BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of TOPEKA GROUP, INC. to acquire control of Deltona Corporation's utility subsidiaries.	) DOCKET NO.	881501-WS
	) ORDER NO.	22307
	) ISSUED:	12-12-89

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD
BETTY EASLEY

ORDER APPROVING TOPEKA GROUP, INC.'S TRANSFER OF MAJORITY ORGANIZATIONAL CONTROL OF DELTONA CORPORATION'S UTILITY SUBSIDIARIES, REQUIRING MONTHLY UPDATE ON STATUS OF LAND OWNERSHIP, AND REQUIRING UTILITIES TO HONOR PRIOR COMMITMENTS MADE TO DELTONA LOT OWNERS

BY THE COMMISSION:

BACKGROUND

In 1985, The Topeka Group, Inc. (Topeka or the Applicant) obtained warrants to purchase all the common stock of various utility subsidiaries wholly owned by The Deltona Corporation, including Deltona Utilities, Inc. (DUI), United Florida Utilities Corporation (UFUC) and Pelican Utility Company. Those three subsidiaries are authorized by the Florida Public Service Commission to provide water and wastewater services to the general public in designated areas in Citrus, Collier, Hernando, Marion, St. Johns, Washington and Volusia Counties. Together, these subsidiaries serve an estimated 54,000 water customers and 23,000 wastewater customers.

On November 18, 1988, Topeka filed an application with this Commission for approval of its forthcoming acquisition of majority organizational control of said utility subsidiaries. Topeka requested a waiver of certain notice of application requirements set out in Rule 25-30.040, Florida Administrative Code. In January, 1989, we denied Applicant's request for a waiver. Topeka complied with the notice requirements. The Office of the Public Counsel, The Deltona Corporation, and the

Boards of County Commissioners of Volusia and St. Johns Counties filed timely objections to the application, as did two homeowner civic associations who did not thereafter participate in this proceeding. The utility subsidiaries themselves also filed timely objections. On May 1, 1989, The Deltona Corporation initiated an action against Applicant in the United States District Court for the Southern District of Florida, seeking to enjoin Topeka's exercise of the warrants and to compel Topeka to assume or honor various commitments made by The Deltona Corporation to lot purchasers regarding water and wastewater service availability from the utility subsidiaries. On or about May 26, 1989, The Deltona Corporation requested that this Commission defer action on the application pending resolution of the federal litigation.

On June 6, 1989, Topeka exercised its warrants for the common stock of the utilities. By Order No. 21414, issued on June 19, 1989, the Prehearing Officer established procedures for this proceeding. On or about June 26, 1989, Federal District Court Judge Spellman denied The Deltona Corporation's bid for a temporary restraining order, and ruled that "concern for the transfer of the Utilities is vested in the Public Service Commission, which the Court assumes will exercise its responsibilities pursuant to Chapter 367, Florida Statutes." After Topeka assumed control of DUI and UFUC, those utilities formally withdrew their objections to the transfer application. By Order No. 21729, issued on August 15, 1989, the Prehearing Officer denied The Deltona Corporation's Motion for Continuance, wherein Deltona had again sought to delay this Commission proceeding until after completion of the federal district court case. On August 21, 1989, the Prehearing Officer held the prehearing conference. Prehearing Order No. 21790, issued August 25, 1989, reflects all actions taken and decisions made at that prehearing conference. We held the hearing in this matter on August 30 and 31, 1989, in Orlando, Florida.

I. The Topeka Group, Inc., has the technical and financial capability to operate The Deltona Corporation's utility subsidiaries.

Topeka Group, Inc., is a Minnesota Corporation and is a wholly owned subsidiary of Minnesota Power and Light Company (M P & L), Duluth, Minnesota, whose stock is traded on the New York stock exchange. Topeka was formed as a diversification unit for M P & L.

Topeka Witness Woods testified that all of the personnel involved in the day-to-day operation of the utilities will continue as they have been in the past. Also, three of MSC's corporate officers were previously with The Deltona Corporation, DUI or UFUC.

We believe that Topeka's capacity to operate the utility subsidiaries has been clearly demonstrated. The record shows that Topeka, through its subsidiary, MSC, has acquired the personnel necessary to provide the utility subsidiaries with engineering, administrative, financial, and operational support and legal services, and thus, has proven that it has the technical capacity to operate them. Topeka states in its brief and we agree that the Applicant has assembled an impressive management team with the resources to fulfill its commitment to provide quality water and wastewater utility service.

Topeka's 1988 audited financial statement shows assets totalling $239,091,672 and stockholders' equity in the amount of $76,416,442. Topeka's consolidated statement of cash flows for the year ending December 31, 1988 reveals that Topeka had $3,690,870 in cash at the end of the year. Total stockholders' equity is comprised of the following components:

Common stock -	$ 10,000
Additional Paid-in Capital -	$62,876,783
Retained Earnings -	$13,529,659

Topeka's consolidated Statement of income for the year ending December 31, 1988, shows:

Operating Revenues -	$34,437,049
Operating Expenses -	$25,934,420
Operating Income -	$ 8,502,629
Net Income -	$ 4,624,944

The Deltona Corporation states in its brief that there is a real question, with regard to financial capability, whether Topeka will commit its financial strength to the utility subsidiaries. Deltona points out that though it was represented that resources will be available to the utility subsidiaries to solve certain problems, the Financial Vice President of the Topeka-managed utilities testified that the utility subsidiaries had not, as yet, received any capital infusion from Topeka.

