State of Florida

REVISED

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: NOVEMBER 19, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (CHRISTENSEN)
DIVISION OF REGULATORY OVERSIGHT (MESSER, REDEMANN)

RE: DOCKET NO. 991666-WU - APPLICATION FOR AMENDMENT OF CERTIFICATE NO. 106-W TO ADD TERRITORY IN LAKE COUNTY BY FLORIDA WATER SERVICES CORPORATION.

AGENDA: 12/04/2001 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991666R2.RCM

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CASE BACKGROUND

On November 3, 1999, Florida Water Services Corporation (FWSC, Florida Water or utility) filed an application for amendment of Certificate No. 106-W to add territory in Lake County. FWSC is a Class A utility.

The City of Groveland (City) timely filed a protest to the application on November 24, 1999. By Order No. PSC-00-0623-PCO-WU (Order Establishing Procedure), issued April 3, 2000, this matter was scheduled for an administrative hearing on December 11 and 12, 2000.

On October 27, 2000, the parties filed a Joint Motion for Extension of Time to File Rebuttal Testimony and Joint Motion for Continuance of the hearing dates. By Order No. PSC-00-2096-PCO-WU, issued November 6, 2000, the hearing dates were changed to March 13 and 14, 2001, the prehearing date was changed to March 1, 2001, and other key activity dates were consequently changed. By Order No. PSC-01-0279-PCO-WU, issued January 31, 2001, the hearing dates were changed to March 15 and 16, 2001. Pursuant to Order No. PSC-01-0395-PCO-WU, issued February 16, 2001, the prehearing conference and hearing dates were changed to June 25, 2001, and July 11 and 12, 2001, respectively. In addition, by Order No. PSC-01-0395-PCO-WU, the discovery cutoff date was changed to June 18, 2001. By Order No. PSC-01-1287-PCO-WU, issued June 13, 2001, the prehearing conference date was changed to June 26, 2001, and the discovery cutoff date was extended to July 3, 2001.

On May 10, 2001, FWSC filed its Motion for Summary Final Order. On May 17, 2001, the City filed its Response in Opposition to Motion for Summary Final Order. On May 17, 2001, the City also filed a Motion Requesting Oral Argument on the Motion for Summary Final Order. By Order No. PSC-01-1478-FOF-WU, issued July 16, 2001, FWSC's Motion for Summary Final Order was denied. Thus, the matter proceeded to administrative hearing on July 11 and 12, 2001.

No existing customers of Florida Water attended the hearing. However, one resident of Lake County who lives across the street from the proposed development provided testimony on past development plans in that area, and questioned future plans of the City to annex that area and the impact that would have on existing residents such as himself. The Commission directed both the City and the utility to meet and answer all of this resident's

questions, and to supply the Commission with a copy of those responses. Both parties supplied that information to the Commission.

At the hearing, the City of Groveland made an *ore tenus* Motion to Strike the testimony of Mr. John L. Tillman. Further, the City requested that Mr. Mittauer be tendered as an expert in the field of water and wastewater utility design, construction and permitting. The Commission directed the parties to brief the following two additional issues related to the City's Motion: 1) should Mr. Tillman and Mr. Mittauer be tendered as expert witnesses, and if so, in what areas? and 2) should the City's Motion to Strike those portions of Mr. Tillman's testimony and exhibits identified at the July 11th hearing be granted? On August 13, 2001, the City filed its Brief on Motions to Strike and To Reject or Accept Expert Witnesses of the City of Groveland, Florida. On August 13, 2001, FWSC filed its brief entitled Florida Water Service Corporation's Legal Memorandum on Issues A and B.

Pursuant to the Prehearing Order, the parties were required to include in their post-hearing statements a summary of each position of no more than 50 words, set off with asterisks. Staff notes that when the positions of FWSC and the City of Groveland exceeded 50 words, staff included the position up to the 50 word limit.

By Order No. PSC-01-1919-PCO-WU, issued September 24, 2001, the Commission issued its ruling on the issues of whether Mr. Tillman and Mr. Mittauer should be accepted as experts, and if so in what areas; and whether certain portions of Mr. Tillman's testimony should be striken. The Commission found that Mr. Tillman should be accepted as an expert in the area of water and wastewater utility management. Id. At 10. Further, the Commission found that the City's additional proffer that Mr. Mittauer be accepted as an expert in the field of engineering was unnecessary and that it is clear from the record that he is an expert in water and wastewater utility engineering. Id. At 10-11. The Commission denied the City's motion to strike certain portions of Mr. Tillman's testimony in its entirety. Id. At 24. Further, the Commission overruled the City's objection to the admission of Exhibit 5. Id.

On October 25, 2001, staff filed its post-hearing recommendation, which was scheduled to be heard at the November 6, 2001, Agenda Conference. On November 1, 2001, the City filed a Motion to Reopen Hearing and a Request for Oral Argument. Due to

the City's Motion, the Commission deferred the post-hearing recommendation at the November 6, 2001, Agenda Conference. On November 8, 2001, FWSC filed its Response in Opposition to the City of Groveland's Motion to Reopen Hearing. This recommendation is being revised to include two additional issues addressing these pleadings. Issue A addresses the City's Request for Oral Argument. Issue B addresses the City's Motion to Reopen Hearing and FWSC's Response to the Motion. Because of these additional issues, Issue C now addresses the City's Motion to Include Responses in Exhibit 23. Issues A and B are the only new issues to the recommendation. Issues C - 13 are identical to the original recommendation filed on October 25, 2001.

The Commission has jurisdiction pursuant to Sections 367.045 120.569, and 120.57, Florida Statutes. This recommendation addresses the merits of FWSC's application for amendment of Certificate No. 106-W to add territory in Lake County.

STIPULATIONS

In Order No. PSC-01-1448-PHO-WU, issued July 6, 2001 (Prehearing Order), the following proposed stipulations were identified. At the July 11, 2001 hearing, the Commission voted to approve these stipulations. (TR 6-7) These stipulations are identified below.

1. There is a need for service in the territory proposed by Florida Water Service Corporation's application.

2. Florida Water Services Corporation has the financial ability to serve the requested territory.

3. Florida Water Services Corporation has the technical ability to serve the requested territory.

ISSUE A: Should the Commission grant the City of Groveland's Request for Oral Argument on its Motion to Reopen Hearing?

RECOMMENDATION: No. Staff recommends that the Commission should deny the City of Groveland's Request for Oral Argument on its Motion to Reopen Hearing. Should the Commission grant the Request for Oral Argument upon finding that oral argument would assist the Commission in making its decision on whether to reopen the record, staff recommends that oral argument be limited in scope to only the Motion to Reopen Hearing.

STAFF ANALYSIS: On November 1, 2001, the City filed its Motion to Reopen Hearing along with its Request for Oral Argument. The City asserts that its Motion to Reopen Hearing is based on newly discovered evidence and on changed circumstances. The City argues that oral argument will benefit the Commission in evaluating the newly discovered evidence and the legal merits of reopening the hearing.
FWSC did not file a response to the City's Request for Oral Argument.

Rule 25-22.058, Florida Administrative Code, states that:

> The Commission may grant oral argument upon request of any party to a section 120.57 formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it.

Staff believes that the issues are clearly set forth in the pleadings, and oral argument is not necessary for the Commission to comprehend or evaluate the issues. Should the Commission grant the Request for Oral Argument upon finding that oral argument would assist the Commission in making its decision on whether to reopen the record, staff recommends that oral argument be limited in scope to only the Motion to Reopen Hearing. Staff notes that on post-hearing recommendations, Agenda Conference participation is limited to staff and Commissioners only.

Therefore, staff recommends that the Commission should deny the City of Groveland's Request for Oral Argument on its Motion to Reopen Hearing.

ISSUE B: Should the Commission grant the City of Groveland's Motion to Reopen Hearing?

RECOMMENDATION: No. Staff recommends that the Commission should deny the City of Groveland's Motion to Reopen Hearing.

STAFF ANALYSIS:

The City's Motion

On November 1, 2001, the City filed a Motion to Reopen Hearing. In support of its Motion, the City states that Exhibit 5, entered into the record at the hearing in this case, contains an Application For Service Extension executed by Robert A. Davis, as Trustee for the Summit requesting service by July 1, 2000. The City asserts that one of the threshold issues in any certificate case is whether and when utility service is actually needed. The City argues that its position is that, if actually developed, the Summit would create a demand for service, but that the timing of that demand is so indefinite that the request for service is premature.

The City claims in its Motion that it has completed its water line extension to the western edge of the Summit and has notified the developer of this fact. In response to this information, the developer's attorney, Steven J. Richey, sent a letter to the City dated October 31, 2001, a facsimile copy of which is attached to the City's Motion. The City states that in this letter, Mr. Richey indicates that the developer has requested that the City provide water and wastewater service to the Summit and that the post September 11, 2001, economic climate has made it financially impossible for development of the Summit to proceed. The City also states that Mr. Richey indicates in the letter that the developer has stopped development and no date can be set for when service will be needed. The City argues that based on this letter, there is no longer a need for service in the area requested by FWSC.

The City argues that the legal standard applied to the reopening of a civil hearing when there are changed circumstances or newly discovered evidence is based upon Rules 1.530 and 1.540, Florida Rules of Civil Procedure, and is as follows: 1) the evidence is such that it will probably change the result if a new trial is granted; 2) it could not have been discovered before the trial by exercise of due diligence; 3) it is material to the issue;

and 4) it is not merely cumulative or impeaching.[1] Further, the City contends that this standard has been applied by both the Division of Administrative Hearings and the Commission to motions to reopen hearings based on newly discovered evidence and/or changed circumstances.[2]

The City argues that Section 367.045(2)(b), Florida Statutes, expressly authorizes the Commission to inquire into the need or lack of need for service in an area that the applicant seeks to add. The City contends that the fact that the developer has stopped development of the Summit indefinitely is a material change of circumstances which has the ability to change the outcome of this docket. The City further argues that this fact is not cumulative nor impeaching of previous testimony and was not capable of being discovered by the City prior to the hearing since it was based on the economic circumstances since September 11, 2001. The City concludes that the criteria for reopening the hearing in this docket for the purposes of exploring the actual need for service in the area requested by FWSC have been met.

FWSC's Response

On November 8, 2001, FWSC filed its Response in Opposition to the City's Motion to Reopen Hearing. In support of its Response, FWSC states that the City filed a protest which was primarily based upon the fact that the requested territory was located within an exclusive service district established by the City pursuant to Section 180.02(3), Florida Statutes. FWSC contends that the City's objection did not challenge the need for service to the requested

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[1] The City cites to City of Winter Haven, for Use and Benefit of Lastinger v. Tuttle/While Constructors, Inc., 370 So.2d 829, 831 (Fla. 2nd DCA 1979).

[2]The City cites to City of Gainesville, Gainesville Regional Utilities v. University of Florida, DOAH Case No. 88-2034BID, issued November 30, 1988, at 6, 1988 Fla. Div. Adm Hear. LEXIS 4454, (citing Ragen v. Paramount Hudson, Inc., 434 So.2d 907 (Fla. 3rd DCA 1983), rev. den., 444 So.2d 417 (Fla. 1984)); In re: Application of Air-Beep of Florida, Inc., Order No. 6874, issued August 28, 1975, in FPSC Docket No. 74150-RCC; In re: Investigation of Forced Shutdown of Crystal River No. 3, 81 F.P.S.C. 1: 249 (1981).

territory, and in the City's prehearing statement the City acknowledged the need for service. Further, FWSC states that at the hearing, the Commission approved the stipulations set forth in the Prehearing Order including a stipulation that there is a need for service. TR 6-7. FWSC contends that the City should not be allowed to make the need for service an issue two years after filing its objection and three months following the conclusion of the evidentiary hearing.

FWSC asserts that at the time the City filed its objections, the City's water lines terminated approximately five miles from the requested territory. FWSC states that as reflected by the evidence in the record, during the almost two years that the application has been pending, the City raced to extend its water lines in an effort to buttress it legal position that it had a preemptive right to serve.

FWSC argues that after successfully delaying the certification of the new territory to FWSC for two years, the City seeks to further delay this matter based upon the hearsay statements of a non-witness with no demonstrated connection to the issues in this docket and oblique references to the tragic events of September 11, 2001. FWSC contends that the City has attached to its Motion a copy of a facsimile transmission to the City Manager which purports to be from an attorney who purports to represent an individual who purports to be a principle landowner of the property. FWSC asserts that the letter from the attorney, who never entered an appearance in this docket, references purported discussions with the City wherein the attorney purportedly conveyed that his purported client had determined that it was financially impossible to proceed with development for some unspecified time due to the economic climate after September 11, 2001.

FWSC argues that the City's Motion must be denied as inadequate on its face. FWSC contends that need for serve has already been stipulated in this case. FWSC asserts that the attachment to the City's Motion deals only with alleged discussions regarding the City's desire to provide service without mention of FWSC. FWSC states that nothing in the Motion or attachment abrogates or disclaims the Water Service Agreement for the Summit entered into by FWSC and the developer on February 25, 2000. FWSC states that the Developer Agreement was admitted into the record and was duly recorded in the public records of Lake County. FWSC concludes that the failure of the City's Motion to address the

Agreement between FWSC and the developer precluded the granting of the relief sought.

FWSC states that Section 17 of the Water Service Agreement provides that it is subject to Commission approval of the territory expansion. FWSC argues that while the Agreement states that there would be a need for service by July 2000, the City's challenge to the Application effectively placed the Agreement on hold until the Commission issues its ruling. FWSC contends that the majority of the steps necessary for FWSC and the developer to move forward with the development have taken place, in that a water distribution permit has been obtained from DEP and other major steps required by the permitting agencies for the development have been completed or have been put in process.

FWSC argues that in its post-hearing brief, the City raised a whole host of issues as to why it believed that the development would not proceed and argued that no viable date for service had been established in the record. FWSC asserts that the City's alleged new evidence is simply an uncorroborated, hearsay addition to the laundry list of non-consequential arguments previously advanced by the City. FWSC states that an example is the argument raised in the City's post-hearing brief regarding the alleged economic conditions which might affect the developer's ability to finance the project. FWSC contends that the City's Motion is a rehash of that prior argument which should be rejected.

FWSC cites to Health Care and Retirement Corp. of America v. Department of Health and Rehabilitate Services[3], for the proposition that a party does not have a right to present evidence after the record is closed. FWSC states that in Canova v. Florida Nat. Bank of Jacksonvile,[4] the Supreme Court upheld a chancellor's

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[3]Health Care and Retirement Corp. of America v. Department of Health and Rehabilitate Services, 489 So.2d 789, 792 (Fla. 1st DCA 1986).

[4]Canova v. Florida Nat. Bank of Jacksonvile, 60 So.2d 627 (Fla. 1952); FWSC also cites Order No. PSC-98-1165-FOF-TX, issued August 27, 1998, in Docket No. 971056-TX, In Re: Application for Certificate to Provide Alternative Local Exchange Telecommunications Service by BellSouth BSE, Inc. (BellSouth BSE, Inc.)

discretionary action denying a request to reopen a case for the taking of further testimony. Citing to Florida Bridge Company v. Bevis and United Telephone Company v. Mayo[5], FWSC states that the Commission clearly has the discretion to terminate its data-gathering function. FWSC contends that in this case the parties have already had a chance to present their positions regarding the issues framed by the City's objection. FWSC asserts that after two years, it is time for a ruling on the issues raised.

FWSC states that the legal arguments in the City's Motion lump together two distinct concepts, changed circumstances and newly discovered evidence. FWSC contends that neither concept is applicable here. FWSC cites to Noor v. Continental Causualty Company[6], for the proposition that there is no automatic right to reopen an evidentiary proceeding based on newly discovered evidence. FWSC argues that a quick review of the cases in which a new trial was granted based upon newly discovered evidence reveal that they usually involve fraud or the need to prevent a miscarriage of justice.[7]

FWSC argues that some of the cases cited by the City actually support denial of its request to reopen the proceeding. FWSC cites to City of Winter Haven v. Tuttle/White Construction, in which the appellate court reversed the trial court's decision to grant a new trial based upon the alleged new evidence. FWSC asserts that in that case, the court found that the alleged new evidence was not material to the central issue involved in the hearing. FWSC contends that likewise the instant case, the alleged new evidence from an unverified source is not relevant to the terms of the Water Service Agreement entered into between the developer and FWSC.

FWSC argues that the purported new evidence offered in support of the City's Motion is, at a minimum, double hearsay that appears

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[5]Florida Bridge Company v. Bevis, 363 So. 2d 799 (Fla. 1978); and United Telephone Company v. Mayo, 345 So. 2d 648 (Fla. 1977).

[6]Noor v. Continental Causualty Company, 508 So. 2d 363 (Fla. 2nd DCA 1987).

[7]Regan v. Paramount Hudson, Inc., 434 So. 2d 907 (Fla. 3rd DCA 1983).

to relate to efforts by the City to provide service and is therefore irrelevant to the pending docket. FWSC asserts that the record confirms an on-going effort to delay and confuse on grounds that were not raised in the City's original objection. Further, FWSC contends that the Commission has already noted that the primary issue raised by the City in its objection is beyond the Commission's jurisdiction. FWSC asks how long can the City continue to delay approval of FWSC's application. FWSC concludes that it is entitled to a determination by the Commission based on the evidence presented at the hearing. Citing to Order No. PSC-01-1623-PCO-WS[8], FWSC summarily states that the Commission should deny the City's Motion.

Analysis

The City requests that the Commission reopen the hearing to take additional evidence based upon a copy of a letter from the developer's attorney. The City argues that this letter reveals newly discovered evidence and a change in circumstance which warrants reopening the hearing in this matter.

The Commission in BellSouth BSE, Inc, found that "A party does not have a right to present evidence after the record is closed, but the Commission may permit a party to reopen its evidence." Id. at 4. In the Cavona case, the Supreme Court found no abuse of discretion where a chancellor allowed the appellant to reopen the case for the taking of additional testimony. Id. at 629.

The First District Court of Appeal found in Health and Retirement Corp. of America, that a motion to supplement the record was correctly denied by the hearing officer because Section 120.60(2), Florida Statutes, did not compel the agency to accept additional information or evidence after a formal Section 120.57(1) hearing was concluded. Id. at 792. In Noor, the Second District Court of Appeal upheld the trial court's denial of a motion for rehearing based upon newly discovered evidence because the motion did not involve newly discovered evidence but rather evidence of a new expert. Id. at 365. The Third District Court of Appeal in the

[8] Order No. PSC-01-1623-PCO-WS, issued August 8, 2001, in Docket No. 992040-WS, In Re: Application for Original Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns County by Nocatee Utility Corporation.

Ragen case, ordered a new trial based upon newly discovered evidence stating that when it is likely that a correctable injustice has been done it would not hesitate in ordering a new trial based on all available evidence. Id. at 907.

In the City of Gainesville case, the hearing officer denied a motion to reopen hearing even though the newly discoverable evidence was not discoverable at the time of hearing, because it was not probable that the newly discovered evidence would change the outcome of the hearing. Id. at 7. The Commission in the Air Beep case, denied a motion to reopen the hearing after reviewing the motion and the attached affidavit because the evidence sought to be introduced was merely cumulative in nature in that it attempted to show that the company had begun a program testified to at the hearing. Id. at 3. However, the Commission in the Crystal River No. 3 case did reopen the hearing after the company proffered additional evidence on the impact of dropping of a test weight device, but on a limited basis. Id. at 2.

However, as the Commission noted in the Nocatee case, ". . . at some point the record in the case must be closed." Id. at 3. In the Florida Bridge case, the Supreme Court upheld the Commission's decision not to consider evidence tendered by the utility after the hearing but before the final vote. Id. at 801. The Supreme Court held that the Commission has discretion to terminate its data-gathering function.[9]

Staff believes that in this case, the letter is insufficient on its face to warrant reopening the record in this matter for the following reasons. In this letter, the attorney indicates that the City had contacted the developer several month ago and advised him that the City was extending lines to the Summit. It is unclear from the letter whether this contact took place before or after the hearing in this docket. Further, the attorney indicates that the City sent a letter advising that the City had completed its water line extension to the western border of the Summit. This information is not new, but rather it is cumlative evidence. The City's water line extension and its future placement were discussed at the hearing and in the post-hearing briefs.

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[9] See also, United Telephone Company v. Mayo, 345 So. 2d 648, 651-652 (Fla 1977).

The attorney further indicates that the developer of the Summit has requested service to the Summit. At the hearing, the City's manager discussed the request for service by a developer, although the record is clear that the developer was not the same developer who has a water service agreement with FWSC. (TR 513) It appears that now the City is attempting to supplement that testimony with information regarding a request for service by the developer that should have been discoverable prior to the hearing.

The letter further states that:

> However, the post-September 11, 2001 economic climate has made it financially impossible for my client to proceed with the development of The Summit. That being the case, my client has stopped the development of this property and at this time and no date can be set when service will be needed.

The only factor that has changed since the hearing is the economic climate subsequent to the September 11, 2001, tragedy. Staff believes that the ultimate impact of these events is unknown at this time. While the letter indicates that the developer has stopped further development at this time, the progress made prior to September 11, 2001, remains. Therefore, staff is not persuaded by the City's argument that this creates more uncertainty regarding the timing of service that would require that the record be reopened. As noted by FWSC in its response, the City has already argued in its brief that the development might be delayed by economic circumstances. Further, nothing in the letter disputes or refutes the validity of the Water Service Agreement signed between FWSC and the developer.

Moreover, the letter states that the developer is seeking service, but does not know when this service will be needed. The City argues that this calls into question not only the timing of the need for service but whether service is needed at all. Staff disagrees with the City's conclusion that this calls into question whether service will be needed at all. Nothing in the letter indicates that service will not be needed. Staff notes that the issue of need for service was stipulated by the parties and accepted by the Commission. Only the timing of the need for service remained in dispute. (TR 6-7). Moreover, the letter does not indicate how long further development will be delayed. It could be for as little as several months. Staff does not believe

that the letter supports the City's conclusion that the timing is now more uncertain than it was when the City raised this argument in its post-hearing brief. The City's contention that the timing of the need for service is now more uncertain is speculative. Additionally, staff notes that Section 367.111(1), Florida Statutes, permits the Commission to review and amend or revoke a utility's certificate of authorization if service has not been provided to the area within five years after the date of authorization for service to such area, whether there has been a demand for such service or not.

Staff believes that the City's Motion does not meet the criteria for reopening a hearing, even applying the standard for granting a new trial in a civil case as set forth in the City of Winter Haven case. The City of Winter Haven case states that

> (The) requirements for the granting of a new trial on the ground of newly discovered evidence are (1) that it must appear that the evidence is such as will probably change the result if the new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue(s); and (5) that it is not merely cumulative or impeaching.

Id. at 831. As noted above, most of the information contained in the letter was known and discoverable prior to the hearing. In fact, some of the information was discussed or argued to various degrees at the hearing and in the post-hearing briefs. The only event that was unknown was the tragedy of September 11, 2001, the economic impact of which is speculative at best.

Staff is also troubled by the hearsay nature of the letter. The letter is not a sworn statement from the developer attesting to changes in the development schedule, but is rather a writing from an attorney describing what his client, the developer, said to him. Moreover, staff notes that nothing in the record supports these unsworn statements regarding the change in preference to the City or the delay in the timing of service. Yet, the City seeks to have the Commission reopen its hearing solely based on this letter. Staff finds it problematic that the only evidence upon which the City relies to reopen the record is an uncorroborated hearsay statement in the form of a letter.

For the foregoing reasons, staff believes that the "newly discovered evidence" upon which the City is basing its Motion is merely cumulative in nature in that it rehashes arguments made regarding the timing issues in the City's post hearing brief. Moreover, the changed circumstances resulting from the September 11, 2001, tragedy are speculative. Therefore, staff recommends that the Commission should deny the City of Groveland's Motion to Reopen Hearing.

ISSUE C: Should the Commission grant the City of Groveland's Motion to Include Responses in Exhibit 23?

