

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for) DOCKET NO. 951419-SU
amendment of Certificate No.) ORDER NO. PSC-96-0674-PHO-SU
379-S in Seminole County by) ISSUED: May 22, 1996
Alafaya Utilities, Inc.)
_____)

Pursuant to Notice, a Prehearing Conference was held on May 17, 1996, in Tallahassee, Florida, before Commissioner J. Terry Deason, as Prehearing Officer.

APPEARANCES:

MARTIN S. FRIEDMAN, ESQUIRE, F. MARSHALL DETERDING, ESQUIRE, ROSE, SUNDSTROM & BENTLEY, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301
On behalf of Alafaya Utilities, Inc.

MARK K. LOGAN, ESQUIRE, PAUL R. BRADSHAW, ESQUIRE, BRYANT, MILLER AND OLIVE, P.A., 201 South Monroe Street, Suite 500, Tallahassee, Florida 32301 and WILLIAM L. COLBERT, ESQUIRE, STENSTROM, MCINTOSH, JULIAN, COLBERT, WHIGHAM & SIMMONS, P.A., Post Office Box 4848, Suite 22 - Sunbank Building, Sanford, Florida 32772-4848
On behalf of the City of Oviedo.

BOBBIE L. REYES, ESQUIRE, LILA A. JABER, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0863
On behalf of the Commission Staff.

PREHEARING ORDER

I. CASE BACKGROUND

Alafaya Utilities, Inc. (Alafaya or Utility) is a Class A utility providing wastewater service in Seminole County. The annual report for 1994 shows that the utility's annual operating revenue for the wastewater system is \$1,225,949. The utility recorded a net operating income of \$151,770 for the wastewater system.

On November 16, 1995, pursuant to Section 367.045, Florida Statutes, the utility applied for an amendment of its wastewater Certificate No. 379-S to add additional territory in Seminole County, in Docket No. 951419-SU. On February 7, 1996, the utility filed an amendment to its Application for Amendment of Certificate

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No. 379-S, which included accurate legal descriptions and maps of the proposed territory to be added, an affidavit of notice of amendment, and proposed revisions to the utility's tariff. The proposed additional territory is adjacent to the utility's existing territory in Seminole County. The utility's proposed amendment is in a critical use area as defined by the St. John's River Water Management District.

On December 8, 1995, the City of Oviedo (Oviedo or City) filed with the Commission Oviedo's Objection to the Application for Amendment of Wastewater Certificate No. 379-S in Seminole County by Alafaya Utilities, Inc. (Oviedo's Objection).

On January 16, 1996, Alafaya Utilities, Inc. filed a complaint for declaratory and injunctive relief in the Circuit Court in and for Seminole County in Case No. 96-0115-CA-16-B. Alafaya Utilities, Inc. petitioned the court to secure an order declaring that the City of Oviedo shall not provide wastewater or reuse service to the territory adjacent to Alafaya's certificated territory, prohibiting the City of Oviedo from taking such actions, and requiring the City of Oviedo to dismiss its objection filed in Docket No. 951419-SU.

On February 20, 1996, the City of Oviedo filed a Motion to Abate, or in the Alternative, Stay Counts I and II of Alafaya's Complaint pending the outcome of the Commission's action in this docket. The City also filed a Motion to Dismiss Count III of Alafaya's complaint. Those Motions are scheduled for hearing on June 14, 1996.

As a result of the objection raised by the City of Oviedo, this matter has been scheduled for a May 28-29, 1996 administrative hearing.

II. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the

information within the time periods set forth in Section 367.156, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 367.156, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 367.156, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.

- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

III. POST-HEARING PROCEDURES

Rule 25-22.056(3), Florida Administrative Code, requires each party to file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. The rule also provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 60 pages, and shall be filed at the same time. The prehearing officer may modify the page limit for good cause shown. Please see Rule 25-22.056, Florida Administrative Code, for other requirements pertaining to post-hearing filings.

