

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Original Certificate
Of Authorization and Initial Rates and
Charges for Water and Wastewater Service
In Duval, Baker and Nassau Counties,
Florida by FIRST COAST REGIONAL
UTILITIES, INC.

DOCKET NO. 20190168-WS

FIRST COAST REGIONAL UTILITIES INC'S MOTION TO STRIKE

First Coast Regional Utilities Inc. (First Coast) hereby files this Motion to Strike select provisions of JEA's Petition (initially characterized as an "objection") and in support states:

1. JEA's Petition requests that the Commission deny the application of First Coast for an original certificate in Duval, Baker, and Nassau counties. *Inter alia*, the Petition provides that:

4. JEA's substantial interests will be affected by the Commission's determination of the Application, as follows:

a. JEA has **exclusive franchise agreements** with the City of Jacksonville and Nassau County to provide water and wastewater service. The Applicant seeks to provide water and wastewater services in those areas. Accordingly, issuance of a certificate of authorization to Applicant would be directly contrary to JEA's **exclusive** franchises.

6. The disputed issues of material fact known at this time include but are not limited to the following:

b. Whether the issuance of a certificate of authorization to the Applicant would violate JEA's **exclusive** franchise agreements with the City of Jacksonville and Nassau County to provide water and wastewater service;

(emphasis added)

2. The use of the word "exclusive" by JEA in this context can only have one meaning. Indeed, the very word does not lend itself to parsing or ambiguity. The Cambridge Dictionary defines "exclusive" as "limited to only one person or group of people". JEA's

selection of this nomenclature in its petition can only mean one thing: it is JEA's position that JEA, not the Commission, is the only entity – by and through its “franchise agreements” – which will decide what utilities operate within those unilaterally established territories set forth in those agreements. In fact, if it is not the position of JEA that its franchise agreements are “exclusive”, such that any Commission ruling granting the requested territory to First Coast would be contrary as a matter of law to that ostensible exclusivity, then its response to this motion will provide an ample opportunity to so state.

3. The Florida legislature could not have been more clear, in drafting the Commission's enabling water and wastewater statute, that there is in fact only one entity with the unchallenged and immutable authority to decide whether First Coast should receive the certificated territory it has requested, and that entity is not JEA. Although the unquestioned extent of the Commission's jurisdiction has been repeated dozens (if not hundreds) of times in case law and administrative decisions, one need only review Chapter 367 to lay this apparent conflict to rest:

367.011 Jurisdiction; legislative intent.—

(1) This chapter may be cited as the “Water and Wastewater System Regulatory Law.”

(2) The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates.

(3) The regulation of utilities is declared to be in the public interest, and this law is an exercise of the police power of the state for the protection of the public health, safety, and welfare. The provisions of this chapter shall be liberally construed for the accomplishment of this purpose.

(4) This chapter shall supersede all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. This chapter shall not impair or take away vested rights other than procedural rights or benefits.

As clear as that is, Florida's Supreme Court has expanded upon the concept. While these cases rely upon the sister statutes of Chapter 367, no case or order of the Commission has ever

suggested that the Commission's jurisdiction under Chapter 367 is somehow more limited, or any less all-encompassing, than it is under the Commission's other enabling statutes. In

Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), the Court proclaimed that:

The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law. Because of this, the power to mandate an efficient and effective utility in the public interest necessitates a correlative power to protect the utility against unnecessary, expensive competitive practices.

Likewise, in *FPSC v. Bryson*, 569 So.2d 1253 (Fla. 1990), the Court, referring to the Commission's authority under Chapter 366, declared that:

The PSC derives its authority solely from the legislature, which defines the PSC's jurisdiction, duties, and powers. *See, e.g., United Tel. Co. v. Public Serv. Comm'n*, 496 So.2d 116, 118 (Fla.1986). In section 366.04(1) of the Florida Statutes (1987), the legislature granted the PSC exclusive jurisdiction over matters respecting the rates and service of public utilities:

[T]he commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service.... The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

4. JEA proffers the word "exclusive" exactly because it is so clear, so definitive, and so authoritative. If JEA can enter into an "exclusive" franchise agreement which bars the creation and operation of a utility which the Commission would otherwise certificate, then Commission's jurisdiction is not exclusive. Such a conclusion would be clearly contrary to the Commission's authority, the Commission's enabling statute, and all the many decisions the Commission has made over the years enforcing that authority.

5. This conflict, created by the allegations in the Petition, is a clear question of law which should be dealt with now in order to save any more time or expense in litigating an already clear legal concept. Indeed, if JEA has the power to issue "exclusive" agreements which override

the Commission's authority, and effectively grant to JEA the prerogative to veto in advance any future Commission decision to certificate any utility within the geographic reach of those agreements, better that the parties know now rather learn only after a fully adjudicated administrative hearing.

6. JEA can hardly claim to be surprised by the exclusive extent of the Commission's jurisdiction. Duval County has been a PSC jurisdictional county for decades. In light of this fact, it is all the more notable that these franchise agreements do not even mention either the Commission nor its jurisdiction or authority.

7. The undersigned consulted with counsel for Petitioner regarding JEA's position on this Motion. JEA opposes the motion and will respond in writing.

For all of the reasons set forth herein, the Commission should grant this Motion to Strike; strike from the Petition all references or implications, express or implied, to "exclusivity" with regard to the JEA franchise agreements; and in that Order make clear that it is the Commission, and the Commission alone, who has exclusive jurisdiction and exclusive authority over First Coast's proposed authority, service, and rates.

Respectfully submitted this 1st day of September, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email on this 1st day of September, 2020 to:

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