State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: November 7, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Walden)
Office of the General Counsel (Jaeger)

RE: Docket No. 070109-WS – 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).
County(ies): Charlotte

AGENDA: 11/20/07 – Regular Agenda – Motion for Summary Final Order or Relinquishment of Jurisdiction – Oral Argument Requested – Participation Dependent on Commission Vote on Issue 1

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\070109.RCM.DOC

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 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 This resolution rescinded Resolution 94-195 which had previously granted jurisdiction over utilities in that County to the Commission, and stated that Charlotte County took back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 Response in Opposition to the County's Motion on October 19, 2007 (Response).

This recommendation addresses the County's Request for Oral Argument, its Motion for Summary Final Order, and Alternative Motion for Relinquishment of Jurisdiction. The Commission has jurisdiction pursuant to Sections 367.045(2) and 367.171(5), Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should Charlotte County's Request for Oral Argument be granted?

Recommendation: Yes, oral argument should be granted. There is a large volume of information provided and oral argument may aid the Commission in rendering its decision. If the Commission grants oral argument, each party should be limited to ten minutes. (Jaeger)

Staff Analysis: The County seeks oral argument on its Motion for Summary Final Order or Relinquishment of Jurisdiction (Motion). In support of its Request for Oral Argument, the County states:

> Oral argument would aid the Commission in its determination of this dispositive motion because it would allow the parties to address in more detail the Commission's jurisdiction, and to discuss the Commission's role when a petition is brought which is inconsistent with the DCA-approved local comprehensive plan. The impacts of the Commission's decisions are substantial, not only for the parties involved, but for future litigants facing the same or similar situations. Oral argument would promote a full and open discussion of the matter.

Rule 25-22.0022, F.A.C., provides that the Commission, at its discretion, may grant a request for oral argument. The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying motion. Staff believes oral argument may aid the Commission in its decision on the Motion. Therefore, staff recommends that the Commission grant the County's request for oral argument. Staff also recommends that if the Commission decides to hear oral argument, argument should be limited to tene minutes per party.

Rule 25-22.0022, F.A.C, allows the Commission the discretion to hear oral argument. If the Commission believes that the Motion and response are clear on their face and that oral argument would not be helpful, it has the discretion to deny the motion.

Issue 2: Should Charlotte County's Motion for Summary Final Order be granted?

Recommendation: No, the County's Motion for Summary Final Order should be denied. (Jaeger)

Staff Analysis: As stated in the Case Background, the County filed its Motion for Summary Final Order or Relinquishment of Jurisdiction on October 9, 2007, and the utility filed its response on October 19, 2007. This issue addresses the Motion for Summary Final Order, the utility's response, and staff's analysis and recommendation.

County's Motion for Summary Final Order

The crux of the County's Motion for Summary Final Order is that there is no dispute of material fact, and that the County is entitled to a Summary Final Order as a matter of law. The County states that because Sun River cannot show that its planned activities are consistent with the Charlotte County Comprehensive Plan (Comp Plan), and, therefore, with the public interests of the citizens of the County, that "there is no genuine issue of material fact." Therefore, the County "requests that the Commission grant a Summary Final Order in its favor." The County specifically notes that the County conducted 115 public meetings for the purpose of rewriting its Comp Plan, and that the Comp Plan as rewritten was found by the Department of Community Affairs to be "in compliance" on May 16, 2000,[1] as evidence that the Comp Plan must be in the public interest.

The County argues that the Comp Plan was designed to direct growth in an orderly and efficient manner, and that the Plan's policy was to reduce urban sprawl and efficiently control urban growth – again, all in the public interest. The County claims that the following are undisputed facts:

1. The Comp Plan contains planning directives which use the location and 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.[2]

2. Page 4-36 of the Comp Plan describes "Rural Service Areas" as those locations "in which central potable water and sanitary sewer service should not be extended during the planning time period."

3. Policy 9.1.4 of the Comp Plan limits the ability to expand certified areas with solely a few exceptions. Certified areas cannot be extended or expanded for potable water or sanitary sewer service outside of Infill Area boundaries. Exceptions to this rule are to be made in the case of New Communities or Developments of Regional Impact in West County, Mid County, or South County or Rural Communities in East County as designated by the Comp

[1] The County also notes that it had to obtain the approval of a whole "laundry list of state and regional planning and regulatory entities prior to implementation of the plan."
[2] Comp Plan Objective 1.3, Policy 2.2.22 (attached to Affidavit of Jeffrey C. Ruggieri).