RECOMMENDATION: No. Staff recommends that the Commission deny the City of Groveland's Motion to Include Responses in Exhibit 23. The responses at issue have been appropriately filed in the docket. (CHRISTENSEN)

STAFF ANALYSIS: On August 9, 2001, the City of Groveland (City) filed its Motion to Include Responses in Exhibit 23. FWSC did not file a response to the City's motion. Hearing Exhibit 23 is the customer letter dated July 12, 2001, and provided at the hearing.

In support of its motion, the City states that at the July 11 and 12 hearing, the Commission identified a letter provided by Mr. Jeffrey S. Cooper, who testified during the customer service hearing. Attached to the letter was a list of questions for both FWSC and the City. The City contends that the Commission directed the parties, the City and FWSC, to provide responses to those questions to Mr. Cooper and to staff. Thereafter, Exhibit 23 was entered into the record. The City asserts that while it is clear that the letter was made part of the record, the status of the responses to Mr. Cooper's letter is unclear. The City contends that in the interest of having a complete record, both its response and FWSC's response to the letter should be included as part of Exhibit 23. The City further contends that inclusion of the responses would assure that the responses to Mr. Cooper's concerns would be available to support the Commission's decision.

On July 11, 2001, Mr. Cooper testified at the service hearing. Mr. Cooper stated that he lives on Cherry Lake Road approximately across from the requested territory but not within the requested territory. (Service Hearing TR 7) Mr. Cooper had numerous questions regarding the proposed service by both the City and FWSC and what effect service by either party would have on him. (Service Hearing TR 9, 15-17) At the Service Hearing, the City was directed to speak with Mr. Cooper and perhaps follow up with a letter with copies to all the parties. (Service Hearing TR 12) FWSC was also to speak with Mr. Cooper at the conclusion of the service hearing and respond to his questions. (Service Hearing TR 12, 20)

On July 12, 2001, Mr. Cooper provided the Commission a letter with some questions attached that he wanted FWSC and the City to answer. (TR 392) Mr. Cooper's letter dated July 12, 2001, was

marked for identification and moved into the record as Exhibit 23. In addition, the Presiding Officer stated that

> [A]nd I would also like to ask that Florida Water and the City of Groveland respond to Mr. Cooper and make sure that you send a copy of the response to all the parties and Staff. So with that, we'll move Exhibit 23 into the record."

(TR 392) Thus, FWSC and the City were directed to provide written responses to Mr. Cooper's letter and to provide a copy to all parties and staff. However, the record indicates that only Mr. Cooper's letter with the attached questions was admitted into the record as Exhibit 23. Staff believes that it is clear from the record that the parties responses were not included in Exhibit 23. Further, staff believes that it was not intended that the responses be included as a late filing to Exhibit 23. The record lacks any statement that the parties were to file these responses as late filed exhibits or as a late filing to Exhibit 23. Therefore, staff recommends that that the parties responses should not be included in Exhibit 23.

The City states its belief that these responses should be included for purposes of having a complete record and that these responses would be available to support the Commission's decision. Staff does not agree. Mr. Cooper's concerns expressed at the service hearing related to connections outside the Summit development, the developer's plans, and water sources/consumption. (Service Hearing TR 7-23) Staff notes that the City and FWSC were to address Mr. Cooper's concerns off the record at the conclusion of the service hearing. (Service Hearing TR 12, 20) While staff believes that the responses are relevant to Mr. Cooper's concerns, the concerns that Mr. Cooper expressed are not sufficiently related to issues which are the subject matter of the proceeding on which the Commission will base its decision. As the Presiding Officer stated at the service hearing:

> And that's why I said those kinds of concerns would be better addressed by the county because our limited focus here is really on Florida Water's application. It's not even that we would be ruling on the City of Groveland's plants. It's only as it relates to the application as was filed by Florida Water.

(Service Hearing TR 22) Thus, staff believes that the response would not provide any additional information upon which the Commission would rely in rendering its decision.

In addition, staff is concerned that these responses have not be subject to cross-examination. Nor have the parties had the opportunity to make any relevant objections to the responses to Mr. Cooper's questions. Moreover, staff notes that the City states that its motion was filed pursuant to Rule 28-106.204, Florida Administrative Code. Subsection (3) of that Rule requires that "[m]otions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion." The City included no such statement in its motion.

For the foregoing reasons, staff recommends that the Commission deny the City of Groveland's Motion to Include Responses in Exhibit 23. Staff believes that the record shows that the City and FWSC's responses were not intended to be included as a late filing to Exhibit 23. Those responses have been appropriately filed in the docket.

ISSUE 1: When will service be required in the territory proposed by Florida Water Services Corporation's application?

RECOMMENDATION: Florida Water Services Corporation and the developer's actions indicate that water service will be required at the Summit in the near future. There is no need for centralized wastewater service at this time. (REDEMANN, MESSER)

POSITION OF PARTIES

FWSC: Pursuant to a stipulation between the parties, there is a need for service in the territory proposed by Florida Water Services Corporation's application. The evidence established that there is a current need for water service. There is no need for the wastewater service discussed in the City's prefiled testimony.

CITY: No viable date for service has been established in this record by FWSC since the only date for requested service in this record is July 1, 2000. The changing nature of the development, lack of County construction plan approval and delays on the part of both FWSC and the developer . . .

STAFF ANALYSIS: Section 367.045(1)(b), Florida Statutes, requires an examination of the need for service in the requested area. Rule 25-30.036(3)(b), Florida Administrative Code, requires an applicant for an amendment to provide a statement showing the financial and technical ability of the utility to provide service and the need for service in the area requested. The Commission unanimously approved the stipulation on the first day of the hearing, July 11, 2001, that service was needed to the area requested by FWSC. This was due largely to the introduction of a developer agreement, pursuant to Rules 25-30.515(6) and 25-30.540(1), Florida Administrative Code.

FWSC witness John Tillman, Senior Vice President of Business Development for Florida Water, sponsored composite Exhibit 5 and attachments A and F, which include the Developer Agreement and contain the details on the development plan for the subdivision to be known as "The Summit". These Exhibits indicate that the proposed development consists of about 690 acres. Low density housing in the area will consist of 135 single family homes, a golf course and a club house. Each lot is about one acre in size with

one side of each lot facing a preservation area, a lake or the golf course. About 80% of the development is open space. (EX 5, CLS-2, Page 34 of 38) Witness Tillman also sponsored late filed Exhibit 15 which contains portions of the Summit Construction Plan Sheets submitted to Florida Water by the Developer. Sheet No. 5 shows the master plan by which the developer is required to design the system to support the requirements of the development, including the provision of fire protection.

The City stated that it believes the timing of the need for service was in question, and that in fact the application by the utility was premature. (TR 6-7) This issue is intended to address the timing of service in the proposed area.

FWSC Brief

FWSC states that there is a current need for water service and no need for wastewater service. In its brief, Florida Water argues that it entered into a Water Service Agreement in February 2000 with the developer of the Summit, as contemplated in the statutes and rules. (EX 5, CLS-2, TR 154) The brief states that the Agreement has been duly recorded in the public records of Lake County, and that Section 17 of the Agreement provides that it is subject to Commission approval of the amendment application. (EX 12, TR 249) Further, Section 26 of the Agreement states that Commission approval is a condition precedent to the effectiveness of the Agreement. Therefore, while the Agreement indicated that service would be needed by July, 2000, the City's initiation of a challenge to the Application effectively placed the Agreement on hold until the Commission issues its ruling. (TR 252-253, 255) Florida Water identified a number of steps that the Development had completed while the Commission's decision was pending. (EX 10,12, TR 243, 248-250, 287) The Developer also submitted plans to Florida Water that included the provision of fire flow service, which Florida Water is prepared to supply when necessary. (TR 243, 404, EX 15, sheet 5) With respect to the provision of wastewater, the utility stated that the Summit is a low density development that has received preliminary plant approval to proceed using septic tanks, and the developer has not requested wastewater service. (TR 171) Therefore, there is no need for wastewater service. (BR 7)

City Brief

The overall position of the City, as argued in its brief, is that no viable date for service has been established in this record by FWSC, since the only date for requested service is July 1, 2000. The City states that FWSC has neither given testimony nor produced any written documentation from the developer in this proceeding stating a revised date for when service will actually be needed by the Summit development. (BR 3)

The City continues in its brief that it would not expect the developer to give FWSC a revised service date, because it is the City's contention that the developer does not know the date himself. (BR 3) Consistent with this conclusion is that fact that although required by Section 8.3 of the Water Services Agreement to produce "any building permits for construction of all or any portion of the Improvements" within 10 days of the developer's receipt of such documents, as of the date of the hearing FWSC had not received a single building permit for construction of all or any portion of the proposed utility facilities identified on the developer's plan. (BR 3)(TR 252) The City argues the reason that FWSC does not have any building or construction permits is simple: there are none since Lake County is still in the process of reviewing the Summit's construction plans. (TR 325) (BR 3-4)

In a footnote in its Brief, the City argues that witness Tillman's testimony that addressed the timing for service cannot be used to support the finding that the developer can start construction "at will" for several reasons. Witness Tillman testified that it was his understanding from conversations with his staff, that Mr. Davis (the developer) had completed the submission process to the County to begin construction so that construction could start at will. (TR 405) (BR 3-4) Staff notes that in this footnote, the City argues that this conversation is hearsay, and is inadmissible hearsay because it is not substantiated by competent substantial evidence in the record. However, staff notes that the City did not object to witness Tillman's testimony regarding this coversation at the hearing.

The City further states that both FWSC and the developer have not completed the essential steps necessary to provide service to the Summit, and that this demonstrates that the Summit will not require utility service in the near future. The City referred to the lack of specific dates or a revised construction schedule

within the Development Plan submitted to FWSC by the developer. Also, the City's brief provided a chart listing the requirements of the Water Service Agreement with respect to various documents provided by the developer, the Agreement's dates for filing these documents, and the dates the developer complied with these contract dates. The City states that of the five requirements included in the contract, the developer complied with only one in a timely fashion. The City states that three were complied with eight monthsafter the original agreement date and one may not have been complied with (production of the certificate of good standing) at all. (BR 5) Further, the City argues that the developer has not paid the plant capacity charge of $105,411.74 required by the Water Services Agreement. (TR 253)(BR 6) Until the developer has actually paid these fees, requested connection and physically interconnected with FWSC's system, FWSC is not contractually required to provide water capacity to the developer nor to reserve any plant capacity for the developer. (TR 255-7) (BR 5-6)

In addition, the City states in its brief that the plans for this development have substantially changed over the last 21 months since the filing of the request for service. This is evident from the face of the construction plans themselves which show numerous revisions, as well as the fact that the amounts of capacity requested for the development have changed with each request for service or regulatory agency approval. (BR 7) (EX 5, Water Service Agreement at 34; Ex. 11 at 4) The City states that this indicates that the charges in the Summit development are not at an end. (BR 6-7)

The City also argues in its brief that it should be noted that even if the developer had final construction plan approval by Lake County, which he does not, there are other factors which influence the timing of any development: economic conditions affecting the developer's ability to finance the project, potential annexation, the presence of a willing buyer and a desire to sell. (BR 9) (TR 463-4) The City states that Mr. Cooper's testimony (a County resident) shows that homeowners are opposed to a development of higher density than that proposed and are anxious that annexation by Groveland would allow such development. (Service Hearing TR 7-8, 16) Since the City intends to annex the Summit and surrounding Cherry Lake area, the City concludes that, "The developer's desire to wait and see if annexation will in fact take place allowing him to develop his 690 acre parcel at a higher density would also lead him to delay the project." (TR 503-505, 510-511)

The City concludes that FWSC's application was filed prematurely in the fall of 1999 for a project which is still very much in the preliminary stages of development. And while the City agrees, and has stipulated to the fact that this development will eventually require potable water service, the only date in the record for that service, July of 2000, has long since come and gone. (TR 6) Without a reliable date for timing of service, this application must fail as premature. (BR 8)

Neither the City's position or brief addresses the provision of fire flow or wastewater service in its discussion of need for service.

Analysis

Water Service

In this case, timing of need for service has been directly impacted by the City's protest of Florida Water's amendment application. The City's objection on November 24, 1999, suspended any further action by the Commission with respect to ruling on the requested amendment. On Page 24 of 38 of EX 5, CLS-2, Section 17 specifies that the Agreement is subject to the Commission's approval of the certificate amendment.

Since FWSC is a utility subject to the Commission's jurisdiction, it would have been imprudent for it to continue its efforts concerning the amendment until the Commission made its decision. Witness Tillman testified that once the application was protested, FWSC did not press the developer or any of the developer's engineers to provide the documentation to FWSC immediately. (TR 248, 252, 253, 255)

In fact, FWSC has received documentation from the Developer indicating that the Developer has completed several steps identified as necessary under the Agreement. For example, the Agreement was recorded on March 16, 2000 in the Public Records of Lake County (EX 12, TR 251), which was required in Section 16 of the Agreement (Ex 5, CLS-2, Page 24 of 38). The Developer has submitted plans and specifications for all on-site facilities as required by Section 3.1. (TR 243, CLS-2 Page 6 of 38) A plat map for the subdivision was provided by the Developer. (TR 244, EX 15 Sheet 4 of 40) A warranty deed for the property has been provided by the Developer as required by Section 3.9 of the Agreement and

certain fees have been paid, such as the engineering and inspection fees of $750 and legal and administrative fees of $500, which are required by Sections 6.3 and 6.5 of the Agreement. (TR 248-250, EX 5 CLS-2 pages 11, EX 12 pages 15-16) In addition, the Developer was issued construction permit Number WD35-080593-010 from the Florida Department of Environmental Protection (DEP) to construct a water distribution system extension, pursuant to Section 403.861(9), Florida Statutes. This permit authorizes the extension of the Palisades Country Club water distribution system to serve The Summit a Planned Unit Development (133 proposed single-family residential units, a golf clubhouse and, golf course maintenance facility. (TR 287, EX 10, Page 3 of 9) (Staff notes that the permit and the application differ by two residential units. This difference was not corrected or discussed at the hearing. Nevertheless, staff believes that the two unit difference is immaterial.)

Staff agrees with the City that outstanding Agreement items between the developer and Florida Water include payment of the plant capacity charge, the provision of building permits, submission of a certificate of good standing and possibly the completion of the review by the Lake County Public Works Department. (BR 3-6) However, staff disagrees with the City's conclusions concerning the significance of these various items, as well as its arguments concerning the changing nature of the development, the interest of the developer in delaying the development to allow the City to annex the area, and the inadmissablity of Witness Tillman's statements about the developer's readiness to start. (BR 4)

With respect to the nonpayment of plant capacity fees to Florida Water as required by Section 6.1 Page 14 of 38 of the Agreement, witness Tillman testified that the capacity fees and meter installation fees are to be paid at the time the meter is installed. (TR 253, CLS-2, Page 37 of 38). Since development has not been able to progress because of the City's protest, staff believes that these fees are not due at this time.

As an indication that the developer did not know when service would be needed, the City argued that the developer had not provided a copy of any building permits to the utility, as required by Section 8.3 of the Application for Service. Since witness Tillman testified that he did not have any building permits to the best of his knowledge, the City concluded that the lack of such

building permits would indicate that the developer does not know when service will be needed. (TR 252) (BR 3-4)

Section 8.3 is a subparagraph under the overall section titled, "Customer Installations". The paragraph references the requirement of the "developer, its successors, or the occupant(s) of the developer's property" to make a written application for service, and for the payment of various service charges. The reference to building permits is, "within ten (10) business days after developer's receipt of any building permits for construction of all or any portion of the improvements; the developer shall send a true copy of any such building permits to the utility." (EX 5, CLS-2, page 18 of 38)

Staff believes that the reference to "improvements" makes it unclear as to whether the required building permit would be for internal lines to be built by the developer, or whether it is for construction of homes, or both. In either case, staff believes it is reasonable to assume that permits for the construction of lines or homes would not occur until there was some finality about whether or not FWSC was granted the territory. This is consistent with witness Tillman's testimony that FWSC did not press for all the documentation outlines in the Agreement, once the application had been protested by the City. (TR 252, 253, 255) In fact, staff believes that both the utility and developer have continued to show good faith throughout this proceeding to complete the steps necessary to begin development on a timely basis, as discussed earlier in the analysis section.

The City also suggested that compliance with Section 22 of the Agreement is questionable. Section 22 requires that the developer submit a certificate of good standing or a certificate resolution of corporate entity. The City argues that lack of this Certificate from the developer is further proof that the development itself is not prepared to move forward at this time. Witness Tillman testified that he did not know if it was provided, since it would have been provided to his staff and he does not review every piece of paper there. (TR 252) Regardless of whether the document was or was not actually received by the utility prior to the hearing, staff believes it is not important with respect to the various approvals and other documents required of both the developer and the utility to be able to proceed with the development. Much more critical to the process was the approval of a water distribution permit from the DEP (which the utility has already received) and

ultimately the Commission's decision with respect to the utility's Application. (EX 10)

Witness Tillman responded to the question of lack of permits by stating that his staff informed him that the developer had completed the submission process to Lake County and construction could start at will. The City argued that this response was inadmissable hearsay. (BR 4) Staff notes that witness Tillman's testimony regarding his conversation with his staff was not included in the City's Motion to Strike certain portions of witness Tillman's testimony, which Motion was resolved by Order No. PSC-01-1919-PCO-WU. Staff further notes that the City did not object to the testimony at the hearing, thereby waiving any objection and rendering the objection in the footnote of its brief untimely. (TR 405) Thus, witness Tillman's testimony has been admitted into the record.

Staff believes the record shows that the submission process to the County has been completed. (TR 325, 405) However, based on Witness Mittauer's testimony, there is some lack of clarity about exactly what the County is still reviewing or when it may be completed with that review. (TR 325) Regardless, the staff does not believe that this uncertainty should be taken to mean that there is such a deficiency in the plans that development will never occur - or that it is so open ended that no parties could estimate a new date of service. Again, the contract at issue was frozen at the time of the City's protest. It seems appropriate that no new specific dates have been filed or suggested, since the Commission has not yet ruled on the utility's amendment.

Other arguments in the City's brief relating to the timing of service concerned the changing nature of the development and the developer's desire to wait for annexation of the area by the City. The City alleges that the development has substantially changed over the last 21 months, since the face of the construction plans show numerous revisions, as well as the fact that the amounts of capacity requested for the development have changed with each request for service. (BR 6-7) Staff believes the construction plans indicate slight changes on some sheets. These revisions include technical updates and corrections, such as changing a title, adding air release valve and jumper details, revising landscape notes, etc. (EX 15, sheets 5, 36) Further, Witness Tillman testified that the developer may submit a plan change to the DEP before it submits the plans to FWSC. (TR 269) As indicated earlier, EX 5,

A and F, show that the Summit Development plan is consistent the DEP application which shows the same number of homes, a golf course clubhouse and a golf course maintenance facility. (EX 11) Therefore, the staff believes that the City's characterization of the changes in the development plan as being "substantial" is not supported by the record.

The City also stated that the changes to the capacity needed for the development stood for the proposition that the plans were in such a state of flux that the developer was unable to establish a new date for timing of service. (BR 6-7) The record shows that the developer had originally written in 200,000 gallons per day (gpd) average daily flow on October 5, 1999; which was changed to 38,400 gpd average daily flow when the water service agreement was signed (EX 5, CLS-2 page 34); and then stated in the DEP application that 78,550 gpd average daily flow would be needed. (EX 11) Witness Tillman testified that he had no idea why or who changed the initial 200,000 gpd number (TR 267). With respect to the difference in the water service agreement and DEP application numbers, he stated that it was his understanding that the Commission uses one standard for average daily consumption and the DEP uses another. (TR 267) Staff believes the record reflects that there were some changes in the overall demand estimates. However, these changes do not equate to an inability to determine the timing of need for service because no real plan is moving forward, as suggested by the City. Rather, the changes reflect an iterative process by the utility and developer to finalize development plans.

The City also stated that there are other factors which influence the timing of any development: economic conditions affecting the developer's ability to finance the project, potential annexation, the presence of a willing buyer and a desire to sell, as cited on pages 463-4 of the transcript. (BR 7) Staff notes that the only criteria mentioned in the brief that were referenced at those cites was the potential inability of a developer to move forward because it did not have the funds to actually install the infrastructure. When questioned by counsel on redirect examination whether there were other factors included that would affect the timing of the actual development of a PUD or subdivision, witness Yarborough testified, "Yes. I mean, there could be anything from the market. It could be the fact that the developer didn't have the funds to actually install the infrastructure." (TR 464-464) There is nothing in the record that discusses potential annexation, the presence of a willing buyer, and a desire to sell. Further,

there is no record evidence discussing any financial hardships of the developer in this case.

The City also argued in its brief that, "The developer's desire to wait and see if annexation will in fact take place allowing him to develop his 690 acre parcel at a higher density would also lead him to delay the project." (BR 7-8) This statement suggests that the City was engaged in an annexation process of this area which would allow greater density and also that the developer was evaluating the outcome of this process. Witness Yarborough testified that the City had informal conversations with entities along Cherry Lake Road, but nothing was in writing. (TR 512-513) Further, witness Yarborough testified that a developer other than the developer (in this case) had submited a written request to annex the Summit. However, the City had not voted on annexation of the area at issue and there was no current plan for annexation. (TR 504)

As previously noted, a County citizen who lived across the road from the proposed development testified at the hearing. Witness Cooper discussed the fact that three or four years ago a development was proposed for that same area, which would have allowed a house for every quarter acre. He organized the local residents and they objected to that density level and were successful in stopping the project. Since the current project was a much lower density, the area residents decided not to object to the plan. (Service Hearing TR 7-8) Therefore, staff believes that this reflects no active plan for annexation of the area at issue at this time, nor is there any indication that density would be increased if the area was annexed. Nothing in the record supports a suggestion that the developer is waiting for annexation. In fact, as stated earlier, Witness Tillman testified that the Developer is ready to start construction. (TR 405)

Wastewater Service

With respect to wastewater service, Witness Tillman testified that FWSC has no information indicating that there is a need for wastewater service. The Summit is a very low density development with about one dwelling unit planned per one acre. The Developer has received preliminary plat approval for Lake County to proceed with development using septic tanks. (TR 171) Witness Yarborough testified that although the Summit development as currently proposed would utilize septic tanks, the City could provide

wastewater treatment to the development from its existing wastewater treatment plant within twelve months of the request for service. (TR 482) Witness Mittauer, the City Engineer, testified that the City would have to run a wastewater force main about 26,000 feet from the current terminus to reach the Summit. (TR 345-347) However, the City did not address the provision of wastewater service in its position or brief on this issue.

The staff believes that since this development has received approval from the County to install septic tanks, there is no need for installation of a central wastewater system at this time. Therefore, we do not believe that there is a need for wastewater service at this time.

Conclusion

The parties have agreed that there is a need for service to the Summit development. Staff believes that the majority of the steps necessary for FWSC and the Developer to move forward with the development have taken place as noted above. The steps that are pending are not fatal flaws for the developer and utility to establish a revised service date. Furthermore, the staff believes that probably the largest single determinant in postponing a revised service date is not the items mentioned in the City's brief, but is the direct result of the City's protest to Florida Water's Amendment application. Section 17 of the Agreement specifically provides that it is subject to FPSC approval of the territory amendment application. (EX 5, CLS-2, page 24 of 38) Thus, while the Agreement indicates that service would be needed by July, 2000, the City's initiation of a challenge to the utility's application has effectively placed the Agreement on hold until the Commission issues its ruling. (TR 252, 253, 255) Nowhere in the City's brief does it recognize the fact that its objection suspends the amendment process.

The City has focused narrowly on the argument that there have not been any new dates included in contracts or in the Agreement. The staff believes that such a focus misses the broader evidence provided in this docket, which is that the major steps for development required by permitting agencies have been completed or are in process, as are many of the other contractual steps between the developer and the utility. Staff believes that it is not appropriate to evaluate the issue of timing of service by a missed contract date, but rather by the overall acts and actions of the

parties to show their overall readiness and commitment to provide service. If the utility was representing a date for service that had no support in terms of completion of necessary basic activities, that might support the City's argument. However, it is self-evident that the contractual date of service became void once the City protested the utility's amendment.