Topeka Witness Mr. Charles Woods, President and Chief Operating Officer of Topeka, testified that Topeka's Management Service Company (MSC) is Deltona Utilities Consultants, Inc. (DUCI). He testified that MSC is now operating DUI and UFUC. According to testimony from Topeka Witness Mr. Jack McDonald, Chairman of the Board and Chief Executive Officer of Topeka, MSC will provide engineering, administrative, financial, and operational support, and legal services to all the operating companies.

Witness McDonald testified that his utility experience includes 22 years with M P & L. During that time, he was active in sales, engineering, budgets, operations analysis, purchasing, strategic planning and diversification. He also served on the Board of Directors of The Deltona Corporation for approximately three years.

Witness Woods testified that he served as President and Chief Executive Officer of the New Haven Water Company for almost 13 years and was with that company in various executive capacities for almost 32 years. New Haven Water Company serves approximately 95,000 customers, with annual gross revenues of approximately $30,000,000.

Deltona Corporation Witness Ms. Deborah Swain testified that she has been employed by DUCI, now a subsidiary of Topeka, since 1982. She testified that she has been Vice President of DUCI since June, 1987. Prior to June, 1987, she was comptroller of DUI and UFUC from May, 1984, to June 1987. Witness Swain further testified that, prior to being comptroller of DUI and UFUC, she served as a rate analyst for those corporations from approximately June, 1982, through May, 1984.

As Vice President of DUCI, Witness Swain stated she was responsible for the direct supervision of the accounting and rate departments of The Deltona Corporation utility subsidiaries and also served as an assistant to Mr. Arsenio Milian, President of the utilities, in the implementation of his policies. During her tenure as rate analyst for DUCI and UFUC, Witness Swain stated she was primarily responsible for the filing of rate applications, and other regulatory reports, such as Public Service Commission annual reports, and assuring the adherence by the company to policies of the Public Service Commission and county regulators.

Although the utility subsidiaries have not as yet received any infusion of equity from Topeka, Witness Woods testified that he has approved a number of critical engineering studies necessary to remedy plant deficiencies. Further, Witness Woods testified that Topeka plans to make whatever investments are necessary in order to correct any problems. The record shows that Topeka has already discussed as a preliminary budget for next year approximately $10 million to be committed to solve plant deficiencies. The sources of the funds will be additional infusions of equity in the form of retained earnings, depreciation and borrowed money. Moreover, Witness Woods testified that Topeka is committed to continue to provide the funds necessary as long as there is adequate protection of those funds if this Commission should decide against the management transfer.

Based on the information contained in Topeka's 1988 audited financial statement, the information and the representations of the Applicant contained in the record, we find that Topeka clearly has the financial and technical capability to operate The Deltona Corporation utility subsidiaries.

II. The utility subsidiaries do not currently own all of the utility property and facilities necessary to provide service to their customers. The utility subsidiaries shall provide monthly updates to this Commission on the status of land ownership until such ownership is obtained.

Rule 25-30.035(3)(f), Florida Administrative Code, and Commission policy require that a utility own the land on which the utility's facilities are located or have an agreement which provides for the continuous use of the land. This policy has evolved because problems have occurred in the past when water and wastewater utilities have been abandoned by their owners and forced into receivership, only then to have it discovered that some portion of the land under the treatment plant is not actually owned by the utility.

The record of this proceeding shows that Topeka does not own all the utility plant sites needed to serve its present customers. However, the late-filed exhibits filed by Topeka and The Deltona Corporation contain a conflicting number of utility sites not owned by the utility subsidiaries. The Deltona Corporation's late-filed exhibit lists 20 utility sites

necessary to provide service to the present customers. Topeka's late-filed exhibit includes 152 present and future sites. After analyzing these exhibits, we find that the 20 sites listed on The Deltona Corporation's exhibit and 48 additional sites which were listed on Topeka's exhibit represent all of the property we believe is needed to provide service to current customers. These sites are set out on Attachments A and B to this Order.

We believe that Topeka will work towards obtaining ownership of the necessary land to continue providing service to its customers. The utility subsidiaries are hereby required to update this Commission on the status of the land ownership each month until this matter is resolved.

III. The Deltona Corporation's utility subsidiaries' approved service availability policies provide for either the developer donating lines or the utility investing in lines depending upon the availability of an existing main and the anticipated revenues to be derived from such an extension. Topeka shall file revised service availability policies within 90 days of this Order clarifying its main extension policy consistent with our decisions herein, as well as revised tariffs reflecting our decisions herein.

The utility subsidiaries have uniform service availability policies which allow latitude for the utilities to either make an investment in main extensions or to require the customer or developer to pay for the additional lines needed to provide service. Specifically, within the certificated area where a main exists, a customer will be connected and required to pay a main extension charge as specified in the utility's tariff. In areas within the certificated area where lines do not exist or areas outside the certificated territory, the utilities may, at their sole discretion, require the developer or customer to install and donate the lines or pay the total costs of the line extension.

The record shows that when under prior ownership, latitude within this policy was used. In the case of The Deltona Corporation, the utility subsidiaries have installed lines as an investment to Deltona lot purchasers. In the case of other

developers, the utility subsidiaries have required these developers to either fund or install lines where existing lines are not available both within and outside the certificated territory. In conjunction with this policy and as stated within the rules and regulations sections of the tariffs, extensions as a utility investment will be made provided the revenues to be derived thereupon shall be sufficient to afford a fair and reasonable return on the cost of providing and rendering service.

