmental and private entities to provide utility services to the public is statutory and the franchise right of each is equal and neither entity is, per se, superior or inferior to the other.

[11] (2) A franchise granted to an entity, either governmental or private, authorized by law to provide utility service to the public, may be exclusive as to both type of service and territory. *See, St. Joe Natural Co. v. City of Ward Ridge*, 265 So.2d 714 (Fla. 1st DCA 1972), *cert. denied*, 272 So.2d 817 (Fla.1973).

[12] (3) The right (franchise) to provide utility services to the public carries a concomitant duty to promptly and efficiently provide those same services. *See*, 73B C.J.S., *Public Utilities*, § 2 (1983).

[13] (4) The right (franchise) to provide utility services to the public in a franchised territory is inherently subject to, and conditional upon, the ability of the franchise holder to promptly and efficiently meet its duty to provide such services. Section 367.045(5)(a), Florida Statutes.

[14] (5) When a public service entity, whether governmental or private, has a prior (earlier acquired) legal right to provide services in a particular territory but does not have the present ability to promptly and efficiently meet its duty to do so, the public is entitled to be served by some other public service entity which does have the present ability to provide the needed service although the legal claim of right of the second entity to provide such services is secondary in time priority to the prior legal right of the entity without the ability.[3]

[15] (6) When each of two public service utility entities, whether governmental or private, have a legal basis for the claim of a right to provide similar services in the same territory and each has the present ability to promptly and efficiently do so, that entity with the earliest acquired (prior) legal right has the exclusive legal right to provide service in that territory without interference from the entity with the later acquired (subsequent) claim of right.

AFFIRMED.

GOSHORN, J., concurs.

HARRIS, J., dissents with opinion.

HARRIS, Judge, dissenting.

I would like to concur in the majority opinion because I believe that the regulatory scheme devised by the trial court and approved by the majority is fairer than the one enacted by the legislature. Under the majority's water and wastewater system plan, the franchisee is given an exclusive area which cannot be encroached upon by anyone so long as it services or is capable

3. *City of Winter Park v. Southern States Utilities*, 540 So.2d 178 (Fla. 5th DCA 1989).

of servicing the area. Unfortunately the legislative plan is different and I believe controls.

Under chapter 367 there is no authority for the Public Service Commission to grant an exclusive franchise area. The certificate in this case does not purport to grant an exclusive franchise area. The commission grants exclusivity by limiting the number of franchises in any given area. Therein, of course, lies the problem. A governmental agency, such as appellant, is exempted from the jurisdiction of the Public Service Commission in supplying water and sewer services within its corporate limits. The subject property has now been annexed at the request of the property owner and is part of the municipality. The municipality may now serve the area without a permit from the Public Service Commission. If it is to be prohibited from proceeding to provide service, it must be under the strictures of section 180.06.

To preclude appellant under this section, appellee must be *actually* operating within or adjacent to the annexed area. Such has not been shown in this record. Ability or capacity to operate in or adjacent to the annexed area is not sufficient, under this statute, to deny the municipality the right to extend its water and sewer lines.

The majority believes, as I do, that one who makes an investment in reliance on a certificate deserves economic protection.[1] To provide this protection the majority recognizes an exclusive franchise area. This, however, permits the Public Service Commission, by granting a service area to a private company, even within the municipality,[2] to exclude future municipal development. This indirectly permits the Public Service Commission to regulate the service and service area of the municipality contrary to the express exemption contained in the statute.

I would REVERSE.

1. I urge that this protection should come from the legislature.

Kenneth Leslie WILLIAMS and Betty J. Williams and Williams Communications, Appellants,

v.

STATE of Florida DEPARTMENT OF TRANSPORTATION, Appellee.

No. 90-1624.

District Court of Appeal of Florida, First District.

April 29, 1991.

Condemnee appealed from final judgment of the Circuit Court, Leon County, Ben C. Willis, J., pursuant to jury verdict determining amount of business and severance damages owed by Department of Transportation for taking of its business property. The District Court of Appeal, Zehmer, J., held that: (1) testimony of Department's appraiser was based on misconception of law resulting in lower than correct valuation of damages, and trial court's refusal to strike that testimony was reversible error; (2) opinion testimony of another Department expert as to adequacy of parking under proposed cures was outside area of his expertise; (3) trial court also committed reversible error in allowing Departmental expert in civil and site plan engineering to opine as to whether proposed cures complied with city and county ordinances and in submitting those legal questions to jury; and (4) requested instruction on business damages caused by proposed cures was somewhat confusing and was properly refused.

Reversed and remanded.

1. Appeal and Error ⇐719(1), 758.1

While appellate rules no longer require formal assignments of error, appellate

2. § 367.021(10), Fla.Stat. (1989).