



Public Service Commission

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RECORDS AND REPORTING

DATE: SEPTEMBER 23, 1999

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

FROM: DIVISION OF LEGAL SERVICES (VACCARO) *JVes*
DIVISION OF WATER AND WASTEWATER (REDEMANN) *BSM*

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

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

AGENDA: OCTOBER 5, 1999 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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

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 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

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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 Charlotte 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. 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. Charlotte County's response was subsequently 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.

A Prehearing Conference was held in this matter on December 14, 1998, and Order No. PSC-98-1756-PHO-WS (Prehearing Order) was

issued on December 23, 1998, setting forth the procedures to be followed at hearing. On January 11, 1999, FWSC, in conjunction with Lake Suzy, filed a Joint Motion for Continuance, stating that the movants were engaged in good faith settlement discussions and had appeared to reach a settlement in principle on major points.

By Order No. PSC-99-0078-PCO-WS, issued January 11, 1999, the parties' motion was granted. Pursuant to that Order, the parties were to report on the status of settlement negotiations within 90 days from the date of filing the motion. In the event the parties had not reached a settlement, the Order provided that hearing and procedural dates would be reestablished. Based on the Order, the hearing dates were canceled.

On April 9, 1999, FWSC and Lake Suzy filed a Settlement Progress Report and Motion for More Time. The parties indicated that they were making progress toward a settlement but required additional time. Therefore, the parties requested an additional 45 days from the date of the progress report to again report to the Commission on their settlement progress. By Order No. PSC-99-0973-PCO-WS, the parties' motion was granted.

On May 17, 1999, Lake Suzy filed a Progress Report and Request to Reschedule Hearing. Lake Suzy stated that FWSC and Lake Suzy could not finalize a settlement. Lake Suzy requested that the matter be rescheduled for hearing as soon as possible. On June 7, 1999, FWSC Filed a Supplement to Settlement Progress Report. FWSC indicated that Lake Suzy had been purchased by Aqua Source Utility, Inc., and suggested that more discovery would be needed, and that the issues in positions in the Prehearing Order would need to be revisited in light of this purchase. On June 7, 1999, Lake Suzy responded to FWSC's supplement to settlement progress report, indicating there was no need to revisit the issues and positions in the Prehearing Order.

On June 18, 1999, FWSC filed a Motion for Commission to Take Official Notice that DeSoto County had enacted an Ordinance Number 1999-10, which granted FWSC territory in DeSoto County, which Lake Suzy has requested in this proceeding before the Commission. On June 24, 1999, Lake Suzy timely responded to FWSC's motion, requesting that the Commission deny FWSC's motion and to reaffirm that DeSoto County's action did not divest the Commission of its jurisdiction over Lake Suzy's application.

In July, 1999, the parties met informally with staff to discuss the subsequent developments in the case and to attempt to reschedule hearing dates and any necessary preliminary dates.

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Staff proposed that it request hearing dates on August 24-25, 1999, which had become available following the cancellation of a hearing in another matter. FWSC indicated that it would not be ready to proceed to hearing on those dates, given the subsequent developments, which it believed to affect the issues in the case.

The parties proposed that the hearing be rescheduled sometime during the dates of October 12 through 15, 1999, pending settlement of hearings in other FWSC proceedings scheduled for those dates. The October dates did not become available, and the hearing was rescheduled for February 3 and 4, 1999, the next earliest dates available.

On August 30, 1999, DeSoto County (the County) filed a Petition for Leave to Intervene in this proceeding. On September 7, 1999, Lake Suzy timely filed an objection to the County's motion. The County filed a reply to Lake Suzy's objection on September 20, 1999. On September 8, 1999, Lake Suzy filed a Motion to Expedite Hearing. On September 17, 1999, Haus Development, Inc. filed a letter indicating that it concurred with Lake Suzy's motion to expedite. This recommendation addresses FWSC's motion to take official notice, the County's petition to intervene and Lake Suzy's motion to expedite hearing.

