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August 13, 2001

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Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

RE: Docket No. 991666-WU
In re: Application for Amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Florida Water Services Corporation ("Florida Water") are the original and fifteen copies of:

1. Florida Water's Post-Hearing Brief and Statement of Positions and Issues;

2. Florida Water's Legal Memorandum on Issues A and B; and,

3. A diskette containing both documents formatted as Word Perfect documents.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me. Thank you for your attention to this matter.

Sincerely,

J. Stephen Menton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation.	)	Docket No. 991666-WU
		Filed: August 13, 2001

FLORIDA WATER SERVICE CORPORATION'S POST-HEARING BRIEF AND STATEMENT OF POSITIONS AND ISSUES

Florida Water Services Corporation ("Florida Water"), pursuant to Rule 28-106.215, Florida Administrative Code, and Order No. PSC-00-0623-PCO-WU, hereby submits its Post-Hearing Brief and Statement of Positions and Issues. In this Brief, references to Exhibits in the record will be designated "Ex. __" [with further reference to page number]. References to the testimony in the record transcript will be designated "T. Vol. __, p. __."

I. Introduction

This docket involves Florida Water's application (the "Application") to extend its service to include additional territory in Lake County. The City of Groveland (the "City") filed a protest to the Application on November 23, 1999. The City's November 23 objection letter (the "Objection") is brief and raises only a limited number of issues. First, the City objects to Florida Water's Application on the ground that the City adopted an ordinance purporting to establish, pursuant to Section 180.02(3), Florida Statutes, a "Utility Service Area" for the provision of water and wastewater services within a zone up to five miles outside of the corporate limits of the City. The City argues that the territory proposed to be served by Florida Water is included within the City's Utility Service Area (sometimes referred to as the "Utility Service District"). Second, the City claims that it has the capacity to serve the new territory requested by Florida Water in its Application. A review of the four corners of the one page Objection and the City's supporting

prefiled direct testimony does not reveal any other issues or basis for the City's challenge to Florida Water's Application.

II. Basic Position

Florida Water seeks approval through its Application to provide water service to a new development in Lake County known as the "Summit." Florida Water has entered into an agreement with the developer of the Summit to provide water service to the requested territory. Florida Water is already providing water service to an adjoining territory, the Palisades Country Club ("Palisades"). The Palisades was developed by an affiliated company of the developer of the Summit and Florida Water has capacity at its existing Palisades plant to meet the foreseeable needs of the Summit. Florida Water is the most appropriate utility to provide water service to the requested territory. Approval of Florida Water's Application will allow for more efficient utilization of the existing Palisades system and would avoid wasteful duplication of facilities. Florida Water will be able to provide the necessary service in a timely and economical manner.

As confirmed by the City's Prehearing Statement filed in this docket on February 8, 2001, the City's basic position is that it has established a Utility Service District by ordinance and has the prior right to serve the territory at issue. The City further claims that service by Florida Water would duplicate existing utility services in violation of Section 367.045(5)(a), Florida Statutes. The City's Prehearing Statement acknowledges that there is a need for service to the territory at issue, that Florida Water has the financial and technical ability to serve the requested territory. The City did

not specifically dispute in its Objection or Prehearing Statement Florida Water's capacity to serve the territory.[1]

Florida Water denies that the City has an exclusive right to provide water service to the requested territory. The assertions by the City as to the scope and import of the City's Utility Service District were challenged by Florida Water in a Motion for Summary Final Order filed May 10, 2001. In an Order Denying Motion for Summary Final Order, Order No. PSC-01-1478-FOF-WU issued July 16, 2001, the Florida Public Service Commission ("Commission") quoted from its earlier order in Lake Utilities[2] for the proposition that the Commission did not have the authority to enforce Chapter 180, Florida Statutes. The Order quoted with approval the following language from Lake Utilities:

> It is correct that pursuant to Chapter 180, municipality [sic] may designate a utility district. However Chapter 367, Florida Statutes, gives us exclusive jurisdiction over a regulated utility's service, authority, and rates....Section 367.011(4), Florida Statutes, states that Chapter 367, Florida Statutes, shall supersede all others laws..., and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. Chapter 180 contains no express override.

Thus, the primary issue raised in the City's Objection and discussed at length in the prefiled testimony of the City's witnesses regarding the City's Utility Service District cannot be resolved in this proceeding. The Commission is limited to a determination of whether Florida Water's

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[1]Under Rule 25-30.031, Florida Administrative Code, if the City was objecting to the Application on this basis, it should have been asserted in the Objection.

[2]Order No. PSC-95-0062-FOF-WS, issued January 11, 1995, in Docket No. 940091-WS, In re: Application for transfer of Facilities of Lake Utilities, Ltd. to Southern States Utilities, Inc.; Amendment of Certificate Nos. 189-W and 134-S, Cancellation of Certificate Nos. 442-WN372-S in Citrus County; Amendment of Certificate Nos. 106-W and 120-S, and Cancellation of Certificate Nos. 205-WN and 150-S in Lake County.

Application would be a duplication of or in competition with an existing system. To the extent the City urges any other grounds for denying the Application, such issues were not timely raised in the City's Objection or Prehearing Statement and, therefore, are beyond the scope of this proceeding.

The prehearing stipulations and the testimony in this proceeding conclusively establish that the City is not currently providing service to the Summit and cannot for a minimum of several months. At best, the City has a desire to serve the requested territory. Service by the City to the Summit would not be consistent with the local comprehensive plans and would be more expensive for the customers. Moreover, service by the City would result in unnecessary duplication of the existing Florida Water Palisades system. When all factors are considered, including the need for service, the financial and technical capabilities of Florida Water, the rates, the landowner preference, and other factors, the Commission should grant the Application submitted by Florida Water.

III. Positions on Issues:

Issue No. 1: When will service be required in the territory proposed by Florida Water Services Corporation's application?