In this case, staff believes that the timing of need for service is held captive pending a decision from the Commission, not by a lack of preparedness by either the developer or the utility. Further, it does not appear unreasonable to staff that a new specific date for service has not been identified. FWSC cannot provide service to the development unless and until FWSC's amendment application is approved. In addition, given the multiple processes that must be completed in order for the developer to begin construction, staff believes that any anticipated dates would merely be an approximation. Staff routinely sees amendment applications filed well in advance of a proposed construction date for these very reasons.

Furthermore, the staff disagrees with various statements and conclusions drawn in the City's brief with respect to the changing nature of the development plans, reasons for the development not going forward and the desire of the developer to wait for future annexation of the area by the City. The staff believes that there is no record support for these various statements.

Finally, the staff believes that the record supports the installation of septic tanks to provide wastewater service to the development. Therefore, there is no need for centralized wastewater service at this time.

For the foregoing reasons, staff recommends that FWSC's and the developer's actions indicate that there is a need for water service at the Summit in the near future. There is no need for centralized wastewater service at this time.

ISSUE 2: Stipulated.

Issue 3: Stipulated.

ISSUE 4: Does Florida Water Services Corporation have the plant capacity to serve the requested territory?

RECOMMENDATION: Yes. FWSC has sufficient plant capacity to serve the requested territory. FWSC has provided reasonable options to increase its capacity if additional capacity is needed in the later years of the development. (REDEMANN, MESSER)

POSITION OF PARTIES

FWSC: Yes. Florida Water's Palisades system has two operational wells that have adequate capacity to meet the needs of the Summit through at least 2006.

CITY: No, the existing 576,000 gpd permitted capacity of the Palisades plant is insufficient to provide service to existing Palisades customers when maximum day demands and reasonable growth are taken into account. The addition of Summit customers will require that an additional well plus water storage improvements be added immediately.

STAFF ANALYSIS: This issue is intended to determine whether FWSC has the plant capacity to serve the requested territory. A part of the filing requirement for an application for an amendment of certificate is the demonstration of adequate capacity to serve the proposed territory pursuant to Rule 25-30.036(3)(j), Florida Administrative Code. FWSC's position is that the utility has adequate capacity to meet the needs of the Summit through at least 2006.

The City's position is that it does not believe the existing FWSC Palisades plant has sufficient capacity to serve the Summit development. In its brief, the City describes several concerns and points of confusion in the record, including the maximum amount of plant capacity at the Palisades water plant, the maximum and average daily flows at the Palisades plant, and the amount of water demand associated with the proposed development and the associated fire flow. (City BR 10, TR 150)

The following analysis describes FWSC's position, the City's response, and FWSC's rebuttal with respect to three elements: (1) the existing capacity of the Palisades water system, (2) the current demand placed on the Palisades water system, and (3) the anticipated demand for the Summit development.

Palisades Water System Capacity

Witness Tillman, FWSC's Senior Vice President of Business Development, testified that FWSC has the plant capacity to serve the immediate needs in the Summit in accordance with the developer's plan. (TR 158) He testified that there are two 800 gpm wells at the Palisades water treatment plant. (TR 199, 271) The second well was cleared for service on January 4, 2000, and began operating around May, 2001. (TR 399-400) The Palisades water treatment plant has no elevated storage tank or high service capacity pump. (TR 200-201)

Witness Tillman testified that the maximum day capacity of the plant is 1,152,000 gpd based on multiplying one 800 gallons per minute (gpm) well times 1,440 minutes per day. (TR 150, 200-201) This capacity is also reflected in FWSC's application, which indicates that the wells can supply a maximum daily demand of 1,152,000 gpd and instantaneous peak demand of 1,600 gpm. (EX 5, CLS-1, EX D) Witness Tillman testified that the capacity was found on the plant's Consumptive Use Permit (CUP), but later acknowledged that the maximum permitted capacity was not on the permit but was calculated. (TR 196, 198-200)

Palisades Existing Demand

According to FWSC's Monthly Operating Reports (MORs), the most recent peak period demand for the Palisades system occurred in May, 2001 and the peak day occurred on May 24, 2001. The demand on that day was 567,000 gpd. The MORs indicate that there were 219 service connections at the end of May, 2001. (EX 7) In addition, the MORs reflect that the previous peak day demand of 637,000 gpd occurred on June 21, 2000. (EX 8)

Anticipated Summit Demand

The Summit development is planned to consist of about 690 acres. Low density housing in the area will consist of 135 single family homes, a golf course, and a golf club house. FWSC's application indicates that the estimated average water demand for the Summit development will be 135,000 gpd and the maximum daily demand will be 270,000 gpd. (EX 5, CLS-1, EX A, D and F) The Developer Agreement for the Summit indicates that the developer will pay $106,838.74 for plant capacity for 148.23 ERCs or 38,400 gpd. (EX, CLS-2, Pages 32 and 37)

The Summit development plan shows the specifications for the system design and fire flow requirements. (TR 244-248, EX 15, Sheet 34 and 36) Two references are made to fire flow requirements on the DEP Application. One reference indicates that 500 gpm for two hours will be needed and the other reference indicates 750 gpm. (EX 11, pages 4 and 9) Witness Tillman testified that if the fire protection was revised, the Developer would communicate with the FWSC engineering staff and determine the correct solution to the problem. (TR 404)

Witness Tillman also testified that, in a worst case scenario, if there was not sufficient capacity, Florida Water has an option to place into service a third well located on the Summit property. All the well tests indicate that this well can be used as a potable water well. (TR 292) The third potable water well could be brought on line within 120 to 180 days at the maximum. (TR 293-294) By placing ground storage in conjunction with the two wells that FWSC has, the capacity can be doubled from 1.152 million gallons per day (mgd) to 2.304 mgd. (TR 401) Based on the current hookup rate, which is around 70 units per year, the current capacity without adding ground storage will be sufficient to extend through 2006.(TR 402)

FWSC's Consumptive Use Permit (CUP) from the St. Johns River Water Managment District for the Palisades development indicates that FWSC's maximum daily ground water withdrawals must not exceed 674,000 gpd. The maximum annual withdrawals must not exceed 127,750,000 gpd. (EX 5, CLS-1, Page 19 of 57) Witness Tillman testified that as customers come on-line, FWSC can go to the Water Management District to have the CUP increased. (TR 293)

Witness Tillman testified that FWSC's water lines are immediately adjacent to the Summit development in FWSC's certificated territory that includes the existing Palisades system. According to the Developer Agreement for the Summit, the developer will construct and contribute the on-site and off-site facilities to FWSC. (EX 5, CLS-2, Pages 6-12 of 38, TR 164) The developer plans to run approximately 6,700 feet of 10 to 12 inch water mains from the Palisades plant across its existing development to the requested area. Extending service to the Summit can be accomplished in a timely, cost effective manner consistent with the development plans. (TR 155, 163-164)

FWSC does not currently provide wastewater service to the Palisades development and does not plan to provide wastewater service to the Summit development at this time. Currently the Palisades customers are on individual septic tanks and the Summit development is also expected to use septic tanks. (TR 171-172, EX 5, CLS-1, EX C)

Witness Tillman stated that if the developer of the Summit were to request wastewater service, there are several options. Based on the number of units and the projected water flows, one feasible approach would be to install a package plant capable of providing reuse quality water. FWSC would be able to install such a plant in close proximity to the existing FWSC facilities and could meet the projected wastewater needs of the Summit at a cost of approximately $500,000. By placing the facility close to the development, FWSC would significantly minimize the piping costs. (TR 172)

City's Response Regarding Palisades Water System Capacity

The City states that several numbers were presented as the permitted maximum day capacity of the Palisades plant capacity, including 576,000 gpd and 1,152,000 gpd. (City BR 13-15, TR 150, 222-224) The City uses FWSC's MORs, the DEP permit application, and the testimony to conclude that the permitted maximum daily capacity is 576,000 gpd and that the existing plant capacity must be expanded in order to provide adequate service to the existing Palisades customers. (City BR 14-15, EX 18, EX 5, Appendix E-1, EX 11)

For example, the City points out that witness Tillman testified that the MORs for the Palisades plant filed by FWSC from July, 1999 to June, 2000 and for January, February, and May, 2001 reported the plant's maximum permitted capacity as 576,000 gpd. (TR 222-224) In addition, in its brief, the City pointed out that witness Tillman did not calculate the capacity of the plant himself and that he incorrectly testified that the capacity was shown on the CUP. (TR 223, EX 5, CLS-1, Page 19 0f 57)

The City further argued in its brief that witness Tillman testified that dividing the 1,152,000 gpd (the capacity of one 800 gpm well) by two, to account for the absence of the elevated storage tanks or high service capacity pumps, is the formula that he believes DEP applies to determine maximum permitted daily

capacity of water plants. (TR 200) However, it should be noted that witness Tillman later indicated that he did not know if that was the correct formula. (TR 205) In addition, City witness Mittauer testified that to calculate the capacity of a water system, it is necessary to remove the highest capacity well from the equation and base the capacity on the remaining wells. (TR 358)

City's Response Regarding Palisades Existing Demand

The City's brief describes various testimony and evidence regarding the existing demand for the Palisades water plant. Several averages were calculated using the MORs, ranging from 218,000 gpd to 413,472 gpd, and compared to witness Tillman's testimony. The original direct testimony indicated the average demand was 395,000 gpd, and at the hearing the demand was changed to 319,000 gpd. (TR 135-136, 154, 226, 230-231) (BR 15-17, EX 7, EX 8)

The City argues that FWSC's CUP establishes that the maximum daily ground water withdrawal cannot exceed 674,000 gpd, and concludes the maximum day was already produced on June 21, 2000 (637,000 gpd). (BR 17, EX 5, Appendix E-1, p. 19, EX 7, EX 8)

City's Response Regarding Anticipated Summit Demand

In its brief, the City further discusses the estimated Summit water demand and the changes in the fire flow demand reflected in the application. Two calculations of demand were contained in the developer's application for service dated October 5, 1999. The average daily flow was originally 200,000 gpd and the fire flow was 2500 gpm. However, the originally typed flows are lined through and replaced by a handwritten amount of 38,400 gpd. (EX 5, CLS-2 p. 34 of 38) The developer's DEP constructon application indicated an average day water demand of 78,550 gpd, a maximum day demand of 157,100 and fire flow demand of 860 gpm. (EX 11, p. 9) However, DEP issued the construction permit for an estimated average day demand of 78,750 gpd. (EX 10, p. 1) Mr. Tillman could not explain the changes. (TR 267-268)

City Witness Mittauer estimated the average demand for the Summit to be 51,880 gpd. He stated that he used the flow design standards set forth in Chapter VI-D, Policy 6D-1.3, Potable Water Sub-element 9J-5-0111(2) of Lake County's Comprehensive Plan to estimate the demand for the Summit development.(TR 314, 362, EX 18)

The policy he used to estimate the average demand refers to a design flow schedule; however, the peaking factors and storage requirements were not provided. The City argues that the engineering testimony of Mr. Mittauer and his calculation of average daily water and fire flow of 51,880 gpd and 750 gpm, respectively, should be used. (City BR 13, TR 314)

FWSC's Response To City's Position

FWSC's brief states that the City did not raise the plant capacity issue in the City's Objection, its Prehearing Statement or in any of the prefiled testimony. (BR 10) FWSC indicated that at most, the City raised an issue as to the proper method for calculating the amount of capacity that will be needed to serve the Summit. (BR 9-10) FWSC admits that, at the hearing, there was some confusion created as to the capacity of the Palisades plant as a result of questions asked during the cross-examination of Mr. Tillman regarding the permitted capacity reflected on the MORs. (BR 10)

In response to the City's argument, FWSC stated that Mr. Tillman is not responsible for the preparation of the MORs and that the unrebutted testimonty established that, until very recently, the Palisades system had operated a single well at its Palisades system. (BR 10-11) Beginning in January, 2000 FWSC had a second well available. Each of the two wells is rated at 800 gpm. The wells can work independently of each other. Thus, the maximum day capacity for the system is 1,152,000 gpd as reflected in the application and confirmed in the DEP construction permit application filed by the developer. The current capacity of the Palisades system is adequate to meet the anticipated needs of the Summit at least through the year 2006 and additional capacity could be easily added to meet further growth if it occurs. (BR 10-11)

Analysis

The City correctly points out that there are many differing documents and estimates of FWSC's existing plant capacity, the maximum and average daily flows at the Palisades plant, and the Summit's demand and fire flow requirements. The staff believes that, in spite of the confusing testimony with respect to specific areas, the broader concern is whether FWSC has the ability to provide potable water and fire protection to the proposed territory.

With respect to FWSC's existing plant capacity, there is no dispute that Florida Water's Palisades water system consists of two wells that can each pump 800 gpm. (TR 199, 271) FWSC's application indicates that the wells can supply a maximum daily demand of 1,152,000 gpd and instantaneous peak demand of 1,600 gpm.(EX 5, CLS-1, EX D) Although witness Tillman originally indicated that he did not know if 576,000 gpd or 1,152,000 gpd was the maximum daily capacity of the Palisades water plant, he later indicated that there was an administrative error when the 576,000 gpd was reported on the MORs. The database was not properly updated when the new well went on-line to show that the capacity doubled with the additional well, since both wells are the same size. (TR 225, 400)

The City argued in its brief that Mr. Tillman testified that he agreed that dividing the 1,152,000 gpd by two, to account for the absence of the elevated storage tanks or high service capacity pumps, is the formula that he believes DEP applies to determine maximum permitted daily capacity of water plants. However, witness Tillman later testified that he did not know if that was correct. (TR 200-205)

Based on the evidence in the record, staff believes that it is clear that the Palisades water system has two 800 gpm wells in service. City witness Mittauer testified that the appropriate calculation of the maximum day capacity is to remove the largest well from the calculation and base the capacity on the remaining well capacity, because the largest well would be out of service at some point for maintenance or some other type of problem. (TR 358) Multiplying 800 gpm for one well times 1,440 minutes per day equals 1,152,000 gpd, which matches the permitted maximum day capacity identified on EX 11 page 2. Therefore, staff recommends that the maximum daily capacity of the Palisades plant is 1,152,000 gpd.

With respect to the existing demand for the Palisades water system, staff recommends that the Commission rely on the utility's MORs. Exhibit 7 consists of the MOR's from January - May, 2001. Exhibit 8 consists of the MOR's from July 99 - June 2000. Those exhibits indicate a recent maximum day flow of 567,000 gpd on May 24, 2001. The MORs indicate that there were 219 service connections at the end of May, 2001. In addition, the MORs reflect that the previous peak day demand of 637,000 gpd occurred on June 21, 2000.

The water system is dynamic and the peak and average can change as a result of irrigation needs, drought, new customers, and line breaks. The utility must be able to meet its customers' water demands at any given time. Staff recommends that in this instance the utility's highest peak day demand should be compared with its existing maximum daily capacity in order to provide an indication as to whether the utility has sufficient capacity to serve the proposed territory. The MORs entered into the record indicate that the highest peak day demand for the Palisades was 637,000 gpd on June 21, 2000.

With respect to the demand for the Summit development, the estimates ranged from a low average daily flow of 38,400 gpd on the developer's applicaton for service to a high of 270,000 gpd maximum daily demand on FWSC's amendment application. (EX 5, CLS-2, pp. 34 and 37 of 38; CLS-1, page 12 of 57) In addition, a maximum day demand of 157,100 gpd is shown on the DEP construction permit application (EX 11, Page 9). The 38,400 gpd was the basis for the amount of service availability charges to be paid by the developer. The 157,100 gpd is based on two times the estimated average daily flow for 135 units (3.5 persons per unit at 150 gallons per capita) of 70,800 gpd and 7,750 gpd (78,550 gpd) for the clubhouse. The 270,000 gpd maximum daily demand FWSC indicated on its amendment application is based on an average demand of 135,000 gpd, although there is no documentation as to the source of that number. City Witness Mittauer estimated the average demand for the Summit to be 51,880 gpd based on the flow design standards set forth in the Lake County Comprehensive Plan. (TR 314, 362, EX 18)

With respect to the fire flow requirements for the Summit, the DEP permit application (EX 11) contained two different estimates for fire flow. In one section of the application, the demand was projected to be 750 gpm and in another section, the demand was projected to be 500 gpm for 2 hours based on the Lake County Fire Protection Resolution. (EX 11 pp. 4, 9) The DEP permit application indicates that no booster pumping facilities are needed. (EX 11, p. 10) According to Witness Mittauer, the minimum criteria for fire demand is 750 gpm found in Lake County Ordinance No. 96-42. (TR 314) Mr. Mittauer did not indicate the number of hours of fire flow required by the Lake County Ordinance.

The City's estimated average demand for the Summit of 51,880 gpd is less than the developer's estimated average demand of 78,550 gpd. Staff was unable to determine the City's estimated maximum

day demand. Based on the evidence in the record, staff believes that the estimated maximum daily demand for the Summit at build out is 157,100 gpd and the fire flow demand is 750 gpm.

In summary, in order to determine whether FWSC has sufficient plant capacity to serve the Summit development, the staff recommended maximum daily capacity of the Palisades plant must be compared with the existing demand of the Palisades customers and the estimated demand for the Summit. Staff recommends that maximum daily capacity of the Palisades plant is 1,152,000 gpd based on one 800 gpm well. The maximum day flow at the Palisades water system was 637,000 gpd and the estimated maximum day demand for the Summit is 157,100 gpd plus a fire flow requirement of 750 gpm. Comparing the Palisades plant capacity of 1,152,000 gpd with the current maximum day demand of 637,000 gpd leaves approximately 515,000 gpd available to meet the needs of the additional growth at the Palisades and serve the Summit development.

According to these estimates, the existing capacity of the Palisades water system is sufficient to serve the current maximum day demand as well as the anticipated maximum day demand for the Summit. Approximately 357,900 gpd of capacity, based on only one of the two 800 gpm wells, would be available for additional growth in the Palisades and to meet the fire flow requirements for the Summit development. Alternatively, the second 800 gpm well would be sufficient capacity for the Summit fire flow requirement of 750 gpm and the remaining 357,900 gpd of capacity from the first well would be available to serve the additional growth in the Palisades.

Moreover, testimony was provided that Florida Water has an option to place into service a third well located on the Summit property which could be brought on line within 120 to 180 days. The testimony also indicates that as customers come on-line, FWSC can go to the Water Management District to have the CUP increased. Finally, the developer has already received a construction permit from DEP to build water lines from the Palisades to the Summit. With respect to wastewater, FWSC could build a package wastewater plant, if the developer needed wastewater service. However, in Issue 1 staff recommends that there is no need for wastewater service, nor has the utility requested approval to provide such service at this time.

For the foregoing reasons, staff recommends that FWSC has sufficient plant capacity to serve the requested territory. FWSC

has provided reasonable options to increase its capacity if additional capacity is needed in the later years of the development.

ISSUE 5: Is Florida Water Services Corporation's application consistent with the local comprehensive plan?

RECOMENDATION: Yes. Florida Water Services Corporation's application is consistent with the City and County comprehensive plans. (MESSER)

POSITION OF PARTIES

FWSC: Yes. Florida Water's application is consistent with the local comprehensive plan.

CITY: No. Service by FWSC of the City of Groveland's utility service district established by Ordinance 99-05-07 is inconsistent with the City's Comprehensive Plan Intergovernmental Coordination Element 9J-5.015(3), Policy 7-1.8.1 and the proposed Joint Planning Area (JPA) for Lake County.

STAFF ANALYSIS: This issue was raised by the staff once the City protested FWSC's amendment application. Section 367.045(5)(b), Florida Statutes, states that,

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

As a result of the Memorandum of Understanding between the Department of Community Affairs (DCA) and the Commission, all amendment and original certificate applications are reviewed by DCA with respect to the need for service and consistency with the local comprehensive plan. The DCA is the agency of primacy with respect to review and approval of comprehensive plans. Once this docket was protested, the staff sponsored a DCA witness who testified to the information submitted by the DCA, and the issue was included in the prehearing statement.

FWSC's position is that its application is consistent with the local comprehensive plan. The City's position is that FWSC's plan is inconsistent with the Ordinance adopted under Section 180.02(3), Florida Statutes, the City's Intergovernmental Coordination Element of its Comprehensive Plan, and the proposed Joint Planning Area for Lake County.

In its brief, FWSC stated that there is no dispute that service by Florida Water would be consistent with the local government comprehensive plans. (TR 34,40,66,105) In order to provide service, Florida Water would not have to traverse any areas that have been designated as rural or otherwise sensitive on the County's Future Land Use Maps (FLUM). (TR 48,66) (BR 11)

The City stated that the City's Comprehensive Plan, (Policies 4-1.5.1 and 4-1.13.1) clearly indicate that the City will provide water and wastewater utility service outside of its corporate limits. (TR 420, 427) The City also stated that the City's Comprehensive Plan Intergovernmental Coordination Element 95-5.015(3), Policy 7-1.8.1 requires that the City coordinate with other municipalities in Lake County via interlocal agreements, to establish a "joint planning area which covers the area where a municipality can logically deliver public services and infrastructure." (TR 421) This joint planning effort will coordinate all of Lake County's existing Section 180, Florida Statutes, municipal utility districts and will be included in Lake County's Comprehensive Plan. (TR 422, 436) The City concludes by summarizing that the Summit Development is included totally within the City's Chapter 180, Florida Statutes, utility services district. (TR 481, 484) The City argues that, to that extent, FWSC's amendment is inconsistent with the City's and Lake County's Comprehensive Plans. (BR 20)

The City's argument with respect to this issue appears to focus mainly on the concept that the City has enacted a Chapter 180 Utility District, and the area in which Florida Water requests approval to provide water service is within that District. Witness Beliveau cited Section 5 of Ordinance 99-05-07 which states that, "No private or public utility shall be authorized to construct within the District any system work, project or utility of a similar character to that being operated in the District by the City unless the City consents to such construction." Therefore, the City reasons that Florida Water's plan must be inconsistent with the City and County Comprehensive Plans.

In Order No. PSC-01-1478-FOF-WU, issued July 16, 2001, the Commission agreed that pursuant to Chapter 180, a city may designate a utility district. However, Chapter 367, Florida Statutes, gives the Commission exclusive jurisdiction over a regulated utility's service, authority and rates. Section 367.011(4), Florida Statutes, states that, "Chapter 367 shall supersede all other laws..., and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference." Chapter 180 contains no such express override. The Order agrees that the existence of a Chapter 180 Utility District may be a factor in determining whether the regulated utility would be a duplication of or in competition with an existing system. However, the Commission makes its determination based upon the criteria set forth in Chapter 367, Florida Statutes. The existence of a Chapter 180 District does not preclude the Commission from evaluating whether it is in the public interest to amend a regulated utility's certificated service area.

The City also argues that Policies 4-1.5.1 and 4-1.13.1 of the City's Comprehensive Plan clearly indicate that the City will provide water and wastewater utility service outside its corporate limits. However, during cross-examination, Witness Beliveau stated that the City and County Comprehensive Plans addressed this extension of City service by inference, through the fact that both the City and the County Comprehensive Plans require Joint Planning Agreements between the cities. (TR 439) Witness Beliveau also stated that there is no specific criteria in the City's Plan as to when or where it would extend services beyond municipal boundaries. (TR 437) His testimony also referenced the Future Land Use Map attached to the City's Comprehensive Plan, which cannot include land located outside the City's municipal limits since the City has no authority over such land. (TR 420-421)

Another argument made by the City was the reference to an Intergovernmental Coordination Element in the City's Comprehensive plan, Policy 7-1.8.1, which requires the City to coordinate with other municipalities in Lake County to establish, via interlocal agreements, areas where a municipality could deliver public services and infrastructure. The City states that this joint planning agreement will coordinate all of Lake County's existing Section 180, Florida Statutes, municipal districts and will be included in Lake County's Comprehensive Plan. However, cross-examination of witness Mittauer at the hearing revealed that although the joint planning agreement process was initiated in

1994, it has not been finalized at this time. (TR 439) Although one city had approved their joint agreement, that action did not constitute finalization of the joint planning agreement process. (TR 456-457) Further, there is no record support for a time frame of when these actions might occur and/or become finalized.