ISSUE 1: Should the Commission grant Florida Water Services Corporation's Motion for Commission to Take Official Notice?

RECOMMENDATION: Yes. The Commission should grant Florida Water Services Corporation's motion and take official notice of DeSoto County Ordinance No. 1999-10. (VACCARO)

STAFF ANALYSIS: On June 18, 1999, FWSC filed a motion in which it requested that the Commission take official notice of DeSoto County Ordinance No. 1999-10. FWSC states that DeSoto County Ordinance No. 1999-01, enacted on February 23, 1999, established the authority, process and procedures for the granting of water and wastewater franchises within DeSoto County. FWSC further states that it applied for a franchise with the County, and a public hearing was held before the County's Board of County Commissioner's on June 8, 1999. FWSC states that the County granted the utility's requested franchise by enactment of Ordinance No. 1999-10. FWSC further states that the territory granted by the franchise includes all of the DeSoto County territory sought by Lake Suzy in the present Commission docket. A copy of Ordinance No. 1999-10 was attached to the motion which was provided to the parties in this docket.

On June 23, 1999, Lake Suzy timely responded to FWSC's motion. Lake Suzy asserts that FWSC entered into settlement negotiations with Lake Suzy as a delay tactic until DeSoto County could enact Ordinance No. 1999-01. Upon enactment of that Ordinance, FWSC applied for a franchise with the County, despite an agreement between the parties to delay any efforts at securing franchises before the County, pending settlement negotiations before the Commission. Lake Suzy asserts that FWSC has used delay tactics to secure a first in time first in right franchise pursuant to City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991). Lake Suzy argues that FWSC's motion should be denied, because Lake Suzy has sought judicial review of the County's actions in granting a franchise; therefore, the Ordinance is not final. Lake Suzy also argues that the Commission should deny the motion, because but for FWSC's objection, the Commission would have granted Lake Suzy's application. Lake Suzy requests that the Commission reaffirm that DeSoto County's action does not divest the Commission of its jurisdiction to grant Lake Suzy's application.

Section 90.202(10), Florida Statutes, provides that a court may take judicial notice of "duly enacted ordinances and resolutions of municipalities and counties located in Florida, provided such resolutions are available in printed copies or as

certified copies." FWSC has provided a copy of the ordinance in question. The ordinance itself indicates that it was enacted pursuant to Ordinance No. 1999-01 which establishes the County's authority, process and procedures for the granting of water and wastewater franchises within the County. The ordinance also indicates that it was enacted pursuant to public notice and hearing. Therefore, staff believes that Ordinance No. 1999-10 falls under matters of which the Commission may take official notice.

Lake Suzy asserts that the Commission should deny FWSC's motion, because Lake Suzy has sought judicial review of the ordinance. Staff notes that Section 90.202(10), Florida Statutes, does not distinguish ordinances which have been appealed. Lake Suzy will have an opportunity to offer evidence at the hearing regarding the appellate status of the ordinance. Further, Lake Suzy's comments regarding FWSC's motives and the Commission's jurisdiction over Lake Suzy's application go to the merits of the case instead of FWSC's motion. Based on the foregoing, staff recommends that the Commission grant FWSC's motion and take official notice of DeSoto County Ordinance No. 1999-10.

ISSUE 2: Should the Commission grant DeSoto County's Petition for Leave to Intervene?

RECOMMENDATION: Yes. The Commission should grant DeSoto County's Petition for Leave to Intervene. (VACCARO)

STAFF ANALYSIS: On August 30, 1999, DeSoto County filed a Petition for Leave to Intervene in this matter in which it asserts the following:

1. The County has previously filed objections to this proceeding and was granted party status;

2. The County has a substantially affected interest in this proceeding. By Resolution No. 97-22, adopted in 1997, the County reasserted jurisdiction over investor-owned water and wastewater utilities in DeSoto County and excluded the County from the provisions of Chapter 367, Florida Statutes. The Commission acknowledged the effect of this resolution by Order No. PSC-97-0603-FOF-WS, issued May 27, 1997, in Docket No. 970411;