Summary of Position: **Pursuant to a stipulation between the parties, there is a need for service in the territory proposed by Florida Water Services Corporation's application. The evidence established that there is a current need for water service. There is no need for the wastewater service discussed in the City's prefiled testimony.**

Analysis and Argument: Section 367.045(1)(b), Florida Statutes, requires an examination of the need for service in the requested area. Rule 25-30.036(3)(b), Florida Administrative Code, directs an applicant seeking to extend its service territory to provide a statement showing the need for service in the proposed area. Florida Water has provided such a

statement in its Application and the need is confirmed by the Water Service Agreement executed by the developer of the requested territory. (Ex. 5, CLS-2).

The parties have stipulated that there is a need for service in the territory requested by Florida Water. (Prehearing Order, p. 17, Section XI, ¶ 1; T. Vol. 1, pp. 6-7.) What remains to be resolved with respect to this issue is unclear. At the Prehearing Conference, the City indicated that, while it would stipulate as to need, it would not stipulate as to the timing of the need for service. As discussed in more detail in Florida Water's Legal Memorandum on Issues A and B, the City's Objection and the positions set forth in its Prehearing Statement frame the issues in this docket. Woodholly Associates v. Department of Natural Resources, 451 So.2d 1002 (Fla. 1st DCA 1984). The Commission must reject any arguments or issues raised by the City that are not clearly alleged in its Objection or Prehearing Statement.[3] No concerns regarding need were raised in the City's Objection to the Application as required by Rule 25-30.031, Florida Administrative Code. The City's Prehearing Statement filed February 8, 2001 provides as follows with respect to Issue 1:

> Yes, there is a need for service in the area requested. The Developer of the Palisades subdivision originally requested service to commence by July 1, 2000, however this date has been now been [sic] rescheduled to a later date. The Developer has not yet requested any construction permits from the County.

The City's Prehearing Statement did not specifically express any reservation about the need for service to the requested territory.

Assuming there is some issue related to the timing of the need for service that must be resolved in this proceeding, the testimony at the hearing established that the developer of the

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[3]Florida Water's Analysis and Argument on Issue B in its Legal Memorandum discusses the requirements of the Order Establishing Procedure and Prehearing Order in more detail.

requested territory has a current need for service and has requested Florida Water to meet that need through extensions from the existing Florida Water facilities in the neighboring Palisades development. (T. Vol. 4, p. 405). Thus, the evidence in this proceeding confirms the need for service. (T. Vol. 4, p. 405).

The Summit is vested for development and the service proposed by Florida Water is consistent with those vested rights including the current land use designations. (T. Vol. 1, pp. 33, 40-41). In February 2000, Florida Water entered into a Water Service Agreement with the developer of the Summit (Ex. 5, CLS-2; T. Vol. 2, p. 154). That Agreement has been duly recorded in the public records of Lake County. (Ex. 12; T. Vol. 2, p. 249). Section 17 of the Agreement specifically provides that it is subject to Florida Public Service Commission approval of a territory amendment application. Under Section 26, Commission approval is a condition precedent to the effectiveness of the Agreement. Thus, while the Agreement indicates that service would be needed by July, 2000, the City's initiation of a challenge to the Application has effectively placed the Agreement on hold until the Commission issues its ruling. (T. Vol. 2, pp. 252, 253, 255). Notwithstanding the delays incurred as a result of the City's challenge to the Application, the parties to the Agreement have taken several of the steps ultimately necessary for implementation. For example, the Agreement has been recorded in the public records as contemplated in Section 16 (Ex. 12). The Developer has submitted plans to Florida Water for the necessary extensions, has provided the required evidence of ownership of the property and has paid certain specified fees. (T. Vol. 2, pp. 243, 248-250; Vol. 3, p. 288). In addition, the Developer has obtained a permit from the Department of Environmental Protection ("DEP") for construction of the lines necessary to connect the Summit to Florida Water's existing Palisades' system. (Ex. 10; T. Vol. 3, p. 287). The Developer has communicated to Florida

Water that he has completed the submission process to the county and is ready to start construction. (T. Vol. 4, p. 405).

As noted above, Florida Water has received construction plans from the Developer in accordance with the terms of the Water Service Agreement. (T. Vol. 2, p. 243). Based upon the construction plans submitted by the developer, Florida Water is prepared to meet the fire flow needs of the development. (T. Vol. 4, p. 404; Ex. 15, sheet 5). If, during the County review process, the proposed approach to fire flow protection is changed, Florida Water would make the necessary modifications to the proposed system in consultation with its engineering staff. (T. Vol. 4, p. 404).

The testimony of some of the City's witnesses includes a discussion of the City's purported ability to provide wastewater service to the requested territory. (T. Vol. 3, pp. 315-316; Vol. 4, pp. 482-483, 485-486). However, there is no evidence of any need for wastewater service. The Summit is a low density development that has received preliminary plat approval to proceed using septic tanks. (T. Vol. 2, p. 171). The developer has not requested wastewater service from Florida Water or from anyone else. (T. Vol. 2, p. 171). The City would have to run its wastewater lines approximately 26,000 feet from its current terminus in order to reach the Summit or else develop some other approach to provide wastewater service to the requested territory. (T. Vol. 2, p. 179; Vol. 3, pp. 345-347).

Issue No. 2: Does Florida Water Services Corporation have the financial ability to serve the requested territory?

Summary of Position: **Pursuant to a stipulation between the parties, Florida Water has the financial ability to serve the requested territory.**

Analysis and Argument: The parties have stipulated that Florida Water has the financial ability to serve the requested territory. (Prehearing Order p. 17, Section XI, ¶ 2; T. Vol. 1, pp.6-7; pp.111-113; Vol. 2, p. 156; Ex. 3).

Issue No. 3: Does Florida Water Services Corporation have the technical ability to serve the requested territory?

