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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 20190168-WS

Application for water and
wastewater service in Duval,
Baker, and Nassau Counties,
by First Coast Regional
Utilities, Inc.

_____ /

PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 2

COMMISSIONERS
PARTICIPATING: CHAIRMAN GARY F. CLARK
COMMISSIONER ART GRAHAM
COMMISSIONER MIKE LA ROSA

DATE: Tuesday, January 5, 2021

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: DEBRA R. KRICK
Court Reporter and
Notary Public in and for
the State of Florida at Large

PREMIER REPORTING
114 W. 5TH AVENUE
TALLAHASSEE, FLORIDA
(850) 894-0828

1 P R O C E E D I N G S

2 CHAIRMAN CLARK: All right. Next item. Help
3 me out. Two, okay -- Item 7.

4 All right. Next up, Item No. 2.

5 Ms. Helton.

6 MS. HELTON: Item No. 2 addresses dispositive
7 motions filed in the original certificate case
8 filed by First Coast Regional Utilities.

9 First Coast seeks an application for water and
10 wastewater service in Duval, Baker and Nassau
11 Counties, and JEA objects.

12 First I need to correct an administrative
13 typographical error on the cover page. The
14 recommendation incorrectly lists this matter as
15 coming before all Commissioners. That is not
16 correct as this case has been assigned to a panel
17 made up of Chairman Clark and Commissioners Graham
18 and La Rosa.

19 Before you today are requests for oral
20 argument filed by both First Coast and JEA. In
21 addition, both parties have filed motions for
22 summary final order, and First Coast has filed a
23 motion to strike portions of JEA's objection.

24 In Issue 1, which you should take up first,
25 staff is recommending that both First Coast and JEA

1 be allowed 10 minutes each to address all of the
2 remaining issues in staff's recommendation.

3 In the remaining issues, staff recommends that
4 the motions for summary final order and motion --
5 and the motion to strike be denied.

6 John Wharton, representing First Coast, and Tom
7 Crabb and Susan Clark representing JEA, are on the
8 telephone and prepared to make oral argument.
9 Staff members are also on the line and available
10 for questions.

11 CHAIRMAN CLARK: All right. Thank you, Ms.
12 Helton.

13 You want to -- you would like to stay, okay.
14 I was going to let -- I will give Commissioner
15 Brown an out here, but she's going to sit through
16 this one. It's going to be quick and easy, right?

17 All right. First item take up oral argument.
18 I'll entertain a motion. A motion and I have a
19 second to approve oral argument.

20 Any discussion?

21 All in favor say aye.

22 (Chorus of ayes.)

23 CHAIRMAN CLARK: Item No. 1 is approved.

24 Okay. Parties, you have 10 minutes each. You
25 don't have to use that entire time, but we will

1 begin with FCRU, Mr. Wharton, are you on the line?

2 MR. WHARTON: I am on the line, Mr. Chairman.

3 CHAIRMAN CLARK: You are recognized.

4 MR. WHARTON: Thank you, sir.

5 Good morning, Mr. Chairman, Commissioners.

6 This is John Wharton with the Tallahassee office of
7 Dean Mead, along with Bill Sundstrom and Bob
8 Brannan of Sundstrom & Mindlin. We represent First
9 Coast Regional Utilities.

10 I will endeavor to address this matter in the
11 time allotted. I will try to be efficient. I
12 don't feel like it's necessary that I go deeply
13 into the basis of our motion because our motion is
14 basically what the statute says that I will be
15 reading to you later; rather, I am going to try to
16 give you context and argument that I hope will help
17 you understand where we stand.

18 There are three motions before you --

19 CHAIRMAN CLARK: Mr. Wharton, let me interrupt
20 you -- let me interrupt you one second. We are
21 not -- we are having a little bit of difficulty
22 understanding you. It's kind of a latency issue I
23 think, but slow down your speech just a little bit
24 and try to enunciate a little louder for us.

25 MR. WHARTON: I will definitely do that, sir.

1 There are three motions before you today. The
2 first is First Coast motion to strike -- how is
3 that, Mr. Chairman?

4 CHAIRMAN CLARK: Much better.

5 MR. WHARTON: All right. The motion to strike
6 is subsumed within, as to its practical effect,
7 with the second motion of First Coast, and I don't
8 intend to address any arguments to it today.