Topeka has stated throughout this proceeding that it is its intent to operate consistent with the rules of this Commission and the utility subsidiaries' approved tariffs. However, the current service availability policies neither require the utility subsidiaries to invest in lines nor the developer to pay for the lines. This decision is at the sole discretion of the utility subsidiaries. In making this decision, Topeka states it will look at the economic feasibility of the extension. This is a departure from the past practice of the utility subsidiaries wherein, regarding Deltona lots, lines were extended regardless of economic justification, resulting in the need for used and useful adjustments. It was noted at the hearing that the present service availability policies are ambiguous. Therefore, we hereby require Topeka to revise its service availability policies to specify the procedures and conditions leading to the determination of when lines will be invested or donated. These revised policies shall be filed within 90 days of this Order.

It is the policy of this Commission, and all parties stipulated at the Prehearing Conference, that the utilities' currently-approved rates and charges shall be continued. However, the utility subsidiaries shall file revised tariffs reflecting the clarification of their service availability policies and the change in ownership within 90 days of this Order.

IV. <u>The utility subsidiaries shall extend service to customers within a reasonable time in accordance with Section 367.111, Florida Statutes, and in accordance with any Commission-approved developer agreement or service availability policy.</u>

The Deltona Corporation has asserted in this proceeding that, since the early 1980's, the utility subsidiaries have

made available water service within 60 days and wastewater service within 180 days of a customer's request provided that the customer has complied with certain payment and building permit obligations. The Deltona Corporation presented Witnesses Mr. Arsenio Milian, Mr. Earle Cortright and Ms. Sharon Hummerhielm who testified that these time frames were represented to the lot purchasers in the terms of the lot purchasers' agreements and the offering statements. However, they testified that the lot purchasers' agreements and the offering statements were prepared by The Deltona Corporation, not the utility subsidiaries. In fact, under cross examination, these witnesses admitted that there is no written documentation from the utility subsidiaries establishing these time frames in developer agreements, service availability policies or commitment letters. It should be noted that Offering Statements are required by the Division of Land Sales, Condominiums and Mobile Homes of the Florida Department of Business Regulation as part of the disclosure to every lot purchaser. Among other things, these documents must include an assurance of the capacity and availability of water and sewer service to the development. This Commission does not have jurisdiction over the commitments contained in the Offering Statements.

Under cross examination, Topeka Witness Woods stated that, under Topeka's ownership, service will be provided as quickly as is technically feasible and in accordance with the Commission's rules and the utility subsidiaries' service availability policies. He also stated that it is not Topeka's intention to delay any service installations and, in most cases, service would probably be provided within 60 days.

Pursuant to Section 367.111, Florida Statutes, each utility shall provide service to the territory described in its certificate within a reasonable time. No specific time frame is indicated in the statute. Commission Rule 25-30.530, Florida Administrative Code, requires the utility to notify the applicant in writing within 30 days after receipt of the application whether service can be made available within a reasonable time. The utility subsidiaries' current tariffs uniformly provide that they will respond to each individual applicant for service within 30 days and to each applicant who is a multi-unit, commercial or industrial developer within 60 days. The tariffs include no stated time frame within which service will be provided.

We find that the record is unclear as to whether the

utility subsidiaries committed to the 60/180 day time frames. As noted above, The Deltona Corporation witnesses testified that, historically, service was provided within these time frames to Deltona lot purchasers. The Deltona Corporation further asserted that lot sales agreements and offering statements represented to the lot purchasers that water and wastewater service would be provided within 60 and 180 days, respectively. However, these documents were prepared by the developer, not the utility subsidiaries. The Deltona Corporation provided no written documentation from the utility subsidiaries regarding a commitment as to a time frame for service.

Topeka has testified that it intends to provide service as quickly as possible according to this Commission's rules and the utility subsidiaries' tariffs and, in most cases, within 60 days. A lot purchaser may certainly contact this Commission if he believes one of the utility subsidiaries is not providing service in a timely manner. Therefore, we do not find it appropriate to require the utility subsidiaries to provide service within the 60 and 180 day time frame commitments, as we have been urged to do by The Deltona Corporation. As in the case of all water and wastewater utilities, Topeka shall extend service to applicants within a reasonable time in accordance with Section 367.111, Florida Statutes, and any commitments it might make in a Commission-approved developer agreement or its approved service availability policy.

V. We find The Topeka Group, Inc.'s transfer of majority organizational control of The Deltona Corporation's utility subsidiaries to be in the public interest. However, the utility subsidiaries shall honor all the commitments made to the Deltona lot purchasers prior to the transfer of control by The Topeka Group, Inc. We also find that the cost of all imprudent line extensions shall be borne by The Deltona Corporation. However, if the federal court determines that such is the obligation of The Topeka Group, Inc., and not the utility subsidiaries, the cost shall be borne by The Topeka Group, Inc., and not the utility subsidiaries. Also, the utility subsidiaries shall enter into refundable advance agreements with the responsible party, whether it be The Deltona Corporation or The Topeka Group, Inc.

We require the utility subsidiaries to file balance sheets and income statements for their systems with this Commission by March 31, 1990, regardless of any requests for extensions for filing Annual Reports.

Pursuant to Section 367.071, Florida Statutes, the legal criterion for our consideration of an application for transfer of majority organizational control is that we find such transfer to be in the public interest. As noted earlier, we have found that Topeka has demonstrated that it has the technical and financial capability to operate the utility subsidiaries. However, there have been commitments made by The Deltona Corporation to a large number of Deltona lot purchasers that line extensions to provide service to their lots will be made as utility investment, not at the cost of the lot owner. We believe that how these commitments are met is a significant factor in determining if the approval of this transfer is in the public interest.

