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ORIGINAL FILE COPY

May 31, 1991

891280-WS

VERONICA DONNELLY
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399

Re: **Betmar Utilities, Inc. v. City of Zephyrhills and Pasco County and Public Service Commission**
Case Number: 91-1159

Dear Ms. Donnelly:

Please find enclosed Written Argument on behalf of the City of Zephyrhills in opposition of Betmar Utilities' Petition to extend its service area. You will note that I have enclosed two (2) proposed final Orders, which address our alternate positions regarding total denial, or in the alternative, modification to delete that portion of the property from Betmar's application which is located within the City's delineated service area.

Yours truly,

THOMAS P. McALVANAH, ESQUIRE

TPM/saf
Enclosures

cc: Scott L. Knox, Esquire

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETMAR UTILITIES, INC.,

Petitioner,

vs. CASE NO.: 91-1159

CITY OF ZEPHYRHILLS and
PASCO COUNTY,

Respondents,

and

PUBLIC SERVICE COMMISSION,

Intervenor.
_____/

WRITTEN ARGUMENT

The Respondent, CITY OF ZEPHYRHILLS (hereinafter referred to as the "CITY"), herein files its Written Argument opposing Petitioner's, BETMAR UTILITIES, INC. (hereinafter referred to as "BETMAR") Application to Amend its Certificate of Authorization to include additional territory outside its initial certificate.

References to the transcript of the hearing shall be made by designating the letter "T", followed by the page or pages upon which the particular testimony can be found.

References to the "northern area in dispute" will refer to that area located northerly of BETMAR's existing service area and immediately south of the Geiger Road right of way. The "southern area in dispute" will refer to that area south of BETMAR's existing service area and north of State Road 54.

ARGUMENT

I. BETMAR'S APPLICATION FAILS TO CONFORM WITH THE APPLICABLE STATUTE AND RULES:

Florida Statute 367.045 (2)(b) states that the applicant provide the information required by the Commission's Rule. The Rule in question, 25-30.036 (1)(d) requires that the applicant

provide evidence that it owns the land upon which the treatment facilities are located, or at the very least, has a long term lease (such as one for 99 years). The testimony and exhibits establish that BETMAR has dismantled its former treatment plant and at this time, owns no treatment facilities. (T-33). BETMAR relies solely on Pasco County for treatment service and operates merely as a collection agent for the County.

It would appear that the Public Service Commission's rationale for requiring the applicant to provide proof of its ownership or possessory right in a treatment center is to assure that the utilities customers will enjoy an uninterrupted service for a significant period of time. In the Instant case, the evidence shows that BETMAR merely has only a 25 year Bulk Transfer Agreement with the County, (Petitioner's Exhibit 3). On Page 9 of said Agreement, the County has reserved the right to act in the best interest of its own customers. Writer would suggest that said provision is tantamount to a "bailout" clause if the County reasonably concluded that the treatment capacity utilized by BETMAR was needed for County customers and could result in the ceasation of the Bulk Transfer Agreement. This arrangement does not meet the requirements of the Public Service Commission's applicable rule. New customers should have the security of a utility with its own treatment facilities to assure proper land management and growth.

II. GRANTING BETMAR'S REQUEST FOR AN AMENDED CERTIFICATE OF AUTHORIZATION IS NOT IN THE PUBLIC'S INTEREST:

Florida Statute 367.045 (5)(a) bestows upon the Commission, discretion to grant or amend a certificate in whole or in part or with modifications in the public's interest. The public interest in East Pasco County would not be served by granting BETMAR's application. Zephyrhills City Manager, Nick Nichols testified that the CITY has 2½ million gallon a day capacity wastewater treatment and has adequate revenues and capacity to serve the area (T-61). Nichols also testified that the City of Zephyrhills

has already in place sewer and water facilities immediately north of the northern area in dispute at the Silver Oaks Planned Unit Development and immediately east thereof at the Wedgewood Planned Unit Development. (T-58). Nichols testified that the CITY intends to complete the loop and connect the two plan developments and that said loop would run through the northern disputed area. City Manager's testimony was that the CITY had delayed the completion until the COUNTY had completed the acquisition and design of the Zephyrhills West By-Pass. (T-73).

Nichols also testified that the CITY had adequate resources and capacity to serve the northern disputed area. (T-72).

The City's Manager also testified that the CITY servicing of the northern disputed area would help to insure proper growth management and avoid strip zoning. (T-66, 67).

Writer would submit that it is in the public's best interest that the time, energy and monies expended by the CITY to date in anticipation of connecting the loop through the northern disputed area and its desire to insure reasonable growth management are items by which the public is best served if the applicant's request is denied, particularly for the northern disputed area.

