

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

On June 3, 1997, Lake Suzy Utilities, Inc. (Lake Suzy) filed an application for amendment to include additional territory in DeSoto and Charlotte Counties. On August 8, 1997, the utility was advised that it needed to file an application for original in existence certificates instead of an application for amendment of certificates. On September 11, 1997, Lake Suzy filed an original certificate application to provide water and wastewater service in DeSoto and Charlotte Counties. On October 22, 1997, DeSoto County timely filed an objection to the application for original certificate. On October 24, 1997, Charlotte County (Charlotte or County) timely filed an objection to Lake Suzy's application. On January 13, 1998, DeSoto County filed a withdrawal of the objection to Lake Suzy's application and a notice of voluntary dismissal. On January 14, 1998, Charlotte County also withdrew its objection and included a copy of the settlement agreement reached between the County and Lake Suzy. The official filing date for this application was March 17, 1998, when all the deficiencies were complete.

On February 19, 1998, Florida Water Services Corporation (FWSC or Florida Water) filed an application for amendment to add territory in Charlotte County. Subsequently, on March 4, 1998, FWSC filed an Objection to Application(s) for Territory Amendment & Original Certificates by Lake Suzy Utilities, Inc. and Petition for Leave to Intervene. On March 18 and 19, 1998, Charlotte County and Haus Development, Inc. (Haus), respectively, timely filed objections to FWSC's application. On March 20, 1998, Lake Suzy filed a Response to Objection of Florida Water Services Corporation and Florida Water Services Corporation's Petition to Intervene, as well as a timely objection to FWSC's application. On April 13, 1998, FWSC filed a Motion to Consolidate Dockets Nos. 970657-WS and 980261-WS. On April 20 and 28, 1998, Lake Suzy and Haus, respectively, filed responses to FWSC's Motion to Consolidate.

By Order No. PSC-98-1089-PCO-WS, issued August 11, 1998, the Commission consolidated Dockets Nos. 970657-WS and 980261-WS and set the matter for hearing. In light of this decision, the 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 21, 1998, the Division of Legal Services received a copy of a Memorandum and Response to Lake Suzy Utilities, Inc.'s Motion for Partial Summary Disposition by Charlotte County. The County's response subsequently was filed with the Division of Records and Reporting on August 31, 1998. At the October 6, 1998 Agenda Conference, the Commission acknowledged DeSoto County's withdrawal and voluntary dismissal of its petition and denied Lake Suzy's motion. By Order No. PSC-98-1538-PCO-WS, issued November 20, 1998, the Commission reconsidered its October 6, 1998 decision and again denied Lake Suzy's motion.

For purposes of clarification, Lake Suzy has requested authority to provide water and wastewater service to certain areas within DeSoto County. In addition, Lake Suzy has requested authority to provide water service only to the Links Subdivision (Links) in Charlotte County. Lake Suzy and Charlotte County have contractually agreed for Lake Suzy to provide water service and Charlotte County to provide wastewater service to the Links. However, FWSC has requested in its revised amendment application to provide both water and wastewater service to the Links. Charlotte County objects to FWSC's request to provide water since it has contracted with Lake Suzy to do so. Further, the County objects to FWSC providing wastewater to the Links since it alleges it is willing, able and ready to provide that service.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such

request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 367.156, Florida Statutes.

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

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

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

appropriate protective agreement with the owner of the material.

- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

With the exception of Mr. Robert Koncar, testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon

insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

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

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

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Dallas Shepard	LAKE SUZY	1,2,3,5,6
Brian P. Armstrong	FWSC	1,2,3,5
Charles L. Sweat	FWSC	1,4
Richard E. Howell	CHARLOTTE	1,2,3,4,5
Charlotte Sopko	HAUS	1
*Robert Koncar	LAKE SUZY, FWSC, STAFF	2,3
<u>Rebuttal</u>		
Brian P. Armstrong	FWSC	1,2,3,5

*Mr. Koncar has not prefiled testimony in this matter. Mr. Koncar's deposition shall be entered into the record without objection by the parties in lieu of his prefiled testimony.