Summary of Position: **Pursuant to a stipulation between the parties, Florida Water has the technical ability to serve the requested territory.**

Analysis and Argument: The parties have stipulated that Florida Water has the technical ability to serve the requested territory. (Prehearing Order p. 17, Section XI, ¶3; T. Vol. 1, pp. 6-7). Florida Water is the largest and one of the most experienced investor-owned water and wastewater utilities in the state. (T. Vol. 2, p. 156). Florida Water has an excellent and long history of providing quality service to its customers. (T. Vol. 2, p. 156). Florida Water has a staff of licensed operators, engineers and professionals qualified to provide the technical expertise necessary for safe, adequate and reliable service to the requested territory. (T. Vol. 2, p. 156).

Issue No. 4: Does Florida Water have the plant capacity to serve the requested territory?

Summary of Position: **Yes. Florida Water's Palisades system has two operational wells that have adequate capacity to meet the needs of the Summit through at least 2006.**

Analysis and Argument: Florida Water has the plant capacity to serve the requested territory. (T. Vol. 2, p. 158). Florida Water's existing facilities in the neighboring Palisades development can meet the anticipated needs of the Summit. (T. Vol. 2, p. 154). Florida Water has reserved sufficient capacity from its existing Palisades water treatment plant to provide service to the requested area. (T. Vol. 2, p. 154).

While there was questioning and argument at the hearing regarding the plant capacity of Florida Water's Palisades system, a challenge to the plant capacity was not timely raised in the City's Objection or its Prehearing Statement and is not properly part of this docket. See, Rule 25-30.031, Florida Administrative Code.[4]

The City's position in its Prehearing Statement with respect to Issue 4, which addresses Florida Water's plant capacity to serve the requested territory, is as follows:

> Florida Water...has indicated that it will provide water from its Palisades Water Treatment Plant permitted for 1.15 MGD. The City is unclear how much demand has been calculated as required for the Summit development at issue in this docket. Exhibit D of the Application indicates that 135,000 gpd will be needed. Mr. Sweat's testimony indicates that 38,400 gpd will be needed. Using the higher figure of Exhibit D, when growth is taken into account, a new water supply well will be needed within three years to adequately supply both the existing and proposed development within the service territory.

No dispute as to the capacity of the Palisades plant was mentioned. The City did not seek to amend its position with respect to Florida Water's plant capacity at any time prior to the hearing in this matter.[5] Moreover, the City did not file any testimony challenging Florida Water's ability to provide water service to the new territory as set forth in the Application. At most, the City raised an issue

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[4]This issue is discussed in more detail in the Analysis and Argument on Issue B in Florida Water's Legal Memorandum filed contemporaneously with this Post-Hearing Brief.

[5]The City's Prehearing Statement was filed February 8, 2001, two months after the rebuttal testimony of Mr. Tillman which specifically confirmed that Mr. Tillman would be adopting Mr. Sweat's prefiled direct testimony. The prefiled direct testimony clearly disclosed the capacity of the Palisades plant as 1,152,000 gallons per day. (T. Vol. 2, p. 154). This testimony was consistent with the capacity described in the Application. (Ex. 5, CLS-1, p. 12). As discussed below, despite some confusion during the early portion of the hearing, this capacity was ultimately confirmed and reflects the two operational wells that currently exist at the Palisades plant.

as to the proper method for calculating the amount of capacity that will be needed to serve the Summit. The City's position recognizes that, even using the higher demand figure, Florida Water would not need to add an additional well for three years. The testimony at the hearing established that a third well has already been tested and could be easily added to the Palisades system if necessary. (T. Vol. 3, p. 292). Florida Water could also double the existing capacity of its Palisades system by simply adding storage tanks or pneumatic pumps. (T. Vol. 4, p. 401). The bottom line is Florida Water has plenty of excess capacity at its Palisades plant and has viable, low cost options to increase that capacity if it ever become necessary.

The City has improperly and belatedly attempted to interject a new issue in this proceeding regarding the capacity of Florida Water's Palisades plant. Since that issue was not raised in the City's Objection, its Prehearing Statement or any of the prefiled testimony, it cannot serve as a basis for denial of Florida Water's application. In any event, the evidence in this case conclusively established that the Florida Water's Palisades plant has the capacity represented in the Application which is more than adequate to meet the needs of the Summit.

At the hearing, there was some confusion created as to the capacity of the Florida Water Palisades plant. This confusion arose as a result of questions during the cross-examination of Mr. Tillman regarding the permitted capacity reflected on the monthly operating reports ("MORs"). (T. Vol. 2, pp. 223). Mr. Tillman is not responsible for the preparation of the MORs for Florida Water. (T. Vol. 4, p. 399). The unrebutted testimony established that, until very recently, the Palisades system has operated with a single well. Beginning in January 2000, Florida

Water had a second well available at its Palisades system.[6] (T. Vol. 2, p. 150; Vol. 4, p. 399). Each of the two wells currently at the Palisades plant is rated at 800 gallons per minute. (T. Vol. 4, pp. 399, 405-406). The wells can work independent of each other. (T. Vol. 4, pp. 405-406). Thus, the maximum day capacity for the system is 1.152 mgd as reflected in the Application and confirmed in the DEP construction permit application filed by the developer. (T. Vol. 4, pp. 399, 401; Ex. 11, p. 2, Section III).

The engineering department of Florida Water has advised management that the Palisades system has adequate capacity to provide the requested service to the Summit. (T. Vol. 4, p. 398). The correct capacity figures are set forth in the Application. (T. Vol. 4, p. 401). Even assuming the plant capacity is an issue to be considered in this docket, no persuasive evidence to the contrary has been presented. Morever, by simply adding storage tanks or pneumatic pumps to the Palisades system, the rated capacity for the existing wells could be doubled. (T. Vol. 4, p. 401). That additional equipment has not been put in place because there is no need for increasing the capacity at the Palisades system at this time. (T. Vol. 4, p. 401). The current capacity of the Palisades system is adequate to meet the anticipated needs of the Summit at least through the year 2006. (T. Vol. 4, p. 402). Additional capacity could be easily added to meet further growth if it occurs. (T. Vol. 2, p. 292; Vol. 4, p. 402).

