BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for amendment of Certificate No. 379-S in Seminole County by Alafaya Utilities, Inc.	) DOCKET NO. 951419-SU) ORDER NO. PSC-96-1281-FOF-SU) ISSUED: October 15, 1996

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
DIANE K. KIESLING
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APPEARANCES:

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On behalf of the City of Oviedo.

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On behalf of the Commission Staff.

FINAL ORDER AMENDING CERTIFICATE NO. 379-S TO INCLUDE ADDITIONAL TERRITORY

BY THE COMMISSION:

BACKGROUND

Alafaya Utilities, Inc. (Alafaya or utility) is a Class B utility providing wastewater service in Seminole County. The utility provides service to approximately 4,569 customers. The customers receive water service from the City of Oviedo. The

utility's 1995 annual report shows an annual operating revenue of $1,498,732 and a net operating income of $370,853.

On November 15, 1995, pursuant to Section 367.045, Florida Statutes, the utility applied for an amendment of its wastewater Certificate No. 379-S to add additional territory in Seminole County. The proposed additional territory would consist of property owned by Richland Properties, Inc. (Richland). The parcel includes portions of Sections 13, 17, 18, 19, and 20, Township 21 South, Ranges 31 and 32 East and contains approximately 725 acres in Seminole County. The utility states that the proposed additional territory is contiguous to its current certificated area. Alafaya also states that the property owners plan to create approximately 1,400 single family residences.

On December 8, 1995, the City of Oviedo (City) filed with the Commission an Objection to Notice of Application to Alafaya's amendment pursuant to Section 367.045, Florida Statutes. The City contended in its objection that there is no demonstrated need for expansion of Alafaya's territory, that the application violates the City's established comprehensive plan, and that the application is not in the public interest and would compete with the city's wastewater system. Subsequently, a formal hearing was scheduled.

On January 18, 1996, Alafaya filed a complaint for declaratory and injunctive relief in the Circuit Court in and for Seminole County in Case No. 96-0115-CA-16-B. Alafaya petitioned the court to secure an order declaring that the City of Oviedo shall not provide wastewater or reuse service to the territory adjacent to Alafaya's certificated territory, prohibiting the City of Oviedo from taking such actions, and requiring the City of Oviedo to dismiss its objection filed in Docket No. 951419-SU.

On February 8, 1996, Alafaya filed an amendment to its application. The amended application contained 8 parcels of land containing approximately 4,120 acres in Seminole County. These parcels include the proposed Flying Seminole Ranch property, Live Oak Pud, River Oaks and Estes Trust Property, a private farm, and an undeveloped land parcel. Also included were three small parcels of land located within the utility's currently certificated territory. The utility projects that 5,700 single family residences will be located within these new parcels at build-out.

On February 20, 1996, the City of Oviedo filed with the Circuit Court a Motion to Abate, or in the Alternative, Stay Counts I and II of Alafaya's Complaint pending the outcome of the Commission's action in this docket. The City also filed a Motion to Dismiss Count III of Alafaya's complaint. These motions were

scheduled for hearing on June 14, 1996. On June 13, 1996, a Stipulation to Temporary Abeyance of Action was entered into by Alafaya and the City pending issuance of a final order by the Commission in this docket. On May 8, 1996, the City filed a Motion for Summary Judgment with the Commission. On May 23, 1996, Alafaya filed a Request for Official Notice and a Motion for Partial Summary Disposition.

The Prehearing Conference was held on May 17, 1996, in Tallahassee, Florida. On May 28 through 29, 1996, the technical hearing was held in Oviedo, Florida. Customer testimony was taken at the technical hearing, and seven individuals testified concerning Alafaya's application. At hearing, the City withdrew its Motion for Summary Judgment. Furthermore, Alafaya's request for official notice of certain documents was rendered moot since staff introduced these documents as exhibits. Alafaya's Motion for Partial Summary Disposition was denied as untimely. On June 26, 1996, Alafaya and the City each filed their Statement of Issues and Positions in accordance with Rule 25-22.056(3)(a), Florida Administrative Code. On July 22, 1996, Alafaya filed a Motion to Strike a Reference in the Post-Hearing Brief of the City of Oviedo. On August 6, 1996, the City filed a Memorandum in Response to Alafaya's Motion to Strike.

STIPULATIONS

At hearing, the parties agreed upon and we accepted the following stipulations:

1. Parcels E, F, G, and H should be added to Alafaya's service area.

2. Alafaya is not required to obtain the City's consent prior to serving the disputed area.

FINDINGS OF FACT, LAW AND POLICY

Having heard the evidence presented at the hearing in this proceeding and having reviewed the recommendation of the Commission staff, as well as the post-hearing filings of the parties, we now enter our findings and conclusions.

ALAFAYA'S MOTION TO STRIKE A REFERENCE IN THE POST-HEARING BRIEF OF THE CITY OF OVIEDO AND THE CITY OF OVIEDO'S MOTION TO STRIKE RESPONSE TO CITY'S MEMORANDUM

In Alafaya's Motion to Strike a reference in the City's Post-Hearing Brief, Alafaya states that the City, in a footnote in its

Post-Hearing Brief, makes reference to action purportedly taken by the City which is not a part of the record and is acknowledged as such by the City. Furthermore, Late-filed Exhibit 12 was to be limited to the outcome of the June 3, 1996 City Council meeting, but there are no references to any agreement with Seminole County regarding wastewater service in the minutes of that meeting. In its memorandum in response to Alafaya's motion to strike, the City acknowledged that the City's actions were not part of the record and assented to the striking of footnote number three in the City's brief.

On August 14, 1996, Alafaya filed a response to the City's memorandum stating that the City's response continues the fiction that the City took definitive action, that the City's executive session was held in violation of the Sunshine Law, that a statement made by the City's attorney was evidence that the City's footnote was not included in good faith, but as an attempt to improperly influence the Commission, and that the City was contemplating ex parte communications.

On August 19, 1996, the City of Oviedo filed its Motion to Strike Response to City's Memorandum stating that the Commission's rules do not provide for the filing of Alafaya's response to the City's memorandum and that the pleading was untimely. The City further stated that if the Commission did consider the substance of the response, then the City attorney's statement must be considered in context. Furthermore, the City denied contemplating any ex parte communication with any panel member or other Commissioner.

The City has assented in its response to having footnote number three stricken from its brief. Accordingly, Alafaya's and the City's motions to strike are moot. Therefore, it is unnecessary for us to rule on either motion.

NEED FOR SERVICE

According to the briefs filed in this docket, both parties seem to agree that a need for service exists in the disputed territory. However, the disagreement centers on which party is best suited to provide the service. The application contains eight separate parcels which are proposed to be included in the utility's certificated service area. Witness Chancellor testified that Parcel A is an approved Planned Unit Development of approximately 1,040 acres, and an estimated 1,000 residential units are proposed for this property. Parcel B is generally referred to as the Flying Seminole Ranch and consists of approximately 742 acres of predominately undeveloped land which has a potential of approximately 1,300 residential units. Parcel C is a parcel of

approximately 1,388 acres of predominately undeveloped land within Seminole County with an estimated development potential of 2,500 residential units. Parcel D is commonly referred to as the River Oaks and Estes Trust properties, which is approximately 866 acres of undeveloped land with a potential of approximately 800 residential units. Parcel E is a small private farm located immediately adjacent to the utility's existing service area. Parcels F, G and H are within the outer boundaries of Alafaya's existing service area.

