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February 7, 2008

VIA HAND DELIVERY

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

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket is the original and fifteen (15) copies of Charlotte County's Post-Hearing Statement of Issues and Brief. The filing consists of twenty-two pages.

- CMP _____
- COM _____
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- SEC _____
- OTH _____

Thank you for your assistance with this filing, and please do not hesitate to contact me with any questions or concerns.

Sincerely,

AKERMAN SENTERFITT

Todd D. Engelhardt

Enclosures
cc: Martin S. Friedman (by U.S. Mail)

{TL149778;1}

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Ann Cole, Commission Clerk
February 7, 2008
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Martha Young Burton (by U.S. Mail)
Ralph Jaeger (by Hand Delivery)

**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 Filed: February 7, 2008
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CHARLOTTE COUNTY'S POST-HEARING STATEMENT OF ISSUES AND BRIEF

Charlotte County, by and through its undersigned attorneys, hereby files this Post-Hearing Statement of Issues and Brief pursuant to Order No. PSC-07-0452-PCO-WS issued in Docket No. 070109-WS, on May 29, 2007, as revised by Order No. PSC-07-0662-PCO-WS issued on August 16, 2007, and Order No. PSC-07-0807-PCO-WS issued on October 4, 2007, and states:

Introduction

Sun River Utilities, Inc. ("Sun River") has filed an Application for Amendment of Certificates 611-W and 527-S in an attempt to extend its right to serve within Charlotte County. However, Sun River's application must be denied for its failure to meet two burdens. First, Sun River must show that a need exists within the proposed service area, and that this need is not being properly fulfilled by the current certificate holder for the area, Charlotte County. Sun River has put forth absolutely no proof of any specific need within the area, as required by statute and Commission precedent. Sun River failed to show any such need exists at the present time, and based its claims of future need on mere speculation, supposition, and anticipation, and not on any actual evidence. Its "customer requests" supplied insufficient detail showing even the most basic factors of need, i.e., how much need there will be, what the need consists of, and

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when the need will exist, and its witnesses failed to provide any further details through their testimony.

Sun River's proposal would also violate the Charlotte County Comprehensive Plan. This is the opinion not only of the County and the Department of Community Affairs, but even of Sun River's own witnesses. But despite these objections by both the local governmental entity who coordinated and created with its citizens a comprehensive plan for the development and use of land within the county, and the state agency placed by the Legislature in charge of comprehensive planning, Sun River has defiantly directed the Commission to statutory language which permits, but does not require, the Commission to allow an amendment to a certificate despite its noncompliance with a validly enacted comprehensive plan. However, Sun River has failed to show why this Commission should choose to ignore the voices of the citizens of Charlotte County, whose wishes are expressed in the comprehensive plan supported by both the County and the Department of Community Affairs. Without any compelling reasons to support Sun River's application, the Commission acts in the public's interest by instead siding with the County's valid comprehensive plan, and denying the Application for Amendment.

Statement of Issues of Fact, Law and Policy, and Supporting Brief:

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

Charlotte County's Position: There has been no demonstration of any need for service in the requested territory. The letters and witness testimony that Sun River produced as evidence are insufficient to establish that a need exists, when the need must be fulfilled, and how much service is needed.

Argument:

Sun River has failed to establish that there is any need for services within the proposed territory. In order for Sun River to obtain the amended certificates, it must show in detail the

need for service in the proposed area it seeks to add.¹ Commission precedent has established that when a utility applies for an extension of its service area it must show details of what development already exists in the area, and what development is proposed. “Mere speculation as to what development may be allowed or may take place” does not establish a need for service.² A failure to provide details of what development might consist of, or evidence of any ability to supply the unknown amount of needed service, is fatal to a utility’s application.³ If there is no evidence of the existence of a plan for construction development established in the evidence of the record, and no evidence which shows when or on what schedule the construction of that development might occur, then no need is established by the utility.⁴ This required showing has not been made here.

At no point before or at the technical hearing did Sun River put forth any evidence showing an actual need within the proposed service area. The Application for Amendment contains no documentation detailing any levels of need that already exist within the proposed service area, or any levels of need for proposed development within that area. Instead, Sun River makes the unsupported claim that “[t]he territory will consist of residential, commercial and industrial development.” Exhibit 3 p.5, ¶13. Sun River does not claim that there are actual plans for commercial or industrial development, but rather notes solely that such development “can be predicted.” *Id.* The Application next refers to the existence of “letters from the property owners in the proposed service territory requesting inclusion in the expanded territory,” but these letters

¹ § 367.045(2)(b) states, in part, “When a utility applies for an amended certificate of authorization from the commission, it shall ... [p]rovide all information required by rule or order of the commission, which information may include a detailed inquiry into ... the need or lack of need for service in the area that the applicant seeks to delete or add...”