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[6]The MORs for the period prior to the addition of the new well reflected the capacity of the system with one well, which was 576,000 gpd. When the additional well was brought on line, the data base was not updated to reflect the new well, which essentially doubled the existing capacity. (T. Vol. 4, pp. 399-400). The new well was cleared for service on January 4, 2000 and has been in a standby condition since it has not been needed given the current demands on the Palisades system. (T. Vol. 4, p. 400). It was not until approximately May 2001 that the new well actually began operations. (T. Vol. 4, p. 400).

Issue No. 5: Is Florida Water Services Corporation's application consistent with the local comprehensive plan?

Summary of Position: **Yes. Florida Water's application is consistent with the local comprehensive plan.**

Analysis and Argument: There is no dispute that service by Florida Water would be consistent with the local government comprehensive plans. (T. Vol. 1, pp. 34, 40, 66, 105). Significantly, in order to provide service, Florida Water would not have to traverse any areas that have been designated as rural or otherwise sensitive on the County's future land use maps. (T. Vol. 1, pp. 48, 66).

Issue No. 6: Does the City of Groveland have the financial ability to serve the requested territory?

Summary of Position: **It does not appear the City has the financial ability to serve. The City's recent water line extensions were financed in large party by a Department of Environmental Protection grant. That grant has been used up and the operational history of the City's utility system casts doubt on its ability to finance additional extensions.**

Analysis and Argument: It is not clear how the City plans to finance the substantial cost of the design, permitting and construction of the lines required to bring the City's water and wastewater service to the Summit. The City has a total population of approximately 3,100 people. (T. Vol. 4, p. 493). Approximately 80% of the City's utility customers are located within the city boundaries. (T. Vol. 4, p. 493). The extension of lines undertaken by the City during the pendency of this proceeding to provide service outside the City limits to the Garden City subdivision was financed in large part by a grant from the DEP. (T. Vol. 2, pp. 312, 366). The initial cost projection for the extensions to reach the Garden City subdivision was $295,000. (T. Vol. 2, p. 338; Ex. 19).

Later, that estimate was increased to $500,000 (T. Vol. 2, p. 340) and the DEP agreed to fund a certain portion of the estimated cost amounting to approximately $381,000. (T. Vol. 2, p. 340). The actual cost to construct the water line out to the Garden City subdivision turned out to be significantly less than $500,000. (T. Vol. 2, p. 342). The City took the difference between the $500,000 estimated and the actual cost and used the money to extend the lines out beyond Garden City. (T. Vol. 2, p. 342). The extensions beyond the Garden City subdivision were not done in response to any specific request for service. (T. Vol. 2, p. 332). The DEP grant has now been exhausted and there are no additional grant proposals being sought by the City in order to extend lines to the Summit. (T. Vol. 2, p. 344).

Even though the City fiscal year ends on September 30, financial statements for the year ending September 30, 2000, are not yet available. (T. Vol. 4, p. 497). The total operating revenues for the City's enterprise fund, which includes water, wastewater and sanitation services, for the fiscal year ending September, 1999 were $877,160. One of the revenue entries for that year was a water quality assurance payment of $150,466. (T. Vol. 4, p. 499). The City Manager could not explain the source of this revenue. (T. Vol. 4, p. 499). No similar revenue was reflected in the financial statements for 1998. (T. Vol. 4, p. 499). In 1998, the City's proprietary fund had a net loss of $21,406. A loss would also have been reflected in 1999 but for the apparently non-recurring water quality assurance payment. (T. Vol. 4, p. 500). It is also not clear whether the City has established a reserve for equipment replacement or plant replacement. (T. Vol. 4, p. 501). All of these factors raise serious doubts as to the City's ability to finance service to the Summit.

Issue No. 7: Does the City of Groveland have the technical ability to serve the requested territory?

Summary of Position: **No. From the evidence presented, it does not appear that the City has the technical ability to serve**

Analysis and Argument: Despite its efforts to run lines closer to the Summit during the pendency of this proceeding, the City still does not have lines adjacent to the requested territory. In fact, the City's lines are approximately 7,000 feet from the entrance to the Summit. (T. Vol. 3, p. 301). Service by the City will require additional line extensions and will require traversing rural areas that are not slated for development. Under Section 180.06, Florida Statutes, the City cannot provide water service to the requested area, which is adjacent to the existing service area of Florida Water, without the consent of Florida Water.[7] No effort has been made to comply with this statute. (T. Vol. 3, pp. 329-330; Vol. 4, p. 494-496). Thus, it is unclear whether or when the City could ever provide service to the Summit.

Issue No. 8: Is the City of Groveland's proposal to serve the area consistent with the local comprehensive plan?

Summary of Position: **No. The City's proposed service to the area is inconsistent with the future land use designations in the County comprehensive plan. Moreover, the City's own comprehensive plan does not support service to the requested area.**

Analysis and Argument: Based upon the testimony provided by the Department of Community Affairs ("DCA"), it appears that service by the City to the requested area would not be

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[7]Section 180.06, Florida Statutes, provides as follows:

> [A] municipality shall not construct any system, work, project or utility authorized to be constructed hereunder in the event that a system, work, project or utility of a similar character is being actually operated by a municipality or private company in the municipality or territory immediately adjacent thereto, unless such municipality or private company consents to such construction. [emphasis added]

consistent with the Lake County Comprehensive Plan. Furthermore, service by the City is not supported by the City's own Comprehensive Plan. (Ex. 1, CRG2, pp. 3-4; T. Vol. pp. 34).

The area between the City and the Summit has been designated by the County on its future land use maps as suburban and rural. (T. Vol. 1, p. 40). The rural category limits development to one dwelling unit per five acres. (T. Vol. 1, p. 40). Providing utility services to rural areas is not cost effective and potentially encourages urban sprawl. The availability of the lines increases the chance that people will want or request more intense development. (T. Vol. 1, pp. 41). Indeed, the City's Comprehensive Plan includes a specific objective to encourage growth in areas where it places its utility facilities. (T. Vol. 4, p. 436). Thus, the extension of the City's utility system into the rural and suburban areas is likely to foster development contrary to the land use designations.