Evidence on the timing of the need for service was presented by several witnesses. City witness Williford testified that Parcel A will be developed within the next 12 to 18 months. Both the developer of this parcel and Mr. Williford testified that Parcel B, the Flying Seminole Ranch, will be developed and need service within the next 18 months. Mr. Williford testified that the southwest portion of Parcel D, which is owned by Winter Park Holding Company, will need service within the next 12 months, while the remainder of this parcel (the Estes and River Oaks Properties) would require service within 18 months. No witness provided testimony on the timing of the need for service in Parcel C, which is located in unincorporated Seminole County. Utility witnesses Chancellor and Wenz testified only that this parcel could potentially add 2,500 residential units.

While both parties demonstrated that there will be a need for service in the disputed territory, neither party has any binding agreements for service. The city asserts that it has entered into agreements with developers to participate in the design and construction of a wastewater treatment plant to serve the disputed territory; however, it has produced only two letters from developers which address the commitment to take service from the City of Oviedo. No signed developer agreements or contracts were produced. Richland Properties' Vice President, James Wilkinson, was the only developer to provide testimony. Mr. Wilkinson stated that Richland Properties, the developer of the Flying Seminole Ranch (Parcel B), wrote a letter to the City expressing interest in joining with other developers and the City in the design and construction of a wastewater treatment plant to serve the disputed territory. The initial amount of Richland Properties' commitment was to be $12,000 dollars. Witness Wilkinson also stated that at the time he wrote the letter to the City he did not know whether Alafaya had sufficient capacity to provide service to the Flying Seminole Ranch development. Further, to date no monies have been paid out by Richland Properties. Witness Wilkinson added that Richland Properties had no binding agreement at this time with the City and that the developer would not object to service from Alafaya if the Commission granted Alafaya's amendment request.

Based on the evidence presented, we find that there will be an apparent need for service in Parcels A, B, and D in the disputed territory within 12 to 18 months. We also find that there will eventually be a need for service in Parcel C, but the timing of such is unknown at this time.

WASTEWATER TREATMENT AND DISPOSAL CAPACITY

Based on the positions, the parties obviously have divergent viewpoints. In its brief, Alafaya states that it can serve its existing and requested territory. The City of Oviedo, in its brief, argues that Alafaya's existing plant could not serve all of its existing territory and the disputed territory at build-out. Alafaya's wastewater treatment plant has a five year operating permit and a plant capacity of 2.4 MGD. However, the plant is currently limited to an inflow capacity of 1.1 MGD by DEP due to the limited effluent disposal capacity. In order to determine if the utility will have the capacity to serve its existing territory as well as the disputed territory, we have analyzed the utility's wastewater treatment plant and effluent disposal capacity separately.

Treatment Plant Capacity

The wastewater flows of Alafaya's existing service area are approximately 0.8 MGD. The utility expects the flows from the existing territory to increase to approximately 1.0 MGD when the service area reaches build-out. The utility also projects the flows for the disputed territory will be approximately 1.0 MGD. Subtracting the flows at build-out for the current territory and the expected flows from the disputed territory from the treatment plant capacity of 2.4 MGD leaves approximately 0.4 MGD of excess capacity.

The utility's flow data, both for the existing service area as well as the requested territory, was based on a usage rate of 175 gallons per day (GPD) per equivalent residential connection (ERC). This flow rate is based on the utility's actual flows of the existing customers and has been established by DEP as the flow rate to be used for this utility.

While the City agrees that 175 GPD is appropriate for estimating the flows of the existing territory, City witness Hooper testified that this rate is too low to apply to the disputed territory. Mr. Hooper testified that he believes the flows in the proposed territory to be greater than Alafaya's existing flows due to the larger houses and larger lots. However, under cross examination, Mr. Hooper admitted that he had no knowledge that DEP

limited the applicability of the 175 GPD usage rate to Alafaya's existing territory.

Mr. Hooper testified that a flow estimate of approximately 300 GPD is a better indicator of future flows in the disputed territory and is the estimate adopted by the City in its comprehensive plan for all future growth. Therefore, the City estimates the capacity needed to serve the disputed territory at build-out is approximately 1.68 MGD, using 300 GPD usage flows per ERC. Furthermore, the City points out that it has a commitment from the utility for 0.5 MGD reserve capacity at Alafaya's existing facility for two years. Adding the City's estimates of capacity needed to serve Alafaya's existing territory (approximately 1.0 MGD), the City commitment (0.5 MGD), and the disputed territory at build-out (1.68 MGD), results in a total capacity needed of 3.18 MGD. Because the total capacity needed exceeds the treatment plant capacity of 2.4 MGD, the City contends that this clearly shows Alafaya has inadequate treatment capacity to serve its existing service area as well as the disputed territory.

With regard to the City's commitment for 0.5 MGD, City witness Hooper testified that the commitment expires in approximately 10 months and that the City has taken no action to utilize this commitment. If the commitment is acted upon by the City, the total flows expected at build-out of all existing and proposed territory will exceed the capacity of the treatment plant by approximately 100,000 GPD using the utility's estimate of build-out flows. (2.4 MGD - 1.0 - 1.0 - 0.5 = 0.1 MGD, where 2.4 represents the plant capacity, 1.0 represents the existing territory at build-out, 1.0 represents the requested territory at build-out and 0.5 represents the City commitment.) Utility witness Chancellor testified that if demands exceed the existing capacity, the wastewater treatment plant site is sufficient in size to expand the wastewater treatment plant to 3.0 MGD.

Based on the evidence presented, we find that the 175 GPD per ERC established by DEP for Alafaya is the appropriate flow estimation to use for determining the adequacy of the utility's wastewater treatment capacity. The City presented no compelling evidence to indicate that this estimate would not apply to the disputed territory. Further, even if actual flow demands exceed the existing capacity, the record indicates that the present wastewater treatment plant site is sufficient in size to expand the wastewater treatment plant to 3.0 MGD. Therefore, we find that the utility has satisfactorily demonstrated that it has sufficient treatment plant capacity to serve the existing territory plus the disputed parcels.

Effluent Disposal Capacity

Currently, Alafaya's effluent disposal capacity is comprised of 1.0 MGD that flows into its percolation ponds, and 0.1 MGD reuse flows that are directed to the Ekana Golf Course. Adding the flows to the percolation ponds and golf course together results in the current 1.1 MGD permitted flow capacity. Because the current wastewater flows of the existing customer base are approximately 0.8 MGD, Alafaya has excess disposal capacity of 0.3 MGD. Utility witness Chancellor testified that the utility is considering adding an additional 100,000 gallons per day of effluent disposal capacity at the percolation pond site through spray irrigation. This additional spray irrigation at the pond would increase the excess disposal capacity to 0.4 MGD.

The utility currently has the filtration and chlorination capacity to provide 0.5 MGD of public access reuse quality effluent, of which an annual average of 0.1 MGD is being used by the golf course. This leaves approximately 0.4 MGD of public access quality effluent unutilized. Witness Chancellor testified that the utility has recently filed an application with DEP to increase its capacity to provide public access reuse quality effluent to 1.0 MGD. This would add an additional 0.5 MGD of public access reuse quality effluent ready for use. Finally, the City's ordinances require that all new developments, which will include those planned for the disputed parcels, install reuse lines and dedicate them without cost to the utility. This requirement is applicable to the new developments Alafaya proposes to add to its wastewater system. As a result of this requirement, an increase in the wastewater flows to Alafaya's wastewater treatment plant will coincide with an increase in additional effluent disposal through reuse to those developments.

