

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment of  
Certificates 611-W and 527-S to extend water  
and wastewater service areas to include certain  
land in Charlotte County by Sun River  
Utilities, Inc. (f/k/a MSM Utilities, LLC).

DOCKET NO. 070109-WS  
ORDER NO. PSC-08-0029-PHO-WS  
ISSUED: January 7, 2008

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code (F.A.C.), a Prehearing Conference was held on January 3, 2008, in Tallahassee, Florida, before Commissioner McMurrin, as Prehearing Officer.

APPEARANCES:

MARTIN S. FRIEDMAN and ROBERT C. BRANNAN, ESQUIRES, Rose,  
Sundstrom & Bentley, LLP, 2548 Blairstone Pines Drive, Tallahassee, Florida  
32301  
On behalf of Sun River Utilities, Inc.

H. MCLEAN and T. ENGELHARDT, ESQUIRES, Akerman Law Firm,  
106 East College Avenue, Suite 1200, Tallahassee, Florida 32302-1877  
On behalf of Charlotte County, Florida.

RALPH R. JAEGER, ESQUIRE, SENIOR ATTORNEY, Florida Public Service  
Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Florida Public Service Commission.

**PREHEARING ORDER**

I. CASE BACKGROUND

On February 28, 2007, MSM Utilities, LLC, n/k/a Sun River Utilities, Inc. (Sun River or utility) filed its application for amendment of Certificates 611-W and 527-S to extend water and wastewater service areas to include certain land in Charlotte County. On March 16, 2007, the Board of County Commissioners of Charlotte County filed an objection to the amendment application.

By Order No. PSC-07-0452-PCO-WS (Order Establishing Procedure), issued May 29, 2007, the objection of Charlotte County (County) to the amendment application of Sun River was scheduled for formal hearing to be held on November 1 and 2, 2007, with a Prehearing Conference scheduled for October 15, 2007. By Order No. PSC-07-0662-PCO-WS, issued on August 16, 2007, the utility's Motion for Continuance was granted, and the Prehearing

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FPSC-COMMISSION CLERK

Conference was rescheduled for January 3, 2008, and the hearing was rescheduled for January 16 and 17, 2008.

On September 25, 2007, the Charlotte County Board of County Commissioners adopted Resolution No. 2007-143. This resolution rescinded Resolution 94-195 which had previously granted jurisdiction over utilities in that County to the Commission, and stated that Charlotte County took back jurisdiction effective immediately.

On October 9, 2007, the County filed its Motion for Summary Final Order or Relinquishment of Jurisdiction (Motion), with affidavits attached. The County also timely filed a Request for Oral Argument in accordance with Rule 25-22.0022, Florida Administrative Code (F.A.C.). The utility filed its timely Response in Opposition to the County's Motion on October 19, 2007 (Response). The Motion was denied by Order No. PSC-07-0972-PCO-WS, issued December 5, 2007.

## II. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, F.A.C., this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

## III. JURISDICTION

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 367, Florida Statutes (F.S.).<sup>1</sup> This hearing will be governed by said Chapter and Chapters 25-30, 25-22, and 28-106, F.A.C., as well as any other applicable provisions of law.

## IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

Information for which proprietary confidential business information status is requested pursuant to Section 367.156, F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 367.156(2), F.S. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

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

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<sup>1</sup> Specifically, Sections 367.045(2) and 367.171(5), F.S.

Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 367.156, F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Office of Commission Clerk's confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

#### V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties (and Staff) has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

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

VI. ORDER OF WITNESSES

As a result of discussions prior to the Prehearing Conference, the testimony of Allen B. Fisher shall be inserted into the record as though read, and that witness shall be excused from attending the hearing scheduled for January 16-17, 2008. Mr. Fisher did not have any exhibits to his testimony.

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Allen B. Fisher*	Sun River	2
A.A. Reeves, III	Sun River	1-8
Gerald C. Hartman	Sun River	1, 3-8
Jeffrey C. Ruggieri	Charlotte County	1, 5, 8
Jeffrey L. Pearson	Charlotte County	1, 6, 7
Suzanne K. Lex	Staff	5
<u>Rebuttal</u>		
Stephen J. Feldman	Sun River	1, 5, 8
Craig A. Dearden	Sun River	1, 7, 8
Gerald C. Hartman	Sun River	1, 3-8

\*This witness is excused from being present at hearing and will have his testimony inserted into the record as though read.

VII. BASIC POSITIONS

**SUN RIVER  
UTILITIES,**

**INC.:** Sun River is entitled to the requested amendment to its certificates of authorization because it has satisfied all statutorily required and Commission requested evidence demonstrating that there is a need for service and that it has the financial and technical ability to serve the requested service territory and that granting such amendments is in the public interest.