The record reflects that there are commitments by The Deltona Corporation to Deltona lot purchasers stating that water and wastewater lines will be available within 60 and 180 days, respectively, and that these lines will be an investment of the utility. A central issue in this proceeding has been whether these commitments are within the utility subsidiaries' approved service availability policies or this Commission's rules and whether or not the utility subsidiaries should be bound by these commitments. This issue relates to who should bear the carrying charges on the investment for the necessary line extensions, not who should provide the permanent utility investment. The utilities' current service availability charges have been established so that when all customers have connected to the system and paid their connection charges, the plant will be contributed as required by our rules. As noted earlier, the approved service availability policies allow the utility subsidiaries to either invest in lines or require developers or customers to fund the line extensions.

Service to developers other than The Deltona Corporation appears to have been formalized through developer agreements. These agreements are within the latitude of the approved service availability policies requiring the developers to fund line extensions without reference to a specific time frame for the provision of service. Regarding The Deltona Corporation's lots, a business decision was made that the utility

subsidiaries would invest in the lines. As noted by Witness Milian, the utility subsidiaries committed to run lines to Deltona lots regardless of economic justification. This decision was never the subject of a developer agreement. Instead, the commitment to extend lines as utility investment is referenced in commitment letters from the utility subsidiaries to The Deltona Corporation and within the public offering statements made by The Deltona Corporation itself.

Our examination of the letters of commitment and offering statements demonstrates that The Deltona Corporation has made these commitments. To begin, the "letters of commitment" are not from the chief executive officer of the utility subsidiaries to the parent, The Deltona Corporation. They are addressed merely "To whom it may concern". As such, we find them to resemble "sales pitch" letters, not commitments by the utility subsidiaries. Also, these letters from the utility subsidiaries to "whom it may concern" make statements that service will be provided, that investment will be made but do not clearly state by whom, that adequate water supply and sewage treatment is available and that service will be provided pursuant to Commission rules and regulations. It is not clearly stated that the utility subsidiaries will make investment in distribution and/or collection lines. We find these letters are ambiguous and appear to have been utilized only to support The Deltona Corporation's interests as the developer.

The offering statements by The Deltona Corporation attempted to inappropriately obligate a regulated utility to make investment and install lines. A developer can obligate itself to make investment and install lines, but a regulated utility can obligate itself to do so only with the approval of this Commission. Nevertheless, approximately 40,000 lots have been sold with this commitment which have yet to receive service. Therefore, the record demonstrates that a commitment to fund the lines to serve Deltona lot owners has been made and that customers are relying on this promise.

The record also shows that Topeka was aware of the commitment prior to executing the warrants. From November, 1985, until January, 1989, Topeka designated two representatives to serve on The Deltona Corporation's Board of Directors, Mr. Jack McDonald, President of Topeka, and Mr. Donny Crandell, currently Treasurer of MSC and Director of the Utilities. As board members, these individuals would have been aware of the commitments by The Deltona Corporation and its

utility subsidiaries. Additionally, testimony in the record clearly demonstrates Topeka's knowledge of this commitment prior to the takeover of the utility subsidiaries.

We believe that the commitment to fund the line extensions to Deltona lot owners was an imprudent utility decision as well as a discriminatory one. The commitments are discriminatory because they relate only to lots sold by The Deltona Corporation, not to lots sold by other developers. The commitments represent an imprudent utility decision because to install lines which can serve more than the customers that are expected to connect in a reasonable time results in utility plant that is not used and useful in providing service to its customers. If this plant is allowed to be in the utility's rate base, the rates of the existing customers would be higher than would otherwise be the case. For this reason, in the past, the utility subsidiaries did not book these lines as used and useful plant. Thus, the excess plant had no impact on the rates of the existing customers.

Topeka may not continue the policy of installing non-used and useful lines as utility investment. If this Commission were to require the utility subsidiaries to invest in non-used and useful lines in order to honor the commitments, this could have an adverse impact on the rates of the general body of ratepayers. However, approximately 40,000 lot owners have relied on this commitment. While it is true that the previous owners of the utility subsidiaries entered into these commitments, which were never approved by this Commission, it is clear that Topeka knew of the commitments prior to the takeover. We believe both parties have been negligent in not resolving the responsibility for these commitments.

We find that it is not in the public interest to approve this transfer of majority organizational control if the promise made to the 40,000 lot owners is ignored. In our opinion, this matter should have been settled between The Deltona Corporation and Topeka prior to the takeover so that the lot owners would be held harmless. However, it was not resolved and the question of which party should be financially responsible for satisfying these commitments is at issue in a federal court case set for hearing in December, 1989.

We believe that a solution which protects the lot owners as much as possible, yet does not circumvent the authority of the federal court in this matter, is to require the utility

subsidiaries to honor the commitments made to the Deltona lot purchasers prior to the takeover by Topeka. If a Deltona lot purchaser requests service and that results in an extension of service that would be an imprudent utility investment resulting in significant non-used and useful lines, the "up-front" cost of installing the lines shall be borne by the party which made the commitments and benefited from them--The Deltona Corporation. If, however, the federal court determines the new owner, Topeka, is responsible, the "up-front" cost shall be borne by Topeka. In other words, the utility subsidiaries will honor the commitments and "send the bill" to either The Deltona Corporation or Topeka, whichever is found to be responsible by the federal court. We do not find it appropriate to require the utility subsidiaries to honor any commitments made by The Deltona Corporation after the takeover, which occurred on June 6, 1989.

The utility subsidiaries shall enter into refundable advance agreements with the responsible party so that as customers connect to the system and pay the service availability charges contained in the tariff, a refund of the advance will be made. This will leave the utility subsidiaries in the same posture with respect to the level of contributions-in-aid-of-construction (CIAC) and investment as they were under the prior ownership of The Deltona Corporation. The refundable advance agreements shall be filed with this Commission within 90 days of the date of this Order for our approval.

