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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Consolidated Dockets

In Re: Application by Nocatee Utility Corporation for Original Certificate for Water & Wastewater Service in Duval and St. Johns Counties, Florida	Docket No. 990696-WS
In Re: Application for Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.	Docket No. 992040-WS

COLLIER COUNTY AND CITRUS COUNTY
MOTION TO DISMISS

The Board of County Commissioners of Collier County ("Collier County") and the Board of County Commissioners of Citrus County ("Citrus County"), (collectively "the Counties"), political subdivisions of the State of Florida, by and through their undersigned attorney moves the Florida Public Service Commission ("Commission") to dismiss the above-referenced dockets on the basis that it lacks subject matter jurisdiction to grant these applications requesting service territory approval within a county that has not relinquished its statutory jurisdiction to the Commission pursuant to Section 367.171(7), F.S. In support of their motion, the Counties state as follows:

PROLOGUE

"The Further Exercise of Power Should Be Arrested"

> We conclude that this case is resolved on the threshold legal issue of whether the PSC exceeded its statutory authority in granting the present

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determination of need. As we stated in United Telephone Co. of Florida v. Public Service Commission, 496 So. 2d 116 (Fla. 1986):

> We note preliminarily that 'orders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made.' General Telephone Co. v. Carter, 115 So. 2d 554, 556 (Fla. 1959) (footnote omitted). See also Citizens v. Public Service Commission, 448 So. 2d 1024, 1026 (Fla. 1984).
>
> Such deference, however, cannot be accorded when the commission exceeds its authority. At the threshold, we must establish the grant of legislative authority to act since the commission derives it power solely from the legislature. See Florida Bridge Co. v. Bevis, 363 Sol. 2d 799, 802 (Fla. 1978). As we said in Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So. 2d 577, 582 (Fla. 1965):
>
>> [O]f course, the orders of the Florida Commission come to this court with a presumption of regularity, Sec. 364.20, Fla. Stat., F.S.A. But we cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.

496 So.2d at 118.[1]

1. Collier and Citrus Counties, like St. Johns County, the county whose territory and jurisdiction is to be usurped by Commission approval of the two applications being considered, and like Hillsborough and Sarasota Counties, who are also seeking dismissal of these applications,

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[1] The Florida Supreme Court recently reversed this Commission's New Smyrna Beach "merchant plant" approval on the basis that the Commission had exceeded its statutory authority. Tampa Electric Co. v. Joe Garcia, Case Nos. SC95444; SC95445; SC95446 (Slip opinion issued April 20, 2000, at pages 10 and 11.)

are political subdivisions of the State of Florida, created by the Florida Constitution, whose jurisdiction and authority are deserving of appropriate respect and deference by this Commission.[2]

2. These consolidated cases involve the question of whether this Commission has the clear statutory authority to approve initial or original applications for exclusive territory or franchises to operate water and/or wastewater utilities within the political boundaries of a county that is considered "non-jurisdictional" within the meaning of Chapter 367, F.S., more specifically, Section 367.171, F.S. The Counties would urge, especially given the history of the statutes being considered, if there exists "Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission, (it) must be resolved against the exercise thereof, and the further exercise of the power should be arrested." City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493, 496 (Fla. 1973).

3. The State of Florida has established a multi-jurisdictional statutory solution to the supervision and regulation of the provisioning of water and wastewater utility services to Floridians. On the one hand, Counties have long had the statutory authority to provide water and wastewater services to the unincorporated areas of their counties. (Chapter 153, F.S. 1959). Pursuant to Section 125.01(1)(k)1, F.S., counties have had the statutory authority to provide water and wastewater service since 1971. Specifically, 125.01, F.S. provides:

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[2] Counties are established as the "political subdivisions" of the State of Florida pursuant to Article VIII, Section 1(a), Florida Constitution, and created, abolished or changed by law as provided therein. Specific counties and their political boundaries are established by general law in Chapter 7, F.S. Each of the five counties involved in these proceedings and, in fact, all Florida Counties are officially established within Chapter 7, F.S. and their precise political boundaries set forth. Citrus County is established and described at Section 7.09, F.S.; Collier County at Section 7.11, F.S.; Hillsborough County at 7.29, F.S.; Sarasota County at Section 7.56, F.S.; and St. Johns County at 7.58, F.S.

> Powers and duties.—
>
> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:
>
> (k)1. Provide and regulate waste and sewage collection and disposal, water and alternative water supplies, including, but not limited to, reclaimed water and water from aquifer storage and recovery and desalination systems, and conservation programs.