The City's proposed service to the Summit runs through designated rural areas without any support in the City or County Comprehensive Plans as to why such service should be provided. (T. Vol. 1, pp. 47, 51, 65). The potential impacts of running water lines through the low density areas between the City and the Summit raises long term planning concerns that have not been addressed by the City. (T. Vol. 1, p. 42). As expressed by Brenda Winningham, the City's efforts to extend its facilities beyond its boundaries does not appear to be consistent with the County's long-term planning efforts and land use designations. (T. Vol. 1, pp. 34, 41, 50-52, 54-55; Ex. 1, CRG2, pp. 3-4). By contrast, Florida Water would not have to run lines through any rural or suburban areas in order to provide service to the Summit. (T. Vol. 1, pp. 48, 66).

There is nothing in the County's Comprehensive Plan that indicates the City will provide service to the requested area. (T. Vol. 1, p. 51). The County has expressed concern about

the amount of suburban and rural land between the City and the Summit. (T. Vol. 1, pp. 47, 65). Based upon the current designations and data available, it appears that service to the Summit by the City would be inconsistent with the County's Plan. (T. Vol. 1, p. 52).

Similarly, there is nothing in the City's Comprehensive Plan that would indicate the City's provision of service to the requested area would be compatible with the land uses in the vicinity or is justified on some other grounds. (T. Vol. 1, pp. 44, 51; Vol. 4, pp. 434-435). While the City has suggested that the provision of service to rural areas may be justified by health or safety concerns, there is no evidence that service by the City to the Summit is warranted because of such concerns. From a planning perspective, it is important to coordinate the provision of utility services with land use in order to control urban sprawl and to avoid wasteful spending of money to run lines to serve areas that are not going to have the population growth necessary to justify the expenditure. (T. Vol. 1, p. 45). Typically, the provision of utility services to areas outside of a municipality's boundaries would be reflected in the capital improvement schedule for the municipality. (T. Vol. 1, p. 46). The City's capital improvement schedule does not reflect service to the disputed territory. (T. Vol. 1, p. 46).

Through questioning by counsel at the hearing, the City seems to suggest that well contamination in the area overrides the planning concerns raised by the DCA. Two days prior to the commencement of the hearing, the City filed a Request for Official Recognition that included Chapter 62-524, Florida Administrative Code, and a DEP delineation map for potable water well

permitting prepared under that rule.[8] The evidence established that there is no problem with water quality from the existing Palisades plant or the possible third well that could be added to provide additional water to that system. (T. Vol. 3, pp. 292). The City has not provided any supporting evidence regarding the DEP map and Rule. Perhaps the City's efforts to provide water to the Garden City subdivision could be reconciled with the comprehensive plans based upon health or safety needs. However, there is no evidence that either the City or the County has attempted to incorporate health or safety issues into their comprehensive plans as a basis for the extension of utility services through any of the rural or suburban areas between the City and the Summit and more particularly from Garden City to the Summit.

Issue No. 9: What is the landowner's service preference and what weight should the Commission give to that preference?

Summary of Position: **As reflected by the Water Service Agreement executed by the owner of the property, the landowner prefers service from Florida Water. This preference is entitled to considerable weight.**

Analysis and Argument: The landowner clearly prefers service by Florida Water as confirmed by the developer's execution of the Water Service Agreement with Florida Water. (Ex.

[8]Neither, the City's Objection nor its Prehearing Statement raised any public health, safety or welfare issues as a basis for the provision of water service by the City to the Summit or any neighboring areas. Moreover, no such issues are raised in the prefiled direct testimony of any of the City's witnesses. It is unclear why the City has requested official recognition of the DEP map and Rule. In the event the City attempts to interject new issues into this proceeding based upon these materials that effort should be rejected as untimely. In any event, it should be noted that the Rule applies to new water wells. The Rule simply establishes certain precautionary methods that must be followed for new potable water wells located in certain areas where contamination could be a potential problem. The Palisades plant has two existing wells which would not fall under the Rule. In addition, Florida Water has tested a possible third well without any evidence of contamination. (T. Vol. 3, p. 292).

5, CLS-2). This preference is entitled to considerable weight and reflects the economic benefits that would be accomplished by allowing Florida Water to provide the requested water service.

There is no dispute that the landowner in this case has requested to receive service from Florida Water. (Ex. 5, CLS2; T. Vol. 2, p. 155). The Commission should afford that preference significant weight in its deliberations. In an early case involving the Commission's approval of a territorial service agreement between two electric utilities, the Florida Supreme Court stated that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Storey v. Mayo, 217 So.2d 304 (Fla. 1968). In that case, the two utilities had agreed on a territorial boundary and the Commission had approved that agreement as being in the public interest. In a more recent case involving a dispute between two electric utilities, the Court held that it was reversible error for the Commission to disregard customer preference in a situation where each utility was capable of serving the territory in dispute. Gulf Coast Electric Co-op, Inc. v. Clark, 647 So.2d 120 (Fla. 1996). The Supreme Court has also recognized customer preference as a factor to consider in certificate cases. See, Davie Utilities, Inc. v. Yarborough, 263 So.2d 215 (Fla. 1972). Thus, customer preference is clearly a relevant factor for the Commission to consider in this docket.

In a District Court of Appeal decision involving a contested water and sewer certificate application, the court upheld a Commission order which gave weight to the importance of having an overall plan for orderly development of a large scale land development project. St. Johns North Utility Corp. v. Florida Public Service Commission, 549 So.2d 1066 (Fla. 1st DCA 1989). In at least one prior case, the Commission has recognized that a specific request for service by a developer in the requested territory expansion area "would bolster the merit of [the applicant's]

filing." In re: Application for Amendment of Certificate Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., Docket No. 941121-WS, Order No. PSC-96-1137-FOF-WS, 96 FPSC 9:190 at 194 (Sept. 10, 1996). These precedents provide further support for the Commission's consideration of landowner preference.

