



ORIGINAL

SARASOTA COUNTY GOVERNMENT

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September 1, 2000

BY FEDERAL EXPRESS

John S. Wheeler
Clerk
First District Court of Appeal
301 Martin Luther King Boulevard
Tallahassee, FL 32399-1850

990696-WS

Dear Mr. Wheeler:

Re: *Collier County Board of County Commissioners, et al. v. Florida Public Sere Commission, et al.* – Case No. 1D00-3127

Please find enclosed an original and three (3) copies of the Response of Appellants Citrus County, Collier County and Sarasota County to Appellees' Joint Motion to Dismiss.

Please indicate receipt of this filing on the enclosed copy of this letter and return to the undersigned in the enclosed stamped envelope. Thank you for your attention to this matter.

Sincerely,

Alan R. Best
for: Kathleen F. Schneider
Assistant County Attorney

Enclosures

- APP _____
- CAF _____
- CMP _____
- COM _____
- CTR _____
- ECR _____
- LEG _____
- OPC _____
- PAI _____
- RGO _____
- SEC _____
- SER _____
- OTH _____

DOCUMENT NUMBER-DATE

10922 SEP-58

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FPSC-RECORDS/REPORTING

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
TALLAHASSEE, FLORIDA

COLLIER COUNTY BOARD OF COUNTY)
COMMISSIONERS; CITRUS BOARD OF)
COUNTY COMMISSIONERS; and)
SARASOTA COUNTY BOARD OF)
COUNTY COMMISSIONERS)

Appellants,)

v.)

FLORIDA PUBLIC SERVICE COMMISSION;)
NOCATEE UTILITY CORPORATION; and)
INTERCOASTAL UTILITIES, INC.)

Appellees.)

CASE NO. 1D00-3127

RESPONSE OF APPELLANTS CITRUS COUNTY,
COLLIER COUNTY AND SARASOTA COUNTY
TO APPELLEES' JOINT MOTION TO DISMISS

Appellants Citrus County, Collier County and Sarasota County (the "Counties") respond to Appellees' Joint Motion to Dismiss the Notice of Appeal filed by the Counties and the Court's Order to Show Cause and request that this Court deny the motion on the grounds that: (1) the Order entered by the Florida Public Service Commission ("PSC") denying the Counties' Petitions to Intervene is final and the appeal is a matter of right pursuant to Rule 9.110, Florida Rules of Appellate Procedure, and (2) if the PSC's Order is deemed non-final, pursuant to Section 120.68(1), Florida Statutes, the Counties have made the requisite showing that review of the PSC's final decision on the merits would not provide adequate relief to the Counties who have been denied intervention.

DOCUMENT NUMBER-DATE

10922 SEP-58

FPSC-RECORDS/REPORTING

The underlying consolidated cause of action in this proceeding arises out of applications filed with the PSC by Nocatee Utility Corporation (“Nocatee”) and Intercoastal Utilities, Inc. (“Intercoastal”) for certification to provide water and sewer service in Duval and St. Johns counties. Pursuant to Chapter 367, Florida Statutes, the PSC is authorized to regulate water and sewer utilities only in those counties where the governing body has expressly delegated regulation to the PSC. Section 367.171(1), Florida Statutes. Counties which have made this express delegation are commonly referred to as “jurisdictional counties” because utilities located in those counties are subject to the regulatory jurisdiction of the PSC. By contrast, counties whose governing body has retained the legislative authority to regulate water and sewer utilities within its jurisdictional boundaries are referred to as “nonjurisdictional counties” because utilities located within these counties are not subject to the regulatory jurisdiction of the PSC. St. Johns County, Citrus County, Collier County and Sarasota County are nonjurisdictional counties.

Pursuant to Chapter 367, Florida Statutes, there are only two ways by which a non-jurisdictional county can be divested of its regulatory authority: (1) the county’s governing body adopts a resolution relinquishing regulatory jurisdiction to the PSC, section 367.171(1), Florida Statutes, or (2) the service provided by a utility system transverses county boundaries. Section 367.171(7). In nonjurisdictional counties, only the utility whose service transverses county boundaries is subject to PSC regulation. All other utilities within that county remain regulated by the local governing body.

In the underlying proceeding, Nocatee and Intercoastal sought certificates from the PSC to provide service which would transverse the county boundaries of Duval County and St. Johns County. Duval is a jurisdictional county subject to PSC regulation. St. Johns is a nonjurisdictional county. St. Johns County moved to dismiss the request based on the ground

that, pursuant to section 367.1761(7), Florida Statutes, the PSC lacked jurisdiction to consider the requests because the mere filing of an application for certification is not sufficient to divest a nonjurisdictional county of regulatory authority. Based on the fact that a determination by the PSC as to its jurisdiction under Section 367.171(7), Florida Statutes would have an immediate and direct impact on their regulatory authority, the Counties filed their individual petitions to intervene. Joint Exhibit "1".