These stated county powers are not restrictive or exclusive, but, rather, incorporate all the necessary implied powers required to carry them out. In fact, Chapter 71-14, Laws of Florida, notes that the intent of the legislation is "to continue and expand" the powers of the county commission. Further, the law states that the counties' powers and duties shall be "liberally construed" in order to secure the broad exercise of "home rule powers authorized by the State Constitution." Specifically, Section 125.01(3)(a) states:

> (3)(a) The enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated . . . .
>
> (b) <u>The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution.</u> (Emphasis supplied.)

4. The statutory authority for Florida municipalities to engage in the operation of water and wastewater utilities are contained generally in Chapter 166 and 180, Florida Statutes, and are of long-standing effect.

5. This Commission, as a completely statutory creature, had no jurisdiction in the field of water and wastewater regulation until the Florida Legislature saw fit to give it such a role. That

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role did not begin until 1971 when, by the passage of Chapter 71-278, Law of Florida, this Commission's authority under Chapter 367 was first created. Prior to then, the Commission had no role as compared to the pre-existing duties and powers of the counties and municipalities. Furthermore, as a "johnny come lately" to the field, statutorily at least, the Commission's authority was clearly placed as subordinate to that of the counties. From the very outset, what is now Section 367.171(3), F.S. provided an expansive list of counties which were excluded completely from the provisions of Chapter 367. This exclusion was based on factors the Florida Legislature expressed this way in the 1999 edition of the statutes:

> (3) In consideration of the variance of powers, duties, responsibilities, population, and size of municipalities of the several counties and in consideration of the fact that every county varies from every other county and thereby affects the functions, duties, and responsibilities required of its county officers and the scope of responsibilities which each county may, at this time, undertake, the Counties of Alachua, Baker, Bradford, Calhoun, Charlotte, Collier, Dade, Dixie, Escambia, Flagler, Gadsden, Gilchrist, Glades, Hamilton, Hardee, Hendry, Hernando, Hillsborough, Holmes, Indian River, Jefferson, Lafayette, Leon, Liberty, Madison, Manatee, Okaloosa, Okeechobee, Polk, St. Lucie, Santa Rosa, Sarasota, Suwannee, Taylor, Union, Wakulla, and Walton are excluded from the provisions of this chapter until such time as the board of county commissioners of any such county, acting pursuant to the provisions of subsection (1), makes this chapter applicable to such county or until the Legislature, by appropriate act, removes one or more of such counties from this exclusion.

(Emphasis supplied.) At its inception, this Commission's jurisdiction, including the ability to grant exclusive service territories or certificates pursuant to Section 367.031, F.S., excluded a long list of counties who could only be brought within the Commission's jurisdiction by statute enacted by the Florida Legislature or by act of the counties elected officials. Not only did the statutory scheme provide that county governments must "opt-in" by resolution (Section 367.171(1), F.S.), it also provided that a county could elect to "opt-out" of this Commission's jurisdiction after staying

the appropriate number of years (also Section 367.171(1), F.S.). The bottom line, however, was, that absent a legislative directive that a given county be under Commission Chapter 367 jurisdiction, the decision to come under the Commission's regulatory authority rested completely and exclusively with the counties and their respective leadership. Furthermore, for the majority of the years the Commission has had water and wastewater authority pursuant to Chapter 367, the totality of the regulatory authority either rested completely with a given county or completely with the Commission. That is, if the Commission had jurisdiction, it had complete jurisdiction, to include ratemaking and the authority to grant original certificates and extensions thereto. Conversely, if a county retained water and wastewater authority and was, thus, "nonjurisdictional," it held the complete authority to include ratemaking and the award of territory to any investor-owned utility seeking to operate within its political boundaries. There was no overlap until the 1989 legislative session and until that session the home rule authority recognized as preeminent in Section 125.01(k)1, F.S. was inviolate.

6. During its 1989 session the Florida Legislature modified the counties' complete discretion to opt-in or opt-out of Commission jurisdiction by passage of Chapter 89-353, Laws of Florida, which provided for the language found in Section 367.171(7), F.S. addressing "jurisdiction over all utility systems whose service transverses county boundaries." This language was first added in 1989 and then was modified somewhat the following year to describe that systems subject to, and remaining subject to, "interlocal agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries" would not be subject to Commission jurisdiction. The section currently reads:

> (7) Notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such interlocal agreement shall divest commission jurisdiction over such systems, any portion of which provides service within a county that is subject to commission jurisdiction under this section.

