BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for water certificate in Brevard, Orange and Osceola Counties by EAST CENTRAL FLORIDA SERVICES, INC.	DOCKET NO. 910114-WU ORDER NO. PSC-92-0955-FOF-WU ISSUED: 09/09/92

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY

ORDER VACATING STAY

BY THE COMMISSION:

BACKGROUND

On February 6, 1991, East Central Florida Services, Inc., (ECFS or utility) filed an application for an original water certificate in Brevard, Orange, and Osceola Counties. In its application, ECFS proposed providing residential, agricultural, and raw water services. On March 8, 1991, Orange County filed an objection to ECFS's notice of the above-referenced application. On March 15, 1991, Brevard County filed an objection to ECFS's notice of application. Three days later, on March 18, 1991, South Brevard Water Authority (SBWA) filed an objection to the notice, and the next day, March 19, 1991, both the City of Cocoa (Cocoa) and Osceola County filed objections.

On September 26, 1991, Brevard County submitted a Notice of Conditional Withdrawal of its objection. The condition for Brevard County's withdrawal was the Commission's acceptance of a restrictive amendment to ECFS's application. By Order No. 25149, issued October 1, 1991, the Prehearing Order for this proceeding, the Prehearing Officer granted both ECFS's motion to restrictively amend and Brevard County's withdrawal.

Just prior to the October 2 and 3, 1991, hearing in this matter, Orange County submitted a Notice of Voluntary Dismissal With Prejudice. We granted Orange County's withdrawal at the onset of the hearing.

By Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, the Commission granted ECFS a water certificate. Cocoa filed a timely

notice of appeal of this Order on April 6, 1992. On April 29, 1992, ECFS was issued Certificate No. 537-W; and on May 15, 1992, ECFS's original tariff sheets were approved.

By motion served May 13, 1992, Cocoa sought to have the First District Court of Appeal (DCA) enforce the automatic stay provided for by Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure. The First DCA granted Cocoa's motion to enforce the automatic stay, noting, however, that its decision was without prejudice to the parties' right to litigate and this Commission's right to determine whether the stay should remain in effect.

On May 28, 1992, ECFS filed with this Commission a Motion to Vacate Stay. On June 3, 1992, Cocoa filed a Memorandum in Opposition to ECFS's Motion to Vacate Stay. On June 8, 1992, ECFS filed a Response to Cocoa's Memorandum in Opposition, and on June 12, 1992, Cocoa filed a Motion to Strike ECFS's Response to its Memorandum in Opposition. This Order reflects our disposition of these two Motions.

MOTION TO VACATE STAY

The motion Cocoa had filed with the First DCA sought enforcement of the automatic stay provided for in Rule 9.310(b)(2), Florida Rules of Appellate Procedure. Rule 9.310(b)(2) provides, in pertinent part, as follows:

> The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the State, any public officer in an official capacity, board, commission, or other public body seeks review . . . . On motion, the lower tribunal or the court may extend a stay, impose lawful conditions, or vacate the stay.

This Commission and ECFS filed responses to Cocoa's motion with the First DCA. By Order entered June 9, 1992, the First DCA granted Cocoa's motion to enforce the automatic stay; however, it explained that its ruling was "without prejudice to the rights of the parties to litigate and the Public Service Commission to determine whether the stay should remain in effect during the appeal." We believe

the DCA's ruling had the effect of voiding the certificate issued to ECFS and, presumably, the approval of the tariff sheets.

The pertinent arguments in ECFS's Motion to Vacate Stay are summarized as follows: (1) If the automatic stay is allowed to remain in effect, ECFS will be put in the position of providing water service without necessary regulatory oversight; (2) The potential prejudice to ECFS and/or its customers if the stay remains in effect outweighs any potential prejudice to Cocoa, which in the course of the proceedings before the Commission failed to show how ECFS's proposed activities would harm it in a way the Commission had control over; (3) The primary purpose of the Fla. R. App. P. 9.310(b)(2) automatic stay is to protect governmental entities from execution on money judgments and suffering irreversible damage while an appeal is pending and that purpose cannot be fulfilled by enforcing the stay in this type of case; (4) Stays are supposed to delay the execution of a judgment so as to prevent injury, but not to undo the substance of the judgement, which a stay in Cocoa's favor would do here, negating what the Commission already decided; and (5) Unlike a private party which obtains a money judgment against a governmental entity, the Commission is a governmental entity charged with upholding the public interest, and, therefore, any harm to the public which the automatic stay seeks to avoid has already been taken into account by the Commission.

ECFS asks that the Commission vacate the stay in its entirety or, in the alternative, modify the stay so as to allow ECFS to function as a regulated utility in the entire territory granted except where that territory overlaps with Cocoa's service territory. ECFS apparently believes any potential harm to Cocoa would be minimized by this suggested alternative.

