

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for) DOCKET NO. 941121-WS
amendment of Certificates Nos.) ORDER NO. PSC-95-0614-FOF-WS
359-W and 290-S to add territory) ISSUED: May 22, 1995
in Broward County by SOUTH)
BROWARD UTILITY, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

- SUSAN F. CLARK, Chairman
- J. TERRY DEASON
- JOE GARCIA
- JULIA L. JOHNSON
- DIANE K. KIESLING

ORDER GRANTING REQUEST FOR ORAL ARGUMENT, DENYING MOTION TO DISMISS AND DENYING MOTION TO STAY

BY THE COMMISSION:

BACKGROUND

South Broward Utility, Inc. (South Broward or utility) provides water and wastewater service in Broward County and services approximately 1,853 water and wastewater customers. The annual report for 1993 shows that the consolidated annual operating revenue for the system is \$1,319,408 and the net operating income is \$30,802. The utility is a Class B utility company under Commission jurisdiction.

On October 18, 1995, South Broward applied for an amendment of Certificates Nos. 359-W and 290-S to include additional territory in Broward County. According to South Broward, owners of certain properties in Broward County requested that the utility extend its service area to include those properties.

The proposed additional territory would consist of the "Carr Property" (97.95 acres) and "Imagination Farms" (900 acres). South Broward states that the property owners plan to create single-family developments, totalling 1,200 units within the two properties.

On September 1, 1995, The City of Sunrise (Sunrise or City) filed a declatory action in the Circuit Court in and for Broward County (Broward circuit court), in Case No. 94-010527. Sunrise

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petitioned the court to acknowledge that the area South Broward seeks to serve is part of the City's water and wastewater service area, and that South Broward does not have authority to provide service to the territory. On September 26, 1994, South Broward filed a motion to dismiss Sunrise's complaint, which was granted by the court on December 29, 1994.

On November 18, 1994, Sunrise filed an Objection to and Motion to Dismiss, or In the Alternative, Motion to Stay Consideration of South Broward's application. In its motion, Sunrise requested a formal hearing pursuant to Section 120.57, Florida Statutes, in the event that its motion was denied. On November 29, 1994, South Broward filed a Memorandum in Opposition to the City of Sunrise's Objection to and Motion to Dismiss, or in the Alternative, Motion to Stay South Broward's application. On that same date, South Broward also filed a Request for Oral Argument on its memorandum.

On December 12, 1994, Sunrise filed its Memorandum in Response to South Broward Utility's Memorandum in Opposition to the City of Sunrise's Motion to Dismiss, or in the Alternative, Motion to Stay Consideration of South Broward's application. On that same date, Sunrise also filed a Notice of Supplement to its initial motion. Finally, on December 22, 1994, South Broward filed its Reply to the City of Sunrise's Memorandum.

On January 6, 1995, Sunrise filed its amended complaint in the circuit court action. South Broward filed a Motion to Dismiss or In the Alternative, Motion for Abandonment, or in the Alternative, Motion for a More Definite Statement on January 26, 1995. We filed a Petition to Intervene or In the Alternative, to Appear as an Amicus Curiae and Memorandum in Support of South Broward Utility's Motion to Dismiss on April 17, 1995. On April 18, 1995, the Broward circuit court granted South Broward Utility's Motion to Dismiss, directing Sunrise to litigate its claim before us.

ORAL ARGUMENT

On November 29, 1994, the utility filed a Request for Oral Argument on its Memorandum in Opposition to Sunrise's Motion to Dismiss, or in the Alternative, Motion to Stay South Broward's application. The utility stated that oral argument would aid us in comprehending and evaluating the issues raised by giving the utility an opportunity to respond to any questions that we might have had which required clarification or explanation.

The utility was free to attend the Agenda Conference in order to be available to answer any questions. The utility's memorandum appears to contain sufficient argument for us to render a fair and complete evaluation of the merits without oral argument.

Nevertheless, because this matter has not been to hearing, we granted the utility's Request for Oral Argument, but limited argument to five minutes for each party who wished to speak.

MOTION TO DISMISS

In its motion to dismiss, Sunrise asserts under City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991), that the City possesses an exclusive right to serve the territory in question. According to Sunrise, this exclusive right is based upon the City's present ability to promptly and efficiently provide service, along with its prior legal right to serve the area sought by South Broward. Therefore, Sunrise argues that South Broward's application should be dismissed.

In support of its argument, Sunrise argues the following:

1. The City currently has facilities in place and is serving areas adjacent to the territory in question.
2. The City acquired two former Commission certificated utilities, the territory of both having encompassed the area Sunrise wishes to serve.
3. Sunrise entered a court ordered stipulation with the Town of Davie, whereby Sunrise would have the legal right to provide water and wastewater service in and about the corporate limits of the Town of Davie. The service area covered by this agreement includes the area South Broward wishes to serve.
4. The comprehensive plans of the City and Broward County as well as the City's utility master plan, include the territory in question within the City's regional utility service area.

SOUTH BROWARD'S RESPONSE TO SUNRISE'S MOTION TO DISMISS

South Broward sets forth a number of reasons why Sunrise's motion to dismiss should be denied:

1. Sunrise's motion does not allege any defense which is permitted by the Florida Rules of Civil Procedure.

2. Sunrise's motion is contrary to the requirements of Chapter 367, Florida Statutes and Rule 25-22.037, Florida Administrative Code.
3. Sunrise's motion to dismiss attempts to introduce facts which are not contained within the four corners of South Broward's application.

As South Broward asserts in its first point, Rule 25-22.0375(1), Florida Administrative Code provides that pleadings before the Commission shall substantially conform to the Florida Rules of Civil Procedure.

