BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment of Certificate No. 226-S to add territory in Seminole County by Florida Water Services Corporation.	DOCKET NO. 971638-SU ORDER NO. ISSUED:

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of Direct Testimony and Exhibits of Joann Chase has been furnished by U.S. Mail this 18th day of December, 1998 to:

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DOCKET NO.: 971638-SU - FLORIDA WATER SERVICES CORPORATION

WITNESS: **DIRECT AND REBUTTAL TESTIMONY OF JOANN CHASE** APPEARING ON BEHALF OF THE STAFF OF THE FLORIDA PUBLIC SERVICE COMMISSION

DATE FILED: DECEMBER 18, 1998

DIRECT AND REBUTTAL TESTIMONY OF JOANN CHASE

Q. Please state your name and business address?

A. JoAnn Chase, 2540 Shumard Oak Boulevard, Tallahassee, Florida, 32399-0850.

Q. By whom are you employed and in what capacity?

A. I am employed by the Florida Public Service Commission in the Division of Water and Wastewater. I currently hold the position of Supervisor of Monitoring and Compliance in the Bureau of Special Assistance.

Q. Please state your educational background and provide a summary of your experience in the area of utility regulation.

A. I received a Bachelor of Science degree in Business Management from the Florida State University. I have been employed by the Commission for approximately 24 years. During this time, I have worked in the Division of Electric and Gas in the area of rates and cost and service, the Division of Research in the area of management studies, and in the Division of Water and Wastewater in several areas. Prior to my current position in the Division of Water and Wastewater, I was the Supervisor of Certification from 1989 until 1993 and Supervisor of Policy Development and Intergovernmental Relations from 1993 until 1997.

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to provide some background of the Commission staff's experience in water and wastewater certification cases involving the issue of compliance with local comprehensive plans, to provide my research on the relationships of certification applications with local comprehensive plan issues, and to explain the

purpose and elements of the Memorandum of Understanding (MOU) between the Department of Community Affairs (DCA) and the Public Service Commission (PSC) relating to PSC cases involving certification, or territorial, issues.

Q. Why is that relevant to this case?

A. This case involves the application of a private utility to extend its certificated territory to provide wastewater service to 22 warehouse or office buildings, representing approximately 68 equivalent residential connections. The City of Longwood protested the application in part on the basis that it is inconsistent with its local comprehensive plan.

Q. Did you co-author a paper documenting the history of cases before the Commission involving protests of certification cases by governmental bodies on the basis of inconsistencies with local comprehensive plans?

A. Yes, I co-authored a paper with Lila Jaber, who is the Bureau Chief of the Water and Wastewater Section in the Commission's Division of Legal Services. The paper is entitled "Analysis of Comprehensive Plan Provision Contained in Chapter 367, Florida Statutes", and is attached to my testimony as Exhibit JC-1.

Q. Would you please summarize the paper?

A. This paper examines the history of the statutory provision in Chapter 367 regarding local comprehensive plans and its applicability in cases before the PSC where conflict with the plans has been an issue. In addition, we attempted to address the basic concerns that have surfaced in these cases due to the sometimes pluralistic regulatory scheme in the area of water and wastewater regulation. Finally, we offered possible

solutions to these concerns under the current statutory framework, including more interaction and communication with local and state governmental entities on this issue, and a formal memorandum of understanding with the DCA.

Q. What is the current provision in Chapter 367, Florida Statutes, regarding objections to certification cases on the basis of inconsistencies with local comprehensive plans?

A. Section 367.045(5)(b) provides:

> When granting or amending a certificate of authorization, the commission need not consider whether the issuance or amendment of the certificate of authorization is inconsistent with the local comprehensive plan of a county or municipality unless a timely objection to the notice required by this section has been made by an appropriate motion or application. If such an objection has been timely made, the commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality.

Q. Please summarize your research on this issue.

A. In 1984, a bill was introduced in the Florida Senate which would have provided that the Commission shall not issue or amend a certificate if the provision of service would be inconsistent with the comprehensive plan. This bill was subsequently changed by Senate and House committees to give county and municipal governments standing to object to certificate applications before the PSC on the grounds that it would violate local government comprehensive plans. Further, the bill that

was ultimately adopted required the PSC to consider the objection but not be bound by the comprehensive plan in its decision.

In conducting our research, we also reviewed the committee staff bill analysis for this proposal, which contained the following analysis:

> The provisions of Chapter 163, Florida Statutes, were not intended to amend or add criteria to the provisions of Chapter 367, Florida Statutes. The authority of a local government unit to develop a comprehensive plan does not carry with it any implication that the local government thus obtains the authority to designate service areas for providers of water and sewer services. This authority clearly lies within the sole discretion of the PSC.
>
> The fact that a utility might have a certificate to operate from the PSC does not negate its duty to comply with local government zoning and subdivision regulations--the focus of enforcement of local government comprehensive plans.

Under the "Policy Considerations" section of the bill analysis, the committee staff wrote:

Clearly, the burden of proof will fall on local government to show that the issuance, extension, or amendment of a service certificate would violate their comprehensive plan. The PSC may issue a certificate regardless of its compliance with local comprehensive plans. The issue seems to be where the enforcement of comprehensive plans takes place.

This bill was ordered enrolled on May 22, 1984. The act took effect on October 1, 1984, and with the exception of some minor changes in 1989, is still in effect.

Q. You mentioned earlier that the PSC has entered into a MOU with the DCA concerning the processing of PSC certification cases. Were you involved in the process of developing the MOU?

A. Yes, I was involved in the staff meetings between the agencies in which the MOU language was drafted. The MOU was ultimately signed by both agencies in June, 1998, although the process of sharing certificate applications has been in effect for approximately one year. A copy of the MOU is attached to my testimony as Exhibit JC-2.

Q. What interaction between the agencies on these cases is contemplated by that MOU?

A. The MOU contemplates that the PSC staff will provide the DCA with copies of all amendment and original certificate cases filed with the Commission. The DCA staff then provides its analysis of the application with regard to its relationship to the local government comprehensive

plan and other information regarding the land uses, patterns of development, and need for service in the requested territory. The response from DCA is placed in the Commission's official docket file and is referred to and summarized in the staff recommendation to the Commission on the application. The DCA has the option to speak to the Commission at its Agenda Conference on the item if it chooses. Further, the MOU contemplates that in cases that have been protested by a local government because of a comprehensive plan issue, the DCA staff may, at the request of the PSC staff, sponsor testimony at the Commission hearing to complete the record regarding the DCA comments related to the application and the local comprehensive plan.

Q. Did the staff send a copy of the application in this docket to the DCA pursuant to the MOU?

A. Yes.

Q. Did the DCA provide a response evaluating the application with respect to the land use and growth management issues?

A Yes. I have attached a memorandum we received from Charles Gauthier, Growth Management Administrator, as Exhibit JC-3.

Q. Have you read the testimony provided by the City of Longwood in this case?

A. Yes, I have read the direct testimony of Richard Kornbluh, the City's Utilities Division Manager, Geraldine Zambri, City Clerk, and John Brock, the City's Director of Community Services Department.

Q. Do any of these witnesses address whether the amendment application is consistent with the City's comprehensive plan?

A. Yes, Mr. Kornbluh addresses this issue. On the second page of his testimony, Mr. Kornbluh states that the service area covered by this application is included in the City's sewage system as set forth in the City of Longwood Comprehensive Plan. (See lines 17 through 23.) Later, on page four of his testimony, Mr. Kornbluh states again that the disputed territory is subject of the Comprehensive Master Wastewater Collection Plan as well as the Comprehensive Plan of the City of Longwood.

Q. Based on your research on this topic and the past PSC cases, what is your opinion of Mr. Kornbluh's statements that you refer to above?

A. From a policy standpoint, I do not believe that a local comprehensive plan should be used to designate service territory for utilities, whether public or privately owned. The legislative staff analysis of the bill that requires the Commission to consider comprehensive plans when making decisions on certification cases seems clear that it is not intended to do so. Governmentally owned and privately owned utilities are sometimes in competition for the same customer base, as in this case. To attempt to control utility service areas through local comprehensive plans appears to contradict the statutory scheme regarding the Commission's responsibilities and jurisdiction over the certification and regulation of privately owned water and wastewater utilities. Furthermore, in meetings the DCA staff has acknowledged that comprehensive plans should not be used to circumvent the role of the PSC in certification cases.

Q. How does the City's comprehensive plan circumvent the PSC's role over

privately owned utilities?