The record shows that Topeka plans to conform to the Commission's service availability requirements as expressed in our rules and the utility subsidiaries' approved tariffs and approved developer agreements with regard to investment in line extensions. We find this to be appropriate for future connections for which no commitments were made by the utility subsidiaries to extend lines as utility investment. The revised service availability policies we have required earlier in this Order should reflect intention. In addition, we find it appropriate to require the utility subsidiaries to file balance sheets and income statements with this Commission by March 31, 1990, regardless of any requests they might make for extensions of time to file their Annual Reports. This is because we believe it important for this Commission to be able to evaluate the affect this transfer of majority organizational control has had on the financial condition of these utility subsidiaries. If the utility subsidiaries file their Annual

Reports by the March 31, 1990, deadline, we will consider this requirement to have been fulfilled.

VI. We find we have no jurisdiction to construe the terms of any franchise agreement entered into between St. Johns County and the utility subsidiaries. Concerns of parties to such agreements would be more appropriately addressed in a circuit court action. However, it is appropriate for this Commission to consider any concerns raised by a county regarding whether approval of an application for transfer of majority organizational control is in the public interest.

We took judicial notice of Ordinance 71-1 of St. Johns County during this proceeding upon the County's request. That Ordinance, adopted when St. Johns County still had jurisdiction over the water and sewer utilities located within the County, gave Deltona Utilities, Inc., the right to use county roads and other rights-of-way in the County, as well as providing a franchise. St. Johns County cites a Florida Supreme Court decision, State v. Mason, 1727 So.2d 225 (Fla.1965), as authority for its position that a franchise agreement between a city and a utility remains in force even when jurisdiction is vested in this Commission to the extent that it does not conflict with the Florida Statutes granting such jurisdiction.

The County states that there is a provision in the franchise agreement that gives it the right to purchase the utility through arbitration and that, because this provision is not in direct conflict with any statute relating to this Commission, it remains in force and effect. Because Topeka has indicated that it does not intend to honor the franchise provision giving the County a right to purchase the utility through arbitration, the County states that Topeka has not demonstrated its fitness to operate these utilities. The County argues that Topeka has demonstrated an unwillingness to comply with the laws of the State of Florida by testifying that it ". . . .does not intend to honor commitments which its now captive utilities have made to agencies of the State of Florida including the Division of Land Sales." Therefore, the County concludes it is not in the public interest for this Commission to approve Topeka's application for transfer of majority

organizational control of these utility subsidiaries.

The County concedes that this Commission is not the forum in which to enforce the provisions of its franchise agreement nor the forum for The Deltona Corporation to enforce contract provisions between it and Topeka. However, the County asserts that Topeka's unwillingness to honor these commitments negatively reflects on its fitness to operate these utility subsidiaries. Topeka's obligation to honor a provision in a franchise agreement, entered into with St. Johns County when that County had jurisdiction over St. Augustine Shores Utilities, is truly outside the scope of this proceeding and the jurisdiction of this Commission. Topeka has taken the position that when St. Johns County relinquished its jurisdiction over St. Augustine Shores, it also relinquished any rights contained in a preexisting franchise agreement. Topeka cites Florida Public Service Commission v. Florida Cities Water Company, 446 So.2d 1111 (2nd DCA 1984) as authority for this position. We find that the determination of whether Deltona Utilities, Inc., may be held to a preexisting franchise agreement provision containing a right to purchase by St. Johns County may properly be made only by a circuit court. This Commission does not have the authority nor the obligation to attempt to construe the terms of any such franchise agreement. Our decision regarding whether this transfer of majority organizational control is in the public interest does not require such construction.

VII. We find that the transfer of majority organizational control of The Deltona Corporation's utility subsidiaries was not in accordance with the provisions of Chapter 367, Florida Statutes, and our Rules. However, we do not find it appropriate to fine the utility subsidiaries because this was a hostile takeover and because The Topeka Group, Inc., consistently kept this Commission aware of the situation. We also find it appropriate to deny The Deltona Corporation's ore tenus Motion to Dismiss.

This application and its processing have been accomplished in accordance with the great majority of the applicable statutory provisions of Chapter 367, Florida Statutes, and our Rules. However, there are two aspects of this application for

transfer of majority organizational control that violate the applicable statutes and Rules. The first violation is that the application was not filed by the appropriate party. Section 367.071, Florida Statutes, provides that ". . .No utility shall sell, assign, or transfer its certificate, facilities or any portion thereof, or majority organizational control without determination and approval of the Commission that the proposed sale, assignment, or transfer is in the public interest." In addition, Rule 25-30.040, Florida Administrative Code, states "When a utility proposes to sell, transfer, or assign its certificate, facilities or any portion of those facilities, or majority organizational control the utility shall apply to the Commission for authorization of the transactions." That Rule goes on to state ". . . The utility must demonstrate that the proposed sale, transfer, or assignment is in the public interest." and "The utility shall submit an original and fifteen copies of an application which shall include. . . a statement of fact relied upon by the seller to show that the transfer is in the public interest, including a summary of the buyer's experience in water and/or sewer utility operations and a showing of the buyer's financial ability to provide the service. . . ." These references throughout this statute and this Rule make it clear that the seller is the appropriate party to file the application. Most of the objectors, including The Deltona Corporation, St. Johns County and the Public Counsel, have taken the position that the application should be dismissed for this reason.

The Deltona Corporation's position on these issues as stated in its Brief is that the application should be dismissed because it was not filed by the "utility" as required by Rule 25-30.040, Florida Administrative Code, and that because the transfer was effected prior to receiving Commission approval it should be voided. The Deltona Corporation states that Topeka is a non-utility entity that is not within the jurisdiction of this Commission, a foreign corporation not even registered to do business in the State of Florida.