There was a "Sunshine Review" of all the Commission's statutes during 1989 (Chapter 367 by Chapter 89-353, Laws of Florida; Chapter 366 by Chapter 89-292, Laws of Florida) and the following year (Chapter 350 by Chapter 90-272, Laws of Florida; and Chapter 364 by Chapter 90-245, Laws of Florida) and it is difficult, if not impossible, in all that activity to discern any "legislative intent" motivating the change to allow Commission jurisdiction over such water and wastewater systems. However, it seems reasonably clear that there must have been: (1) at least one existing system whose "service transversed county boundaries" motivating the change; and (2) at least one such system that would be allowed to be "grandfathered" out of Commission jurisdiction by virtue of an inter-local agreement as of a date certain.

7. Whether it was "the system" motivating the 1989 "transversing county boundaries" change, the first case to arrive at this Commission pursuant to the statutory change involved General Development Utilities West Coast operation, which involved <u>existing</u> water and wastewater systems whose actual service lines and pipes crossed the county boundaries between Charlotte, DeSoto and Sarasota Counties. Through the rate increase application filed pursuant to Section 367.171(7), F.S., the utility managed to effectively have the "tail wag the dog" inasmuch as this Commission, which had jurisdiction over less than ten percent of all the customers and revenues under the prior law, took jurisdiction over 100 percent of the utility and considered the

full rate increase request. The rate increase was not decided by the Commission because the system was ultimately sold and the rate application dismissed by the utility. One can suspect, but not prove, that the rate increase filed with this Commission alone, as opposed to with multiple jurisdictions, served to ratchet up the sales price obtained for the utility from the governmental agencies involved. If enhancing the sales price of the GDU systems was the ultimate goal of the statutory change, it apparently succeeded. However, as suggested by the Counties, the unintended consequences of this statutory change were yet to begin and they are not concluded, as demonstrated by the instant case. Importantly, however, the first application to the Commission for expanded Commission jurisdiction involved an existing or extant utility system whose physical lines and pipes and, thus, service actually crossed or transversed county boundaries. The next two cases pushed the statutory definition further and in the process further impaired the counties' jurisdiction and home rule prerogatives.

8. In January, 1991, Jacksonville Suburban Utilities Corp. petitioned this Commission for a declaratory statement as to whether the Commission had exclusive jurisdiction over this utility's several water and wastewater facilities located in Duval, Nassau and St. Johns Counties pursuant to Section 367.171(7), F.S. The basis for the jurisdiction, "service transversing county boundaries," was not the actual existence of pipes and delivered service as in the prior GDU case, but, rather, the assertion that centralized management and shared support services constituted the requisite "service." St. Johns County intervened in the Commission's declaratory proceeding, protested the acceptance of managerial and administrative interconnectedness as a "system transversing county boundaries," but lost to this Commission's determination that it had jurisdiction pursuant to Section 367.171(7), F.S. St. Johns County appealed, but the

Commission's order was upheld in a decision reported at Board of County Com'rs of St. Johns County v. Beard, 601 So.2d 590 (Fla. 1st DCA 1992). Thereafter, there was a succession of cases in which utilities sought to have this Commission exert jurisdiction over utilities found within nonjurisdictional counties and without there being any physical pipes transversing county boundaries to support the utilization of Section 367.171(7), F.S.[3] In Hernando County v. Florida Public Service Commission, 685 So.2d 48, 52 (Fla 1st DCA 1996), the Court found that in order to be jurisdictional pursuant to Section 367.171(7), F.S., a utility "system" had to deliver utility services (meaning actual water and wastewater) over a physical interconnection that crossed contiguous county boundaries. In effect, Hernando County implicitly reverses Beard,.

9. Collier and Citrus Counties would urge on this Commission the view that there must be actual physical interconnections crossing contiguous county boundaries by which actual water and wastewater services are being transported in order for there to be jurisdiction in the Commission pursuant to Section 367.171(7), F.S. This view does not mean that the Commission can grant service territory within a nonjurisdictional county as part of an application, which if ultimately approved and constructed would result in actual physical interconnections transporting water and wastewater services. This type of "bootstrap" logic has no foundation in precedent and would do severe damage to the nonjurisdictional counties' ability to exercise their home rule prerogatives afforded by Chapter 125, F.S. Not only would the construction sought by both Nocatee and Intercoastal constitute a decision not liberally construing the provisions of Chapter