Plan; or in the case of where a utility(s) shall provide both central potable water and sanitary sewer service in a tandem manner within the Urban Service Area Overlay District.

4. Policy 1.1.10 of the Comp Plan lists the criteria for amending the Urban Service Area boundary. Paragraph "e" of this Policy requires that any proposed expansion does not constitute urban sprawl or promote the expansion of urban sprawl in surrounding areas.

5. The Comp Plan notes that lands designated primarily for agricultural activities are located primarily within the Rural Service Area. Policy 2.2.22 of the Comp Plan requires that conversions of agricultural land to more intensive urban uses must occur in accordance with the Urban Service Area strategy Rural Community or New Community concepts, or Development of Regional Impact. Such conversion may only occur when a demonstrated need has been established and it is determined by the County that it does not constitute urban sprawl or promote urban sprawl in surrounding areas.

6. On February 8, 2007, Sun River filed an Application for Amendment of Certificates 611-W and 527-S to extend water and wastewater service areas to include certain land in Charlotte County.

7. The land within the boundary of Charlotte County described by Sun River's Application is located in a Rural Service Area, and not within the Urban Service Area.

8. The proposal by Sun River violates the Comp Plan.

9. Sun River's proposal encourages urban sprawl in violation of Objective 1.3 and Policy 2.2.22.

10. Sun River's proposal violates the directive on page 4-36 to not extend potable water and sanitary sewer service during the operation of the current Comp Plan.

11. Sun River's proposal violates Policy 9.1.4's limits on the serviceable areas within the County.

12. On May 10, 2007, the DCA filed a Memorandum in which it evaluated Sun River's Application and determined that Sun River's proposed extension of utility services is inconsistent with the Comp Plan.

Citing Order No. PSC-05-0702-FOF-TP,[3] p. 12, and Order No. PSC-03-1469-FOF-TL,[4] the County states that the "purpose of a summary final order is to avoid the expense and delay of

[3] Order issued on June 29, 2005, in Docket No. 040732-TP, In re: Complaint against BellSouth Telecommunications, Inc. seeking resolution of monetary dispute regarding alleged overbilling under

trial when no dispute exists as to the material facts." Citing Order No. PSC-03-0528-FOF-TP, Order No. PSC-01-1427-FOF-TP,[5] and Rule 28-106.204(4), F.A.C., the County argues that when a party establishes that there is no dispute or genuine issue of material fact, and a party is entitled to judgment as a matter of law, "then the burden shifts to the opponent to demonstrate the falsity of the showing." It further asserts that, if the opponent fails to demonstrate there are disputed or genuine issues of material fact, then summary final judgment is proper.

The County states that, in the utility's application, Sun River admits that its plan to provide utility service in a Rural Service Area may not comport with the Comp Plan. The County states that, according to the plan, a Rural Service Area is one "in which central potable water and sanitary sewer service should not be extended during the planning time period." The County states that the utility's proposal violates both the premise of the Comp Plan, which is to use location and timing of infrastructure and services to direct growth in an orderly and efficient manner, and the goals of the Comp Plan, which is to discourage urban sprawl.

In further support of its argument, the County cites to Chapter 163, F.S., and cites Section 163.3161(3), F.S. Section 163.3161(3), F.S., provides, in pertinent part, as follows:

> It is the intent of this act that [comprehensive plan] adoption is necessary so that local governments can . . . encourage the most appropriate use of land, water, and resources, consistent with the public interest . . . . Through the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, . . . 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 . . . and protect natural resources within their jurisdictions.

The County admits that the Commission is not "bound by the specific language and directives listed in Chapter 163," but asserts that the Commission should be bound by "the impetus behind the statutes." The County acknowledges that Section 367.011, F.S., makes the Commission's "regulatory powers superior to the provisions in other statutes covering the same subject matter," but argues that Chapter 367, F.S., repeatedly refers to acting in the public interest, and that the Florida Supreme Court views the public interest as "the ultimate measuring stick to guide" the Commission in its decisions.[6]

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interconnection agreement, and requesting stay to prohibit any discontinuance of service pending resolution of the matter, by Saturn Telecommunications Services, Inc. d/b/a STS Telecom

[4] Order issued on December 24, 2003, in Dockets Nos. 030867-TL, 030868-TL, 030869-TL, and 030961-TL.

[5] Order No. PSC-03-0528-FOF-TP, issued April 21, 2003, in Docket No. 020919-TP, In re: Request for arbitration concerning complaint of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG South Florida for enforcement of interconnection agreements with Bellsouth Telecommunications, Inc., p. 8; and Order No. PSC-01-1427-FOF-TP, issued July 3, 2001, in Docket No. 001810-TP, In re: Request for arbitration concerning complaint of TCG South Florida and Teleport Communications Group against BellSouth Telecommunications, Inc., for breach of terms of interconnection agreement, p. 13.

