

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment of) DOCKET NO. 900889-WU
Certificates 444-W and 462-S in) ORDER NO. 24383
Charlotte County by GENERAL DEVELOP-) ISSUED: 4/18/91
MENT UTILITIES, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON
BETTY EASLEY
GERALD L. GUNTER
MICHAEL MCK. WILSON

ORDER GRANTING MOTION TO DISMISS OBJECTION, APPROVING STIPULATION AND GRANTING AMENDMENT OF CERTIFICATE IN PART

BY THE COMMISSION:

BACKGROUND

General Development Utilities, Inc. (GDU) is a Class A utility. Service is provided to approximately 33,300 water customers and approximately 15,200 wastewater customers in the West Coast Division. Overall GDU has approximately 70,000 water customers and approximately 37,000 wastewater customers. GDU is wholly-owned by General Development Corporation.

GDU's West Coast Division was issued Certificate No. 444-W in Desoto County in 1985, when the system obtained its original certificate. The rest of the West Coast Division (Charlotte and Sarasota Counties) became subject to jurisdiction effective October 1, 1989, by virtue of Section 367.171(7), Florida Statutes. The facilities were placed into operation in 1959.

The utility filed an application on November 2, 1990 to amend its certificate in Charlotte County to include additional territory. According to the utility's filing, the proposed territory in the water system will eventually serve approximately 1,429 equivalent residential connections (ERCs).

El Jobean Water Association, Inc. (El Jobean), a homeowners association, receives water service from GDU under a bulk service

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agreement as a reseller to its own territory. El Jobean filed an objection on November 9, 1990, alleging the failure of GDU to provide potable water that meets state secondary treatment standards. El Jobean also filed the same objection in two other dockets involving applications by GDU for amendment of territory in Charlotte County (Docket Nos. 900713-WS and 900612-WS). GDU filed motions in all three dockets to dismiss El Jobean's objections because the objections do not allege that the addition of the new territory will cause El Jobean to suffer any injury in fact. El Jobean has filed a response to the motion to dismiss. On November 13, 1990, Harbor Lakes Water System, Inc. (Harbor Lakes) also objected to GDU's application.

On March 5, 1991, the Commission granted GDU's motion to dismiss El Jobean's objections in Docket Nos. 900713-WS and 900612-WS. At the March 5th agenda conference, the attorney for GDU brought up a possible stipulation between Harbor Lakes and GDU whereby Harbor Lakes would agree that it does not object to the utility serving a portion of the territory requested in this docket. However, at that agenda conference, attorneys for Harbor Lakes stated that they were not prepared to stipulate at that time. Therefore, the entire item was deferred. Since that time, a stipulation has been reached between GDU and Harbor Lakes.

MOTION TO DISMISS

El Jobean, as a reseller to its own territory, has about 1,000 connections and is adding connections as the development expands. However, GDU's proposed service territory in this docket does not encompass any of the El Jobean territory. As previously stated, El Jobean filed an objection on November 9, 1990, alleging the failure of GDU to provide potable water that meets state secondary treatment standards. On February 8, 1991, GDU filed with the Commission a Motion to Dismiss El Jobean's written objection. On February 15, 1991, El Jobean filed a response to the Motion to Dismiss.

According to the Department of Environmental Regulation (DER), high sulfates and excess total dissolved solids (TDS) have been a recurring problem from GDU's Northport water plant. These are secondary water standards, which are not health-related. DER had indicated that GDU is in compliance with a Consent Agreement. In fact, DER is aware of GDU's intermittent failure to always meet the secondary standards at the Northport plant and is issuing GDU

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construction permits to add new customers. DER indicated in the Consent Agreement (#90-0548) that the failure to meet secondary standards regarding excess sulfates and TDS's was exacerbated by drought conditions during 1989 and 1990. GDU has been required to complete a study, to make plant improvements that will bring it into compliance and to file progress reports. GDU is on schedule in meeting the mandates of the Consent Agreement.

In its objection to the application for amendment, El Jobean contends that GDU is not technically able to render sufficient or adequate service to its existing customers, much less those in the proposed extension, until such time as it is in full compliance with the Consent Agreement and providing water which meets all state standards. El Jobean cites to Section 367.011(3), Florida Statutes, which states that regulation under Chapter 367 is an exercise of police powers to protect public health, safety and welfare.

In its Motion to Dismiss, GDU asserts that it is in compliance with DER's consent agreement and that exceeding the secondary standards does not affect the public health. In addition, the Motion to Dismiss alleges that El Jobean has failed to show standing pursuant to Section 367.045(4), Florida Statutes, because it has not alleged any facts to show that it is substantially affected by the extension. GDU further alleges that DER has primary jurisdiction over the issues raised by El Jobean.