Witness Winningham, from the DCA, provided testimony on behalf of the staff, pursuant to the Memorandum of Understanding between the Commission and the DCA. She testified that as part of the review, the DCA became aware that the City had concerns with the proposed Florida Water area expansion because it was interested in being the service provider, and that the City believed Florida Water's application would expand into the City's utility district. The DCA reviewed the City's comprehensive plan and found that while the public facilities element makes reference to areas outside the City elements where potable water service would be provided, there are no clear guidelines or criteria in the plan that could be used to select or identify potential water service areas outside of the City. Witness Winningham further testified that the City's plan does not identify the proposed Florida Water service expansion area as a potential service area for water for the City. Witness Winningham concluded by stating that although the DCA understands and has evaluated the concerns raised by the City, its staff did not recommend any objections to the application by Florida Water to the Commission. (TR 33-34)

Witness Winningham further explained the DCA's review perspective. She testified that Florida Water's plan to serve the proposed area would not contribute to urban sprawl, because the proposed area was located adjacent to Florida Water's existing development, and Florida Water was proposing to serve only that new development from the existing development area. Therefore, Florida Water would not be running lines through a rural area to provide service. (TR 66) She later restated that it was her opinion that based on the information she had reviewed, the provision of service to the Summit by Florida Water would not create any inconsistencies with the future land use map of Lake County. (TR 105)

According to the DCA witness's testimony, the plan to serve the Summit development by Florida Water is not inconsistent with the current City and County Comprehensive Plans. The City's argument about the passage of a utility district pursuant to Chapter 180, Florida Statutes, is not a relevent argument before the Commission, because the Commission's jurisdiction supersedes

Chapter 180 with respect to water and wastewater utility matters. The Commission will evaluate the application of Florida Water pursuant to the criteria set forth in its statutes, including public interest considerations.

With respect to the City's argument that its comprehensive plan precludes the provision of service by Florida Water, staff believes the testimony does not support that statement. The City's plan infers that it will provide service to various areas, but these areas are not clearly defined either directly or indirectly within the City or the County Comprehensive Plan. Neither does the record support the City's statement that the City's Intergovernmental Coordination Element of its Plan precludes service by Florida Water, because of a coordinated service effort executed among Lake County's individual cities. The record indicates that the joint planning process was initiated in 1994 and is not finalized at this time. Therefore, the staff recommends that Florida Water Services Corporation's application is consistent with the City and County local comprehensive plans.

ISSUE 6: Does the City of Groveland have the financial ability to serve the requested territory?

RECOMENDATION: Yes, the City of Groveland appears to have the financial ability to serve the requested territory. (MESSER)

POSITION OF PARTIES

FWSC: It does not appear the City has the financial ability to serve. The City's recent water line extensions were financed in large part by a Department of Environmental Protection grant. That grant has been used up and the operational history of the City's utility system casts doubt on its ability . . .

CITY: Yes.

STAFF ANALYSIS: This issue is evaluated in amendment cases as a result of statutory and rule requirements. Section 367.045(2)(b), Florida Statutes, requires that an applicant submit all information which may include a detailed inquiry into the ability or inability of the applicant to provide service. Rule 25-30.036(3)(b), Florida Administrative Code. requires an applicant for an amendment to provide a statement showing the financial ability of the utility to provide service in the requested area. Although the City is not the applicant, since the City has protested the application of FWSC because it would like to serve the area, it is appropriate for the Commission to review the financial ability of the City to provide service to the Summit in order to determine whether FWSC is best able to serve.

In its brief, Florida Water begins its discussion with the statement that it is not clear how the City plans to finance the substantial cost of the design, permitting and construction of the lines required to bring the City's water and wastewater service to the Summit. The utility states that the City has a total population of approximately 3,100 people, and that 80% of the City's utility customers are within the City boundaries. (TR 493) The extension of the lines outside the City was financed primarily by a grant from the DEP for the purpose of serving a development called Garden City. (TR 312,366) The City's initial estimate to serve Garden City was $295,000 and then later it was increased to $500,000. (TR 338-9) The DEP agreed to fund a portion of the estimated cost, up to $381,000. (TR 340) The actual cost to

construct the water line out to Garden City proved to be substantially less than the amount the City received from the DEP grant, so the City had been using that reserve to continue the line extensions past Garden City, even though there have been no requests for service to the City for service beyond Garden City. (TR 332, 342) The DEP grant funds have been exhausted and the City is not seeking any additional grants to extend lines to the Summit. (TR 344)

FWSC continues by stating that as of the date of the hearing (July 2001), financial statements for the year ending September 30, 2000 were not yet available. (TR 497) Based on the year end report for September 30, 1999, the total operating revenues for the City's enterprise fund, which includes water, wastewater and sanitation services, was $877,160. One of the revenue entries for that year was a water quality assurance payment of $150,466. No similar payment was reflected in the financial statement for 1998, and the City Manager could not explain the source of that revenue. (TR 498-499) The City's fund showed a loss in 1998, and a loss would have also been reflected in 1999, but for the apparently non-recurring water quality assurance payment. (TR 500) FWSC further noted that it was not clear whether the City had established a reserve for equipment replacement or plant replacement. (TR 501) FWSC concluded by stating that all of these factors raise serious doubts as to the City's ability to finance service to the Summit. (BR 13)

The City argues that its 1999 Financial Report reflects its strong financial position. (EX 25) It states that the City Council authorized the expansion of its system beyond Cherry Slough, its current terminus, to extend another 3,000 feet to the Summit property, and that the City has adequate cash on hand to construct the extension. (TR 300, 483) The City states that the loss of $21,406 in its 1998 proprietary fund, which includes the City utility department revenues and expenses, was attributable to depreciation expenses and was therefore a paper loss. (TR 499-500) The City also addressed FWSC's introduction of the loss that would have been incurred in 1999 had it not been for a "water quality assurance" payment of $150,466. It stated that the expense figure used to to calculate this loss ($784,793), was the total operating expenses associated with sanitation services as well as utility services. (TR 508) (BR 21) The City states that, therefore, standing alone, the utility department of the City may well have not suffered a loss in 1999. It concluded by stating that the City

utility department did have a sinking fund and/or reserve fund for equipment and plant replacement. (TR 501)(BR 21)

During the hearing, a number of questions were asked with respect to the total cost of the project by the City to date (since the City had continued its extension past the original terminus of Garden City and was now at Cherry Lake Slough), and what the estimated expense would be to continue the project out to the Summit. City Witness Mittauer testified that the project from Jim Payne Road to Cherry Lake Slough had cost about $500,000, and that $391,000 of that had been paid by the DEP grant. (TR 366) Therefore, the difference of $109,000 had been paid for with City funds, which apparently originated from a loan. (TR 342) Witness Mittauer also stated that he had provided the City with revised estimates to extend the line from its present terminus at Cherry Lake Slough to the entrance of the Summit PUD, which was $228,000. This included a 15 percent contingency and engineering services. The actual construction cost was projected to be about $167,000. (TR 343-344). Witness Mittauer also testified that the cost to extend the line from Cherry Lake Slough to the closest point of the Summit development was $145,000. (TR 313, 365) With respect to the internal lines of the Summit system, the FWSC application contemplated that those would be built by the developer and donated to FWSC. (EX 5) On cross-examination, Witness Mittauer indicated that the City also anticipates that the internal lines will be constructed by the developer, since the connection point is outside of the development. (TR 338-345) Therefore, this issue boils down to whether the City has the ability to fund a construction project to extend lines totaling approximately $228,000 (worst-case scenerio), plus the ongoing financial ability to operate and maintain the system in the future.

The City attached its most recent audited financial statement dated September 30, 1999, to Witness Yarborough's testimony. (EX 25, TR 478) The initiation of requesting grant funds from the DEP occurred in the timeframe between March and October 1999, and the grant was approved by the DEP in March 2000. (EX 19) Therefore, it appears that the City's Financial Report submitted as Exhibit 25 did not include the impact of any of those funds on the City's operations, or the subsequent expenditures of those funds by the City to extend the line.

The notes to the Financial Statements explain that the accounts of the City are organized on the basis of funds and

account groups, each of which is considered a separate accounting entity. Government resources are allocated to and accounted for in individual funds based upon the purposes for which they are to be spent and the means by which spending activities are controlled. (EX. 25, pages 16-17 of 59) The City has two funds, the Governmental Fund and the Proprietary Fund. The Governmental Fund has one subcategory called the General Fund, and it is the general operating fund of the City. The Proprietary Fund has one subcategory called the Enterprise Fund. The Enterprise Fund specifically accounts for the provision of water, wastewater and sanitation services. (EX 25, page 29 of 59)

The parties' analysis focused on the schedules included for the Enterprise Fund, and more specifically, the statement of revenues and expenses. Although the Statement was for the year ending September 30, 1999, it also provided the account information for prior year 1998 for comparison. The staff has considered the statement of revenues and expenses, in addition to the statment of cash and cash equivalents and the combined income statement, in order to assess the overall financial stability of the City, and the City's ability to respond to maintenance needs of a new utility system.

Overall, the City's income statement for 1999 showed total operating revenues for the Enterprise Fund of $877,160 and total operating expenses of $784,793, resulting in operating income of $92,367. Net nonoperating revenues and expenses were $27,189, which included the $150,466 Water Quality Assurance payment for 1999. (EX 25, page 13 of 59) Witness Yarborough agreed on cross-examination that the water quality assurance payment was one of the components that contributed to this number being a positive number rather than a negative number. (TR 499-500) Exhibit 25 also showed that the City's net income before operating transfers was $119,556. Witness Yarborough testified that the transfer out of the Enterprise Fund and into the Governmental Fund of $45,482 was to pay itself back for water and sanitation's portion of a loan taken out by the City. (TR 502) After the transfer, the City's net income for the Enterprise Fund was $74,074.

The next page in the financial statements is the Statement of Cash Flows, which provides information on the general liquidity of the Enterprise Fund. (EX 25, page 14 of 59) The year 1999 started with a balance of $427,231 for cash and cash equivalents. The year ended with a net decrease in cash of $34,337, making the year end

total $392,894. The $150,466 water quality assurance payment discussed by FWSC contributed to the cash position. However, it should also be noted that there were several entries for loan or lease repayments in 1999, which were not reflected in 1998, and several were repayments back to the City's General Fund (from the Enterprise Fund).

A review of these Enterprise Fund accounts shows that the City appears to have cash available to meet various planned or unplanned expenses. However, the Staff disagrees with the statement in the City's brief that it had a sinking fund and/or reserve fund for plant or equipment replacement that was established as a condition of its revenue bonds. Witness Yarborough stated that the water and sewer bonds require reserves for bond payments. However, the City adds monies into that account for plant equipment, instead of opening another checking account. (TR 501) Staff believes there is no record confirmation that a fund for replacements is a condition of the City's bonds. Regardless, according to the Combined Balance Sheet, the City's reserved fund balances were $463,919 and unreserved fund balances were $323,869. (EX 25, page 10 of 59)

Page 9 of 59 of Exhibit 25 is a Combined Balance Sheet which shows all Fund and Account Groups. This page shows that the City's water system (without depreciation) is valued at $2.6 million, and its wastewater system is valued at $4.9 million. This is compared to total City assets of $9.8 million. Page 10 of Exhibit 25 shows that the City's total debt is about $3.6 million compared to total equity of $6.2 million. The staff believes that this information reflects that the City has a substantial investment in its water and wastewater systems, which is about 76% of the City's total assets. Further, the City's overall debt to equity ratio is about 1:2 - that is, it has almost twice as much equity as debt.

The City's Financial Statement also included comments on areas of concern, more specifically called reportable conditions. These included any areas coming to the attention of the auditors relating to significant deficiencies in the design or operation of the internal control over financial reporting that could adversely affect the City's ability to record, process, summarize and report financial data consistent with the assertions of management in the general purpose financial statements. (EX 25, pages 50 and 51) The audit noted the condition that the interfund accounts were not reconciled on a monthly basis. As a result, expenses in the water fund were either not recorded or were in some instances materially

overstated on the unadjusted trial balance. The City responded that this would be monitored and corrected. (EX 25, page 56)

In spite of the reported condition, the financial statements show that the City's Enterprise Fund has been able to repay various amounts back to the General Fund. This was shown in the Enterprise Fund Statement of Cash Flows, and in the Income Statement. The statements also appear to indicate that money is available to maintain equipment or respond to other material needs with respect to utility service. Staff believes that the other financial factors combine to present an overall picture of stability for the City, and the ability of the City to obtain capital and sustain payments. Therefore, the staff recommends that the City of Groveland appears to have the financial ability to serve the requested territory.

ISSUE 7: Does the City of Groveland have the technical ability to serve the requested territory?

RECOMMENDATION: Yes. The City has the technical ability to provide both water and wastewater service to the Summit. Further, the staff recommends that the City has the plant capacity and lines to provide water service. The City also appears to have the wastewater plant capacity, but not the wastewater lines to serve the Summit. (REDEMANN, MESSER)

POSITION OF PARTIES

FWSC: No. From the evidence presented, it does not appear that the City has the technical ability to serve.

CITY: Yes, the City's lines currently end at Cherry Slough and are being extended 3,000 feet to the Summit, a process that is underway now and will take approximately four months. Further, the City, unlike FWSC, has adequate existing water plant capacity to meet the Summit's potable water and fire flow . . .

STAFF ANALYSIS: Rule 25-30.036(3)(b), Florida Administrative Code, requires that a utility requesting an increase in territory must demonstrate that it has the technical ability to provide service. The City's protest of Florida Water's amendment application led the parties to include the issue of whether the City has the technical ability to provide service to the Summit. Section 3 (j) of the above-mentioned Rule also requires a utility to submit detailed information describing the capacity of the existing lines, the capacity of the treatment facilities, and the design capacity of the proposed extension.

Technical ability has been considered by the Commission to include the components of managerial and technical expertise to operate and manage a utility. In this case, a separate issue was not included to address the plant capacity of the City to provide service. However, there was much testimony on this topic, and the City's brief used much of this testimony to support its position that the City has the technical ability to provide service to the Summit. Therefore, the Staff has analyzed the City's technical ability, and we have also included a separate discussion water and wastewater plant capacity and line capacity to serve the Summit. The capacity analysis is divided into discussions relating to the

City's water plant and line capacity and water demand, wastewater plant and line capacity and wastewater demand, and the Summit's demand for water and wastewater.

City's Arguments

The City's position is that the City has adequate plant and line capacity to serve the Summit with potable water and fire protection. In the City's brief, the City states that the calculated average daily water demand for the Summit is 51,880 gpd and the average daily fireflow demand is 750 gpd, for a total demand of 141,880 gpd. (TR 314) (BR 22) The City also stated that it had two water plants served by three wells, with rated capacities of 550 gpm or 792,000 gpd (Well 1), 503 gpm or 724,320 gpd (Well 3a) and 462 gpm or 665,280 gpd (Well 5). (TR 313, 357) The total capacities for the wells was calculated by multiplying the gallons per minute rated capacity times 60 minutes per hour times 24 hours per day. (TR 356-8) Adding all the well capacities together makes the City's total capacity 2.18 mgd. (BR 23) The City's system also includes high capacity pumps and elevated storage tanks. (TR 357-8) Moreover, the City noted that it is in compliance with all applicable rules of the St. Johns River Water Management District, EPA and DEP. (TR 315)

The City further discusses how much available plant capacity could be used to provide service to the Summit. The City stated that the average daily flow for Plant 1 and Plant 2 is approximately 110,000 gpd and 320,000 gpd, respectively. (TR 313) Therefore, of this permitted capacity, the City had approximately 1.6 mgd available to serve the Summit as of June, 2000. (TR 313) The City referenced the combined maximum daily flows from Plant 1 and 2 in May 2001, and also the individual maximum daily flows of each plant. (EX 17, TR 361) The City states that using these May 2001 amounts, the plant still has 1.12 mgd of capacity available to serve the Summit. (BR 23)

In its brief, the City discusses the infrastructure in place to deliver water service to the Summit. The City has constructed lines which are 3,000 feet from the Summit at its closest point and 7,000 feet from the entrance to the Summit. (TR 363-5) (BR 23) The City provided the estimated costs to extend those lines, and also stated that the extension had been approved by the City and engineering work was in process. (BR 23-24) Since no construction permits have yet been issued for the Summit, the City

would be able to provide water service in a timely fashion, as it would take it approximately four months to continue the extension. (TR 325)

The City contends that its lines would have a pressure rating of pounds per square inch (psi) of 55 psi at the point of interconnection with the Summit. (TR 351, EX 20 at 2) This amount of pressure is 35 psi greater than that needed to meet environmental regulations. (BR 24) (TR 347) The City argues that pressure within the development is to be sustained through pressure booster systems provided by the developer. (TR 355)

The City concludes in its brief, that the the City has the technical ability to serve the Summit since it has both the plant capacity and the infrastructure necessary to provide adequate and reliable water service to the Summit in a timely fashion. (BR 24)

FWSC's Arguments

Florida Water's position is that it does not appear that the City has the technical ability to serve. In its brief, FWSC states that the City's lines are approximately 7,000 feet from the entrance of the Summit. (TR 301) FWSC argues that service by the City will require additional line extensions and will require traversing rural areas that are not slated for development. FWSC further argues that Section 180.06, Florida Statutes, prohibits the City from providing water service to the requested area adjacent to Florida Water's existing service territory, without the consent of Florida Water. (BR 14) Since no effort has been made to comply with this Statute, it is unclear whether or when the City could ever provide service to the Summit. (BR 14)

Transcript

Operational and Managerial Ability

With respect to water operations, witness Yarborough, chief executive officer for the City, testified that the City has one Class "C" water operator as well as two water operator technicians who are training for their Class "C" license. (TR 482-483) Witness Mittauer, the City's consulting engineer, testified that the City had one non-operational violation for its water system within the last five years, which occurred after McDonald's completed construction of a restaurant in Groveland by connecting to the

City's water line with a 1 1/2 inch line. (TR 315-316) He explained that since the 1 1/2 inch line was considered a main extension by DEP, DEP issued a Warning Letter, indicating that bacterial sampling should have been conducted by the City (EX 16, JAM-4). He also testified that DEP offered a proposed settlement and the case was closed on February 5, 1997. (EX 16, JAM 5-6) (TR 315-316)

With respect to wastewater operations, Witness Yarborough testified that the City has two Class "C" wastewater operators and one Class "B" and two class "C" wastewater collection operators. (TR 483) Witness Yarborough also testified that the City has had no violations or fines as a result of operating its wastewater facilities. (TR 483)

According to the witnesses, the City is currently in compliance with all DEP, St. Johns Water Management District and EPA permit requirements for its water and wastewater systems. (TR 315, 482-483)

City Water Plant Capacity, Demand and Lines

Witness Yarborough testified that the existing capacity of the water plant system is 2.18 mgd. (TR 482) Witness Mittauer testified that the City currently has two water plants. Plant 1 is on Pomelo Street, which is downtown, and Plant 2 is on Sampey Road, which is the newer, main water plant. (TR 350, 360) The average daily flow for each water treatment plant is approximately 110,000 and 320,000 gallons per day, respectively. (TR 313) Witness Mittauer testified that the maximum day for the water treatment system was on May 26, 2001 with Plant 1 pumping 66,000 gpd and Plant 2 pumping 949,000 gpd for a maximum daily flow of 1,015,000 gpd. (TR 376-377, EX 17)

Witness Mittauer further testified that these plants are served by three wells with the following rated capacities: Well No. 1, 550 gallons per minute (gpm) or 792,000 gpd; Well No. 3A, 503 gpm or 724,320 gpd and Well No. 5, 462 gpm or 665,280 gpd. (TR 313) He stated that Well No. 1 goes into an elevated tank, and that the City has one 200,000 gallon ground storage tank, one 100,000 gallon elevated tank and one 75,000 elevated tank. (TR 349, 357-358)

The City did not provide specific testimony of the City's fire flow demand or amount allocated by the City for fire flow.

With respect to water lines, Witness Mittauer testified that the City has constructed a 12-inch water line past the Garden City subdivision and is up to Cherry Lake slough. This 12 inch line is connected to two existing lines, one 6 inch and one 8 inch line at Jim Payne Road, which is 6,500 feet away from the water plant. (TR 349-350) The City is in the process of doing bacteriological disinfection. The line has been pressure tested, and it is in its final stages of being certificated. The point of interconnection with the Summit is about 7,000 feet from the City line. The nearest point to the development is only 3,000 feet. (TR 300-302, 313)

Witness Mittauer sponsored a water hydraulic study, which is a distribution model designed to show the design criteria for the distribution system to the entrance of the Summit. (TR 355, 369-370, EX 20) This distribution model indicates that the pressure at that point of connection would be 21.1 psi, if the City had flows of 900 gpm (750 gpm fire flow + 150 gpm Summit Demand). (EX 20) Witness Mittauer agreed that the DEP requires a utility to maintain at a minimum 20 psi in their water lines. (TR 347) During cross-examination by FWSC, witness Mittauer indicated that the entrance to the Summit on Cherry Lake Road is about 115 feet higher than the starting point of the distribution system (EX 20 elevation of discharge) and according to the topographic survey, there are some areas within the Summit that reach an elevation of 200 feet. (EX 21, TR 354) He stated that since 1 psi of pressure is required to force water through the lines for every 2.3 feet of elevation, a booster system of some sort would be necessary, and that it was his understanding that it would be provided within the water distribution system of the Summit, per the permit application Agreement. (TR 347-348, 355)

City Wastewater Plant Capacity, Demand and Lines

Witness Mittauer testified that the Groveland Wastewater Treatment Plant has the capacity of 250,000 gpd with average day wastewater demand of approximately 110,000 gpd. (TR 315) There is no information in the record concerning the City's maximum day wastewater flows.

