FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399-0863

M E M O R A N D U M

March 22, 1990

TO : DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (N. DAVIS)
DIVISION OF WATER AND SEWER (J. WILLIAMS)

RE : UTILITY: CONROCK UTILITY COMPANY

DOCKET NO.: 890459-WU

CASE: OBJECTION TO NOTICE OF CONROCK UTILITY COMPANY OF INTENT TO APPLY FOR A WATER CERTIFICATE IN HERNANDO COUNTY

AGENDA: APRIL 3, 1990 - CONTROVERSIAL - PARTIES MAY NOT PARTICIPATE

PANEL: FULL COMMISSION

CRITICAL DATES: FINAL ORDER MUST BE ISSUED BY APRIL 25, 1990

ISSUE AND RECOMMENDATION SUMMARY

ISSUE NO. 1: Should the exceptions to the Hearing Officer's recommended order by accepted?

RECOMMENDATION: The exception to Finding of Fact No. 12 should be accepted. The exceptions to the Conclusions of Law should be accepted also. (Davis)

DOCUMENT NUMBER-DATE
02575 MAR 22 1990
FPSC-RECORDS/REPORTING

ISSUE NO. 2: Should the Hearing Officer's recommended order be adopted?

RECOMMENDATION: The Hearing Officer's recommended order should be adopted with modifications. (Davis)

ISSUE NO. 3: Should this docket be closed?

RECOMMENDATION: Yes. (Davis)

BACKGROUND

The City of Brooksville, Hernando County and Rolling Acres Enterprises timely protested Conrock Utility Company's (Conrock or utility) notice of intent to seek a certificate to provide water service. The matter was set for hearing before the Division of Administrative Hearings (DOAH) and heard on September 13, 1989. Rolling Acres withdrew its objection at hearing. The utility, the City, the County, and Staff filed proposed findings of fact and conclusions of law with DOAH. The Hearing Officer's recommended order was filed January 24, 1990. Only Staff filed exceptions to the recommended order.

Under Rule 28-5.405(2), Florida Administrative Code, the Agency must issue its final order within 90 days of receipt of the recommended order. The recommended order must be considered at a public meeting. It cannot be a de novo review, but must be confined to the record submitted to the agency together with the recommended order.

Pursuant to Section 120.57(10), Florida Statutes, the agency may adopt the recommended order as the final order of the agency. The statute further states that the agency

> may reject or modify the conlusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. (Emphasis supplied)

DISCUSSION OF ISSUES

ISSUE NO. 1: Should the exceptions to the Hearing Officer's recommended order by accepted?

RECOMMENDATION: The exception to Finding of Fact No. 12 should be accepted. The exceptions to the Conclusions of Law should be accepted also. (Davis)

STAFF ANALYSIS:

Exception to Finding of Fact

As stated in the background section of this recommendation, an agency may not reject or modify the hearing officer's finding of fact unless the agency reviews the record and determines with particularity, that the finding was not based on competent substantial evidence. Section 120.57(10), Florida Statutes; Manasota 88, Inc. v. Diane D. Tremor, 14 FLW 1467, June 23, 1989. Staff Counsel filed one exception to the Hearing Officer's findings of fact. Rule 28-5.405(3), Florida Administrative Code, requires the agency to make explicit rulings on each exception to a recommended order.

I. Exception to Hearing Officer's Finding of Fact No. 12 -

The Hearing Officer, at pp.10 and 11 of the recommended order, found that Conrock's president has an income interest in the family trust. A review of the record does not show that finding to be supported by competent, substantial evidence. The record shows that the utility president's father has an income interest in the trust. (TR 54) When asked if other people share an income interest in the trust, the utility president responded as follows:

> Okay. This trust, if I remember right, deals with what my grandmother set up when she passed on. And the way it works is, it goes to -- I don't know if it goes to my children and it passes down from generation to generation once the preceding generation has passed on. (TR 54, 55)

Thus, there is no evidence explicitly showing that the utility president himself does have an income interest in the trust.

Therefore, the Commission must reject Finding of Fact No. 12 as not being supported by competent, substantial evidence in the record.

II. Exceptions to Hearing Officer's Conclusions of Law

While the agency cannot reject a hearing officer's finding of fact unless it is unsupported by competent, substantial evidence, the agency is free to reject the conclusions of law

set out in a hearing officer's recommended order in whole or in part. McPherson v. School Board of Monroe County, 505 So. 2d 682 (3rd DCA 1987), Siess v. Department of Health and Rehabilitative Services, 468 So.2d 478 (2nd DCA 1985).

A. Compliance with Rule 25-30.035(3)(f)

Rule 25-30.035(3)(f), Florida Administrative Code, states that the utility shall provide:

> Evidence that the utility owns the land where the utility treatment facilities are located or a copy of the agreement which provided for the continuous use of the land.

