

Dorothy Menasco

From: Trina Collins [TCollins@RSBattorneys.com]
Sent: Friday, October 19, 2007 3:26 PM
To: Filings@psc.state.fl.us
Cc: Martin Friedman; Christian W. Marcelli; Trina Collins
Subject: Filing in Docket No.: 070109-WS; Application for Amendment of Certificates 611-W and 527-S to Extend Water and Wastewater Service Area to Include Certain Land in Charlotte County
Importance: High
Attachments: Response in Opposition to Motion for Summary Final Order or Relinquishment of Jurisdiction (FINAL) 10-19-2007(5).pdf

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- b. Docket No.: 070109-WS; In re: Application for Amendment of Certificates 611-W and 527-S to Extend Water and Wastewater Service Area to Include Certain Land in Charlotte County.
- c. Sun River Utilities, Inc.
- d. 17 pages.
- c. Response in Opposition to Motion for Summary Final Order or Relinquishment of Jurisdiction – 17 pages.

DOCUMENT NUMBER DATE

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REPLY TO CENTRAL FLORIDA OFFICE

October 19, 2007

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E-FILING

Ann Cole, Commission Clerk
Office of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket No.: 070109-WS, Application for Amendment of Certificates 611-W and 527-S to Extend Water and Wastewater Service Area to Include Certain Land in Charlotte County
Our File No.: 41069.03

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket is Sun River Utilities, Inc.'s Response in Opposition to Charlotte County's Motion for Summary Final Order or Relinquishment of Jurisdiction.

Should you have any questions regarding this filing, please do not hesitate to give me a call.

Very truly yours,



MARTIN S. FRIEDMAN
For the Firm

MSF/tlc
Enclosure

cc: A. A. Reeves, Vice President (w/enclosure)
Robert C. Brannon, Esquire (w/enclosure)
Todd D. Engelhardt, Esquire (w/enclosure)
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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Application of
SUN RIVER UTILITIES, INC.
formerly known as MSM UTILITIES, LLC,
for Amendment of Certificates 611-W and
527-S to Extend Water and Wastewater
Service Areas to Include Certain Land
in Charlotte County, Florida.

Docket No. 070109-WS

**SUN RIVER UTILITIES, INC.'S RESPONSE IN OPPOSITION TO
MOTION FOR SUMMARY FINAL ORDER
OR RELINQUISHMENT OF JURISDICTION**

Sun River Utilities, Inc., ("Sun River" or the "Utility") by and through its undersigned attorneys and pursuant to Rule 28-106.204, Florida Administrative Code, files this Response in Opposition to Charlotte County's Motion for Summary Final Order or Relinquishment of Jurisdiction.

The motion by Charlotte County (the "County") should be denied because (1) the County's local comprehensive plan ("Comp Plan") is not binding on the Florida Public Service Commission (the "PSC" or the "Commission") in assessing an application to expand service territory, (2) material issues of fact are in dispute regarding whether the expanded territory violates the comprehensive plan and other growth management issues, and (3) pursuant to Section 367.171(5), "all cases in which the utility is a party then pending before the Commission...shall remain within the jurisdiction of the Commission" (emphasis added).

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FPSC-COMMISSION CLERK

The County's intervention in this case is a thinly veiled attempt to grab service territory to the exclusion of private utilities. The County claims that extending the Utility's service territory will cause "urban sprawl" despite the fact that it retains full control over future development through zoning and construction permitting. The County's ordinance rescinding PSC jurisdiction is an indicator of how far the County will go to block out competition for water and wastewater service.

I. THE COUNTY'S COMP PLAN IS NOT DISPOSITIVE WITH RESPECT TO WATER AND WASTEWATER CERTIFICATE ISSUES

Section 367.045(5)(b), Florida Statutes, states, "the Commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality." The legislature could have required the PSC to defer to a properly adopted comprehensive plan, but chose not to do so. Instead, the legislature mandated in plain language that the PSC consider, but not be bound by, the Comp Plan.¹ Such a consideration can only be done after a full and fair hearing, not in summary fashion.

The Comp Plan is a tool for managing development. The County specifically states that avoiding the type of development known as "urban sprawl" is the goal of the Comp Plan (p. 6). Water and wastewater service areas, however, are not "development" as defined by Florida Statutes² and therefore do not contribute to urban sprawl. Moreover, Policy 9.2.3 of the Comp Plan specifically states that

¹ *City of Oviedo v. Clark*, 699 So. 2d 316 (Fla. 1st DCA 1997) ("The PSC is expressly granted discretion of whether to defer to the plan").

