

FLORIDA PUBLIC SERVICE COMMISSION  
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Tallahassee, Florida 32399-0850

M E M O R A N D U M

DECEMBER 5, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)  
FROM: DIVISION OF LEGAL SERVICES (VACCARO) *gv pb com OJA*  
DIVISION OF WATER & WASTEWATER (BRADY) *JW*  
RE: DOCKET NO. 960695-WS - JOINT APPLICATION FOR APPROVAL OF  
TRANSFER OF CERTIFICATES NOS. 359-W AND 290-S AND UTILITY  
FACILITIES FROM SOUTH BROWARD UTILITY, INC. TO CLAY  
UTILITY COMPANY  
COUNTY: BROWARD  
AGENDA: DECEMBER 17, 1996 - REGULAR AGENDA - INTERESTED PERSONS  
MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\960695WS.RCM

CASE BACKGROUND

South Broward Utility, Inc., (SBU or utility) is a Class B utility which provides service to approximately 2,446 water and 2,023 wastewater customers in Broward County. The utility's 1995 income statement shows combined annual revenues of \$1,836,000 and a combined operating income of \$527,000. SBU was granted Certificates Nos. 359-W and 290-S by Order No. 9806 in February 18, 1981, with the first customers connected in 1986. SBU is currently 100% owned and operated by the Hugh F. Culverhouse Trust.

Clay Utility Company (Clay or utility) was a Class A water and wastewater utility in Clay County which was also owned 50% by the Hugh F. Culverhouse Trust. On June 3, 1996, Clay and SBU filed a joint application for transfer of Water Certificate No. 359-W and Wastewater Certificate No. 290-S from SBU to Clay. On July 3, 1996, staff notified the applicants of deficiencies in the application which were corrected on August 28, 1996.

On July 3, 1996, the City of Sunrise (Sunrise or city) filed an Objection to Clay Utility Company's and South Broward Utility, Inc.'s Joint Application for Transfer of South Broward Utility's Water and Wastewater Certificates Nos. 359-W and 290-S, and Utilities Facilities. On August 5, 1996, SBU and Clay filed a Motion to Dismiss or Strike City of Sunrise's Objection to Clay

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Utility Company's and South Broward Utility, Inc.'s Joint Application for Transfer of South Broward Utility's Water Certificate No. 359-W and Wastewater Certificate No. 290-S, and Utilities Facilities.

On August 12, 1996, Sunrise filed a response to SBU's and Clay's motion to dismiss or strike. This recommendation addresses SBU's and Clay's motion to dismiss or strike Sunrise's objection.

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### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission grant SBU's and Clay's Motion to Dismiss or Strike City of Sunrise's Objection to Clay Utility Company's and South Broward Utility, Inc.'s Joint Application for Transfer of South Broward Utility's Water Certificate No. 359-W and Wastewater Certificate No. 290-S, and Utilities Facilities?

**RECOMMENDATION:** Yes. The Commission should grant SBU's and Clay's motion to dismiss Sunrise's objection to Clay's and SBU's joint application for transfer. (VACCARO, BRADY)

**ANALYSIS:** As stated in the case background, on July 3, 1996, Sunrise filed its notice of objection in this docket. In support thereof, Sunrise sets forth the following grounds:

1. Sunrise is a party substantially affected by SBU's and Clay's joint application for transfer;
2. SBU has an application before the Commission in Docket No. 941121-WS for an amendment of its certificates to add additional territory in Broward County. Sunrise objected to the amendment, and the Commission held a Section 120.57, Florida Statutes hearing on SBU's application on April 8-9, 1996;
3. Two of the issues before the Commission were SBU's financial and technical ability to serve the additional territory;
4. Pursuant to SBU's and Clay's joint application for transfer, Clay is the utility now seeking to serve additional territory; and
5. The Commission must now determine and Clay must show that it has the financial and technical ability to serve the additional territory. If the Commission is inclined to grant SBU's and Clay's joint application of transfer, it must determine if Clay is able to serve the additional territory because if Clay cannot serve, the Commission must deny the amendment application.

On August 5, 1996, SBU and Clay filed a motion to dismiss or strike Sunrise's objection. As grounds for its motion, SBU and Clay state the following:

1. Under Section 367.071(1), Florida Statutes, the test for whether the Commission should grant an application for

transfer is: a) whether the proposed transfer is in the public interest; and b) whether the transferee will fulfill the commitments, obligations and representations of the utility. Sunrise inappropriately attempts to add an additional test requiring Clay to show that it has the financial and technical ability to serve the territory sought by SBU in its amendment application. Sunrise's additional test is not the test for a transfer application and, therefore, is irrelevant or immaterial in this docket.