St. Johns County's position on these issues is that the application was not filed by the appropriate party and that it should be dismissed for that reason and because the transfer was effected prior to receiving Commission approval. St. Johns County's primary concern in this matter is that Topeka has not committed to allow St. Johns County to acquire the St. Augustine Shores system as the County believes The Deltona Corporation had committed to do and was prepared to do prior to

the transfer of control. Volusia County's participation was limited to its concern that the transfer of majority organizational control to Topeka not affect the net book value of the assets of the utility subsidiaries.

The Public Counsel's position is that the application should have been filed by the seller, The Deltona Corporation, and that the sale should not have been consummated prior to its being found by the Commission to be in the public interest. The Public Counsel states that it believes this Commission has the authority to choose any of several alternatives, including requiring an improperly submitted application to be resubmitted, voiding a transfer consummated prior to Commission approval, and disallowing a transfer found not to be in the public interest.

Topeka has taken the position that this Commission has established a policy of accepting applications from buyers or from both the seller and the buyer. It is true that we have, in the past, accepted applications from buyers and joint applications from both the seller and the buyer. It has been clearly established throughout the record of this proceeding that this transfer became a "hostile takeover." We find that it would, therefore, be unreasonable to expect that Topeka would have been able to force The Deltona Corporation to file the application.

Each case of violation of the statute and rule requiring applications to be filed by the seller must be evaluated on its own merits. We reject the position taken by the Applicant that it is this Commission's policy to accept applications from whomever. However, it is our belief that this violation of the statute and rule was, to some extent, unavoidable on Topeka's part and, therefore, we find no punitive action appropriate. Accordingly, we also find it appropriate to deny The Deltona Corporation's ore tenus Motion to Dismiss made at the close of the hearing in Orlando on the grounds of lack of jurisdiction over the application because it was filed by the buyer and not the seller or the "utility."

The second violation of the statute and rule results from Topeka's exercise of the warrants effecting the transfer of majority organizational control of The Deltona Corporation's utility subsidiaries prior to obtaining our approval. Regarding the fact that Topeka effected the transfer of control of these utilities prior to receiving Commission approval, the

Applicant's position is that the "vast majority of regulated water and wastewater utility transfers close before Commission approval" and, therefore, this transfer simply falls into that vast majority. Topeka states that, since "the Commission has fashioned a policy whereby no penalty is imposed where the Commission had been kept closely informed of the status of the transfer and where the application for Commission approval preceded or shortly followed the acquisition," no penalty would be appropriate in this case.

By filing the application for such approval in November, 1988, the Applicant demonstrated that it wished to obtain the approval of this Commission required by Section 367.071, Florida Statutes, and Rule 25-30.040, Florida Administrative Code. However, the Applicant felt it was compelled to exercise the warrants it held on June 6, 1989, because of the environmental problems with the various systems, as testified to by Topeka Witness McDonald.

Each and every violation of a statute or a rule must be evaluated taking into account the specific factual situation. We find that the unique circumstances of this case, wherein Topeka was involved in a hostile takeover of The Deltona Corporation's utility subsidiaries and where Topeka has gone to great pains to keep this Commission informed of every detail of the situation, we do not find it appropriate to fine the utility subsidiaries.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that The Topeka Group, Inc.'s application for approval to transfer majority organizational control of The Deltona Corporation's utility subsidiaries is hereby approved on the conditions set forth in the body of this Order. It is further

ORDERED that Deltona Utilities, Inc., and United Florida Utilities Corporation shall continue to charge the currently approved water and wastewater rates, the currently approved service availability charges, and the currently approved miscellaneous service charges. It is further

ORDERED that Deltona Utilities, Inc., and United Florida Utilities Corporation shall provide monthly status reports to this Commission regarding the status of their ownership of the utility land sites set out on Attachments A and B hereto, until

the matter is resolved. It is further

ORDERED that Deltona Utilities, Inc., and United Florida Utilities Corporation shall honor the commitments made to the Deltona lot owners made prior to the transfer of control of these utilities on June 6, 1989. It is further

ORDERED that Deltona Utilities, Inc., and United Florida Utilities Corporation shall file revised service availability policies and tariff sheets reflecting the decisions set out herein within 90 days of the issuance of this Order. It is further

ORDERED that Deltona Utilities, Inc., and United Florida Utilities Corporation shall file balance sheets and income statements for their systems by March 31, 1990, regardless of any extensions requested for filing of their Annual Reports. It is further

ORDERED that Deltona Utilities, Inc., and United Florida Utilities Corporation shall submit their Certificates to this Commission for appropriate entry within 30 days of the issuance of this Order. It is further

ORDERED that each of the specific findings contained in the body of this Order are approved and ratified in every respect. It is further

ORDERED that all matters contained herein and attached hereto, whether in the form of discourse or schedules, are, by this reference, specifically made integral parts of this Order. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission this 12th day of DECEMBER, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