III. GRANTING BETMAR'S PETITION WOULD DO VIOLENCE TO THE COMPREHENSIVE PLANS OF BOTH PASCO COUNTY AND THE CITY OF ZEPHYRHILLS:

Respondent's Exhibit 1, Interlocal Agreement between the CITY and the County, delineated service areas for providing utility services between the County and the CITY. Such agreements are not only allowed by statute, but encouraged. (See Florida Statutes Chapter 163). It is the intent of the Statute and the purpose of these agreements to assure that local government units make the most efficient use of their powers by cooperating in areas of mutual advantage. In the Instant case, Pasco County and the CITY have cooperated to delineate service areas and to avoid duplication of services. The northern area in dispute is within the CITY's service area. The Comprehensive

Plans of both governmental entities acknowledge the Interlocal Agreements and reaffirm each entities intent to abide thereby. Granting of the Application to expand BETMAR's service area would diminish the effectiveness of the Agreement and also potentially cause the County's breach thereof. Granting any breach of the Interlocal Agreement would be in contravention of the CITY's and County's Comprehensive Plans. BETMAR has acknowledged that the County and not BETMAR will service the treatment needs of customers within the areas sought to be included in the expansion. (T-37). Insomuch as the County has agreed not to service those areas, unless the CITY fails or refuses to provide such service, BETMAR's extension and delivery of wastewater to be treated by the County would constitute a breach of the agreement and therefore violate the Comprehensive Plan. Florida Statute 37.045 (5)(b) mandates that the Commission consider, but not be bound by the local Comprehensive Plan of the County or CITY. While not controlling, Commission should deny the request because it does violence to the local Comprehensive Plans and is not in the best interest of the public.

IV. THE CITY HAS A LEGAL BASIS FOR CLAIM TO THE DISPUTED AREA TO THE EXCLUSION OF BETMAR:

The Fifth District Court of Appeals recently considered a case with striking similarities to the Instant case. In City of Mt. Dora, Florida v. JJ's Mobile Homes, Inc., (Case No. 90-733, 5DCA, Opinion filed 4/25/91, Mandate 5/13/91), the Court held that the Public Service Commission's granting of a franchise is exclusive and subsequent annexation by the City does not give it the right to extend services to an area. Recognizing the finality of a certificate granted by the Public Service Commission, the Court pronounced a test that Courts should follow when called upon to resolve disputes between competing utility interests. Beginning on Page 1117 of the Opinion, and continuing through Page 1118, the Court established six (6) principals to govern such cases. The sixth principal announced by the Court is

of particular interest to this cause. The Court stated:

> When each of two public service utility entities, whether governmental or private, have a legal basis for the claim of a right to provide similar services in the same territory and each has the present ability to promptly and efficiently do so, that entity with the earliest acquired (prior) legal right has the exclusive legal right to provide service in that territory without interference from the entity with the later acquired (subsequent) claim of right.

In the Instant case, the CITY has acquired through the Interlocal Agreement with the County, a legal basis for its claim to service the northern and southern disputed areas. The northern portions claim is primary, because the CITY has a right of first refusal; the southern disputed area is contingent upon the County's refusal to service therein. Writer expects that BETMAR will claim that it should not be bound by the agreement, because it is not a party thereto. Under normal circumstances, this argument might prevail, however, in the Instant case, the argument fails, because BETMAR has "hitched its wagon" to the County by exclusively utilizing the County's treatment facilities. Therefore, BETMAR should be bound by the County's prior agreement and abide thereby. This is particularly true on that portion where the CITY has the first option to service and the territory is located within the CITY's delineated utility service area.

CONCLUSION:

The CITY's position is in the alternative. The CITY believes that the applicant's request to extend services should be denied altogether, because it fails to conform with the applicable Rule, by failing to provide evidence that BETMAR meets the requirement that it owns or has a substantial leasehold interest in the land upon which the treatment facilities are located. In addition, the CITY has a prior claim on both the northern and southern areas in dispute, pursuant to the Interlocal Agreement between the County and the CITY. While the claim is stronger on the northern area, the claim on the southern

area, nonetheless is a vested interest although contingent upon the County's refusal to serve.

In the alternative, the CITY would argue that the applicant's request be modified to delete the northern area in dispute. In addition to the arguments advanced above, the rationale for deleting this area would include the fact that the inclusion of this area is incompatible and inconsistent with the County and CITY's Comprehensive Plan, would constitute a breach of the existing Interlocatory Agreement between the County and the CITY and that the CITY has a prior and superior claim to the northern area in dispute which should be recognized, pursuant to the City of Mt. Dora, Florida, supra.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail on this 31st day of May, A.D., 1991, to: SCOTT L. KNOX, ESQUIRE, 28870 U.S. 19 N., Suite 230, Clearwater, Florida 34621 and Florida Public Service Commission, Fletcher Building, 101 East Gaines Street, Tallahassee, Florida 32399 and the original to: Veronica Donnelly, Hearing Officer, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399.

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Attorney for Respondent,
CITY OF ZEPHYRHILLS

Criminal law—Search and seizure—Appellate court has jurisdiction to review state's appeal from order granting motion to dismiss count of information—Double jeopardy—Trial court properly dismissed grand theft count on ground that it could not be proved without establishing the same facts as would be necessary in proving the elements of offense of obtaining property in return for worthless checks charged in remaining counts of information

STATE OF FLORIDA, Appellant, v. MONA VANDERBILT SMITH, Appellee. 5th District. Case No. 89-1219. Opinion filed April 25, 1991. Appeal from the Circuit Court for Lake County, Earle W. Peterson, Jr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Judy Taylor Rush, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and Michael S. Becker, Assistant Public Defender, Daytona Beach, for Appellee.