El Jobean's response to GDU's Motion to Dismiss states that the Commission does not require objectors to adhere to technical rules of pleading, that El Jobean does have standing in this matter because it has been injured as a result of receiving substandard water from GDU, that GDU is not technically able to provide sufficient and adequate service to El Jobean and other customers, and that pursuant to Section 367.111, Florida Statutes, the Commission has concurrent jurisdiction with DER over compliance with water quality standards. In its response, El Jobean states that it does not believe the Commission should approve the amendment application until GDU complies with the water quality standards because allowing GDU to serve additional territory encourages a misplacement of priorities and emphasizes expansion over quality of service.

All factual allegations in El Jobean's objection are taken as true for the purposes of this decision. While it is true that the

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Commission does not require objectors to adhere to technical rules of pleading, Section 367.045(4), Florida Statutes, requires that a written objection from a customer must allege that the customer will be "substantially affected" by the requested amendment. Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478, 481 (Fla. 2d DCA 1981), requires that before a person or entity can be considered to have a substantial interest in an administrative proceeding, the person or entity must allege in its objection (1) that it will suffer injury in fact of sufficient immediacy to be entitled to a hearing pursuant to Section 120.57, Florida Statutes, and (2) the injury is of a type or nature which the proceeding is designed to protect.

After a careful and detailed review of its allegations, we find that El Jobean's objection taken in its entirety does not allege sufficient facts that, if taken as true, would show that El Jobean will suffer any injury in fact, immediate or otherwise, if the Commission authorizes GDU to serve the requested additional service territory. The objection does not allege facts which, if taken as true, show any nexus between the additional service and the quality of water served by GDU to EL Jobean. Therefore, we find that El Jobean's objection fails to meet the first prong of the two pronged test of Agrico Chemical Company. Accordingly, the objection does not show that El Jobean will be substantially affected if GDU serves the additional territory. Therefore, we grant GDU's motion to dismiss and dismiss El Jobean's objection.

Further, we find that while the Commission does have concurrent jurisdiction with DER over enforcement of water quality standards, to the extent provided in Section 367.111(2), Florida Statutes, the request of El Jobean would in effect impose more stringent water quality requirements than already imposed on GDU by DER. In addition, we heard statements at agenda that the several actions brought by El Jobean indicate a pattern characteristic of forum shopping. We do not believe such an approach is an appropriate use of the Commission's limited resources.

We note that Docket No. 900211-WS was opened to address a complaint filed by El Jobean against GDU. In that complaint, El Jobean has raised the same concerns regarding quality of service as expressed in its objection to this application. We believe that the concerns raised by El Jobean may be more appropriately addressed in the complaint docket. Further, we find this dismissal

is with prejudice for the following reasons: An amended objection may unduly prejudice GDU and the customers who have requested service by operating as an injunction to that requested service; An amended objection is statutorily inappropriate; and the aforementioned complaint docket affords El Jobean with an additional forum where its concerns may be addressed.

STIPULATION

On March 14, 1991, a stipulation between GDU and Harbor Lakes was filed. A copy of the stipulation is appended to this order as Attachment A and by reference is incorporated herein. The stipulation addresses Harbor Lake's agreement to not oppose the Commission's amending GDU's Certificates in certain areas. The objection to the balance of the territory GDU seeks to add to its certificated area remains pending. We find the stipulation reasonable and in the public interest, and therefore we approve the stipulation.

AMENDMENT

The application, which was filed on November 2, 1990, is in compliance with the governing statute, Section 367.045, Florida Statutes, and other pertinent statutes and administrative rules in effect at that time concerning an application for amendment of certificate. The application contains a check in the amount of \$2,400, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. The applicant has provided evidence that the utility owns the land upon which the utility's facilities are located as required by Rule 25-30.035(3)(f), Florida Administrative Code. Adequate service territory and system maps and a territory description have been provided as prescribed by Rule 25-30.035(3)(h) and (i), Florida Administrative Code. A description of the requested territory agreed to in the stipulation is appended to this memorandum as Attachment B. The utility has submitted an affidavit consistent with Section 367.045(2)(d), Florida Statutes, that it has tariffs and annual reports on file with the Commission. In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code.

GDU has systems regulated by the Commission in Brevard, Marion, Glades and Hendry Counties. The utility has demonstrated its financial and technical ability to provide safe and reliable

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service to its customers and to comply with the rules and regulations of the Commission. We have been contacted regarding immediate service by the Seventh Day Adventist Church which is located in the stipulated territory. Based on the above, we find it is in the public interest to grant the additional territory addressed in the attached stipulation between GDU and Harbor Lakes. The utility has filed revised tariff sheets which reflect the amended territory. In addition, GDU has been ordered in another docket to return the certificates for entry to include additional territory. The remainder of the objection of Harbor Lakes, not addressed in this stipulation, will be set for hearing.