SFS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

01 Deltona Lakes (Volusia Cnty) 07 St. Augustine Shores (St. Johns Cty) (PD) Planned Development

05 Citrus Springs (Citrus Cty) 08 Sunny Hills (Washington Cty) (PUD) Planned Unit Development

06 Marion Oaks (Marion Cty) 10 Marco Shores (Collier Cty) *Under S.E. Bank Trust

Existing Sites for Water/Sewer Utility

DOC Owned Sites

Comm	Unit	Legal Descrpt Block	Lot/Tract	Acres Original Platted	Acres Req. by Utilities	Developer Designated Land Use	Intended Utility Land Use	Required Utility Ownership	Date Placed In Operation
01	8		E	3.17	3.17	Utility	Exist Wells 19 & 31	Fee Simple	1986
01	21		C	4.66	4.66	Utility	Exist Wells 22&32, Stg Tnk	Fee Simple	1987
01	30	portion	B	8.27	0.35	Park	Exist Well 27	Specific Easement	1988
01	33		A	3.15	3.15	Utility	Exist Well 28	Fee Simple	1988
01	34		F	3.35	3.35	Utility	Exist Well 24	Fee Simple	1987
01	53		C	1.64	1.64	Utility	Exist Well 23	Fee Simple	1987
05	1	portion	A	5.63	0.23	Admin Bldg	Exist Well 2	Specific Easement	1969
05	4	portion	P	36.28	0.23	Hgh Sch St	Exist Well 3	Specific Easement	1969
06	4		D	15.06	15.06	Utility	Exist Well 4 & Stge Tank	Fee Simple	1981
06	5	portion	W	247.18	3.00	Golf Course	6" Water Mn thru Golf Crse	Specific Easement	1973
06	9		T-60	15.34	15.34	Utility	Existing Well 6	Fee Simple	1988
07	1R	36	1-5	0.86	0.86	Residential	Existing Raw Water Main	Fee Simple	1972
07	2R	portion	I	61.34	3.00	Golf Course	Wstewtr Trmnt Plt Eff. Line	Specific Easement	1974
07	6	portion	A	6.82	0.28	Business	Raw Water Main	Specific Easement	1984
07	6	portion	B	4.49	0.19	Business	Raw Water Main	Specific Easement	1984
07	6	portion	C	5.72	0.19	Church	Raw Water Main	Specific Easement	1984
08	19	1105	I	0.24	0.24	Commercial	Exsting 10" Wtr Mn from Wtr TP	Fee Simple	1971
10	1		H'	1.41	1.41	Utility	Exsting Wtr Trmt Plnt	Fee Simple	1981
10	1		Q'	3.61	3.61	Utility	Exsting Wstwtr Trtmnt Plnt	Fee Simple	1981
10	30	to be Platted		13.60	13.60	Utility	Exsting Ponds	Fee Simple	1986
20 Total Entries					71.56				

Sheet 1 Staff's list which includes addional property. Attachment "B"

Comm

00 E. Tampa (Hillsborough Cty)
01 Deltona Lakes (Volusia Cty)
04 Spring Hill (Hernando Cty)
05 Citrus Springs (Citrus Cty)
06 Marion Oaks (Marion Cty)
07 St. Augustine Shores (St. Johns Cty)
08 Sunny Hills (Washington Cty)
09 Marco Beach (Collier Cty)

Comm

10 Marco Shores (Collier Cty)
12 Pine Ridge (Citrus Cty)

**Under O.U. Bond Indenture 12/1/84

Sites Existing of Planned for Water/Sewer Utility

Comm	Unit	Legal Descrp Block	Lot/Tract	Ticor Title Commitment Number	Current Owner	Acres Original Platted	Acres Reqd. by Utility	Developer Intended Dsgntd. Land Use	Utility Land use	Rcqrd. Utility Ownership	Date Placed Into Operation	Action Rcqr.
01	3		F		IDC	1.45	1.45	FPL/RW	Wste Trmt Plt Eff	Fee Simple		(2)
01	3		S		IDC	1.84	1.84	FPL/RW	Wste Trmt Plt Eff	Fee Simple		(2)
01	3		T		IDC	2.04	2.04	FPL/RW	Wste Trmt Plt Eff	Fee Simple		(2)
01	3		U		IDC	1.14	1.14	FPL/RW	Wste Trmt Plt Eff	Fee Simple		(2)
01	3		V		IDC	1.17	1.17	FPL/RW	Wste Trmt Plt Eff	Fee Simple		(2)
01	8		J		IDC	0.84	0.84	FPL/RW	Wste Trmt Plt Eff	Fee Simple		(2)
01	11	portion	f	88-2968(E)	County	9.80	0.31	Park	Well 12	SPEC ESMT-OR	1969	(4)
01	21		C	88-2968(E)	IDC	4.66	4.66	Utility	Exst Well 22,Stg Tk	Fee Simple	1987	(2)
01	51		C	88-2968(E)	IDC	1.64	1.64	Utility	Exst Well 23	Fee Simple	1987	(2)
01	70		A		IDC	0.27	0.27	FPLR/W	Wste Trmt Plt Eff	Fee Simple		(2)
01	Sec 4, T19S 31E			88-2968-(E)	DLAIC	20.00	20.00	Schl Site	Eff. Spry Irrig..	Fee Simple		(2)
04	Pt NE 1/4 of NW 1/4 29-23-17				Other	2.12	0.08	Comm Hwy	Trans. Line Esmnt	06/12/79		(4)
04	U.S. 19 1 pt. 6				Other	0.02	0.02	Comm Hwy	Lift Stn Esmnt	07/14/83		(4)
05	1	portion	F	88-2968(D)	County	6.58	1.20	Prk/Util.	Well 7	SPEC ESMT-OR	1973	(4)
06	5	portion	W		IDC	247.18	3.00	Golf Crs	6" Wtr Ln Thru Golf	Spec. Esmnt	1973	(4)
06	6		KK	88 2968(F)	IDC	0.06	0.06	Utility	Util. Right of Way	Fee Simple		(2)
06	9		T-07	88-2968(F)	IDC	0.79	0.79	Spray Eff	Spray Effluent	Fee Simple		(2)
06	9		T-09	88-2968(F)	IDC	1.71	1.71	Ldscp/Grn	Spray Effluent	Fee Simple		(2)
06	9		T-16	88-2968(F)	IDC	2.06	2.06	Ldscp/Grn	Spray Effluent	Fee Simple		(2)
06	9		T-17	88 2968(F)	IDC	4.03	4.03	Ldscp/Grn	Spray Effluent	Fee Simple		(2)