The City of Oviedo takes the position that Alafaya's inflows to its plant cannot exceed the 1.1 MGD without violating the DEP permit. Therefore, the City of Oviedo contends that Alafaya's plant is limited to 1.1 MGD and not the plant capacity of 2.4 MGD. While this limitation exists, the utility has shown that an increase in the flows to Alafaya's wastewater treatment plant will coincide with an increase in additional effluent disposal through reuse to those developments. Therefore, based on the evidence in the record, we find that the utility has demonstrated that it will have adequate disposal capacity to serve the existing service area at build-out as well as the disputed territory.

TECHNICAL AND FINANCIAL ABILITY

Alafaya asserts in its brief that there has been no real challenge to the utility's technical and financial ability to serve the disputed territory. In its brief, the City admits that it does not dispute Alafaya's financial ability to serve the disputed territory. However, the City does dispute the utility's technical ability to serve the area. In support of its position, the City states in its brief that there is no evidence in the record as to how Alafaya plans to deal with wet weather operation of a dramatically increased service area. The City also points to the settlement agreement with DEP, in which the utility's treatment and disposal capacity was reduced to 1.1 MGD. The City concludes in its brief that this calls into question the prudence of allowing the utility to more than double its current operating size by granting the additional territory.

As testified to by Witness Wenz, Alafaya has been a wholly owned subsidiary of Utilities, Inc. since 1994. Utilities, Inc. currently provides service to about 150,000 customers in 13 states, including about 28,000 within Florida. All of these subsidiaries are in good standing with the Florida DEP. Through its affiliation with Utilities, Inc., Alafaya has ready access to in-house experts in engineering, operations, accounting, and other areas of regulation. Additionally, Alafaya has access to capital funding on an as-needed basis, which could prove to be beneficial in the future if increasingly more stringent environmental regulations continue within the industry.

As discussed earlier, the utility has the wastewater treatment and disposal capacity to serve its existing territory as well as the disputed territory. The treatment plant capacity of 2.4 MGD is sufficient to serve Alafaya's current territory and the proposed territory, assuming a DEP approved usage rate of 175 GPD per ERC. Additionally, Alafaya has shown that it can provide adequate effluent disposal through use of its percolation ponds, current reuse flows, spray irrigation at the percolation pond site, and public access reuse to the new developments within the requested territory.

With respect to the settlement agreement with DEP, the agreement specifically provides that Alafaya is in compliance with the requirements of Chapter 403, Florida Statutes, and Rules 62-3, 62-4, 62-600, and 62-610, Florida Administrative Code, and that there have been no DEP notices of violation or deficiencies since Utilities, Inc. acquired the utility in 1994.

Based on the above, we find that the utility has demonstrated that it has the technical and financial ability to serve the disputed territory.

PROVISION OF TIMELY SERVICE BY THE CITY

The City presently provides wastewater service to approximately 400 customers within the city through a capacity purchase agreement with Seminole County. The City adopted a Wastewater Master Plan in 1990 which calls for a central wastewater system for all areas outside of Alafaya's service area to accommodate the projected growth in the area. According to City witnesses Williford and Hooper, the City plans to provide wastewater service to the disputed territory, excluding the parcel located outside of the City's municipal boundary. The City proposed two options for providing the wastewater service to the disputed territory. The first option is to build a new wastewater treatment plant to serve the disputed territory. The second option presented by the City is to use an existing 10-inch force main currently serving the Kingsbridge community to serve the disputed territory and purchasing additional treatment capacity from Seminole County.

Witness Hooper testified that the wastewater plan for the City includes a permanent concrete treatment facility with an initial phase of 0.5 MGD, expandable to 2.0 MGD. This facility is planned to have a public access treatment level with Class I reliability. It is planned that effluent disposal would be accomplished by a reclaimed water distribution system. The City presented testimony that a pre-application meeting to build its wastewater treatment plant was conducted with the DEP on February 12, 1996. Witness Hooper testified that the wastewater treatment plant could be permitted and constructed and on-line by the end of January, 1998, presuming a permit filing date at the end of May, 1996. However, at the time of the hearing on May 28 and 29, the City had not submitted its application to the DEP for the proposed wastewater treatment plant. The projected date for the consultant to get approval by the City Council was at the June 3rd Council meeting, after which time, the permit application would be submitted to the DEP for approval.

Witness Williford provided Late Filed Exhibit 12 reflecting the decision of the City Council at the June 3rd meeting. This exhibit states in pertinent part:

> Mr. Hooper presented to the City Council the alternatives of the City constructing its own central wastewater facility as well as the City purchasing wholesale sewer

> capacity from the Iron Bridge facility through Seminole County.
>
> Because of the complexity of the issues, the City Council decided to review the information presented and to schedule a work session at a future point in time in order to have adequate time to discuss these alternatives. That was the final decision of the City Council at this meeting.

This action by the City Council appears to virtually bring the City's permitting process to a halt. Therefore, it appears that the City has made no decision as to whether the City is going to build its own wastewater treatment plant or work out an agreement with the County for additional treatment capacity.

Witness Hooper testified that it would take approximately 20 months to complete the proposed wastewater treatment plant after the City acquires all of the necessary permits from the DEP, or 14 months if the project was on a fast track. As discussed earlier, there will be a need for service in at least two parcels in the disputed territory within 12 months. Based on the time needed to complete construction, it does not appear that the City can timely meet this need through building its own wastewater treatment plant.

The City also presented testimony regarding the possibility of serving the disputed territory through a modification to its wholesale agreement with Seminole County. City witness Hooper testified that the existing 10-inch force main currently serving the Kingsbridge community could also be used to provide service to the disputed territory. The existing 10-inch force main will serve approximately 500 new customers in the disputed territory before an upgrade to the force main would be required. Witness Hooper further testified that it would take an additional six months from the time the City and Seminole County reached an agreement in order to build the new distribution line from the existing 10-inch force main currently serving Kingsbridge to the disputed territory. Also, a new pump station may have to be constructed along with the new distribution line which could add to the construction time.

The City presented no testimony that suggested the City and Seminole County have reached an agreement or that they were discussing the possibility of providing service to the disputed territory. Further, there was no testimony presented by the City that would suggest any date in the future when such an agreement could be reached or when the construction of the new service distribution line would begin. In fact, as mentioned above, before construction of the main extension could begin, a decision would

have to first be made by the City Council as to whether the City should build its own treatment plant or pursue contract negotiations with the County. The record contains no evidence which indicates that such a decision has been made.

In conclusion, the evidence indicates that the City of Oviedo could serve the disputed territory either by building its own wastewater treatment facilities or by purchasing bulk capacity from Seminole County. However, we find that the City cannot provide service in a timely manner if it chooses to build its own wastewater treatment plant. Furthermore, we find that it is questionable whether the City can provide service to meet the early demand for service in the disputed territory if it chooses to pursue extension of the wholesale wastewater agreement with Seminole County.

COMPREHENSIVE PLAN

This issue originates from the statutory provision in Section 367.045(5)(b), Florida Statutes, which states:

> When granting or amending a certificate of authorization, the commission need not consider whether the issuance or amendment of the certificate of authorization is inconsistent with the local comprehensive plan of a county or municipality unless a timely objection to the notice required by this section has been made by an appropriate motion or application. If such an objection has been timely made, the commission shall consider but is not bound by, the local comprehensive plan of the county or municipality.

The City maintains in its brief that the comprehensive planning process in Florida is of paramount importance in strengthening the role of local government in controlling future development, in enhancing the ability of local government to promote, protect, and improve the public health, safety, and general welfare of its residents, and to enhance the ability of local government to guide the control and timing of development within the provision of adequate public facilities.

