



# Public Service Commission

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RECORDS AND REPORTING

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** OCTOBER 26, 1998

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF LEGAL SERVICES (REYES) *BURTON PRR*  
DIVISION OF WATER AND WASTEWATER (REDEMANN)

**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:** NOVEMBER 3, 1998 - REGULAR AGENDA - PARTIES MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

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

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FPSC-RECORDS/REPORTING

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 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.

At the October 6, 1998 Agenda Conference, the Commission voted, among other things, to acknowledge DeSoto County's withdrawal of its protest. After hearing argument from the parties and upon consideration of staff's recommendation, the Commission also voted to deny Lake Suzy's motion. However, because new arguments were raised by Lake Suzy at the Agenda Conference for which Lake Suzy subsequently furnished supporting documentation, staff conducted further research regarding the rationale behind the Commission's decision. Staff now believes that rationale is in error and the Commission should reconsider its decision with regard to this one issue. The Commission need not reconsider its decision with regard to the acknowledgment of DeSoto County's withdrawal. That decision will be incorporated into the order which will memorialize the Commission's decision upon reconsideration.

This recommendation addresses the error in rationale and readdresses Lake Suzy's motion for partial summary disposition, as well as the parties' responses to that motion.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission reconsider its October 6, 1998 decision regarding Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition?

**RECOMMENDATION:** Yes. Because the rationale of the Commission's October 6, 1998 denial of Lake Suzy's motion is in error, the Commission should reconsider its decision. However, while FWSC's ability to serve appears questionable, the proper information and documentation is not before the Commission for its consideration at this time. Therefore, staff recommends that either the Commission defer ruling on Lake Suzy's motion pending the receipt of the parties' responses to staff's discovery requests and the filing of authenticated copies of the disputed contracts, or that the Commission deny Lake Suzy's motion for summary judgment recognizing that Lake Suzy would be free to renew its motion when the appropriate documentation and information are before the Commission. If the Commission defers ruling on the motion, it should also defer a decision on the award of costs or attorney's fees. If the Commission denies 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.

At the October 6, 1998 Agenda Conference, after hearing from the parties and upon consideration of staff's recommendation, the Commission decided that FWSC had 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 which precluded summary judgment. However, that decision was based only on allegations contained in FWSC's response to Lake Suzy's motion. At the Agenda Conference, counsel for Lake Suzy argued for the first time that the only things which could be relied upon in ruling on a motion for summary judgment were pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any. Lake Suzy further argued that a motion is not a pleading and hence a response to a motion is not a pleading. Therefore, Lake Suzy argued that it would be inappropriate to consider the allegations by FWSC in its response which were wholly unsupported by any of the documents in

the docket files and were not supported by any accompanying affidavits. However, the Commission disagreed with Lake Suzy and relied upon FWSC's response as the basis for the denial of Lake Suzy's motion.

Subsequently, after the Agenda Conference, Lake Suzy forwarded to staff documentation which supports its arguments regarding the inappropriateness of basing a decision on a motion for summary judgment on the allegations contained solely in a response to such a motion. See H. Trawick, Florida Practice and Procedure Sec. 6-1 at 81 (1997 ed.) (stating that motions are not pleadings). As a result, staff conducted further research and has determined that it was inappropriate, absent other appropriate supporting documentation, for the Commission to base its decision solely upon the allegations contained in FWSC's response because it does not constitute a pleading. See White v. Fletcher, 90 So.2d 129 (Fla. 1956); Harris v. Lewis State Bank, 436 So.2d 338 (Fla. 1st DCA 1983) (stating that motions are not pleadings and citing Hart Properties, Inc. v. Slack, 159 So.2d 236, 239 (Fla. 1963) and H. Trawick, Florida Practice and Procedure Sec. 6-1 at 60 (1979 ed.)). Accordingly, staff believes the basis for the Commission's prior decision is in error and that the Commission should reconsider its decision.

#### 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

At the October 6, 1998 Agenda Conference, the Commission found that because Charlotte County's pleading was filed eighteen days after service of Lake Suzy's motion it was untimely. In addition, the Commission determined that Charlotte County's pleading was not responsive to Lake Suzy's motion in that it did 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 raised other independent legal arguments for dismissing FWSC's application. As such, the Commission found it appropriate that the County's pleading not be given consideration in ruling on Lake Suzy's motion. No error was made in this regard, and accordingly, there is no need to readdress the County's response at this time.

#### Staff Discussion

Pursuant to Uniform 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 . . ." A summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. Section 120.57(1)(h), Florida Statutes (1998).

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).

Lake Suzy has challenged FWSC's ability to service the disputed area. In order to determine whether any genuine issue of material fact exists with regards to FWSC's ability to serve, staff

has reviewed the documents contained in the docket files in order to determine which documents may be appropriately relied upon in disposing of Lake Suzy's motion. FWSC's application, which staff believes is appropriately viewed as a pleading, contains statements in Exhibits D, G, & H that FWSC obtains bulk water and wastewater service from Charlotte County pursuant to the agreement and that it is relying on bulk service from the County to provide service to the disputed territory. No mention is made of any other source from which FWSC could obtain bulk service.

Lake Suzy attached a copy of the contract for bulk service executed by FWSC and the County to its motion in support of its allegations that FWSC cannot serve the Links subdivision absent an addendum to the contract. However, that copy is unauthenticated. A copy of the contract is already in the docket file because Charlotte County also attached a copy of the contract to its objection to FWSC's application. However, that copy has not been authenticated either.