² § 380.04, *Fla. Stat.*

“[w]ater and sewer availability will not necessarily provide justification for development approval.” Thus, the County’s own Comp Plan admits that the availability of water and/or wastewater service will not hinder its control over development.³ How can the County claim that the availability of water and wastewater service will “encourage urban sprawl” (pp. 4, 6) when its own Comp Plan blocks using such service availability as a justification for approving development?

The County implies that its Comp Plan is an inviolable document that must be preserved at all costs. Yet, as can be seen in the County’s exhibits, the Comp Plan is a dynamic, constantly evolving document that expires in 2010. Inconsistency with the Comp Plan is merely a pretext for gaining control of the proposed service territory and is, therefore, not a proper foundation for summary disposition of this proceeding.

The County makes a lengthy argument about the “predominance of comprehensive plans when making decisions based on the proper use of land” (p. 7). This is a deflection of the real issue. The Commission has recognized many times that a local municipality retains control over development through zoning and construction permitting.⁴ The County admits that, “zoning and permitting decisions do not fall under the PSC’s jurisdiction, but rather have always been

³ Charlotte County Comprehensive Plan, Policy 9.2.3, p. 4-43.

⁴ See Order No. PSC-04-0980-FOF-WU (issued October 8, 2004) (“The Counties’ hands are not tied when it comes to enforcement of their own comprehensive plans if and when rezoning is needed. Our certification does not deprive the counties of any authority they have to control urban sprawl....”); Order No. PSC-04-1256-PAA-WU (issued December 20, 2004) (“[T]he counties ultimately retain control over any future development through mechanisms such as zoning and construction permits”); Order PSC-06-0770-FOF-WS (issued September 18, 2006).

retained by Charlotte County” (p. 11). Nothing in the Utility’s Application hinders the County’s ability to fully follow and comply with its Comp Plan. As such, the extensive discussion of public participation in local civic affairs set forth by the County (pp. 7-9) should instruct the County’s zoning board and permitting department, not the PSC in issuing a service territory amendment.

The County puts forth the argument that “[a]fter a comprehensive plan has been adopted in conformity with statutory requirements, all development undertaken by, and all actions taken in regard to development orders by, government agencies in regard to land covered by such a plan must be consistent with the plan as adopted” (emphasis in original). The County implies that the PSC is included in the definition of “government agencies” subject to this rule (p. 9). It is well settled law that the directives of Chapter 163 do not apply to the PSC.⁵ Even the County admits that the PSC is not bound by any of the directives in Chapter 163 (p. 9). Thus, the County’s discussion of Chapter 163 is an irrelevant aside intended to obfuscate the issues.

The County’s reliance on a “public interest” argument demonstrates that a summary final order is not appropriate. A determination of how best to serve the public interest can only be made after a full and fair hearing on the disputed facts and issues. For example, the County’s argument appears to be that a comprehensive plan is solely for the public benefit, and therefore it must be in the public interest (as contemplated by the PSC’s standard) to follow it (p. 10). If the

⁵ Order No. PSC-04-0980-FOF-WU (issued October 8, 2004) (“the planning process...does not supercede our authority pursuant to section 367.011, Florida Statutes”).

legislature had intended that the PSC defer to the Comp Plan, it would have provided for such deference in the statute. Yet it chose not to. Each agency has its separate legislatively mandated power and authority. This Commission cannot abrogate its authority over service area amendments to the County or the Department of Community Affairs.

Moreover, the statute states, “[t]he Florida Public Service Commission shall have *exclusive* jurisdiction over each utility with respect to its authority, service and rates” (emphasis added).⁶ This is a clear statement that the legislature did not want local municipalities competing with the PSC in attempting to regulate utilities via a Comp Plan, ordinance or other tool.

The County erroneously claims that the public interest is served when development plans are enforced by indirect means such as prohibiting water or wastewater service instead of by direct means such as zoning and permitting. It is more accurate to say that the public interest is served when experts in the area of regulation of water and wastewater utilities make judgments regarding service territories, and that experts in planning or development make judgments about development, zoning and construction permits. This keeps each agency accountable to the public for its own area of expertise, and avoids confusing water and wastewater issues with political and development-related issues.