In Finding of Fact No. 3, the Hearing Officer specifically found that Conrock did not establish that it owns or has a written lease for the land where the water facilities are proposed to be located. However, based upon the testimony of Conrock's president that a verbal agreement exists, the Hearing Officer found that Conrock established that a written agreement can be consummated in the near future. Hence, in his Conclusions of Law, on p. 17 of the recommended order, the Hearing Officer suggests that Conrock complied with Rule 25-30.035(3)(f), Florida Administrative Code, as it proved that it can secure the required land dedicated to its proposed facilities in the event the certificate is granted.

The Hearing Officer misinterprets the Rule as requiring a mere technical filing, as opposed to setting forth a precondition to receiving a certificate. Rule 25-30.035(3), Florida Administrative Code, implements Section 367.041, Florida Statutes, which states:

> Each applicant for a certificate shall: (1) Provide information required by rule or order of the commission . . .

Rule 25-30.035(3), Florida Administrative Code, states:

> In addition to meeting the requirements of Section 367.041, F.S., the utility shall provide: . . . (Emphasis Supplied).

Conrock's failure to comply with subparagraph (f) of the above-cited rule is a material deficiency in its application. Therefore, the Hearing Officer erred in concluding that Rule 25-30.035(3)(f), Florida Administrative Code, can be met after Conrock has obtained a certificate.

B. Compliance with Rules 25-30.035(3)(k)(m) & (n)

Subparagraphs (k), (m), and (n) of Rule 25-30.035(3), Florida Administrative Code, embody requirements to show the financial ability of the applicant to own and operate a utility. Subparagraphs (k) and (m) of the above-cited rule

require financial statements of the applicant. The applicant in this case is Conrock, not its owners or potential principal funders.

The Hearing Officer found, in Finding of Fact No. 13, that Conrock does not have assets or independent worth establishing its financial responsibility. In his Conclusions of Law, on p. 19 of the recommended order, the Hearing Officer stated that Conrock did not formally demonstrate its financial capability by presentation of financial statements.

Based on the foregoing, Conrock did not prove that it independently has the financial ability to own and operate a water utility, pursuant to subparagraphs (k) and (m) of Rule 25-30.035, Florida Administrative Code. Therefore, Conrock relies on the net worth of its potential principal funders in its attempt to establish financial ability.

Rule 25-30.035(3)(n), Florida Administrative Code, requires the applicant to provide:

> A statement listing those providing the principal funding to the utility, along with their financial statement and copies of any financial agreements.

Conrock did not provide copies of any financial agreements committing funds to the utility. In Finding of Fact No. 11, the Hearing Officer found that the president of Conrock has not

committed any personal funds to the project, and that no efforts have been made to obtain bonds, loans, or grants. However, in his Conclusions of Law, on p. 19 of the recommended order, the Hearing Officer found that the testimony of the president demonstrates that ample financial resources are readily available should the certificate be granted, and that such a technical deficiency would not justify a denial of the application. The requirements of Rule 25-30.035(3), Florida Administrative Code, must be met before a certificate can be granted.

The Hearing Officer's conclusion that Conrock proved its financial ability is also based on the erroneous finding of fact that the president owns an income interest in the trust, as discussed earlier.

Based on the above, the Hearing Officer's conclusion of law that Conrock complied with Rules 25-30.035(k), (m), and (n), Florida Administrative Code, thereby proving its financial ability to construct and operate a water utility, is erroneous. Failure to prove that the utility is financially capable, coupled with the failure to provide commitments, or at least testimony, from the principal funders, is not a mere technical deficiency that may be cured after a certificate is granted. It is another material deficiency.

C. Technical Ability of Applicant to Operate a Water Utility

The Hearing Officer, in his Conclusions of Law, on p. 19 of the recommended order, states that Conrock's present lack of technical expertise in operating a water system is a mere technical deficiency in the application. The Hearing Officer went on to state:

> Conrock did establish, however, that should a certificate be granted, it is financially and otherwise capable of retaining a permanent, trained operator for the water system.

The Hearing Officer errs by finding that Conrock's financial ability, which was not sufficiently demonstrated, provides that applicant with the technical ability to operate a water utility. It is not in the public interest to grant applicants certificates to operate public utilities on such a weak showing of technical ability. Therefore, based upon legal and policy considerations, the Hearing Officer's conclusion of law that Conrock possesses the technical ability to operate a water utility is in error.

D. Significance of the Local Government Comprehensive Plan

Section 367.051(3)(b), Florida Statutes, states:

> If such an objection [based on the comprehensive plan] has been timely raised, the Commission shall consider, but not be bound by, the local comprehensive plan of the county or municipality. (Emphasis Supplied).

The Hearing Officer, in his Conclusions of Law, on p. 15 of the recommended order, goes a step further by declaring:

> . . . the consistency of the proposed utility service with the provisions of the approved comprehensive plan involved is an important consideration and should be persuasive in making the decision to grant or deny. (Emphasis Supplied).