9 The second motion of First Coast is a motion
10 for a partial summary recommended order or a
11 partial summary order on the singular subject of
12 whether JEA's position that because it has a
13 so-called franchise agreement from the City of
14 Jacksonville deprives the Commission of its
15 exclusive jurisdiction over the authority, service,
16 rates and territory of First Coast, despite the
17 fact that 367.011 says without any ambiguity or
18 ambivalence exactly to the contrary. Those exact
19 and precise matters are within your exclusive
20 jurisdiction.

21 You will notice that our motion is partial.
22 If that issue is disposed of, we understand that
23 First Coast still needs to prove that it is
24 entitled to issuance of the certificate by meeting
25 the criteria in your rule.

1 JEA's inapposite motion, which says that your
2 jurisdiction is not only not exclusive, but is
3 nonexistent in this case because of the existence
4 of this alleged franchise from JEA to the City of
5 Jacksonville, who are one entity, as I will explain
6 in a few minutes. They are swinging from the
7 fence. They say that the entire case should be
8 dismissed if their motion is granted.

9 A quick word about the procedural posture.
10 It's important to realize that the question that we
11 raised the franchise, JEA, asserts it holds negates
12 the language 367.011. That's why it's appropriate
13 to bring it as a partial summary motion.

14 We understand that there will have to be a
15 hearing. The Commission has well-developed rule as
16 to how applicants for and true original
17 certificate, as I heard it described today, qualify
18 for certification.

19 Now, on the other hand, JEA's position is that
20 even if the application of First Coast otherwise
21 complies with all of your rules and statutes, JEA
22 says you shouldn't hear any further evidence in
23 this case, because they effectively have exclusive
24 jurisdiction over this territory, not you.

25 Now, that great difference in the position is

1 why First Coast's motion should be granted and
2 JEA's denied. And it's also coined to be the
3 difference in the motion is the reason that I am
4 really not going to address JEA's motion further.
5 But you are going to find today that any local
6 government -- and there is no reason why JEA's
7 argument would be limited to JEA -- can put some
8 magic words in an ordinance or on a piece of paper
9 and call it a franchise, even though this doesn't
10 fit any definition of any of franchise I can find,
11 and that this action divests the Commission of its
12 subject matter jurisdiction which was bestowed upon
13 the agency by the Legislature then little I can say
14 will change your mind, other than that will be a
15 radical departure from any decision you have ever
16 made, and a serious forfeiture of the exclusive
17 jurisdiction the Legislature gave the PSC.

18 I also want to make sure that there is an
19 appreciation with a lot of filings, three motions,
20 responses to the three motions, staff
21 recommendations, a keen appreciation of JEA's
22 position, because they've got in what they filed
23 talkies about the Constitution and ordinances, and
24 et cetera.

25 But the first is that JEA has made completely

1 clear in their pleading that the Commission has no
2 authority, none, to certificate a private utility
3 within their franchised area. In their motion that
4 is before you today, JEA has stated in paragraph 29
5 that First Coast is asking for a certificate in
6 part of an area JEA claims is its franchised area,
7 and that the Commission has no authority. Not that
8 under your rules you should determine you are not
9 going to do it, but you have no authority to do it.

10 Similarly, they say later that the issuance of
11 a certificate would violate JEA's exclusive
12 franchise agreement. The word "exclusive" simply
13 can't be used in the same way by two parties.

14 I think the second thing that you need to
15 understand is this whole issue of the franchise and
16 the constant references to the franchise. And for
17 the purpose of this motion, there is no difference
18 between JEA and the City. It's just nomenclature.
19 This franchise is something that city government
20 right hand handed the city government left hand.

21 In their motion, JEA acknowledges that when
22 they say at paragraph 25, as the City has done with
23 its the wholly owned utility, JEA. And at
24 paragraph 30, the City of Jacksonville has made JEA
25 its wholly owned subsidiary.

1 So having said that, and having -- having set
2 the standard -- the stage, let me -- let me talk a
3 little bit very quickly about what the statute
4 says.

5 First Coast's motion, if it has any flaw, is
6 that what it is asking for is so self-apparent that
7 it barely needs to be said. We are simply asking
8 that the core principle of the Commission's
9 jurisdiction be declared so that the parties can
10 determine now that what appears to be a primary
11 issue to JEA, and a linchpin of JEA's theory of the
12 case, is simply not consistent with established
13 law.