² 85 FPSC 6:163 (Order 14487, Docket 840371-WS In re: Objection of City of Sanford to expansion of water and sewer service in Seminole County by Lake Monroe Utility Corporation and application for expansion by Lake Monroe Utility Corporation).

³ *Id.*

⁴ 1990 WL 749389 (Order 22847, Docket 890459-WU In re: Objection to notice of Conrock Utility Company of intent to apply for a water certificate in Hernando County) p.12 ¶ 7; p.19.

are not described as referring to the need of the property owners, and these letters were not attached to the Application. *Id.*

The testimony of A.A. Reeves, III (“Reeves”), Sun River’s Vice President and Utilities Director, shed no additional light on the claimed need within the proposed territory. On direct examination he merely echoed the Application claims verbatim in regard to envisioned development, and referred to “several” requests from property owners for service by Sun River. Reeves Tr. 25-26. In his summary, Reeves stated that “There is a need for water and sewer service in the area” but based this on “the existing area as well as the requested area” due to Sun River’s anticipation about development. Reeves Tr. 29. When immediately asked by Commissioner Argenziano to explain “what the current need may be,” how the “anticipated need” was derived, and when that need would occur, Reeves noted that Sun River had several projects in the existing certificated area, and had supplied to Staff relevant information establishing that need.

When finally addressing the proposed service area, Reeves admitted no knowledge “of what’s going to be constructed out there in the future” or any ability to determine an expected number of units needed. Reeves Tr. 30. Reeves repeatedly admitted that no developers had in fact contacted Sun River at all about any developments in the six and a half-mile portion of the proposed service area which lies outside the County’s Urban Services Boundary, and that he had no specific knowledge of any specific plans for development, and no knowledge of the capacity Sun River would need to have available to service the area. Reeves Tr. 33-35, 56. He also admitted that the larger portion of the proposed service area was added in order for Sun River to build a facility to accommodate a need on the west side of Highway 17, within the utility’s existing certificated area. Reeves Tr. 42-43. When asked for specifics of the need on the west

side of Highway 17 within the proposed service area, Mr. Reeves had no idea of how many ERCs would be needed. Reeves Tr. 55. In fact, in answer to Staff's Interrogatory #5, Sun River again admitted having no specifics regarding when any need or development would arise, only "anticipat[ing]" that it would occur within five years. Reeves Tr. 54-55, Exhibit 20.

Sun River's entire claim of actual need is based on the "service requests" it filed.⁵ These 4 letters⁶, however, fail to establish any need at all. None of them describe any existing need in the proposed service area. Exhibits 4, 7. Only one even mentions the potential existence of any development plans. Exhibits 4, 7 (Hudson-Sun River LLC letter). The first letter⁷, from Mr. Keenan, is the only letter from a property owner on the west side of Highway 17, within the Urban Service Boundary. Nowhere in the letter does Mr. Keenan state when he will need service; what the service is needed for; or how much service will be needed. Exhibits 4, 7 (Keenan Letter); Reeves Tr. 37. Reeves claimed he had verbal communication with Mr. Keenan regarding need, but the record is barren of any specifics, and when asked by staff how many ERCs would be needed in the Keenan property Reeves had no knowledge. Reeves Tr. 37-38, 55.

The second letter, written by Hudson-Sun River LLC, a business entity related to Sun River⁸, also fails to describe or detail any need. The letter itself comes from a group who does not actually own property within the proposed territory, but who states that it has a contract to purchase the Hudson Ranch property, which lies on the east side of Highway 17 within the

⁵ The Requests were attached to Reeves' direct testimony as Exhibit AAR-3, and were entered at the hearing as Exhibit 4. The Requests were also attached to Hartman's direct testimony as Exhibit GCH-3, and were entered at the hearing as Exhibit 7.

⁶ The exhibit attached to Hartman's direct testimony only contained 3 letters, omitting the one from Dr. Zachariah.

⁷ The Requests filed as Exhibit 4 are in a different order than those filed as Exhibit 7. For consistency, this Brief will follow the order in Exhibit 4, which contains all of the requests filed.