3. By Resolution No. 1998-32, adopted on July 16, 1998, the DeSoto County Water and Sewer District Number One was established for the County's provision of water and sewer service in its area. By Ordinance No. 1999-01, adopted on June 8, 1999, the County established its regulations relating to water and wastewater systems and bulk water utilities in the County;

4. Pursuant to Ordinance No. 1999-01, the County granted FWSC a water and wastewater franchise and territory, by adoption of Ordinance No. 1999-10, adopted on June 8, 1999;

5. By its application before the Commission, Lake Suzy has requested that it be granted territory in DeSoto County which comprises a portion of the DeSoto County Water and Sewer District Number One, and overlaps territory granted by the County to FWSC. The County will suffer an injury of immediate fact if Lake Suzy's request is granted, because the County has already granted FWSC authority to serve a portion of the territory; and

6. Lake Suzy has acknowledged the County's jurisdiction over Lake Suzy on at least three occasions, including applications to the County for a transfer of majority organizational control and for territory expansion, as well as a verbal acknowledgment at a public hearing before the DeSoto County Board of County Commissioners. As such, the County asserts that, at a minimum, its

jurisdiction over Lake Suzy entitles it participate as a party intervenor pursuant to Rule 25-22.039, Florida Administrative Code. The County also asserts that the Commission does not have jurisdiction over utility systems whose service does not transverse the County's boundaries.

On September 8, 1999, Lake Suzy timely filed an objection to the County's petition which states:

1. After having dismissed two previous objections, the County should not be allowed to intervene a third time;

2. Lake Suzy will be prejudiced by the County's intervention by having to conduct and respond to discovery regarding the County. But for bad faith settlement negotiations on the part of FWSC to delay the Final Hearing in this matter, the County would have no proceeding in which to intervene;

3. No issue sought to be raised by the County is relevant to this proceeding. The County's granting of a franchise to FWSC does not divest the Commission of jurisdiction that it previously acquired in this matter;

4. Lake Suzy's acknowledgment that it is subject to the County's jurisdiction does not conflict with the position that the Commission has jurisdiction over the territory in question in this case. There is no question that until the Commission grants Lake Suzy's request, it is subject to the County's jurisdiction.

On September 20, 1999, the County filed a reply to Lake Suzy's objection. The County basically reasserted its positions set forth in its petition; however, the uniform rules do not provide for the filing of a reply.

Pursuant to Rule 25-22.039, Florida Administrative Code, a motion for leave to intervene must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. A two-part test is applied in evaluating whether a person has alleged a substantial interest sufficient to entitle such person to intervene in an administrative proceeding. The person must allege (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Co.

v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. den., 415 So. 2d 1359 (Fla. 1982).

Staff believes that the County has sufficiently alleged that it has a substantially affected interest in the outcome of this proceeding. The County alleges it has reasserted its jurisdiction over investor-owned utilities in DeSoto County. Based upon its jurisdiction, the County has granted territory to FWSC. The County asserts that Lake Suzy's request overlaps FWSC's granted territory and comprises territory within County's Water and Sewer District Number One. Further, the County asserts that the Commission does not have jurisdiction over utility systems in DeSoto County whose service does not transverse the County's boundaries. Staff notes that Lake Suzy's service does not transverse the County's boundaries at this time, except for unauthorized service to one customer.

Section 367.171(1), Florida Statutes, provides that a county may by resolution rescind any prior resolution imposing Commission jurisdiction and thereby exclude itself from the provisions of Chapter, 367, Florida Statutes. Further, Section 367.171(7), Florida Statutes, grants the Commission exclusive jurisdiction over all utility systems whose services transverse county boundaries. Staff believes that the utility has raised a valid issue regarding interpretation of Section 367.171, Florida Statutes. Arguably, the outcome of this proceeding could have a negative impact upon the County's decision-making authority. This matter has already been raised by FWSC, and staff believes that input from the County would be beneficial to completing the record in this proceeding.