14 Chapter 367.011 says in sub (2) the PSC shall
15 have exclusive jurisdiction over each utility with
16 regard to its authority, service and rates. Sub
17 (3) says the chapter should be liberally construed
18 for the accomplishment of the purpose. And sub (4)
19 says the chapter shall supersede all other laws,
20 and other laws shall supersede the chapter only to
21 the extent made by expressed reference.

22 The Legislature could not possibly have made
23 more clear that the extent and the breadth of the
24 exclusivity of the Commission's jurisdiction. Now,
25 all we ask in our motion is a clear declaration

1 that JEA's theory is flawed.

2 Having said that, I want to address one -- one
3 matter, Mr. Chairman, and that is I was an attorney
4 in water and wastewater in '86 and '87 back at the
5 PSC, and I have done hundreds of PSC cases. I know
6 only, I think, two of the present Commissioners
7 know me, but there is something in the staff
8 recommendation, and it was suggested by JEA, and I
9 want to make sure that you understand if that part
10 of the recommendation is accepted what I believe,
11 and I understand that will and a dollar will get me
12 a cup of coffee, we were told, and what is the
13 whole discussion about these two cases, JEA's and
14 Lake Utility Services. I believe if that is
15 included in this discussion and becomes part of
16 this Commission order, you will be mixing legal
17 apples and oranges in a way you never have before.

18 In those cases, appellate courts, when faced
19 with service territory disputes between a
20 government entity and two utilities, said these are
21 the factors we are to apply. And JEA has basically
22 invited the Commission to come in and apply these
23 factors in this case even though you have
24 well-developed rules on how an original certificate
25 is gotten and, in fact, the Administrative

1 Procedures Act requires that any hoops an original
2 applicant must jump through must be embodied in a
3 rule.

4 Staff's analysis went through Lake Utility
5 Services and JJ's, these two cases, and said, well,
6 we do think of for five questions we need to know
7 before we can decide these things. My -- my firm
8 handled both of those cases, the firm I was with at
9 the time. And I just want to point out to the
10 Commissioners, and I will now conclude my remarks.

11 I just want to point out to the Commissioners,
12 those cases were handled under Chapter 180. They
13 are not appeals of PSC orders. They weren't
14 applicants like First Coast is -- yes. I am sorry,
15 I thought, Chairman, maybe you were trying to cut
16 me off. That happens sometimes.

17 CHAIRMAN CLARK: We are there.

18 MR. WHARTON: Okay. Let me just -- give me 60
19 more seconds, if I may?

20 CHAIRMAN CLARK: 30.

21 MR. WHARTON: 30. Those -- those cases were
22 not original applicants. JJ's was seven years old,
23 and Lake was 20 years old. And from what I can
24 tell, no PSC order has ever mentioned them.

25 Those cases say if all other things are equal,

1 then the party who had the first legal right.
2 Well, that's never going to apply to this
3 situation. A private utility will never be able to
4 approve. Its here asking for a certificate, so I
5 don't think those cases should be applied here even
6 if the recommendation is otherwise approved.

7 We would like our motion to be granted and
8 this matter to be set for hearing.

9 Thank you.

10 CHAIRMAN CLARK: All right. Thank you, Mr.
11 Wharton.

12 All right. From JEA, Mr. Crabb or Ms. Clark,
13 are either of you on the line?

14 MR. CRABB: Good morning, Mr. Chairman. It's
15 Tom Crabb from the Radey Law Firm, and I also have
16 Susan Clark here with me as well.

17 CHAIRMAN CLARK: All right. Good morning.
18 You are recognized. You have 10 minutes, sir.

19 MR. CRABB: Thank you, sir. Can you hear me
20 okay?

21 CHAIRMAN CLARK: Yes, sir, loud and clear.

22 MR. CRABB: So I thought I would give you
23 first some background on sort of the procedural
24 posture and some of the just background information
25 of how we got here today, and then walk through the

1 law, quickly, that controls this matter.

2 First of all, JEA is the City of
3 Jacksonville's water utility. It's wholly owned by
4 the City and is, itself, a governmental entity
5 created by law. So this case concerns a proposed
6 development on the western side of the city. Since
7 2010, this development has been controlled by a
8 planned unit development ordinance of the City of
9 Jacksonville. And that PUD ordinance was attached
10 as Exhibit B to our motion, and I would encourage
11 you to take a look at that.