IV. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

V. ORDER OF WITNESSES

<u>Witness</u>	<u>Appearing For</u>	<u>Issues #</u>
<u>Direct</u>		
Carl J. Wenz	Alafaya	1-9
Gerald L. Chancellor	Alafaya	1-3, 6-9
J. Curt Wilkinson	Alafaya	1
V. Eugene Williford	Oviedo	1, 4-9
Ken Hooper	Oviedo	1-2, 4, 6-9
Thomas Pelham	Oviedo	5, 8, 9
<u>Rebuttal</u>		
Carl Wenz	Alafaya	1-9
Gerald Chancellor	Alafaya	1-3, 6-9
Ken Hooper	Oviedo	1-2, 4, 6-9
Thomas Pelham	Oviedo	5, 8, 9

VI. BASIC POSITIONS

ALAFAYA: There is a need for wastewater service within the territory into which Alafaya Utilities, Inc. proposes to extend, and that it has the technical, managerial and financial ability to provide such wastewater service and can do so at a less cost than the City of Oviedo; thus the granting of Alafaya Utilities, Inc.'s application is in the public interest.

OVIEDO: Alafaya's application for additional territory in the City of Oviedo should be denied. Alafaya does not have the wastewater treatment or disposal capacity to serve the expanded territory it seeks. Furthermore, the City has already taken steps to serve the area in question; therefore, there is no need for Alafaya to serve. Granting Alafaya's application would be in competition with, or duplication of, the City's proposed system which is adequate to meet the needs of the city's service area.

Alafaya's application should also be denied because it is inconsistent with the lawfully adopted Oviedo Comprehensive Plan. Granting the application would force the City to deny any development order related to the provision of wastewater service in the expanded area by Alafaya as such service would be inconsistent with the City's Comprehensive Plan in direct contravention of Chapter 163, Florida Statutes (1995). Alafaya had the opportunity to object to that plan when it was proposed for adoption in 1990. Having failed to object then, Alafaya should not be allowed to avoid the State of Florida's important planning process simply by filing a reactionary application for service expansion pursuant to Chapter 367, Florida Statutes (1995).

STAFF: The information gathered through discovery and prefiled testimony indicates, at this point, that the utility has the financial and technical ability to serve the territory. The final determination of whether it is in the public interest to grant the amendment cannot be made until the evidence presented at the hearing is analyzed. Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VII. ISSUES AND POSITIONS

ISSUE 1: **What is the need for service in the disputed territory and when will service be required?**

ALAFAYA: There is a reasonable need for wastewater service to the proposed territory in the reasonably foreseeable future. (Wenz, Chancellor, Wilkinson)

OVIEDO: There is no need for service in the territory by Alafaya Utilities, Inc. The City has long been engaged in the methodical planning for the provision of wastewater service to this area and has entered into agreements with developers in the region to effectuate the provision of such service. Development is expected to begin in the area in late 1996 to early 1997. The City's wastewater treatment facility is expected to be complete by September of 1997. Capacity from Seminole County is available immediately in some areas and within twelve months for certain areas east of Econlockhatchee River. (Williford, Hooper)

STAFF: No position pending further development of the record.

ISSUE 2: Does Alafaya Utilities, Inc. have the wastewater treatment and disposal capacity to serve its existing territory at buildout, as well as the disputed territory? If not, will it have sufficient capacity when the need in the proposed territory arises?

ALAFAYA: Alafaya Utilities, Inc. has sufficient treatment capacity to serve its existing territory at buildout, as well as the disputed territory. To the extent additional disposal capacity is required, the utility has the ability to construct that as needed. (Wenz, Chancellor)

OVIEDO: No. (Hooper)

STAFF: No position pending further development of the record.

ISSUE 3: Does Alafaya Utilities, Inc. have the technical and financial ability to serve the disputed territory?