A. Pursuant to Chapter 367, Florida Statutes, regulated utilities must apply to the PSC for a certificate to serve territory. The Commission must make a finding that the application is in the public interest. The Commission is the economic regulator of private utilities, and must be concerned with the long run economic viability of these utilities. One aspect of this is the utility's ability to plan for growth and build plant and facilities in the most economical and efficient increments to allow for that growth. If a governmental unit can simply convey service territory to itself without consideration of the private utilities in the area, the ability of the Commission to effectively regulate the private utilities is jeopardized.

From a policy standpoint, in deciding whether to grant territory to a utility, the Commission must consider many aspects other than the local government comprehensive plan, including the impact service to the additional territory would have on the existing customers of the utility. If the utility has existing, unused treatment plant capacity and service to the additional territory would be an efficient use of that excess capacity, then the existing customers of the utility would benefit from the expansion since it would result in further economies of scale. It is my professional opinion that a city's designation of itself as the utility provider in its comprehensive plan is an inappropriate use of the plan, especially when the municipality uses the provision to give its utility business a competitive advantage.

Q. Is it your testimony that the application is consistent with the City's

local comprehensive plan?

A. No, it is not. However, I am stating that I do not believe it can be inconsistent with the comprehensive plan based on an assertion that the plan designates the City as the provider of wastewater service in the disputed territory. As mentioned above, a comprehensive plan adopted by a local government cannot in itself convey territory to any entity, and certainly cannot usurp the power of the PSC to designate territory for a private utility.

I have no expertise or knowledge in the areas of land use or growth management and, therefore, have no opinion as to whether the application is consistent with those aspects of the comprehensive plan. This is precisely the role the Commission staff envisions would be filled by the DCA, which is the agency with primacy over growth management issues. We look to that agency to assist us by providing their expertise in this area.

Q. Does this conclude your testimony?

A. Yes, it does.

ANALYSIS OF COMPREHENSIVE PLAN

PROVISION CONTAINED IN

CHAPTER 367, FLORIDA STATUTES

JoAnn Chase
Division of Water and Wastewater

Lila Jaber
Division of Legal Services

FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA
October 10, 1997

TABLE OF CONTENTS

ANALYSIS OF COMPREHENSIVE PLAN PROVISION

CONTAINED IN CHAPTER 367, FLORIDA STATUTES

Introduction

The regulation of the private water and wastewater industry in Florida is marked by a pluralistic and fragmented pattern of jurisdiction. The state Department of Environmental Protection (DEP) (and sometimes the local health department) regulates the environmental, safety and health aspects of water and wastewater service, and the water management districts (WMDs) control the water resource supply. As far as economic regulation, county governments are provided the option of either regulating the rates, service and territory of private companies or of giving this jurisdiction to the Public Service Commission (PSC or Commission). The counties may also rescind the Commission's jurisdiction at any time after ten years by a vote of the county government.[1] Chapter 367, Florida Statutes, defines the Commission's exclusive jurisdiction over rates, service and authority of the private water and wastewater utilities in counties that have passed this jurisdiction to the PSC.

Additionally, the state, local and regional governments involved in various aspects of planning add another element of regulation to the water and wastewater industry since adequate utility service is an integral part of land use planning. Over the years, there has been added emphasis in Florida on growth management and the protection of our fragile environment. In the 1970's, in an effort to address these concerns, the Legislature developed a comprehensive framework for land use planning at all levels of government. Included among the legislative actions was the Local Government Comprehensive Planning Act of 1975 (LGCPA), which required all units of local government to prepare and adopt local land use and infrastructure plans. In 1985, the Growth Management Act was created which, in part, expanded and strengthened the LGCPA by requiring local governments to submit comprehensive land-use plans which comport with the Growth Management Act to the Florida Department of Community Affairs (DCA). The DCA has been designated as the state's land planning agency and is responsible for administering Florida's growth management laws.

Local comprehensive plans represent an opportunity for effective integration of land use and water planning because these plans must address water service and its relationship to future

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[1] See Section 367.171, Florida Statutes.

land use. However, in counties where the PSC regulates private water and wastewater utilities, it is the Commission, not the local government, that determines whether a private utility may have a certificate which allows it to provide service in a requested territory. The only defined link between the decisions of the PSC regarding territory of private utilities and the local comprehensive plans is contained in Chapter 367, Florida Statutes. According to the current statutory requirement, a local government may protest an application to create a new utility or extend the service area of an existing utility based on an inconsistency with the comprehensive plan. In such case, the Commission must consider, but is not bound by, the comprehensive plan.[2]

The PSC has exclusive jurisdiction over authority, rates, and service of the private water and wastewater utilities it regulates.[3] This authority granted by the Commission includes a service territory identified in the order granting the certificate or certificate amendment. Local governments have been charged with the responsibility and duty to develop comprehensive plans to govern and manage growth within their boundaries. One of the vehicles used in managing growth is the provision of water and wastewater services. This apparent overlap of responsibility has resulted in conflicts manifested in protested certificate cases before the PSC.

This paper examines the history of the statutory provision in Chapter 367 regarding local comprehensive plans and its applicability in cases before the PSC where conflict with the plans has been an issue. In addition, we have attempted to address the basic concerns that have surfaced due to this sometimes pluralistic regulatory scheme. Finally, we have offered possible solutions to the dilemma under the current statutory framework, including more interaction and communication with local and state governmental entities on this issue, and a formal memorandum of understanding with the DCA.

Legislative History of the Comprehensive Plan Provision

1984 Legislation

In the 1984 legislative session, Senator Grizzle introduced Senate Bill 692 (House Companion Bill 406, by Rep. Hanson), which

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[2] See Section 367.045(5)(b), Florida Statutes.

[3] See Section 367.011(2), Florida Statutes.

would have created a new Section 367.065, Florida Statutes. This section would have provided that if a person with standing to object alleges that the issuance or amendment of a certificate is inconsistent with the general sanitary sewer, solid waste, drainage, and potable water element or the land use element of a county or municipal comprehensive plan, the PSC shall consider the plan prior to making its determination. Further, a certificate shall not be issued or amended if the provision of service is inconsistent with the comprehensive plan amendments.

Both the Senate Committee on Economic, Community and Consumer Affairs and the House Select Committee on Growth Management replaced these bills with committee substitutes. These identical committee substitute bills gave county and municipal governments standing to object to the issuance of a certificate by the PSC on the grounds that it would violate local government comprehensive plans. The bill further required the PSC to consider the objection but not be bound by the comprehensive plan.

The proposed statutory language contained in the bill was:

> **367.051(2)** ...Notwithstanding the ability to object on any other grounds, county and municipal governments shall have standing to object on the grounds that the issuance of the certificate will violate established local comprehensive plans developed pursuant to ss. 163.3161-163.3211.

and,

> **367.051(3)(b)** When granting a certificate, the commission need not consider whether the issuance of the certificate is inconsistent with the local comprehensive plan of a county or municipality unless an objection to the certificate has been timely raised in an appropriate motion or application. If such an objection has been timely raised, the commission shall consider, but not be bound by, the local comprehensive plan of a county or municipality.

The bill analysis of the House Select Committee on Growth Management dated April 11, 1984, contained an explanation of the present situation and the probable effect of the bill. In addition, under the "Other Facts" section of the bill analysis, committee staff wrote:

> The provisions of Chapter 163, Florida Statutes, were not intended to amend or add criteria to the provisions of Chapter 367, Florida Statutes. The authority of a local government unit to develop a comprehensive plan does not carry with it any implication that the local government thus obtains the authority to designate service areas for providers of water and sewer services. This authority clearly lies within the sole discretion of the PSC.
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> The fact that a utility might have a certificate to operate from the PSC does not negate its duty to comply with local government zoning and subdivision regulations--the focus of enforcement of local government comprehensive plans.

Under the "Policy Considerations" section of the bill analysis, the committee staff wrote:

> Clearly, the burden of proof will fall on local government to show that the issuance, extension, or amendment of a service certificate would violate their comprehensive plan. The PSC may issue a certificate regardless of its compliance with local comprehensive plans. The issue seems to be where the enforcement of comprehensive plans takes place.

This bill was ordered enrolled on May 22, 1984. The act took effect on October 1, 1984, and with the exception of some minor changes in 1989, is still in effect.

1989 Legislation

Sunset review for Chapter 367, Florida Statutes, was conducted during the 1989 legislative session. As part of Sunset, Section 367.045, Florida Statutes, was created to consolidate certain provisions in Sections 367.041, .051, .055, and .061, which were repealed. The provisions in Section 367.051, Florida Statutes, which related to the comprehensive plan issue were retained and carried forward in Sections 367.045(4) and (5)(b), Florida Statutes, with very minor wording changes.

