



Public Service Commission

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SEP 24 AM 11:36
REPORTING AND

DATE: SEPTEMBER 24, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (REYES) *BR*
DIVISION OF WATER AND WASTEWATER (REDEMANN) *RR*

RE: DOCKET NO. 970657-WS - APPLICATION FOR CERTIFICATES TO OPERATE A WATER AND WASTEWATER UTILITY IN CHARLOTTE AND DESOTO COUNTIES BY LAKE SUZY UTILITIES, INC.

DOCKET NO. 980261-WS - APPLICATION FOR AMENDMENT OF CERTIFICATES NOS. 570-W AND 496-S TO ADD TERRITORY IN CHARLOTTE COUNTY BY FLORIDA WATER SERVICES CORPORATION.

AGENDA: OCTOBER 6, 1998 - REGULAR AGENDA - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\970657.RCM

CASE BACKGROUND

On March 4, 1998, Florida Water Services Corporation (FWSC) filed an Objection to Application(s) for Territory Amendment & Original Certificates by Lake Suzy Utilities, Inc. and Petition for Leave to Intervene in this docket. On March 20, 1998, Lake Suzy Utilities, Inc. (Lake Suzy) filed a Response to Objection of Florida Water Services Corporation and Florida Water Services Corporation's Petition to Intervene. On April 13, 1998, FWSC filed a Motion to Consolidate Dockets Nos. 970657-WS and 980261-WS (Application for amendment of Certificates Nos. 570-W and 396-S in Charlotte County by FWSC). On April 20 and 28, 1998, Lake Suzy and Haus Development, Inc. (Haus Development) respectively filed responses to FWSC's Motion to Consolidate.

By Order No. PSC-98-1089-PCO-WS, issued August 11, 1998, the Commission consolidated Dockets Nos. 970657-WS and 980261-WS and set the matter for hearing. In light of this decision, the

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Commission also granted intervention to both Charlotte and DeSoto Counties upon oral motion at the July 21, 1998 Agenda Conference. Subsequently, on August 17, 1998, DeSoto County filed notice of its withdrawal of its objection to the application of Lake Suzy and notice of voluntary dismissal of its petition.

On August 13, 1998, Lake Suzy filed a Motion for Partial Summary Disposition, and on August 25, 1998, FWSC filed its Response in Opposition to Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition. Finally, on August 31, 1998, Charlotte County filed a Memorandum and Response to Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition.

This recommendation addresses DeSoto County's withdrawal of its objection and Lake Suzy's motion for partial summary disposition, as well as the parties' responses to that motion.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission acknowledge the withdrawal of DeSoto County's intervention?

RECOMMENDATION: Yes, the Commission should acknowledge the withdrawal of DeSoto County's intervention and participation in this proceeding. (REYES)

STAFF ANALYSIS: As stated earlier, on October 22, 1997, DeSoto County timely filed an objection to Lake Suzy's application for original certificates. However, on January 13, 1998, DeSoto County filed a withdrawal of its objection and a notice of voluntary dismissal.

By Order No. PSC-98-1089-PCO-WS, the Commission consolidated Dockets Nos. 970657-WS and 980261-WS and set the matter for hearing. In light of this decision, DeSoto County expressed a desire to rescind its previous withdrawal of its objection and notice of voluntary dismissal and also made an oral motion for intervention which the Commission granted at the July 21, 1998 Agenda Conference. Having granted DeSoto County intervention, the Commission determined that it was unnecessary for it to address the County's desire to rescind its previous withdrawal.

Subsequently, on August 17, 1998, DeSoto County filed a pleading styled "Withdrawal of Objection of the Board of County Commissioners of DeSoto County, Florida, to the Application of Lake Suzy Utilities, Inc. and Notice of Voluntary Dismissal." In its pleading, the County states that it withdraws its objection to Lake Suzy's application and gives notice of voluntary dismissal of its petition. Staff has subsequently had a telephone conversation with counsel for the County who represented that DeSoto County desires to withdraw its intervention in this proceeding. Accordingly, staff recommends that the Commission should acknowledge the withdrawal of DeSoto County's intervention and participation in this proceeding.

ISSUE 2: Should the Commission grant Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition?