⁸ At the hearing, Sun River downplayed the interrelationship between these entities. However, in addition to being the only known area businesses with the name "Sun River" and the admission of Reeves and Feldman to a shared minority owner, Reeves testified that "we were planning on building our own utility on that site" in regard to the Hudson-Sun River LLC property contracted for prior to Sun River's purchase of MSM, the former utility owner. However, once the utility became available, to save costs Sun River purchased MSM instead of building new facilities. Reeves Tr. 38-40(emphasis added); Feldman Tr. 206. This detailed level of mutual planning and use of "we" implies more than a distant relationship.

proposed service area. Exhibits 4, 7 (Hudson-Sun River LLC Letter); Reeves Tr. 43; Feldman Tr. 194, 207. The letter does not describe any contingencies within that contract which would cause the contract to fail if water and wastewater services are not made available by a time certain, and there was no testimony supporting such a scenario. Exhibits 4, 7 (Hudson-Sun River LLC Letter); Reeves Tr. 43-44; Feldman Tr. 207. Nowhere in the letter is there any description of what development plans exist; how many ERCs would be needed; when any development would take place; or when service would be needed. Exhibits 4, 7 (Hudson-Sun River LLC Letter); Reeves Tr. 44-45.

The third letter, written by Mr. Schwartz, not only fails to describe any need in the proposed service area, but fails to show that Mr. Schwartz owns any property at all within the proposed service area. As entered in both Exhibits 4 & 7, the letter does not contain any identification of the location of Mr. Schwartz' properties, beyond indicating that they are somewhere along US 17 in Charlotte County. Exhibits 4, 7 (Schwartz Letter); Reeves Tr. 46; Hartman Tr. 78. No parcel ID numbers were filed in this docket identifying the location of the Schwartz property, which could lie anywhere along US 17, on the east or west side, north or south of the proposed service area. Even accepting Sun River's unsupported claim that Mr. Schwartz' property lies within the proposed service area, the letter itself does not describe when service will be needed; how much service is needed; what service will be needed for; or any plans for development. Exhibits 4, 7 (Schwartz Letter); Reeves Tr. 46. Reeves, who describes his job duties as including "handl[ing] requests from potential customers for water and wastewater service" further admitted he has never even spoken with Mr. Schwartz. Reeves Tr. 24, 45.

The final letter, from Dr. Zachariah, was written after the Application for Amendment was filed, and comes from a landowner whose property Sun River admits does not even lie in the proposed service area at all. Exhibits 4, 7 (Zachariah Letter); Reeves Tr. 46-47; Hartman Tr. 78. Even if the Commission granted the amendment sought by Sun River, this property would not receive service.⁹ Reeves Tr. 47. Additionally, this letter, like all of the others included in Exhibits 4 & 7, fails to describe when service will be needed; how much service is needed; what service will be needed for; or any plans for development. Exhibits 4, 7 (Zachariah Letter).

Even the developer Sun River called as a rebuttal witness failed to describe with any particularity what need exists either now or in the future within the proposed service area. Steven Feldman, managing member of Hudson-Sun River LLC, testified that there is an “urgent, compelling need and requirement to provide sewer and water service to all of the future industrial, retail, commercial businesses and residents who will locate [in] and populate” the proposed service area. Feldman Tr. 199-200. However, Feldman was unable to point to any such plans for development. In his direct testimony he pointed out that Florida Gulf Coast University had selected the Hudson Ranch as its site for development of a satellite learning facility in Charlotte County, but he admitted on cross-examination that this agreement was no longer in place, and that the agreement was quashed for reasons other than the availability of water and wastewater service. Feldman Tr. 196-197, 209-211. In fact, this failed deal is the only contract or agreement that has ever been entered into for development of the property within a specific timeframe with a specific need. Feldman Tr. 210-211. Further, Feldman admitted that he has no deals pending regarding the property within the proposed service area, and that

⁹ Commissioner Skop noted that the letter might be indicative of a need for service in the general area, even though certification is not being sought in this specific proceeding. However, any future requests for amended certificates will fall under the jurisdiction of Charlotte County, not the Commission, and therefore it is inappropriate to consider the Zachariah letter as an indication of any potential future filing by Sun River with the Commission. Reeves Tr. 52. *See also* Order PSC-07-0984-FOF-WS.

interested users approach Hudson-Sun River LLC in regard to their DeSoto County property, and not the Charlotte County property. Feldman Tr. 214 (“I’m certainly not saying we have somebody on the hook. We certainly think we do on our DeSoto property, but clearly not on Charlotte.”) He also admitted that despite his “urgent, compelling need” he has never contacted Charlotte County, the current holder of the certificate to service the area, in order to arrange for service. Feldman Tr. 138.

Finally, Staff’s witness, Ms. Lex, representing the Department of Community Affairs, agreed that Sun River failed to meet its burden of establishing a need within the area. Lex testified that “[Sun River] states that there is an immediate and growing need for potable water and wastewater service in the proposed service territory, but insufficient supporting documentation was provided.” Lex Tr. 169. Lex repeatedly noted the lack of any development plans in the area. Lex Tr. 172, 174, 179, 186. She then twice summarized the Department of Community Affairs’ position on the application as being “premature” based on the lack of any enforceable development plans. Lex Tr. 186, 189.