⁶ § 367.011(2), *Fla. Stat.*

II. MATERIAL ISSUES OF FACT ARE IN DISPUTE REGARDING THE COMP PLAN AND OTHER GROWTH MANAGEMENT ISSUES

The County asserts that “[t]here is no question that Sun River’s proposal violates the Comp Plan.” This is false. The extension of the Utility’s service area does not violate the Comp Plan. Despite the assertions of the County, the Utility has never admitted that its Application violates the Comp Plan, and believes that the Application does not violate the Comp Plan. Footnote 15 on page 5 of the County’s motion is an irresponsible mischaracterization of the record. Mr. Reeves testified that the portion outside the urban service territory *may* not comport with the Comp Plan as it exists today (emphasis added). This statement is nothing more than recognition of the issues and objections put forth by the County. It is not an admission of any kind. It should also be noted that the phrase “may not comport” is not synonymous with the phrase “does not comport.”

The citation to Mr. Hartman’s testimony is curious. Mr. Hartman’s statement that Charlotte County has no plans to provide utility service to the area is not related to the issue of whether the Utility’s Application violates the Comp Plan. There is no allegation that the County is currently planning to construct a water or wastewater system in the area and the County’s inability to provide water or wastewater service at any time in the near future is a separate issue from whether the Application violates the Comp Plan.

The County claims that extending service territory into the area will violate the Comp Plan, yet it is attempting to claim such territory for its own Charlotte

County Utilities. The County admits in its Objection⁷ and in its Response to MSM Utilities, LLC's First Set of Interrogatories⁸ that the purpose of the objection is to grab territory for Charlotte County Utilities' own service territory. Thus far, the County has made no attempt to explain why its own claims to the service territory are in compliance with the Comp Plan while Sun River's claim to the territory is not. In its objection, the County stated:

“The water and wastewater service area expansion proposed by Applicant represents an illegal encroachment into Charlotte County's utility service area, in that it would extend Applicant's certificated service area into Charlotte County Water and Sewer District No. 2....”⁹

The County, in its Response to MSM Utilities, LLC's First Set of Interrogatories, stated:

“...[The Utility's] requested service area expansion is entirely within the service area of Charlotte County Utilities (“CCU”), and approving the requested expansion would result in a reduction of CCU's service area.”¹⁰

The fact that the County is claiming the proposed extended territory as its own service territory demonstrates that the County is not interested in reducing certificated service territories *per se*. It is more interested in reducing the certificated service territories of competing utilities. The County cannot claim that extending the Utility's service territory is a violation of the Comp Plan while claiming that its own Charlotte County Utilities' service territory is not a violation

⁷ See Objection of the Board of County Commissioners of Charlotte County, Florida, to the Application of MSM Utilities, LLC, for Amendment of Certs 611-W and 527-S to Extend Water and Wastewater Services Areas to Include Certain Land in Charlotte County and Request for Formal Hearing (filed March 16, 2007).

⁸ See Charlotte County's Response To MSM Utilities, LLC's First Set of Interrogatories, p. 1 (filed April 30, 2007).

⁹ See footnote 7.

¹⁰ See footnote 8.

of the Comp Plan. In other words, why is it that the area being in Sun River's service area violates the Com Plan, but being in the County's service area does not?

In addition to disputes over whether the Application violates the Comp Plan, the Utility disputes the unfounded claim that water and/or wastewater certificates "encourage urban sprawl" (p. 4). This issue, in and of itself, is a material fact that is in dispute. The Commission can make that determination only after hearing the conflicting evidence from witnesses. Such a summary conclusion would be inconsistent with the prior Orders of this Commission.¹¹

Given that urban sprawl is defined as "[u]rban development" (p. 6), and the Florida Statutes do not define service territory extensions as development,¹² this alleged fact is unsupported.

Aside from the definitional inconsistencies, there is not a shred of evidence showing that the Application will encourage sprawl. Development is more likely spurred by the forces of supply and demand as viewed through the experience of a developer rather than the issuance of service territory certificates for water or wastewater utilities. As noted above, it is unclear why extending Sun River's service territory will cause urban sprawl while at the same time claiming the area for Charlotte County Utilities will not.

¹¹ See Order No. PSC-01-0360-PAA-WS (issued February 9, 2001) ("it is well established that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact....The burden is on the movant to demonstrate that the opposing party cannot prevail....If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper") (internal citations omitted).