Witness Mittauer also testified that although the Summit development, as currently proposed, would utilize septic tanks, the City could provide wastewater treatment from its existing plant within 12 months of the request for service for approximately

$500,000. (TR 315) He stated that to serve the Summit, a force main would have to be run either 26,000 feet or 32,000 feet depending on the point of connection. (TR 346-347) He also stated that an on-site pump station at the Summit would be needed to pump the wastewater back to the City system. He agreed that there had been no analysis as to what lift stations would be required in order to provide service to the Summit. (TR 346-347) He admitted that the City has not extended any wastewater lines to State Road 19 at this time. (TR 345)

Witness Yarborough testified that the City is in the process of amending its Comprehensive Plan for wastewater with DCA to include a policy that requires developers to put in dry lines in anticipation of hooking up to the central wastewater system when the City's main wastewater line abuts their project. He stated that the customers would have to cut off all the septic tanks and hook up immediately to the City's wastewater system. (TR 458)

Summit Demand for Water and Wastewater

According to the Application sponsored by witness Tillman, the average demand for water in the Summit development was to be 135,000 gpd and maximum daily flows would be 270,000 gpd. (EX 5, CLS-1 page 12 of 57) The Developer Agreement sponsored by Witness Tillman showed the average daily flow of the Summit would be 38,400 gpd. (EX 5, CLS-2 page 34 of 38) The DEP construction permit for the water system, sponsored by Witness Tillman, stated an average daily demand of 78,550 gpd and a maximum daily demand of 157,100 gpd. (EX 11, page 9)

As previously discussed in Issue 4, the staff believes that the most appropriate number to use in this analysis is the maximum day demand shown in the DEP permit of 157,100 gpd. Further, in Issue 4, the staff recommends a fire flow demand of 750 gpm for the Summit. In Exhibit 11, Florida Water used two hours of fire flow in its Application for a Construction Permit. Therefore, the staff recommends that the Summit's total water demand including fire flow is 247,000 gpd [157,000 gpd + (750 gpm x 60 min. x 2 hrs.)]. (TR 315, EX 11, EX 18)

Witness Mittauer testified that the City calculated the Summit's water demand by using the flow design standards set forth in a specific chapter of Lake County's Comprehensive Plan and Florida Water's calculation of 148.23 ERCs for the Summit PUD found

in Exhibit "B" of the Florida Water/Summit Water Service Agreement. He testified that based on this information and on Lake County's minimum criteria for fire demand, the average day demand for the Summit is 51,880 gpd and fire flow demand is 750 gpm. (TR 314)

Witness Mittauer stated that this amount of water capacity is significantly greater than that requested by the Summit but is also easily met by the City. (TR 313-314) The City contends in its brief that the total demand with fire flow is 141,880 gpd. (BR 22)

With respect to wastewater, Witness Tillman testified that Florida Water did not address wastewater service in its application because the developer had not requested wastewater service and had apparently already been approved authorization to proceed using septic tanks. Witness Tillman further stated that if the developer needed wastewater service, Florida Water could provide that service in a cost effective manner. (TR 171) He explained that without a specific request, any plans from Florida Water would be speculative at best. However, one feasible approach would be to install a package plant capable of providing reuse quality water. He estimated that the cost of that option would be approximately $500,000. (TR 172)

He further questioned the City's testimony concerning its expense to deliver wastewater service to the Summit. He explained that the estimate did not seem to take into account bridge crossings and other difficult and costly placements for the lines. Witness Tillman stated that even at a conservative cost of $25 per square foot for piping alone, Witness Mittauer's estimate seemed low. Further, he stated that estimate did not appear to include other expenses such as additional lift stations, engineering and permitting costs. (TR 172-173) He also testified that from the information provided, it did not appear that the City would be able to provide reuse service to the Summit, while Florida Water would be able to do so if it implemented a wastewater system. (TR 173)

City witness Mittauer provided his estimated average day wastewater demand for the Summit of 44,469 gpd using his calculated number of ERCs for the Summit and design criteria indentified in the Lake County Comprehensive Plan. (TR 314-315) There was no testimony offered on potential peak wastewater flows from the Summit.

Analysis

Operational and Managerial Ability

Witnesses Yarborough and Mittauer testified that the City meets all of the personnel requirements with respect to qualified staffing to operate its water and wastewater facilities. Both water and wastewater systems are in compliance with all DEP, St. Johns River Water Management District and EPA permit requirements. (TR 482-483) Florida Water provided no testimony in this area. Therefore, staff believes that the City has the operational and managerial ability to provide water and wastewater service to the Summit.

Available Capacity to Serve the Summit Water

Witness Yarborough testified that the total water plant capacity of the City is 2.18 mgd. (TR 482). Witness Mittauer testified that this number is obtained by adding all of the well capacities together, times 60 minutes per hour times 24 hours per day, and he calculated these capacities as maximum day capacities. Witness Mittauer testified that all his well calculations were based on the individual well capacities. (TR 357-358) However, he further explained that in determining firm capacity of a plant, the largest well should be taken out of service, because it might have maintenance problems, electrical problems or a pump failure. (TR 358) This is consistent with Exhibit 11, the DEP Application, which removes the largest well from service for FWSC. (TR 411) Therefore, based on the information in the record and utilizing the methodology which the City argued was correct, staff believes that the City's available capacity to serve the Summit would be the total of Wells Nos. 3A and 5, or 1.39 mgd, and not 2.18 mgd as stated by the City.

Witness Mittauer testified that the maximum daily flow at the City's plants occurred on May 26, 2001, and resulted in a combined total of 1,015,000 gpd. (TR 376-377 EX 17) Staff has compared this to the maximum capacity of 1.39 gpd to provide the City's available capacity to serve the Summit. Based on this analysis, staff believes the City has 375,000 gpd of available capacity. Staff believes that comparing maximum daily flows is appropriate when determining available capacity, because it reflects the system's ability to meet its peak demand and still have excess capacity to serve the Summit.

Staff notes that the City's brief contained various discrepancies and misstatements concerning the flows from Plant 1 and Plant 2 during the month of May 2001. (BR 23) However, staff agrees that based on the actual flow reports, the City experienced its maximum daily flow for the system of 1,015 mgd in May 2001.

The City's brief also reflects that the plant still has 1.12 mgd available to serve the Summit, even after experiencing a maximum daily flow. (BR 23) This number would be calculated by subtracting 1.015 mgd from 2.181 mgd, which yields 1.165 mgd, or 1.12 mgd when rounded.

As discussed above, the staff believes the actual available capacity of the City's water system to serve the Summit is 375,000 gpd, which is 1.39 mgd - 1.015 mgd. Florida Water did not question any City testimony on overall water capacity available for the City to use in providing service to the Summit.

The City's brief states that the total demand with fire flow for the Summit is 141,880 gpd. (BR 22) There is no specific record support for this particular number. The Staff has determined that this number can be derived if one uses the Summit demand of 51,880 gpd and fire flow of 750 gpm, as Witness Mittauer testified. (TR 313-314) Although Witness Mittauer stated that the County standards were used in estimating fire flow, Late filed Exhibit 18 did not clarify the standard amount of time to use in calculating fire flow. (TR 314, EX 18) Although the County-required hours of fire flow are not in the record with respect to the City's calculations, Florida Water used two hours of fire flow in its Application for a Construction Permit. (EX 11) Staff determined that the City also used two hours of fire flow, resulting in the City's total Summit demand number of 141,880 gpd [(750 gpm x 60 min. x 2 hrs.) + 51,880 gpd = 141,880 gpd].

However, as discussed in Issue 4, water demand for the Summit development was not what the City stated in its brief, but rather the numbers indicated on the DEP permit. In this issue, staff recommends that the Summit water demand would be 157,100 gpd, plus a fire flow demand of 750 gpm, for a total demand of 247,100 gpd [157,000 gpd + (750 gpm x 60 min. x 2 hrs.)]. (TR 315, EX 11, EX 18)

Since the total available capacity of the City water system is 375,000 mgd, and the total demand of the Summit development

including fireflow is 247,100 gpd, it appears that the City would have adequate capacity to serve both itself and the Summit, plus provide fire flow. Florida Water provided no testimony to contradict those findings. Therefore, the staff believes that the City has adequate capacity to provide water service to the Summit.

With respect to the City's ability to deliver water to the Summit, Witness Mittauer testifed that the City had constructed 12 inch water mains within either 3,000 or 7,000 feet of the Summit. (TR 301-302) He also testified that the City was in the process of doing bacteriological disinfection, and that the line has been pressure tested and is in its final stages of being certificated. (TR 300-302, 313) Therefore, the staff believes that the City has the lines available to deliver water service when necessary, to the Summit development.

Available Capacity to Provide Wastewater Service to the Summit

With respect to wastewater, neither the City's nor FWSC's brief discusses the provision of wastewater service. Witness Tillman testified to Florida Water's intentions to provide wastewater service if the developer requested that service. (TR 371-373) Witness Mittauer testified to the capacity of the City's wastewater treatment plant, as well as to how far it was to run lines and the estimated cost of those lines. (TR 315) He also testified that no lines have been extended out toward the development at this time. (TR 345-346)

Since the development at issue is planning to install septic tanks, there are no estimates for wastewater service in the Developer Agreement. Witness Mittauer's testimony included average daily flow information for the City, but not maximum day flow information. Based on Witness Mittauer's testimony, the City has 140,000 gpd available to serve the Summit, based on average day flows. (TR 315) Again, using his County criteria, Witness Mittauer testified that the Summit wastewater average day demand would be 44,469 gpd. (TR 315) Although this analysis uses average flows, staff believes that it appears the City has the wastewater capacity to serve the Summit.

With respect to the lines to collect the wastewater, Witness Mittauer confirmed that the City had no plans underway to extend lines some 26,000 or 32,000 feet. (TR 346-347) The City's testimony regarding its intention to require developers to install

dry lines for anticipation of hookup to the central wastewater system, does not address the issue of capacity, but is considered under overall public interest in Issue 12. (TR 458)

Since there is no need for central wastewater service at this time, as discussed in Issue 1, there is not a need to determine whether the City has the ability to provide wastewater service to the development. Nevertheless, it appears that the City has wastewater capacity to provide wastewater service to the Summit. However, the City does not have the lines to provide wastewater service.

Conclusion

Florida Water's brief focused on arguments addressing the length of water line to be run, the areas that line would extend through, and the City's alleged violation of Chapter 180.06, Florida Statutes. (BR 13) The first two points are addressed in Issue 8, and the last point is outside of the Commission's jurisdiction to resolve. Therefore, we do not include further discussion of these points in this issue. Although Florida Water questioned at the hearing the pressure requirements to deliver water to the Summit by the City and the lack of active plans to install wastewater lines to the Summit, Florida Water did not question the managerial and technical expertise of the City, or the City's plant capacity for either service.

Therefore, based on staff's analysis of each component, staff recommends that the City has the technical ability to provide both water and wastewater service to the Summit. Further, the staff recommends that the City has the plant capacity and lines to provide water service. The City also appears to have the wastewater plant capacity, but not the wastewater lines to serve the Summit.

ISSUE 8: Is the City of Groveland's proposal to serve the area consistent with the local Comprehensive Plan?

RECOMENDATION: No. The City of Groveland's proposal to serve the potential service area is inconsistent with the City and County Comprehensive Plans. (MESSER)

POSITION OF PARTIES

FWSC: No. The City's proposed service to the area is inconsistent with the future land use designations in the County comprehensive plan. Moreover, the City's own comprehensive plan does not support service to the requested area.

CITY: Yes, the presence of contaminated water in the Garden City subdivision and along SR 478 in conjunction with vested developments requiring centralized water service make service by the City to the Summit consistent with the County's Future Land Use Map and the City's Comprehensive Plan.

STAFF ANALYSIS: This issue was raised as a companion issue to Issue 5. Once the City protested FWSC's amendment application, the staff sponsored testimony by the DCA with respect to the consistency of Florida Water's proposed service plan with the local comprehensive plan, pursuant to the Memorandum of Understanding between the Department of Community Affairs (DCA) and the Commission. This testimony also raised various concerns about the City's proposed plan to serve the area at issue. (TR 33-34)

City Position

The City's position is that the presence of contaminated water in the Garden City subdivision and along SR 478 in conjunction with vested developments requiring centralized water service, make service by the City to the Summit consistent with the County's Future Land Use Map and the City's Comprehensive Plan. In its brief, the City supported its contamination argument by stating that it extended its lines to the Garden City subdivision in order to provide water to an area which had been identified by DEP as contaminated with ethylene dibromide (EDB), a known carcinogen. (EX 19, TR 447) The City stated that the fact that the location of the Palisades water plant was completely within an area identified

on DEP's Map as containing EDB, would be a basis for amending the City's Comprehensive Plan to extend the City's line to provide service to the Summit. (TR 78, 93-94) The City argues that modification of the City's Comprehensive Plan to add the Summit to its utility service area would remove any concerns that DCA had regarding inconsistency. (BR 26)

With respect to the argument concerning vested developments, the City's brief stated that Witness Winningham testified that the presence of vested development at densities which would require the installation of centralized water and/or wastewater systems could make service by the City consistent with the County's plan. (TR 59-60) Witness Beliveau confirmed that there are other vested developments between the Garden City subdivision and the Summit which will require the installation of centralized utility services. (TR 447-450) Therefore, the City's position is that the extension of lines to the Summit is consistent with Lake County's Comprehensive Plan. (BR 28)

FWSC Position

FWSC's position is that the City's proposed service to the area is inconsistent with the future land use designations in the County Comprehensive Plan, and that the City's comprehensive plan does not support service to the requested area. Florida Water's brief states that the proposed service to the Summit by the City runs through areas designated on the County's Future Land Use Maps (FLUM) as suburban or rural areas. (TR 40) Providing utility services to rural areas is not cost effective and potentially encourages urban sprawl, because the availability of lines increases the chance that people will want or request more intense development. (TR 40-41) In fact, the City's Comprehensive Plan includes a specific objective to encourage growth in areas where it places its utility facilities. (TR 436) Therefore, the extension of the City's utility system into the rural and suburban areas is likely to foster development contrary to the land use designations in the County's FLUM.

Furthermore, Florida Water states that there is nothing in the City's Comprehensive Plan that would indicate that the City's provision of service to the requested area would be compatible with the land uses in the vicinity or that it is justified on some other grounds. (TR 44, 51, 434-435) While the City has suggested that the provision of service to rural areas may be justified by health

or safety concerns, there is no evidence that service by the City to the Summit is warranted because of such concerns. (BR 15) Florida Water also notes that the provision of utility services outside of a municipality's boundaries would be reflected in the capital improvement schedule for the municipality. However, there is no such schedule in the City's budget. (TR 46)

City Comprehensive Plan Witness

The City sponsored the testimony of Witness Beliveau, who is the contracted City Planner for the City. (TR 419) Witness Beliveau discussed how the City's actions to extend its water lines to the Summit development were appropriate under the City's Comprehensive Plan, through references to the FLUM in conjunction with the Intergovernmental Coordination Element of the City's Plan. (TR 421-421) He testified that the City has appropriate references in its Comprehensive Plan to utility service outside of its City limits and is currently working with the Lake County League of Cities and all of the municipalities in Lake County to provide specific references to its service territory in Lake County's Comprehensive Plan. (TR 422)

Witness Beliveau also testified as to the authority under which areas outside the City's current city limits, which are not included or referenced in the FLUM, could be provided service by the City pursuant to the City's Plan. He stated that the enactment of a utility service district, pursuant to Section 180.02(3), Florida Statutes, and Chapter 102, Ordinance 99-05-07, Groveland Code of Ordinances, allows the City to provide service to the Summit. (TR 422-424)

He also stated that any development within the City's Utilities Service District would be required to secure the appropriate approvals from Lake County planning agencies. He testified that this review process would prevent the DCA's concerns about urban sprawl created from running water or wastewater lines through rural or silviculture areas. (TR 424)

Witness Beliveau concluded by stating that the City, at DCA's request, was ordered to prepare a wastewater feasibility study for the City to provide centralized wastewater service to serve areas surrounding the City. He believed that this study was recognition of the City's separate service areas including areas outside of the

City's limits, as a beneficial change and a mitigation of urban sprawl. (TR 425)

DCA Testimony

Staff Witness Winningham, from the DCA, provided the primary testimony on this issue. The DCA is the agency that evaluates comprehensive plans, and Witness Winningham's responsiblities include the review of comprehensive plans and developments of regional impact throughout the state, including Lake County. (TR 32, 36-37) The City pointed out in its brief that Witness Winningham did not address this issue specifically in her initial testimony, which was adopted from the prefiled testimony of prior DCA Witness Gauthier. Rather, the witness first expressed an opinion on the consistency of the City's service to the Summit with either the City's or the County's Comprehensive Plan at her deposition. (BR 25-26)

Propriety of DCA Testimony

As the staff noted in Issue 5, the testimony of the DCA was added after the City protested FWSC's amendment application. The testimony was based on the analysis conducted by the DCA with respect to the consistency of FWSC's amendment application with the local comprehensive plans, pursuant to the Memorandum of Understanding between the PSC and the DCA. Since the application had been protested at the time of filing the testimony, the testimony also included concerns about the City's plan to serve the area. (TR 33-34)

At hearing, the Witness was specifically questioned by the City as to whether she had been asked by staff to file any additional testimony on these points. She stated that she had not been requested by Staff to file additional testimony. (TR 76) When asked if she had any reason prior to the deposition to consider whether the City's plan was inconsistent with Lake County's Comprehensive Plan, Witness Winningham stated she did not look at whether the City's plan was inconsistent with the County's plan prior to her deposition, but rather looked at the City and County information in relation to the proposed expansion area. (TR 100-101)

Staff notes that Witness Winningham responded to a direct question by counsel for the City during her deposition concerning

her opinion on whether or not the City's plan to serve was consistent or inconsistent with its Comprehensive Plans. (TR 101) Therefore, the staff believes there is nothing inappropriate about the orientation of the original DCA testimony or the opinion provided by the witness at her deposition and at hearing, as suggested by the City in its brief. (BR 26)

County Comprehensive Plan

Witness Winningham testified that the proposed expansion by the City would run lines through areas that the County Future Land Use Map (FLUM), adopted by the DCA on March 20, 2001, has designated as suburban and rural areas in the County's Comprehensive Plan. (TR 33, 35, 38-39, 40, 56) The significance of these land designations to the DCA is how they relate to expectations of future development and the provision of various services that would be required by that development. Witness Winningham stated that the rural category means one dwelling unit per five acres, and that the DCA would not normally expect utilities to be provided to such a rural area because it would not be cost effective. In addition, it would potentially encourage urban sprawl, because having more lines available would increase the chance that people would want or request more intense development than was anticipated on the FLUM. (TR 40-41) When asked by the City whether the City's plan to provide service to the Summit was inconsistent with the County's Plan, Witness Winningham stated that it was her opinion that it is inconsistent because of the rural designation. She explained that since providing service to the Summit required going through rural and suburban areas as shown on the County FLUM, the City's plan was inconsistent. (TR 52, 55)

The City questioned whether this recent FLUM map also showed vested developments in the area and specifically along SR 478. (TR 58-59) Witness Winningham testified that the map did not show vested interests, meaning areas that received approval or had gone through a certain amount of preparation and reliance upon some sort of approval process prior to the adoption of the comprehensive plan under the Land Planning Act approved in 1990 or 1991. (TR 57) She also agreed that there could be a number of vested developments along SR 478 which she was unaware of at that time. (TR 58)

However, when asked if the existence of a vested development would change her opinion as to whether extension by the City's

water line to serve the Summit is inconsistent with the County's comprehensive plan, she stated that that type of information would be part of the data and analysis the DCA would use to evaluate plan consistency. (TR 59) However, the DCA had not received anything from the City to support this service to the Summit in its plan. (TR 45-46) She did not address wastewater in her comments about vested developments, contrary to the statement in the City's brief. (BR 27)

Witness Winningham also explained that data and analysis was the information that would support a proposed change to the (City or County) plan. She stated that data and analysis could include information such as population growth showing that the area needs to develop more intensively. Witness Winningham acknowledged that as a city grows and expands, one would expect a change to the comprehensive plan to increase those densities, and that the site or area was appropriate for a more intensive development. (TR 44-45) However, she testified that the DCA had not received any data or analysis from the City to indicate or support a need to change its plans. (TR 45-46)

Witness Winningham was also questioned on her conversations with County staff persons with respect to FWSC's plan to serve the Summit and the City's plan. She testified that the County had indicated it had concern about the amount of suburban and rural land that was between the City and the site. (TR 47) However, the County expressed no similar concern about Florida Water because its plan did not run any lines through suburban or rural areas. (TR 48) She stated that nothing in Witness Beliveau's prefiled rebuttal testimony resolved the questions that she had regarding potential service by the City to the requested territory. (TR 48) She also testified that she did not believe he addressed the issues she felt were important in terms of consistency. (TR 49)

City Comprehensive Plan

Witness Winningham testified on the consistency of the City's plan to provide service with the City's Comprehensive Plan. She stated that the City's Plan does not address anything about where water would be provided outside the city with respect to utility service, other than the 22 homes outside the City that are receiving City water. (TR 43) She explained that the City's Plan contains no policies that give any specific guidance to where service would be located outside of the City, or in what timeframe

it might be provided. (TR 44) For example, she stated that there was nothing in the City's five year schedule of capital improvements to indicate what improvements it would be doing, at what time it would be doing them, the anticipated cost of the improvements and where the funding would be coming from, with respect to providing service into the Summit area. (TR 46) These were all items that DCA would expect to see in any city's proposal to modify its service area and change its plan, but which were not shown in the City's capital improvements schedule. (TR 46) She further testified that there is nothing in the City's current Plan that addresses how providing service to the Summit would be compatible with the existing land uses. She stated that normally when a comprehensive plan amendment comes is filed with the DCA, it would include information such as what would be the proposed expansion of the city service area, and other data and analysis on the need, environmental factors, the distance, timeliness or when the service would be needed, and various other factors. (TR 44) The DCA has not received any such information from the City. (TR 45-46)

The fact that none of the information discussed above was included in the City's plan, nor any criteria to suggest expansion other than to the 22 homes outside the city receiving city water, led Witness Winningham to state that she believed the City's proposal to serve the Summit was inconsistent with the City's plan. (TR 62) She affirmed that her opinion was based on the fact that there was simply nothing in the plan to indicate that the City would provide utility service to the area at issue. (TR 83)

Witness Winningham was further questioned by the Commission as to how her statement in her prefiled testimony that there was not enough information in the City's comprehensive plan to determine if what the City was proposing was inconsistent with its comprehensive plan, should be reconciled with her testimony at hearing that the City's plan was inconsistent. (TR 63-65) She responded that the City's Plan does not address service to this proposed area in its data or in its policies. She stated that there is no map showing that the City is planning to provide service. She continued by stating that it appears that there is nothing to support that the City was involved in a planning process to decide whether to expand its service and if so, where. She testifed that the County had obviously looked at the land uses in that area and established them as suburban and rural, which meant that it was not anticipating water service to be provided in that area. (TR 65) It appears that

it was the combination of the parameters in the County Plan, and what was missing in the City's Plan, that led the Witness to conclude at hearing that the City's provision of service would be inconsistent with its current plan.

Witness Winningham was questioned regarding the City's ability to amend its comprehensive plan, and specifically how the City could apply to the DCA to request that its plan be changed so that the provision of utility service would be consistent with the City's approved DCA plan. Witness Winningham agreed that the City could and should make application to the DCA for those changes. (TR 63-66, 81) However, until the DCA actually has the application and reviews the data, she could not make a decision on whether a modified comprehensive plan from the DCA would be appropriate. (TR 82)

Health, Safety and Welfare Issues

Witness Winningham was questioned about various situations or special criteria that could create a potential exception to a finding of inconsistency, if it were shown that a health, safety, or welfare issue was involved. (TR 78, 95) She agreed that the existing Palisades water treatment plant was located in an area that had been identified on a DEP delineation map for potable water well permitting. (TR 91, 94) She also stated that the existence of such an issue (health, safety or welfare) could create a potential exemption to the DCA's findings of consistency or inconsistency with the comprehensive plans. (TR 95)

Staff does not believe that these statements allow the conclusion to be drawn that the location of the wells in the Palisades system would be a basis for amending the City's Comprehensive Plan to extend service to the Summit, as stated in the City's brief. (BR 26) While theoretically, that statement may be true, the record in this case does not support a finding that the Palisades wells are contaminated.

The DEP Map has a legend at the bottom that states that it represents areas of ground water contamination for which testing is required under a particular rule. (EX 19) Witness Tillman's testimony indicated that the utility is currently providing service to the Palisades subdivision and that it also has received a permit from the DEP to connect its Palisades' wells to the neighboring Summit development. (TR 150, 154, 264, EX 10) It is apparent that

whatever testing is required by the DEP has occurred, and that the Palisades systems are not contaminated with EDB or any other contaminant. Witness Beliveau testified as the City's comprehensive plan expert, that he was not aware that there are any problems with the water quality from the Palisades system. (TR 452)

Staff believes this is further supported by the fact that the DEP would not have issued a Permit for the Summit to connect to the Palisades system, if there was any question about the Palisades well having contaminated water. It should also be noted that the new Summit development is not located in an area identified on the DEP map as having known ground water contamination. (EX 19)

City Testimony

Most of the points raised by the City were addressed in the questions placed to witness Winningham. However, the City presented two points that have not been addressed. One is the appropriateness of the extension because of existing PUDs between the Garden City development and the Summit. (BR 28) Another is the inference that the DCA's request to the City for a study about expanding the wastewater system might include the area at issue in this case. (TR 425)

With respect to the existence of approved PUDs, the record does reflect that there are other PUDs in the area in which the City extended its water lines, which predate the City's Comprehensive Plan and are therefore not identified in the Plan. Specifically, the PUD of Garden City was discussed at length by witness Beliveau, which was the reason why the City requested grant money from the DEP to provide service. (TR 448-450) However, there is no record evidence concerning the actual location of these PUDs between Garden City and the Summit. The record does indicate the existence of a PUD located directly across from the Summit. (TR 511) Witness Yarborough testified that the City had not received any written requests for service from any other PUDs along Cherry lake Road. (TR 511-512)

Witness Beliveau also elaborated on his prefiled testimony concerning the expansion of the City's wastewater system. He stated that the DCA had concerns about development in the Green Swamp areas south of the City, because that area was of critical

state concern. (TR 442) There was no testimony affirming that similar concerns exist in the area of the Summit.