If the Commission were to adopt this conclusion of law, it would in effect be changing its policy and procedures in that in determining whether it is in the public interest to grant a certificate, the Commission looks primarily to the applicant's financial and technical ability to provide the service, the availability of service from other providers, and need for service as set forth in Section 367.041, Florida Statutes, and Rule 25-30.035, Florida Administrative Code. The Commission also considers the local comprehensive plan when a county or city objects to the certification of the applicant, pursuant to Section 367.051, Florida Statutes. The approved comprehensive plan, in theory, would control the need for service in the location when the certificate was requested. The Commission is

not bound, however, to enforce a locality's comprehensive plan. Further, the authority given to local governments in Chapter 163, cited by the Hearing Officer, does not override this Commission's exclusive jurisdiction as set forth in Sections 367.011(2) and (4), Florida Statutes, as there is no express override of Chapter 367 in Chapter 163. The Commission has no authority to administer or enforce Chapter 163. Accordingly, this conclusion, that the comprehensive plan should be persuasive, cannot be accepted. However, the Hearing Officer's ultimate conclusion, that the application should be denied, is correct and should be accepted as discussed in Issue No. 2.

ISSUE NO. 2: Should the Hearing Officer's recommended order be adopted?

RECOMMENDATION: The Hearing Officer's recommended order should be adopted with modifications. (Davis)

STAFF ANALYSIS: The recommended order is attached to this recommendation. The Hearing Officer found, in pertinent part, that

a) No evidence was presented to show that the newspaper containing the notice of intent actually circulates in Conrock's proposed service territory. (Paragraph 1 of recommended order)

b) It was not established that Conrock owns or has a written lease for the land where the water facilities are proposed to be located. (Paragraph 3)

c) Conrock provided a territorial map but not a system map. (Paragraph 4)

d) There is no evidence that the Family Trust that owns 900 acres of the proposed service territory contemplates real estate development on the tract or other tracts in the area which could be served by the proposed utility. (Paragraph 5)

e) The people living in the proposed service area either have wells or receive water from the City of Brooksville or Hernando County. (Paragraph 6)

f) Conrock has not received any requests for water service. (Paragraph 7)

g) The utility has no employees. If Conrock receives a certificate, one of two employees of a related business would be operations manager. Neither person possesses any license or training authorizing him or her to operate a water utility. Conrock did establish it will promptly retain operating personnel of adequate training and experience. (Paragraph 9)

h) Conrock has not established what type of system it would install. (Paragraph 10)

i) Conrock Corporation has no assets. (Paragraph 11)

j) Conrock's president has an income interest in the Family Trust. (Paragraph 12)

k) Conrock's president testified that sufficient funds are available from his family and the Trust. (Paragraph 13)

l) The proposed utility's service in the rural area of the county is in derogation of the comprehensive land use plan. Also, the proposed system would be in partial competition with and duplication of the city and county water systems. (Paragraph 15)

All of the findings of the Hearing Officer, except item (j) above (Paragraph 12 of the recommended order) are supported by competent substantial evidence and should be approved. Paragraph 12 should be rejected, as discussed in Issue 1.

The Hearing Officer's ultimate conclusion of law, that the application of Conrock should be denied, is correct. However, the subordinate legal conclusions used by the Hearing Officer to arrive at the ultimate conclusion should be rejected, as discussed in Issue 1.

The Hearing Officer's recommendation is to deny Conrock's application for a water certificate, which in effect upholds the objections of the parties.

Upon review of the record and the recommended order submitted by the Hearing Officer, staff recommends that the Hearing Officer's recommended order be accepted with the modifications recommended in Issue 1.

ISSUE NO. 3: Should this docket be closed?

RECOMMENDATION: Yes. (Davis)

STAFF ANALYSIS: This docket was opened to resolve the objections to Conrock's notice of intent and application for a water certificate. The objections have been upheld by the recommendation to deny the application. Therefore, there is no further action to be taken in this docket and it should be closed.

State of Florida
Division of Administrative Hearings
The DeSoto Building, 1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675 • SunCom: 278-9675

Sharyn L. Smith
Director

Ann Cole
Clerk

January 24, 1990

Steve Tribble, Director
Records and Recording
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Re: Rolling Acres Enterprises, City of Brooksville, and Hernando County vs. Conrock Utility Company, DOAH Case No. 89-2700

Dear Mr. Tribble:

Enclosed is my Recommended Order in the referenced case. Also enclosed are the exhibits received in evidence and the transcript of the final hearing.

As required by Section 120.58(5), Florida Statutes, please provide the Division of Administrative Hearings a copy of your final order in this case within 15 days of rendition.