The City asserts that the record is clear that the proposed amendment is inconsistent with the city's lawfully adopted comprehensive plan. According to Mr. Pelham, witness for the City, the amendment is inconsistent with the comprehensive plan in the following ways:

1. the strong city policy of controlling central sewer service within the City of Oviedo;

2. the city's desire to achieve the important management goals relating to the timing and phasing of development;

3. achievement of environmental goals; and,

4. the achievement of greater efficiency in the provision of these services.

Alafaya maintains that the proposed amendment is not in conflict with the City's comprehensive plan. In support of this position, Alafaya points to the fact that the map of the City's sewer service area contained in the comprehensive plan does not contain any of the proposed territory requested in this application for amendment. It is only the recent comprehensive plan amendments still pending before the Department of Community Affairs (DCA) which designate the disputed territory as the future service area of the City. Alafaya witness Wenz testified that the utility has objected to these amendments.

Alafaya further argues that the amendment is not inconsistent with stated goals within the wastewater element of the comprehensive plan. The stated goal of the wastewater element of the City's comprehensive plan is:

> To provide cost effective environmentally acceptable wastewater treatment facilities to serve the existing and future development of the City.

The utility maintains that the use of Alafaya as the central wastewater provider furthers that goal. The utility points out in its brief that since the comprehensive plan was adopted six years ago, Alafaya has operated as the central wastewater provider within the City. Witness Williford testified that during the 1980's, the City experienced a 600% population increase. The utility argues that Alafaya was the only provider of central wastewater service during this time, and obviously the City has been able to control growth without using wastewater service as its method of control.

We disagree with the conclusion drawn by Alafaya with regard to the maps contained in the comprehensive plan. The title on the page depicting the map is "City of Oviedo, Sewer Service Area, November 1991". Clearly this map is a representation of the sewer service area then served by the City, not necessarily all of the territory it intends to serve. City witness Williford testified that the comprehensive plan contemplated the adoption of a master

wastewater plan. Further, witness Williford testified that the master wastewater plan prepared by Glace and Radcliffe, contains a map with various wastewater service areas that in fact do encompass all of the existing municipal boundaries of the City. Based on this evidence, we find that the comprehensive plan contemplated the City providing wastewater service to the entire city boundaries.

The City has reasonably shown that the comprehensive plan indicates that it is the City's policy that it should be the provider of central wastewater service within the City limits of Oviedo. The wastewater element of the plan contains numerous references to the City providing the wastewater service. The introduction to this element of the plan contains a reference to the City's evaluation of options for providing central sewer service in the City and that the City is committed to providing service, but more evaluation is needed in order to select an option or combination of options. Further, Section 4-1.2.7 of the Wastewater element contains the City's priority for extending central sewer service within the city. Therefore, the evidence indicates that the proposed territory amendment would be inconsistent with this aspect of the wastewater element of the City's comprehensive plan.

However, with regard to the other alleged inconsistencies noted by witness Pelham, we believe that these goals can be achieved regardless of which entity provides the central wastewater service.

With regard to the City's desire to achieve the management goals relating to the timing and phasing of development, the City has other, equally effective, means to control timing of development. As noted by witness Williford, the City provides the water service to all parts of the municipality, including those areas located within Alafaya's currently certificated wastewater service area. Witness Pelham testified that the availability of water service can be used to control development, but the City's position would be materially weakened if it cannot control the central wastewater facilities as its plan calls for. However, witness Pelham failed to show how the position would be so weakened, with the exception of ownership of the utilities. He agreed that there are a great many instances where private utilities co-exist with governments within comprehensive plans. He further testified that there are quite a few comprehensive plans that do not adopt as a policy ownership and control of all the utilities, but rather elect other methods of achieving that goal. He concludes, however, that this was not the approach taken by the City. Based on the evidence presented, we believe it is only the utility ownership aspect of the comprehensive plan that witness

Pelham is referring to when he states that without control of the wastewater utility, the City's position is materially weakened.

With regard to the achievement of environmental goals, we believe it is the provision of central sewer service that supports this aspect of the comprehensive plan, not which entity provides it.

As mentioned above, witness Pelham also alleged that the amendment is inconsistent with the objective in the comprehensive plan relating to the achievement of greater efficiency in the provision of central sewer service. However, the evidence in the record does not support this allegation. As discussed earlier, the utility demonstrated that its existing wastewater plant has sufficient excess capacity to serve the proposed territory as the need arises. As testified to by witness Wenz, the use of these existing facilities would allow for economies of scale as the plant would be more fully utilized. Greater economies of scale are beneficial to the customers of the utility. As previously discussed, the City could provide the necessary capacity to serve the proposed territory by either a bulk agreement with the county or building its own wastewater treatment plant. Because Alafaya's proposal to serve the proposed territory would utilize existing treatment facilities, we find that it would be an efficient means of providing service due to the increased economies of scale. If the City provides service to the proposed territory by a bulk agreement with the County, similar economies and efficiencies could be realized. However, if the City elects to provide service by building its own wastewater treatment plant, there will be a reduction in efficiency since the Alafaya plant will be under-utilized.

Therefore, while the proposed amendment is inconsistent with the comprehensive plan with regard to the ownership aspect, we believe it meets the other goals within the wastewater element of the comprehensive plan. The question, then, becomes whether the inconsistency warrants a denial of the application. Alafaya witness Wenz argued that the proposal meets the stated goal set forth in the wastewater element of the comprehensive plan of providing cost effective, environmentally acceptable wastewater treatment to serve the existing and future development of the City. The City asserts in its brief that this argument results in the complete gutting of the City's comprehensive plan and makes a mockery of the comprehensive planning process.

However, in our opinion, the City failed to demonstrate how this is true if the stated goals and objectives of the comprehensive plan can be met with the exception of ownership of

the wastewater utility service. Since all goals within the comprehensive plan are not equally important, one or more of the objectives or policies may not be met at any time, as long as the overall goal is being met. Therefore, we believe that the overall goal of the wastewater element should be focused on when evaluating the consistency of the amendment application with the City's comprehensive plan. As discussed above, the application is consistent with this overall goal.

In its brief, the City suggests that whenever possible the Commission should attempt to harmonize Chapters 367 and 163, Florida Statutes, when construing comprehensive plans in its evaluation of an application for amendment. We agree with this approach. In our opinion, to achieve harmony between the statutes, the application for amendment should be evaluated in light of the overall goal of the comprehensive plan as it relates to wastewater service, not with any specific objective or policy within the plan. This evaluation indicates to us that Alafaya's application is in concert with the overall purpose of the comprehensive plan, and, therefore, we find that the conflicts with portions of the comprehensive plan should not be fatal to the utility's application.

Further, as discussed previously, Parcel C of the requested territory is not located within the municipal boundaries of the City of Oviedo. As testified to by witness Williford, the City does not have any jurisdiction over any territory in Seminole County. Also, as testified to by witnesses Wenz and Williford, the City does not intend to provide service within Parcel C. In fact, Section 4-1.4.5 of the wastewater element of the city's comprehensive plan provides that "[t]he City's central sewer area shall not extend beyond municipal boundaries." Therefore, the City's comprehensive plan does not control development within Parcel C. That parcel would be controlled by the comprehensive plan of Seminole County, which has chosen not to object to the application for amendment or intervene in this proceeding. Based on this, we find that service by Alafaya of Parcel C cannot be in conflict with the comprehensive plan of the City of Oviedo.

DUPLICATION OF SERVICE

Alafaya believes that competition or duplication in this proceeding is created by proposed construction of new treatment, disposal and reuse facilities, reuse transport facilities, or off-site effluent disposal facilities which would be redundant to those currently available to provide service, as well as reservation of additional bulk service capacity in existing facilities of others. The City believes that duplication exists when an entity has taken

good faith steps to provide service to a particular area consistent with the need for service in that area. Neither party presented any evidence at hearing regarding this issue.