2. In its objection to the transfer application, Sunrise did not request a Section 120.57, Florida Statutes hearing as required by Sections 367.045(4) and 367.071(4), Florida Statutes. Sunrise's objection inappropriately requested nothing other than that the Commission deny SBU's amendment application if it determines that Clay cannot serve the territory SBU seeks in its amendment application.
3. Rule 25-30.031, Florida Administrative Code, provides that objections to transfer applications must state the grounds for the objection with particularity. Sunrise set forth no grounds for objecting to the transfer and did not even request that the transfer be denied.
4. Sunrise's objection does not include an explanation of how Sunrise's substantial interests will be or are affected by the Commission's determination of this transfer docket as required by Rule 25-22.036(7)(a)(2), Florida Administrative Code. Sunrise's interests are not being substantially affected by the transfer of SBU's assets to Clay nor does Sunrise have any substantial interests subject to determination in this transfer docket.
5. Rule 25-22.036(7)(a)(4), Florida Administrative Code, requires that Sunrise's objection include a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle Sunrise to relief. Sunrise's objection does not demonstrate that it is entitled to participate in this transfer docket as a matter of statutory right or pursuant to Commission rule, nor does it state a cause of action or set forth any ground for denying the transfer application.

6. SBU and Clay make assertions regarding the merits of the transfer docket which staff finds inappropriate to be considered by the Commission in this recommendation.

On August 12, 1996, Sunrise filed a timely response to SBU's and Clay's motion. In its response Sunrise asserts that the issue of Clay's financial and technical ability to serve the territory sought in SBU's amendment application is directly responsive to whether Clay will fulfill the commitments, obligations and representations of the utility as required under Section 367.071(1), Florida Statutes. Sunrise also asserts that it is an interested party because the territory SBU seeks in its amendment application which would subsequently be transferred to Clay is inside Sunrise's established water and wastewater utility service area, and Sunrise is already providing service inside that territory. Finally, Sunrise asserts that Clay and SBU argue the merits of their transfer application and Clay's ability to serve the amendment territory in a motion to dismiss or strike, contrary to the Florida Rules of Civil Procedure and the Commission's practice and procedure.

When addressing a motion to dismiss, it is first appropriate to examine if, assuming that all allegations in the objection are facially valid, the objection fails to state a cause of action for which relief can be granted. Staff believes that even assuming that all allegations in the city's objection are facially valid, Sunrise seeks inappropriate relief. The Commission cannot grant Sunrise's request to deny the amendment proceeding in Docket No. 941121-WS, in the present transfer of service addressed in its Sunrise's concern over duplication of service which the Commission addresses in amendment applications, not transfer docket. Therefore, staff recommends that the Commission grant SBU's and Clay's motion to dismiss.

Although staff believes that the foregoing analysis provides sufficient justification for dismissing Sunrise's objection, there are other reasons for dismissal. Staff has included the following analysis in the event that the Commission should require additional grounds for dismissal of Sunrise's objection.

#### Substantial Interests

Sunrise has failed to demonstrate a substantial interest in the outcome of the transfer application. Sunrise's only ground for objecting to the transfer is that the Commission must determine and Clay must show its financial and technical ability to serve the territory sought by SBU in the amendment docket.

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Section 367.071(1), Florida Statutes, requires a showing that Clay can fulfill the commitments, obligations and representations of SBU. Rule 25-30.037(2)(j), Florida Administrative Code, requires a showing of Clay's experience in water and wastewater utility operations and its financial ability to provide service. Therefore, staff agrees that Clay's financial and technical ability are at issue in the transfer docket (although staff believes that these issues relate to SBU's entire service area, not just the specific area in the transfer docket).

However, Sunrise's objection does not challenge Clay's financial and technical ability, nor does it set forth how a determination of such will affect the City. Sunrise merely sets forth an issue which the Commission must determine regardless of Sunrise's objection.

Further, Florida courts have set forth a specific standard for determining substantial interests. In Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), the Court developed a two-prong test: before an individual can be considered to have a substantial interest in the outcome of a proceeding, he or she must demonstrate 1) injury in fact which is of sufficient immediacy to warrant a formal hearing, and 2) the injury is of a type which the proceeding is designed to protect. Sunrise's objection does not satisfy either prong.