RATES

Pursuant to Rule 25-9.004, Florida Administrative Code, the rates and charges currently approved for this utility for its West Coast Division shall be applied to the customers in the additional territory approved herein.

This docket shall remain open pending resolution of the objection of Harbor Lakes.

It is, therefore

ORDERED by the Florida Public Service Commission that the motion to dismiss the objection of the El Jobean Water Association, Inc. filed by General Development Utilities, Inc. is granted and the objection is hereby dismissed with prejudice. It is further

ORDERED that the Stipulation entered into between Harbor Lakes and General Development Utilities, Inc. is hereby approved. It is further

ORDERED that Certificates 444-W and 462-S held by General Development Utilities, Inc. are hereby amended to include the territory described in Attachment B to this Order. It is further

ORDERED that the customers in the added territory shall be charged the same water and wastewater rates and charges approved in the utility's tariffs. It is further

ORDERED that this docket shall remain open pending resolution of the objection of Harbor Lakes to the remainder of General Development Utilities, Inc.'s application for amendment.

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By ORDER of the Florida Public Service Commission this 18th
day of APRIL, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CB

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

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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.

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application of General :
Development Utilities, Inc. for : Docket No. 900889-WS
Amendment of Certificate Nos. :
444-W and 462-S in Charlotte County: Filed: March 14, 1991

STIPULATION

WHEREAS, General Development Utilities, Inc. (GDU) filed in this docket an Application of General Development Utilities, Inc. for Amendment of Certificate Nos. 444-W and 462-S for Water and Wastewater Service to Add Territory in Charlotte County, which territory is located in the following sections:

Township 40 South, Range 21 East

Section 13
Section 17
Section 18
Section 20
Section 21
Section 28
Section 29

Township 40 South, Range 23 East

Section 18

and

WHEREAS, Harbor Lakes Water System, Inc. (Harbor Lakes) has filed an objection to GDU's application; and

WHEREAS, GDU represents that there is an immediate need for water service in Section 13, Township 40 South, Range 21 East and Section 18, Township 40 South, Range 23 East, and that there is an immediate need for sewer service in Section 18, Township 40 South, Range 23 East; and

WHEREAS, notwithstanding its objection, Harbor Lakes does not oppose the Commission amending GDU's water Certificate No. 444-W, during the pendency of its objection, in order to provide water service in S13, T40S, R21E and in S18, T40S, R23E and does not oppose the Commission amending GDU's sewer Certificate No. 462-S, during the pendency of its objection, in order to provide sewer service in S18, T40S, R23E;

NOW, THEREFORE, the parties agree as follows:

1. Harbor Lakes does not oppose the Commission's approval of the portion of GDU's requested amendment to provide water service in Section 13, Township 40 South, Range 21 East, and to provide both water and sewer service in Section 18, Township 40 South, Range 23 East.

2. Except as to the specific sections referred to in Paragraph 1, nothing in this Stipulation waives the right of Harbor Lakes to prosecute its objection to the Application of GDU for Amendment of Certificate Nos. 444-W and 462-S in Charlotte County, in this docket, on any grounds available to Harbor Lakes, nor the right of GDU to defend against Harbor Lakes' objection on any grounds available to GDU.

IN WITNESS WHEREOF, the parties have executed this Stipulation the 13th day of March, 1991.

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ATTACHMENT B

GENERAL DEVELOPMENT UTILITIES, INC.

THE WEST COAST DIVISION

TERRITORY DESCRIPTION

WATER

TOWNSHIP 40 SOUTH, RANGE 21 EAST

SECTION 13

THE NORTH 125 FEET OF THE SOUTH 1322 FEET OF THE WEST 1319 FEET OF THE EAST 1671 FEET OF THE SOUTHEAST 1/2 OF SECTION 13.

TOWNSHIP 40 SOUTH, RANGE 23 EAST

SECTION 18

ALL THAT PORTION OF THE NORTHWEST 1/4 OF SECTION 18 LYING EAST OF THE SECTION LINE AND WEST OF KINGS HIGHWAY

WASTEWATER

TOWNSHIP 40 SOUTH, RANGE 23 EAST

SECTION 18

ALL THAT PORTION OF THE NORTHWEST 1/4 OF SECTION 18 LYING EAST OF THE SECTION LINE AND WEST OF KINGS HIGHWAY