VII. BASIC POSITIONS

LAKE SUZY: It is in the public interest for Lake Suzy to provide water service to the property in question. Merely because FWSC is a larger utility does not mean it is more qualified to serve the property in question even if it had the ability to do so. The addition of the 49 lots will allow Lake Suzy to benefit from economics of scale, whereas the addition of those lots to FWSC's service area will have no impact upon existing customers. All other things being equal, Lake Suzy should be granted the territory in question since it filed its application first.

FWSC: Florida Water and Lake Suzy have filed competing territory amendment applications with the Commission. Although Lake Suzy has applied for substantially greater territory within DeSoto County, the area which Florida Water and Lake Suzy both seek to add to their respective territories is known as the Links Subdivision, consisting of some 50 lots within Charlotte County. Lake Suzy does not have adequate technical and financial ability to provide service to the territory it requests. Florida Water has more than adequate technical and financial ability to serve the territory it requests. The Commission should find that it is in the public interest for Florida Water, not Lake Suzy, to provide water and wastewater service to the Links Subdivision.

CHARLOTTE: The Florida Public Service Commission (FPSC) does have the authority to determine whether a water and wastewater utility, subject to its jurisdiction, should be allowed to serve a particular territory. The FPSC does not have the authority to determine whether a governmental entity providing water and wastewater service should be allowed to serve a particular territory. Charlotte County through Charlotte County Utilities has a prior existing legal right to serve the territory in question and is ready, willing and able to provide both water and wastewater services.

HAUS: Adopts Lake Suzy's position.

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

VIII. ISSUES AND POSITIONS

ISSUE 1: When will service to the areas Lake Suzy and FWSC seek to add to their certificates be required?

POSITIONS

LAKE SUZY: There is an immediate need for service in the area. (SHEPARD)

FWSC: Water and wastewater service to the Links will be required within a reasonable time. The specific time frame for when lots owned by Haus will require water and wastewater service is subject to further discovery. Lot 18 of the Links, which Lake Suzy connected to its water system illegally, appears to have desired water service immediately, but this too is subject to further discovery. Case law provides that the unlawful provision of utility service may not be used as evidence of public convenience and necessity. Wytrwal v. Bevis, 304 So.2d 13 (Fla. 1974). (ARMSTRONG, SWEAT)

CHARLOTTE: There is a current need for service in the area.
(HOWELL)

HAUS: There is an immediate need for service in the area.
(SOPKO)

STAFF: It appears that the need for service is immediate.

ISSUE 2: Does Lake Suzy/FWSC have the financial ability to serve the requested territory?

POSITIONS

LAKE SUZY: Lake Suzy has the financial ability to serve the requested territory. FWSC does not have the financial ability to provide water and wastewater service to the requested territory. (SHEPARD)

FWSC: Lake Suzy does not have adequate financial ability to serve requested territory. However, FWSC does have adequate financial ability to serve the territory. (ARMSTRONG)

CHARLOTTE: Lake Suzy has the financial ability to serve the territory. FWSC's financial ability to serve the territory is in question in light of the dispute with Charlotte County related to the payment for bulk water and wastewater services rendered pursuant to the services agreement to which FWSC and Charlotte County are successor utilities. (HOWELL)

HAUS: Lake Suzy has the financial ability to serve the requested territory while FWSC does not.

STAFF: It appears that both Lake Suzy and FWSC have the financial ability to serve the requested territory.

ISSUE 3: Does Lake Suzy/FWSC have the plant capacity and technical ability to serve the requested territory?

POSITIONS

LAKE SUZY: Lake Suzy has the plant capacity and technical ability to serve the requested territory. However, FWSC does not have the plant capacity or the technical ability to serve the requested territory. (SHEPARD)

FWSC: Lake Suzy does not have the technical ability to serve the requested territory. Lake Suzy does not have adequate water and wastewater capacity available to serve its entire requested territory. However, FWSC does have the technical ability and water and wastewater capacity to serve the area. (ARMSTRONG)

CHARLOTTE: Agree with staff. (HOWELL)

HAUS: Lake Suzy has the plant capacity and technical ability to serve the requested territory. However, FWSC does not have the plant capacity or the technical ability to serve the requested territory.

STAFF: Lake Suzy has both the capacity and technical ability to serve the requested territory. It appears that FWSC has the technical ability to serve the area, but it is unclear at this time if FWSC has the capacity to serve the area pursuant to its bulk service agreement with Charlotte County due to a financial, as well as a contract interpretation, dispute with Charlotte County. Furthermore, no other contractual arrangements for capacity via other bulk service agreements have been provided by FWSC at this time.