**CHARLOTTE  
COUNTY:**

The Charlotte County Comprehensive Plan is the result of a great deal of effort by the citizens of this county and their elected officials to establish a policy that

provides a rational plan for the development of land within our county and the preservation of our quality of life. It is Charlotte County's position that the proposed extension of service territory by Sun River Utilities is inconsistent with this Comprehensive Plan. The County's primary growth management tool is an urban service area strategy that uses public infrastructure and services as a means for directing the timing, location and intensity of development. The proposed territory is almost entirely outside of the County's urban service area, and adding the provision of water and wastewater service to this proposed territory would promote additional development and allow for land use patterns which would disproportionately increase the cost in time, money and energy of providing and maintaining facilities and services, including water, sewer, storm water management, roads law enforcement, education, health care, fire and emergency response.

**STAFF:** Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

#### VIII. ISSUES AND POSITIONS

**ISSUE 1:** **Is there a need for service in the proposed territory, and, if so, when will service be required?**

#### **POSITIONS**

#### **SUN RIVER UTILITIES,**

**INC.:** Yes, the need for service in the area is established in by the submitted evidence, including Exhibits AAR-3, GCH-3 and the testimony of Stephen Feldman. Neither the Florida Statutes nor any Charlotte County ordinance requires that a developer seek a service commitment from Charlotte County Utilities ("CCU"). There can, therefore, be no negative inference drawn from the fact that nobody approached CCU requesting service to the proposed territory. In fact, it is more likely that nobody approached CCU because it is widely known that CCU does not have the ability or desire to serve the territory and that it has issued a meaningless Letter of Availability in the past (See Testimony of Craig Dearden).

The County asserts that there can be no need in the area because the current zoning and comprehensive plan do not permit development in the area. However, all agree that provisions for water and sewer service are necessary before any applications for zoning variances, Comprehensive Plan ("Comp Plan") amendments and construction permits can be considered.

**CHARLOTTE**

**COUNTY:** No, there has not been a demonstrated need for service in the requested territory. Charlotte County Utilities has not been contacted by any land owners or developers requesting water or wastewater service within this area, nor has the County received any requests for a change of land use designation in the proposed territory, and there have been no proposed amendments to the Charlotte County comprehensive plan.

**STAFF:** No position at this time, pending further development of the record.

**ISSUE 2:** **PROPOSED STIPULATION** – See Section X, Proposed Stipulations

**ISSUE 3:** **PROPOSED STIPULATION** – See Section X, Proposed Stipulations

**ISSUE 4:** **PROPOSED STIPULATION** – See Section X, Proposed Stipulations

**ISSUE 5:** **Is the proposed amendment inconsistent with the Charlotte County Comprehensive Plan?**

**POSITIONS**

**SUN RIVER  
UTILITIES,  
INC.:**

No, the proposed amendment is consistent with the Charlotte County Comprehensive plan. Even if it is assumed that the proposed Amendment is inconsistent with the present language of the Comp Plan, it is still in the public interest and should be granted notwithstanding the Comp Plan.

**CHARLOTTE**

**COUNTY:** Yes, the proposed expansion is in direct conflict with certain objectives and policies of the Comprehensive Plan. The proposed territory is outside of the designated urban service area, which was identified as a means for directing the timing, location and intensity of development. Neither Sun River nor any land owner has followed the established procedure to request a future land use amendment or a rezoning. Allowing development along the scale of that being contemplated by Sun River would encourage and constitute urban sprawl.

**STAFF:** It appears that, for the proposed territory west of U.S. 17 (Duncan Road), the utility's application is in compliance with the Comprehensive Plan. However, for the territory east of U.S. 17, it appears that the application is inconsistent with the

Comprehensive Plan. Staff's final position will be dependent upon further development of the record.

**ISSUE 6:** Will the proposed amendment to the applicant's territory duplicate or compete with any other system?

**POSITIONS**

**SUN RIVER  
UTILITIES,**

**INC.:** No, there is currently no water or wastewater infrastructure in the proposed service territory. CCU does not have any plans to construct such infrastructure. As such, there is no current or planned system in competition with Sun River in the proposed service territory.

**CHARLOTTE**

**COUNTY:** The proposed amendment to Sun River's territory would duplicate and compete with CCU's Water & Sewer District #2.

**STAFF:** No position at this time, pending further development of the record.

**ISSUE 7:** If the proposed amendment would result in an extension of a system which would be in competition with, or a duplication of another system, is that other system inadequate to meet the reasonable needs of the public or is the owner of the system unable, unwilling, or neglecting to provide reasonably adequate service to the proposed territory?

