BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation.	DOCKET NO. 991666-WU ORDER NO. PSC-01-1478-FOF-WU ISSUED: July 16, 2001

The following Commissioners participated in the disposition of this matter:

LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER DENYING MOTION FOR SUMMARY FINAL ORDER

BY THE COMMISSION:

BACKGROUND

On November 3, 1999, Florida Water Services Corporation (FWSC or utility) filed an application for amendment of Certificate No. 106-W to add territory in Lake County. FWSC is a Class A utility.

The City of Groveland (City) timely filed a protest to the application on November 24, 1999. By Order No. PSC-00-0623-PCO-WU (Order Establishing Procedure), issued April 3, 2000, this matter had been set for an administrative hearing on December 11 and 12, 2000.

On October 27, 2000, the parties filed a Joint Motion for Extension of Time to File Rebuttal Testimony and Joint Motion for Continuance of the hearing dates. By Order No. PSC-00-2096-PCO-WU, issued November 6, 2000, the hearing dates were changed to March 13 and 14, 2001, the prehearing date was changed to March 1, 2001, and other key activity dates were consequently changed. By Order No. PSC-01-0279-PCO-WU, issued January 31, 2001, the hearing dates were changed to March 15 and 16, 2001. Pursuant to Order No. PSC-01-0395-PCO-WU, issued February 16, 2001, the prehearing conference and hearing dates were changed to June 25, 2001, and July 11 and

12, 2001, respectively. In addition, by Order No. PSC-01-0395-PCO-WU, the discovery cutoff date was changed to June 18, 2001. By Order No. PSC-01-1287-PCO-WU, issued June 13, 2001, the prehearing conference date was changed to June 26, 2001, and the discovery cutoff date was extended to July 3, 2001.

On May 10, 2001, FWSC filed its Motion for Summary Final Order (Motion). On May 17, 2001, the City filed its Response in Opposition to Motion for Summary Final Order (Response). On May 17, 2001, the City also filed a Motion Requesting Oral Argument on the Motion for Summary Final Order. This Order addresses the City's request for oral argument and the Motion and Response. We have jurisdiction pursuant to Chapters 367.045 and 120.57, Florida Statutes, and Rules 25-22.058 and 28-106.204, Florida Administrative Code.

ORAL ARGUMENT

As noted above, on May 17, 2001, concurrent with its Response to FWSC's Motion, the City filed a Motion Requesting Oral Argument. The City asserts that the issues raised by FWSC in the Motion regarding our jurisdiction over Chapter 180, Florida Statutes, service territories and their treatment in certificate cases are complex. The City states that oral argument will aid us in comprehending and evaluating these issues.

Rule 25-22.058, Florida Administrative Code, states that:

> The Commission may grant oral argument upon request of any party to a section 120.57 formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it.

We believe that the issues are clearly set forth in the pleadings, and oral argument is not necessary for us to comprehend or evaluate the issues. However, we note that since the issues are being presented to us before the hearing, parties and interested persons may participate at the Agenda Conference. Therefore, we find that no ruling is necessary on the City's Motion Requesting

Oral Argument because parties and other interested persons may participate at the Agenda Conference.

MOTION FOR SUMMARY FINAL ORDER

FWSC's Motion

As stated previously, on May 10, 2001, FWSC filed its Motion for Summary Final Order. In its Motion, FWSC states that its application for amendment is limited to water service and does not include wastewater service. FWSC states that the City is the only party that has protested its application. FWSC asserts that the City's protest is limited to several issues. FWSC contends that the City's first objection is based on its adoption of Ordinance No. 99-05-07 purporting to establish pursuant to Section 180.02(3), Florida Statutes (1989), a Utilities Service District for the provision of water and wastewater service within a zone up to five miles outside of the corporate limits of the City. FWSC states that the City's objection is that the territory proposed to be served by FWSC is included in the territory of the City's Utilities Service District. FWSC asserts that the City's second objection is that the City has the capacity to serve the new territory requested by FWSC in its application. FWSC states that the City's basic position is that the City has a prior right to serve the territory at issue and service by FWSC would duplicate its existing utility services in violation of Section 367.045(5)(a), Florida Statutes.