[6] See Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So. 2d 259, 264 (Fla. 1999)

The County further notes that when there is an objection by the County to an amendment application, the Commission is not required to "defer" to the Comp Plan, but must consider it.[7] The County argues that, because the Comp Plan was developed to promote the public interest, any violation of the plan must necessarily be against the public interest. The County concludes that an amendment application which goes against the stated planning goals of the citizens of the County cannot by definition be in the public interest. Therefore, the County asserts the Commission "must deny the application as a matter of law."

Sun River's Response

The utility lists two main arguments why a summary final order is not warranted. These arguments are: (1) the county's comp plan is not dispositive with respect to water and wastewater certificate issues; and (2) material issues of fact are in dispute regarding the comp plan and other growth management issues. These arguments are discussed below.

(1) The County's Comp Plan Is Not Dispositive With Respect To Water And Wastewater Certificate Issues

The utility cites to Section 367.045(5)(b), F.S., which states that "the Commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality." The utility further argues that the Legislature could have required the Commission to defer to a properly adopted comprehensive plan, but did not do so. The utility states that the Commission's discretion to defer to a comprehensive plan was expressly acknowledged by the Court in City of Oviedo v. Clark, 699 So. 2d 316 (Fla. 1st DCA 1997).

The utility further states that when the Commission grants a certificate of service, it does not state what type of development will occur in that area. The utility argues that the "Commission has recognized many times that a local municipality retains control over development through zoning and construction permitting."[8]

In regard to the County's discussion of Chapter 163, F.S., the utility states that it is well settled law that Chapter 163 does not apply to the Commission.[9] The utility notes that the County admits this on page nine of its motion.

Finally, the utility argues that "a determination of how best to serve the public interest can be made only after a full and fair hearing on the disputed facts and issues." The utility cites Section 367.011(2), F.S., which states, in pertinent part: "The . . . Commission shall have

[7] See Section 367.045(5)(b), F.S.

[8] The utility cites to Order No. PSC-04-0980-FOF-WU, issued October 8, 2004, in Docket No. 021256-WU, In re: Application for certificate to provide water service in Volusia and Brevard Counties by Farmton Water Resources LLC ("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."); and Order No. PSC-04-1256-PAA-WU, issued December 20, 2004, in Docket No. 041040-WU, In re: Application for certificate to operate water utility in Baker and Union Counties by B & C Water Resources, L.L.C. ("[T]he counties ultimately retain control over any future development through mechanisms such as zoning and construction permits.")

[9] The utility cites to Order No. PSC-04-0980-FOF-WU ("the planning process . . . does not supersede our authority pursuant to section 367.011, Florida Statutes.")

exclusive jurisdiction over each utility with respect to its authority, service, and rates," and argues that the Commission cannot abrogate its authority over service area amendments to the County. The utility concludes that the public interest will be served by allowing the Commission, the expert in the area of regulation of water and wastewater service territories, to make the decision on the amendment application, and should leave to the County or the Department of Community Affairs, the experts in planning or development, to make the judgments about development, zoning, and construction permits.

(2) Material Issues of Fact Are In Dispute Regarding The Comp Plan And Other Growth Management Issues

The utility disputes the County's statement that "there is no question that Sun River's proposal violates the Comp Plan." The utility notes that it has prefiled testimony wherein a witness testifies that a portion of the territory at issue in the amendment application is outside the urban service territory and may not comport with the Comp Plan as it exists today, and that this is different from "does not comport" with the Comp Plan.

The utility points out that in the County's Motion, the County argues that the area at issue is in the County's Water and Sewer District No. 2. The utility states that it is incongruous for the County to state that granting the amendment application would be in violation of the Comp Plan, but then turn around and argue that this area is in the County's service territory.[10] The utility argues that this shows the real intent of the County, which is to reduce or keep competing utilities' certificated service territories small.

The utility further disputes the County's "unfounded claim that water and/or wastewater certificates 'encourage urban sprawl.'" The utility states that the Commission can only make that determination after hearing the conflicting evidence from the witnesses and that a summary conclusion would be inconsistent with prior orders of the Commission.[11] The utility argues that because urban sprawl is defined as "[u]rban development," and the Florida Statutes do not define service territory extensions as development, then "this alleged fact is unsupported." Moreover, the utility states that "there is not a shred of evidence showing that the Application will encourage sprawl," and asserts that "[d]evelopment is more likely spurred by the forces of supply and demand as viewed through the experience of a developer."