Sincerely,

P. MICHAEL RUFF
Hearing Officer

PMR:gg
Enclosures
cc: William B. Eppley
Peyton B. Hyslop
James F. Pingel, Jr.
David C. Schwartz
David Swafford
Susan Clark

RECEIVED
FLORIDA PUBLIC
SERVICE COMMISSION
90 JAN 25 AM 8:12
MAIL ROOM

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROLLING ACRES ENTERPRISES, CITY OF BROOKSVILLE, and HERNANDO COUNTY, Petitioners, vs. CONROCK UTILITY COMPANY, Respondent.	CASE NO. 89-2700

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly designated Hearing Officer, on September 13, 1989, in Brooksville, Florida. The appearances were as follows:

APPEARANCES

For Petitioner, City of Brooksville:	William B. Eppley, Esquire Post Office Box 1478 Brooksville, Florida 34605
For Petitioner, Hernando County:	Peyton B. Hyslop, Esquire 10 North Brooksville Avenue Brooksville, Florida 34601
For Respondent, Conrock Utility Company:	James F. Pingel, Jr., Esquire 100 South Ashley Drive Suite 1400, Ashley Tower Post Office 1050 Tampa, Florida 33601
For Intervenor, Florida Public Service Commission:	David C. Schwartz, Esquire 101 East Gaines Street Fletcher Tower Tallahassee, Florida 32399-0855

STATEMENT OF THE ISSUES

The issues to be adjudicated in this proceeding concern whether Conrock Utility Company's application for a water certificate in Hernando County meets the requirements of Sections 367.041 and 367.051, Florida Statutes, and, therefore, whether it should be granted.

PRELIMINARY STATEMENT

Conrock Utility Company (Conrock) has filed a notice of intent to apply for an original water certificate to provide service to an area in Hernando County lying generally east of the City of Brooksville, pursuant to Section 367.041, Florida Statutes. It has filed a formal application in addition to the notice of intent seeking to serve the territory described therein. Pursuant to Section 367.051(2), Florida Statutes, the Petitioners, City of Brooksville and Hernando County, as well as Rolling Acres Enterprises, have filed objections to Conrock's notice, thus initiating this Chapter 120 proceeding.

The City of Brooksville objected to the notice of intent on the grounds that the territory sought to be served by Conrock includes properties within the City's "statutory service area;" that the application will promote urban sprawl; that the application will involve a needless duplication of services; and that the application will infringe on the City's ability to meet the financial obligations under its water and sewer bond issue undertaken in June 1988.

Hernando County objected to the notice of intent on the grounds that a grant of the certificate and the certificated territory would result in competition with, and duplication of, the county and city's water systems and may violate the comprehensive plan approved by the Department of Community Affairs.

Rolling Acres Enterprises, a nearby utility, objected on the grounds that it feared that its territory might be included in the territory sought to be approved and franchised to Conrock in the future. Due to an agreement entered into shortly prior to hearing, the grounds for Rolling Acres Enterprises' objections to the notice were alleviated and it has voluntarily dismissed its objection and petition.

The Florida Public Service Commission was granted authority to intervene in this case. At hearing it developed that the Public Service Commission took the position that the various requirements for the grant of a water and sewer certificate embodied in Statutes 367.041 and 051, Florida Statutes, have not, or may not, be met.

The cause came on for hearing as noticed. Conrock presented the testimony of Mark Williams, President of the Conrock Corporation; Rod Pomp, a consulting engineer; and Robert Green, also a consulting engineer. The City of Brooksville presented the testimony of William Geiger, the City's Director of Development; and Charles Arbuckle, the City's Director of Utilities and Sanitation. Hernando County presented the

testimony of Robert Holbach, engineer and coordinator for the county's utilities department. The Public Service Commission presented no witnesses, but conducted cross examination of other party witnesses and introduced certain exhibits into evidence. Intervenors exhibits 1-5 were admitted into evidence. The Petitioner City's exhibits 1-6 were admitted, as well as Petitioner Rolling Acre's exhibit 1. Respondent Conrock's exhibits 1-8 were admitted with the exception of exhibit 7 which was not moved into evidence.

At the conclusion of the proceeding, the parties elected to obtain a transcript and stipulated to a schedule for filing proposed findings of fact and conclusions of law, waiving the requirements of Rule 5.402, Florida Administrative Code. Those proposed findings of fact are addressed in this recommended order and in the appendix attached hereto and incorporated by reference herein.

FINDINGS OF FACT

1. Applications and notices of intent to apply for a water certificate for a particular service area are required to be noticed in a newspaper of general circulation in the service area involved. In this proceeding, an affidavit was introduced from the "Sun Coast News," to the effect that Conrock had caused to be published in that newspaper its notice of intent to apply for the water certificate. That newspaper is published on Wednesdays and Saturdays in New Port Richey, Pasco County, Florida. Conrock's proposed service area, or territory, is in

that portion of Hernando County lying east of the City of Brooksville. This newspaper is a free publication and states on the front page that it is circulated in Pasco and Hernando Counties. There is some testimony to the effect that the newspaper is only circulated in that portion of Hernando County lying westward of Brooksville near the Pasco County border, which is an area removed from Conrock's proposed service territory. No evidence was presented to the effect that that newspaper actually circulates in Conrock's proposed service territory.