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Sugarmill Woods Civic Ass'n, Inc. V. Southern States Utilities, 687 So.2d 1346 (Fla. 1st DCA, 1997); Hernando County V. Florida Public Service Com'n, 685 So.2d 48 (Fla. 1st DCA,1996); Citrus County V. Southern States Utilities, Inc., 656 So.2d 1307 (Fla. 1st DCA, 1995)

125, F.S., it clearly constitutes a case of first impression, which if granted, would greatly stretch this Commission's jurisdiction to a point that the Counties would suggest is beyond that comprehended by the Florida Legislature. In a word, there is no prior history to support this Commission granting service territory within a nonjurisdictional county and there is clearly a reasonable doubt as to the lawful existence of that authority. Given the reasonable doubt to grant service territories within a nonjurisdictional county, the exercise of the power should be arrested. Tampa Electric Co. v. Joe Garcia, supra.

10. The certificated service territory sought by both Nocatee and Intercoastal in their applications includes thousands of acres located exclusively within St. Johns County, a nonjurisdictional county. In fact, the vast majority of the territory sought is within St. Johns County and not Duval County, a jurisdictional county. Under the scenario presented by the applicants in this case and by the Commission staff's recommendation, there is no end to the amount of territory within a nonjurisdictional county that this Commission could grant pursuant to requests similar to those before it. Why stop at just the territory actually proposed to be developed by Nocatee? The case law does not require that the Commission limit itself to grants of territory which will immediately require service. Furthermore, under the scenario presented by Staff's recommendation, it appears that this Commission could effectively grant the applicants in this case or a similar case all the territory within a nonjurisdictional county that is not presently being served, irrespective of whether or not the county commission had already determined that all or part of the area would be better served by another nonjurisdictional utility. Additionally, under this scenario, territory physically adjacent to certificated areas granted by this Commission within the boundaries of nonjurisdictional counties would always be at risk if the utility sought an

expansion of a previously granted certificate. Where would it stop? Where could such an intrusion reasonably be expected to stop once the Commission embarks upon the process of taking jurisdiction from nonjurisdictional counties and using that jurisdiction to grant service territories? The answer, the Counties would submit, is that there could be no limit to the service territory awarded in nonjurisdictional counties and all nonjurisdictional counties in the state would be at risk from such a policy.

11. As noted by St. Johns County and apparently conceded by all parties, this is an issue of first impression. Whereas there are cases clearly supporting the Commission's ability (although not without limits) of granting service territory expansions in jurisdictional counties, there are no cases the Counties are aware of supporting the Commission's grant of additional territory to a utility within a nonjurisdictional county, even where the utility has already been found to be jurisdictional on the basis of Section 367.171(7), F.S., let alone where the utility in question is merely proposed, but is otherwise not in existence. Furthermore, as cited by St. Johns County, City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So.2d 219, 225 (Fla. 5th DCA 1991), the franchise rights granted by this Commission are merely equal to, not superior to, those awarded by local governments. In the instant case, approving either the Nocatee or Intercoastal applications will trample on the earlier and inconsistent territorial decision made by St. Johns County. In accord is Lake Utility Services, Inc. v. City of Clermont, 727 So.2d 984, 988 (Fla. 5th DCA 1999).

12. On the surface there is no apparent conflict between the internal provisions of Section 367.171(7), F.S. granting counties the discretion to become and remain "nonjurisdictional" and the provision that requires the Commission to exercise exclusive

jurisdiction over systems whose service transverses county boundaries, provided that one accepts that any systems whose service transverses county boundaries is extant or actually in existence at the time that regulation is sought to be imposed. Under this view, all existing systems having actual physical service transversing county boundaries must be regulated by this Commission in all statutory respects with the exception of the ability to award service area expansions within nonjurisdictional counties. Commission jurisdiction over such a utility would exist irrespective of whether the utility met the "transverses county boundaries" on the date Section 367.171(7), F.S. become effective or by virtue of a nonjurisdictional county knowingly granting a utility service territory within its boundaries coupled with an application in an adjacent county that, once completed, would bring it within this Commission's jurisdiction. Under this scenario, the nonjurisdictional county still maintains control of its own powers and duties provided both by Chapter 125, F.S. and Chapter 367, F.S. In the instant case, St. Johns County might elect to award Nocatee (it has already refused Intercoastal) all or a portion of the territory sought within St. Johns County's political boundaries. It could do so with the full knowledge that the Commission would take jurisdiction of whatever the County granted, after, but only after, its territorial grant is mated with territory on the other side of a county boundary. Such an interpretation would do justice to all the statutory provisions considering water and wastewater and would be preferred. Central Truck Lines, Inc. v. Railroad Comm., 118 Fla. 526, 160 So. 22 (Fla. 1935).