Section 367.045(5)(a), Florida Statutes, provides that the Commission may not grant an amendment to a certificate if the extension of the system would be in competition or duplication of any other system or portion of a system unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service. Section 367.021(11), Florida Statutes defines "system" as facilities and land used and useful in providing service.

In Order No. PSC-92-0104-FOF-WU, Docket No. 910114-WU, issued March 27, 1992, the Commission specifically stated:

> we cannot determine whether a proposed system will be in competition with or a duplication of another system when such other system does not exist. We do not believe Section 367.045(5)(a), Florida Statutes, requires this Commission to hypothesize which of two proposed systems might be in place first and, thus, which would compete with or duplicate the other. Engaging in such speculation would be of little use.

In Order No. 17158, Docket No. 850597-WS, issued February 5, 1987, the Commission stated that it was not required to:

> speculate as to competition with, or duplication of, proposed systems which are essentially little more than future possibilities. Rather, the statute addresses the existing system as that which warrants a closer investigation as to the potentially undesirable effects of duplication and/or competition.

The City proposes a very liberal standard for determining when competition or duplication exists. The City suggests the standard is met when a party takes good faith steps to provide service to a particular area without regard to whether any physical facilities are actually in place. Alafaya proposes a standard similar to the City's in that it believes that the proposed construction of facilities which would be redundant to those currently available to provide service would constitute competition or duplication, as well as the reservation of additional bulk service capacity in existing facilities of others. The standards suggested by both parties, however, appear contrary to the statute and the

Commission's prior decisions. In fact, Commission precedent clearly requires that some physical facilities be in existence before the competition/duplication analysis is made. Furthermore, the parties' standards are simply too broad and undefined to be workable and would create a litany of litigation.

Based on the foregoing, we find that some physical facilities must be in place before duplication or competition can exist. The determination involving exactly what physical facilities are necessary in order to constitute a system and require the duplication/competition analysis is one that must be made on a case by case basis.

Alafaya believes that granting the amendment will not result in a system which is in competition with or duplication of the City's system. The City believes that Alafaya's proposal would constitute duplication of the City's proposed system.

Witnesses Williford and Hooper testified that neither Alafaya nor the City has any physical facilities in the disputed territory. Witness Hooper further testified that the City owns no wastewater treatment or effluent disposal facilities anywhere. In order to serve the territory, the City must decide first whether it will build its own facilities or purchase bulk capacity from the county. The City has not yet reached such a decision.

Alafaya cannot duplicate or compete with that which has not yet been built. Since Alafaya has no collection system in place within the disputed territory, competition or duplication of the utility's collection lines will not exist if the City serves the territory. However, Alafaya has shown that it has excess treatment plant capacity that will remain under-utilized if the utility is not allowed to provide service to the disputed territory. Therefore, we believe the City's construction of a wastewater treatment plant would be in competition with and duplication of Alafaya's existing treatment plant which has adequate excess capacity to serve the territory.

However, as testified to by City witnesses, the City could opt to serve the disputed territory through expansion of its bulk capacity agreement with Seminole County. If this option is chosen, service by the City to the disputed territory would be through excess capacity of an existing treatment plant, which is the same situation that exists with Alafaya.

Because there are no physical facilities in place in the disputed territory by either party, we find that service by either party would not be in competition with or constitute a duplication

of any collection system. With regard to treatment facilities, we find that Alafaya's treatment facilities are not in duplication of the City's proposed treatment facilities, because they are non-existent. If the City opts to build its own facilities, the City's treatment plant would be in competition with and duplication of Alafaya's existing treatment plant. Section 367.045(5)(a), Florida Statutes, provides that the Commission may not grant an amendment to a certificate if the extension of the system would be in competition or duplication of any other system or portion of a system unless it first determines that such other system or portion thereof is inadequate or unable to provide adequate service. No such system exists. Therefore, this point is not relevant to our decision.

The second part of this issue is that if duplication does in fact exist, are those existing systems inadequate to meet the reasonable needs of the public, or are the persons operating those systems unable, refusing or neglecting to provide reasonably adequate service. The existing system in this case would be the existing treatment plant of Alafaya. Alafaya's position is that its system is clearly adequate to meet the reasonable needs in the disputed territory. The City's position is that the record is clear that the City's proposed system is clearly adequate to meet the needs of the disputed territory, and, therefore, Alafaya's application should be denied. We find that the utility's treatment plant is adequate to meet the projected need for service on a timely basis, and the utility has the technical and financial ability to provide service to the disputed territory. Further, Alafaya is obviously willing to provide service as evidenced by filing this application for approval to do so.

CONSIDERATION OF PUBLIC INTEREST

In its brief, Alafaya asserts that it is in the public interest to grant this amendment for several reasons. First, Alafaya is the only utility that currently provides wastewater collection, treatment and reuse service within the City since the City provides only limited wastewater collection service. The proposed extension will provide it with greater efficiencies in the utilization and provision of utility services and will allow Alafaya to expand the economies of scale already in place. Second, the utility has existing capacity and can provide service on demand, whereas the City has no wastewater treatment or effluent disposal facilities and cannot complete construction of a wastewater treatment plant within the time frame that wastewater service will be needed by the new developments. Third, both the utility's current service availability charges and monthly wastewater rates are lower than those of the City. Fourth, while

the City currently provides no reuse, Alafaya has filed a wastewater reuse study with the Commission and has filed an application with the DEP which would allow the utility to expand its current reuse capacity and apply public access quality reuse to its existing and proposed territories. Finally, Alafaya maintains that it has operated its wastewater facilities in compliance with DEP statutes and rules.

The City maintains, in its brief, that in determining whether an application for amendment is in the public interest, consideration must be given to the consistency of the application with the local comprehensive plan. The City concludes that this issue alone makes denial of Alafaya's application in the public interest. According to the City, denial would maintain the integrity of the City's comprehensive plan, allow the City to fully use the tools contemplated in its plan to control growth and urban sprawl, allow the City to achieve greater efficiencies of its own systems, send a clear message to Alafaya and other similarly situated private utilities that participation in the comprehensive planning process is a critical component of a utility's commitment to the community, and result in a harmonization of the planning process and the Commission-governed certification process. The City contends that there are other reasons that the public interest would be served in denying the application, including the benefit to the region from the use of the state-of-the-art Iron Bridge facility and allowing Alafaya to concentrate its service efforts on its existing territory where no reuse service is provided.

Alafaya claims in its brief that it is the only utility that currently provides wastewater collection, treatment and reuse service within the City of Oviedo since the City provides only limited wastewater collection service, and that the proposed extension will provide it with greater efficiencies and economies of scale. In responding to this, the City points to the fact that the treatment plant with excess capacity is a second ring-steel package plant that was permitted for construction in 1988. The City concludes that since 1988 the utility has been able to operate efficiently and at its current rate structure, so there is no reason why it cannot continue to do so now even if this application is denied. However, the record indicates that efficiencies and economies of scale can be enhanced for Alafaya with the approval of this application. As discussed earlier, the utility has excess treatment plant capacity using the DEP approved usage rates, which can only be fully utilized with additional effluent disposal capacity. The additional territory offers the utility both additional customers to utilize the excess treatment plant capacity and a means of effluent disposal through reuse. Such future efficiencies would inure to the benefit of the utility's existing

customer base (City of Oviedo residents), as well as future customers of the utility.