¹² § 380.04, *Fla. Stat.*

Also in dispute is the County's claim that "[n]o immediate need for utilities exists" (p. 6) despite several letters from property owners in the area requesting service and interest from developers. The Utility has shown that interest exists in the area, and noted its reasonable expectation of continued expansion of the area as a result of the expansion of US Highway 17.¹³ The Commission does not require that the proposed service territory be fully developed before issuing a certificate.¹⁴

Further, Objective 2.7 of the Comp Plan involves Rural Community developments wherein rural lands within the Eastern County are converted to more intensive uses providing residential and employment opportunities. Policy 2.7.4 notes that the residential portion will be clustered. Policy 2.7.7 notes that clustering, as part of a master plan, requires "utilization of infrastructure such as central wastewater facilities." For landowners to seek service commitments and for Sun River to seek service territory to serve them are actions that are actually required to comply with the directives of the Comp Plan.¹⁵

The County asserts that it is pointless to approve the Application because no development is currently permitted in the proposed expanded service territory. Notwithstanding the fact that the Comp Plan can be and is regularly amended and expires in 2010, there are myriad ways that new development can be approved without contributing to urban sprawl. In addition, changes are regularly made to

¹³ See Prefiled Testimony of A. A. Reeves, pp. 3-4, and Exhibit AAR-3 attached thereto.

¹⁴ See Order No. PSC 04-0980-FOF-WU (approving an application extending a utility's certificate based on a limited need for service even though the need for service was not pervasive throughout the territory).

¹⁵ Charlotte County Comprehensive Plan, Objective 2.7; Policies 2.7.4 and 2.7.7, pp. 1-242 to 1-243.

the Com Plans. For example, Policy 1.1.10 of the Comp Plan sets forth criteria for amending the Urban Service Territory boundary.¹⁶ It is unclear why the Utility's property would not satisfy such criteria. If Comp Plans were intended to be inviolate there would not be a procedure for amendment.

III. THE PSC DOES NOT HAVE THE AUTHORITY UNDER SECTION 367.171(5), FLORIDA STATUTES, TO RELINQUISH JURISDICTION OF THIS MATTER.

Section 367.171(5), Florida Statutes, states that "all cases in which the utility is a party then pending before the Commission...shall remain within the jurisdiction of the Commission...until disposed of in accordance with the law in effect on the day such case was filed..." There is no language giving the Commission the discretion to relinquish jurisdiction in selected cases.¹⁷ The Commission has historically maintained jurisdiction over proceedings in process at the time a county took back jurisdiction.¹⁸ The Utility has been unable to find a single case where the Commission violated its statutory obligation by relinquishing jurisdiction of a pending matter under similar circumstances. The County has even recognized that this case will remain with the PSC. On October 16, 2007, the County Attorney's office sent a letter to Robert C. Brannan of Rose, Sundstrom & Bentley stating that during an Executive (closed-door) Session of the

¹⁶ Charlotte County Comprehensive Plan, Policy 1.1.10, p. 1-203.

¹⁷ See Order No. 22220, Docket No. 890969-WS ("Section 367.171(5), *Florida Statutes*, requires that all cases pending before the Commission when a county takes back jurisdiction be completed in accordance with the law in effect on the day the case was filed with the Commission").

¹⁸ See Order No. PSC-04-1155-PCO-WS (issued November 22, 2004); Order No. PSC-97-0552-FOF-WS (issued May 14, 1997); Order No. PSC-00-1879-AS-WS (issued October 16, 2000); Order No. PSC-94-1050-FOF-WU (issued August 29, 1994); Order No. PSC-98-0507-FOF-WS (issued April 13, 1998).

Charlotte County Commission the County's "Counsel advised the Board [of Commissioners] that even if the Board later passed a resolution to take back regulation from the PSC, the Sun River case would probably remain with the PSC, unless all parties voluntarily agreed to transfer the case to Charlotte County" (Letter attached hereto as Exhibit A). Even if the parties agreed upon a transfer, there is no provision for such a transfer in the statute.

Moreover, the Utility is entitled, by statute, to have this case adjudicated "in accordance with the law in effect on the day such case was filed...."¹⁹ Relinquishing jurisdiction would have the effect of changing the law of the case in violation of Section 367.171(5), *Florida Statutes*, unless the new body applies the same law as is guiding the current case. Given that reality, it is unclear why the parties should start over from scratch.

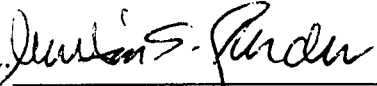
The County asserts that disposing of this case in accordance with Chapter 367, *Florida Statutes*, would be a "colossal waste" of time and resources. That is not the case. Pursuant to Section 367.171(4), *Florida Statutes*, the County must honor the service area determination made by the Commission in this proceeding. Assuming, *arguendo*, that there is room for discretion, more resources would be wasted re-litigating this entire proceeding. The time and effort expended in this case would be lost to the Utility and parties. The County would have to adopt rules and procedures to dispose of the case, then hire outside experts and consultants to analyze and adjudicate the case anew. Given that this dispute must be settled by the law in effect at the time of the filing, it is unclear why starting

¹⁹ § 367.171(5), *Fla. Stat.*

over would be efficient. The County appears to want to have a different law apply, before its own county commission, so that it can eliminate competition and reserve service territory exclusivity for itself. Ultimately, the County's Comp Plan, the basis of its dispute, will likely not even be in effect by the end of this proceeding if jurisdiction is relinquished.