2. Rules 25-30.030(2)(f), 25-30.035(3)(f) and 25-30.035(3)(h), Florida Administrative Code, require that the utility provide evidence that it owns the land where the treatment facilities are to be located or provide a copy of an agreement providing authority for the continuous use of the land involved in the utility operations and that a system map of the proposed lines and facilities be filed with the Commission.

3. It was not established that Conrock owns or has a written lease for the land where the water facilities are proposed to be located. No actual lease has been executed providing for long-term continuous use of the land. It is true, however, that a verbal agreement exists with the Williams family members and/or the Williams Family Trust, who own the land upon which the facilities would be located, authorizing the use of the land for the proposed operations and facilities. That unrebutted evidence does establish, therefore, that Conrock has authorization to use the land where the water facilities,

including the wells, are, or will be located. Although there is no extant written agreement, as yet, providing for the continuous use of the land involved, Conrock did establish that such an agreement can be consummated in the near future based on the verbal agreement it already has.

4. Conrock did place into evidence a territorial map of the proposed service area. It did not, however, provide a system map or otherwise provide concrete evidence of where distribution lines and other facilities would be located for its proposed system. It submitted instead a "planning study" directed to the question of whether a water utility is needed for the proposed territorial area. It submitted no design specifications for the proposed system into evidence however. Conrock has not filed any tariff rate schedules for any water service it might conduct, if granted a certificate.

5. Concerning the question of the need for the proposed water service, it was established by Conrock that 900 acres of the proposed service territory are mainly owned by the Sumner A. Williams Family Trust (Family Trust). Additionally, some small tracts are owned by S. A. Williams Corporation, a related family corporation. The majority of the 900-acre tract is zoned agricultural and the S.A.W. Corporation operates a construction/demolition landfill on that property. There is no evidence that it contemplates a real estate development on that 900-acre tract or other tracts in the area which could be served by the proposed water utility. Neither is Conrock attempting

entry into the utility business in order to supply water to a development of the above-named corporation or any related party, person or entity.

6. The proposed service area is rural in nature. The majority of people living in the area live on tracts of land ranging from 1 to 200 acres in size. The people living in the proposed territory either have individual wells or currently receive water service from the City of Brooksville or from Hernando County. Both of those entities serve small subdivisions, or portions thereof, lying wholly or in part in the proposed service territory of Conrock.

7. Conrock has not received any requests for water services from residents in the proposed service territory. There is some evidence that discussions to that effect may have occurred with an entity known as TBF Properties, lying generally to the north of the proposed service territory. TBF Properties apparently contemplates a real estate development on land it owns, which also encompasses part of the Williams family property; some of which lies within the proposed service territory. Plans for TBF's residential construction development are not established in the evidence in this case however. There is no evidence which shows when or on what schedule the construction of that development might occur, nor whether it would actually seek service from Conrock if that entity was granted a water certificate. TBF Properties is the only entity or person in Conrock's proposed service territory that has

expressed any interest to the City of Brooksville concerning receiving water service from the city. There have been no requests to the county for water service in the proposed service territory, except by Budget Inn, a motel development.

8. The proposed service area includes a number of small subdivisions. These subdivisions are Mundon Hill Farms, Eastside Estates, Cooper Terrace, Country Oak Estates, Chris Morris Trailer Park, Potterfield Sunny Acres, Gunderman Mobile Home Park, and Country Side Estates. Mundon Hill Farms is an undeveloped subdivision. Eastside Estates and Cooper Terrace have limited development and the Country Oak Estates consist of only three homes. The Chris Morris Trailer Park has a small number of mobile homes but is not of a high density. Potterfield Sunny Acres has six to eight homes. Gunderman Mobile Home Park is a minor development. The Country Side Estates development has its own independent water system. Some subdivisions in Conrock's proposed service area already receive water service from the city or the county.

9. Conrock was incorporated in the past year and as yet has not had any active business operations. It currently has no employees. Mark Williams, the President of Conrock, manages the construction/demolition landfill operation owned by the S.A.W. Corporation. The landfill business is the most closely related business endeavor to a water utility business in the experience of Mr. Williams, Conrock's president. If Conrock were granted a water certificate, either Ms. Donna Martin or

Mr. Charles DeLamater would be the operations manager. Neither of these persons possesses any license or training authorizing him or her to operate a water utility system. No evidence was presented as to Ms. Martin's qualifications to operate a water utility system. Mr. DeLamater manages a ranch at the present time and also works in a management capacity in the landfill operation for the Williams family. There is no evidence that he has received any training in the operation of a water utility. It is true, however, that the representatives of the engineering and consulting firm retained by Conrock, who testified in this case, do possess extensive water and sewer design and operation expertise. The evidence does not reflect that those entities or persons would be retained to help operate the utility, but Conrock established that it will promptly retain operating personnel of adequate training and experience to operate the water system should the certificate be granted.