1990 Legislation

In the 1990 legislative session, Senator Johnson introduced Senate Bill 1108 (House Companion Bill 2619 by Rep. Peoples) which would amend Section 367.045(5)(b), Florida Statutes, by requiring the PSC to issue or amend a certificate for a water or sewer system only when it is consistent with the local government's comprehensive plan.

The proposed change to the statute was:

> **367.045(5)(b)** When granting a certificate, the commission ~~need not consider whether the issuance of the certificate is inconsistent with the local comprehensive plan of a county or municipality unless an objection to the certificate has been timely raised in an appropriate motion or application. If such an objection has been timely made, the commission~~ shall <u>be</u> ~~consider, but is not~~ bound by ~~,~~ the local comprehensive plan of <u>a</u> ~~the~~ county or municipality<u>, and shall issue or amend a certificate of authorization only where such issuance or amendment is consistent with the local government's comprehensive plan</u>.

The Commission's position on the proposed legislation was that a change to the current statutory provision was not necessary. The Commission also offered alternative language to be used if the legislature wanted to require the Commission to follow the local comprehensive plans. This alternative language was:

> **Section 367.045(5)(b)** When granting or amending a certificate of authorization, the Commission shall be bound by the local comprehensive plan as approved by the Department of Community Affairs unless it can be shown that compliance with the local comprehensive plan will cause undue hardship and not be in the public interest.

This bill did not pass out of the legislative committees, and no change to Chapter 367 regarding the comprehensive plan provision was passed during the 1990 session.

Concerns Relating to Consideration of Comprehensive Plans

PSC Cases Involving the Comprehensive Plan Issue

Over the years, the Commission has processed certification cases in which local governments (counties and municipalities) have objected on the basis of alleged inconsistencies with the local comprehensive plan. Attached to this report, as Appendix A, is a discussion of cases from 1980 to date involving the comprehensive plan issue and the Commission's decision in each case. Twenty-one cases have been identified. Thirteen of these cases were protested by the affected county government, five cases were protested by a municipality, two cases were protested by both county and municipal governments, and one case was protested by a group of individuals alleging an inconsistency with the county's comprehensive plan. Four of the 21 cases involved applications for original certificates (creation of new utilities), while the remaining 17 cases addressed requests for extension of service territory by existing utilities.

While arguably all of these cases involved unique circumstances, we believe they can generally be grouped into two broad categories:

(1) Six cases which involve objections based on the assertion that there is no need for service under the land use designations contained in the comprehensive plan; and

(2) Fifteen cases which involve objections based on the assertion that there is a need for service in the requested area (either immediately or down the road)[4], and that the local government must be the service provider in order to achieve consistency with the comprehensive plan.

Of the six cases in the first category, involving allegations that there is no need for service in the requested area, the Commission denied two of the applications, and approved one application in total and one in part[5]. In addition, the Commission

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[4] There were eleven cases with a showing of an immediate need for service and four cases indicating that the need for service would be sometime in the future.

[5] The application was approved only for that service territory where a clear need for service was established.

approved two stipulations: one wherein the local government and the utility agreed that there was no comprehensive plan violation, and another where the utility and the local government agreed to split the requested territory.

Of the 15 cases in the second category, involving allegations that the comprehensive plan requires that service be provided by the local government, the Commission approved eight of the applications, and two applications were withdrawn by the applicants. In addition, the Commission approved five stipulations: three in which the utility and the local government agreed to split the territory in dispute, and two in which the utility agreed to be the interim provider of utility service until service was available from the local government.

Four of the decisions in these 21 cases were appealed to the First District Court of Appeal by the affected local government. In three cases the court upheld the Commission's order in per curiam affirmance[6], and one appeal was voluntarily dismissed by the local government. In the opinion issued in the latest of the per curiam cases, the court also addressed the local government's argument concerning the PSC's application of the comprehensive plan provision in Chapter 367. In its opinion, the court held that the PSC correctly applied the requirements of the statute, saying that the plain language of the statute only requires the PSC to consider the comprehensive plan and is expressly granted discretion in the decision of whether to defer to the plan. The court points out that five pages of the Commission's order are devoted entirely to the comprehensive plan issue, and plainly demonstrates that the PSC considered the local government's plan.[7]

Local Government Concerns

It is clear that contradictions and regulatory tension result from the current statutory framework that provides that the Commission must consider but is not bound by local comprehensive plans when determining service territory of private utilities. Local governments apparently believe that their authority and responsibility to govern and manage growth within their boundaries

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[6] A per curiam affirmance is one in which the DCA agrees with the order on appeal without issuing a written opinion.

[7] Docket No. 951419-SU, Order No. PSC-96-1281-FOF-SU, Application of Alafaya Utilities, Inc. for an amendment to its wastewater certificate in Seminole County. See Appendix for summary of the case.

is undermined when a protest by a local government does not control the Commission's decision in a certificate case. They believe the Commission should defer to an approved comprehensive plan regardless of the basis for the protest. However, as shown above, often the basis for the protest relates to which entity should serve the disputed territory, and not whether the development that will be served in the area is inconsistent with the growth management plan. This attempt to control utility service areas through local comprehensive plans appears to contradict the statutory scheme regarding the Commission's responsibilities and jurisdiction over privately owned water and wastewater utilities as set forth in Chapter 367.[8]

The distinction between the authority of the Commission and that of the local governments was noted by the Legislature in the creation of the comprehensive plan provision in Chapter 367, as shown in the following excerpt from the House Committee staff report in 1984:

> ...The authority of a local government unit to develop a comprehensive plan does not carry with it any implication that the local government thus obtains the authority to designate service areas for providers of water and sewer services. This authority clearly lies within the sole discretion of the PSC.

There are valid reasons why this authority rests with the Commission, which bear discussion at this point. First, the Department of Community Affairs (DCA) is the state's land planning agency and, as such, approves local comprehensive plans. In this regard, the DCA's focus is on growth management and planning issues, not issues surrounding utility territory disputes. However, if a local government could determine service territory through its comprehensive plan, the DCA's approval process would be the only avenue available for private utilities prohibited from serving additional territory through a comprehensive plan provision. Thus, the DCA would be faced with the task of resolving these disputes even though this is not the focus of their concern

[8] Section 367.011(2), Florida Statutes, provides that the PSC shall have exclusive jurisdiction over each utility with respect to its authority, service and rates. Section 367.011(3), Florida Statutes, provides that "[t]he regulation of utilities is declared to be in the public interest, and this law is an exercise of the police power of the state for the protection of the public health, safety, and welfare."

nor their area of expertise.

Second, the PSC is the economic regulator of private utilities. As such, the Commission is concerned with the long run economic viability of the utility, which is in the best interests of the utility and its customers. One aspect of this viability analysis is consideration of the utility's ability to grow and serve additional customers. By doing so, a utility and the current customers usually benefit due to the economies of scale afforded by spreading costs over a larger customer base. As the economic regulator, the PSC has the technical expertise to address issues involving the long run viability of a utility, including whether the utility should be allowed to expand its service territory.

Third, many local governments are in the utility business, and thus can be in competition with private utilities in the area for customers and territory. As discussed above, 15 of the 21 cases we reviewed for this paper involved protests by a local government which wanted to provide the service themselves. Thus, if the local government could dictate service areas through a comprehensive planning document, there would be an obvious incentive to name itself as the monopoly provider in the area regardless of the ability of private utilities to provide the needed service.

Finally, if a county government wants to control the service territories of private utilities within its boundaries, it already has the statutory authority to do so through the "county option" provision in Chapter 367, Florida Statutes. If this option is exercised, the county, not the PSC, is responsible for regulating the rates and charges of the private utilities, as well as the service territory.[9]

DCA Concerns

The focus of a comprehensive plan is on local planning, growth and environmental issues. Obviously, part of that planning process includes the provision of adequate and timely water and wastewater utility service. However, the comprehensive plan is designed to address when and where development should occur, and how utility service should be provided in order to be consistent with the density and timing of future development. The utility element of the comprehensive plan properly addresses such issues as the timing of utility service in conjunction with other infrastructure needs in future development areas, and whether a centralized system as opposed to private wells or septic tanks is needed in a particular

[9] See Sections 367.171(1), (4) and (6), Florida Statutes.

area in order to respond to density or environmental needs. Who should own the centralized water or wastewater system is beyond the scope of a comprehensive plan.