A related argument raised by the utility in its brief is that it has existing capacity and can provide service on demand, whereas the City has no wastewater treatment or effluent disposal facilities and cannot complete construction of a wastewater treatment plant within the time frame that wastewater service will be needed by the new developments. While the City discussed an alternative option for providing service by expanding its contract with Seminole County to purchase additional treatment capacity, the evidence further indicates that the City needs additional time to choose which option it will pursue. Based on this delay, it is questionable whether the City and the County could reach a suitable agreement in time to provide service based on the timing of the demand. Therefore, while the utility has existing excess capacity which can be utilized to timely serve the requested territory, it is questionable that the City could meet the demand on a timely basis.

As support for approval of this application, Alafaya states that both the utility's current service availability charges and monthly wastewater rates are lower than those of the City. The City maintains that while the utility's current rates might be lower than the City's, there is no evidence to suggest that Alafaya's rates will remain static in the future. The City also asserts that there was no evidence submitted in this record that the City's rates were unreasonable. We agree with the City. It is dangerous to rely on current rates when evaluating the application for additional territory, especially when such amendment will substantially increase the utility's service area. While there was no evidence that Alafaya's rates and charges would increase with the addition of this territory, the utility currently has an application for approval of a reuse plan pending in another docket before this Commission. Part of the reuse plan is an analysis of the utility's rates and charges resulting from the expansion of reuse service. Therefore, we believe that a comparison of the parties' current rates and charges should not be a factor considered in the evaluation of this requested territory amendment.

As part of its public interest argument, Alafaya maintains that while the City currently provides no reuse, the utility has filed applications with the DEP and PSC which would allow it to expand its current reuse capacity and apply public access quality reuse to its existing and proposed territories. While not disputing this statement, the City has indicated that it plans to provide reuse within its corporate limits if it serves the territory in question. In fact, the City has faulted the utility

for not providing reuse to its current territory and suggests that if this amendment is denied, the utility could concentrate its service efforts on its existing territory where no reuse service is provided. We have not considered this argument in this docket. As mentioned above, the utility has a pending application for evaluation of several options for providing reuse, including providing reuse to customers within its current territory. A decision on this matter will be made in another docket.

Finally, Alafaya maintains that it has operated its wastewater facilities in compliance with DEP statutes and rules. The City states that Alafaya was subjected to a moratorium on additional connections to its facility in 1994 and was forced into a settlement agreement with DEP resulting in a reduction of permitted disposal capacity. The City argues that this calls into question the prudence of allowing the utility to more than double its size by granting this application. However, it is the very addition of customers able to accept reuse which will allow the utility to utilize the excess treatment capacity currently in place. Further, the evidence shows that Alafaya is in compliance with DEP rules and that there have been no notices of violation or deficiencies since Utilities, Inc. acquired the utility.

Within its brief, the City argues that the alleged inconsistency with the comprehensive plan of the City of Oviedo alone makes denial of Alafaya's application in the public interest. However, as discussed previously, the evidence indicates that the amendment is inconsistent with the wastewater element of the plan only in that ownership of the wastewater utility would not rest with the City. The primary goals of the wastewater element are tied more to the provision of centralized wastewater service, rather than ownership of the utility. Therefore, we believe the inconsistency with the City's comprehensive plan is not contrary to the public interest.

Public Testimony

As mentioned earlier, seven members of the public testified at the hearing concerning Alafaya's application, five of which are customers of the utility. The two public witnesses who are not utility customers do not own property in the disputed territory. One of these individuals expressed concern about the effect that service to the disputed territory might have on the land values of the neighboring properties. The other expressed concern that the availability of sewer service within the disputed territory might create urban sprawl. We have previously addressed the consistency of service to the disputed territory by Alafaya with the City's comprehensive plan and have determined that the application is

consistent with the overall goal of the comprehensive plan, which is designed to guide and control the timing of development within the City.

Two customers representing existing subdivisions within Alafaya's current service territory testified concerning the provision of reuse within the territory. A representative of the Riverside subdivision presented 70 petitions in opposition to the application, and a representative of the Twin Rivers subdivision presented 300 petitions in opposition to the application. Customers within these subdivisions are interested in obtaining reuse and do not believe the utility should be given additional territory until reuse service is provided within the existing territory. As discussed earlier, the provision of reuse service within the existing territory is not an issue in this docket, but will be addressed in another docket.

The president of the Alafaya Woods Homeowners Association, presented 240 signed letters in opposition to the application. Concern was expressed regarding Alafaya's expansion of its existing plant capacity since customers believe increased noise and odor would occur. We have determined that Alafaya has existing capacity to serve the disputed territory; therefore, no plant expansion should be necessary.

Another customer testified regarding his concern that the utility has not demonstrated sufficient willingness to work with the City and developers on which entity should serve the territory. He also stated that the City has wastewater service already in place. Additionally, he expressed concern with the capacity of the retention ponds and the rising of the groundwater. The evidence shows that the City has only a collection system in place and would either have to build a treatment plant or purchase bulk service from the County to serve the disputed territory. With regard to his concern with the capacity of the retention ponds (or percolation ponds), if Alafaya's application is granted, additional effluent disposal will be provided by reuse of reclaimed water and will not affect the percolation ponds.

Another customer testified that he is philosophically opposed to an outside utility providing wastewater service within a city and that he is concerned that the City system will not grow large enough and be strong enough to provide service throughout the rest of the City if this application is approved. He also expressed concerns with the capacity of the retention ponds.

CONCLUSION

We find that Alafaya's application is in compliance with the governing statute, Section 367.045, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for amendment of certificate. The application contains a check in the amount of $2,250.00 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 25-30.036(1)(d), Florida Administrative Code. Adequate service territory and system maps and a territory description have been provided as prescribed by Rule 25-30.036(1)(e),(f) and (i), Florida Administrative Code. A description of the territory requested by the utility is appended to this issue as Attachment A. The application contains an affidavit, consistent with Section 367.045(2)(d), Florida Statutes, that it has tariffs and annual reports on file with the Commission. Further, the utility has filed revised tariff sheets incorporating the additional territory into its tariff and has submitted Certificate No. 379-S for entry reflecting the additional territory.

As previously discussed, we believe the utility has demonstrated the technical and financial ability to provide service on a timely basis in accordance with the need for service in the area, that the provision of service will enhance efficient use of existing utility facilities and result in the achievement of future economies of scale, and that it is consistent with the stated goal within the City's local comprehensive plan. Therefore, we believe Alafaya has demonstrated that granting this application is in the public interest. In making this decision, it is not necessary that we judge whether or when the City could serve the territory. It is only necessary to conclude that the City failed to demonstrate Alafaya's inability to adequately serve the disputed territory, or how the application was otherwise contrary to the public interest. For the reasons discussed previously, we believe that the City did not accomplish this. Based on the foregoing analysis, we find that it is in the public interest to grant the amendment application of Alafaya filed in this docket. Accordingly, we grant Alafaya's application for amendment to include the territory contained in Attachment A. Alafaya shall charge the customers in the territory herein the rates and charges approved in its tariff until authorized to change by this Commission. No further action is required; therefore, this docket shall be closed administratively after the approval of revised tariff sheets concerning the territory.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction to consider and determine the matters regarding Alafaya's amendment of territory and provision of service to its entire territory, and other matters at issue in this docket pursuant to Sections 367.011, 367.045, and 367.121, Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Wastewater Certificate No. 379-S, held by Alafaya Utilities, Inc., is hereby amended to include the additional territory described in Attachment A of this Order, which by reference is incorporated herein. It is further

ORDERED that Alafaya Utilities, Inc., shall charge the customers in the territory herein the rates and charges approved in its tariff until authorized to change by this Commission. It is further

ORDERED that each of the findings in the body of this Order is hereby approved in every respect. It is further

ORDERED that this docket shall be closed administratively, after staff's approval of the revised tariff sheets concerning the additional territory.