Thus, the evidence and testimony, put forth by both Sun River itself and Staff’s witness representing the Department of Community Affairs, conclusively establish that there is no need for services within the proposed territory. Commission precedent requires that, for this reason alone, the Application must be denied.¹⁰

¹⁰ During the technical hearing, Commissioner Argenziano asked whether the proposed service area constitutes an agricultural enclave. At one point, counsel for Sun River answered her question affirmatively. Brannan Tr. 58. However, the proposed service area is most certainly not an “Agricultural Enclave” as defined in Section 163.3164 (33), Florida Statutes. An “Agricultural enclave” is defined as being an unincorporated, undeveloped parcel that: (a) Is owned by a single person or entity; (b) Has been in continuous use for bona fide agricultural purposes, as defined by s. 193.461, for a period of 5 years prior to the date of any comprehensive plan amendment application; (c) Is surrounded on at least 75 percent of its perimeter by 1. Property that has existing industrial, commercial, or residential development; or 2. Property that the local government has designated, in the local government’s comprehensive plan, zoning map, and future land use map, as land that is to be developed for industrial, commercial, or residential purposes, and at least 75 percent of such property is existing industrial, commercial, or residential development; (d) Has public services, including water, wastewater, transportation, schools, and recreation facilities,

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

Charlotte County's Position: Charlotte County takes no position on this issue, which was stipulated to by Staff and Sun River.

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

Charlotte County's Position: Charlotte County takes no position on this issue, which was stipulated to by Staff and Sun River.

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

Charlotte County's Position: Charlotte County takes no position on this issue, which was stipulated to by Staff and Sun River.

Issue 5: Is the proposed amendment inconsistent with the Charlotte County comprehensive plan?

Charlotte County's Position: The proposed amendment directly conflicts with the Comprehensive Plan. The proposed territory is almost entirely outside of the Urban Service Boundary, which directs the timing, location and intensity of development. Allowing services in that area will lead to development on too great of a scale and would encourage urban sprawl.

Argument:

Development of any type, by private or public actors, which is not in conformity with an approved comprehensive plan, or elements or portions thereof, violates state law. §163.3161(5), Florida Statutes. The Charlotte County Comprehensive Plan, adopted after 115 public meetings and approved by the state agency responsible for making determinations of compliance, the Department of Community Affairs, contains planning directives which use the location and

available or such public services are scheduled in the capital improvement element to be provided by the local government or can be provided by an alternative provider of local government infrastructure in order to ensure consistency with applicable concurrency provisions of s.163.3180; and (e) Does not exceed 1,280 acres; however, if the property is surrounded by existing or authorized residential development that will result in a density at buildout of at least 1,000 residents per square mile, then the area shall be determined to be urban and the parcel may not exceed 4,480 acres.

This Act is clearly inapplicable. First, this area is not owned by a single person or entity. Second, it has not been in continuous use for bona fide agricultural purposes for 5 years. Third, it is not surrounded on at least 75% of its perimeter by property with existing industrial, commercial, or residential development or by property that the county has designated in its Comp Plan, zoning and future lands use maps as land to be developed and is currently developed. Fourth, there are no public services of the types listed in the statute available or scheduled to be provided by the local government or an alternate provider. Finally, the property exceeds 1,280 acres and is not surrounded by existing or authorized residential development that will result in a density at buildout of at least 1,000 residents per square mile.

timing of infrastructure and services to direct growth in an orderly and efficient manner. The Plan's policy is generally aimed at reducing urban sprawl and controlling urban growth efficiently. Exhibit 9, p. 4, 8 (Objective 1.3; Policy 2.2.22). To achieve these goals, Charlotte County's Comprehensive Plan demarks an Urban Service Boundary, which separates geographic areas within the county into groups that will receive higher levels of publicly funded infrastructure and services. Ruggieri Tr. 99. These services include roads, potable water, sanitary sewer, storm water management, law enforcement, parks, schools, health care, fire and emergency response, and general government. Ruggieri Tr. 102; Lex Tr. 168. The Urban Service Boundary is a tool used to create flourishing places to live, work, and play, while still protecting farms and forests from urban sprawl, and to promote efficiency in land use, public facilities, and services. Lex Tr. 168.