Conclusion

While circumstances can always change in the future, the facts of this case indicate that the City made no efforts to modify either its City Comprehensive Plan in advance of taking the actions to extend the water service line out to the Summit, after it had reached the previously approved extension to Garden City. Nor has the City requested that the County submit changes to its plan. Witness Beliveau testified that it was common in Lake County to build a water line and not make an amendment to the comprehensive plan. He stated that municipalities evaluate whether they can finance or obtain funding to provide extensions of systems into areas outside of the exisiting service area, but within the Chapter 180 service area. (TR 453)

The City suggests in its brief that Witness Winningham's testimony was confusing at times. (BR 27) The staff disagrees, and suggests that the Witness consistently explained the information that was lacking in the present Plans and the rationale for her opinion. (TR 33, 38-41, 43-46, 52, 55, 62, 65, 83) Further, she testifed that there were no amendments pending with the DCA concerning this proposed water service area. (TR 103) She agreed that it was not a prohibitive process to make amendments to plans as needed, to accomodate changing population growth or a change in circumstances such as contamination. (TR 103) She testified that cities or counties can amend a plan through large scale amendments twice a year, but there are exceptions for emergency amendments and developments of regional impact. (TR 102)

The staff believes that the record is clear that the City's and County's existing Comprehensive Plans do not support the extension by the City to the Summit development. Further, there are no pending amendments to the City's plan or requests by the City to amend the County plan concerning this extension, filed with the DCA at the time of the hearing. Therefore, there was no information to consider whether other variables such as vested developments, environmental factors, or any other factors existed which might modify the DCA's opinion with respect to consistency. (TR 44-46, 59) The witness who provided these opinions represents the agency that approves the Plans. (TR 32-33, 36-37) And, when questioned whether testimony from the City's witness on the

comprehensive plans changed her testimony or opinions in any way, she stated no, it did not. (TR 48-49) Therefore, the staff recommends that the Commission find that the City's proposed service to the Summit is inconsistent with the City's and County's Comprehensive Plans.

ISSUE 9: What is the landowner's service preference and what weight should the Commission give to the preference?

RECOMMENDATION: Staff recommends that the Commission may consider landowner preference and the record indicates that the developer's preference is FWSC. However, based on Storey v. Mayo, and the facts of this case, it is not necessary to give landowner preference any particular weight. (CHRISTENSEN)

POSITIONS OF PARTIES

FWSC: As reflected the Water Service Agreement executed by the owner of the property, the landowner prefers service from Florida Water. This preference is entitled to considerable weight.

CITY: The developer requested service from FWSC apparently unaware that the Summit development was located within the City's service area. Notwithstanding this fact, Florida case law is clear that developers/customers cannot select their own utility service provider. Therefore, the developer's preference should be given no weight in this case.

STAFF ANALYSIS: In its brief, FWSC states that the landowner clearly prefers service by FWSC as confirmed by the developer's execution of the Water Service Agreement. (BR 17) FWSC asserts that the landowner's preference is entitled to considerable weight and reflects the economic benefits that would be accomplished by allowing FWSC to provide the requested water service. (BR 18)

FWSC asserts that there is no dispute that the developer has requested service from FWSC. (BR 18) FWSC also acknowledges that in Storey v. Mayo, which involved a territorial dispute between two electric companies, the Florida Supreme Court stated that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself."[10] (BR 18) However, FWSC states that in Storey v. Mayo, the utilities had agreed on a territorial boundary and the Commission had approved the agreement as being in the public interest. (BR 18) FWSC cites to Gulf Coast Electric Co-op, Inc. v.

[10]Storey v. Mayo, 217 So. 2d 304, 307-8 (Fla. 1968).

Clark,[11] in which the Florida Supreme Court held that is was reversible error in a dispute between two electric utilities, for the Commission to disregard customer preference where each utility was capable of serving the territory in the dispute. (BR 18) Further, FWSC argues that the Florida Supreme Court has recognized customer preference as a factor to be considered in certificate cases.[12] Therefore, FWSC argues that customer preference is a relevant factor for the Commission to consider in this docket. (BR 18)

FWSC states that the First District Court of Appeal decision in St. Johns North Utility Corp. v. Florida Public Service Commission,[13] involving a contested water and wastewater certificate application, the Court upheld a Commission order which gave weight to the importance of having an overall plan for orderly development of a large scale land development project. (BR 18) Further, FWSC contends that in at least one prior case[14], the Commission has recognized that a specific request for service by a developer in the requested territory expansion area " would bolster the merit of [the applicant's] filing." FWSC contends that these cases further support its position that the Commission should consider landowner's preference. (BR 18-19)

In its brief, the City states that the landowner requested service from FWSC in October of 1999 and was apparently unaware that the Summit development was within its established Utilities Service District. (BR 29) The City cites Storey v. Mayo[15] for the proposition that it is established Florida law that where adequate

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[11]Gulf Coast Electric Co-op, Inc. v. Clark, 647 So. 2d 120 (Fla. 1996).

[12]See, Davie Utilities, Inc. v. Yarbourough, 263 So. 2d 215 (Fla. 1972).

[13]St. Johns North Utility Corp. v. Florida Public Service Commission, 549 So.2d 1066 (Fla. 1st DCA 1989).

[14]Order No. PSC 96-1137-FOF-WS, issued September 10, 1996, in Docket No. 941121-WS, In re: Application for Amendment of Certificate Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc. (South Broward).

[15]Storey v. Mayo, 217 So. 2d 304 (Fla. 1968).

and timely service is available, landowners/developers cannot select their own utility service provider. (BR 29) Thus, the City asserts that the developer's uninformed request for service should be given no weight in this case. (BR 29)

Staff Analysis

Staff notes that there appears to be no dispute regarding the fact that FWSC has a written service agreement with the developer of the Summit. (Ex. 1) It also appears clear from the record that the City does not have any written agreement from the Summit developer who appears on the application. (TR 513) Witness Yarborough testified that "[t]he [C]ity was approached by a developer, other than the developer on the application, who did write a letter to us about annexing the Summit." (TR 513) It appears to staff that it is the City's position that the Summit developer did not ask the City for service because he was unaware of the City service. (BR 29) However, staff believes that is reasonable to conclude that the Summit developer preferred FWSC, as evidenced by the written service agreement.

The crux of this issue is what weight should be given to the landowner's apparent preference in this proceeding. In Storey v. Mayo, the Florida Supreme Court stated that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-308.

Nevertheless, FWSC cites to several cases for the proposition that the Commission should give significant weight to the developer's preference for service from FWSC in this case. FWSC asserts that the Florida Supreme Court found it reversible error not to consider customer preference in accordance with Gulf Coast Electric Co-op, Inc. v. Clark. (BR 18) However, staff notes that in Gulf Coast Electric Co-op, Inc. v. Clark, the Court made its determination that customer preference must be considered based upon Rule 24-6.0441(2), Florida Administrate Code, (1993), which required consideration of customer preference if all other factors are substantially equal. Id. at 122-123.

FWSC further asserted that in several water and wastewater cases, the Commission has considered landowner preference as a factor in its determinations. (BR 18-19) In Davie Utilities, Inc. v. Yarborough, the Court noted that the Commission did consider as

a factor that prior to the applicant's filing of its application, another utility had already received a franchise from a town and had also entered into an agreement to provide water and wastewater service to another town. Id. However, the Court noted that the Commission found that it lacked the authority under Section 367.08(2), Florida Statutes, to amend a certificate to include territory which the utility was not serving in the immediate preceding period of January 1 to December 31. Id. at 217. Staff notes that the granting of the amendment of certificate was pursuant to a prior statutory scheme, and that it appears that landowner preference was not the determining factor regarding whether to grant the amendment.

In St. Johns North Utility Corp., the First District Court of Appeal noted that

> Essentially, the Commission relied on Sunray's averments that much of its land was being made accessible simultaneously. Due to this factor, and the fact that most of the area was owned by Sunray's parent company, the Commission found it important to plan the utility service for the entire area prior to development.

Id. at 1070. Staff observes that in this case, it appears that one of the factors which the Commission considered is the close relationship of the developer and Sunray and the working relationship already established between the utility and the developer.

In South Broward, the Commission found that "[c]ertainly, in an analysis of any territory expansion filing, a specific request for service to the applicant would bolster the merit of its filing." Order No. PSC-96-1137-FOF-WS at p. 6. However, the Commission further noted that in Storey v. Mayo, no individual has a right to service by a particular utility because he deems it advantageous to himself. Id. The Commission stated that ". . . the issue remains simply whether a need for service exists." Id.

Staff notes that the Commission has in the past considered as a factor what relationship exists between the utility and person in the requested territory. In Nocatee Utility Corporation, the

Commission found that it may consider landowner preference.[16] Further, the Commission noted that it could consider the service preference of the landowner even though such preference is not enumerated in the water and wastewater statutes and rules. Order No. PSC-01-1916-FOF-WS at 75.

The record shows that there is no dispute that there is a service agreement between FWSC and the Summit Developer. (Ex. 1) Further, the record is clear that there is no written agreement between the Summit developer and the City. (TR 513) Thus, staff concludes that the developer's preference appears to be FWSC. However, staff believes that the developer's specific request to FWSC for service is more important to the issue of need for service and the timing for the need for service. Staff does not believe that based on the facts of this case that landowner preference should be the determinative factor upon which the Commission should base its decision as to whether to grant FWSC's requested amendment.

Based on the foregoing, staff recommends that the Commission may consider landowner preference and the record indicates that the developer's preference is FWSC. However, based on Storey v. Mayo, and the facts of this case, it is not necessary to give landowner preference any particular weight.

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[16]Order No. PSC-01-1916-FOF-WS, issued September 24, 2001, in Dockets Nos. 990696-WS and 992040-WS, In re: Application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation; and In re: Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc. at 75.

ISSUE 10: Will the extension of Florida Water Services Corporation's territory in Lake County duplicate or compete with the City of Groveland's utility system?

RECOMMENDATION: No, the extension of Florida Water Services Corporation's territory in Lake County will not duplicate or compete with the City of Groveland's utility system. (CHRISTENSEN)

POSITION OF PARTIES

FWSC: No. The City is not providing service to the requested territory, cannot provide service consistent with the local comprehensive plans and has not sought approval to provide service from Florida Water as required under Section 180.06, Florida Statutes.

CITY: Yes.

STAFF ANALYSIS:

FWSC's Arguments

In its brief, FWSC argues that the only articulated basis for the City's claim that granting its application would result in duplication of the City's system is the City's designation of a Chapter 180, Florida Statutes, utility service area. (BR 19) FWSC asserts that Section 180.02(3), Florida Statutes, permits a municipality to designate an exclusive area for sewage system or alternative water supply system. (BR 19) FWSC contends that the City is not seeking to provide an alternative water supply system; therefore, the City's utility service area is irrelevant to the application which is solely for the provision of retail potable water. (BR 20) FWSC argues that it is clear from the testimony that while the City has been racing to bring its lines closer to the Summit during this proceeding, the City does not have existing facilities on or immediately adjacent to the requested territory. (BR 20) FWSC contends that Section 180.06, Florida Statutes, requires that the City cannot provide service to the Summit, which is adjacent to FWSC's existing territory, without first obtaining the consent of FWSC. (BR 20) FWSC asserts that the City has not sought such consent nor has such consent been given by FWSC. (BR 20)

FWSC argues that Witness Yarabough admitted that he has not read any applicable legal precedents related to Section 180.02(3), Florida Statutes, despite his extensive interpretations of the statute in his prefiled testimony. (BR 20) FWSC contends that Witness Mittauer admitted that he is not familiar with Section 180.02(3), Florida Statutes, and was not involved with the City's designation of its 180 utility district even though his prefiled direct testimony includes numerous references to it. (BR 20)

FWSC states that in the Lake Utilities[17] proceeding, the Commission considered an application filed by Southern States Utilities, Inc. (SSU, now FWSC) for the transfer of facilities of Lake Utilities, Ltd. to SSU and the amendment of SSU's water and wastewater certificates in Citrus and Lake Counties to add the former Lake Utilities territory. (BR 20-21) FWSC argues that in that case, the City of Fruitland Park filed an objection to the transfer. (BR 21) FWSC contends that like the instant case, the City of Fruitland Park did not dispute the utility's managerial, financial, technical abilities or otherwise, to meet the obligations to provide water and wastewater services to the existing and future customers within the certificated area. (BR 21) FWSC argues that rather, the City of Fruitland Park focused its objection on the fact that the area fell within its Chapter 180 utility district like the instant case. (BR 21) FWSC contends that in the Lake Utilities case, the Commission found it significant that the City did not dispute the applicant's technical and financial ability to provide service. (BR 21) FWSC cites to Lake Utilities for the proposition that the Commission found that Section 364.045, Florida Statutes, does not require the Commission to address or attempt to remedy a Chapter 180 concern. (BR 21) FWSC asserts that the Commission refused to engage in an analysis or interpretation of the scope of a municipality's claim under Chapter 180. (BR 21) FWSC concludes that based on this precedent,

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[17]Order No. PSC-95-0062-FOF-WS, issued January 11, 1995, in Docket No. 940091-WS, In re: Application for transfer of Facilities of Lake Utilities, LTD. to Southern States Utilities, Inc.; Amendment of Certificates Nos. 189-W and 134-S, Cancellation of Certificate Nos. 442-W and 372-S in Citrus County; Amendment of Certificates Nos. 106-W and 120-S, and Cancellation of Certificates Nos. 205-W and 150-S in Lake County (Lake Utilities).

the issue for consideration is whether FWSC would duplicate or be in competition with an existing system. (BR 21)

FWSC contends that while not specifically mentioned in its Objection, the City took the position in its Prehearing Statement and in its Response to FWSC's Motion for Summary Final Order that the extension of FWSC's certification will be a duplication of an existing utility system which is prohibited by Section 367.045, Florida Statutes. FWSC contends that the City's position lacks merit in both fact and law. (BR 21) FWSC argues that none of the evidence presented by the City through the direct testimonies of Witness Yarabough and Witness Mittauer or the rebuttal testimony of Witness Beliveau even address an allegation or contention that service by FWSC would duplicate existing facilities or services provided by the City. (BR 21-22) FWSC concludes that because the City cannot provide service to the territory consistent with the local comprehensive plans and has not complied with Section 180.06, Florida Statute, there is no existing system that would be duplicated by granting its application. (BR 22)

FWSC contends that during this proceeding, the City has run lines from its prior terminus within the City limits, approximately five miles from the Summit, to the Garden City, approximately 2 1/2 miles from the Summit. (BR 22) FWSC asserts that the City then continued to extend its lines beyond the Garden City subdivision even though it has no customers beyond that point. Thus, the City's closest customer is approximately 2 1/2 miles from the Summit. (BR 22) FWSC argues that while the City has raced to extend its lines closer to the Summit, the City has no existing facilities in the requested territory or immediately adjacent to it. (BR 22) FWSC contends that the City does not have an existing system that would be in competition with or duplicate the service proposed by FWSC. (BR 22) FWSC asserts that, at most, the City's desire to serve is jeopardized by FWSC's application. (BR 22) FWSC contends that it is unclear whether or when the City could ever provide service to the Summit since it has no legal right to provide service under Section 180.02(3), Florida Statutes, and has not attempted to comply with Section 180.06, Florida Statutes. (BR 22)

FWSC cites to the SeaCoast Utilities[18] case for the proposition that Section 367.045(5)(a), Florida Statutes (or it predecessor, Section 367.051(3)(a), Florida Statutes), prohibits only duplication of an existing water or wastewater system, not a proposed system. (BR 22-23) FWSC asserts that a clear enunciation of this policy is found in the Alafaya Utilities[19] case which involved an application for an extension of Alafaya's service area to provide wastewater service to areas adjacent to existing service territory in Seminole County. (BR 23) FWSC contends that in the Alafaya Utilities case, the application was protested by the City of Oviedo because the City was planning to provide service to the area. (BR 23) FWSC asserts that the City of Oviedo asserted that service by Alafaya Utilities would violate its comprehensive plan which required central wastewater service by the City and that Alafaya's service would duplicate or be in competition with the service proposed by the City in violation of Section 367.045(5)(a), Florida Statutes. (BR 23)

FWSC contends that after a hearing, the Commission amended Alafaya's service territory to include the area requested in the application. (BR 23) FWSC asserts the Commission found, among other things, that: 1) the City had not finalized its plans for how it would provide service to the area and, depending on the method chosen, it was either impossible or unlikely that the City could provide service to the area in a timely manner; 2) that there could be no competition with or duplication of a proposed system which did not yet exist; that the Commission is not bound by the Comprehensive Plan provisions that designate the City as the preferred provider, since the overriding goal of the plan was to ensure centralize wastewater service; and that it was unnecessary for the Commission to judge whether or when the City could provide service. It was only necessary to conclude that the City failed to demonstrate Alafaya's inability to adequately serve the disputed

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[18]Order No. 17158, issued February 5, 1987, in Docket No. 85-0597-WS, In re: Objection of Palm Beach County to Notice by SeaCoast Utilities, Inc. to Amend Water and Sewer Certificates in Palm Beach County, Florida (SeaCoast Utilities).

[19]Order No. PSC-96-1281-FOF-WU, issued October 15, 1996, in Docket No. 951419-SU, In Re: Application for Amendment of Certificate No. 379-S in Seminole County by Alafaya Utilities, Inc. (Alafaya Utilities).

territory, or how the application was otherwise contrary to the public interest.[20] FWSC contends that on appeal, in City of Oviedo v. Clark, 699 So. 2d 316 (1ST DCA 1997), the Court affirmed the Commission's decision in an opinion that only addressed the comprehensive plan issue. (BR 24)

FWSC asserts that under the Alafaya Utilities case, the Commission must judge FWSC's application against the statutory standard of Chapter 367 in the context of the City's existing system, not its claimed area or proposed system. (BR 24) FWSC argues that the inescapable truth is that service by FWSC would not duplicate or compete with any existing City service or facility. (BR 24) FWSC contends that if the Commission grants its certificate amendment and the City chooses to pursue its claim that the development is within the City's utility service area, the matter may become an issue for the courts to decide. (BR 24)

FWSC argues that the true threat of duplication comes from the City's efforts to provide service to the Summit. (BR 24) FWSC asserts that its lines are immediately adjacent to the Summit in its currently certificated territory that includes the Palisades. (BR 24) FWSC concludes that the City's provision of service to the Summit would be an unnecessary duplication of the system and facilities currently available through FWSC's Palisades system. (BR 24-25)

City's Arguments

In its brief, the City argues the its has enacted a utility service district pursuant to Chapter 180, Florida Statutes, which was provided to the County and to which the County nor other municipalities have objected. (BR 30) The City contends that the Summit development is completely with its utility district. (BR 30) The City asserts that it intends to provide service through phased expansion throughout the entire utility district to make its system more efficient on both an infrastructure and an economic basis. (BR 30) The City argues that it enacted its Chapter 180 utility services district ordinance in May 1999, five months before the Summit's developer requested service from FWSC and six months prior to FWSC requesting an amendment to its certificate. (BR 30)

[20]Order No. PSC-96-1281-FOF-WU at 218, 223, 221 and 227.

The City asserts that its water system was extended by means of a DEP grant to the Garden City subdivision Planned Unit Development (PUD) in order to remove Garden City residents from wells contaminated with EDB. (BR 30-31) The City contends that the grant was for approximately $500,000 and that approximately $391,000 was expended to provide service to Garden City and the remainder was used to extend the line to its current terminus at Cherry Slough. (BR 31) The City contends that DEP was aware of the disposition of the grant funds since it was sent a bid tab and notice of the award for the Garden City project. (BR 31) The City asserts that the record clearly establishes that its 12 inch lines were extended to Garden City at the request of and with the assistance of DEP. (BR 31)

The City asserts that Cherry Slough is 3,000 feet from the nearest connection point to the Summit. (BR 31) The City contends that the Palisades water plant is 6,700 feet from the nearest point of interconnection with the Summit. (BR 31) The City asserts that it is the developer's intention to run 12 inch lines from the Palisades water plant down Cherry Lake Road to a point of connection with the subdivision. (BR 31) The City argues that its lines and system are currently 3,700 feet closer to the Summit development than those of FWSC. (BR 31)

The City argues that it currently provides water and wastewater service outside of its limits to the Green Swamp area south of the City limits and to an area west of the City and south of the Summit development. (BR 31) The City contends that it has received written and oral requests for both annexation and utility service along Cherry Lake Road in the area of the Summit, specifically to Wilson Island which is directly across from the Summit. (BR 31-32) The City argues that expansion of its system is both consistent with its legally adopted service territory ordinance and with its utility policy objectives. (BR 32)

The City contends that FWSC will argue that competition with and duplication under Section 367.045(5)(a), Florida Statutes, should be measured from the time that the application was filed, November 1999, not at the present time. (BR 32) The City asserts that it disagrees with this position because utility systems are by their very nature dynamic and are modified in response to demands for service and in order to enhance system efficiencies, as the record indicates in this case. (BR 32) The City contends that it is not required to stop developing its system simply because FWSC

wants to serve a particular area or a developer wants FWSC to do so absent a certificate to service the area. (BR 32) The City asserts that the whole purpose of having a utility service territory for either an investor-owned utility or municipal utility is to encourage the efficient use of the funds in order to provide the lowest cost reliable service. (BR 32) The City argues that the Commission ignores the presence of existing municipal systems and their legitimate right to provide service at the expense of this fundamental utility principle. (BR32)

The City asserts that FWSC will also argue that the City should have asked FWSC's permission before extending its lines adjacent to the Palisades system as required by Section 180.06, Florida Statutes. (BR 32) The City contends that that statute actually uses the term "immediately adjacent to" without further definition. (BR 32-33) The City argues that

> How close does one have to be to be 'immediately adjacent': 13,000 feet; 6,700 feet; 3,000 feet, across the street, or simply near an area that the objecting utility wants to serve itself? Obviously, the Legislature intended that the trier of fact to make reach his own finding on this issue based on the record before him.

(BR 33) The City contends that in Lake County, where virtually every one of the 14 municipalities have enacted a Chapter 180, Florida Statute, ordinance of its own, every municipal system can be construed as being immediately adjacent to many other systems if the term is interpreted too broadly. (BR 33)

The City argues that even if the developer was not aware of the City's right to serve this area, FWSC certainly was. (BR 33) The City asserts that it attempted to negociate with FWSC a territory swap which involved the Summit and territory at the intersection of U.S. 19 and 27. (BR 33) The City contends that this compromise was of economic benefit to both sides and was rejected by FWSC. (BR 33)

The City contends that the record is clear that service by the City to the Summit development does duplicate and compete with the City's utility system. (BR 33)

Analysis

Section 367.045(5), Florida Statutes, states:

> The Commission may not grant a certificate of authorization for a proposed system, or an amendment to a certificate of authorization for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

Pursuant to Section 367.045(5), Florida Statutes, the Commission may not grant an amendment if a system would be in competition with, or duplication of, another system. However, if the Commission finds that other system is inadequate or the utility is unable, refusing, or neglecting to provide reasonably adequate service, then the Commission may grant the amendment. Staff notes that there is no legislative history on the duplication of or competition with language in Section 367.045(5), Florida Statutes.

