

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for) DOCKET NO. 941121-WS
amendment of Certificates Nos.) ORDER NO. PSC-96-0420-FOF-WS
359-W and 290-S to add territory) ISSUED: March 26, 1996
in Broward County by South)
Broward Utility, Inc.)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON

ORDER GRANTING ORAL ARGUMENT AND DENYING SOUTH BROWARD UTILITY'S
MOTION FOR PRESERVATION OF JURISDICTION,
OR IN THE ALTERNATIVE, MOTION TO EXPEDITE HEARING

BY THE COMMISSION:

BACKGROUND

South Broward Utility, Inc. (SBU or Utility) is a class B utility which 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.

On October 18, 1994, pursuant to Section 367.045, Florida Statutes, SBU applied for an amendment of its water and wastewater Certificates Nos. 359-W and 290-S to add additional territory in Broward County, in Docket No. 941121-WS. The proposed additional territory would consist of the "Carr Property" (97.95 acres) and "Imagination Farms" (900 acres). SBU states that the property owners plan to create single-family developments, totalling 1,200 units within the two properties.

On September 1, 1994, the City of Sunrise (Sunrise or City) filed a declaratory action in the Circuit Court in and for Broward County, in Case No. 94-010527. Sunrise petitioned the court to secure an order declaring that Sunrise had the exclusive right to serve the territory SBU wished to add to its service area. On September 26, 1994, SBU filed a motion to dismiss Sunrise's

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complaint, which was granted by the court on December 29, 1994, for lack of subject matter jurisdiction.

On November 17, 1994, Sunrise filed with the Commission Sunrise's Objection to and Motion to Dismiss, or in the alternative, Motion to Stay Consideration of, South Broward Utility, Inc.'s Application for Amendment of Water Certificate No. 359-W and Wastewater Certificate No. 290-S in Broward County, Florida ("Sunrise' Objection").

On January 6, 1995, Sunrise filed with the circuit court an amended complaint. Sunrise alleged that it already had the right to serve the territory based upon local comprehensive plans and case law. Sunrise also alleged that it was required by Florida Statutes and the Florida Administrative Code to plan for future water service in the territory. Sunrise asserted that SBU's application raised doubt over Sunrise's responsibilities for planning and jeopardized the City's expenditures for planning.

SBU filed a motion to dismiss in circuit court, in which it alleged that the Commission had exclusive jurisdiction pursuant to case law and Chapter 367, Florida Statutes. Further, SBU asserted that Sunrise failed to join the Commission as an indispensable party. Finally, SBU asserted that it has no right to serve the territory until the Commission approved its application pursuant to Section 367.045, Florida Statutes. Therefore, a justiciable controversy did not exist.

On April 14, 1995, the Commission filed, with the circuit court, a Petition for Leave to Intervene, or in the Alternative, to Appear as Amicus Curiae and Memorandum in Support of South Broward Utility's Motion to Dismiss, asserting that it had exclusive jurisdiction over this matter as provided by case law and Chapter 367, Florida Statutes. Furthermore, the Commission asserted that Sunrise failed to exhaust its administrative remedy of a Section 120.57, Florida Statutes hearing pursuant to Section 367.045(4), Florida Statutes. Finally, the Commission asserted that pursuant to Section 367.045(5)(b), Florida Statutes, the Commission was not bound by Sunrise's comprehensive plans.

On April 18, 1995, the Broward County Circuit Court held a hearing on SBU's motion to dismiss. The court dismissed Sunrise's amended complaint without ruling on the Commission's petition to intervene and directed the City to litigate its claim before the Commission.

On May 3, 1995, Sunrise filed a Petition for Writ of Mandamus and Certiorari in the District Court of Appeal of the State of

Florida Fourth District. On August 15, 1995, the court entered an order treating Sunrise's petition as an appeal from a final order. On October 3, 1995, Sunrise filed its Initial Brief with the court. On October 30, 1995, the Commission filed a Motion for Leave to File Amicus Curiae Brief and the accompanying brief with the court. The Commission argued that Section 367.045, Florida Statutes grants Sunrise standing to object to SBU's application, by authorizing it to request a Section 120.57, Florida Statutes, hearing before the Commission. In determining the parties' claims, the Commission is required to consider, but is not bound by, Sunrise's local comprehensive plans. Because immediate legal relief is available to Sunrise via its requested Section 120.57, Florida Statutes, hearing, the Commission argued that the trial court properly ruled that it lacked subject matter jurisdiction to resolve Sunrise's claim pursuant to the Declaratory Judgment Act.

In Order No. PSC-95-0614-FOF-WS, issued on May 22, 1995 ("Order"), the Commission denied Sunrise's Motion to Dismiss and Motion to Stay. Sunrise's Objection also requested a hearing pursuant to Section 120.57, Florida Statutes. The Commission scheduled the hearing for February 7 and 8, 1996. The Commission then rescheduled the hearing on this matter for April 8 and 9, 1996. Both SBU and Sunrise have filed direct testimony.

On January 22, 1996, SBU filed its Motion for Preservation of Jurisdiction, or in the Alternative, Motion to Expedite Hearing and its Request for Oral Argument on this Motion. On February 1, 1996, Sunrise timely filed its Response to South Broward Utility's Motion for Preservation of Jurisdiction.

On February 6, 1996, SBU filed a new complaint to enjoin Sunrise from installing service lines in the disputed territory in Broward circuit court case No. 96-1725-08. SBU secured an injunction from the circuit court without a hearing by posting the requisite bond. The temporary injunction was dissolved on February 9, 1996 by the circuit court which specified that the circuit court lacked subject matter jurisdiction. Finally, on February 20, 1996, SBU filed a reply to Sunrise's response to SBU's Motion for Preservation of Jurisdiction.