By ORDER of the Florida Public Service Commission, this 15th day of October, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: _____
Chief, Bureau of Records

(S E A L)

BLR

DISSENT

Commissioner Joe Garcia dissents from the Commission's decision in this matter with the following statement:

In Order PSC-96-1137-FOF-WS[1], I dissented in part based on my belief that the record was unclear as to whether the grant of the application was "in the public interest." In that docket, as in this case, a regulated utility sought an extension of its Commission-approved territory under lawful protest from a municipality which also intended to serve the disputed territory.

The majority's error in defining what constitutes duplication or competition, and its subsequent misapplication of Section 367.045(5)(a), Florida Statutes, makes it impossible for any entity seeking to serve a disputed territory to successfully challenge an application, so long as the applicant satisfies a few objective qualifications. If all we are required to do is determine that the applicant utility possesses the technical and financial capability to serve the disputed territory, and that no other utility has facilities in the disputed territory, then all the discovery, litigation, and hearings are pointless.

Florida Statutes provides that this Commission may not grant an amendment in a utility's service territory, if it will be in competition with or duplication of another system, unless it is first determined that the other system is "inadequate to meet the reasonable needs of the public...." Sec. 367.045(5)(a). As part of our analysis, this Commission undertook the task of defining what constitutes competition or duplication of service.

The standard applied by the majority states, "there must be some physical facilities in existence before duplication or competition can exist. Exactly what physical facilities are necessary to constitute a system and require the duplication/competition analysis is one that must be made on a case by case basis." [2] This standard fails to address even the most obvious question: Where must the facilities exist? Utilities are usually reluctant to build facilities based on speculation of this Commission's future approval of amendments to territory. The most likely scenario is that facilities exist which can be extended to serve the disputed territory. I believe the Florida Statutes and the record in this docket supports that conclusion. I find that Section 367.045(2)(b), Florida Statutes, does provide the Commission with some guidance regarding this issue. It states in part:

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[1] Docket No. 941121-WS, Application for amendment of Certificates Nos. 359-W and 290-S to add territory in Broward County by SOUTH BROWARD UTILITY, INC.

[2] Order at 18.

> When a utility applies for an amended certificate of authorization from the Commission, it shall:
>
> * * *
>
> (b) Provide all information required by rule or order, which information may include... the existence or non-existence of service from other sources within geographical proximity to the area that the applicant seeks to ... add, (Emphasis added)

The standard would appear to be what facilities are in the geographical proximity and not which facilities are in existence in the area in dispute.

By applying the standard which the majority adopts, there can be no possibility of duplication of facilities in the disputed territory unless a party actually extended facilities prior to Commission approval. This creates a "race to serve", a condition which both Florida Statutes and Commission policy seeks to avoid.

The record suggests that both parties have facilities in the geographic proximity available to serve the disputed territory.— The majority recognizes that the utility has excess capacity, and that the City can also serve the disputed territory via bulk capacity agreement with Seminole County.[3]

Concerning Alafaya's excess capacity, the majority raises the issue that the utility's plant capacity will be under-utilized if not allowed to serve the disputed territory.[4] This observation is troubling to me in more than one respect. I believe that excess capacity exists independently of the disputed territory, not specifically for it. Otherwise, we risk sending the signal to utilities that the notion of certificated territories has no meaning or impact on the sizing of plants. The majority's concern in this context also creates the appearance that this Commission is favoring its regulated utilities.[5]

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[3] Ibid. at 12.

[4] Ibid. at 15, 18.

[5] For example, Staff recognizes that "service to Parcels A, B, and D would be in conflict with the comprehensive plan of the City of Oviedo since the plan specifies ownership of sewer service by the City." (Rec. at 22). The majority argues correctly and, one would think, with finality by asserting that the Commission is not bound in its decision by the comprehensive plan, pursuant to Section 367.045(5)(b), Florida Statutes. But further comment on the comprehensive plan is indicative of the provincial attitude that seems to pervade

The key in this case, however, lies in the interpretation of the phrase "in competition with" found in the statute. In its analysis, the majority uses the notions of duplication and competition interchangeably. While I agree that there is some overlap between the two concepts, I disagree with the idea that the same analysis can properly serve to evaluate the two.

The majority's position cannot overcome the fact that there are clearly efforts on the part of more than one party to secure the disputed territory, by virtue of the City's protest in this docket. This is the essence of competition, and precisely what the controlling statute was written to address. Had this been a case of two regulated utilities trying to serve the same territory, it might hold true that this Commission has all the authority to settle the dispute with a measure of finality, by awarding the disputed territory to one utility or another.— The fact that our decision today cannot prevent the City from serving the disputed territory makes the existence of competition, and the possibility of duplication, more real. We are therefore obligated by Section 367.045(5)(a), Florida Statutes, to determine that the City's ability to serve the reasonable needs of the public is inadequate, if we are to approve the utility's application.

The plain language of this subsection does not suggest that this determination take the form of a comparison of the two competing systems, in order to choose a "winner". Rather, the clear operation of the statute is that unless the inadequacy of the other system is established, the application must be denied. This interpretation allows the Commission to discharge its duty to assess any regulated utility's ability to serve and does not conflict with a municipality's exempt status, in keeping with the degree of deference which Florida Statutes, and the constitution, confer upon municipal governments.[6] Consistent with this concept is Fargo Van and Storage v. Bevis, 324 So.2d 129 (Fla. 1975):

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our consideration of these matters:

> Since all goals within the comprehensive plan are not equally important, one or more of the objectives or policies within the element may not be met at any time, as long as the overall goal is being met.

(Order at 16). I doubt any autonomous political subdivision, exempt by statute from our regulation, would agree with this cavalier interpretation of a lawfully passed municipal act.

[6] See Sections 367.022(2), 180.02(2), Florida Statutes, among others.

> Burden is on applicant for certificate in territory already served by another carrier to show that existing service and facilities are unsatisfactory and that public convenience and necessity requires granting of additional service.

After a determination of duplication and/or competition, the burden remains with the applicant to show that existing facilities in the geographical proximity are inadequate.

Under the limited focus of consideration adopted by the majority, there is no need to consider anything outside of the applicant utility's ability to serve. We nevertheless considered the City's ability to serve, concluding that it "could serve the disputed territory either by building its own wastewater treatment facilities or by purchasing bulk capacity from Seminole County." (Rec. at 17). At no time did this Commission determine that the City could not serve at least that part of the disputed territory which lies within its boundaries.[7] Doubts as to the viability of the City's ability to serve via bulk capacity agreement seem to rest solely on the fact that no negotiations were underway between the City and Seminole County at the time of the hearing. I believe we can equate negotiations for bulk capacity with construction necessary to serve the disputed territory. For reasons previously stated, it does not surprise me that no agreement was in place, much as there were no facilities on the disputed territory. Furthermore, there is no evidence to suggest that Seminole County does not possess the excess capacity which the City would need to serve the disputed territory. This alternative would achieve efficiencies of scale similar to those of the utility. In short, the inadequacy of the City's system is never established and, therefore, the application of the utility cannot be approved, pursuant to Section 367.045(5)(a).

In conclusion, I believe Section 367.045(5)(a) has been misapplied in this case. I must reiterate my belief that we are not adequately serving the public interest when the framework under which we operate does not permit us to consider the realities which spur these cases, nor to address the broader and more significant

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[7] The fact that a large part of the disputed territory lies within the City's corporate limits only adds to my concern that the Commission may be unable to adequately address cases with similar circumstances. I realize that this Commission is bound to consider the application as submitted, and cannot engage in altering the disputed territory. However, this restriction does not allow the Commission to fashion more common-sense solutions.

issues which impact on the public interest. The instant case offers a compelling example of how we fail to address those broader issues.