RECOMMENDATION: No. Material facts remain at issue. Thus, the Motion for Partial Summary Disposition on the issue of FWSC's application to provide water service to the Links subdivision should be denied. Because staff is recommending denial of Lake Suzy's motion, there is no basis for an award of costs or attorneys fees at this time. (REYES)

STAFF ANALYSIS: On August 13, 1998, Lake Suzy filed a Motion for Partial Summary Disposition. On August 25, 1998, FWSC filed a response in opposition to Lake Suzy's motion, and on August 31, 1998, Charlotte County also filed a memorandum and response to Lake Suzy's motion.

Lake Suzy's Motion for Partial Summary Disposition

Lake Suzy asserts in its motion that as a matter of law, and with no factual dispute, FWSC cannot legally provide water service to the Links subdivision. In support of this assertion, Lake Suzy alleges that the water and wastewater systems operated by Charlotte County and FWSC in Charlotte County were previously owned by General Development Utilities, Inc. and Deep Creek Utilities, Inc., respectively. As such FWSC and Charlotte County are assignees of the rights of Deep Creek Utilities, Inc. and General Development Utilities, Inc. as set forth in the Substitute Water and Sewer Agreement, dated October 7, 1988 (Agreement), and as subsequently amended by an Addendum Agreement, dated April 5, 1990 (Addendum).

Lake Suzy continues by stating that FWSC obtains all of its water for its system in Charlotte County pursuant to the Agreement and Addendum. Lake Suzy argues that FWSC's reservations of capacity in the Agreement are only to serve the property described in Exhibits "A" and "C" of the Agreement, which does not include the Links subdivision.

The Addendum extends the property to which FWSC may provide wastewater service pursuant to the Agreement. Lake Suzy argues that the necessity for the Addendum makes it clear that FWSC may not provide water service to the Links subdivision without a further addendum to the Agreement. Since Charlotte County has already entered into an agreement with Lake Suzy to provide service to the Links subdivision, it cannot amend the Agreement to allow FWSC to serve the Links subdivision. Thus, Lake Suzy argues that FWSC cannot obtain the water necessary to serve the Links subdivision and will not have the ability to serve. As such, its

application to provide service to this subdivision must be denied, and it is without standing to object to Lake Suzy providing service to the area.

Finally Lake Suzy alleges that "FWSC with its tens of millions of dollars in revenue and a team of in-house attorneys has been able to invoke a proceeding - the unprecedented consolidation of a late-filed application with an earlier filed application - which will require Lake Suzy to either give in to FWSC's bullying or expend over 20% of its gross revenue in asserting its legal rights." Lake Suzy argues that in light of the clear contractual prohibition against FWSC serving the Links subdivision, sanctions should be imposed against FWSC for its frivolous actions in the nature of the reimbursement of Lake Suzy's legal fees.

FWSC's Response

FWSC argues in its response that Lake Suzy's motion is based on several flawed premises and fails to meet the applicable legal standards to warrant the relief requested. FWSC argues that it is not clear from the Agreement that FWSC may only serve the property identified therein. In addition, the Agreement contains no such express restriction. Instead, FWSC alleges that the agreement is a reservation of capacity for a minimum number of connections. FWSC alleges that it has not yet utilized all of the connections and, therefore, can provide water service to the Links subdivision and other properties.

In addition, FWSC asserts that it is engaged in efforts to obtain water supply from sources other than Charlotte County pursuant to the Agreement, such as from DeSoto County, which may be used to provide service to the Links subdivision. FWSC argues that the foregoing establishes that there are indeed disputed issues of material fact as to FWSC's ability to provide service to the disputed area.

Finally, FWSC states that because denial of Lake Suzy's motion is required as discussed above, there is no basis for an award of costs. Even if Lake Suzy's motion is granted, FWSC alleges that Lake Suzy fails to establish FWSC's application was made for an improper purpose as defined by Section 120.595(1)(e)1., Florida Statutes. FWSC alleges that it had a reasonably clear legal justification for its filing, as established by the facts set forth above.