OPINION ON MOTION FOR REHEARING

[Original Opinion at 15 F.L.W. D1865]

(HARRIS, J.) This matter was originally dismissed for lack of jurisdiction because it was an appeal from an order granting a motion rather than from an order specifically dismissing a count of the information. *See* Rule 9.140(c)(1)(A), Rules of Appellate Procedure. However, on the authority of *State v. Saufley*, 574 So.2d 1207 (Fla. 5th DCA 1991), we grant rehearing and withdraw our original opinion, determine that we have jurisdiction and proceed on the merits.

On October 23, 1988,[1] Mona Smith passed worthless checks to Sears in exchange for merchandise having a value in excess of $ She was charged with both grand theft and obtaining property in return for worthless checks. The trial court dismissed the grand theft count because it "could not be proved without establishing the same facts as would be necessary in proving the elements of the remaining counts of the information." We agree and affirm.

The state contends that since each offense contains different elements the dismissal was improper. It is true that the worthless check counts require proof that a check was involved in the offense. But this same element can satisfy the more general element in theft: "obtains . . . the property of another with the intent to . . . appropriate the property to his own use or to the use of any person not entitled thereto." The theft element is not different in the sense that it distinguishes theft from obtaining property in return for a worthless check, it is merely more inclusive. Obtaining property in return for a worthless check *will always* constitute theft because *the more general theft element subsumes the more specific worthless check element*. We agree that double jeopardy prohibits prosecution for this same offense.

(DAUKSCH and GRIFFIN, JJ., concur.)

[1] ...1, Florida Statutes (1988) and not *Carawan v. State*, 515 ...87) controls.

* * *

Criminal law—Search and seizure—Appellate court has jurisdiction over state's appeal from order granting motion to suppress—Officer lacked valid reason to stop defendant whom he observed walking aimlessly through mall parking lot while carrying unpackaged camcorder mounted on tripod

STATE OF FLORIDA, Appellant, v. TAMBERLANE DAVID MOODY, Appellee. 5th District. Case No. 89-1938. Opinion filed April 25, 1991. Appeal from the Circuit Court for Seminole County, Robert B. McGregor, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and David S. Morgan, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and Michael S. Becker, Assistant Public Defender, Daytona Beach, for Appellee.

OPINION ON MOTION FOR REHEARING

(HARRIS, J.) This matter was originally dismissed for lack of jurisdiction because it was an appeal from an order granting ... rather than from an order specifically suppressing ... *See* Rule 9.140(c)(1)(B), Rules of Appellate Procedure. ... on the authority of *State v. Saufley*, 574 So.2d ... (Fla. 5th DCA 1991), we reinstate the appeal and grant rehearing, determine that we have jurisdiction and proceed on the merits.

Officer Antoszewski of the Altamonte Springs Police Department, while on "mall patrol," observed Tamberlane Moody walking aimlessly through the parking lot with an unpackaged VCR camcorder mounted to a tripod over his shoulder. There were no price tags attached to the camcorder, but Officer Antoszewski did see plastic on the legs of the tripods. Although the officer had not been advised that a camcorder had been stolen, he was suspicious because of the lack of packaging. He confronted Moody, directed him to place the camcorder on the trunk of the police vehicle, and demanded identification. A computer check revealed that Moody was wanted on a felony charge.

Moody was arrested on the felony warrant and, after it was confirmed that the camcorder was in fact stolen, charged with grand theft. The trial judge determined that Moody's detention was not based on reasonable suspicion and suppressed the evidence. We agree that this was a detention and not merely a street encounter and further agree that it was improper.

As stated in *Romanillo v. State*, 365 So.2d 220, 221 (Fla. 4th DCA 1978):

> [T]he officers had only a "hunch" (although a good one as it turned out), that is, a "bare" or "unfounded" suspicion that something was wrong, which is clearly *not* sufficient to validate a stop and detention.

Perhaps carrying an unpackaged camcorder over one's shoulder in a parking lot is unusual. But the mere carrying of an unpackaged purchase (perhaps after buying a floor sample or verifying the contents of a previously packaged purchase) while wandering through a parking lot trying to remember where the car is parked does not justify even a brief seizure.

AFFIRMED. (DAUKSCH and COWART, JJ., concur.)