10. Conrock has not established what type of system it would install should the certificate be granted, but a number of alternatives were examined and treated in its feasibility study (in evidence). One alternative involves the use of well fields alone, without treatment, storage or transmission lines. In this connection, the feasibility study contains some indication that the water quality available in the existing wells is such that no water treatment is necessary. In any event, Conrock has not established of record in this case what type of facilities it proposes to install in order to operate its proposed water

service. Further, that feasibility study, designed to show a need for the proposed water service, is based upon the actual population, density and occupancies in the homes and subdivisions of the proposed service territory, even though those current residents and occupants have independent water supplies at the present time, either through private wells or through service provided by the City of Brooksville or Hernando County. Thus, the feasibility study itself does not establish that the proposed service is actually needed.

11. Concerning the issue of the proposed facility's financial ability to install and provide the service, it was shown that Conrock stock is jointly held between the Williams family and the S.A.W. Corporation. The Conrock Corporation itself has no assets. The president of Conrock owns 100 shares of the utility corporation, but has not yet committed any personal funds to the venture. No efforts, as yet, have been made to obtain bonds, loans or grants. In fact, the first phase of the proposed project, which is expected to cost approximately $400,000, can be provided in cash from funds presently held by the Williams Family Trust and the S.A.W. Corporation. The various system alternatives proposed in Conrock's feasibility study, in evidence, range in cost from $728,200 to $5,963,100. Conrock has no assets and therefore no financial statement as yet.

12. The financial statements of Mr. and Mrs. Sumner A. Williams, the parents of Conrock's president, include

approximately $3,069,907. This is the corpus of the family trust mentioned above, and with other assets, amount to a net worth for those individuals of approximately 5.8 million dollars. Mr. Williams, Conrock's president, has an income interest in the family trust.

13. The financial statements of the S.A.W. Corporation indicate it has a net worth of $1,588,739. The Family Trust financial statement shows a net worth of $3,069,907 of which $1,444,165 consists of stock in the S.A.W. Corporation. The Family Trust owns 90.9 percent of the S.A.W. Corporation stock. It is thus a close-held corporation, not publicly traded and thus has no value independent of the corporation's actual assets. In spite of the fact that Conrock, itself, the corporate applicant herein, does not have assets or net worth directly establishing its own financial responsibility and feasibility, in terms of constructing and operating the proposed water service, the testimony of Mr. Williams, its president, was unrefuted and does establish that sufficient funds from family members and the trust are available to adequately accomplish the proposed project.

14. Concerning the issue of competition with or duplication of other systems, it was established that the City of Brooksville currently provides water service to the Wesleyan Village, a subdivision within the Conrock proposed service territory. The City has a major transmission line running from its corporate limits out to the Wesleyan Village. The Wesleyan Village is receiving adequate water service at the present time.

although there is some evidence that water pressure is not adequate for full fire flows. The City also has another water main running from US 41 down Crum Road, which is in the proposed service territory of Conrock. By agreement with Hernando County, a so-called "interlocal agreement," the City of Brooksville is authorized to provide water and sewer utility service in a 5-mile radius in Hernando County around the incorporated area of Brooksville. This 5-mile radius includes much of the proposed service territory of Conrock.

15. The City of Brooksville comprehensive plan, approved by the Florida Department of Community Affairs, contains an established policy discouraging "urban sprawl" or "leap frogging"; the placing of developments including separate, privately owned water utilities in predominantly rural areas. It, instead, favors the installation of subdivision developments in areas which can be served by existing, more centralized, publicly owned water and sewer utilities such as the City of Brooksville or Hernando County. Thus, the installation of the separate, privately owned system in a rural area of the county would serve to encourage urbanization away from area contiguous to the municipality of Brooksville which is served, and legally authorized to be served, by the City of Brooksville. Such a project would be in derogation of the provisions of the approved comprehensive land use plan. Further, Conrock's proposed system would be in partial competition with and duplication of the city and county water systems in the proposed service territory.

16. The county provides some water service through its water and sewer district system to some of the subdivisions and residents in the proposed service territory of Conrock and much of Conrock's territory, as mentioned above, lies within the 5-mile radius urban services area of Brooksville, authorized to be served by the city and county interlocal agreement. Such interlocal agreements, including this one, are contemplated and authorized by the comprehensive plan approved by the Department of Community Affairs and the city/county agreement involved in this proceeding was adopted in 1978 in accordance with certain federal grant mandates in Title 201 of the Federal Safe Water Drinking Act. In terms of present physical competition and duplication, Conrock's proposed system would likely involve the running of water lines parallel to and in duplication of the county's lines within the same subdivision.

CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes (1987). Section 367.051, Florida Statutes, provides as follows:

> (1) If, within 20 days following the official date of filing of the application, the Commission does not receive written objection to the application, the Commission may dispose of the application without hearing. If the applicant is dissatisfied with the disposition, he should be entitled to a proceeding under s. 120.57.
> (2) If, within 20 days following the official date of filing, the Commission receives from the public counsel or governmental agency, or

from a utility or consumer who would be substantially affected by the requested certification, a written objection requesting a proceeding pursuant to s. 120.57, the Commission shall order such proceeding conducted in or near the territory applied for, if feasible. Notwithstanding the ability to object on any other ground, a county or municipal government has standing to object on the ground that the issuance of the certificate will violate established local comprehensive plans developed pursuant to ss. 163.3161 - 163.3211. If any consumer, utility, or governmental agency or the public counsel request a public hearing on the application, such hearing shall, if feasible, be held in or near the territory applied for; and the transcript of such hearing and any material at or before the hearing shall be considered as part of the record of the application and any proceeding related thereto.

(3)(a) The Commission may grant a certificate, in whole or in part or with modifications in the public interest, but may in no event grant authority greater than that requested in the application or amendments thereto and noticed under s. 367.041, or it may deny a certificate. The Commission shall not grant a certificate for a proposed system, or for the extension for an existing system, which will be in competition with, or 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.

(b) When granting a certificate, the Commission need not consider whether the issuance of a certificate is inconsistent with the local comprehensive plan of a county or municipality unless an objection to the certificate has been timely raised in an appropriate motion or application. If such an objection has been timely raised, the Commission shall consider, but not be bound by, the local comprehensive plan of the county or municipality.

Under the above-quoted authority therefore, the Commission must consider the public interest in deciding whether to grant or deny a certificate. Although the Commission is not bound by the provisions and mandates of the comprehensive plan involved in deciding whether to grant or deny a certificate, the consistency of the proposed utility service with the provisions of the approved comprehensive plan involved is an important consideration and should be persuasive in making the decision to grant or deny. In the instant case, the proposed utility certificated territory and service involved was shown to be contrary to the provisions of the comprehensive plan concerning the fact that the certificated territory proposed would overlap that reserved to the municipality of Brooksville by its agreement with Hernando County. That agreement is adopted as part of the comprehensive plan of the City of Brooksville, in that the 5-mile radius urban service area of the City of Brooksville encompasses the proposed territory sought by Conrock or a large portion of it.

Further, the installation of the proposed system in the rural area involved in Hernando County would be contrary to the principles adopted in the comprehensive plan, and approved by the Department of Community Affairs, which are designed to discourage and prevent urbanization and the proliferation of privately owned, separate utility systems in rural areas. Thus, in this context, the proposed certificated territory and the utility system contemplated by Conrock would not be in the public interest.

Section 163.3161, Florida Statutes, embodies the purpose of the "Local Government Comprehensive Planning and Land Development Regulation Act," including the prevention of overcrowding of land and avoidance of undue concentration of population, as well as facilitating adequate and efficient provision of water and sewer service. Sections 163.3164 and 163.3171 make it clear that the provisions of the approved municipal comprehensive plan involved encompass, in the definition of the "area of jurisdiction," the areas adjacent to the incorporated boundaries of the City of Brooksville embodied in the subject interlocal agreement (in evidence as Petitioner City of Brooksville's, exhibit 6). That 5-mile radius area as referenced above, encompasses a large portion of the territory sought be to certificated by Conrock.

Pursuant to the provisions of Chapter 163 and its statutorily authorized interlocal agreement, the city has authority to regulate the provision of utility service within the 5-mile urban service area, including the requiring of central water and sewer systems for new urban developments, which are designed to be compatible with future public utility systems, and regulating land use density and extent which will control urban sprawl and avoid depletion of the physical, social and fiscal resources of the city. The proposed utility service and system which is the subject of this application has been shown to promote "urban sprawl," which is to be discouraged under the provisions of the city's comprehensive plan. It would unduly

duplicate and be competitive with the city's water and sewer utility service in the proposed service area and that which is contemplated to be provided by the city and the county in accordance with the approved comprehensive plan and interlocal agreement. Thus, the proposed utility service is not established to be in the public interest in this context as well.

In addition to the above considerations, Conrock did not provide evidence to establish that it owns the land where the utility facilities would be located or that it actually has an agreement providing for long-term continuous control and use of the land involved, as required by Rule 25-30.035(3)(f), Florida Administrative Code. Conrock, however, demonstrated through testimony of its president, that it has verbal arrangements made to entitle it to use the land owned by family members and/or the above-named trust. The evidence adduced by Conrock leaves no doubt that it can secure the required land dedicated to its proposed utility facilities in the event the certificate is granted.

Rule 25-30.035(3)(h), Florida Administrative Code, provides that a system map must be provided by the proposed utility depicting proposed transmission and other lines and facilities. Conrock did not establish that it has a system map of such proposed lines and facilities.

Section 367.041(2), Florida Statutes, and Rule 25-30.035(3)(g), Florida Administrative Code, provides that the applicant for a utility certificate must file tariff schedules

showing the rates and charges it contemplates charging customers for its services. Conrock did not file such a tariff schedule showing rates and charges for its services with the Commission nor introduce them into evidence in this proceeding.