Rule 1.140(b), Florida Rules of Civil Procedure sets forth the defenses which may be made by motion. The defenses are as follow:

- (1) lack of jurisdiction over the subject matter
- (2) lack of jurisdiction over the person
- (3) improper venue
- (4) insufficiency of process
- (5) insufficiency of service of process
- (6) failure to state a cause of action
- (7) failure to join indispensable parties

We find that Sunrise's motion to dismiss makes no defense provided for in Rule 1.140(b), Florida Rules of Civil Procedure.

In its second point, South Broward cites to Section 367.045(4), Florida Statutes which provides the following:

If, within 30 days after the last day that notice was mailed or published by the applicant, whichever is later, the commission receives from the Public Counsel, a governmental authority, or a utility or consumer who would be substantially affected by the requested certification or amendment a written objection requesting a proceeding pursuant to s. 120.57, the commission shall order such proceeding conducted in or near the area for which application is made, if feasible (emphasis added).

South Broward asserts that dismissal of its application is inappropriate, because the aforementioned statute requires us to conduct a Section 120.57, Florida Statutes hearing once an objection to an application is filed. South Broward also cites to Rule 25-22.036(2), Florida Administrative Code which provides in part that an initial pleading shall be entitled as an application, petition, complaint, order or notice. Furthermore, Rule 25-22.037(2)(a), Florida Administrative Code provides in part that

motions in opposition to an order, notice, complaint, or petition include motions to dismiss. South Broward asserts that our rules do not provide for the use of a motion to dismiss in opposition to an application.

We find that Section 367.045(4), Florida Statutes makes no reference to filing a motion to dismiss in objection to an application for amendment of certificates. However, as South Broward asserts, Rule 25-22.037(2)(a), Florida Administrative Code sets forth the pleadings for which a motion to dismiss is appropriate.

We find that South Broward fails to properly interpret Rule 25-22.037(2)(a), Florida Administrative Code. Although Rule 25-22.036(2), Florida Administrative Code specifies an application as a form of initial pleading, we find no distinction between an application and a petition for purposes of Rule 25-22.037(2)(a), Florida Administrative Code. South Broward's argument does not support a denial of Sunrise's motion to dismiss.

As South Broward asserts in its third point, Sunrise's motion to dismiss contains facts which are not contained within South Broward's application. In doing so, Sunrise argues the merits of its case rather than the insufficiency of South Broward's application.

South Broward cites Varnes v. Dawkins, 624 So. 2d 349 (Fla. 1st DCA 1993). Where the court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." Id. at 350.

Varnes also states that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by the other side". Id.

Among other cases, South Broward cites to is Dykema v. Godfrey, 467 So. 2d 824 (Fla. 1st DCA 1985), for the proposition that, "[a] motion to dismiss a complaint is not a substitute for a summary judgement where the court may deal with the facts rather than the pleadings." Id. at 825.

We find that the facts alleged in Sunrise's motion to dismiss argue the merits of the City's case. In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief may be had.

In its motion, Sunrise argues that the City has the exclusive, prior, legal right to service the territory in question, which it can accomplish promptly and efficiently. Sunrise does not argue that South Broward's application fails to state a cause of action for which relief may be had. For this reason, as well as the arguments made by South Broward, we hereby deny Sunrise's motion to dismiss.

MOTION TO STAY

As previously stated, Sunrise filed a declaratory action against South Broward in the Circuit Court in and for Broward County, in Case No. 94-010527. The subject matter of the circuit court action is to acknowledge that the territory in question is part of the City's water and wastewater utility service area, and that South Broward does not have authority to provide service to the territory.

Sunrise argues that because the Commission has no jurisdiction over the City, the Commission cannot exercise any jurisdiction over the subject matter of the circuit court action. Therefore, Sunrise asserts that South Broward's application should be stayed, because a court decision favorable to Sunrise could render our consideration of the utility's application moot.

We find that Sunrise's argument lacks merit. Section 367.011(2), Florida Statutes, grants us the exclusive jurisdiction over each utility with respect to its authority, service and rates. The subject matter of this docket is South Broward's application for amended certificates to include additional territory to the utility's service area.

Section 367.045(2), Florida Statutes, provides in part that a utility may not extend its service area outside of the area described in its certificate of authorization until it has obtained an amended certificate from us. Furthermore, Section 367.045(4), Florida Statutes, requires that we conduct a formal hearing pursuant to Section 120.57, Florida Statutes upon Sunrise's objection to South Broward's application.

We have scheduled a formal hearing in this matter on February 7 - 8, 1995. Because Sections 367.011(2) and 367.045(2) and (4), Florida Statutes, grant us exclusive jurisdiction to consider South Broward's application, we hereby deny Sunrise's motion to stay.

This docket shall remain open pending the resolution of the formal hearing. We will make a final decision regarding South Broward Utility, Inc.'s application following the hearing.

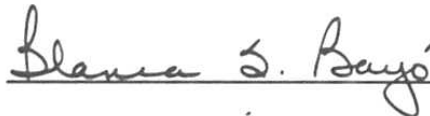
Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that South Broward Utility, Inc.'s Request for Oral Argument on its Memorandum in Opposition to Sunrise's Motion to Dismiss, or in the Alternative, Motion to Stay South Broward's Application for Amendment of Certificates Nos. 359-W and 290-S to add territory in Broward County is hereby granted. It is further

ORDERED that the City of Sunrise's Motion to Dismiss, or in the Alternative, Motion to Stay Consideration of South Broward Utility, Inc.'s Application for Amendment of Certificates Nos. 359-W and 290-S to add territory in Broward County is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 22nd day of May, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.

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Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.