ISSUE 4: Is Charlotte County, through the Charlotte County Utilities Department, ready, willing and able to provide service to the area in question?

POSITIONS

LAKE SUZY: Yes, Charlotte County is ready, willing and able to provide service to the area. However, Charlotte County and Lake Suzy have contractually agreed for Lake Suzy to provide water service and Charlotte County to provide wastewater service to the Links Subdivision.

FWSC: Charlotte County Utilities ("CCU") cannot provide wastewater service to the Links without Florida Water's permission to utilize Florida Water's facilities. CCU informed Florida Water that Florida Water could provide water and wastewater service to the Links. CCU agreed, subject to Public Service Commission approval, for Lake Suzy to provide water service to the Links. If neither Lake Suzy nor Florida Water are granted the Links, CCU could provide water service thereto. (SWEAT)

CHARLOTTE: Yes, Charlotte County is ready, willing and able to provide service to the area. Charlotte County and Lake Suzy have contractually agreed for Lake Suzy to provide water service and Charlotte County to provide wastewater service to the Links Subdivision. This contractual agreement is contingent on the grant of authority from the Commission. In the event the Commission does not grant Lake Suzy authority to provide water service to the area, Charlotte County is ready, willing and able to provide both water and wastewater service to the Links subdivision. (HOWELL)

HAUS: Yes, Charlotte County is ready, willing and able to provide service to the area. However, Charlotte County and Lake Suzy have contractually agreed for Lake Suzy to provide water service and Charlotte County to provide wastewater service to the Links Subdivision.

STAFF: At this time, Charlotte County's ability to provide wastewater service to the area is in dispute because FWSC has alleged that it is the owner, not Charlotte County, of the wastewater line abutting the territory which Charlotte County has stated would be used by it to serve the area. As to Charlotte County's ability to provide water service, it appears that the County is not ready, willing, or able to serve since it has contracted with Lake Suzy for Lake Suzy to provide water service to the area.

ISSUE 5: Is it in the public interest for the Commission to grant Lake Suzy's/FWSC's application?

POSITIONS

LAKE SUZY: It is in the public interest for the Commission to grant Lake Suzy's application. It is not in the public interest for the Commission to grant FWSC's application. If both parties are determined to be equally qualified to serve the territory in question, then the party whose application was filed first should be granted the territory in question. (SHEPARD)

FWSC: It is in the public interest for the Commission to grant FWSC's application. It is not in the public interest for the Commission to grant Lake Suzy's application. (ARMSTRONG)

CHARLOTTE: It is in the public interest for the Commission to grant authority to Lake Suzy to serve the Links subdivision. In light of the dispute between Charlotte County and FWSC, the financial and technical ability of FWSC to serve the area is in question and it would not appear to be in the public interest to grant FWSC authority to provide either water or wastewater service to the Links subdivision. (HOWELL)

HAUS: It is in the public interest for the Commission to grant Lake Suzy's application. It is not in the public interest for the Commission to grant FWSC's

application. If both parties are determined to be equally qualified to serve the territory in question, then the party whose application was filed first should be granted the territory in question.

STAFF: The determination of this issue is dependent upon the resolution of the other issues, and as such, staff has no position pending further development of the record.

ISSUE 6: Are Lake Suzy's water and wastewater facilities and land functionally related to each other such that they constitute a single system whose service transverses county boundaries?

POSITIONS

LAKE SUZY: Yes. (SHEPARD)

FWSC: No position.

CHARLOTTE: No position.

HAUS: No position.

STAFF: Yes, Lake Suzy's wastewater facilities are functionally related to its water facilities, both operationally and administratively. These facilities will constitute a single system whose service transverses county boundaries if the Commission grants Lake Suzy's application.

LEGAL ISSUE

ISSUE 7: What legal authority does the Commission have in this proceeding to make a determination of the rights and duties of the parties to the service agreement to which FWSC and Charlotte County Utilities are successor utilities?