The City's argument that FWSC's proposed extension is in competition with, or a duplication of, its system, in large part, relies on a Utility Service District established pursuant to Chapter 180, Florida Statutes. Section 180.02(3), Florida Statutes, permits a municipality to create an exclusive utility service district for the provisioning of wastewater service and alternative water supply service. Further, Section 180.06, Florida Statutes, requires that a municipality or private company shall not construct any system, work, project or utility 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 company consents to the construction.

Staff notes that the testimony is undisputed that the City created a Chapter 180 utility service area effective May 1999, which includes the territory of the Summit. (TR 480-481) Further, Witness Yarabough testified that neither the Summit's developer nor FWSC asked for its consent to provide service to the area as required by its ordinance. (TR 480-481) Witness Yarabough stated that the City had not made any attempt to obtain the consent of FWSC to provide service to the Summit. (TR 496) Further, Witness Yarabough stated that he did not believe that the City had to obtain such consent, but admitted he was not familiar with the requirements of Section

180.06, Florida Statutes. (TR 496) Witness Yarabough admitted that the Summit territory adjoins FWSC's current territory in the Palisades as well as a small portion of territory which is immediately adjacent to the Summit but not connected directly to the Palisades. (TR 494)

In City of Mount Dora v. JJ's Mobile Homes, 579 So. 2d 219, 221 (5th DCA 1991), a private utility company filed a complaint in circuit court for a judicial determination that the utility had the legal right to provide water and wastewater service within all the territory specified in its certificate from the PSC. Further, the City of Mount Dora annexed a portion of the territory that was within the utility's certificated territory. Id. The Court found in favor of the private utility, in part based on its prior right to serve. Id. at 225.

Lake Utilities Services, Inc. v. City of Clermont, 727 So. 2d 984 (5th DCA), involved a dispute between the municipality and the utility regarding the right to serve a PSC certificated area where the municipality had a previously created Chapter 180 utility service area. The Court found that even though the City had obtained its right to serve before the PSC granted its certificate, the City had waived its right because it failed to provide service. Id. at 991. Subsequently, the City appealed the lower tribunal's entry of summary judgment. In City of Clermont v. Lake Utilities, Inc., 760 S. 2d 1123 (5th DCA 2000), the Court reversed the lower court's ruling because the utility failed to show that there was no genuine issue of material fact.

In the instant case, the territory in dispute is not currently within FWSC's certificated territory. (EX. 5) Rather, the area in dispute is within the City's Chapter 180 utility service area. (TR 480-481) The record also shows that the Summit is adjacent to FWSC's certificated territory and a small portion of FWSC's territory is on the opposite side of the Summit. (TR 152, 494) The record shows that the City did not obtain FWSC's permission prior to enacting its Chapter 180 utility service area. (TR 496) Therefore, staff believes that the issue of whether the City has established a prior right to serve is an issue for a court of appropriate jurisdiction to decide. However, staff notes that it is unclear whether the City perfected a prior right to serve.

In Lake Utilities[21], the Commission found:

> It is correct that pursuant to Chapter 180, a municipality may designate a utility district. However Chapter 367, Florida Statutes, gives us exclusive jurisdiction over a regulated utility's service, authority, and rates. . . . Section 367.011(4), Florida Statutes, states that Chapter 367, Florida Statutes, shall supersede all other laws . . ., and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. Chapter 180 contains no express override.

Order No. PSC-95-0062-FOF-WS at p. 7.

Staff notes that in Order No. PSC-01-1478-FOF-WS, issued July 16, 2001, in this docket, the Commission found that "We agree with the parties that we do not have the authority to enforce a Chapter 180, Florida Statutes, action." Order No. PSC-01-1478-FOF-WS at p. 8. The existence of a Chapter 180 Utility District may be a factor in determining whether the regulated utility would be a duplication of or in competition with an existing system. Order No. PSC-01-1478-FOF-WS at p. 9. Staff believes that whether or not the City complied with all of the requirements in Chapter 180, Florida Statutes, is not a determination that the Commission must render. However, staff believes that the evidence in the record indicates that there are questions regarding the City's Chapter 180 utility service area. Particularly in question is whether pursuant to Section 180.06, Florida Statutes, the City should have extended its water lines beyond the Garden City subdivision without first obtaining FWSC's permission.

Thus, staff does not believe that in this instance the existence of the City's Chapter 180 utility service area should be a factor considered in resolving the issue of duplication or

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[21]Order No. PSC-95-0062-FOF-WS, issued January 11, 1995, in Docket No. 940091-WS, In re: Application for transfer of Facilities of Lake Utilities, LTD. to Southern States Utilities, Inc.; Amendment of Certificates Nos. 189-W and 134-S, Cancellation of Certificate Nos. 442-W and 372-S in Citrus County; Amendment of Certificates Nos. 106-W and 120-S, and Cancellation of Certificates Nos. 205-W and 150-S in Lake County.

competition with an existing system. As previously stated in Order No. PSC-0101478-FOF-WS, "regardless of a municipality's Chapter 180 status, we make our determination based upon the criteria set forth in Chapter 367, Florida Statutes". Under Section 367.045, Florida Statutes, the Commission evaluates a regulated utility's financial, technical, and managerial ability to serve; the need for service; and whether the amendment is in the public interest. Order No. PSC-01-1478-FOF-WS at p. 9. Thus, staff believes that the issue to be resolved is whether or not FWSC's proposed extension of service to the Summit would duplicate or compete with the City's system. Order No. PSC-01-1478-FOF-WS at p. 9.

FWSC cites to the SeaCoast Utilities and Alafaya Utilities cases for the proposition that Section 367.045, Florida Statutes, prohibits only duplication of an existing water or wastewater system, not a proposed system. In SeaCoast Utilities, Palm Beach County protested the utility's application. The Commission found that the property which was the subject of the proceeding was not being served by any existing system. Order No. 17158 at 2. The Commission further found that the County had no facilities, existing or proposed, to serve the area and its nearest lines were eight to ten miles away. Id. Thus, the Commission concluded that its did not have to speculate as to competition with or duplication of proposed systems, which are little more than future speculation. Id. The Commission noted that "[R]ather, the statute addresses the existing system as that which warrants closer investigation as to the potentially undesirable effects of duplication and/or competition. Id.

The Alafaya Utilities case involved an application for an extension of Alafaya Utilities, Inc.'s (Alafaya) service area to provide wastewater service to a particular area in Seminole County. The application was protested by the City of Oviedo. The City of Oviedo asserted that it was planning to provide service to the area at issue. The City of Oviedo also maintained that service by Alafaya would violate the City's comprehensive plan, which it claimed required central wastewater service by the City, and that service by Alafaya would be in competition with or a duplication of the service proposed by the City in violation of Section 367.045(5)(a), Florida Statutes. The Commission amended Alafaya's wastewater certificate to include the territory at issue. The Commission concluded that it was not bound by the City of Oviedo's comprehensive plan provisions that designated the City as the preferred service provider because the overriding goal of the plan

was to ensure the provision of central wastewater service. The Commission also found that there could be no competition with or duplication of a proposed system which did not yet exist.

The City of Oviedo appealed the Commission's decision. In City of Oviedo v. Clark, 699 So. 2d 316 (Fla. 1st DCA 1997), the court affirmed the Commission's decision in an opinion that only addressed the comprehensive planning issue. The court stated that the Commission correctly applied the requirements of Section 367.045(5)(b), Florida Statutes, in its consideration of the comprehensive plan, and that the Commission was not required to defer to the local comprehensive plan. Id. at 318.

In East Central Florida[22], the Commission found that Section 367.045, Florida Statutes, does not require the Commission to hypothesize which of two proposed systems would be in place first and, thus, which would be in competition with or duplicate the other. Id. at 22. Further, the Commission noted that "[J]ust because SBWA was statutorily created does not mean that the preservation of its territory is any more in the public interest than granting ECFS the same territory . . ." Id. at 23.

In South Broward[23], the Commission found that no duplication existed because the City did not have the facilities to meet the expected time frame required. Id. at 19. The Commission found that the utility could not duplicate what has not been built. Id. Further, the Commission noted that the City's plant expansions, line extensions and even the budgetary process indicated that it used a generic approach rather than a customer specific approach. Id. Specifically, the Commission found that:

> . . . competition or duplication will not exist, because the plans for expanded City facilities include the entire City service area and not just the disputed territory;

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[22]Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, In Re: Application of East Central Florida Services, Inc. for an Original Certificate in Brevard, Orange and Osceola Counties (East Central Florida)

[23]Order No. PSC 96-1137-FOF-WS, issued September 10, 1996, in Docket No. 941121-WS, In re: Application for Amendment of Certificate Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc. (South Broward).

> the lines constructed to the territory are not connected, cannot provided service and are not inside the disputed territory; and there is not current service to any customer within the disputed area.

Id. at 20.

Both FWSC and the City have facilities outside the disputed territory which could serve the disputed territory. (TR 149-152, 481-483) FWSC has existing facilities in the Palisades development which adjoins the requested territory. (TR 152-153) FWSC would require the developer to run an approximately 6,700 feet of 10 to 12 inch water mains from the Palisades plant across its existing development to the Summit, the disputed territory. (TR 155) Witness Tillman testified that the Palisades plant has sufficient capacity to provide service to the territory. (TR at 154)

Currently, the City has a line extension that ends outside the disputed territory at Cherry Lake Slough. (TR 300) Witness Mittauer testified that the City's line currently ends approximately 3000 feet from the Summit. (TR 300) Witness Mittauer testified that the City has sufficient plant capacity to serve the Summit. (TR 313)

Staff notes that neither FWSC nor the City currently has facilities or lines within the disputed territory of the Summit. (TR 155, 300) The Cherry Lake Road extension of the City's system was initiated because of a specific grant from DEP to provide service to the Garden City subdivision. Further, staff believes that the record clearly demonstrates that the City extended its lines to Cherry Lake slough because it had funds remaining from the project to extend its line to the Garden City subdivision south of the Summit, rather than because of any specific intention of serving the Summit. (TR 332, 342) Further, Witness Yarabough testified that the City had received requests to provide service to various PUDs along Cherry Lake Road and to Wilson Island which is across from the disputed territory. (TR 511) Therefore, staff believes that FWSC service to the Summit would not duplicate or compete with the City's system. The City's plans for expansion of its line was to provide requested to service to other customers, not to the Summit; the Cherry Lake line is not connected to the Summit and remains at least 3000 feet outside the disputed territory; and the City is not providing service to anyone within the disputed territory.

Based on the foregoing, staff does not believe that FWSC service to the Summit would duplicate or compete with the City's system. Therefore, staff recommends that the Commission find that the extension of Florida Water Services Corporation's territory in Lake County will not duplicate or compete with the City of Groveland's utility system.

ISSUE 11(a): If the granting of the territory which FloridaWater Services Corporation seeks to add to its PSC Certificate would result in an extension of a system which would be in competition with, or a duplication of the City of Groveland's system or portion of its system, is the City of Groveland's system inadequate to meet the reasonable needs of the public or is the City unable, refusing or neglecting to provide reasonably adequate service to the proposed territory?

RECOMMENDATION: If the Commission agrees with staff's recommendation on Issue 10 that the proposed extension of FWSC's Palisades system is not in competition with or duplication of the City's system, then it is unnecessary for the Commission to make a finding as to whether the City's system is inadequate or unable, refusing, or unwilling to provide reasonably adequate service to the Summit. (CHRISTENSEN)

POSITIONS OF PARTIES

FWSC: Granting Florida Water's Application would not result in extension of a system that would be in competition with or duplication of the City's system. The Commission has the authority to grant the Application which complies with the requirements of Section 367.045, Florida Statutes. The City's desire to serve the area . . .

CITY: No, the City of Groveland has both the technical and financial ability to provide adequate and timely water service to the Summit. Further, the City also has to existing plant capacity to provide centralized sewer services to the development.

STAFF ANALYSIS: In its brief, FWSC asserts that Section 367.045(5)(a), Florida Statutes, provides that the Commission may not grant a certificate for a new system that is in competition with, or a duplication of, any other system or portion of a system unless the Commission determines that that system is inadequate to meet the reasonable needs of the public or the person operating such a system is unable, refuses or neglects to provide reasonably adequate service. (BR 25) FWSC cites to Alafaya Utilities[24] for the

[24]Order No. PSC-96-1281-FOF-WU, issued October 15, 1996, in Docket No. 951419-SU, In Re: Application for Amendment of

proposition that in applying this provision, the Commission has found that some physical facilities must be in existence before the competition/duplication analysis is made. FWSC also cites to East Central Florida[25] for the proposition that "the Commission is not required to hypothesize which of two proposed systems might be in place first and thus duplicate or compete with the other." (BR 25-26) Additionally, FWSC cites SeaCoast Utilities[26], for the proposition that the Commission is not required to speculate as to competition with, or duplication of, a proposed system which is little more than a future possibility, but that existing systems require a closer investigation as to the possible undesired effects of competition or duplication. (BR 26)

FWSC contends that because the City has no physical facilities next to the Summit, there is no competition or duplication of another system for the Commission to examine. (BR 26) FWSC states that "[t]his is especially true since Section 180.06, Florida Statutes, precludes that City from providing service to areas adjacent to Florida Water's certificated territory without Florida Water's consent." (BR 26) FWSC contends that while the Commission is not authorized to grant a certificate to a proposed system that would be in competition with, or duplication of, an existing system, granting FWSC's application in this case would not result in a system which is in competition with, or duplication with another system. (BR 26-27) FWSC asserts that the extension of the City's system would result in competition with its system. (BR 27)

In its brief, the City refers to its discussions of Issues 1, 6, 7, and 8. (BR 34). The City contends that the only date for service established in the record was the date of July 1, 2000.

Certificate No. 379-S in Seminole County by Alafaya Utilities, Inc. (Alafaya Utilities).

[25]Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, In Re: Application of East Central Florida Services, Inc. for an Original Certificate in Brevard, Orange and Osceola Counties (East Central Florida).

[26]Order No. 17158, issued February 5, 1987, in Docket No. 85-0597-WS, In re: Objection of Palm Beach County to Notice by Seacoast Utilities, Inc. to Amend Water and Sewer Certificates in Palm Beach County, Florida (SeaCoast Utilities).

(BR 3) The City concludes that the FWSC's application was prematurely filed in the Fall of 1999 because the project was very much in development and thus, the application should fail because it is premature. (BR 8) Nevertheless, the City concedes that potable water service will eventually be need to the development. (BR 8)

The City contends that it has the financial ability to serve the Summit. (BR 21). The City asserts that the operating loss indicated in the City's audited financial statements for 1998 in the proprietary fund was a paper loss attributable to depreciation expenses. (BR 21). The City contends that its financial statements demonstrate that it does have the financial ability to serve. (BR 21)

The City asserts that it has the plant capacity to serve the development. (BR 22) Further, the City asserts that it has the necessary infrastructure to provide adequate and reliable water service to the Summit in a timely fashion. (BR 24) According to Witness Mittauer, the City's lines are 3000 feet to the closest point in the Summit. (BR 24, TR 300) The City concludes that it has the technical ability to service the area. (BR 22).

The City asserts that its proposal to serve the development is consistent with the local comprehensive plan. (BR 28) The City contends that

> DCA would allow the City's Comprehensive Plan to be amended to include these areas in its utility service area with the effect that City service would be consistent with its Comprehensive Plan.

(BR 27) Further, the City states that it appears that Witness Winningham's concerns are that the City service would be inconsistent with the County's Comprehensive Plan. (BR 27) The City asserts that there are other vested developments between the Garden City Subdivision and the Summit. (BR 28). Thus, the City concludes that these vested developments and public health and safety concerns regarding contaminated water would make the City's line through the rural and suburban areas appropriate and consistent with the Lake County Future Land Use Map. (BR 28)

Analysis

Staff notes that this issue as drafted presumes that FWSC's proposed extension is determined to be in competition with, or a duplication of, the City's system. While staff's analysis addresses the issue as framed, it is also written to be consistent with the staff's recommendation on Issue 10.

Staff agrees with FWSC that the statute sets forth a two-part analysis. Section 367.045(6), Florida Statutes, states:

> The Commission may not grant a certificate of authorization for a proposed system, or an amendment to a certificate of authorization for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

Under the statute, the Commission determines first whether the proposed extension is in competition with, or a duplication of, another system or portion of a system. Only if the Commission finds that the proposed extension is in competition with, or duplication of, another system, then the Commission must determine whether the other system is inadequate to meet the public need or whether the utility is unable, refuses or neglects to provide reasonable service.

As discussed previously, staff believes that the City would have the financial ability and technical ability to provide service to the Summit. Witness Yarabough testified that the City is willing and able to provide water and wastewater service to the Summit. (TR 481). However, witness Mittauer testified that there are currently no wastewater lines in the area of the project. (TR 435-436) Staff notes that there are currently no wastewater lines that are in close proximity to the Summit Development. (TR 345).

Further, staff notes that neither FWSC nor the City currently has facilities or lines within the disputed territory of the Summit. (TR 155, 300) Staff believes that FWSC service to the Summit would not duplicate or compete with the City's system

because the City's plans for expansion of its line was to provide requested to service to other customers, not to the Summit. The Cherry Lake water line is not connected to the Summit and remains at least 3000 feet outside the disputed territory and the City is not providing service to anyone within the disputed territory. Therefore, staff believes that while the City does have the financial and technical ability to serve the Summit, the proposed extension of FWSC's Palisades system is not in competition with, or duplication of, the City's system.

Based on the foregoing, if the Commission agrees with staff's recommendation on Issue 10 that the proposed extension of FWSC's Palisades system is not in competition with or duplication of the City's system, then it is unnecessary for the Commission to make a finding as to whether the City's system is inadequate or unable, refusing, or unwilling to provide reasonably adequate service to the Summit.

ISSUE 11(b): Does the Commission have the statutory authority togrant an extension of service territory to Florida Water Service Corporation which will be in competition with, or a duplication of, the City of Groveland's system(s), unless factual findings are made that the City's system(s) or portion thereof is inadequate to meet the reasonable needs of the public or that the City is unable, refuses, or has neglected to provide reasonably adequate service to the proposed service territory?

RECOMMENDATION: If the Commission agrees with staff's recommendation on Issue 10 that the proposed extension of FWSC Palisades system is not in competition with, or a duplication of, the City's system, then the Commission has the statutory authority in this docket to grant FWSC's amendment application if granting the amendment application is determined to be in the public interest. (CHRISTENSEN)

POSITIONS OF PARTIES

FWSC: No such competition or duplication has been shown in this docket.

CITY: No. §367.045(5)(a), F.S., prohibits the Commission from granting a certificate for modification of FWSC's certificate in this case.

STAFF ANALYSIS: Section 367.045(5)(a), Florida Statutes, states:

> The Commission may not grant a certificate of authorization for a proposed system, or an amendment to a certificate of authorization for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

In it brief, FWSC states that granting the requested territory would not result in competition or duplication. (BR 27) Further, FWSC asserts that the City's witnesses ascribe an overly broad scope to the Utility Service District created by the City. FWSC

states that "[i]n any event, the Commission has already determined that duplication or competition only exists with respect to existing facilities." FWSC contends that the City has no such existing facilities that can serve the Summit. Therefore, FWSC concludes that the Commission has the authority to grant the requested territory extension.

In its brief, the City cites to Section 367.045(5)(a), Florida Statutes. (BR 34-35) The City contends that the record is clear that the FWSC system is in competition with, and a duplication of, the City's system. (BR 35) The City asserts that the City is in full compliance with the requirements of all applicable regulatory agencies and has the plant capacity and infrastructure necessary to provide adequate and reliable service to the Summit. (BR 35) Further, the City states that it is willing to provide such service. (BR 35) Thus, the City concludes that based on these facts, the Commission lacks the statutory authority to amend FWSC's certificate in this proceeding. (BR 35)

Analysis

Staff notes that this issue presumes that FWSC's proposed extension is determined to be in competition with, or a duplication of, the City's system. While staff's analysis addresses the issue as framed, it is also written to be consistent with the staff's recommendation on Issue 10.

As noted in Issue 11(a), staff believes that the statute sets forth a two-part analysis for determining when the Commission may not grant an amendment for an extension of service. In accordance with the statute, the Commission may not grant an amendment if that system would be in competition with, or a duplication of, another system. However, if the Commission finds that that other system is inadequate or that the utility is unable, refusing, or neglecting to provide reasonably adequate service, then the Commission may grant the amendment. Thus, if the Commission were to determine that FWSC's proposed system is in competition with, or a duplication of, the City's system, and that the City's system is adequate and able to provide reasonable service, then in accordance with the statute, the Commission could not grant FWSC's amendment.

The City's argument that FWSC's proposed extension is in competition with, or a duplication of, its system, in large part, relies on the Utility Service District established pursuant to

Chapter 180, Florida Statutes. Staff notes that in Order No. PSC-01-1478-FOF-WS, issued July 16, 2001, in this docket, the Commission found that "We agree with the parties that we do not have the authority to enforce a Chapter 180, Florida Statutes, action." Order No. PSC-01-1478-FOF-WS at p. 8. In Lake Utilities[27], the Commission found:

> It is correct that pursuant to Chapter 180, a municipality may designate a utility district. However Chapter 367, Florida Statutes, gives us exclusive jurisdiction over a regulated utility's service, authority, and rates. . . . Section 367.011(4), Florida Statutes, states that Chapter 367, Florida Statutes, shall supersede all other laws. . ., and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. Chapter 180 contains no express override.

Order No. PSC-95-0062-FOF-WS at p. 7. Under Section 367.045, Florida Statutes, the Commission evaluates a regulated utility's financial, technical, and managerial ability to serve; the need for service; and whether the amendment is in the public interest. Order No. PSC-01-1478-FOF-WS at p. 9. The existence of a Chapter 180 Utility District may be a factor in determining whether the regulated utility would be a duplication of or in competition with an existing system. Order No. PSC-01-1478-FOF-WS at p. 9. Further, staff notes that the Commission found that "regardless of a municipality's Chapter 180 status, we make our determination based upon the criteria set forth in Chapter 367, Florida Statutes." Order No. PSC-01-1478-FOF-WS at p. 9.

Thus, as previously discussed in Issues 10 and 11(a), staff does not believe that the proposed extension by FWSC is in competition with, or in duplication of, the City's system. As noted in Issue 11(a), staff believes that once the Commission

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[27]Order No. PSC-95-0062-FOF-WS, issued January 11, 1995, in Docket No. 940091-WS, In re: Application for transfer of Facilities of Lake Utilities, LTD. to Southern States Utilities, Inc.; Amendment of Certificates Nos. 189-W and 134-S, Cancellation of Certificate Nos. 442-W and 372-S in Citrus County; Amendment of Certificates Nos. 106-W and 120-S, and Cancellation of Certificates Nos. 205-W and 150-S in Lake County.

determines that no competition or duplication exists, it becomes unnecessary to determine whether the City has the ability to serve and is willing to serve the proposed area.

As recommended in Issue 10, staff believes that the proposed extension of FWSC's Palisades system is not in competition with, or a duplication of, the City's system. If the Commission agrees with staff's recommendation in Issue 10, then the Commission has the statutory authority in this docket to grant FWSC's amendment application if granting the amendment application is determined to be in the public interest.

ISSUE 12: Is it in the public interest for Florida Water Services Corporation to be granted an amendment to Water Certificate No. 106-W for the territory proposed in its application?

RECOMENDATION: Yes, it is in the public interest to grant the amendment of Florida Water Services Corporation's Water Certificate No. 106-W for the territory proposed in its application, and Florida Water Services Corporation's application should be granted. (CHRISTENSEN, REDEMANN, MESSER)

POSITION OF PARTIES

FWSC: Yes. Granting the application will allow for extension of water service to the requested area in a timely, economical manner and will allow Florida Water to better utilize existing facilities.

CITY: No. The City of Groveland has a prior right to provide water and sewer service to the Summit and the technical and financial ability to provide both water and sewer utility services to the development in a timely manner. Extension of FWSC's certificate in this case will duplicate the City's . . .