**POSITIONS**

**SUN RIVER  
UTILITIES,**

**INC.:** As stated in the response to Issue 6, there is no other system in competition with the Sun River system currently or within the proposed service territory. As such, this issue is not applicable. If, for argument's sake, one assumes that CCU is in competition with Sun River, it should be noted that CCU is unwilling and unable to provide any service to the proposed service territory.

**CHARLOTTE**

**COUNTY:** CCU's system is adequate to meet the reasonable needs of the public, and Charlotte County, as owner of the system, is able, willing, and responsive to public need to provide reasonably adequate service to the proposed territory. However, Charlotte County believes that at this time there is no established need within the proposed service area, and for that reason CCU has not yet provided service to the area. Should such a pervasive need be demonstrated to Charlotte County, all necessary steps to provide service to the area can and would be taken.

**STAFF:** No position at this time, pending further development of the record.

**ISSUE 8:** **Is it in the public interest for the applicant to be granted an amendment to Certificates Nos. 611-W and 527-S for the territory proposed in its application?**

**POSITIONS**

**SUN RIVER  
UTILITIES,**

**INC.:** Yes, the proposed amendment is in the public interest for the reasons noted above.

**CHARLOTTE**

**COUNTY:** No, this application is not in the public interest. The proposed service expansion is in direct conflict with the County's Comprehensive Plan. The PSC should recognize that the comprehensive plan is the rational and lawful means by which the county protects its resources and citizens where development is concerned, and, therefore, should deny the application in its entirety.

**STAFF:** No position at this time, pending further development of the record.

IX. **EXHIBIT LIST**

<u>Witness</u>	<u>Proffered By</u>	<u>Exhibit #</u>	<u>Description</u>
<u>Direct</u>			
A.A. Reeves	Sun River	AAR-1	Summary of Experience
A.A. Reeves	Sun River	AAR-2	Application for Amendment to Certificates
A.A. Reeves	Sun River	AAR-3	Requests for service in the requested service territory



<u>Witness</u>	<u>Proffered By</u>	<u>Exhibit #</u>	<u>Description</u>
Gerald C. Hartman	Sun River	GCH-1	Summary of Experience
Gerald C. Hartman	Sun River	GCH-2	Letter of Engagement
Gerald C. Hartman	Sun River	GCH-3	Request for service in the requested service territory
Gerald C. Hartman	Sun River	GCH-4	Map of Present Service Territory
Jeffrey C. Ruggieri	Charlotte County	JCR-1	Excerpts from Charlotte County's Comprehensive Plan
Jeffrey L. Pearson	Charlotte County	JLP-1	Uniform Extension Policy adopted by Charlotte County
Jeffrey L. Pearson	Charlotte County	Late-filed Exhibit 1	CCU's Service Districts #1 & #2 Map
Suzanne K. Lex	Staff	SKL-1	Urban Service Area Overlay Map

Rebuttal

Stephen J. Feldman	Sun River	SJF-1	Resume of Stephen J. Feldman
Gerald C. Hartman	Sun River	GCH-1	Additional Map of Present Service Territory
Gerald C. Hartman	Sun River	GCH-2	Map of Charlotte County and general service areas
Gerald C. Hartman	Sun River	GCH-3	Charlotte County Utilities Map of Proposed Territory Extension
Gerald C. Hartman	Sun River	GCH-4	Desoto County Existing Land Use Map
Gerald C. Hartman	Sun River	GCH-5	Desoto County Future Land Use Map

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

X. PROPOSED STIPULATIONS

The following are proposed stipulations on which Sun River and Staff are in agreement. The County does not affirmatively stipulate to Issues 2, 3, and 4, but takes no position on these issues:

**ISSUE 2:** Does the applicant have the financial ability to serve the proposed territory?

**Stipulation:** The utility has demonstrated that it has the financial ability to serve the proposed territory.

**ISSUE 3:** Does the applicant have the technical ability to serve the proposed territory?

**Stipulation:** The utility has demonstrated that it has the technical ability to serve the proposed territory.

**ISSUE 4:** Does the applicant have sufficient plant capacity to serve the requested territory?

**Stipulation:** The utility has demonstrated that it either has sufficient plant capacity to serve the requested territory or will construct the plant when it is needed.

XI. PENDING MOTIONS

There are no pending motions at this time.

XII. PENDING CONFIDENTIALITY MATTERS

There are no pending confidentiality matters at this time.

XIII. POST-HEARING PROCEDURES

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

Pursuant to Rule 28-106.215, F.A.C., a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time.


XIV. RULINGS

Opening statements, if any, shall not exceed ten minutes per party.

It is therefore,

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

By ORDER of Commissioner Katrina J. McMurrin, as Prehearing Officer, this 7th day of January, 2008.

  
KATRINA J. McMURRIAN  
Commissioner and Prehearing Officer

( S E A L )

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.