Staff also believes that the County's alleged injury is of a type or nature which the proceeding is designed to protect. Section 367.045(1)(a), Florida Statutes, requires a utility applying for an original certificate to provide notice of the actual application to the governing body of the county or city affected by the proceeding. Further, Section 367.045(5)(a), Florida Statutes, provides:

The Commission may not grant a certificate of authorization for a proposed system . . . which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public

The County raises this issue. Arguably, FWSC's system would be that which was duplicated; however, this matter does call into

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question the County's decision-making authority to grant territory in DeSoto County. Therefore, staff believes that the County has made the requisite showing to support its Petition for Leave to Intervene. Based upon the foregoing, staff recommends that the Commission grant DeSoto County's Petition for Leave to Intervene in this proceeding.

ISSUE 3: Should the Commission grant Lake Suzy Utilities, Inc.'s Motion to Expedite Hearing?

RECOMMENDATION: No. The Commission should deny Lake Suzy's Motion to Expedite Hearing. (VACCARO)

STAFF ANALYSIS: On September 8, 1999, Lake Suzy filed a Motion to Expedite Hearing in which it asserts the following:

1. This matter was originally scheduled for Final Hearing on January 13 and 14, 1999, but was continued when Lake Suzy and FWSC believed they had reached a settlement. On May 14, 1999, Lake Suzy advised the Commission that a settlement was not accomplished and requested that the matter be set for hearing;

2. The parties and staff worked together with scheduling the Final Hearing on October 14 and 15, 1999 in anticipation of settlement of another FWSC proceeding scheduled on those dates. Although the other case settled, those dates are not available, and this matter cannot be rescheduled until February, 2000;

3. Pursuant to City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991), the first entity in time acquiring the right to provide utility service obtains the exclusive right to provide such service. There are certain requirements in order to obtain that right as set forth in City of Mount Dora, and that right is not without certain qualifications. Lake Utility Services, Inc. v. City of Clermont, 727 So. 2d 984 (Fla. 5th DCA). However, the courts have yet to rule on a situation like the instant case where first in right is obtained in one forum by delay of action taken by one of the parties in another forum. But for FWSC's objection, Lake Suzy's application would have been granted before DeSoto County took action in June, 1999;

4. If the hearing in this matter is scheduled for February, 2000, a decision will not likely be rendered until April, 2000. Although Lake Suzy has challenged DeSoto County's grant of a franchise to FWSC, those challenges will likely be resolved, at least at an initial level, before April, 2000;

5. Since the Commission obtained jurisdiction of the territory in question at the time Lake Suzy's application was filed, it should make every effort to rule upon entitlement of the territory in a timely manner to avoid a jurisdictional conflict.

On September 17, 1999, Haus Development, Inc. (Haus) filed a letter indicating that it concurred with Lake Suzy's motion to expedite. Haus stated that it would be prejudiced by a delay in setting the hearing. Haus owns and is attempting to sell 41 of the 49 lots which the parties have requested to serve in Charlotte County. Haus stated that it is satisfied with an agreement between Lake Suzy and Charlotte County for the provision of utility service to those lots.

The hearing in this matter is scheduled for February 3-4, 2000. Staff reserved two days for the hearing given the complexities involved with this case. Staff has attempted to set earlier hearing dates. Staff indicated to the parties that it would attempt to assist in securing the earliest possible hearing dates, but made no guarantee regarding specific dates, which would require approval by the Chairman. Upon reviewing the Commission calendar, Staff has determined that earlier dates are not available. Staff notes that Section 367.045, Florida Statutes, sets no time limit for determination of certificates of authorization. Therefore, staff recommends that lake Suzy's Motion to Expedite Hearing be denied.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the Final Hearing scheduled in this matter. (VACCARO, REDEMANN)

STAFF ANALYSIS: A Final Hearing in this matter has been scheduled. This docket should remain open pending the hearing.