ALAFAYA: Yes. (Wenz, Chancellor)

OVIEDO: It is not known at this time whether Alafaya has the technical and financial ability to serve the disputed territory.

STAFF: Yes, it appears that Alafaya has the technical and financial ability to serve the disputed territory.

ISSUE 4: Can the City of Oviedo provide service to the disputed territory in a timely manner?

ALAFAYA: No. The City's proposal to serve the area has been rejected by the Department of Community Affairs, and its ability to construct a sewage treatment plant is highly questionable. (Wenz)

OVIEDO: Yes. (Hooper, Williford)

STAFF: No position pending further development of the record.

ISSUE 5: Would service to the disputed territory by Alafaya Utilities, Inc. be inconsistent with the local comprehensive plan of the City of Oviedo, and, if so, what consideration should the Commission give to the comprehensive plan in evaluating the application of Alafaya?

ALAFAYA: Alafaya's service to the proposed service territory is not in conflict with the comprehensive plan. Even if so, the comprehensive plan would be contrary to Section 367, Florida Statutes, and would be unconstitutional. (Wenz)

OVIEDO: Yes. The Commission, in considering the City's lawfully adopted comprehensive plan, should give the document great deference. Since expansion of Alafaya's territory is in direct contravention of that plan and since Alafaya failed to object to the plan at the time of its adoption, the application should be denied. (Williford, Pelham)

STAFF: No position pending further development of the record.

ISSUE 6: For purposes of this proceeding, what constitutes competition or duplication of service?

ALAFAYA: Because all on-site sewage collection facilities will be constructed by the developers of those properties, competition or duplication in this proceeding is created by proposed construction of new treatment, disposal and reuse facilities, reuse transport facilities, or off-site effluent disposal facilities which would be redundant to those currently available to provide service to the proposed territory. Reservation of additional bulk service capacity in existing facilities of others would also constitute such duplication or competition. (Wenz, Chancellor).

OVIEDO: Duplication exists when an entity has taken good faith steps to provide service to a particular area consistent with the need for service in that area.

STAFF: In the context of Section 367.045, Florida Statutes, this issue cannot be fully answered until the factual evidence is heard. What constitutes competition or duplication in the context of Section 367.045, Florida Statutes, is a determination which must be made on a case by case basis.

ISSUE 7: Would service by either party in the proposed territory be in competition with or constitute a duplication of any system or portion of a system?

ALAFAYA: Service by the City would constitute competition with and duplication of Alafaya's system. Service by Alafaya would not constitute competition with or duplication of the City's system. (Wenz, Chancellor)

OVIEDO: Service by Alafaya would constitute competition with and duplication of the City's system. Service by the City would not constitute competition with or duplication of Alafaya's system. (Williford, Hooper)

STAFF: No position pending further development of the record.

ISSUE 8: If the service to the territory by either party would result in an extension of a system which would be in competition with or a duplication of any system or a portion of any system, are those systems inadequate to meet the reasonable needs of the public, or are the persons operating those systems unable, refusing or neglecting to provide reasonably adequate service?

ALAFAYA: As noted above, the proposed extension is not in competition with or duplication of any system. To the extent the Commission determines such competition or duplication exists, the City's system is inadequate to meet the reasonable needs of the public and the City refuses to provide or neglects to provide reasonably adequate service. Alafaya's system is adequate to meet the reasonable needs of the public, and Alafaya agrees to provide reasonably adequate service. (Wenz, Chancellor)

OVIEDO: No. The City's proposed system is adequate whether served by a new treatment facility or by a capacity purchase from the Seminole County. (Williford, Hooper)

STAFF: No position pending further development of the record.

ISSUE 9: Is it in the public interest to grant the application of Alafaya Utilities, Inc. for extension of its certificated territory?

ALAFAYA: Yes. (Wenz, Chancellor)

OVIEDO: No. (Williford, Hooper, Pelham)

STAFF: No position pending further development of the record.