Charlotte County's Response

Charlotte County alleges that the area in question is wholly within Charlotte County and wholly within the boundaries of Charlotte County Utilities (CCU), a publicly owned water and wastewater system owned and operated by Charlotte County pursuant to its powers as a home rule county. Charlotte County also argues that CCU is a public service entity with a prior, earlier acquired legal right to provide service to the area in question. Further, Charlotte County alleges that it is factually undisputed that CCU's water and wastewater facilities are in close proximity and CCU has the present ability to properly and efficiently provide service to the area in question.

As such, CCU believes it has the exclusive legal right to provide service to the area in question without interference from any entity which may claim or attempt to acquire a subsequent right. Accordingly, Charlotte County requests that the Commission enter an order acknowledging Charlotte County's right and present ability to provide service to the area in question.

Staff Discussion

Pursuant to Rule 28-106.204, Florida Administrative Code, "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact . . . All other parties may, within seven days of service, file a response in opposition" Under Florida law "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought. Green v. CSX Transportation, Inc., 626 So.2d 974 (Fla. 1st DCA 1993). "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So.2d 666 (Fla. 1985). In this case, upon review of all the pleadings and attachments filed by the parties, staff believes that material issues of fact remain, as set forth below, which preclude the granting of summary disposition at this time.

Initially, staff notes that with regards to Charlotte County's memorandum and response, Charlotte County's pleading was filed eighteen days after service of Lake Suzy's motion and, therefore, is untimely. In addition, Charlotte County's pleading does not appear responsive to Lake Suzy's motion in that it does not address FWSC's ability to provide service or more importantly, its understanding of the Agreement given its status as a party to the

Agreement. Instead, it raises other independent legal arguments for dismissing FWSC's application. As such, staff recommends that the County's pleading not be given consideration by the Commission because it is untimely and because it is not responsive to Lake Suzy's motion.

Even if the Commission were to consider Charlotte County's pleading, staff believes that a determination as to whether or not Charlotte County has an earlier acquired legal right to serve would not be dispositive of this matter. Pursuant to Section 367.045, Florida Statutes, the Commission is not precluded from granting the same or a portion of the same territory to a regulated utility so long as the Commission makes the requisite findings. More specifically, the Commission would have to first find that there is a need for service in the area and that the regulated utility has the financial and technical ability to serve. If granting the regulated utility's application would result in duplication of or competition with another utility system or a portion thereof, then the Commission must first make a finding that the 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.

These are all issues which are not addressed by any of the parties' pleadings and which are more appropriately addressed as disputed issues of fact which will be resolved during the hearing process. Finally, the question as to whether the Commission can even rule on Charlotte County's request can be addressed via the parties' briefs in the hearing process. Accordingly, staff believes it would be improper for the Commission to grant the relief sought by the County at this juncture in this proceeding.

With regards to Lake Suzy's motion, "[w]here the determination of the issues of a [dispute] depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment." Palm Beach County v. Trinity Industries, Inc., 661 So.2d 942, 944 (Fla. 4th DCA 1995). While Lake Suzy has alleged that a determination of some of the issues in this case, i.e. FWSC's ability to provide service to the Links subdivision, is governed by the Agreement and, therefore, is a question of law and not fact subject to summary disposition by the Commission, staff believes that FWSC in its response has demonstrated a disputed issue of material fact regarding its ability to provide service by utilizing other possible sources other than the Agreement with Charlotte County.

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As stated earlier, FWSC has alleged that it is engaged in efforts to obtain water supply from sources other than Charlotte County pursuant to the Agreement, such as from DeSoto County or some other source, which it may use to provide service to the Links subdivision. Staff believes this allegation demonstrates the existence of a disputed issue of material fact which precludes the granting of summary disposition. Therefore, summary disposition is improper, and staff recommends that Lake Suzy's motion should be denied.

With regards to Lake Suzy's request for an award of fees and costs, pursuant to Section 120.595(1)(b), Florida Statutes, the final order in a proceeding pursuant to Section 120.57(1), Florida Statutes, shall award reasonable costs and attorney's fees where the nonprevailing adverse party has been determined to have participated in the proceeding for an improper purpose. Because staff is recommending denial of Lake Suzy's motion, there is no basis for an award of costs or attorneys fees at this time.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. If staff's recommendation is approved in Issue 2, this docket should remain open pending final disposition of this case. (REYES)

STAFF ANALYSIS: No. If staff's recommendation is approved in Issue 2, this docket should remain open pending final disposition of this case.