FWSC contends that based upon the four corners of the City's one page objection letter and its prefiled testimony, the City has failed to provide a basis for denial of FWSC's application pursuant to applicable statutes and Commission precedent. FWSC asserts that Section 180.02(3), Florida Statutes, does not grant a city the right to establish an exclusive five mile zone of retail water service. FWSC contends that the statute which allows municipalities to establish exclusive five mile zones has been in effect since 1935 and has always authorized a municipality to establish such a zone for sewer service. FWSC states that in 1995 the statute was amended to allow exclusive service areas for "alternative water supply, including, but not limited to, reclaimed water, aquifer storage and recovery, and desalination systems." (emphasis added). FWSC cites to Sumner v. Department of

Professional Regulation, Board of Psychological Examiners, 555 So.2d 919, 921 (Fla 1st DCA 1990) for the proposition that had the legislature intended to include retail water systems or services within the authorized exclusive five mile zone, it could have easily done so. FWSC asserts that because the legislature has not taken such action, and based on the plain language of the statute, it must be concluded that the City's 1999 ordinance is not enforceable to the extent it purports to establish a five mile exclusive zone for the provision of retail water service. FWSC states that the provision of retail water service is all that is involved in this docket. Thus, FWSC argues that the City's objection should be dismissed on this basis alone.

Further, FWSC argues that dismissal is appropriate because Commission precedent recognizes that the scope and effect of municipal actions under Chapter 180 are not within our jurisdiction. FWSC cites Lake Utilities[1], in which the City of Fruitland Park filed an objection to the transfer application of FWSC (then Southern States Utilities, Inc.) to transfer the Lake Utilities' facilities to FWSC and cancellation of Lake Utilities' certificates. FWSC contends that like the instant case, the City of Fruitland Park's protest was based on a Chapter 180 Utility District, and that the City of Fruitland Park did not protest FWSC's managerial, financial, technical or other ability to meet the obligations of the transferor, Lake Utilities, to provide water and wastewater service to the existing and future customers in the territory.

FWSC states that in Lake Utilities, we determined that the appropriate test to apply is whether the City of Fruitland Park was substantially affected by the transfer as set forth in Agrico.[2]

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[1]Order No. PSC-95-0062-FOF-WS, issued January 11, 1995, in Docket No. 940091-WS, In re: Application for transfer of Facilities of Lake Utilities, LTD. to Southern States Utilities, Inc.; Amendment of Certificates Nos. 189-W and 134-S, Cancellation of Certificate Nos. 442-W and 372-S in Citrus County; Amendment of Certificates Nos. 106-W and 120-S, and Cancellation of Certificates Nos. 205-W and 150-S in Lake County.

[2]Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla 2nd DCA 1981)(The two pronged test

FWSC states that in Lake Utilities, we found that the City of Fruitland Park had failed to meet the Agrico test because it had not shown an injury in fact arising from the transfer to FWSC. FWSC contends that in reaching this conclusion, we noted that the City of Fruitland Park was not an FWSC customer and had created the 180 Utility District after the transfer application had been filed. FWSC asserts that we reached our conclusion because Lake Utilities had always served the customers who were being transferred to FWSC and who were in the City's new Utility District, and the requested transfer would have no impact on the City of Fruitland Park. FWSC contends that even though the City passed its ordinance prior to FWSC filing its application, this has no legal significance.

Further, FWSC states that in the Lake Utilities proceeding, we concluded that we did not have jurisdiction to remedy any violation of Chapter 180, Florida Statutes. FWSC states that we noted that in a transfer proceeding, we analyze the utility's financial and technical ability to determine whether the proposed transfer is in the public interest, just as in the instant amendment case. FWSC further contends that in Lake Utilities, the City of Fruitland Park did not dispute FWSC's technical and financial ability to serve, just as in the instant case. Therefore, FWSC contends in applying the zone of protection prong of the Agrico test, that we refused to engage in an analysis or interpretation of the scope of a municipality's claims under Chapter 180. FWSC concludes that under the Agrico test, this is not the type of proceeding designed to protect the City's alleged Chapter 180 rights because we have no jurisdiction to interpret or enforce such rights.

FWSC also contends that while not included specifically in its objection, the City's prehearing statement contains the City's position that the expansion of FWSC's certificate in Lake County would constitute a duplication of existing utility services which is prohibited by Section 367.045(5)(a), Florida Statutes. FWSC asserts that this position is without merit as a matter of fact and law. FWSC states that none of the evidence presented by the City

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concerning set forth in Agrico is that the person will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing; and that his injury is of a type or nature which the proceeding is designed to protect.)

in the direct testimonies of Mr. Yarborough and Mr. Mittauer or the rebuttal testimony of Mr. Beliveau addresses the issues of duplication of existing systems. FWSC contends that this is because sworn testimony to that effect could not be made in good faith. FWSC states that the City does not have existing lines adjacent to the development at issue and, based on its information and belief, the terminus of the City's system remains approximately two to five miles away from the development of which territory is in dispute. FWSC states that as a matter of law, we have found on more than one occasion that Section 367.045(5)(a) or its predecessor, Section 367.051(3)(a), prohibits only the duplication of an existing water or wastewater system, not the duplication of or competition with a proposed system.[3]

The City's Response

In its Response, the City agrees with FWSC that we have no jurisdiction over municipal water and wastewater utilities pursuant to Section 367.022(2), Florida Statutes, and as such, have no authority to interpret the provisions of Chapter 180, Florida Statutes. The City contends that we have no authority to interpret statutes that do not fall within the ambit of our own empowering legislation.