* * *

Public utilities—Water and sewer—Territorial dispute between private utility with certificates from Public Service Commission authorizing it to provide utilities in certain geographical territory and municipality which annexed portion of private company's service area—City is not authorized to interfere with preexisting rights granted by PSC to private company by mere subsequent annexation of a portion of the private company's territory—Where each of two public service utility entities, whether governmental or private, had legal basis for claim of a right to provide similar services in the same territory, and each has the present ability to promptly and efficiently do so, the entity with the earliest acquired legal right has the exclusive legal right to provide service in that territory without interference from the entity with the later acquired claim of right—Trial court properly found that municipality could not extend its water and sewer utility lines into private company's territory

CITY OF MOUNT DORA, FLORIDA, Appellant, v. JJ's MOBILE HOMES, INC., Appellee. 5th District. Case No. 90-733. Opinion filed April 25, 1991. Appeal from the Circuit Court for Lake County, Ernest C. Aulis, Jr., Judge. Sherri K. Dewitt and Houston E. Short of Graham, Clark, Pohl & Jones, Winter Park, for Appellant. Mary M. McDaniel of Minkoff & McDaniel, P.A., Tavares and Robert Q. Williams of Williams, Smith & Summers, P.A., Tavares, for Appellee.

(COWART, J.) This case involves a territorial dispute between a private utility company with certificates from the Florida Public Service Commission (PSC) authorizing it to provide utilities in a certain geographical territory and a municipality which, subsequent to the acquisition by the private company of its utility franchise, annexed a portion of the private utility company's service area and claims the right to provide similar utility services in the annexed portion of the private utility company's service territory.

In 1981, a private utility company, JJ's Mobile Homes, Inc. (appellee herein, plaintiff below) obtained from the Florida PSC certificates of necessity granting the private utility company the

.ght (franchise) to operate a water and sewer utilities system within a specified geographical territory near, but outside of, the city limits of a municipality (the City of Mount Dora, appellant herein, defendant below). In 1988, the municipality voluntarily annexed into its city limits a tract of land most of which is within the private utility company's certified service territory and by ordinance approved a land developer's proposal that the municipality serve the developer by extending the municipality's water and sewer utilities into a portion of the newly annexed area of the private utility company's certified service territory.

The private utility company, as plaintiff, filed this action against the municipality, as defendant, for a judicial determination that the private utility company had the legal right to provide water and sewer service within all the territory specified in its certificates from the Florida PSC and that the municipality did not have the legal right to provide the same utility service within the territory. The trial court granted summary judgment in favor of the private utility company and the municipality appeals.

We adopt the trial court's finding of uncontroverted facts, conclusions of law and results. The trial court found the following facts to be uncontroverted:

1. The Plaintiff (private company) owns and holds Florida Public Service Commission Certificates Number 298-W and 248-S granting the Plaintiff the right to operate a water and sewer utility system within a specified territory.

2. On March 5, 1981, the Florida Public Service Commission entered an order approving the issuance of the foregoing water and sewer certificates to the Plaintiffs and in said order, found that notice as required by law had been given and that the issuance of the certificates to the plaintiff was "in the public interest."

3. Pursuant to that authority, the Plaintiff owns, operates and maintains an approved water and sewer utility system within the certified territory, which utilities have been in operation since the mid-1970's.

4. The Plaintiff's certificated territory encompasses Dora Pines mobile home subdivision, together with a large parcel of currently undeveloped property. The Plaintiff's utilities currently serve the Dora Pines mobile homes subdivision, which consists of approximately one hundred thirty-eight (138) water and sewer customers.

5. At the time the Plaintiff's water and sewer systems were constructed, they were designed and built for the purpose of providing water and sewer utility service to the entire certificated territory. The Plaintiff's utilities have the present ability to provide water and sewer service to the certificated territory.

6. The Plaintiff's water and sewer utilities have current operating permits from the Department of Environmental Regulation, which permits are valid through October 15, 1994. The sewer plant is currently permitted for ninety-five thousand (95,000) gallons per day, and current flows going into the plant are only about seventeen thousand (17,000) gallons per day. The plant is designed so as to be expandable up to two hundred ninety-five thousand (295,000) gallons per day.

7. Sometime in 1987, the Plaintiff learned that the Defendant was considering the voluntary annexation of a large tract of property, a significant portion of which was within the Plaintiff's certificated territory. The Plaintiff objected at that time to the City's proposed extension of its municipal utilities into the Plaintiff's certificated territory.

8. In Ordinance 467 (adopted May 3, 1988) and Ordinances 488, 489 and 490 (adopted October 3, 1989), the City voluntarily annexed a tract of contiguous property, most of which lay within the Plaintiff's certificated territory. In Ordinance 529 (adopted October 3, 1989), the City authorized a planned unit development for the annexed property and as a part of that ordinance, adopted a developer's agreement calling for water and sewer utilities to be furnished by the City to the annexed property.

9. On March 31, 1989, the Plaintiff, through its attorney, formally notified the City of its claimed right to provide water and sewer service to its certificated territory.

10. The Plaintiff is currently actually operating its water and sewer utility within it certificated territory. The Plaintiff's existing water and sewer lines extend to a point that is immediately adjacent to the annexed property making them much closer to the annexed property than the Defendant's water and sewer line.

The trial court made the following conclusions of law:

1. The Public Service Commission water and sewer certificates issued to the Plaintiff grant the Plaintiff the exclusive right to provide water and sewer utilities service to the certificated territory. This right precludes any other entity from having the right to serve the certificated area with water and sewer utilities.

2. Although municipal utility systems are not subject to regulation by the Public Service Commission as a utility, neither are municipalities given dominion over decisions of the Public Service Commission.