12 The PUD ordinance requires the developer as a
13 condition of this development to construct at its
14 own expense water, wastewater and reuse capacity at
15 levels and to standards acceptable to JEA, to be
16 dedicated to JEA for operation and maintenance, or
17 for contract operation. There is nothing unclear
18 about this requirement in the PUD ordinance.

19 So in 2017, or seven years after the PUD
20 ordinance became effective, the proposed
21 development was sold to a new developer, 301
22 Capital Partners. So rather than comply with the
23 PUD ordinance as it was written, challenged the
24 ordinance in a court, a new development -- or the
25 new developer formed a wholly owned subsidiary

1 called First Coast Regional Utilities and filed
2 this application in an attempt to serve the
3 development itself.

4 So by filing their application, the developer
5 is essentially asking the Commission to aid in
6 their violation of the PUD ordinance that requires
7 the developer to build the facilities at its own
8 expense to JEA standards, and then dedicate them to
9 JEA. So that's why JEA has objected in this
10 docket.

11 The basis for our motion for summary final
12 order is that the applicant cannot be given the
13 right to serve this territory because that right is
14 already vested in JEA as a governmental entity, a
15 municipal provider. In First Coast's argument
16 talking about the authority of the Commission, we
17 do not dispute but fully endorse the role of
18 municipal providers and the provision for municipal
19 providers under the law.

20 So without question, cities have the right
21 under Chapter 180 to provide water and wastewater
22 service as part of their public works. JEA's
23 exclusive right to serve is memorialized in both a
24 city ordinance and an interlocal agreement between
25 the City and JEA. There is no question that cities

1 have the right to provide their own water and
2 wastewater service. And so -- and on the other
3 hand, of course, the Commission has the authority
4 to certificate indicate private utilities.

5 The question then becomes how do you reconcile
6 franchise rights of municipal providers with
7 franchise rights of private utilities certificated
8 by the Commission? And appellate courts have held
9 that the rights of -- that those franchise rights
10 of the governmental entity and the private utility
11 are equal. That neither one is superior or
12 inferior to the other. Instead, the entity,
13 whether public or private, that first acquired the
14 right to provide service is the one that has the
15 exclusive right to provide the service provided it
16 has the ability to serve, and that's a key point.
17 So first in time is first in right, provided there
18 is the ability to serve.

19 In those two cases, City of Mount Dora versus
20 JJ's Mobile Homes, and also Lake Utility Services
21 versus the City of Clermont, and this is only
22 logical that if you are measuring franchise rights
23 of municipal providers with franchise rights of
24 private utilities, that if one is first in time and
25 has the ability to serve, then there would be no

1 reason to displace them for the other, for a
2 private entity or for the municipal provider, as
3 the case may be. So in this case, JEA is first in
4 time by many years, and it has the present ability
5 to serve as required by the PUD ordinance.

6 And on the point about JJ's Mobile Homes not
7 having ever been cited by the Commission -- in
8 fact, the case cited by staff in its recommendation
9 in re application of East Central Florida Services
10 specifically cited that JJ's Mobile Home case and
11 applied that same test, first in time is first in
12 right, ultimately concluded that the municipality
13 was first in time but had waived its right by
14 having no plan to serve that -- that area, except
15 for potential future expansion. So the Commission
16 has previously applied this test of JJ's Mobile
17 Homes.

18 So this is the basis of our motion for summary
19 final order. We are first in time. JEA as a
20 municipal provider, wholly owned by the City, has
21 the City's right to provide service. The franchise
22 is memorialized in both an ordinance and an
23 agreement. And without question, we have the
24 ability to serve.

25 The other part of the JJ's Mobile Homes test

1 under the PUD ordinance, which the developer is
2 trying to avoid and get you to sanction their
3 avoidance, it is up to the developer to build the
4 facilities and dedicate them to -- to JEA.

5 Without question, JEA has the ability to serve
6 this development, assuming the developer complies
7 with its obligations under the PUD ordinance.
8 There is approximately 15,000 connections, even in
9 ultimate build-out in this development
10 approximately 3,000 for the first 10 years. JEA
11 has filed evidence along with our motion talking
12 about our resources. We currently have 370,000
13 water customers, 278 wastewater customers, and net
14 capital assets of about \$2.75 billion. There is no
15 question that JEA has the ability to provide
16 service if the developer complies with its
17 obligations under the PUD ordinance.