ORAL ARGUMENT

On January 22, 1996, the Utility filed a Request for Oral Argument on its Motion for Preservation of Jurisdiction, or in the Alternative, Motion to Expedite Hearing. 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 attended the Agenda Conference in order to be available to answer any questions. The Utility's motion 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.

MOTION FOR PRESERVATION OF JURISDICTION,
OR IN THE ALTERNATIVE, MOTION TO EXPEDITE HEARING

In its motion for expedited hearing the Utility makes the following arguments:

1. Sections 367.011(2) and 367.045(2) and (4), Florida Statutes, grant the Commission exclusive jurisdiction to consider its application. Sunrise, filed an objection to SBU's amendment application and requested a hearing before the Commission, therefore Sunrise submitted itself to the Commission's jurisdiction;
2. Sunrise, by constructing service lines, is attempting to keep the Commission from exercising its jurisdiction, and should not be permitted to do so;
3. According to section 367.121(1)(g), Florida Statutes, the Commission has the power to exercise all judicial power, issue writs, and do all things necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements.
4. According to section 367.121(1)(j), Florida Statutes, the Commission has the power to seek relief via the circuit courts including temporary and permanent injunctions, restraining orders, or any other appropriate order, because the Legislature finds that violations of Commission orders, in connection with the impairment of a Utility's operations or service, constitute irreparable harm for which there is no adequate remedy at law.
5. There is a substantial likelihood that SBU's application will prevail. If SBU's application is denied because of Sunrise's installation of service lines prior to hearing, SBU will be irreparably harmed due to a loss of a future customer base.

Therefore, the Commission should exercise its powers and enjoin Sunrise from installing lines prior to the Commission's ruling on the matter in order to keep the status quo and, to the extent necessary, seek additional restraints from Sunrise in the Circuit Court.

In its reply, Sunrise argues the following:

1. "Systems owned, operated, managed or controlled by governmental authorities" are not subject to the provisions of Chapter 367, Florida Statutes. Therefore, the Commission does not have jurisdiction over municipalities such as Sunrise, and therefore the Commission cannot enjoin Sunrise from installing the service lines;
2. Pursuant to Southern Gulf Utilities, Inc. v. Mason, 166 So.2d 138 (Fla. 1964), the Commission has recognized its lack of jurisdiction over a city encroaching over a Utility's territory. In this case SBU has not even been awarded the territory yet so SBU's position is even more tenuous.
3. The Commission should deny the amendment because pursuant to section 367.045(5)(a), Florida Statutes, once Sunrise installs its lines in the ground, there will be an impermissible duplication of service if the Commission grants the amendment.

Finally, on February 20, 1996, SBU filed a reply to Sunrise's response. Our rules do not provide for a reply to a response and so we do not address it in our analysis.

We find that Sunrise cannot wrest our jurisdiction to rule upon SBU's application by installing service lines in the disputed territory. Pursuant to 367.045(2), Florida Statutes,

A Utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the commission.

Pursuant to Section 367.045(4), Florida Statutes,

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. [emphasis added]

In this case, SBU applied for an amendment application with the Commission, and Sunrise objected and requested a hearing. We find that we still have jurisdiction over SBU's application regardless of Sunrise's installation of service lines.

Section 367.045(5)(a), Florida Statutes, in pertinent part, lists the criteria the Commission considers when amending certificated areas for service:

The 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 find that duplication of service is a major factor for us to consider in determining whether SBU's application should be granted. There is a possibility of irreparable harm to SBU if Sunrise installs its lines. However, we have not yet determined whether Sunrise will provide adequate service or not, in accordance with Section 367.045(5)(a), Florida Statutes. We will not be able to make that determination until the April 1996 hearing. At the hearing, we will also analyze the ability or inability of the applicant to provide service, the need or lack of need for service in the area, and the existence or nonexistence of service from other sources within geographical proximity to the area that the applicant seeks to delete or add.

The possibility does exist that SBU may be irreparably harmed by Sunrise's action. However, until we can weigh all of the evidence and all of the informational determinations in this docket, it is not certain which party will prevail.

Furthermore, we find that we do not have authority to prevent Sunrise, or any other municipality, from installing pipes in the ground, See Southern Gulf. Therefore, we cannot issue an order in the present case to enjoin Sunrise, or secure such an order under section 367.121(1)(j), Florida Statutes, from Circuit Court. Sunrise's argument that SBU's amendment should be denied, is premature and one to be voiced at the April hearing. Based upon

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the foregoing, we hereby deny SBU's Motion for Preservation of Jurisdiction.

SBU's Motion to Expedite Hearing

SBU requests that in the event the Commission does not issue an order, either on its own or through the Circuit Court, to prevent Sunrise from installing service lines, that the Commission should expedite the April 8 - 9, 1996 service hearings.

We reserved two days for the hearing given the complexities involved with this case. We attempted to set earlier hearing dates, but earlier dates are not available on the Commission calendar. Therefore, we hereby deny SBU's Motion to Expedite Hearing. This docket shall remain open pending the disposition of the April 8 - 9, 1996, formal 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 Motion for Preservation of Jurisdiction, or in the Alternative, Motion to Expedite Hearing is hereby granted. It is further

ORDERED that South Broward Utility, Inc.'s Motion for Preservation of Jurisdiction, or in the Alternative, Motion for Expedited Hearing is hereby denied. It is further

ORDERED that the docket shall remain open pending the disposition of the April 8 - 9, 1996, formal hearing.

By ORDER of the Florida Public Service Commission, this 26th day of March, 1996.



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.

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.