3. The Plaintiff's actual operation of its water and sewer utility within its certificated territory is in territory which is immediately adjacent to the Defendant. Therefore, pursuant to Section 180.06, Florida Statutes (1989), the Defendant must obtain the Plaintiff's consent before construction of water and sewer utilities within the Plaintiff's certificated area. Without that consent, the Plaintiff has the exclusive right to provide service within its certificated territory.

The trial court declared and adjudicated:

...that the water and sewer certificates issued to the Plaintiff by the Florida Public Service Commission grant the Plaintiff the right to furnish water and sewer utility service to the certificated territory as described in the certificates to the exclusion of all other utilities, including those owned by the Defendant. Accordingly, the Defendant may not extend its water and sewer utility lines into any part of the Plaintiff's certificated territory.

Section 180.06, Florida Statutes, after enumerating activities authorized by municipalities and private companies, provides:

> However, a private company or municipality shall not construct any system, work, project or utility authorized to be constructed hereunder in the event that a system, work, project or utility of a similar character *is being actually operated by a municipality or private company* in the municipality or territory immediately adjacent thereto, unless such municipality or private company consents to such construction. [Emphasis added].

The city argues that section 180.06, Florida Statutes, does not apply because the private company does not actually provide services to the disputed area.

The restriction of the statute was designed to avoid the wastefulness of duplicate capital investments for competing utilities that could not likely be operated without financially jeopardizing each other's operating revenues if erected in the same consumer territory. *State v. Plant City*, 127 Fla. 495, 173 So. 363 (Fla. 1937) (construing Ch. 17119, § 1, Laws of Fla., predecessor statute to § 180.06, Fla. Stat.).

In regard to section 180.06, Florida Statutes, in *Ortega Utility v. City of Jacksonville*, 564 So.2d 1156 (Fla. 1st DCA 1990), the court held:

> While the statute is not a monument to clarity and draftsmanship,...we interpret it only to prohibit direct encroachment by one utility provider into an operating area already served by another. Any other interpretation would not seem to comport with logic or reason. Under our interpretation, there would be no duplicate capital investment within the same consumer territory.

In *Ortega*, the private company provided services within a specific (certified) area. The city planned to provide service to an area *outside* but located near the private company's certified area. In addition the private company had neither the capacity nor plans to serve the new area.

This case is distinguished from *Ortega* in that in *Ortega* the area sought to be served by the municipality was outside the private company's certified area and the private utility company did not have the capacity to serve the area the municipality sought to serve, while in this case, the area the municipality proposes

to serve is within the territory which the private company has the prior legal right to serve and the private company is ready, willing and able to serve the utility needs of its service area.[1]

The municipality argues that it is not subject to regulation by the PSC and interprets this statement to mean that it may serve with utilities an area within the city's boundary whether or not the PSC may have theretofore issued a certificate of necessity authorizing a private utility company to provide similar utility services in the same area.

Chapter 367, the "Water and Wastewater System Regulatory Law" provides the Florida Public Service Commission with exclusive jurisdiction over the authority, service and rates of utilities. Section 367.022(2) provides:

> 367.022 *Exemptions* - The following are not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter except as expressly provided:
>
> ***
>
> (2) Systems owned, or systems of which the rates and charges for utility service to the public are controlled, by governmental authorities.

The certificates issued to the private company by the PSC are a granting of a privilege generally referred to as a franchise. A franchise is defined as "a special privilege conferred by the government on individuals or corporations that does not belong to the citizens of a country generally by common right (citations omitted.)" 12 McQuillin, *Municipal Corporations*, § 34.03 (3d Ed.). When granted, a franchise becomes a property right in the legal sense of the word. *Leonard v. Baylen Street Wharf Co.*, 59 Fla. 547, 52 So. 718 (1910); *West Coast Disposal Service, Inc. v. Smith*, 143 So.2d 352 (Fla. 2d DCA 1962), *cert. denied*, 148 So.2d 279 (Fla. 1962). *But see, Alterman Transport Lines, Inc. v. State*, 405 So.2d 456 (Fla. 1st DCA 1981) where the court rejected the argument of holders of certificates of public convenience that the deregulation of the trucking industry took away a valuable property right of the holders (the certificates) and impaired existing contracts.

In *Pahokee Housing Authority v. South Florida Sanitation Co.*, 478 So.2d 1107 (Fla. 4th DCA 1985), *rev. denied*, 491 So.2d 280 (Fla. 1986), a dispute arose between a housing authority and the holder of an exclusive garbage franchise from the county over garbage collection in the area controlled by the authority. The authority decided to collect and dispose of its own garbage, claiming it was exempt from the exclusive franchise granted by the city. The trial court found that the authority's intrusion violated the private company's exclusive franchise. The district court affirmed but reversed the damages awarded to include the holder's costs of operation.