Approximately 98.5 percent of the territory that Sun River seeks to service lies outside of the Urban Service Boundary, which runs along Highway 17. Reeves Tr. 32; Lex Tr. 168.¹¹ There is no existing infrastructure within the area, and there are no residents currently living there. The majority of the territory is in a Rural Service Area, zoned for agricultural use. Ruggieri Tr. 101. The Charlotte County Comprehensive Plan, however, aims to direct the timing, location, density, and intensity of development so that urbanized development is directed towards Urban Service Infill Areas. Lex Tr. 169 (referring to Objective 1.1). Capital improvements within the Infill Area are a priority in the Plan. Lex Tr. 170 (referring to Policy 1.1.3); Exhibit 9 p.4 (Policy 1.3.1). Both Charlotte County itself, and private utilities serving the county, are required to assure the provision of potable water and sanitary sewer services to new

¹¹ This calculation is arrived at by using the acreage amounts contained in Exhibit 3 p. 35-39. The portion of the proposed territory located on the west side of Highway 17, within the Urban Service Boundary, is approximately 62 ¼ acres, and the portion of the proposed territory located on the east side of Highway 17, outside of the Urban Service Boundary, is approximately 6 ½ miles, or 4160 acres.

and existing development in conjunction with existing certifications and the Urban Service Area strategy. Exhibit 9 p.1 (Objective 9.1). The implementation of that objective is detailed in Policy 9.1.1, which states that utilities are encouraged to extend those services to Infill Areas in accordance with the Urban Service Area strategy. Lex Tr. 170; Exhibit 9, p.1 (Policy 9.1.1).

Agricultural lands within Charlotte County may be converted to other uses when a demonstrated need has been established and it is determined that it does not constitute urban sprawl or promote urban sprawl in surrounding areas. Exhibit 9, p.8 (Policy 2.2.22). The Urban Service Boundary can also be expanded, but only if the proposed expansion does not constitute urban sprawl or promote the expansion of urban sprawl in surrounding areas. Exhibit 9 p.3 (Policy 1.1.10 (e)). The Florida Administrative code defines “urban sprawl” in part as “The creation of areas of urban development or uses which fail to maximize the use of existing public facilities or the use of areas within which public services are currently provided.” Rule 9J-5.003(134)(c), Florida Administrative Code; Ruggieri Tr. 101-102.

The provision of water and wastewater service to this area would clearly constitute and promote urban sprawl, in direct violation of the Comprehensive Plan. Sun River’s stated purpose for its application was to service residential, commercial, and industrial development in this area.¹² Exhibit 3, p.5 ¶13. Development in this Rural Area is only allowed on a ratio of 1 unit per 10 acres. Ruggieri Tr. 106. Such a ratio would not be suitable for the types of development Sun River admits it hopes to serve. Feldman Tr. 197. In order to accomplish any of these development goals, the Comprehensive Plan would need to be amended, and the Urban Service Boundary would need to be redrawn. Feldman Tr. 197-198. However, an incremental expansion of the Urban Service Boundary would contribute to the proliferation of urban sprawl. Lex Tr.

¹² Although, as argued in response to Issue 1, Sun River has not shown any development plans for the area actually exist.

169, 173. An exception to these policies does exist for New Communities or Developments of Regional Impact, but there has been no application for either of these types of development. Exhibit 9, p.1-2 (Policy 9.1.4). Another exception exists solely for situations which jeopardize the “public health, safety, and welfare, or at the request and capital outlay of citizens within an area.” Exhibit 9, p.4 (Policy 1.3.2). Again, this exception does not apply, because there has been no showing of threat to public health, safety or welfare, and no showing that the citizens within the area would be making the capital outlay themselves for infrastructure and services to the area. Presumably, Sun River would be making such a capital outlay, and Sun River is not a citizen of the proposed territory.¹³

Additionally, the lack of any defined need in the area, and the lack of any specific plans for development of the area, causes the application to violate Charlotte County’s Comprehensive Plan. The provision of infrastructures outside of the Urban Service Area, without a development plan in place, violates the Comprehensive Plan. Lex Tr. 172-174, 185-186. The transfer of designation of lands from an agricultural use to any other use, without a development plan, violates the Comprehensive Plan. Exhibit 9, p.8 (Policy 2.2.22). Because the proposed territory does not lie in an area in which Charlotte County’s Comprehensive Plan has identified to expand services and allow for increases in development, and insufficient documentation supporting the existence of an immediate and growing need for service exists, the application violates the Comprehensive Plan. Lex Tr. 169.

The Commission need look no further than the third paragraph of Sun River’s Application for Amendment to find that even Sun River admits that the provision of water and wastewater service to portions of the proposed service area is not consistent with Charlotte

¹³ In fact, not one of Sun River’s witnesses is a resident of Charlotte County, much less a resident of the proposed service area.