It does not take a rocket scientist to understand why the County is fighting so hard to allow the County to rule upon Sun River's service area amendment in light of the County's previous argument that it wants that area for itself. All Sun River asks for is a level playing field where the most persuasive evidence dictates the result, not politics.

Respectfully submitted on this 19th day
of October, 2007, by:

By: 
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CERTIFICATE OF SERVICE
DOCKET NO.: 070109-WS

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to Charlotte County's Motion for Summary Final Order or Relinquishment of Jurisdiction has been furnished by U.S. Mail this 19th day of October, 2007, to:

Todd D. Engelhardt, Esquire
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Ralph Jaeger, Esquire
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Florida Public Service Commission
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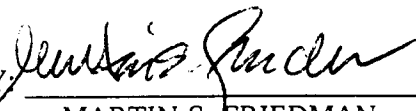
BY 
MARTIN S. FRIEDMAN
For the Firm

EXHIBIT “A”



Charlotte County Government

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October 16, 2007

VIA FACSIMILE and U.S. MAIL

Robert C. Brannan, Esquire
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Plines Drive
Tallahassee, Florida 32301

Re: Public Service Commission ("PSC") Docket No. 070109
MSM / Sun River Utilities, Inc.
Application for Amendment of Certificates 611-W and 527-S to extend
Water and Wastewater service areas to include certain land in Charlotte County

**REQUEST FOR TRANSCRIPT OF EXECUTIVE SESSION OF THE BOARD OF
COUNTY COMMISSIONERS**

Dear Mr. Brannan:

This is in response to your September 25, 2007 public records request to Charlotte County Clerk of the Circuit Court Barbara T. Scott for a copy of the transcript from the September 11, 2007 Executive Session on the Sun River Utilities PSC case.

Your letter states that you were informed "through the office of the County Attorney" that the issue of transferring regulation of the private water and wastewater system utilities was discussed during a recent Executive Session. Although the issue of regulation of the private water and wastewater utilities was mentioned at the September 11 Executive Session on the Sun River Utilities PSC case, our office advised the Board that any action on transferring such regulation back to Charlotte County must be taken at a regular Board of County Commissioners meeting, which is why the item was placed on the Board's September 25 agenda. Such discussion during the September Executive Session arose naturally as part of the Board's discussion of Sun River Utilities, which of course is regulated by the PSC.

The issue of County regulation of private water and wastewater system utilities has come up several times, most recently at an April 17, 2007 Board of County Commissioners Strategic Planning Meeting, where County staff discussed the problem of PSC-regulated utilities expanding utility service areas outside of the County's Urban Service Area, and also that some Florida counties have acted to regain control of such private utilities. Commissioner Cummings then commented on the County's previous regulation of such utilities.

COUNTY ATTORNEY'S OFFICE

18500 Murdock Circle, Suite 573 | Port Charlotte, FL 33948-1068
Phone: 941.743.1330 | Fax: 941.743.1550

Exhibit A


October 16, 2007

Page 2

The Board's discussions during the September 11 Executive Session were limited to background of and strategy for the pending PSC case and estimated related costs. Counsel advised the Board that even if the Board later passed a resolution to take back regulation from the PSC, the Sun River case would probably remain with the PSC, unless all parties voluntarily agreed to transfer the case to Charlotte County. As prohibited by law, no action or vote on PSC regulation was taken at the Executive Session, but the Board requested the issue to be placed on a future agenda at a regular Board meeting.

Therefore, as the Sun River Utilities PSC case is still in litigation, the transcript that you requested is not currently available but will be made part of the public record upon conclusion of the litigation, pursuant to Florida Statutes Section 286.011(8). Please feel free to contact me with any further questions or to discuss this matter.

Sincerely,



Martha Young Burton
Assistant County Attorney

MYB/ldl

Cc: Barbara T. Scott, Clerk of the Circuit Court
Tommy White, Deputy Clerk of the Circuit Court
Janette S. Knowlton, County Attorney
Harold McLean, Esquire, Akerman Senterfitt

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LR 2007-0221

Exhibit A