Southern Gulf Utilities Inc. v. Mason, 166 So.2d 138 (Fla. 1964) is cited by the city for the broad proposition that the PSC has no authority whatsoever over utilities operated by governmental agencies. *Mason* must be read more narrowly. In *Mason*, a private company with an exclusive certificate issued by the PSC sought the PSC to issue a stop order for a municipal utility which invaded the private company's service area. The PSC dismissed the private company's complaint on the grounds that the PSC had no authority to restrain a governmental agency from invading the service area of the private company. The supreme court agreed but specifically noted it did not rule on the rights of the parties which [illegible] were being litigated in an action for injunction in the circuit court which was not the subject of the appeal. This case presents no question as to the PSC's authority, as distinguished from the circuit court's subject matter jurisdiction, to restrain the city from invading the private company's area.

Although governmental utilities are exempt from the authority of the PSC this does not mean that the governmental unit has the authority to interfere with rights granted a private utility company by the PSC. The PSC certificates issued to the private company represent a valuable property right and the city is not authorized to interfere with [illegible] preexisting rights by the mere subsequent annexation of a portion of the private company's territory.

The municipality further argues that the trial court erred in finding as a matter of law that the certificates issued to the private utility company granted an exclusive right to provide utilities to the service territory because the certificates as issued do not use the word "exclusive."

In this case the PSC issued the private utility company certificates of necessity authorizing the private utility company to provide the public with water and sewer in the questioned territory before the municipality, which has the general legal authority to provide similar services within its municipal limits, annexed the area. The private utility company not only had the prior legal right but, more importantly, it also had the ability to meet its duty to provide such services. The statutory scheme of Chapter 367,[2] as well as the concept of a public utility, envisions that the right granted by the PSC to a private utility company is exclusive to the extent that such company has the ability to promptly provide service to the public within its franchised territory.

The essence of the concept of utilities serving the public is that it is in the best interests of the public that the entities, governmental or private, providing utility services not be permitted to compete as to rates and service and that each entity be given an exclusive service area and monopolistic status. This unusual economic advantage is given a utility in our free market economy in exchange for the utility relinquishing its usual right to determine the level of service it provides and to set its own competitive rate and submitting those two matters to a governmental authority which regulates the quality of service to be provided and sets rates to provide the utility a reasonable return on its investment. The term public utility implies a public use with a duty on the public utility to service the public and treat all persons alike. *See* 73 C.J.S., *Public Utilities* § 2 (1983) and 78 Am.Jur., *Waterworks and Water Companies*, § 2 (1975).

Territorial rights and duties relating to utility services as between prospective suppliers are more properly defined and delineated by administrative implementation of clear legislation than by judicial resolution of actual cases and controversies resulting from the lack of clear legislative direction. However, the problem is currently a controversial political matter in the State of Florida and in the absence of clear legislative intent courts must resolve individual disputes by the application of principles which appear to best serve the public and to be fair and equitable to legitimate competing interests. Some such principles are:

(1) In Florida the basis for the right of both governmental and private entities to provide utility services to the public is [illegible] and the franchise right of each is equal and neither entity is superior or inferior to the other.

(2) A franchise granted to an entity, either governmental or private, authorized by law to provide utility service to the public may be exclusive as to both type of service and territory. *See, St. Joe Natural Co. v. City of Ward Ridge*, 265 So.2d 714 (Fla. 1st DCA 1972), *cert. denied*, 272 So.2d 817 (Fla. 1973).

(3) The right (franchise) to provide utility services to the public carries a concomitant duty to promptly and efficiently provide those same services. *See*, 73B C.J.S., *Public Utilities* § 2 (1983).

(4) The right (franchise) to provide utility services to the public in a franchised territory is inherently subject to, and conditional upon, the ability of the franchise holder to promptly and efficiently meet its duty to provide such services. Section 367.045(5)(a), Florida Statutes.

(5) When a public service entity, whether governmental or private, has a prior (earlier acquired) legal right to provide services in a particular territory but does not have the present ability to promptly and efficiently meet its duty to do so, the public entitled to be served by some other public service entity which does have the present ability to provide the needed service although the legal claim of right of the second entity to provide

ch services is secondary in time priority to the prior legal right of the entity without the ability.[1]

(6) When each of two public service utility entities, whether governmental or private, have a legal basis for the claim of a right to provide similar services in the same territory and each has the present ability to promptly and efficiently do so, that entity with the earliest acquired (prior) legal right has the exclusive legal right to provide service in that territory without interference from the entity with the later acquired (subsequent) claim of right.

AFFIRMED. GOSHORN, J., concurs. HARRIS, J., dissents with opinion.

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[1]In City of Winter Park v. Southern States Utilities, Inc., 540 So.2d 178 (Fla. 5th DCA 1989) this court held that where a city did not have the present ability to serve the public the city had no legal right to prevent a private company certified to provide services to an area within the city's territorial limits, from serving the public where the private company had the present capability to provide services.

[2]Section 367.011(2), Florida Statutes, provides:

The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service and rates.

[3]City of Winter Park v. Southern States Utilities, 540 So.2d 178 (Fla. 5th DCA 1989).

(HARRIS, J., Dissenting.) I would like to concur in the majority opinion because I believe that the regulatory scheme devised by the trial court and approved by the majority is fairer than the one enacted by the legislature. Under the majority's water and waste water system plan, the franchisee is given an exclusive area which cannot be encroached upon by anyone so long as it services or is capable of servicing the area. Unfortunately the legislative plan is different and I believe controls.