Local governments have said that they must be able to control the service territories of private utilities in order to enforce where and when development should occur within their boundaries. One argument that has been put forth by local governments in cases before the Commission is that the availability of water and wastewater service could in fact put development pressures on property that are contrary to a local comprehensive plan. Staff of the DCA has also expressed this concern in informal discussions with Commission staff.

We do not believe that this is necessarily a valid concern as long as the local zoning, building and permitting requirements are consistent with the land use designations contained in the comprehensive plan. In order to gain approval of a certification application, a private utility coming before the PSC must demonstrate that there is a need for service and that the provision of service by the utility would be economically feasible. If the zoning is not consistent with the proposed development or if the potential developer is unable to obtain permits for construction, a need for service cannot be shown. If there is no demonstrated need for service, or if the approved zoning was in such low density that the provision of central utility service would be uneconomical, the certificate application would not be in the public interest and would not be approved. The issue seems to be where enforcement of comprehensive plans should take place. We believe this should be done at the local level ensuring that zoning and permitting is consistent with the comprehensive plan, and not at the state level when considering utility territorial matters.

Possible Solutions

While the focus of local governments and the DCA is different from the Commission with regard to service territories of private utilities, there should be some common ground. The interests of local governments and the DCA is to ensure that water and wastewater service is provided in a manner consistent with it goals related to controlling and managing growth. The Commission's mandate is to ensure that safe, adequate and efficient utility service is provided on a timely basis to fill a demonstrated need for service. Certainly, the Commission, the DCA, and local governments can work together to achieve these objectives.

While the Commission is not bound by the local comprehensive plan, it can be a useful tool in some certification cases to

determine whether and when there will be a need for service in the requested territory. In addition, information contained in the plan can assist the Commission in determining what type of service is anticipated, which can be useful in designing the appropriate rates and charges.

Obviously, the legislature can amend Chapter 367 to require that the PSC's decisions in certificate cases are consistent with the comprehensive plans. However, in this paper we are focusing on ways to address the concerns resulting from the pluralistic regulatory scheme without changes to the current statutory framework. In that regard, the Commission should work more closely with the local governments and the DCA to ensure that certification applications are consistent with the spirit of the comprehensive plans. Some of the things that the Commission can do in this regard include:

Memorandum Of Understanding with the DCA - The Commission should enter into a memorandum of understanding (MOU) with the DCA detailing ways in which the two agencies can cooperate in areas where there is an apparent overlap of responsibility or interest. As mentioned, the DCA is the state's land planning agency and is responsible for administering Florida's growth management laws, including the approval of the local comprehensive plans. The DCA's knowledge and expertise with regard to the local comprehensive plans would be helpful in the evaluation of the need for service in certification cases before the Commission. The MOU could address how this interaction could be accomplished in docketed cases before the Commission. In addition, in certificate cases wherein a local government has protested based on inconsistencies with the comprehensive plan, a representative from the DCA could sponsor testimony on behalf of the Commission staff. This testimony could describe the DCA's analysis of the comprehensive plan in question and present its position on whether and in what way the certificate application is inconsistent with the comprehensive plan. In this way, neither the PSC nor its staff will be forced to interpret what is meant in the comprehensive plan with regard to the water and wastewater element.

Changes in PSC Filing Requirements - The Commission currently has rules that require applications for original certificates and certificate amendments contain a statement that, to the best of the applicant's knowledge, the application is consistent with the local comprehensive plan, or, if not consistent, a statement

showing why granting the application is in the public interest.[10] The Commission could be more stringent in its filing requirements for certification applications by requiring more informative statements, such as what the water and wastewater element of the local comprehensive plan provides, and why the application is consistent with the plan. (Obviously, if the application is inconsistent, the applicant should provide detail as why the application should nevertheless be approved.) This level of detail would better ensure that the utility is aware of the comprehensive plans in the area and has taken the time and effort to review them with regard to its application. A revision to our filing requirement rules would be necessary in order to effect this change.

More formal and informal interaction with local governments - There is clearly a need for more interaction with the local governments on the comprehensive plan issues to exchange information on the responsibilities and perspectives of both parties. Local governments could benefit from a better understanding of the Commission's role in evaluating a certificate application. The PSC could benefit from a general knowledge of what the local government is trying to accomplish through its comprehensive plan.

The time for Commission staff to initiate informal meetings with the local governments is before a protest is filed, since the hearing process is highly structured and not really conducive to a free exchange of information. Commission staff could make a presentation at some general meetings of local government associations, such as the League of Cities and Association of Counties explaining the comprehensive plan issue before the PSC, and what the statute requires in terms of commission review of certification cases. Staff could also initiate meetings with select local governments (cities and counties) that are experiencing significant growth, since growth areas are more likely to experience conflicts with comprehensive plans. This type of informal communication should lead to a better appreciation for the process, and perhaps focus attention on where the real differences are.

In addition, once a local government protests a certification case, a meeting with representatives from the government, utility and staff should be held early on in the proceeding to explain the PSC's hearing process, the importance of proper identification of

[10] See Rules 25-30.033(1)(f), 25-30.034(2)(b), and 25-30.036(3)(c), Florida Administrative Code.

issues, and how the Commission evaluates these issues. Often attorneys for local governments are not familiar with the PSC's administrative process. This information should help put them on a level playing field with the attorneys for the private utilities, which have more experience with the PSC's process. As part of this preliminary discussion, the Commission staff should encourage mediation of the dispute to avoid the time and expense of a formal hearing.

Conclusion

As identified briefly in this paper, there is an unintentional overlap of regulation and an inconsistency in the application and use of comprehensive plans by the DCA, local governments, and the PSC. The three governmental entities rely on comprehensive plans for different reasons and the PSC's use of the local comprehensive plans has been the least significant. Right or wrong, the legislature did not bind the Commission's decision-making in certificate matters to comprehensive plans. Continued communication and input from all involved is the best possible solution to avoiding further disputes in this regard. Appendix A, which follows, is a summary of PSC cases in which the application of comprehensive plans was an issue before the PSC.

APPENDIX A

PSC Case Studies Involving Comprehensive Plan Objections

1980

1. Docket No. 800536-WS
Order No. 9708
Issued December 16, 1980

Utility: South Palm Beach Utilities Corporation
Protestor: Palm Beach County

Order Adopting Recommendation of Hearing Officer and Denying Protest - South Palm Beach Utilities Corporation filed an application to extend its water and wastewater territories in four areas of Palm Beach County. The application was protested by Palm Beach County and four individuals. The four individuals withdrew their protests, however, the objection by Palm Beach went to hearing before a hearing officer at the Division of Administrative Hearings (DOAH).

According to the Hearing Officer's Recommended Order, the County's position was that the extension would conflict with its long-range land use and water and sewer service plans, which were adopted in accordance with Chapter 163, Florida Statutes. The position of the utility and the Public Service Commission, on the other hand, was that the provisions of Section 367.061, Florida Statutes, were not amended by the provisions of Chapter 163, that the PSC had the authority to grant the requested extension without regard to plans adopted by Chapter 163, and that the County had the power to control land use within its boundaries through its zoning authority.

According to the Recommended Order, the County's long range plans envisioned providing water and wastewater service to the areas, even though it would not be in a position to do so for at least five years. The County argued that expansion into these areas, which were designated for low density development, would allow for a level of development not in harmony with the land use element of the comprehensive plan. The hearing officer found that this argument was not supported by any evidence.

The County also contended that the extension would conflict

with the "sewer, potable water, drainage, and solid waste element" of the comprehensive plan. However, the evidence did not establish that the conflict would adversely affect the plan, since the evidence did not show that provision of services by a utility other than the County would render the County's system less feasible.

A conclusion of law reached by the hearing officer was that the controlling statute with regard to the extension of territory was Section 367.061, Florida Statutes. The provisions of Chapter 163 were not intended to amend or add criteria to the provisions of Chapter 367. According to the Recommended Order, this is demonstrated by the language in Section 367.011(4), Florida Statutes which says:

> This chapter shall supersede all other laws on the same subject and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference...

In addition, the County argued that allowing the utility to extend its territory without regard to the County's comprehensive plan would hinder the County's efforts to meet long-range planning goals. According to the order, this was not factually established and to the extent that development plans conflict with the comprehensive plan, the County held its authority to control development through its zoning power. Chapter 367 does nothing to take away that power or render any designation of service area binding upon the county in connection with the County's zoning authority and building permit authority.