POSITIONS

- LAKE SUZY:** To the extent that FWSC relies upon the Agreement as support for its assertion that it has sufficient capacity to serve the Links subdivision, then the Commission has the authority to interpret that Agreement.
- FWSC:** The Commission does not have authority to determine the rights and duties of parties to any contract which the Commission had no authority to approve.
- CHARLOTTE:** The Commission does not have the authority to resolve contractual disputes between FWSC and Charlotte County. However, the Commission does have the authority to review and interpret contracts, agreements, etc., entered into by utilities within its jurisdiction to determine how such contracts, agreements, etc., would affect the customers of such utility and the readiness, willingness and ability of the FPSC regulated utility to provide service.
- HAUS:** Adopts Lake Suzy's position.
- STAFF:** Pursuant to Section 367.045, Florida Statutes, in deciding whether to grant a utility's application, the Commission must determine if the utility has the financial and technical ability and capacity to serve the requested area. While the Commission does not have the legal authority to resolve contractual disputes between parties to the contract, the Commission does have the authority to review that contract and reach its own conclusions regarding the rights and duties of the parties if a utility relies upon it as proof of its financial or technical ability or capacity to serve an area.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Dallas Shepard	LAKE SUZY	DS-1	Application of Lake Suzy, including supplemental and amended filings - Composite Exhibit.
Dallas Shepard	LAKE SUZY	DS-2	Lake Suzy Amended Water Supply Contract with DeSoto County.
Dallas Shepard	LAKE SUZY	DS-3	Water and Wastewater Service Area Agreement dated December 9, 1997 between Charlotte County and Lake Suzy.
Brian Armstrong	FWSC	BPA-1	FWSC's Amendment Application.
Richard E. Howell	CHARLOTTE COUNTY	REH-1	Resolution No. 91-79 of Charlotte County.
Richard E. Howell	CHARLOTTE COUNTY	REH-2	Breakout of amounts owed Charlotte County by FWSC.

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Richard E. Howell	CHARLOTTE COUNTY	REH-3	Charlotte County's Response to Staff 1st Request for Production of Documents.
Richard E. Howell	CHARLOTTE COUNTY	REH-4	Charlotte County's Response to Staff 1st Set of Interrog- atories.
Robert Koncar	LAKE SUZY, FWSC, STAFF	RK-1	DeSoto County agreements for water allocation from Water Supply Authority.

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

X. PROPOSED STIPULATIONS

All of the parties and Staff have agreed that the following stipulations are reasonable and should be accepted by the Commission.

1. There is a need for service in DeSoto County and in the Links subdivision.
2. No competition or duplication will exist in this case regardless of which utility serves the territory because none of the utilities have any physical facilities in place in the disputed area. Because Lake Suzy improperly began serving one customer in the requested area without antecedent Commission approval, it would be improper to

consider these facilities in determining if any competition or duplication exists.

3. The following exhibits may be entered into evidence without objection by the parties: DS-2, DS-3, RK-1, REH-1, and the bulk service contract between FWSC and Charlotte County which is contained within Exhibit REH-3.
4. If the Commission approves Lake Suzy's application, regulatory assessment fees would be due from the effective date of the Commission's order approving Lake Suzy's application provided that Lake Suzy refunds all revenues collected from Lot 18 of the Links subdivision within 30 days of the effective date of the Commission's order. The utility shall provide proof of the refund within 30 days after the refund is completed. In the event Lake Suzy does not refund all revenues collected from Lot 18, pursuant to Rule 25-30.120, Florida Administrative Code, regulatory assessment fees would be due from Lake Suzy from the date the utility began providing service in Charlotte County.

XI. PENDING MOTIONS

There are no pending motions at this time.

XII. RULINGS

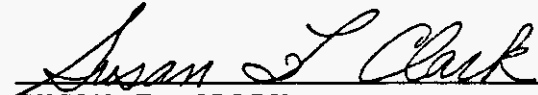
1. Ms. Charlotte Sopko's request to be excused from attending the prehearing conference was granted.
2. Staff's oral request to strike Mr. Koncar as a subpoenaed witness from the Prehearing Order was granted. In lieu of prefiled testimony, Mr. Robert Koncar's deposition will be inserted into the record without objection.

It is therefore,

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

ORDER NO. PSC-98-1756-PHO-WS
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By ORDER of Commissioner Susan F. Clark, as Prehearing
Officer, this 23rd Day of December, 1998.



SUSAN F. CLARK
Commissioner and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.