County's Comprehensive Plan. Exhibit 3, ¶ 3. Sun River's witnesses also repeatedly admit that the provision of water and wastewater service to the overwhelming majority of the proposed area violates the Comprehensive Plan. Reeves Tr. 2 ("The portion of the proposed territory that lies outside the urban service area may not comport with the Comprehensive Plan."); Hartman Tr. 69 ("Charlotte County has no plans in their comprehensive plan for service to the proposed Sun River utility area."); Feldman Tr. 197 (Answering that under the zoning and density currently associated with the Hudson Ranch, Hudson-Sun River LLC would have to file for a comprehensive plan amendment). This conclusion is also shared by the Department of Community Affairs, which both filed an official Memorandum in this Docket and produced a witness who repeatedly testified to this conclusion. Lex Tr. 169, 172, 186, 189.¹⁴ As succinctly stated by Jeffrey Ruggieri, Charlotte County's Director of Growth Management, "It is very clear that the proposed Sun River extension is inconsistent with the applicable Goals, Objectives, and policies of Charlotte County's Comprehensive Plan." Ruggieri Tr. 102.

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

Charlotte County's Position: The proposed amendment to Sun River's territory would duplicate and compete with Charlotte County Utility's ("CCU") Water & Sewer District #2.

Argument:

The proposed amendment seeks to have the Commission transfer the right to serve the proposed territory from Charlotte County to Sun River. The proposed territory is situated squarely within Charlotte County's Utility District # 2 for both water and sewer service. Pearson

¹⁴ See Document 03902-07 filed 5/10/07 p.3 "The expansion of services outside the designated service area is not consistent with the County's Comprehensive Plan ... I recommend that the Department object to this proposed utility service area."

Tr. 147, 164.¹⁵ While Charlotte County has no current infrastructure in place within the proposed service area, upon the showing of a need Charlotte County would be in a position to serve the area. Pearson Tr. 146-150. As confirmed by Sun River's technical witness, the Peace River Manasota Regional Water Supply Authority, of which Charlotte County is both a voting board member and the largest customer, owns a water connection that terminates only 2,000 feet or less from the proposed service area. Hartman Tr. 81. Further, Charlotte County already has available capacity from the Authority, which could be accessed through that location. Pearson Tr. 147-148. In terms of wastewater, Charlotte County expressed confidence in its ability to negotiate an agreement with the City of Punta Gorda for bulk service. The City of Punta Gorda has excess capacity at their wastewater site. Pearson Tr. 153-154. Further, a plan such as Charlotte County's would be significantly cheaper than Sun River's plan to build a new facility on the east side of Highway 17. Pearson Tr. 154-156.

It should be noted that Sun River, of course, has no current infrastructure within the proposed area either, and plans to build new facilities despite not having any specific information as to the level of need that will require to be filled. Reeves Tr. 35, 40-42; Hartman Tr. 73-74, 81.

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 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?

Charlotte County's Position: CCU's system is adequate to meet the reasonable needs of the public, and Charlotte County 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.

¹⁵ See Exhibit 11 Maps showing CCU's Service Districts #1 & #2. These maps also show Sun River's current certificated area, listed under the utility's prior name, MSM Utilities.

Argument:

As stated in response to Issue 1, Sun River has not established that there is any need within the proposed territory. Thus, Charlotte County's system cannot be found to be providing less than adequate service to meet the reasonable needs of the public at this time. However, Charlotte County has repeatedly stated that it is able and willing to meet the reasonable needs of the public when such need arises.

The Commission cannot grant an amendment to a certificate of authorization for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system. § 367.045(5)(a), Florida Statutes. The sole exception to this statutory prohibition requires a determination that the prior system or portion thereof 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. *Id.* Thus, unless a need for service is shown, no amendments to certificated areas may be granted.

Assuming for the sake of argument that Sun River has shown the existence of a need that has gone unaddressed, Florida case law has enforced the rights of the later-applying utility to serve the area only when the prior certificate holder does not have the present ability to promptly and effectively meet its obligation to serve the public and the utility seeking to serve has the present ability to provide the service needed.¹⁶ Such is not the case here. Sun River does not have the present ability to service the proposed area because there is currently no infrastructure in the area. In fact, even if the pipes were in place already to provide service, Sun River would need to build a new facility in order to meet any additional demand. Reeves Tr. 33, 42.

¹⁶ See *City of Mount Dora v. JJ's Mobile Homes, Inc.*, 579 So. 2d 219 (Fla. 5th DCA 1991); *City of Winter Park v. Southern States Utilities, Inc.*, 540 So. 2d 178 (Fla. 5th DCA 1989).

As to Charlotte County's ability to serve the area, Charlotte County has shown that, through its membership in, and place on the governing board of, the Peace River Manasota Regional Water Supply Authority, should a need arise within the proposed area Charlotte County would be in an excellent position to serve the area. Pearson Tr. 146-150. As confirmed by Sun River's technical witness, the Authority owns a water connection that terminates only 2,000 feet or less from the proposed service area. Hartman Tr. 81. Charlotte County has available capacity from the Authority which could be accessed from that location. Pearson Tr. 147-148. In terms of wastewater, Charlotte County expressed confidence in its ability to negotiate an agreement with the City of Punta Gorda for bulk service. The City of Punta Gorda has excess capacity at their wastewater site. Pearson Tr. 153-154.