The hearing officer recommended that the objection be denied and the extension be granted. The recommendation that the objection be denied was adopted by the Commission and the utility was instructed to proceed with its extension plans in accordance with Chapter 367.061, Florida Statutes.

1985

2. Docket No. 840330-WU
Order No. 14140
Issued March 4, 1985

Utility: Orange-Osceola Utilities, Inc.
Protestor: Orange County

Order Acknowledging Withdrawal of Application - Orange-Osceola Utilities, Inc. gave notice of its intention to serve a certain area adjacent to its existing service area. Orange County timely filed a protest requesting a public hearing. According to the Prehearing Order No. 13900, issued December 5, 1984, Orange County protested because pursuant to its comprehensive plan it intended to serve the area applied for by the utility. A stipulation was reached whereby the County would serve the area in question. Order No. 14140 acknowledges the withdrawal of the utility's application and closes the docket.

3. Docket No. 840371-WS
Order No. 14487
Issued June 19, 1985

Utility: Lake Monroe Utility Corporation
Protestor: Seminole County

Order Denying An Extension of Service Area - Seminole County objected to Lake Monroe Utility Corporation's application for an extension of its certificated service territory in Seminole County. Under the County's land use plan, the land in question at the time of the hearing was zoned general rural with a certain prescribed density; any higher density use would result only if the comprehensive plan were amended. Under current zoning, septic tanks and wells were permitted, so there was no present need for utility services. The Commission found that the utility failed to demonstrate an established need for service, and failed to establish whether it was prepared to provide the level of service that could be required if the property was developed to its maximum density. Furthermore, Seminole County had the resources and had given the appropriate assurances that it would provide the area's residents with water and sewer services as provided in its plan.

While stating it was not bound by the County's plan, the Commission found it was the in the best interest of the prospective customers to deny the application.

4. Docket No. 840387-WS; 850072-WS
Order No. 14536
Issued July 3, 1985

Utility: Gulf Utility Company
Protestor: Lee County

Order Approving Amendment of Certificates - Lee County objected to Gulf Utility Company's application for amendment of its water and sewer certificates to include certain parcels of land in Lee County. The County had adopted a comprehensive plan requiring investment in utility infrastructure to be concentrated in the urban service area. The land included in the application consisted largely of "fringe" or transitional area, based upon designations in the County's comprehensive plan. The County argued that development of these areas would be driven by the availability of utility service, and that there could be a potential duplication of county services.

The Commission found that approval of Gulf's application would not be inconsistent with the provisions, intent or spirit of the County's comprehensive plan. Furthermore, the activities proposed by the application fell within an express exception from the definition of "development" pursuant to Section 163.3164(4) of Florida's Local Government Comprehensive Planning Act (LGCPA). Therefore, the Commission found that the application should not be considered inconsistent with the local plan. Finally, the Commission clarified that, pursuant to Section 367.051, Florida Statutes, the LGCPA did not require the PSC to act consistently with the local comprehensive plan to the extent it bound the County. The interpretation suggested by Lee County would allow the local comprehensive plan to control the Commission's decision regarding any determination on the service area of public utilities. On this point, the Commission cited to Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So.2d 67 (Fla. 3d DCA 1983), which rejected the idea that Section 163.3194 of the LGCP should guide a state agency to conform its decision consistent with the local zoning plan.

The Commission found that the utility established a need for service in part of the requested territory. Further, the Commission found that County witnesses presented conflicting evidence as to whether or when the County would be in a position to provide service to the area. The Commission approved the application only for that area where a clear need for service had been demonstrated. The remainder of the application was denied because there was no evidence indicating a need or demand for service.

1986

5. Docket No. 850235-SU
Order No. 15730
Issued February 24, 1986

Utility: Peninsula Utilities, Inc.
Protestor: Town of Ponce Inlet

Order Dismissing Objection and Approving Extension - The Town of Ponce Inlet objected to Peninsula Utilities, Inc.'s application for extension of sewer service in Volusia County, and/or for a sewer certificate to provide sewer service within the entire Town of Ponce Inlet. The Town objected that local, federally-mandated planning documents, and the Ponce Inlet and Volusia County local comprehensive plans all recommended against the location of sewage treatment facilities on barrier islands, such as Ponce Inlet. One local planning document (the "201 plan") recommended a regional wastewater treatment system encompassing the Ponce Inlet area and operated by the City of Port Orange. Ponce Inlet and the City of Port Orange had entered into agreements to implement the 201 plan, which provided in part that Ponce Inlet would acquire Peninsula Utilities' sewer system by purchase or condemnation for interconnection with the City of Port Orange sewer system.

The Commission found that there was a need for service in the area since no alternative central source of sewage treatment was available. While noting that it was not bound by the local comprehensive plans, the Commission held that it would not be inconsistent with the 201 plan or local comprehensive plans to grant the application for extension of service area. The 201 Plan provides for the ultimate treatment and disposal of wastewater from

the Town of Ponce Inlet by the City of Port Orange. Service would not be available from the City of Port Orange until May, 1988. Furthermore, even if the Commission were to determine that the proposed extension was inconsistent, the record readily supported a finding that the extension would not be in competition with, or a duplication of, any other system or portion of a system, since neither Port Orange or Ponce Inlet presently operated a system capable of serving the proposed extension area. The application for amendment was approved.

1987

6. Docket No. 850597-WS
Order No. 17158
Issued February 5, 1987

Utility: Seacoast Utilities, Inc.
Protestor: Palm Beach County

Order Dismissing Objection and Granting Application to Amend Water and Sewer Certificates - Palm Beach County protested Seacoast Utilities, Inc.'s notice of intent to amend it water and sewer service territory in Palm Beach County, on the basis that the issuance of the amended certificate would be inconsistent with the County's comprehensive plan. The County indicated that the inconsistency was with the Limited Urban Service Area ("LUSA") provisions, which contemplated that there should be no further urban expansion west of the western LUSA boundary line, and that portions of the requested service area were beyond this boundary. Seacoast presented evidence that its facilities plan was based on land use designations and densities permitted by the County's comprehensive plan. The Commission found that the granting of Seacoast's application, taken alone, was in no way inconsistent with the comprehensive plan. The plan, and the LUSA concept, both address the control of urban densities in the proposed area. The County's own witness indicated that these densities could still be controlled through other vehicles. According to the Commission, the County retains the ultimate power to control growth and urban densities at a predetermined desired level. Furthermore, even if the proposed extension did present inconsistencies with the

comprehensive plan, the Commission stated that it would elect not to be bound by the same, pursuant to Section 367.051(3)(b), Florida Statutes.

Also of interest in this case is that the County further alleged that it should provide service to the disputed area. Seacoast's application for amendment was approved.

Palm Beach County appealed Order No. 17158 to the First District Court of Appeal (DCA). The DCA upheld the Commission's order. See Palm Beach County v. Florida Public Service Com'n, 518 So.2d 269 (Fla 1st DCA 1987) (per curiam).

1988

7. Docket No. 861384-WS
Order No. 18668
Issued January 8, 1988

Utility: Central Pasco Utilities, Inc.
Protestor: Pasco County

Order Acknowledging Withdrawal of Application and Closing Docket - Pasco County intervened in the docket whereby Central Pasco Utilities, Inc. applied for original certificates to provide water and wastewater service to a large area of Pasco County. Pasco County stated that it presently owned and operated a water system within a portion of the requested territory, that the County was developing water and wastewater capabilities within the requested area, and that the utility's certificate application violated the County's comprehensive plan. The utility did not respond to the County's petition to intervene, which was granted in Order No. 17456, issued April 23, 1987. After "unsuccessful protracted discussions and meetings in attempts to resolve the differences of the parties," the utility withdrew its certificate application, which was acknowledged in Order No. 18668.

8. Docket No. 861198-WS
Order No. 18892
Issued February 22, 1988

Utility: Rolling Oaks Utilities, Inc.
Protestor: Citrus County

Order Dismissing Objection - Citrus County objected to the notice of Rolling Oaks Utilities, Inc. for an extension of its territory. The County objected on several grounds, including that the extension would be contrary to the intent and purpose of the County's comprehensive plan. According to Citrus County, the proposed extension would be inconsistent with Goals 3 and 4 of the water and sewer elements of its comprehensive plan as contained in Chapter IV of Ordinance 86-09. Goal 3 is identified as the protection of "aquifer recharge areas from pollution and abuse." Goal 4 provides that "Citrus County must become an active participant in the provision and protection of water resources in order to protect the health, safety, and welfare of residents, businesses and industries." The objective of the provision was that the County should move into providing service as a "municipal type" urban service that operates within its own revenues. The County planned to develop a master plan, including the evaluation of private systems for possible purchase, dedication and coordination with an eventual County water and sewer system.