13. If the Commission finds a conflict in the statutes (both 367.171(7) internally and with Chapter 125, F.S.), it should attempt to construe them in a manner that harmonizes and reconciles each with the other and without necessarily finding one meaningless or repealed by implication. Oldham v. Rooks, 361 So.2d 140, 143 (Fla. 1978); State v. Putnam County

Development Authority, 249 So.2d 6, 10 (Fla. 1971); Vocelle v. Knight Brothers Paper Co., 118 So.2d 664, 667 (Fla. 1st DCA 1960).

14. The arguments made by St. Johns County in opposition to Intercoastal's application are excellent and Collier and Citrus Counties adopt those arguments in their entirety, as far as they go. The single problem Collier and Citrus Counties see with St. Johns County's excellent argument is that it does not oppose the application filed by Nocatee and for the same reasons it opposes Intercoastal's application. Whatever this lapse, if it is a lapse, or for whatever the reason Nocatee is not challenged, the Nocatee application is every bit as offensive to the jurisdictional rights of St. Johns County, and all nonjurisdictional counties, as the Intercoastal application.[4]

CONCLUSION

15. Section 367.171(7)F.S. clearly provides this Commission with rate and other regulatory authority over utility systems whose actual service, meaning pipes, lines and the transport of water and wastewater services (the things this Commission regulates, not the things that it does not, like telephone services, accounting activities, etc.) transverses county boundaries. Hernando County, supra. Such an interpretation, already upheld by the First District Court of Appeal, does no disservice to, nor is it in any way in conflict with the other statutory rights of the nonjurisdictional counties be they provided by Section 367.171(7), F.S. or Chapter 125, F.S.

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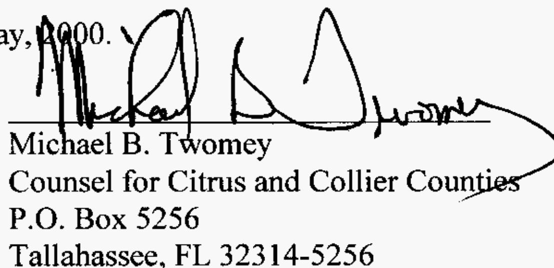
[4] The Intercoastal application, seeking an original certificate for the existing utility solely regulated by St. Johns County and then an expansion out and into Duval County is clearly more farfetched and absurd than that presented by Nocatee but it is every bit as offensive to the statutory rights of nonjurisdictional counties. The authority for Commission staff to merely treat Intercoastal's application as one identical to Nocatee's because it is more consistent with Staff's recommendation is not at all apparent. Intercoastal's application should be considered as filed, not as amended by Commission Staff.

However, any interpretation allowing this Commission to grant service territory, either pursuant to an original application or by expansion of an existing certificate, is clearly inconsistent with the rights of the nonjurisdictional counties. While the Commission has an obligation to interpret the statutes it must administer, it is not entitled to a presumption of correctness where the statute involves jurisdiction. Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577 (Fla. 1965). There is no precedent for such an interpretation and there is clearly reasonable doubt that such authority exists. As cited at the outset in Tampa Electric Co. v. Joe Garcia supra., the Commission, as a statutory body, must find explicit support for its actions in its authorizing statutes and where there is any doubt about the existence of such statutory authority to act, the exercise of that power should be arrested. There is more than a little doubt about the Commission's authority to grant certificates for almost 22,000 acres of service territory within St. Johns County in the face of that County protesting such an approval. The Commission should resist any temptation to test its authority in this area where it has previously done so and been reversed.

16. Wherefore, Collier and Citrus Counties respectfully request that this Commission grant their motions to dismiss and those of the other nonjurisdictional counties and decline to consider any applications for service territory within St. Johns County or any other nonjurisdictional county.

Respectfully submitted this 23d day of May, 2000.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by either regular U. S. Mail or hand this 23rd day of May, 2000, to the following persons:

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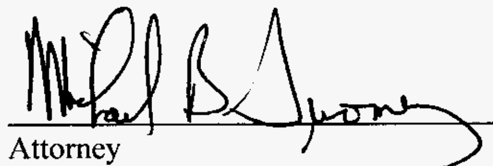

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