Issue No. 10: Will the extension of Florida Water Services Corporation territory in Lake County duplicate or compete with the City of Groveland's utility system?

Summary of Position: **No. The City is not providing service to the requested territory, cannot provide service consistent with the local comprehensive plans and has not sought approval to provide service from Florida Water as required under Section 180.06, Florida Statutes.**

Analysis and Argument: The only articulated basis for the City's claim that granting Florida Water's Application would result in duplication of the City's system is the designation of a Utility Service Area by the City pursuant to Section 180.02(3), Florida Statutes. (T. Vol. 4, pp. 480-481; Vol 3, pp. 311-312). However, on its face, Section 180.02(3) allows a municipality to designate an exclusive service area for "a sewage system or an alternative water supply system."[9]

[9]Section 180.02(3) does not grant a city the right to establish an exclusive five mile service area for the provision of retail water service. The statute allowing municipalities to create exclusive service zones has been in effect since 1935. It has always authorized a municipality to establish an exclusive five mile zone outside the corporate limits of the municipality for sewer service. In 1995, the statute was amended to allow an exclusive service area to be established for an "alternative water supply, including, but not limited to, reclaimed water, aquifer storage and recovery, and desalination systems" [emphasis added]. Had the Legislature intended to include retail water systems or service within the statutory five mile zone authority for municipalities, it would have been easy enough to do so. See, Sumner v. Department of Professional Regulation, Board of Psychological Examiners, 555 So.2d 919, 921 (Fla. 1st DCA 1990). Because the Legislature chose not to take such action, and based on the plain language of the statute, it must be concluded that the City of Groveland's 1999 ordinance is not enforceable to the extent it purports to establish a five mile exclusive zone for the provision of retail water services (which is all that is involved in this docket).

The City is not seeking to provide water to the Summit from an alternative water supply system. Thus, the service area designated by the City is irrelevant to this Application which is solely for the provision of retail potable water. In any event, the testimony is clear that, while the City has been racing to bring its lines closer to the Summit during the pendency of this proceeding, the City does not have existing facilities on or immediately adjacent to the requested territory. Morever, under Section 180.06, Florida Statutes, the City cannot provide service to the Summit, which is adjacent to Florida Water's existing service territory (T. Vol. 4, p. 494), without obtaining the consent of Florida Water. No such consent has been sought by the City or granted by Florida Water. (T. Vol. 4, pp. 494-496).

Despite the extensive interpretations of Section 180.02(3), Florida Statutes, offered by Mr. Yarborough in his prefiled direct testimony, Mr. Yarborough admitted that he had not in fact read any of the applicable legal precedents related to that statute. (T. Vol. 4, p. 494). Similarly, Mr. Mittauer admitted that he was not familiar with the scope of Section 180.02(3), Florida Statutes, and he was not involved in the City's designation of a Chapter 180 service district even though his prefiled direct testimony includes numerous references to it. (T. Vol. 3, pp. 327, 328).

In Docket No. 940091-WS (the Lake Utilities proceeding),[10] the City considered an application filed by Florida Water's predecessor, Southern States Utilities, Inc. ("SSU"), for the transfer of facilities of Lake Utilities, Ltd. to SSU, and the amendment of SSU's water and

[10]In re: Application for transfer of facilities of LAKE UTILITIES, LTD. To SOUTHERN STATES UTILITIES, INC.; amendment of Certificates Nos. 189-W and 134-S, cancellation of Certificates Nos. 442-W and 372-S in Citrus County; amendment of Certificates Nos. 106-W and 120-S, and cancellation of Certificates Nos. 205-W and 150-S in Lake County, Order No. PSC-95-0062-FOF-WS, issued January 11, 1995.

wastewater certificates in Citrus and Lake Counties to add the former Lake Utilities territory. In that case, the City of Fruitland Park filed an objection to the transfer request. The City of Fruitland Park, like the City of Groveland in the instant case, did not dispute the utility's ability - - managerial, financial, technical or otherwise - - to meet the obligations to provide water and wastewater services to existing and future customers within the certificated area. Instead, the City of Fruitland Park, like the City of Groveland in the instant case, focused its objection on the fact that the area fell within the City's Chapter 180 Utility District. In the Lake Utilities proceeding, the Commission found it significant that the City did not dispute the applicant utility's technical and financial ability to provide the service. The Commission concluded:

> Section 367.045, Florida Statutes, does not require us to address or attempt to remedy a Chapter 180 concern. [11]

Thus, the Commission refused to engage in an analysis or interpretation of the scope of a municipality's claims under Chapter 180. Based on this precedent, the issue for consideration in this docket is whether Florida Water's Application would duplicate or be in competition with an existing system.

While not specifically mentioned in its Objection, the City took the position in its Prehearing Statement and in its Response to Florida Water's Motion for Summary Final Order that the expansion of Florida Water's certificate in Lake County "will constitute a duplication of existing utility services and is prohibited by §367.045(5)(a), Florida Statutes." Based on the facts of this case and Commission precedent, this contention lacks merit as a matter of both fact and law. None of the evidence presented by the City through the direct testimony of Mr. Yarborough or Mr. Mittauer or

[11]Order No. PSC-95-0062-FOF-WS, at 7.

through the rebuttal testimony of Mr. Beliveau even address an allegation or contention that service by Florida Water would duplicate existing facilities or services provided by the City. Since the City cannot provide service to the requested territory consistent with the local government comprehensive plans and because it has not complied with the requirements of Section 180.06, Florida Statutes, there is no existing system that would be duplicated by granting Florida Water's Application.