On July 11, 2000, the PSC entered its "Order on Jurisdiction, Denying Petitions for Intervention and Motions to Dismiss and Granting Amicus Curiae Status to the Counties." In response, the Counties filed a "Notice of Administrative Appeal and Alternative Petition for Writ of Certiorari", which set forth the following grounds in support of their position that review of the PSC's final decision on the merits would not provide an adequate remedy: (1) without party status, the Counties would not have standing to challenge the PSC's determination that, pursuant to Section 367.171(7), Florida Statutes, the mere filing of an application to provide service across county boundaries by a utility was sufficient to divest nonjurisdictional counties of their statutory right to regulate utilities providing service within their geographic boundaries; and (2) the Counties will have no ability to participate in the establishment of procedures and standards by which the PSC determines which of two competing utilities is best suited to serve within the boundaries of a nonjurisdictional county, which procedures will also be binding upon all nonjurisdictional counties. Exhibit "2", Notice of Administrative Appeal, pg. 5.

Contrary to Appellees' position, the PSC's order denying the Counties' Petitions to Intervene is a final order as to the Counties. *City of Dania v. Broward County*, 658 So.2d 163, 164 (Fla. 4th DCA 1995) (Due to the final nature of the order denying intervention, the court has jurisdiction pursuant to Florida Rules of Appellate Procedure 9.110 to treat the petitions for

certiorari as an appeal from a final order.) The PSC's order fully resolves the dispute between the parties as to whether the Counties have a substantial interest in the proceedings and denies the Counties any right to review the PSC's order on jurisdiction. *Citibank, N.A. v. Blackhawk Heating & Plumbing Co., Inc.*, 398 So.2d 984, 986 (Fla. 4th DCA 1981). Accordingly, the Counties are entitled to appeal as a matter of right.

In the alternative, even if the PSC's order denying the Counties the right to intervene were to be considered a non-final order, pursuant to Section 120.68(1), Florida Statutes, the Counties are entitled to appeal. As provided in Section 120.68(1), Florida Statutes, a procedural order entered by the PSC is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Contrary to Appellees' argument set forth in its Joint Motion to Dismiss, *Charter Medical-Jacksonville, Inc. v. Community Psychiatric Centers of Florida, Inc.*, 482 So. 2d 437 (Fla. 1st DCA 1985) does not stand for the proposition that a denial of a petition for intervention is a non-final order not subject to review. In *Charter Medical-Jacksonville*, appellant sought review of an administrative ruling by a hearing officer, not a final agency ruling. The court dismissed the appeal from the hearing officer's ruling on the ground that appellant had not shown that review after final agency action would provide inadequate relief.

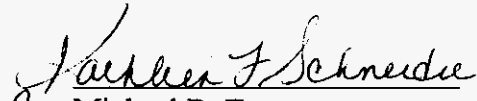
By contrast, in the present proceeding, the Counties are appealing the PSC's final action on their petitions to intervene. They are not appealing the preliminary decision of a hearing officer. The order denying intervention is final as to the Counties, and, in fact, deprives the Counties of the right to appeal the PSC's final decision on the merits or its decision on jurisdiction under Section 367.171(7). The inadequacy of relief available to the Counties was expressly recognized by Commissioner Lila Jaber, who stated in her dissent: "In lieu of granting the Counties intervenor status, the majority has allowed these Counties to participate as amicus

curiae in this matter. Granting amicus curiae status to the Counties will help the Commission make an informed decision. However, as amicus curiae, these counties will not be permitted to appeal our decision. By this order, we have determined that the Commission has jurisdiction under Section 367.171(7), Florida Statutes, to consider Intercoastal's and NOC's applications because the utilities' proposed service will cross county boundaries. This decision will have an impact on other counties. Thus, I believe Sarasota, Hillsborough, Citrus and Collier Counties' Petitions for Intervention should be granted." Exhibit "3", Order, page 30.

Accordingly, whether this Court determines that the PSC's Order denying intervention is a final order entitling the Counties to appeal as a matter of right under Rule 9.110, Florida Rules of Appellate Procedure or a non-final procedural order subject to judicial review under Section 120.68(1), Florida Statutes, the Counties are entitled to a review of the PSC's Order denying intervention.

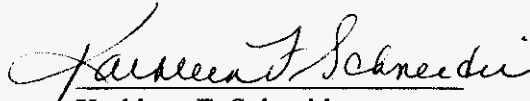
WHEREFORE, Citrus County, Collier County and Sarasota County respectfully request that this Court deny Appellees' Joint Motion to Dismiss.

RESPECTFULLY SUBMITTED this 1st day of September, 2000.



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