Under chapter 367 there is no authority for the Public Service Commission to grant an exclusive franchise area. The certificate in this case does not purport to grant an exclusive franchise area. The commission grants exclusivity by limiting the number of franchises in any given area. Therein, of course, lies the problem. A governmental agency, such as appellant, is exempted from the jurisdiction of the Public Service Commission in supplying water and sewer services within its corporate limits. The subject property has now been annexed at the request of the property owner and is part of the municipality. The municipality may now serve the area without a permit from the Public Service Commission. If it is to be prohibited from proceeding to provide service, it must be under the structures of section 180.06.

To preclude appellant under this section, appellee must be *actually* operating within or adjacent to the annexed area. Such has not been shown in this record. Ability or capacity to operate in or adjacent to the annexed area is not sufficient, under this statute, to deny the municipality the right to extend its water and sewer lines.

The majority believes, as I do, that one who makes an investment in reliance on a certificate deserves economic protection.[1] To provide this protection the majority recognizes an exclusive franchise area. This, however, permits the Public Service Commission, by granting a service area to a private company, even within the municipality,[2] to exclude future municipal development. This indirectly permits the Public Service Commission to regulate the service and service area of the municipality contrary to the express exemption contained in the statute.

I would REVERSE.

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[1]I urge that this protection should come from the legislature.

[2]§ 367.021(2), Fla. Stat. (1989).

* * *

Torts—Negligence—Attorney's fees and costs—Plaintiff receiving verdict in amount at least 25% less than offer of judgment—Amount of judgment obtained by plaintiff means amount of judgment for damages awarded by jury for the cause of action being tried and does not include taxable costs or attorney's fees—When plaintiff failed to accept first offer of judgment within thirty days, plaintiff became subject to potential liability for defendant's costs and attorney's fees as provided by statute—Potential liability was not affected by defendant's second offer of judgment or plaintiff's subsequent demand for judgment—Fact that insurance company or other third party pays or advances costs or fees to defendant does not preclude defendant from recovering costs and attorney's fees—No fault threshold—Jury's finding of no permanent injury not contrary to manifest weight of evidence—No abuse of discretion in awarding plaintiff cost attendant to presence and reporting of court reporter at independent compulsory physical examination—Defendant's right to attorney's fees extends to those incurred on appeal

RONDOB MARIE WILLIAMS, Appellant/Cross-Appellee, v. JEANNINE O. BROCHU, Appellee/Cross-Appellant. 5th District. Case No. 90-370. Opinion filed April 25, 1991. Appeal from the Circuit Court for Orange County, Frederick T. Pfeiffer, Judge. Brent C. Miller of Jacobs & Goodman, P.A., Altamonte Springs, for Appellant/Cross-Appellee. David B. Falstad of Gurney & Handley, P.A., Orlando, for Appellee/Cross-Appellant.

(COWART, J.) This case involves an interpretation of section 768.79(1), Florida Statutes (1986),[1] which provides as follows:

> (1)(a) In any action to which this part applies, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.
>
> (b) Any offer or demand for judgment made pursuant to this section shall not be made until 60 days after filing of the suit, and may not be accepted later than 10 days before the date of the trial.

THE FACTS

Pursuant to the above statute, the defendant (appellee Brochu) on April 27, 1989 (a date more than 60 days after suit was filed) filed an Offer of Judgment for $2,000 which was never accepted by the plaintiff (appellant Williams). On December 4, 1989, the defendant filed a second Offer of Judgment for $7,500 which was never accepted by the plaintiff. On December 13, 1989, the plaintiff filed a Demand for Judgment for $12,000 which the defendant never accepted. The jury trial began on January 2, 1990, and resulted in the plaintiff receiving a net damages award of $1,200.

THE TRIAL COURT ACTION

As found by the trial court, the defendant's costs and the defendant's attorney's fees incurred after the date of the filing of the first Offer of Judgment were $1,900.80 and $6,400, respectively, totaling $8,300.80 while the amount of the plaintiff's damages award ($1,200) and the plaintiff's costs (per section 57.041, Florida Statutes) of $364.50 incurred prior to the date of the filing of the defendant's first Offer of Judgment on April 27, 1989, totaled $1,564.50, resulting in a net difference of $6,736.30, for which amount the trial court entered final judgment in favor of the defendant.

THE ISSUES ON APPEAL

The plaintiff appeals and the defendant cross-appeals. The parties argue for conflicting interpretations of the statute by analogies relating to Florida Rule of Civil Procedure 1.442 and principles of contract law involving offers, effect of second

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETMAR UTILITIES, INC.,

Petitioner,

vs. CASE NO.: 91-1159

CITY OF ZEPHYRHILLS and
PASCO COUNTY,

Respondents,

and

PUBLIC SERVICE COMMISSION,

Intervenor.
_____/

ORDER GRANTING PETITIONER'S APPLICATION IN PART AND DENYING SAME IN PART

THIS CAUSE came to be heard before this Court on the application of the Petitioner, **BETMAR UTILITIES, INC.**, to amend its initial certificate of authorization to include additional territories to be serviced and upon the evidence presented, the Court **FINDS:**

1. That the CITY OF ZEPHYRHILLS and PASCO COUNTY did timely object to the Petitioner's application.

2. That PASCO COUNTY was duly noticed and failed to appear at hearing and has therefore waived or withdrawn its objection and finding the CITY OF ZEPHYRHILLS did appear to oppose the application and the PUBLIC SERVICE COMMISSION was present as intervener.