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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater 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.

ATTACHMENT A

WASTEWATER TERRITORY

Alafaya Utilities Inc.
(PARCEL "A")

County: Seminole

Township 21 South, Range 32 East,

Section 19,
That part of the West 7/8 of the East 1/2 lying Southerly of State Road 419.
Together with:
The East 1/2 of the Southeast 1/4 of the Southeast 1/4 of the Southeast 1/4.

Section 20,
That part of the West 3/4 lying Southerly of State Road 419 (LESS: Begin at the intersection of State Road 419 and the West line of said Section 20; thence South for a distance of 2,093 feet (more or less) to the Northwest corner of the South 1/4 of the Southwest 1/4; thence East along the North line of the South 1/4 of the Southwest 1/4 of said Section 20 for a distance of 1,680 feet (more or less); thence North 9° West for a distance of 1680 feet (more or less) to State Road 419; thence North 73° West along State Road 419 for a distance of 1482 feet (more or less) to the Point of Beginning. Also, (LESS: East 1/2 of the Southeast 1/4 of the Northwest 1/4 of the Southeast 1/4, lying Southerly of State Road 419).

Section 29,
The Northwest 1/4 (LESS: The Southeast 1/4 of the Southeast 1/4 of the Southeast 1/4 of the Northwest 1/4).
Together with:
The Northwest 1/4 of the Northeast 1/4 (LESS: The Southeast 1/4 of the Northwest 1/4 of the Northeast 1/4).
Together with:
The West 1/2 of the Southwest 1/4.

Section 30,
The East 1/2.

Together with:
The Southwest 1/4.

(Parcel "A" contains 1,049.70 Acres, more or less)

ATTACHMENT A

WASTEWATER TERRITORY

Alafaya Utilities Inc.
(PARCEL "B")

County: Seminole

Township 21 South, Range 31 East,

Section 13,
Begin at the Southeast Corner; thence North along the East Line for a distance of 2,640 feet (more or less) to Willingham Road; thence South 45° West along said Willingham Road 1,867 feet (more or less) to the West Line of the East 1/4; thence South along the West line of the East 1/4 for a distance of 1,320 feet (more or less) to the South Line of said Section 13; thence East along said South line for 1,320 feet (more or less) to the Point of Beginning.

Section 24,
That part of the Northeast 1/4 of the Northeast 1/4 lying Northerly of State Road 419.

Township 21 South, Range 32 East,

Section 17,
The West 1/2 of the Southwest 1/4.
Together with:
The North 1,760 feet of the West 1/2 of the South 1/2 of the East 3/4 (LESS: The South 500 feet of the East 470.6 feet of the North 1,760 feet of the West 1/2 of the South 1/2 of the East 3/4).

Section 18,
The South 1/2 (LESS: The North 1/4 of the Southwest 1/4).

Section 19,
That part lying Northerly of State Road 419.

Section 20,
The Northwest 1/4 of the Northwest 1/4.

(Parcel "B" contains 742.48 Acres, more or less)

ATTACHMENT A

WASTEWATER TERRITORY

Alafaya Utilities Inc.
(PARCEL "C")

County: Seminole

Township 21 South, Range 31 East,

Section 13,
That part of the North 3/4 lying Southerly and Easterly of the Econlockhatchee River (LESS: Begin at the Southeast Corner of the North 3/4; thence North along the East Line of said Section 13 for a distance of 1,320 feet (more or less) to Wilmingham Road; thence South 45° West along said Wilmingham Road for a distance of 1,867 feet (more or less) to the South Line of the North 3/4 of said Section 13; thence East along said South Line of the North 3/4 for a distance of 1,320 feet (more or less) to the Point of Beginning)

Township 21 South, Range 32 East,

Section 7,
That part of the South 1/2 lying Easterly of the Econlockhatchee River.

Section 8,
The South 1/2.

Section 17,
The North 1/2.

Section 18,
The North 1/2.
Together with:
The North 1/4 of the Southwest 1/4.

(Parcel "C" contains 1,388.40 Acres, more or less)

ATTACHMENT A

WASTEWATER TERRITORY

Alafaya Utilities Inc.
(PARCEL "D")

County: Seminole

Township 21 South, Range 31 East,

Section 12,
That part of the East 1/2 of the West 1/2 lying South of State Road 426.
Together with:
The Southwest 1/4 of the Southwest 1/4.
Together with:
That part of the Northeast 1/4 lying South of State Road 426.
Together with:
The Southeast 1/4 (LESS: The North 330.5 feet of the Southeast 1/4).

Section 13,
That part of the North 3/4 lying Westerly of the Econlockhatchee River and lying Northerly of State Road 419.
Together with:
The West 3/4 of the South 1/4.

Section 14,
That part of the South 3/4 of the East 1/2, lying North and Easterly of State Road 419.

Section 24,
The Northwest 1/4 of the Northeast 1/4 lying North and Easterly of State Road 419.

(Parcel "D" contains 865.53 Acres, more or less)

ATTACHMENT A

WASTEWATER TERRITORY

Alafaya Utilities Inc.
(PARCEL "E")

County: Seminole

Township 21 South, Range 31 East,

Section 24,
That part of the Northeast 1/4 of the Northeast 1/4 lying Southerly of State Road 419.
Together with:
The North 330 feet of the East 301.74 feet of the Southeast 1/4 of the Northeast 1/4.

Township 21 South, Range 32 East,

Section 19,
That part of the Southwest 1/4 of Government Lot 1 lying Southerly of State Road 419.
Together with:
The Northwest 1/4 of the Northwest 1/4 of Government Lot 2.

(Parcel "E" contains 26.37 Acres, more or less)

ATTACHMENT A

WASTEWATER TERRITORY

Alafaya Utilities Inc.
(PARCEL "F")

County: Seminole

Township 21 South, Range 31 East,

Section 23,

Begin 1,192.97 feet North 02°25'58" West of the Southeast Corner, run South 56°14'08" West, 66.06 feet; North 80°10'45" West, 316.41 feet; North 16°03'38" West, 188.67 feet; North 19°45'34" East, 141.29 feet; North 77°12'32" East, 379.06 feet; South 00°25'58" East, 414.36 feet to the Point of Beginning.

Section 24,

Begin 1,607.33 feet North 02°25'58" West of the Southwest Corner, run North 77°12'32" East, 800.92 feet to the Westerly Line of Lockwood Road; thence Southerly along said Westerly Line of Lockwood Road along a curve concave Easterly having a radius of 1,003.48 feet; thence Southerly along said curve and Westerly Line, 292.05 feet, through a central angle of 16°40'32", thence South 76°55'43" West 631.73 feet; thence South 56°14'08" West 315.67 feet; thence North 02°25'58" West, 414.36 feet to the Point of Beginning.

(Parcel "F" contains 12.88 Acres, more or less)

ATTACHMENT A

WASTEWATER TERRITORY

Alafaya Utilities Inc.
(PARCEL "G")

County: Seminole

Township 21 South, Range 31 East,

Section 23,
The North 231 feet of the East 660 feet of the Southeast 1/4 of the Northeast 1/4.

(Parcel "G" contains 4.58 Acres, more or less)

ATTACHMENT A

WASTEWATER TERRITORY

Alafaya Utilities Inc.
(PARCEL "H")

County: Seminole

Township 21 South, Range 31 East,

Section 26,

The West 1/4 of the Northeast 1/4.

(Parcel "H" contains 29.68 Acres, more or less)