In its order, the Commission stated that the goals and objectives of the County's plan were short on the detail necessary to judge their applicability to the extension proposed in this case. The Order states that it is appropriate that the Commission review those goals within the context of the full text of the water and sewer elements of the comprehensive plan. The record in this proceeding contained an engineering report prepared for Citrus County regarding county development of its water and sewer master plan. The order states that among this report's conclusions is that there is only a limited need for central wastewater facilities due to the type of land use that is proposed in the comprehensive plan and that the existing facilities (operated by Rolling Oaks) can serve present and projected needs. The Commission concluded that there was nothing in the record establishing that the comprehensive plan prohibits or reflects adversely on the proposed extension, particularly given the small dimensions of the proposed development and its close proximity to the Rolling Oaks' service area. The order states that inasmuch as the plan "contemplates

central water and sewer will replace small plants, septic systems, and other source points of pollution", the proposed extension is entirely consistent with the theme of central water and sewer service in the County.

The County also contended that Chapter 163 limits the service area of privately-owned water and sewer utilities to that territory approved by the County under its comprehensive plan. The Commission found that Chapter 163 does not "withdraw or diminish any legal powers or responsibilities" of the Commission. Rather, the Commission must consider, but is not bound by, the local comprehensive plan. "This Commission may, and should in appropriate circumstances, act independently of the County's comprehensive plan." Order No. 17158 (Feb 5, 1987). The order also provides that consistent with case law, prior Commission orders, and applicable statutes, the discretion to designate utility service areas lies exclusively with the Commission, and not Citrus County.

9. Docket No. 870982-WS
Order No. 20067
Issued September 26, 1988

Utility: Mad Hatter Utility, Inc.
Protestor: Pasco County

Order Dismissing Objection and Granting Time to File Extension of Time to File Application - Pasco County protested Mad Hatter Utility's notice of intent to amend it water and sewer service territory in Pasco County on the basis that the issuance of the amended certificates would be inconsistent with the County's comprehensive plan (entitled "Capital Facilities Plan). The County argued that its Capital Facilities Plan provided for an integrated water and wastewater system which was encompassed, in part, by Mad Hatter's proposed extension. The County contended that if Mad Hatter served the area it sought, it would result in competition with, or duplication of, systems owned or operated by the County and Water and Sewer District A, which the County is negotiating to purchase.

The evidence in the record indicates that the County has no treatment plant, mains, lift stations or effluent disposal or

storage facilities in the disputed area. Further, the record indicates that the County has been in negotiations to purchase the systems in Water and Sewer District A for more than two years, and that the District's facilities are involved in bankruptcy proceedings and under a moratorium. The Commission concluded that, since the County had no facilities in the territory and, in light of the situation of the Water and Sewer District A, expansion of those facilities appeared unlikely; therefore there was no duplication or competition with any system.

With regard to the County comprehensive plan, the Commission stated that the plan articulates the objectives of economical, reliable and environmentally sound utility service as well as the development of a county-wide system. The Commission found that Mad Hatter has gradually and systematically planned and built a system with a long-term view of providing an environmentally sound, centralized system of utility services. The Commission concluded that service to the disputed area would be consistent with Section 367.051, Florida Statutes. Based on this finding and other evidence regarding the financial and technical ability of the applicant and need for service in the area, the Commission dismissed the objection of Pasco County and allowed Mad Hatter additional time to complete the extension and file the amendment application.

1990

10. Docket No. 890459-WU
Order No. 22847
Issued April 23, 1990

Utility: Conrock Utility Company
Protestors: City of Brooksville and Hernando County

Final Order Upholding Objections and Denying Certificate - Conrock Utility Company (Conrock) filed a notice of intent to apply for an original certificate to provide water in Hernando County. Two governmental bodies, the City of Brooksville and Hernando County filed an objection to the notice. The case was referred to DOAH for a formal hearing conducted pursuant to Section 120.57(1), Florida Statutes.

The City of Brooksville objected to the notice for four reasons: the requested territory includes properties within the City's "statutory service area"; the application will promote urban sprawl; the application will involve a needless duplication of services; and the application will infringe on the City's ability to meet the financial obligations under its water and wastewater bond issue. Hernando County objected to the notice because it believed that granting the certificate would result in competition with, and duplication of, the county and city's water systems and may violate the comprehensive plan approved by the Department of Community Affairs.

In the Conclusions of Law, the Hearing Officer's Recommended Order provides, in part:

> ...Although the Commission is not bound by the provisions and mandates of the comprehensive plan involved in deciding whether to grant or deny a certificate, the consistency of the proposed utility service with the provisions of the approved comprehensive plan involved is an important consideration and should be persuasive in making the decision to grant or deny. In the instant case, the proposed utility certificated territory and service involved was shown to be contrary to the provisions of the comprehensive plan concerning the fact that the certificated territory proposed would overlap that reserved to the municipality of Brooksville by its agreement with Hernando County. That agreement is adopted as part of the comprehensive plan of the City of Brooksville, in that the 5-mile radius urban service area of the City of Brooksville encompasses the proposed territory sought by Conrock or a large portion of it.
>
> Further, the installation of the proposed system in the rural area involved in Hernando County would be contrary to the principles adopted in the comprehensive plan, and approved by the DCA which are designed to

> discourage and prevent urbanization and the proliferation of privately owned, separate utility systems in rural areas. Thus, in this context, the proposed certificated territory and the utility system contemplated by Conrock would not be in the public interest.

The Conclusions of Law contained in the Hearing Officer's Recommended Order also contain, in part:

> ...The proposed utility service and system which is the subject of this application has been shown to promote "urban sprawl," which is to be discouraged under the provisions of the city's comprehensive plan. It would unduly duplicate and be competitive with the city's water and sewer utility service in the proposed service area and that which is contemplated to be provided by the city and the county in accordance with the approved comprehensive plan and interlocal agreement. Thus, the proposed utility service is not established to be in the public interest in the context as well.

In its Order No. 22847, the Commission disagreed with the Hearing Officer's Conclusion of Law that the approved comprehensive plan should be persuasive in determining the need for service in the location where the certificate was requested. The order states that the Commission is not bound to enforce a locality's comprehensive plan, and that the authority given to local governments in Chapter 163, Florida Statutes, does not override this Commission's exclusive jurisdiction as set forth in Chapter 367.011(2) and (4), Florida Statutes. While disagreeing with this conclusion of the Hearing Officer, the Commission did agree with other aspects of the Recommended Order related to the inadequacies of the application and the applicant's showing of need for service. Accordingly, the objections by the City of Brooksville and Hernando County were upheld and the application of Conrock for a certificate was denied.

11. Docket No. 891264-SU
Order No. 23109
Issued June 25, 1990

Utility: Rookery Bay Utility
Protestor: Collier County

Order Granting Application for Amendment - Collier County filed an objection to Rookery Bay Utility Company's (Rookery Bay) application to amend its certificate stating that the requested territory was located within the Collier County Water-Sewer District. According to a letter from Collier County which was attached to the Commission's order, any development built within the county's water and sewer district will require an agreement that utility facilities other than treatment facilities be dedicated to Collier County and any utility treatment facilities other than those owned by the county shall be considered interim and dismantled when service by the county's regional facilities are available. The County's letter provides that such requirements comport with and carry out the objectives of the county's adopted comprehensive plan. A settlement was reached in this case prior to hearing whereby Rookery Bay agreed to provide interim service to the territory until the regional facilities of Collier County became available. The Commission approved the settlement agreement and granted the proposed amendment to Rookery Bay's certificate.

12. Docket Nos. 891002-WS, 891108-WS, 891192-WS, 891193-WS
Order No. 23162
Issued July 9, 1990

Utility: North Naples Utilities, Inc.
Protestor: Collier County

Order Approving Settlement Stipulation - Collier County filed an objection to North Naples Utilities, Inc.'s (North Naples) notices of its intent to apply for four separate amendments of its water and sewer certificates stating that the requested territory was located within the Collier County Water-Sewer District. According to a letter from Collier County which was attached to the Commission's order, any development built within the county's water and sewer district will require an agreement that utility facilities other than treatment facilities be dedicated to Collier County and any utility treatment facilities other than those owned

by the county shall be considered interim and dismantled when service by the county's regional facilities are available. The County's letter provides that such requirements comport with and carry out the objectives of the county's adopted comprehensive plan. A settlement was reached in this case prior to hearing whereby North Naples Utilities agreed to provide interim service to the territory until the regional facilities of Collier County became available. The Commission approved the settlement agreement and granted the proposed amendments to North Naples' certificate.