Pursuant to Section 367.051(3)(a), Florida Statutes, a certificate application cannot be granted for those areas which are currently being provided water service by city or county governments. Conrock's certificate thus cannot be granted so as to allow it to provide service for areas being provided water service now by the City of Brooksville or Hernando County, since its system has been shown to be, in those particulars, in competition with or in duplication of the city's and county's water systems. Additionally, Conrock failed to show that the other systems were inadequate to meet the reasonable needs of the public. In this connection too, Conrock failed to establish that there was a public need for the service in the territory involved. There was no showing that existing customers are not presently being provided adequate service, and other than projections of demand in the future embodied in Conrock's feasibility study, there has been no showing that future customers in the territory involved cannot be provided adequate service by the presently existing city and county water facilities and reasonably anticipated extensions and augmentations thereof. In this particular, it has been established that the City of Brooksville presently has excess well and water production capacity which can meet anticipated future demands in the territory involved.

Finally, Rule 25-30.035(k),(m) and (n), Florida Administrative Code, mandates that the applicant for a certificate demonstrate its technical and financial ability to install and operate the proposed water system. While it is true that Conrock did not formally demonstrate its financial capability by presentation of financial statements which demonstrate that it has ample financial resources to construct and operate the proposed system, the testimony of its president demonstrates that those financial resources are readily available should the certificate be granted, as delineated in the above findings of fact. If this were the only technical deficiency in the application and service proposed by Conrock, it would not justify a denial of the application. The same considerations are true for Conrock's present lack of technical expertise in operating a water system. It is true that a certified operator is not currently employed by Conrock and that its present employees do not have the expertise necessary to safely and properly operate a water system. Conrock did establish, however, that should a certificate be granted, it is financially and otherwise capable of retaining a permanent, trained operator for the water system. This, too, would not be a basis for denial of its certificate, were that the only deficiency in Conrock's proposal.

In view of the above findings of fact and conclusions of law, it has been established that Conrock has failed to adequately justify a granting of its certificate in consideration

of the statutory and regulatory framework provided in the above-cited statutory provisions and related rules. In particular, Conrock has failed to show that its proposal to provide water service in the proposed territory involved would comport with the pubic interest, as that is elucidated above. Accordingly, the requirements of the above authority not having been met, it is concluded that the application of Conrock should be denied.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is therefore

RECOMMENDED that the application of Conrock Utilities Corporation for a water certificate authorizing it to operate a water utility in Hernando County, Florida, as more particularly described herein, be denied.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 23rd day of January 1990.

P. MICHAEL RUFF
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Copies furnished:

(See next page)

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of January 1990.

Copies furnished to:

William B. Eppley, Esquire
Post Office Box 1478
Brooksville, Florida 34605

Peyton B. Hyslop, Esquire
10 North Brooksville Avenue
Brooksville, Florida 34601

James F. Pingel, Jr., Esquire
100 South Ashley Drive
Suite 1400, Ashley Tower
Post Office 1050
Tampa, Florida 33601

David C. Schwartz, Esquire
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0855

Steve Tribble, Director
Records and Recording
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

David Swafford
Executive Director
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Susan Clark, General Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Case No. 89-2700

APPENDIX

Petitioners, City of Brooksville, Hernando County, and Hernando County Water and Sewer District's proposed findings of fact.

1. Accepted.
2. Accepted.
3. Accepted.
4. Rejected as subordinate to the Hearing Officer's findings of fact on the subject matter.
5. Rejected as subordinate to the Hearing Officer's findings of fact on the subject matter.
6. Rejected as subordinate to the Hearing Officer's findings of fact on the subject matter.

Respondent's proposed findings of fact.

1. Accepted.
2. Accepted.
3. Rejected as subordinate to the Hearing Officer's findings of fact on this subject matter and as not entirely in accordance with the preponderant weight of the evidence.
4. Accepted.
5. Accepted.
6. Rejected as subordinate to the Hearing Officer's findings of fact on this subject matter and as not entirely in accordance with the preponderant weight of the evidence.

Intervenor's proposed findings of fact.

1. Accepted.
2. Rejected as subordinate to the Hearing Officer's findings of fact on this subject matter and not in itself materially dispositive.
3. Accepted.
4. Accepted.
5. Accepted.
6. Accepted.
7. Accepted.
8. Accepted.
9. Accepted.
10. Accepted.
11. Accepted, but not in itself materially dispositive and subordinate to the Hearing Officer's findings of fact on this subject matter.
12. Accepted.
13. Accepted.
14. Rejected as subordinate to the Hearing Officer's findings of fact on this subject matter and as not in itself materially dispositive.
15. Accepted, but not in itself materially dispositive.

16. Accepted, but subordinate to the Hearing Officer's findings of fact on this subject matter.

17. Accepted, but subordinate to the Hearing Officer's findings of fact on this subject matter.

18. Accepted.

19. Accepted.

20. Accepted.

21. Accepted.

Case No. 89-2700