Charlotte County has also shown a willingness to serve the area, once a need is shown to exist, and once the County's Comprehensive Plan is amended. Pearson Tr. 147, 162. Jeff Pearson, the Director of Charlotte County Utilities, testified that no one has ever requested service from the County from the proposed service area, despite the fact that it lies within the County's Service District #2. Pearson Tr. 143, 146-147. He also testified that if a property owner did request service, the county has a formal Uniform Extension Policy, which outlines a variety of tools and options for meeting the financial and planning challenges associated with the provision of these services. Pearson Tr. 141-142; Exhibit 10. The Uniform Extension Policy defines the general process for extending utility service and sets forth both the costs and the non-monetary obligations of the service applicant, including engineering design information and provisions for easements and rights-of-way. Pearson Tr. 142. Charlotte County developed this Policy in conjunction with developers, local land-use attorneys, and private engineering firms to ensure that the Policy met the needs of both the public and the developers. Pearson Tr. 142, 156.

For these reasons, and because Sun River has not put forth any evidence that Charlotte County has been unable or unwilling to provide service to the area, or neglectful in the provision of service, in response to a known need, the proposed amendment must be denied.

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

Charlotte County's Position: This application is not in the public interest, both because it violates Charlotte County's Comprehensive Plan and because there has been no demonstration of a need for services in the area. The Comprehensive Plan is the best statement of the public interest of the residents of Charlotte County.

Argument:

The Florida Supreme Court views the public interest as “the ultimate measuring stick to guide the PSC in its decisions.”¹⁷ Chapter 367 of the Florida Statutes contains repeated references to the importance of the public interest.¹⁸ The Commission is empowered by the Legislature both to “grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest” and to “deny a certificate of authorization, if in the public interest.” §367.045(5)(a), Fla. Stat.

It is also the public interest which drives the comprehensive planning process. It is the Legislature's intent that local governments act through the use of comprehensive planning to “preserve and enhance present advantages; encourage the most appropriate use of land, water, and resources, consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within their jurisdictions.” § 163.3161(3), Fla. Stat. This statute goes on to state that:

“Through the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement

¹⁷ *Gulf Coast Electric Cooperative, Inc. v. Johnson*, 727 So. 2d 259, 264 (Fla. 1999).

¹⁸ *See, e.g.*, §367.045, §367.071, §367.011, §367.111, Fla. Stat.

and fire prevention, and general welfare; prevent the overcrowding of land and avoid undue concentration of population; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.” *Id.*

Comprehensive plans are intended to be joint ventures between local government planners and the public, not decrees from government officials which do not reflect the wants and desires of the citizens within each plan’s geographic area. The plans are meant to implement the shared development goals of both the elected officials and the electing public. To ensure that the process is truly public-oriented, statutes exist mandating notice and procedures allowing for effective public participation in the process. §163.3181, §163.3184, Fla. Stat. The procedures must provide for broad dissemination of the proposals and alternatives, opportunity for written comments, public hearings, open discussion, communications programs, information services, and consideration of and response to public comments. § 163.3181(2), Fla. Stat. At least two advertised public hearings must be held. § 163.3184(15)(b), Fla. Stat. A sign-in form at these hearings must be provided, allowing for information to be mailed directly to members of the public in attendance, in addition to members who submit written comments related to the plan. §163.3184(15)(c), Fla. Stat.

The Legislature has taken further steps to ensure that the overall plan is in the public interest by requiring the approval of not only the Department of Community Affairs, but a laundry list of state and regional planning and regulatory entities prior to implementation of the plan.¹⁹ Specifically, the statute requires the County to transmit its proposed comprehensive plan to “the state land planning agency, the appropriate regional planning council and water management district, the Department of Environmental Protection, the Department of State, and the Department of Transportation,” along with the “Fish and Wildlife Conservation Commission

¹⁹ See §163.3184 (3),(4), Fla. Stat.

and the Department of Agriculture and Consumer Services.” § 163.3184(3), Fla. Stat. Requiring such widespread public and governmental approval of comprehensive plans prior to their implementation demonstrates Florida’s strong public policy in favor of upholding the detailed planning and conclusions reached within these comprehensive plans whenever possible. Individually affected persons who believe that the plans fail to correctly address planning and development issues can challenge the plans, as long as those persons have participated in the process by submitting written or oral comments, recommendations, or objections to the plan. § 163.3184(1), Fla. Stat. However, once adopted, a local comprehensive land use plan is likened to a constitution for all future development within the governmental boundary.²⁰

The repeated, and uncontroverted, testimony in this case, from witnesses for Charlotte County, Staff, and Sun River itself, is that this application violates Charlotte County’s Comprehensive Plan. The Plan was created after an intensive public outreach, covering three years of public hearings. Cummings Tr. 23.²¹ It is seen as the community’s vision for planning, not one solely of the elected officials of Charlotte County. Cummings Tr. 24. The Plan was approved by the Department of Community Affairs, and was held out as a model of how a Comprehensive Plan should be structured. Cummings Tr. 24, 28; Lex Tr. 172.