1991

13. Docket No. 900905-WS
Order No. 24474
Issued May 6, 1991

Utility: Hydratech Utilities, Inc.
Protestor: Martin County

Order Approving Stipulation, Amending Certificates to Include Additional Territory, and Closing Docket - Martin County filed an objection to Hydratech Utilities, Inc.'s application to add service territory in Martin County. Martin County argued that the application's provisions for utility service to portions of the requested area failed to conform with the County's comprehensive plan. The matter was resolved upon this order's ratification of a stipulation and settlement agreement filed by Hydratech and Martin County, whereby Hydratech agreed to delete portions of the territory initially requested. The certificates were amended subject to the stipulated agreement, and the docket was closed.

1992

14. Docket No. 910114-WU
Order No. PSC-92-0104-FOF-WU
Issued March 27, 1992

Utility: East Central Florida Services, Inc.
Protestor: City of Cocoa, South Brevard Water Authority, Osceola County

Final Order Granting Certificate - East Central Florida Services, Inc. (ECFS) filed an application for a water certificate for territory in Brevard, Orange and Osceola Counties. Brevard and Orange Counties filed objections to the application but later filed notices of withdrawal. The City of Cocoa testified that ECFS's application was inconsistent with Cocoa's comprehensive plan because the plan stated that Cocoa would provide water service within its service area. The plan did not indicate that someone else may provide water service within Cocoa's service area. The City of Cocoa and South Brevard Water Authority also argued that the application was inconsistent with Brevard County's comprehensive plan, although Brevard County withdrew its objection, and that ECFS had the burden of proving that certification was not inconsistent with the comprehensive plan.

The Commission found that if the comprehensive plan did not address the possibility of anyone else providing service in Cocoa's service area, the appropriate conclusion is that the plan is silent on the issue, not that ECFS's application is presumptively inconsistent with the plan. The Commission found no persuasive evidence that ECFS's certification was inconsistent with Cocoa's comprehensive plan. Further, the Commission found that if an objection is filed, then the objecting governmental entity must raise the issue of inconsistency. Therefore, the Commission did not consider Cocoa's arguments regarding the comprehensive plan of Brevard County. The Commission found that the applicant demonstrated a need for service in the area, and that there was no duplication of service of any other system that could serve the area. ECFS was granted a certificate.

The City of Cocoa appealed the Commission's order to the First DCA. However, the appeal was voluntarily dismissed in early July, 1993, before briefs were filed by the parties.

15. Docket No. 911139-WU
Order No. PSC-92-0255-FOF-WU
Issued April 27, 1992

Utility: Lake Hills Utilities, Inc.
Protestor: City of Clermont

Order Acknowledging Withdrawal of Objection and Stipulation and Amending Certificates - The City of Clermont timely objected

to the utility's application, based upon its belief that the proposed extension of the utility's service area was in violation of the City's comprehensive plan. However, the City agreed to withdraw its objection to the application, and, as consideration therefor, the utility agreed to file an amendment to the application which served to delete the territory that the City had objected to in its initial application. The Commission approved the utility's amended application.

1994

16. Docket No. 931111-SU
Order No. PSC-94-1132-FOF-SU
Issued September 14, 1994
Order No. PSC-94-1524-FOF-SU
Issued December 12, 1994

Utility: Resort Village Utility, Inc.
Protestor: 5 individuals

Order Granting Motion to Dismiss - Resort Village Utility, Inc. filed an application for a wastewater certificate in Franklin County. Five individuals filed objections to the certificate application stating problems with land use, zoning, and incompatibility with local comprehensive plans. Additionally, environmental concerns were raised concerning the location of the plant. The order granted the utility's motion to dismiss all objectors. The Commission approved the motion stating "even if the allegations raised by the objectors are correct, we find that this Commission does not have jurisdiction to address environmental and zoning issues raised by the objectors." At that time both DEP and the Franklin County Commission were dealing with these same issues. The Commission stated in its order that the proceedings before other governmental agencies underscore the fact that the Commission is not the appropriate forum to address the concerns raised by the objectors. By Order No. PSC-94-1524-FOF-SU, the Commission granted the utility's application for a certificate.

1995

17. Docket No. 941271-WS
Order No. PSC-95-1363-FOF-WS
Issued November 3, 1995

Utility: Florida Cities Water Company
Protestor: Lee County

Order Acknowledging Settlement Agreement and Amending Certificates - Florida Cities Water Company applied for an amendment of its water and wastewater certificates to include territory that it has been serving for many years. Lee County objected to a portion of the requested territory, specifically the provision of water service to thirteen residences and one undeveloped lot in a residential subdivision. It also objected to Florida Cities' provision of wastewater service to three commercial properties. A review of the docket file shows that the reason for the objection was that the request was inconsistent with, and violated the provisions of, the Lee County Comprehensive Plan as approved by the DCA.

The dispute with Lee County was settled with an agreement and the application was approved by the Commission. According to the agreement attached to the order, Florida Cities agreed that Lee County should provide water service and Florida Cities should provide wastewater service to the thirteen residences and undeveloped lot. Florida Cities agreed that Lee County should provide wastewater to the three commercial properties in dispute. In the agreement Florida Cities acknowledged that certain areas were considered planned wastewater service areas by the Lee County Comprehensive Plan.

1996

18. Docket No. 941121-WS
Order No. PSC-96-1137-FOF-WS
Issued September 10, 1996

Utility: South Broward Utility, Inc. (SBU)
Protestor: City of Sunrise

Final Order Amending Certificates 359-W and 290-S to Include Additional Territory - SBU filed an application for amendment to include territory in Broward County. The City of Sunrise filed an objection to the application alleging that: service is not required from SBU; service will not be necessary until the Spring of 1997, and that SBU's application is inconsistent with three local comprehensive plans (Broward County, Town of Davie, and City of Sunrise). The City asserted that all three comprehensive plans identified the City as the regional provider. After reviewing the evidence, the Commission found that there was a need for service, SBU has the technical and financial ability to provide the service, and that it was in the public interest to approve SBU's application. With regard to the comprehensive plan argument, the Commission found that the evidence did not indicate a clear designation that the City was to be the regional service provider, that service to the area by SBU meets the stated objectives in the Broward County and Town of Davie Plans, and that the record does not provide information on the objectives of the City of Sunrise Plan.

The City of Sunrise appealed the Commission's order to the First District Court of Appeal (DCA). The DCA per curiam affirmed the Commission's order. City of Sunrise v. South Broward Utility, Inc., No. 96-4890 (Fla 1st DCA Aug. 28, 1997).

19. Docket No. 951419-SU
Order No. PSC-96-1281-FOF-SU
Issued October 15, 1996

Utility: Alafaya Utilities, Inc.
Protestor: City of Oviedo

Order Amending Certificate - Alafaya Utilities, Inc. filed an

application for amendment of its wastewater certificate to add territory in Seminole County. The City of Oviedo filed an objection to the application alleging that there is no demonstrated need for service in the expanded territory, that the application violates the City comprehensive plan, and that the service would compete with the City's wastewater system.

Both the City and Alafaya presented evidence that there is a need for service in the disputed area, establishing that there will be a demand for service from developments which should be under construction within 12 to 18 months of the order. There was evidence that both the City and Alafaya could ultimately provide service to the area; however, only Alafaya could provide the service within the time frame established to meet the demand in the area. The evidence indicated that the City had not yet decided whether it would build a plant to provide service or enter into a bulk arrangement with Seminole County to purchase wastewater treatment capacity.

The City alleges that the application is inconsistent with the City's comprehensive plan in that it violates the city policy of controlling central sewer service within the City of Oviedo, and the City's desire to achieve the important management goals relating to the timing and phasing of development, and because the comprehensive plan adopted as a policy ownership and control of all the utilities. The Commission found that while the proposed amendment is inconsistent with the comprehensive plan with regard to the ownership aspect, it meets the other goals within the wastewater element of the plan. The Commission found that it met the overall goal of the wastewater element of providing cost effective environmentally acceptable wastewater treatment. Therefore, the inconsistency with the comprehensive plan was not controlling. Also, the Commission found that the City could achieve its management goals relating to the timing and phasing of development through other means, such as permitting and the provision of water service, which is provided by the City.