The utility also takes issue with the County's statement that "[n]o immediate need for utilities exists," and notes that it has received several letters from property owners in the area requesting service. The utility argues that Policy 2.7.4 of the Comp Plan requires the residential portion of development to be clustered, and that Policy 2.7.7 requires utilization of infrastructure such as central wastewater facilities. The utility asserts that its application to serve these property owners is actually necessary under the Comp Plan.

[10] See Paragraph 4.b. of the County's Objection filed on March 16, 2007.
[11] The utility cites Order No. PSC-01-0360-PAA-WS, issued February 9, 2001, in Docket No. 000277-WS, In re: Application for transfer of facilities and Certificates Nos. 353-W and 309-S in Lee County from MHC Systems, Inc. d/b/a FFEC-Six to North Fort Myers Utility, Inc., holder of Certificate No. 247-S; amendment of Certificate No. 247-S; and cancellation of Certificate No. 309-S ("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.")

Finally, the utility notes that while the current Comp Plan may limit development in the area requested, the Comp Plan can be and is regularly amended. Based on all the above, the utility states that the Motion for Summary Final Order should be denied.

Staff's Analysis and Recommendation

Section 120.57(1)(h), F.S., provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that: (1) no genuine issue as to any material fact exists, and (2) that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), F.A.C., states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact."

"The party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought.[12] The burden is on the movant to demonstrate that the opposing party cannot prevail.[13] "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."[14] "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[15] 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.[16] However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.[17]

Staff notes that this Commission has recognized that policy considerations should be taken into account in ruling on a motion for summary final order. By Order No. PSC-98-1538-PCO-WS,[18] the Commission stated:

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a

[12] Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993).
[13] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).
[14] Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). See also McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).
[15] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).
[16] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).
[17] Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).
[18] Issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S to add Territory in Charlotte County by Florida Water Services Corporation, respectively.

vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that

> [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

As stated above, there is a two-prong test for whether issuance of a summary final order is appropriate. The two prong test is: (1) if it is determined that no genuine issue as to any material fact exists; and (2) that the moving party is entitled as a matter of law to the entry of a final summary order, then such order should be issued. Staff believes that the County has failed both prongs of the test.

First, staff does not believe the County has carried its burden to conclusively demonstrate the nonexistence of an issue of material fact. Staff believes that the utility has shown that there are disputes of material fact as to whether its application is in the public interest and whether the application violates the Comp Plan.

However, even if it is determined that there is no genuine issue as to any material fact, staff believes that the County fails the second prong of the test in that it has also not carried its burden to show that it is entitled, as a matter of law, to the entry of a summary final order. Section 367.045(5)(b), F.S., specifically states that when there is a timely objection by the County, "the commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality." Thus, the Commission has the discretion to amend a utility's water and wastewater certificates even if the granting of the amendment application would be contrary to the County's Comp Plan.

As stated in Order No. PSC-98-1538-PCO-WS, "caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim." Based on the foregoing, staff recommends that the County's Motion for Summary Final Order be denied.

Issue 3: Should Charlotte County's Alternative Motion for Relinquishment of Jurisdiction be granted?

Recommendation: No, the County's Alternative Motion for Relinquishment of Jurisdiction should be denied. (Jaeger)

Staff Analysis: As stated in the Case Background, the County's Motion for Summary Final Order filed on October 9, 2007, moved in the alternative for this Commission to relinquish jurisdiction. The utility's response filed on October 19, 2007, also addressed this alternative motion. The following is a summary of the County's Alternative Motion, the utility's response, and staff's analysis and recommendation.

County's Alternative Motion for Relinquishment of Jurisdiction

As in its Motion for Summary Final order, the County argues in its Alternative Motion for Relinquishment of Jurisdiction that the "development sought by Sun River" runs counter to the Comp Plan, and that the area sought "is not currently zoned for the types of activity Sun River seeks to encourage." The County admits that Section 367.171(5), F.S., gives the Commission continuing jurisdiction over the utility's amendment application "until disposed of in accordance with the law in effect on the day such case was filed," but argues that the "exercise of such jurisdiction would constitute a colossal waste of the parties', and the Commission's, time, energy, and resources." The County notes that it retains control of zoning and permitting decisions, and that Sun River would still have to apply to the County to implement its servicing of the area. The County points out that the resolution rescinding jurisdiction was dated September 25, 2007, was effective immediately, and specifically recited that "it is in the best interest of the citizens and residents of Charlotte County that private for-profit water and wastewater systems within Charlotte County be regulated by Charlotte County."