Merely attaching documents which are not 'sworn to or certified' to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla.R.Civ.P. 1.510(e). Moreover, rule 1.510(e) by its very language excludes from consideration . . . any document that is not one of the enumerated documents or is not a certified attachment to a proper affidavit.

Bifulco v. State Farm Mut. Auto. Inc. Co., 693 So.2d 707, 709 (Fla. 4th DCA 1997). Therefore, if the information is not properly authenticated, the court may not properly consider that information in deciding a motion for summary judgment. Daeda v. Blue Cross & Blue Shield of Florida, Inc., 698 So.2d 617, 618 (Fla. 2nd DCA 1997). See also Tunnel v. Hicks, 574 So.2d 264 (Fla. 1st DCA 1991); Booker v. Sarasota, Inc., 707 So.2d 886, 889 (Fla. 1st DCA 1998) (stating that a court may not consider an unauthenticated document even where it appears that such document, if properly authenticated, may have been dispositive). To consider or rely on an unauthenticated document in ruling on a motion for summary judgment constitutes reversible error. Bifulco at 709.

Pursuant to Section 120.54(5)(a)1., Florida Statutes, the uniform rules, not the Florida Rules of Civil Procedure (except for discovery), are the rules to be used by administrative agencies. Although the cited cases reference the rule for summary judgment under the Florida Rules of Civil Procedure, staff believes the same principles and standards apply to a summary judgment proceeding initiated under the uniform rules since the language which

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specifies which documents may be considered in such proceeding mirrors the language used in the Florida Rules of Civil Procedure. Therefore, the bulk service contract is not properly before the Commission and may not be considered or construed by it in ruling on Lake Suzy's motion. All that remains is FWSC's assertion in its application that it may provide service pursuant to that agreement which Lake Suzy and Charlotte County dispute. Therefore, on this basis alone, it appears that Lake Suzy has failed to demonstrate the nonexistence of an issue of material fact in this regard and therefore has failed to meet its burden.

However, assuming arguendo that the parties were to stipulate to the authenticity of the document and that Lake Suzy's interpretation of the contract is correct, staff still believes summary judgment in favor of Lake Suzy would be inappropriate at this time. On October 5, 1998, FWSC prefiled the direct testimony of Charles L. Sweat, Vice President of Corporate Development for FWSC. In his prefiled direct testimony, Mr. Sweat states on page 5, lines 2-11, that FWSC has been negotiating with DeSoto County to purchase an increased allocation of potable water from the Peace River Authority and this water can be used to serve the Links subdivision. Therefore, there may be another bulk service provider from which FWSC may be able to obtain water to serve the disputed territory.

On October 5, 1998, Lake Suzy also prefiled the direct testimony of Dallas A. Shepard, President of Lake Suzy. Mr. Shepard states on page 1, lines 22-25 and page 2 lines 1-3 that pursuant to an agreement with DeSoto County, Lake Suzy purchases all of DeSoto County's current allocation from the Peace River Manasota Regional Water Supply Authority. Mr. Shepard further states that DeSoto County will not have any additional capacity to sell to FWSC until April, 2001 at the earliest.

While staff is cognizant that this prefiled testimony by both parties is not sworn testimony at this time, presumably it will be adopted and sworn to by the witnesses at hearing. However, because it is unsworn, staff is reluctant to advise the Commission to rely upon this information in determining whether to grant summary judgment to Lake Suzy. In addition, in order to determine if Lake Suzy's witness is correct regarding the unavailability of water for DeSoto County to sell to FWSC, the Commission would need to examine the bulk service contract between Lake Suzy and DeSoto County. That document is not properly before the Commission at this time either. While a copy of the contract was attached to FWSC's response, it too is an unauthenticated copy not capable of being relied upon.



Staff is also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of the Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that

[t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. Coastal Caribbean Corp. v. Rawlings, 361 So.2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. Page v. Staley, 226 So.2d 129, 132 (Fla. 4th DCA 1969). The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

Id.

Given the aforementioned considerations, all of which dictate the exercise of caution in granting summary judgment, staff believes that while FWSC's ability to serve may in fact be questionable, the proper information and authenticated documentation currently is not before the Commission for its consideration to make that decision. As a point of information, staff notes that it has served the parties with discovery which addresses the issue of ability to serve by all involved. As a result, staff anticipates that the information which may be obtained through the discovery process will shed further light on this issue. Therefore, given these concerns, staff believes the most appropriate course of action would be to defer ruling on the motion pending the receipt of the parties' responses to staff's discovery and the filing of authenticated copies of the disputed contracts. In the alternative, the Commission could deny Lake Suzy's motion for summary judgment in which case Lake Suzy would be free to renew its motion when it deems appropriate.

With regards to Lake Suzy's request for an award of fees and costs, pursuant to Section 120.595(1)(b), Florida Statutes, the

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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. If the Commission defers ruling on the motion, it should also defer a decision on the award of costs or attorney's fees. If the Commission denies Lake Suzy's motion, there is no basis for an award of costs or attorneys fees.

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**ISSUE 2:** Should these dockets be closed?

**RECOMMENDATION:** No. If staff's recommendation is approved in Issue 1, these dockets should remain open pending final disposition of this case. (REYES)

**STAFF ANALYSIS:** No. If staff's recommendation is approved in Issue 1, these dockets should remain open pending final disposition of this case.