When deciding whether the proposed amendment is in the public interest, it is irrelevant whether the County has other mechanisms to prevent the urban sprawl and over-development the County’s citizens seek to prevent. The Comprehensive Plan is the boldest statement of the public interest, and comes directly from the people of Charlotte County. While the governing officials may be able to make important permitting and zoning decisions to prevent development

²⁰ *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987); *Martin County v. Yusem*, 690 So. 2d 1288, 1293 (Fla. 1997).

²¹ There were a total of 115 public hearings held during this process. See Affidavit of Jeffrey C. Ruggieri, filed in this Docket attached to Document 09256-07.

in this area, which will support the public's goals of efficient use of land, infrastructure, and services, as established in the Comprehensive Plan, this does not change the fact that the public interest will not be served by violating the people's Comprehensive Plan.

For Sun River's application to be in the public interest, it would have to show that some need exists which is not properly being fulfilled by the Comprehensive Plan's mandates. As argued in response to Issue 1, no such need has been established. No area resident has expressed support for Sun River's application. No development plans have been submitted or even described showing a public benefit from Sun River's plan. Without more, Sun River's application is at best only in certain developers' and one utility's interest, not the interest of the people of Charlotte County.

When an application for granting or amending a certificate comes before the Commission, and a timely objection has been made by an appropriate motion or application, the Commission is required to consider the local comprehensive plan of the county or community. §367.045(5)(b), Fla. Stat. Given the Legislature's thorough attention to the comprehensive planning process, including the creation of a major division within the Department of Community Affairs to both oversee the actions of local governments and also to encourage the most appropriate use of land, water, and resources consistent with the public interest, it is clear that the language in Section 367.045(5)(b) is intended to allow the Commission the discretion to rule in a manner counter to a local Comprehensive Plan only when exceptional circumstances are shown which require such a ruling. This interpretation not only comports with the "supremacy" statute of Section 367.011(4), but also honors the Legislature's heightened attentiveness to the importance of the comprehensive planning process and the role of the Department of Community Affairs.

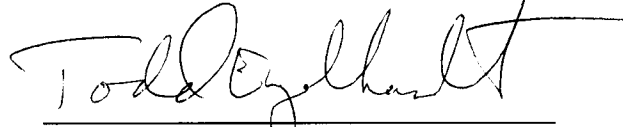
In this case, Sun River has not shown any such extraordinary scenario. In fact, as argued above, Sun River repeatedly admits that its application is not in compliance with the Comprehensive Plan. Having no defense, Sun River has merely attempted to direct the Commission to the lack of mandatory deference language in the statute, and essentially argues that because the Commission has the power of discretion, it is somehow required to use it in Sun River's favor here. Such an argument ignores the facts of this case, and improperly attempts to shift the burden onto Charlotte County to show that its Comprehensive Plan properly reflects the public interest, as opposed to Sun River having the burden to show that its application which admittedly violates a Comprehensive Plan enacted after 115 public hearings over the course of three years, somehow supersedes the Comprehensive Plan's statement of the public interest. Because Sun River has not made any such showing, the Application should be denied.

Conclusion

Sun River's Application for Amendment of Certificates 611-W and 527-S, to extend water and wastewater service areas to include certain land in Charlotte County, failed to establish that any need exists within the proposed service area, or that any need will ever exist there. Further, the Application violates Charlotte County's Comprehensive Plan, which was approved by the Department of Community Affairs following an exhaustive process which allowed for a massive amount of public input from the people who are actually affected by the land use decisions made within Charlotte County. Sun River simply wants the Commission to ignore the people's voice on this subject because the Commission has the statutory power to do so, but Sun River has failed to show any compelling reason why the Commission should exercise its discretion in any way counter to the bold public interest statement made through this

Comprehensive Plan. For these reasons, the public interest requires that the Application be denied.


Respectfully submitted this 7th day of February, 2008.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Charlotte County's Posthearing Statement of Issues and Brief has been furnished by U.S. Mail to Martin S. Friedman, Esq., and Robert C. Brannan, Esq., Rose, Sundstrom & Bentley, LLP, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301; and by Hand Delivery to Ralph Jaeger, Esq., Office of General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, on the 7th day of February 2008:



Todd D. Engelhardt