As stated earlier, Sunrise's objection made no supporting statements regarding its substantial interest. Sunrise did, however, state in its response to SBU's and Clay's motion that the territory sought by SBU in the amendment application would subsequently be served by Clay if the transfer is approved. Sunrise states that the city is already serving that territory.

By Order No. PSC-95-0417-FOF-WS, issued March 27, 1995, in Docket No. 940850-WS, the Commission granted Colonies Water Company's (CWC) motion to dismiss an objection of the transfer of CWC to MHC-DeAnza Financing Limited Partnership d/b/a Colonies Water Company, filed by the City of Margate (Margate) and Colonies of Margate Homeowners Association. One of Margate's grounds for objection was its allegation that CWC was in violation of Margate's service area.

Regarding the first prong of the Agrico test the Commission stated:

In order to meet the Agrico test, a petitioner must demonstrate that it will suffer injury in fact which is of sufficient immediacy to

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entitle it to an administrative proceeding and that the injury is of the type which the proceeding is designed to protect. Even assuming that this Commission approves the transfer, the objectors will be in the same position as they were before the transfer. Thus, they have not demonstrated that they will suffer injury in fact.

Such is the case in the present docket. Sunrise will be in the same position if the transfer is approved as it will be upon completion of Docket No. 941121-WS. By Order No. PSC-96-1137-FOF-WS, issued September 10, 1996, the Commission granted SBU's amendment application. Sunrise filed a motion for reconsideration of the order. At the November 26, 1996 Agenda Conference, the Commission denied Sunrise's motion for reconsideration. Therefore, if the Commission approves the transfer in this docket, the only resulting change is that Clay will be authorized to provide service, not SBU. As for the territory Sunrise is already serving, staff notes that the service currently being provided by Sunrise is emergency service to a small portion of the disputed territory, which the Commission acknowledged in the amendment application order.

Regarding the second prong of the Agrico test the Commission stated:

Nevertheless, to the extent that there may be any duplication, which the City has not demonstrated, under Section 367.045(5)(a), Florida Statutes:

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. (Emphasis added.)

This case does not concern an original certificate for a proposed system, nor an amendment for the extension of an existing

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system. Accordingly, the City's concerns are unfounded.

Likewise, the present docket does not concern an original certificate for a proposed system, nor an amendment for the extension of an existing system. Therefore, Sunrise's concerns about duplication of service are unfounded in the present docket. Sunrise's substantial interest, which included the issue of duplication of service, was established and resolved in Docket No. 941121-WS.

In summary, Sunrise has not met the two prong test of Agrico because Sunrise has failed to demonstrate that the transfer of SBU to Clay will cause Sunrise to suffer an injury in fact and that the potential injury resulting from Docket No. 941121-WS is not of a type which this transfer proceeding is designed to protect.

#### Compliance with Rule and Statutory Requirements

Sunrise's objection does not meet the requirements set forth in the Commission's rules. Rules 25-22.036(7)(a)(2) and (4), Florida Administrative Code, require that a party initiating formal proceedings (i) provide an explanation of how its substantial interests will be or are affected by the proceeding and (ii) provide a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle it to relief.

Sunrise's objection sets forth no support for its statement that it is a party substantially affected by the transfer application. Additionally, Sunrise has set forth no statutory provision or Commission rule which entitles it to relief in this docket.

Further, SBU alleges that Sunrise has not requested a Section 120.57, Florida Statutes, hearing pursuant to Sections 367.045(4), and 367.071(4), Florida Statutes, nor has Sunrise even requested that the transfer even be denied. Arguably, the statute can be read as not requiring that a hearing be requested. Regardless, all that Sunrise requests is that if it is determined that Clay cannot serve the territory sought in SBU's amendment application, that the Commission deny SBU's amendment application.

Based on the foregoing, staff recommends that the Commission grant SBU's and Clay's Motion to Dismiss City of Sunrise's Objection to Clay Utility Company's and South Broward Utility's Inc.'s Joint Application for Transfer of South Broward Utility's Water Certificate No. 359-W and Wastewater Certificate No. 290-S, and Utilities Facilities.



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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open pending the Commission's final decision on Clay's and SBU's joint application for transfer. (VACCARO, BRADY)

**ANALYSIS:** The Commission is scheduled to make a final decision on Clay's and SBU's joint application for transfer on February 4, 1997. This docket should remain open pending that decision.