During the pendency of this proceeding, the City has run lines from the City's prior point of terminus inside the City limits (which was more than 26,000 feet or approximately 5 miles from the Summit) to the Garden City subdivision (which is approximately 2 ½ miles from the Summit development. The City has continued extending its lines beyond Garden City even though it has no customers confirmed beyond that subdivision. The end result is that the closest existing customers on the City's system are approximately 2 ½ miles from the Summit. While the City has raced to extend lines closer to the Summit, there are no existing facilities owned by the City in the requested territory or immediately adjacent to it. Thus, there is no existing City system that would be duplicated or in competition with the service proposed by Florida Water. At most, the City's desire to serve the Summit is jeopardized by Florida Water's Application. However, it is unclear whether or when the City could ever provide service to the Summit since it has no legal right to a retail water exclusive service area under Section 180.02(3), Florida Statutes, and has not even attempted to comply with its obligation under Section 180.06, Florida Statutes.

This Commission has found on more than one occasion that Section 367.045(5)(a), Florida Statutes (or its predecessor, Section 367.051(3)(a)), prohibits only the duplication of an existing water or wastewater system - - not duplication of or competition with a proposed system. See, In re: Objection of Palm Beach County to Notice by Seacoast Utilities, Inc., to Amend Water

and Sewer Certificates in Palm Beach County, Florida ("Seacoast Utilities"), 87 F.P.S.C. 2:34 at 35, Order No. 17158 issued February 5, 1987; In re: Application of East Central Florida Services, Inc., for an Original Certificate in Brevard, Orange and Osceola Counties ("East Central Florida"), 92 F.P.S.C. 3:374 at 395, Order No. PSC-92-0104-FOF-WU issued March 27, 1992.

A clear enunciation of this policy is found in In re: Application for Amendment of Certificate No. 379-S in Seminole County by Alafaya Utilities, Inc., ("Alafaya Utilities") Order No. PSC-96-1281-FOF-SU, issued October 15, 1996, in Docket No. 951419-SU, which involved an application for an extension of Alafaya Utilities' service area to provide wastewater service to areas adjacent to existing service territory in Seminole County. The application was protested by the City of Oviedo. The City of Oviedo asserted that it was planning to provide service to the area at issue. The City of Oviedo also maintained that service by Alafaya would violate the City's comprehensive plan, which it claimed required central wastewater service by the City, and that service by Alafaya would be in competition with or a duplication of the service proposed by the City in violation of Section 367.045(5)(a), Florida Statutes.

After a hearing in the matter, the Commission amended Alafaya's wastewater certificate to include the territory requested in Alafaya's application. In amending Alafaya's certificates over the City's objection, the Commission found, among other things, that:

1) The City had not finalized its plans for how it would serve the territory and, depending on the method chosen, it was either impossible or unlikely that the City could provide service in a timely manner. 96 FPSC 10:209 at 218;

2) There could be no competition with or duplication of a proposed system which did not yet exist. Id. at 223;

3) The Commission was not bound by Comprehensive Plan provisions that designated the City as the preferred provider, since the overriding goal of the plan was to ensure the provision of central wastewater service. Id. at 221; and

4) In granting the application the Commission concluded:

> ...it is not necessary that we judge whether or when the City could serve the territory. It is only necessary to conclude that the City failed to demonstrate Alafaya's inability to adequately serve the disputed territory, or how the application was otherwise contrary to the public interest. Id. at 227.

The City of Oviedo appealed the Commission's decision. In City of Oviedo v. Clark, 699 So. 2d 316 (Fla. 1st DCA 1997), the court affirmed the Commission's decision in an opinion that only addressed the comprehensive planning issue. The court stated that the Commission correctly applied the requirements of Section 367.045(5)(b), Florida Statutes, in its consideration of the comprehensive plan.

Under the Alafaya case, it is clear that this Commission must judge Florida Water's application against the statutory standards in Chapter 367 in the context of the City's existing system, not its claimed area or proposed system. The inescapable truth is that service by Florida Water would not duplicate or compete with any existing City service or facility. If the Commission grants a certificate to Florida Water to serve the development and the City chooses to pursue its claim that the development is within its Utility Service Area, the matter may become an issue for the courts to decide.

The true threat of duplication in this docket comes from the City's efforts to provide service to the Summit. Florida Water has existing lines situated immediately adjacent to the Summit development in Florida Water's current certificated territory that includes the Palisades. The City's

provision of services to the Summit would be an unnecessary duplication of the system and facilities currently available through Florida Water's Palisades system.

Issue No.11A: If the granting of the territory which Florida Water Services Corporation seeks to add to its PSC certificate will result in an extension of a system which would be in competition with, or a duplication of the City of Groveland's system or a portion of its system, is the City of Groveland's system inadequate to meet the reasonable demands of the public or is the City unable, refusing or neglecting to provide reasonably adequate service to the proposed territory?

Summary of Position: **Granting Florida Water's Application would not result in extension of a system that would be in competition with or duplication of the City's system. The Commission has the authority to grant the Application which complies with the requirements of Section 367.045, Florida Statutes. The City's desire to serve the area is not a basis for denying Florida Water's Application.**

Analysis and Argument: Section 367.045(5)(a) provides that the Commission may not grant a certificate for a new system "which will be in competition with, or a duplication of, any other system or portion of a system" unless the Commission determines that the other system is "inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses or neglects to provide reasonably adequate service."

In applying this provision, the Commission has stated:

> ...Commission precedent clearly requires that some physical facilities be in existence before the competition/duplication analysis is made.

Alafaya Utilities, supra, Docket No. 95149-SU, Order No. PSC-96-1281-FOF-SU, 96 FPSC 10:209, 223 (October 15, 1996). See also, East Central Florida, supra, Docket No. 910114-WU, Order PSC-92-0104-FOF-WU, 92 FPSC 3:374 (March 27, 1992)(Commission not required to hypothesize

which of two proposed systems might be in place first and thus duplicate or compete with the other). Since the City has no physical facilities next to the Summit, there is simply no competition or duplication for the Commission to examine. This is especially true since Section 180.06, Florida Statutes, precludes the City from providing service to areas adjacent to Florida Water's certificated territory without Florida Water's consent.