3. That the CITY OF ZEPHYRHILLS and PASCO COUNTY had previously entered into an Interlocal Agreement delineating utility service areas between the COUNTY and the CITY and that a portion of the additional territory sought to be serviced by BETMAR UTILITIES, INC., is within the area delineated to be serviced by the CITY OF ZEPHYRHILLS and that extension of

BETMAR's certificate of authorization to include such areas would not be in the best interests of the public, would violate an existing Interlocal Agreement between the COUNTY and the CITY and would be violative of the Comprehensive Plans of PASCO COUNTY and the CITY OF ZEPHYRHILLS. It is now hereby

ORDERED and ADJUDGED that the Petitioner's application is hereby granted to the extent that areas sought to be serviced are not within the area delineated to be serviced by the CITY OF ZEPHYRHILLS, pursuant to its Interlocal Agreement with PASCO COUNTY. It is further

ORDERED that the Petitioner shall provide a modified legal description within twenty (20) days of the date of this agreement which shall exclude such areas. Respondent or Intervener shall have twenty (20) days from filing of such modified legal description to object to its form or content. If no objection is raised within that time, this Order and the modified legal description shall become final.

DONE and ORDERED on this ____ day of June, A.D., 1991.

VERONICA DONNELLY
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399

Copies to:
THOMAS P. McALVANAH, ESQUIRE
SCOTT L. KNOX, ESQUIRE

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETMAR UTILITIES, INC.,

Petitioner,

vs. CASE NO.: 91-1159

CITY OF ZEPHYRHILLS and
PASCO COUNTY,

Respondents,

and

PUBLIC SERVICE COMMISSION,

Intervenor.
_____/

ORDER DENYING PETITIONER'S APPLICATION

THIS CAUSE came to be heard before this Court on the application of the Petitioner, **BETMAR UTILITIES, INC.**, to amend its initial certificate of authorization to include additional territories to be serviced and upon the evidence presented, the Court **FINDS:**

1. That the CITY OF ZEPHYRHILLS and PASCO COUNTY did timely object to the Petitioner's application.

2. That PASCO COUNTY was duly noticed and failed to appear at hearing and has therefore waived or withdrawn its objection and finding the CITY OF ZEPHYRHILLS did appear to oppose the application and the PUBLIC SERVICE COMMISSION was present as intervener.

3. That the CITY OF ZEPHYRHILLS and PASCO COUNTY had previously entered into an Interlocal Agreement delineating utility service areas between the COUNTY and the CITY and that a portion of the additional territory sought to be serviced by BETMAR UTILITIES, INC., is within the area delineated to be serviced by the CITY OF ZEPHYRHILLS and that extension of BETMAR's certificate of authorization to include such areas would

orig & Pending "B".

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OPC		OPC	OPC
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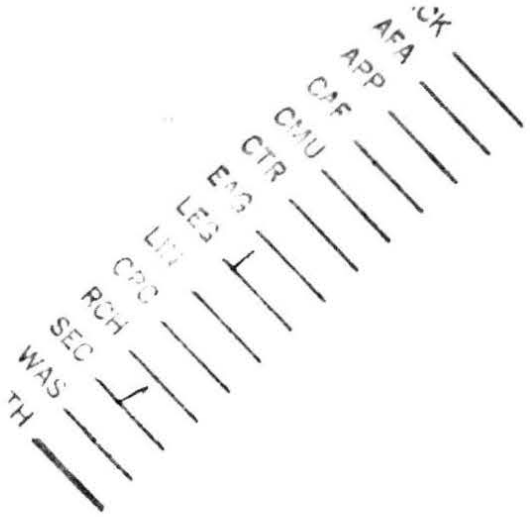

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addition to those shown

not be in the best interests of the public, would violate an existing Interlocal Agreement between the COUNTY and the CITY and would be violative of the Comprehensive Plans of PASCO COUNTY and the CITY OF ZEPHYRHILLS. It is now hereby

ORDERED and ADJUDGED that the Petitioner's application is hereby denied.

DONE and ORDERED on this _____ day of June, A.D., 1991.

VERONICA DONNELLY
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399

Copies to:
THOMAS P. McALVANAH, ESQUIRE
SCOTT L. KNOX, ESQUIRE

DATE: 11-4-91

TO: LCCL
JHS

The attached is sent to you for:

- ☐ Your Information
- ☒ Further Handling
- ☐ Necessary action
- ☐ Advice on Handling
- ☐ Response

Remarks: 11041-91

Division of Records & Reporting TR

PSC/R&R 9 (3/87)