The City states that it strongly disagrees with FWSC's interpretation of Chapter 180, Florida Statutes. The City contends that we are not the proper party to interpret the provisions of Chapter 180, Florida Statutes, or to apply our interpretation of the provisions of Chapter 180 to the facts presented in this case. The City asserts that it is not asking us to interpret and enforce any Chapter 180 right and that the prior right to serve is not an issue in this case. The City states that it is a fact like many

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[3]Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, In re: Application of East Central Florida Services, Inc. for an Original Certificate in Brevard, Orange and Oseola Counties; Order No. 17158, issued February 5, 1987, in Docket No. 85-0597-WS, In re: Objection Of Palm Beach County to Notice by Seacoast Utilities, Inc. to Amend Water and Sewer Certificates in Palm Beach County, Florida.

others presented to us, necessary for our full understanding of this particular application.

The City asserts that because we do not have authority to interpret and enforce Chapter 180, we cannot as a matter of law grant the relief FWSC is requesting - - the interpretation of Section 180.02(3), Florida Statutes, to exclude the establishment of an exclusive municipal five mile service area for the provision of retail water service and the dismissal of the City's objection on this basis alone.

The City contends that the issue in contention in this docket is the duplication of, and competition with, the City's water and wastewater utility systems by the granting of the service area requested by FWSC in this docket as set forth in Section 367.045(5)(a), Florida Statutes. The City contends that this issue has been timely raised and addressed by the parties in the prehearing statements. The City further contends that FWSC admits that these issues are appropriately considered by this Commission. The City contends that only under FWSC's interpretation of our previous decisions does the City's prefiled testimony fail to constitute duplication of service.

The City asserts that under Rule 1.510, Florida Rules of Civil Procedure, motions for summary judgment, the equivalent of a motion for summary final order, can only be granted if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. The City contends that there are genuine issues of material facts surrounding the duplication issue. The City states that it is currently extending the water lines past the Cherry Lake terminus referenced in prefiled testimony, which should be complete by July 11-12, 2001. The City asserts that it is not limited to introducing at hearing only the information presented in its objection and prefiled testimony, but is free to develop its case with additional information which comports with the rules of evidence and Florida administrative procedure. The City notes that in its prehearing statement, it takes the position that FWSC does not have adequate plant capacity and that FWSC's amendment application is not consistent with the local comprehensive plan. The City states that because there are genuine issues of material fact, a summary final order cannot be granted as a matter of law.

Decision

Rule 28-106.204(4), Florida Administrative Code, provides:

> Any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

A summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Section 120.57(1)(h), Florida Statutes (2000).

Under Florida Law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against who a summary judgement is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993)(citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985).

We agree with the City that genuine issues of material facts exist regarding the issue of duplication of existing systems. We note that from the pleadings themselves, the status of the City's lines is in dispute. We note that parties are permitted to make corrections to their testimony at the hearing, such as updating the status of lines.

We agree with the parties that we do not have the authority to enforce a Chapter 180, Florida Statutes, action. In Lake Utilities, we found:

> It is correct that pursuant to Chapter 180, municipality may designate a utility district. However Chapter 367, Florida Statutes, gives us exclusive jurisdiction over a regulated utility's service, authority, and rates. . . . Section 367.011(4), Florida Statutes, states that Chapter 367, Florida Statutes, shall supersede all other laws. . ., and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. Chapter 180 contains no express override.

Under Section 367.045, Florida Statutes, we evaluate a regulated utility's financial, technical, and managerial ability to serve; the need for service; and whether the amendment is in the public interest. Section 367.045(5)(a), Florida Statutes, states that:

> [t]he commission may not grant a certificate of authorization for a proposed system, or an amendment to a certificate of authorization for the extension of an existing 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 reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

We agree that the existence of a Chapter 180 Utility District may be a factor in determining whether the regulated utility would be a duplication of or in competition with an existing system. However, we believe that regardless of a municipality's Chapter 180 status, we make our determination based upon the criteria set forth in Chapter 367, Florida Statutes. As noted above, based on the criteria set forth in Section 367.045, Florida Statutes, there appear to be genuine issues of material fact regarding duplication or competition of systems.

For the foregoing reasons, we find it appropriate to deny FWSC's Motion for Summary Final Order. The matter shall proceed to hearing, as scheduled.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Water Services Corporation's Motion for Summary Final Order is hereby denied. It is further

ORDERED that this docket shall remain open pending resolution of Florida Water Services Corporation's application.

By ORDER of the Florida Public Service Commission this 16th day of July, 2001.

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

By: _____
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of