18 I want to address real quickly the staff
19 recommendation. Staff's recommendation is that the
20 motion be denied because conflicting reasonable
21 inferences can be drawn from the facts on five
22 different issues. JEA disagrees there are any
23 disputed issues of fact.

24 Issue 1: Whether JEA acquired the legal right
25 to provide service and has the ability. Without

1 question, JEA is wholly owned by the City. The
2 City has the right to provide service as part of
3 its public works, and has the ability to do, as I
4 just described the resources they bring to bear.

5 The second issue: Whether the PUD ordinance
6 and franchise agreement were authorized by law.
7 They were not just authorized by law, they are law,
8 and the Commission does not have the authority to
9 declare those laws invalid; nor has the developer
10 filed a judicial action to challenge them.

11 If the developer had a problem with the PUD
12 ordinance that's been on the books for 10 years,
13 it's had the option of filing an action with the
14 court to get a declaration of what exactly the PUD
15 ordinance means, whether dedication to JEA is
16 required, any of those issues could and should have
17 been resolved by a court, not to bring you to an
18 application that requires you to essentially sign
19 off under violation of the PUD ordinance.

20 The third issue: Whether the PUD and
21 franchise obligate JEA to provide service, or
22 merely give JEA the right to do. Our position is
23 that under the franchise and the PUD ordinance, JEA
24 has both the right and the obligation to provide
25 service. The obligation is subject to the

1 requirement in the PUD that the developer has to,
2 at its own expense, build the facilities and -- and
3 dedicate them to JEA.

4 The fourth issue: If JEA acquired the right
5 to provide service, has JEA failed to exercise its
6 duty to promptly and efficiently provide those
7 services which would result in a waiver? No, there
8 can be no -- there can be no waiver here. The PUD
9 ordinance is clear, the developer has to provide
10 the wastewater and water facilities, and then it's
11 up to JEA to operate them. Until the developer
12 does that, there is no service for -- for JEA to
13 provide.

14 And then finally on number five --

15 CHAIRMAN CLARK: Mr. Crabb, 30 seconds to wrap
16 up.

17 MR. CRABB: Perfect.

18 Number five: Whether any changes or updates
19 to the PUD ordinance have been made or requested.
20 The PUD ordinance is law. There is no pending
21 proceeding to revise it.

22 So on these five issues, there are no disputed
23 issues of fact, and we would be happy to take
24 any -- any questions you may have.

25 CHAIRMAN CLARK: Thank you, Mr. Crabb.

1 All right, Commissioners, any questions or
2 comments?

3 Commissioner Graham.

4 COMMISSIONER GRAHAM: I guess I only have one
5 comment. On page six, where staff talks about,
6 it's right underneath staff analysis, where staff
7 talks about the standard for generating or granting
8 final orders very high. Hold on.

9 It says: In general, summary judgment should
10 not be granted unless the facts are so crystal that
11 nothing remains -- nothing remains but the question
12 of the law. I don't think the facts of that
13 crystallized that nothing remains other than
14 questions of the law. I sat down with staff with
15 this yesterday and went round and round in a circle
16 with them, and as -- as most of the time, I agree
17 with staff on this one, and that's pretty much all
18 I have to say.

19 CHAIRMAN CLARK: All right. I will entertain
20 a motion.

21 COMMISSIONER GRAHAM: I will move staff
22 recommendation on all issues.

23 COMMISSIONER LA ROSA: Second.

24 CHAIRMAN CLARK: I have a motion and a second
25 to approve staff recommendation on all issues.

1 Any discussion?

2 On the motion, all in favor say aye.

3 (Chorus of ayes.)

4 CHAIRMAN CLARK: All opposed?

5 (No response.)

6 CHAIRMAN CLARK: Motion carries.

7 All right. Is there any other business to
8 come before the Commission?

9 Seeing none, we stand adjourned.

10 (Agenda item concluded.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, DEBRA KRICK, Court Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 14th day of January, 2021.



DEBRA R. KRICK
NOTARY PUBLIC
COMMISSION #HH31926
EXPIRES AUGUST 13, 2024