In East Central Florida, Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, the Commission stated:

> [W]e cannot determine whether a proposed system will be in competition with or duplication of another system when such other system does not exist. We do not believe Section 367.045(5)(a), Florida Statutes, requires this Commission to hypothesize which of two proposed systems might be in place first and, thus, which would compete with or duplicate the other. Engaging in such speculation would be of little use.

In Seacoast Utilities, supra, Order No. 17158, issued February 5, 1987, in Docket No. 850597-WS, the Commission stated that it was not required to

> [S]peculate as to competition with, or duplication of, proposed systems which are essentially little more than future possibilities. Rather, the statute addresses the existing system as that which warrants a closer investigation as to the potentially undesirable effects of duplication and/or competition.

No utility currently provides service to the Summit development. Orders Nos. PSC-92-0104-FOF-WU and 17158 confirm that the Commission does not have to speculate as to whether a proposed system would be in competition with, or a duplication of, another proposed system. Therefore, while the Commission may not grant a certificate of authorization for a proposed system or an amendment to a certificate of authorization for the extension of an existing system which will be in competition with, or duplication of any other existing system or portion of an existing system,

granting Florida Water's application will not result in a system which will be in competition with or a duplication of another water or wastewater system. In fact, as set forth in the Position on Issue 10 above, extension of the City's system to serve the Summit is unnecessary and would duplicate the Florida Water Palisades system.

Issue No.11B: Does the Commission have the statutory authority to grant an extension of service territory to Florida Water Services Corporation which will be in competition with, or a duplication of, the City of Groveland's system(s), unless factual findings are made that the City's system(s) or a portion thereof is inadequate to meet the reasonable needs of the public or that the City is unable, refuses or has neglected to provide reasonably adequate service to the proposed service territory?

Summary of Position: **No such competition or duplication has been shown in this docket.**

Analysis and Argument: See the discussion of Issues 10 and 11A above regarding the City's allegations of competition or duplication. Granting the requested territory would not result in an extension of a system which would be in competition with or duplication of the existing City system. Furthermore, the prefiled testimony of the City's witnesses ascribe an overly broad scope to the Utility Service District created by the City. In any event, the Commission has already determined that duplication or competition only exists with respect to existing facilities. The City has no existing facilities that can currently serve the Summit. Thus, the Commission has the authority to grant the requested territory extension.

Issue No. 12: Is it in the public interest for Florida Water Services Corporation to be granted an amendment to Water Certificate Number 106-W for the territory proposed in its application?

Summary of Position: **Yes. Granting the application will allow for extension of water service to the requested area in a timely, economical manner and will allow Florida Water to better utilize existing facilities.**

Analysis and Argument: It is in the public interest for the Commission to grant Florida Water the territory it has requested. Granting the Application will allow for extension of water service to the requested area in a timely, economical manner. (T. Vol. 3, pp. 292-293). Florida Water has the plant capacity to serve the immediate needs for service in the requested territory in accordance with the developer's plans. (T. Vol. 2, p. 158; Vol. 4, pp. 399, 401-402). Granting the Application will allow Florida Water to better utilize existing facilities and will eliminate the need for the expenditure of public funds to serve the requested area. (T. Vol. 2, pp. 158-159). The addition of this new territory to Florida Water's system will improve its economies of scale and help Florida Water control costs to existing customers. (T. Vol. 4, p. 403). Approval of the Application will also enable Florida Water to provide service to currently certificated territory in a more economical fashion. (T. Vol. 3, p. 290-292).

Service by Florida Water would be at a lower cost to the residents of the Summit than service by the City. The customers of the Summit would receive water service from Florida Water under the rates applicable to Florida Water's Palisades system. (T. Vol. 2, p. 167). At 10,000 gallons of consumption per month, the monthly bill of a Palisades' customer served by Florida Water would be $29.82. Using the City's rates applicable to customers situated outside the municipal boundaries, the bill for the same amount of consumption would $33.77 or 13.25% higher. (T. Vol. 2, p. 167). Using the average Palisades' customer monthly consumption of 22,660 gallons per month, Florida Water's rates would save $21.67 per month and the average monthly water bill would

be nearly 40% less if Florida Water provides service.[12] (T. Vol. 2, p. 167). With respect to service availability charges, a Florida Water customer receiving water service in the Summit would pay $846.00. (T. Vol. 2, p. 168). The City's service availability charges would be $1,568.65, almost double the amount that would be charged by Florida Water. (T. Vol. 4, p. 485).

In sum, a review of the City's Objection, Prehearing Statement and its Prefiled Direct Testimony reveals that the primary basis for the City's challenge to the Application is the City's claim to a Utility Service District under Section 180.02(3), Florida Statutes. As discussed earlier, that statute, on its face, only applies to sewage systems and alternative water supply systems. Thus, the City's reliance upon this statute is misplaced. In any event, the Commission has already ruled that this is not an appropriate forum for the City to assert its claims under that statute. Instead of seeking to vindicate its erroneous legal position in an appropriate forum, the City has persisted in its challenge to Florida Water's Application in this docket. At the hearing, the City raised issues it had never previously articulated in its Objection or Prehearing Statement. Rather than framing and addressing appropriate challenges to the merits of the Application, the City seeks to defeat it through ill-founded legal technicalities. Meanwhile, the City has utilized the delay created by its challenge to race to extend lines closer to the Summit in the hope of strengthening its otherwise weak claim of a prior right to serve the Summit. The Commission should conclude that the City's objections to the Application are without merit and the City has improperly utilized the administrative hearing

[12]The City apparently contends that its cost to the customers may be lower because of the City's low rates for irrigation water. However, such rates are only applicable if a customer has opted to pay for a separate irrigation meter. Even then, there is no evidence as to how that would affect the overall rates. More importantly, the City's distorted rate structure that allows for drastically lower rates for potable rates used for irrigation is not in the public interest during these times when water conservation is essential.

process to delay the approval of Florida Water's Application so that the City could run lines in closer proximity to the Summit.

Dated this 13th day of August 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing was furnished by Hand Delivery this 13th day of August, 2001 to:

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