Sheet 2 Staff's List which Includes additional property. Attachment "B"

Comm

00 E. Tampa (Hillsborough Cty) 06 Marion Oaks (Marion Cty)

01 Deltona Lakes (Volusia Cty) 07 St. Augustine Shores (St. Johns Cty)

04 Spring Hill (Hernando Cty) 08 Sunny Hills (Washington Cty)

05 Citrus Springs (Citrus Cty) 09 Marco Beach (Collier Cty)

Comm

10 Marco Shores (Collier Cty)

12 Pine Ridge (Citrus Cty) **Under D.U. Bond Indenture 12/1/84

Sites Existing of Planned for Water/Sewer Utility

Comm.	Unit	Legal Description Block	Lot/Tract	Ticor Title Commitment Number	Current Owner	Acres Original Platted	Acres Rcqrd by Util.	Developer Designated Land Use	Intended Utility Land use	Required Utility Ownership	Date Placed Into Operation	Action Required
06	9		T-18	88-2968(F)	TDC	2.17	2.17	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-19	88-2968(F)	TDC	0.75	0.75	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-23	88-2968(F)	TDC	1.77	1.77	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T 25	88-2968(F)	TDC	0.77	0.77	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-27	88-2968(F)	TDC	0.53	0.53	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T 29	88-2968(F)	TDC	3.40	3.40	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-30	88-2968(F)	TDC	3.89	3.89	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-32	88-2968(F)	TDC	4.54	4.54	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-33	88-2968(F)	TDC	3.18	3.18	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-34	88-2968(F)	TDC	1.58	1.58	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-36	88-2968(F)	TDC	1.85	1.85	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-38	88-2968(F)	TDC	1.59	1.59	Spry Eff.	Spray Eff	Fee Simple		(2)
06	9		T-43	88-2968(F)	TDC	1.18	1.18	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-58	88-2968(F)	TDC	10.17	10.17	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-62	88-2968(F)	TDC	7.44	7.44	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-64	88-2968(F)	TDC	4.16	4.16	Ldscp/Grn	Spray Eff	Fee Simple		(2)
06	9		T-66	88-2968(F)	TDC	1.98	1.98	Ldscp/Grn	Spray Eff	Fee Simple		(2)
07	1		S	88-2968(G)	SASSC	6.13	6.13	Trlr Stg	Raw Wtr Mn	DLRT ESMT-OR 678 PG 1632		(3)(4)
07	1R	36	1 S		TDC	0.86	0.86	Rsdntl	Exst Rw Wtr Mn	Fee Simple	1972	(2)

Sheet 1 Staff's List which includes additional property. Attachment "B"

Comm

00 E. Tampa (Hillsborough Cty) 06 Marion Oaks (Marion Cty)

01 Deltona Lakes (Volusia Cty) 07 St. Augustine Shores (St. Johns Cty)

04 Spring Hill (Hernando Cty) 08 Sunny Hills (Washington Cty)

05 Citrus Springs (Citrus Cty) 09 Marco Beach (Collier Cty)

Comm

10 Marco Shores (Collier Cty)

12 Pine Ridge (Citrus Cty) **Under D.U. Bond Indenture 12/1/84

Sites Existing of Planned for Water/Sewer Utility

Comm	Legal Descrp Unit	Block	Lot/Tract	Ticor Title Commitment Number	Current Owner	Acres Original Platted	Acres Reqrd by Dsgntd Util.	Developer Intended Land Use	Intended Utility Land use	Reqrd Utility Ownership	Date Placed into Operation	Action Reqrd
07	28	H		88-2968(G)	SASSC	4.28	4.28	Open Space	34J,34K,34L,35E36	DLKT ESMT-OR 678 PG 1632	1983	(3)(4)
07	28	U		88-2968(G)	SASSC	6.26 .	6.26	Open Space	Raw Wtr Wells 37&38	DLKT ESMT-OR 678 PG 1632	1971	(3)(4)
07	3	D		88 2968(G)	SASSC	10.36	0.74	Greenbelt	Infil/Well 34,34A&B	DLKT ESMT-OR 678 PG 1632	1975	(3)(4)
07	3	E		88-2968(G)	SASSC	0.71	0.71	Greenbelt	Raw Wtr Mn & Well 34D	DLKT ESMT-OR 678 PG 1632	1981	(3)(4)
07	3	F		88-2968(G)	SASSC	6.71	6.71	Park	Raw Wtr Main	DLKT ESMT-OR 678 PG 1632		(3)(4)
07	6	D		88-2968(G)	SASSC	9.23	9.23	Open Space	Prop Wells 39 & 40	DLKT ESMT-OR 678 PG 1632	1989	(1)(3)
08	10	H		88-2968(H)	TDC	5.12	5.12	Park	Well 5	DLKT ESMT-OR 235 PG 1840	1977	(3)(5)
09	Sec22Twp51SRng26E				STATE	0.27	0.27	Fmr Ut 2418	Raw Wtr Booster Stn	Reqr Esmnt from State		
09	Sec25&26Twp51SRng26E			88-2968(A)	STATE	10.16	10.16	Rd to Nowhr	Wtr TP/Ef In to ponds	SPEC ESMT-OR 1089 PG 1250		(4)

48 Total Entries

Action Required: (1) Easement from TDC to DU

(2) DU to Purchase from TDC

(3) Req. Field Survey to Complete

(4) Assign TDC Resv. Easement Interest to DU

(5) Existing Easement in favor of DU or Subs.

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