The County argues that the case is at an early stage and that it would be more expedient for the Commission to relinquish jurisdiction. It further asserts that, if the utility's claim has merit, the utility could seek to have the Comp Plan amended during the development of the new Comp Plan scheduled for 2010, and the utility would not be harmed by the relinquishment of jurisdiction.

Sun River's Response

The utility cites Section 367.171(5), F.S., which states in pertinent part as follows:

> When a utility becomes subject to regulation by a county, all cases in which the utility is a party then pending before the commission, or in any court by appeal from any order of the commission, shall remain within the jurisdiction of the commission or court until disposed of in accordance with the law in effect on the day such case was filed by any party with the commission . . . .

The utility argues that there is no language giving the Commission the discretion to relinquish jurisdiction in selected cases, and that the Commission has traditionally maintained jurisdiction.

The utility cites five orders[19] where the Commission maintained jurisdiction, and states that it has been unable to find a single case where the Commission relinquished jurisdiction. The utility argues that even if the parties agreed upon a transfer of this matter to the County, there is no provision for such a transfer in Chapter 367.

The utility disagrees with the County's statement that to continue would be a waste of time and resources. It argues that the time and effort already expended by the utility and parties would be wasted if they were to have to re-litigate the entire matter. The utility surmises that the reason the County wants this matter to come before its own county commission is so that it "can eliminate competition and reserve service territory exclusivity for itself."

Staff's Analysis and Recommendation

In the past, when the County has taken back jurisdiction, the Commission has maintained jurisdiction to conclude pending cases.[20] In Order No. PSC-04-1155-PCO-WS, issued November 22, 2004,[21] the Commission denied the Office of Public Counsel's (OPC) Motion to Relinquish Jurisdiction when Bay County rescinded jurisdiction and the rate proceeding was pending. More recently, at the October 9, 2007 Agenda Conference, the Commission considered the rate application of Utilities, Inc. of Sandalhaven (Sandalhaven).[22] In that case, staff was recommending that a two-phase rate increase be implemented with the second phase possibly not taking place for two or three years. OPC argued that the Commission should just control the first phase of the rate increase and not address the second phase as it would occur long after the County took over regulation of Sandalhaven. The Commission rejected this argument, and approved the two-phase increase.

Section 367.171(5), F.S., specifically states that the Commission is to maintain jurisdiction over all pending rate cases and dispose of the cases in accordance with the law in effect on the day the case was filed. Staff believes that closing Sun River's pending case before it is completed would be contrary to the Legislature's directive in Section 367.171(5), F.S. Thus,

[19] Order Nos. PSC-04-1155-PCO-WS, issued November 22, 2004, in Docket No. 030444-WS, In re: Application for rate increase in Bay County by Bayside Utility Services, Inc.; PSC-97-0552-FOF-WS, issued May 14, 1997, in Docket No. 920199-WS, In re: Application for a rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities; PSC-00-1879-AS-WS, issued October 16, 2000, in Docket No. 951056-WS, In re; Application for a rate increase in Flagler County by Palm Coast Utility Corporation; PSC-94-1050-FOF-WU, issued August 29, 1994, in Docket No. 940087-WU, In re: Application for a staff-assisted rate case in Hernando County by Rolling Hills Water, Inc.; and PSC-98-0507-FOF-WS, issued April 13, 1998, in Docket No. 980182-WS, In re: Disposition of contributions-in-aid-of-construction gross-up funds in Flagler County by Palm Coast Utility Corporation.

[20] See Orders Nos. PSC-97-0552-FOF-WS, PSC-00-1879-AS-WS, PSC-94-1050-FOF-WU, and PSC-98-0507-FOF-WS.

[21] Order issued in Docket No. 030444-WS, In re: Application for rate increase in Bay County by Bayside Utility Services, Inc.

[22] In Docket No. 060285-SU, In re: Application for increase in wastewater rates in Charlotte County by Utilities, Inc. of Sandalhaven. Charlotte County took back jurisdiction just two days prior to staff filing its recommendation on Sandalhaven.

staff recommends that the County's Alternative Motion to Relinquish Jurisdiction should be denied.

Issue 4: Should the docket be closed?

Recommendation: No, the docket should remain open for the processing of the protested amendment application. (Jaeger)

Staff Analysis: If the Commission approves staff's recommendations to deny the County's Motion for Summary Final Order or Relinquishment of Jurisdiction, the docket should remain open for the processing of the protested amendment application.