ISSUE 10: Whether, as a pre-requisite to providing service to the area sought in Alafaya's application, Alafaya is required to obtain the express consent of the City of Oviedo. (Legal Issue added at request of the City of Oviedo).

ALAFAYA: No. No advance permission of the City of Oviedo is required by law nor is such in the public interest.

OVIEDO: No.

STAFF: As this issue is based on an application of Section 180.06, Florida Statutes, it has no bearing on and is irrelevant to the Commission's consideration of Alafaya's application for extension of its service area. Pursuant to Section 367.011(4), Florida Statutes, Chapter 367, Florida Statutes, supersedes all other laws on the same subject, unless it is superseded by express reference in another statute. No section of Chapter 180, Florida Statutes, expressly supersedes any section of Chapter 367, Florida Statutes. Furthermore, the Commission does not administer Chapter 180, Florida Statutes.

VIII. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Gerald L. Chancellor	Alafaya	_____ (GLC-1)	C. V. for Gerald L. Chancellor, P.E.
Gerald L. Chancellor	Alafaya	_____ (GLC-2)	Map of proposed and existing service area of Alafaya Utilities, Inc. and service area of City of Oviedo
Carl J. Wenz	Alafaya	_____ (CJW-1)	Application for Amendment of Certificate as amended
Carl J. Wenz	Alafaya	_____ (CJW-2)	Map of proposed certificate extension
Carl J. Wenz	Alafaya	_____ (CJW-3)	Response of FL Dept. of Community Affairs to City of Oviedo's Comprehensive Plan amendments (composite exhibit)
V. Eugene Williford	Oviedo	_____ (VEW-1)	City of Oviedo Engineering Report Wastewater Master Plan

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
V. Eugene Williford	Oviedo	<u> </u> (VEW-2)	City of Oviedo Ordinance No. 888
V. Eugene Williford	Oviedo	<u> </u> (VEW-3)	Map of City of O v i e d o Proposed Reuse Area
V. Eugene Williford	Oviedo	<u> </u> (VEW-4)	Letter from Winter Park H o l d i n g C o m p a n y committing all 2 4 0 residential units of WaverLee Woods to the City of Oviedo Sewer Facility
V. Eugene Williford	Oviedo	<u> </u> (VEW-5)	Letter From VEW to John Williams of F P S C to f o r m a l l y oppose any expansion of A l a f a y a Utilities in and around the City of Oviedo
V. Eugene Williford	Oviedo	<u> </u> (VEW-6)	0 3 / 0 6 / 9 5 Memorandum of Intent between the City of Oviedo and A l a f a y a Utilities
V. Eugene Williford	Oviedo	<u> </u> (VEW-7)	Comprehensive Plan of the City of Oviedo

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
V. Eugene Williford	Oviedo	_____ (VEW-8)	Letter of support for the City's Reuse Plan from Richland Properties
Kenneth Hooper	Oviedo	_____ (KRH-1)	Resume
<u>Rebuttal</u>			
Carl J. Wenz	Alafaya	_____ (CJW-1)	Response of Florida Department of Community Affairs to City of Oviedo's Comprehensive Plan Amendments (composite exhibit)

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

IX. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

X. PENDING MOTIONS

City of Oviedo's Motion for Summary Judgment and Request for Oral Argument.

XI. RULINGS

1. Alafaya's Utility, Inc.'s Motion to Strike Prefiled Rebuttal Testimony of City of Oviedo was denied.

2. Alafaya's Motion to Allow Testimony without Prefiled Testimony was granted only to the extent that Mr. Wilkinson may be deposed and his deposition may be filed as prefiled testimony by the close of business on Thursday, May 23, 1996.
3. Oviedo's Motion to Allow Testimony without Prefiled Testimony was denied.
4. Oviedo's Motion to Add Legal Issue (Issue 10) was granted.

It is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 22nd day of May, 1996.



J. TERRY DEASON, Commissioner and
Prehearing Officer

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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.