Further, the Commission found that there was no duplication of service with regard to collection lines since neither party had constructed lines in the territory. With regard to treatment plant, Alafaya has existing capacity to serve the territory; therefore, if the City builds a treatment plant, it would be in duplication of Alafaya's plant. The Commission concluded that it was in the public interest to approve the amendment.

The City of Oviedo appealed this order at the First DCA. The DCA per curiam affirmed the Commission's order. City of Oviedo v. Clark, No. 96-4348(Fla. 1st DCA Sept. 18, 1997). In addition to the per curiam affirmation, the court addressed Oviedo's argument concerning the PSC's application of Section 367.045(5)(b), Florida Statutes. In this opinion, the court held that the PSC correctly applied the requirements of the statute, saying that the plain language of the statute only requires the PSC to consider the comprehensive plan and is expressly granted discretion in the decision of whether to defer to the plan. The court points out that five pages of the Commission's order are devoted entirely to the comprehensive plan issue, and plainly demonstrates that the PSC considered Oviedo's plan. The court concluded that the Legislature could have required the PSC to defer to a properly adopted comprehensive plan but did not do so.

1997

20. Docket No. 960907-WS
Order No. PSC-97-0932-FOF-WS
Issued: August 5, 1997

Utility: Florida Water Services (Florida Water)
Protestor: The City of Cape Coral

Order Approving Stipulation - Florida Water filed an application for amendment to include territory in Charlotte and Lee Counties. The City of Cape Coral filed an objection to the notice asserting that Florida Water's application conflicts with Cape Coral's Comprehensive Plan and that Cape Coral solely possesses the right to regulate and franchise utilities pursuant to Chapter 180, FS. The parties filed a stipulation with the Commission regarding this docket in which the parties agreed that the application does not conflict with the City's comprehensive plan. The City withdrew its objection but did not waive its right to raise the issue of regulation of the utility's service area by the City. This order approves the stipulation and the application of the utility.

21. Docket No. 960867-WU

Utility: Windstream Utilities Company
Protestor: JB Ranch, Marion County

Windstream filed an application for amendment of its water certificate to add territory in Marion County. Marion County filed a Petition to Intervene and a potential customer, JB Ranch, filed an objection to the utility's notice, which objection was later found to be withdrawn. In its Petition to Intervene, Marion County has argued, among other things, that the amendment application is inconsistent with the Marion County Water Resources Protection and Utilities Plan and the Marion County Comprehensive Plan. The Commission had on its own motion set this matter for hearing. Subsequently, the Commission received a settlement agreement between the County and the private utility, by which the County agreed to withdraw its objection to the utility's amendment application in exchange for the utility's modification of its application to remove certain territory. At the October 7, 1997, the Commission accepted the Settlement Agreement and approved the utility's modified application for amendment.

MEMORANDUM OF UNDERSTANDING

FLORIDA PUBLIC SERVICE COMMISSION
AND
FLORIDA DEPARTMENT OF COMMUNITY AFFAIRS

HISTORY

The Legislature has recognized that growth in Florida should be managed so that it occurs in an orderly manner, and enacted Chapter 163, Florida Statutes, to address comprehensive planning in the state. The Department of Community Affairs (DCA), as the state's planning agency, is responsible for the review of local government comprehensive plans and plan amendments. The Legislature also enacted Chapter 367, Florida Statutes, and declared the regulation of investor-owned water and wastewater utilities to be in the public interest. The Legislature gave the Public Service Commission (PSC) exclusive jurisdiction over these utilities with respect to authority, service and rates.

Section 163.3167(2), Florida Statutes, provides that "[e]ach local government shall prepare a comprehensive plan of the type and in the manner set out in this act or shall prepare amendments to its existing comprehensive plan to conform it to the requirements of this part in the manner set out in this part." Pursuant to Section 163.3177(6)(c), Florida Statutes, the plan is required to contain a "general sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer recharge element correlated to principles and guidelines for future land use" and must indicate "ways to provide for future potable water, drainage, sanitary sewer, solid waste, and aquifer recharge protection requirements for the area."

The comprehensive plan is also required to include "a future land use plan element designating proposed future general distribution, location, and extent of uses of land..." and that each category of land use "shall be defined in terms of the types of uses included and specific standards for the density and intensity of use." The future land use plan must be based upon "data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services; and the need for redevelopment..." (Section 163.3177(6)(a), Florida Statutes) Section 163.03(1)(e), Florida Statutes, directs the DCA to "conduct programs to encourage and promote the involvement of private enterprises in the solution of urban problems."

Chapter 367, Florida Statutes, requires water and wastewater utilities regulated by the PSC to obtain a certificate of authorization from the PSC. Section 367.045(5)(b), Florida Statutes, provides that:

> [w]hen granting or amending a certificate of authorization, the Commission need not consider whether the issuance or amendment of the certificate of authorization is inconsistent with the local comprehensive plan of a county or municipality unless a timely objection to the notice required by this section has been made by an appropriate motion or application. If such an objection has been timely made, the Commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality.

By enacting Chapter 163, Florida Statutes, the Legislature did not add criteria to Chapter 367, Florida Statutes, nor did the Legislature intend to allow local governments to use comprehensive plans to designate the specific utility providers for each geographic area. Pursuant to Chapter 367, Florida Statutes, the authority to designate investor-owned utility certificated territories is within the sole discretion of the PSC. However, a PSC certificate does not negate an investor-owned utility's duty to comply with local government future land use designations and other aspects of an approved local comprehensive plan.

It is the intent of this Memorandum of Understanding (MOU) to establish the guidelines under which the PSC and the DCA will work together in PSC certificate cases in order for both agencies to have a satisfactory understanding of the relationship between the regulation of investor-owned water and wastewater utilities and local comprehensive planning.

AGREEMENT

The PSC and the DCA agree to implement the following guidelines:

1. The PSC agrees to inform DCA when an original certificate case or an amendment of territory case is filed. The DCA will provide information to the PSC including comments regarding the relationship of the certificate application and the local government comprehensive plan. The DCA comments will include information from the local government comprehensive plan such as, the land use categories, the densities and intensities of use, and other information regarding the land uses, patterns of development, and need for service in the requested territory. The PSC staff will present the information

provided by the DCA to the Commission for consideration in evaluating the application.

2. The PSC will inform DCA of certificate cases that have been protested by a local government because of a comprehensive plan issue. The DCA agrees to consult with the PSC to determine the appropriate role of the DCA in the certificate case and any subsequent PSC administrative proceeding. This role may include, at the request of the PSC staff, the DCA sponsoring testimony to complete the record regarding the DCA comments related to comprehensive plans.

3. The respective staffs of the PSC and DCA, by January 15, 1999, shall prepare a report to the Commission and Secretary of the Department summarizing the experience of implementing the MOU, and suggest whether statutory or rule changes are needed to carry out legislative intent and to better coordinate the agencies' efforts.

This MOU may be amended by mutual agreement of the DCA and the PSC. It shall remain in effect until it is dissolved by mutual agreement of the agencies or terminated by an agency after giving written 30-day advance notice to the other agency. This agreement will be effective upon the date of the last signature.

Jim Murley, Secretary
Department of Community Affairs

6-5-98
Date

Julia L. Johnson, Chairman
Public Service Commission

Date

STATE OF FLORIDA

DEPARTMENT OF COMMUNITY AFFAIRS

"Helping Floridians create safe, vibrant, sustainable communities"

LAWTON CHILES
Governor

JAMES F. MURLEY
Secretary

MEMORANDUM

TO: Billie Messer and John Williams, Division of Water and Wastewater
Public Service Commission

FROM: Charles Gauthier, AICP, Growth Management Administrator
Department of Community Affairs
Bureau of Local Planning

DATE: March 6, 1998

SUBJECT: Public Service Utilities Expansion Application
Florida Water Services Corp., PSC Docket No. 971638-SU

The Florida Water Services Corporation has applied to the Public Service Commission to amend its water and wastewater certificate to include additional land area in its service territory. The area proposed for addition to the Florida Water Services service territory is located in the City of Longwood in Seminole County, as follows: The Florida Central Commerce Park, Longwood, Florida, Township 21 South, Range 30 East, Section 6, the southwest 1/4 of the southeast 1/4.

The area described above is an urban area with existing industrial land uses and an Industrial future land use designation. These facts have been verified with the planning staff of the City of Longwood.

The expanded service area would not contribute to urban sprawl or promote land uses which would be incompatible with existing land uses. The Department identifies no growth management issues related to the proposed expansion of the Florida Water Services Corporation service are as described above.