In its Memorandum in Opposition, Cocoa attempts to rebut the premise that ECFS's customers will be prejudiced by the stay. Cocoa argues that ECFS has no present customers. Citing discovery conducted in a consumptive use permit dispute pending before the Division of Administrative Hearings (DOAH), Cocoa asserts that ECFS admits that it is not currently providing service or operating certain water withdrawal facilities. Citing the testimony of ECFS's president in another DOAH case, Cocoa asserts that the Corporation of the President of the Church of Jesus Christ of Latter Day Saints (COP) and Deseret Ranches currently control the utility well sites and that ECFS only maintains the flow wells.

In addition, Cocoa argues that the applicable standard for vacating the automatic stay, established in St. Lucie County v. North Palm Development Corp., 444 So.2d 1133 (Fla. 4th DCA 1984), is not met in this case. Cocoa asserts that the automatic stay "should be vacated only under the most compelling circumstances," 444 So.2d at 1135, and Cocoa maintains that ECFS has not shown compelling circumstances.

Further, Cocoa argues that the St Lucie County decision requires that a lower tribunal's decision to vacate a stay must be based on record evidence which shows the requisite "compelling circumstances." Cocoa argues, "ECFS has failed to file any affidavits or other evidence whatsoever to demonstrate it has been or will be prejudiced by the automatic stay." Cocoa also disagrees with ECFS's view of the purpose of the automatic stay, quoting the following from the St Lucie County opinion:

> It is apparent the rule intends that adverse judgments appealed by a governmental agency are automatically stayed. We suggest the reason therefore . . . involves the fact that planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the public generally.

444 So.2d at 1135.

Cocoa concludes that the Commission cannot vacate or modify the stay without first concluding that ECFS is currently serving customers and that "compelling circumstances" are present.

We believe that the St Lucie County decision is an appropriate starting point from which to analyze the arguments raised by ECFS and Cocoa. In the St Lucie County case, developers sought to build on seven parcels of land located on an island in St. Lucie County. Pursuant to the County's Comprehensive Zoning Resolution (CZR), the developers submitted site development plans for approval. After the County rejected the site plans, the developers sued the County in Circuit Court. The Circuit Court declared portions of the CZR facially unconstitutional and found that the developers' site plan met the site plan requirements of the court-modified CZR. After the County filed a timely notice of appeal, the Circuit Court granted the developers' motion to vacate the automatic stay. The

County then sought review of the Circuit Court's order vacating the stay.

In our view, Cocoa has misinterpreted several aspects of the St Lucie County decision. First, Cocoa errs in implying that St Lucie County requires some sort of evidentiary proceeding to address the potentialities of lifting the stay. In St. Lucie County, the Fourth DCA expressed its disagreement with the trial judge's view of possible prejudice to the County, then added,

> And since his conclusion is not based upon any evidentiary record, the usual presumptions do not abide the conclusion in question.

444 So.2d 1135. In other words, since the trial court made no findings of fact at an evidentiary hearing, there was no presumption of correctness to the trial court's factual evaluation.

More importantly, however, we think that Cocoa misapplies the St. Lucie County standard to this case. The Fourth DCA's announced justification for the automatic stay was that the stay gives deference to planning-level decisions made in the public interest so that adverse consequences from proceeding under an erroneous judgment, which presumably harm the public generally, are avoided. However, nowhere in Cocoa's memorandum does it explain how it has made a planning-level decision which is at stake in this proceeding before the Commission. This flaw notwithstanding, we think it safe to presume that the planning-level decision Cocoa would assert as being at issue here is its local comprehensive plan. However, even after embellishing Cocoa's argument in this way, we are not persuaded that the St. Lucie County standard applies.

The critical difference between this case and the St. Lucie County case is that in St. Lucie County, the validity of a planning-level decision, the County's CZR, was the subject of the decision in the court below and the subject of the appeal. In this case the subject of the decision is ECFS's certification, not Cocoa's plan.

The parties cite no other precedents, but we have reviewed two other cases which address the automatic stay and planning-level decisions. In both of these cases, the courts determined the propriety of conditioning the automatic stay on a governmental

entity's posting a bond and, in that context, elucidate the planning-level decision aspect of the St. Lucie County holding.

In City of Lauderdale Lakes v. Corn, 415 So.2d 1270 (Fla. 1982), the trial court declared a City of Lauderdale Lakes municipal zoning ordinance invalid, and the City appealed. The trial court refused a request to lift the automatic stay, but it required the City to post a $1.14 million bond for potential damages as a condition for the stay. The Florida Supreme Court held that requiring a bond was not proper "for appellate review of legislative planning-level determinations," 415 So.2d at 1272, as opposed to operational-level decisions.

Therefore, in Corn, as in St. Lucie County, the decision of the court below directly invalidated a planning-level decision, legislative in nature. In the instant case, this Commission did not invalidate Cocoa's comprehensive plan, and, therefore, the automatic stay's purpose of according deference to the governmental entity's (Cocoa's) planning-level decision appears illusive here.

In City of Delray Beach v. Department of Transportation, 444 So.2d 506 (Fla. 1st DCA 1984), the City of Delray Beach sought review of an order of the Department of Transportation (DOT) denying a motion to vacate the automatic stay but conditioning the stay on the City's posting a bond. The City invoked the automatic stay by appealing DOT's order transferring jurisdiction of and responsibility for a certain road from Palm Beach County to the City. In finding the trial court's bond requirement an appropriate exercise of discretion, the court reasoned that "the judgment involved herein concerned no 'decision' of the City which could be characterized as either an operational or planning-level governmental function . . . . 444 So.2d at 507.

In the City of Delray Beach case, the City's newfound responsibility over the subject road certainly would have an impact on a number of aspects of City government, including planning-level decisions. The indication from the court, however, seems to be that the lower tribunal has to have made direct intervention with a planning-level decision. In the instant case, the Commission made no such direct intervention.

Throughout this proceeding before the Commission, Cocoa maintained that certification of ECFS was inconsistent with Cocoa's comprehensive plan. In Order No. PSC-92-0104-FOF-WU, we expressed

disagreement with this assertion. Moreover, we noted that according to Section 367.045(5)(b), Florida Statutes, we are required to consider inconsistency with comprehensive plans, but are not bound to reject certification if inconsistency exists.

Our disposition of Cocoa's claim regarding its comprehensive plan is significant to our decision on the instant motion for two purposes: First, it demonstrates that we did not (nor is it our responsibility to) directly interfere with a planning-level decision; secondly, it illustrates our legislatively-designated role to make the public interest determination which is a predicate to certificating utilities.

Rule 9.130(2)(b) of the Rules of Appellate Procedure grants the lower tribunal discretion to vacate or modify the stay. In consideration of the above, we do not think that compelling circumstances, as Cocoa espouses, are required; but the exercise of discretion should be justified.

The principal argument in favor of lifting the automatic stay, which ECFS makes and which we have alluded to above, is that this Commission's responsibility is to uphold the public interest. Therefore, any harm to the public was considered when we decided to certificate ECFS. Thus, the rationale for the automatic stay, as announced by the St. Lucie County court, appears to favor this Commission rather than Cocoa.

In balancing the potential harm to Cocoa and ECFS, we do not believe that lifting the stay will harm Cocoa in any way which we have control over. Significantly, in its memorandum in opposition, Cocoa makes no allegations of what harm it will suffer if the stay were lifted. However, the potential harm we perceive in allowing the stay to remain in effect is to the public interest when ECFS begins engaging in regulated activities (if it has not already).

Finally, we do not think that Cocoa's assertion that ECFS may not be operating the utility currently is a matter of concern. Perhaps Order No. PSC-92-0104-FOF-WU is not as clear throughout as it should be on the fact that ECFS proposes to operate as a regulated utility. This Commission's jurisdiction is invoked when an entity engages in or proposes to engage in regulated activity.

In consideration of the above, we shall grant ECFS's motion and exercise our discretion to vacate the automatic stay.

MOTION TO STRIKE

As stated above, ECFS filed a response to Cocoa's Memorandum in Opposition to the motion to vacate the automatic stay, and on June 12, 1992, Cocoa filed a Motion to Strike ECFS's response.

In its Motion to Strike, Cocoa points out that under the Commission's rules, permissible pleadings end with a single responsive pleading, which, in these circumstances, is a memorandum in opposition, as provided for by Rule 25-22.037(2)(b), Florida Administrative Code. Cocoa argues that ECFS's response should be stricken for this reason and also because the response raises new arguments in support of ECFS's motion.

We agree that the Commission's rules contemplate only a single responsive pleading. Although additional responsive pleadings may be helpful in some circumstances, ECFS's response was superfluous. We encourage parties to make their best arguments and address all the issues in the original pleadings allowed by the rules and discourage parties from filing additional pleadings.

In consideration of the above, the City of Cocoa's Motion to Strike ECFS's Response to Cocoa's Memorandum in Opposition is granted.

Based on the foregoing, it is, therefore,

ORDERED that by the Florida Public Service Commission that East Central Florida Services, Inc.'s Motion to Vacate Stay is granted. It is further

ORDERED that the City of Cocoa's Motion to Strike ECFS's Response is granted.

By ORDER of the Florida Public Service Commission this 9th day of September, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)
MJF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.