STAFF ANALYSIS: Section 367.045(5)(a), Florida Statutes, states, in part, that " [T]he commission may grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest, . . . or it may deny a certificate of authorization or an amendment to a certificate of authorization, if in the public interest." Therefore, this issue provides a summary of the findings of previous issues, and also includes an evaluation of other factors that the Commission might consider in order to come to a finding of public interest such as service rates to customers, costs to provide service, any benefit provided by the provision of central wastewater service and resulting economies of scale to the utility.

FWSC's position is that it is in the public interest to grant its application because it will allow for extension of water service to the area in a timely, economical manner and allow it to better utilize existing facilities. (BR 28) In its brief, Florida Water states that it has the plant capacity to serve the immediate need for service in the requested territory in accordance with the

developer's plans. (TR 158, 399, 401-402) Granting the amendment application will allow Florida Water to better utilize existing facilities and eliminate the need for expenditure of public funds to serve this area. (TR 157-158) The amendment will allow Florida Water to improve its economies of scale and control costs to serve existing customers. (TR 403) Florida Water also stated that it would provide service at a lower cost to residents than if service was provided by the City, based on a comparison of residential service availability fees and monthly service rates. (TR 167-168, 485)

In its brief, the City contends that granting the area to Florida Water is not in the public interest because the City has a prior right to provide water and wastewater service to the area. Further, it states that an extension of territory by Florida Water will duplicate the City's existing facilities. (BR 36) The City breaks its discussion into four areas, including cost to provide service, cost to the developer to secure service, cost to the ultimate customer to receive service and policy/public interest. (BR 36, 37, 38)

In its cost to provide service section, the City argues that the record supports a conclusion that Florida Water does not have existing capacity to serve the new area and in fact, will have to immediately request that a third well be placed in service. (BR 36-37) The City argues that these actions will require expenditures by Florida Water, which will not be able to be recouped from the developer. (BR 37) Conversely, the City states that its incremental cost to serve the area is no more than the cost of extending the line from Cherry Slough, or $148,000. The City has money available to fund this extension and will recoup its expense through its service availability agreement with the developer. (BR 37)

Under the cost to the developer section, the City argues that the total cost to the developer will be greater under its current developer agreement with Florida Water, than if it renegotiated a service contract with the City. In its analysis, the City assumes that the cost for the developer to extend its line from the plant to the development would be the same as the City's cost to extend its lines. The City also affirms that the developer will pay negotiated charges to the City, which will include rebates as customers come on line. (BR 37-38)

In the cost to the customer section, the City makes various arguments with respect to the service availability charges a customer could pay, and the monthly service charges customers would pay using a one inch meter. The City concludes that customers would pay less with City service than with service from Florida Water. (BR 38-39)

The brief concludes with a discussion of policy and public interest. The City describes the possibility of future wastewater service by the City, as opposed to the use of septic tanks if service is provided by Florida Water. The City also discusses economies of scale it would achieve by extending its service. The City states that these economies would likely result in rate decreases, allow its system to be more efficiently configured, and provide customers with equivalent access to policy makers as would customers of Florida Water. The City concludes that these various items support its statement that granting the amendment of Florida Water is not in the public interest. (BR 39-40)

Analysis

The issue of public interest is generally included as the last issue in certification cases. It includes both a summary of prior issues, as well as any other factors that might be relevant in assisting the Commission to take a broad view of the public interest considerations. This analysis will be divided into two sections. The first is an overview of recommendations in prior issues. The second is a discussion of additional information and factors that were included in the record but not addressed specifically in a prior issue.

Issue Summary

Issue 1 addresses the issue of the timing of need for service. Staff believes that the timing of need for service has been held captive pending a decision from the Commission on FWSC's application to amend its certificate, and that major steps toward readiness to begin construction of the development and to provide water service have been made by both the developer and the utility. Since the development has received approvals for the installation of septic tanks, staff recommends that there is no need for central wastewater service at this time. Therefore, staff recommends that there is a current need for water service. There is no need for centralized wastewater service to the area at this time.

Issues 2 and 3 address the financial and technical ability of FWSC to provide service to the requested area. The parties stipulated at the hearing that Florida Water has the financial and technical ability to serve.

Issue 4 addresses the issue of whether Florida Water has the plant capacity to serve the area. Staff believes that FWSC has sufficient plant capacity to serve the requested territory. FWSC has provided reasonable options to increase its capacity if additional capacity is needed in the later years of the development.

Issue 5 questions whether Florida Water's application is consistent with the local comprehensive plan. This issue resulted in a comparison of the application with both the City's and the County's Comprehensive Plans. The staff believes that the DCA witness clearly stated that the plan to serve the Summit development by Florida Water is not inconsistent with the current City and County Comprehensive Plans. Therefore, in Issue 5, staff recommends that Florida Water's application is consistent with both the City and County's Comprehensive Plans.

Issue 6 discusses whether the City has the financial ability to provide service to the requested territory. Staff believes that the financial factors combine to present an overall picture of stability for the city and the ability of the City to obtain capital and sustain payments. Therefore, the staff recommends that the City appears to have the financial ability to serve the requested territory.

Issue 7 evaluates the City's technical ability to provide utility service to the area at issue. The staff recommends that the City has the plant capacity and lines to provide water service. Staff also recommends that the City appears to have the wastewater plant capacity, but not the wastewater lines to serve the Summit.

Issue 8 considers whether the City's plan to serve the area at issue complies with the local comprehensive plan. The staff believes that the record is clear that the City's and County's existing Comprehensive Plans do not support the extension by the City to the Summit development. The witness stating these opinions represents the DCA, which agency approves the plans themselves. Therefore, the staff recommends that the City's plan to serve the

area is inconsistent with the City's and County's Comprehensive Plan.

Issue 9 discusses the landowner's service preference and what weight the Commission should give to the preference. Staff recommends that the Commission may consider landowner preference and the record indicates that the developer's preference is FWSC. However, based on Storey v. Mayo, and the facts of this case, it is not necessary to give landowner preference any particular weight.

Issue 10 discusses whether the extension of Florida Water's territory in Lake County duplicates or competes with the City's utility system. Staff recommends that the extension of Florida Water's territory in Lake County will not duplicate or compete with the City's utility system.

Issue 11A discusses whether the granting of the territory which FWSC seeks to add to its PSC Certificate would result in an extension of a system which will be in competition with, or a duplication of the City's system or portion of its system, whether the City's system is inadequate to meet the reasonable needs of the public or whether the City is unable, refusing or neglecting to provide reasonably adequate service to the proposed territory. Staff recommends that if the Commission agrees with staff's recommendation on Issue 10 that the proposed extension of FWSC's Palisades system is not in competition with or a duplication of the City's system, then, it is unnecessary for the Commission to make a finding as to whether the City's system is inadequate or unable, refusing, or unwilling to provide reasonably adequate service to the Summit.

Issue 11B evaluates whether the Commission has the statutory authority to grant an extension of service territory to Florida Water which will be in competition with, or a duplication of, the City's system(s), unless factual findings are made that the City's system or portion thereof is inadequate to meet the reasonable needs of the public or that the City is unable, refuses, or has neglected to provide reasonably adequate service to the proposed service territory. Staff recommends that if the Commission agrees with staff's recommendation on Issue 10 that the proposed extension of FWSC Palisades system is not in competition with, or a duplication of, the City's system, then the Commission has the statutory authority in this docket to grant FWSC's amendment

application if granting the amendment application is determined to be in the public interest.

Other Factors

In addition to the above issues, the record includes other testimony in other areas that relate to public interest, but were not specifically captured in the framework of these issues. These include discussions on the rates that residential customers would pay for utility service from the City or from FWSC, the cost to provide service by the utilities, provision of central wastewater service and also economies of scale that might accrue to either utility from providing utility service to the area at issue.

The City suggested that another area that should be evaluated when considering public interest is the costs incurred by the developer. The City's brief includes a discussion of charges identified in the contract and also estimates additional charges it believes the developer will incur. (BR 37-38) The staff believes that this consideration is actually not one the Commission would include in its evaluation of public interest, because the costs to the developer are a result of a contractual arrangement. The terms of the contract must comport with the utility's tariff, and there is no evidence in this record to suggest that there is anything unusual about this contract. Upon occassion, utilities are required to negotiate special terms, and these contracts are called Special Service Agreements which must be specifically approved by the Commission, pursuant to Rule 25.30-550(2), Florida Administrative Code. Again, that is not the case with the contract at issue in this case. Therefore, staff believes that this area is not appropriate for analysis as a public interest consideration.

Rates and Charges Comparison

Both Florida Water and the City sponsored testimony on the various applicable rates and charges for water service. Witness Tillman's testimony described the fees associated with residential customers using a 5/8" x 3/4" meter. (TR 167) However, the Water Service Agreement included in Exhibit 5, showed a breakdown of various fees and included a 1 inch meter for residential customers. (EX 25, CLS-2, page 38) Since there appears to be some question as to which monthly service rates would apply to future customers, the staff has prepared a rate comparison using both meter sizes. Florida Water's rates are derived from Exhibit 9. (TR 411) The

City stated that it had the same monthly rates (user charges) for all meter sizes. (TR 507) This information is shown on Table 1.

TABLE 1
Comparison of Monthly Service Rates
for Florida Water and the City of Groveland
With a 5/8"x3/4" and 1" Meter

Utility	Base Facility Charge	Gallonage Charge
FWSC		
5/8"x3/4"	$ 9.42	$2.04 per 1,000g
1"	$23.56	
City of Groveland (outside city limits)	$13.13 (includes 4,000g)	$3.44 per 1,000g

Table 2 presents a comparison of monthly residential bills for the City and Florida Water customers using 10,000 gallons and 22,660 gallons per month. Witness Tillman testified to monthly bills calculated at a 10,000 gallon per month level. (TR 167) This is a general industry standard for monthly residential usage, unless specific usage in the area is shown to differ. That was the case here, where witness Tillman testified that the average water usage of customers within the existing Palisades development was 22,660 gallons per month. (TR 167) He suggested that the higher number would be a conservative estimate for future customers within the Summit, because it would have larger lots than those in the Palisades and he anticipated increased usage of water for irrigation purposes. (TR 167-8) The City also used a threshold calculation of 10,000 gallons in its brief. (BR 38) Staff has presented a rate comparison of customers' bills at both the 10,000 gallon and 22,660 gallon levels in Table 2.

TABLE 2
Rate Comparison Between FWSC and the City of Groveland
with a Residential 5/8" x 3/4" and 1" Meter

Utility	10,000 gallons	22,660 gallons
FWSC		
5/8"x3/4"	$29.82	$55.65
1"	$43.96	$69.79
City of Groveland	$33.77	$77.32

Table 3 shows a comparison of residential connection charges for both utilities with either a 5/8" x 3/4" meter and a 1" meter.

TABLE 3
Comparison of Service Availability
and Connection Charges for
Florida Water and the City of Groveland
With a 5/8"x3/4" and 1" Meter

Util.	Plant Capacity	Main Exten.	Meter Install.	Deposit	Serv. Install.	Total
FWSC	$700	n/a(1)		$41	$15	
5/8"x3/4"			$ 90			$ 846
1"			$ 140			$ 896
City of Groveland	$695	$300	$ 500	(2)	$10	$ 1,505/ $ 1,569 (3)

(1) Note: FWSC will not charge customers a main extension charge because the developer is installing all on-site lines, all service taps and the line from the utility well to the point of connection in the Summit. AFPI charges to individual customers will also not apply. (TR 168)
(2) Note: FWSC testimony included a $75 deposit required by the City, in its rate comparison. (TR 168) However, in an abundance of caution, since the City's testimony did not include any mention of a deposit, it is not included in Table 3. (EX 25, TR 514)

(3) Note: The City also testified that it had requested a rate increase in its connection charges, and that the new total connection fee would be $1,568.65. (TR 485) This number (rounded to $1,569) is also used in the City's brief. (BR 38) Staff believes the record is unclear as to exactly when this increase will occur. Therefore, the staff has included both numbers in its comparison.

These Tables show that a residential customer would pay lower monthly service rates at the higher gallonage levels, and lower connection fees to Florida Water than it would if the City served the Summit. Tables 1 and 2 show that a City customer would pay less than a customer of Florida Water using 10,000 gallons of water. However, based on the testimony of witness Tillman, staff believes that the use of 22,660 gallons of water per month provides a more appropriate comparison. (TR 167-8) At those levels, service under Florida Water is more cost effective by $21.67 with a 5/8" x 3/4" meter and by $7.53 with a 1" meter.

Table 3 indicates the difference in connection charges between the City's rates and FWSC's rates. The difference would be either $659 at the old rates or $723 at the new rates, for a 5/8" x 3/4" meter, and $609 at the old rates or $673 at the new rates for a 1" meter. In its brief, the City states that these charges are negotiable and could go lower, citing to Witness Yarborough's testimony. However, Witness Yarborough did not testify to, nor does the record otherwise reflect, a lower charge or negotiated amounts. (EX 25, TR 514) Witness Yarborough attempted to revise all the rate information while on the stand, when witnesses are permitted to correct errors, mistakes, or update the information provided in their prefiled testimony. FWSC objected to Witness Yarborough's revision regarding rate information as a substantial change to testimony. (TR 467-468). The Commission sustained FWSC's objection and required that Witness Yarborough's testimony not be changed to reflect such lower charges. (TR 468-473) Because the record does not support the use of the reference to negotiated charges and the associated number used in the City's brief, staff has not considered this information.

The City made a further argument in its brief, that unlike Florida Water, it had reduced its nonresidential water gallonage rates by 7% in the last three years, and that granting the area to the City would allow it to further reduce rates. (BR 39) The record reflects that Witness Yarborough testified that as a result

of expansion, the City had been able to reduce gallonage charges, so that the overall water charges for both City and nonCity residents for 5,000 gallons of water usage were reduced by 7%. (TR 487) Staff notes that the testimony indicates that the City's overall water bill was reduced by 7%, not that the nonresidential gallonage rates were reduced by 7%. Staff further notes that the testimony indicates that these reductions were for bills at 5,000 gallons, and as discussed previously in this issue, customers in the new area would be expected to use about 22,660 gallons per month. The comparison of bills between the City and Florida Water shows that the City's bills were lower at lower gallonage amounts, and higher at the usage levels that more closely reflect expected water demand in the new area (using a 1" meter). While the expansion of the City's customer base might allow for future rate decreases, it is actually unknown whether this will occur for residents outside the City. Witness Yarborough testified that the City was requesting an increase in connection charges. (TR 485) Staff believes that the statement that a rate decrease will result from including this area in its territory is speculative and should therefore be given little weight in this proceeding.

Cost to Utility of Providing Service

The record also included information on the various costs of the utilities to provide service. The Commission might consider that type of cost or expense as a public interest concern, to the extent that the cost to provide service to an area could create other expenses or problems that would be borne or recovered from the utility's existing rate payers.

For Florida Water, Witness Tillman testified that the Developer was installing all on site lines which will be contributed to the utility, as well as constructing the connecting line between the the well and point of connection in the Summit. (TR 163-164, EX 5, TR 408) He further testified that the granting of Florida Water's application would allow it to better utilize existing facilities and eliminate the need for expenditure of public funds to serve the requested area. (TR 158) Although the City stated in its brief that FWSC would have to "immediately" act to operate a third well in order to provide service, Witness Tillman testified that there were no plans to add more facilities at the Palisades plant in order to serve the Summit, and that the existing plant had the capacity to provide service to both the Palisades and Summit development. (TR 154, 275) He also testified

that in the event additional water capacity was required, Florida Water had an option on a third well on Summit property, which had already been favorably tested for use for potable water. (TR 292) Staff believes that the City's characterization of Florida Water's actions with respect to capacity and the third well are not supported by the record.

In its brief, the City states that the City's incremental cost to serve the Summit was no more than $148,000, which reflected the cost to construct an additional 3,000 feet of line to the Summit. The City states it has the money to fund this extension and will recoup that money through its service availability agreement with the developer. (BR 37) The staff believes that the record indicates that the City's incremental cost is either $145,000 or $228,000, depending on whether the City would connect to the closest point to the development or to the front of the development. (TR 313, 343-344, 364-365) Although the City states in its brief that it will recoup this expense through a developer agreement, there is no testimony or evidence on this point. Neither is there a developer agreement to evaluate, since the contract at issue is between the developer and Florida Water. The staff agrees that the City has the financial ability to fund the extension, as discussed in Issue 6.

For the foregoing reasons, the staff believes that the record supports a finding that the cost of Florida Water's provision of service will be recovered from the developer and users of that system. Staff also believes that the City's provision of service clearly requires additional funding from the City, in an amount that is somewhere between $145,000 and $228,000. The record does not specify the exact source or recovery mechanism of this funding, but staff believes the record does support that the City has the financial resources to support these amounts.

Provision of Wastewater Service

By Order No. PSC-00-2464-PCO-WU, issued December 21, 2000, FWSC's Motion to Strike certain portions of the City's prefiled testimony regarding wastewater issues was denied and wasterwater service was found to be an issue in this proceeding. Witness Tillman testified that there was no need for central wastewater service because the area had received preliminary plat approval for septic tanks. Further, it will be a very low density development with one unit planned per five acres. (TR 171) Also, the

developer has already entered into an agreement with Florida Water for only water service. (EX 5, TR 408) City Witness Yarborough testified that the Summit was approved as a Planned Unit Development under the Lake County Comprehensive Plan, and associated land development regulations do not require the installation of a centralized wastewater system. (TR 485) Therefore, the staff believes that there are no requirements for a centralized wastewater system, from either regulatory agencies or from the developer.

The City argued that the granting of the area to the City would allow the City to require the developer to install dry wastewater lines which would avoid costly retrofits in the future if the septic tanks failed or were prohibited in the future. (BR 39) This statement was based on Witness Yarborough's response to a question about amending the City's Comprehensive Plan. He testified that the City currently has a proposed amendment which it has submitted to the DCA, requiring the construction of dry lines for connection when the City's line abuts the project. (TR 458)

Witness Mittauer stated that the City would have to install up to 32,000 feet of main to reach the Summit from its existing wastewater facilities and that no construction or plans for construction for this extension were underway. (TR 345-347) He also agreed that there could be septic problems in providing wastewater service through such long lines. (TR 347)

Staff believes that the City's argument in its brief concerning installation of dry lines by the developer may be premature, since the reference to the requirement to install dry lines by witness Yarborough was that although the City has submitted the change to the DCA, there is no indication that the change had been approved by the DCA. Witness Yarborough agreed that changes by the DCA to comprehensive plans were not a "rubber stamp" process. (TR 458) Since there is no requirement or demand for central wastewater service, and no existing plan to provide such service to this subdivision, the staff believes that there is no need for central wastewater service at this time, and the provision of wastewater service through septic tanks does not conflict with any public interest elements addressed in this docket.

Economies of Scale

Witness Tillman testified that granting the application will allow Florida Water to better utilize existing facilities. (TR 156-157) He also stated that the addition of the new territory to Florida Water's system will improve its economies of scale and help Florida Water control costs to existing customers. (TR 403) Staff believes the record supports these statements, as discussed in Issue 4 that Florida Water would be providing service to the new area by utilizing the excess capacity of an existing water plant.

The record also included discussion of the fact that Florida Water's existing certificated area included the area directly to the east of the requested area (which contains the existing Palisades development), as well as an area directly west of the requested area. (TR 290-291, TR 494, EX 5) In other words, the requested area lies directly between two areas that were already approved as service areas for Florida Water. Witness Tillman was asked how Florida Water would provide service to this far west area, if it were granted the requested area of the Summit development. He stated that there would probably be an extension of the lines within the development. Depending on the size of those lines, the far west area could possibly be fed from lines inside the Summit development itself through a lateral main, or something of that nature. He also stated that if Florida Water were not granted the Summit territory, it would attempt to move in the most direct route which might be going down a highway right-of-way and extending service to that area from the existing Palisades system. (TR 291) Finally, he stated that it would be less expensive to serve the far west area if Florida Water was granted the intermediate area of the Summit. (TR 292)

City witness Yarborough stated that including customers in the new area will allow the City to expand its customer base, spread its costs of operation and take advantage of the economies of scale associated wtih its existing water and wastewater treatment facilities. (TR 486) Economies of scale means that an entity is able to reduce its overall fixed cost of operations by spreading those costs over more production of units, or customers, while maintaining its existing components that generate the fixed costs. In other words, a utility thus utilizes its existing facilities more effectively such as to reduce unit costs.

The City is actually adding an additional 13,000 feet of line beyond the point of connection intended by the DEP grant. (TR 342) (EX 16, JAM-3) Although a portion of that extension was paid for by the DEP grant, those monies could have been returned to the City and used for other improvements. Further, the City has extended those lines without any written service request from that area, or from the Summit Developer. (TR 512-513) This type of action is actually the opposite of the definition of economies of scale. First, the City has expended funds to expand fixed costs (lines) rather than utilize existing facilities, and the City has no confirmed additional units (customers) to spread those costs over. Even if it did have the additional units (customers), it is questionable whether the number of customers would come close to offsetting the expense to the City of running the lines out to the area. Including the excess DEP grant money, this expense is between $254,000 and $337,000. (TR 342, 313, 342-344) [Note: ($500,000 DEP Grant)-($391,000 cost to Garden City) = $109,000 Difference. ($109,000)+ ($145,000 estimate to serve Summit in 3,000 ft) = $254,000. ($109,000) + ($228,000 estimate to serve Summit in 7,000 ft) = $337,000] The area at issue is planned to be a low density development with 135 single family homes. (EX 10, page 3 of 9)

As mentioned earlier, the City has suggested in its brief that it will recover these expenses through a developer agreement. (BR 37) However, the record contains no such developer agreement, or other evidence on this point.

The staff believes that the extension of FWSC's system will allow the utility to benefit from utilizing existing plant to provide service to the Summit. Further, it will allow FWSC to provide service to its existing territory to the far west of the requested area at a lower overall cost. Both of these benefits will add to the efficiency of operations of the existing water system, and by definition, allow Florida Water to benefit from economies of scale. The staff does not believe that granting this area to the City will result in any operational economies of scale or associated benefits.

Conclusion

With respect to technical issues, the parties stipulated that a need for service exists, and staff recommends that there is a present need for water service to the Summit development, but no

need for central wastewater service. Staff recommends that both the City and Florida Water have the capacity to serve the Summit, and that the City has the financial ability to serve this area. The parties stipulated that Florida Water has the technical and financial ability to provide service. Staff believes that service by Florida Water is consistent with both the City and County Comprehensive Plans, while provision of service by the City is not consistent with those Plans. Staff further believes that there is no duplication of City service by Florida Water.

With respect to public interest issues, staff believes that the record reflects that customers in the Summit will benefit under the rate structure of Florida Water more than under that of the City. This is true for both monthly service rates and various connection charges. Staff believes that as a broad policy consideration, it is not appropriate for the Commission to consider the costs to the developer, primarily because those are a result of contract rates between the utility and a private entity. However, in this case, the terms of the contract comport with all provisions included in the utility's existing tariff as approved by the Commission. Therefore, the staff does not believe that there is any issue with respect to those costs in this case. While there may be a consideration of costs to provide service, staff believes that the real issue is whether the extension would result in imprudent costs that would have to be borne by the existing ratepayers of the utility. Staff believes that service by Florida Water will not result in such additional expenses. Service by the City will require additional funding and it is unclear as to how those costs will be recovered. The discussion as to whether the City was in a better position to ultimately provide central wastewater service to the area than Florida Water, concluded that this also was not an issue of public interest in this case. There were no regulations requiring that type of service, nor was there any immediate availability of that service from the City. Further, there is no an immediate need for centralized wastewater service. Finally, the staff believes that while Florida Water may and should experience economies of scale in its operations if its territory is expanded to include the Summit, the City will not.

For the foregoing reasons, and based on the overall record of this proceeding, the staff believes that service by Florida Water will provide sufficient, cost effective and economic service to the Summit. Therefore, staff recommends that it is in the public interest for Florida Water Services Corporation to be granted an

amendment to Water Certificate No. 106-W for the territory proposed in its application, and that the amendment application should be granted.

ISSUE 13: Should this docket be closed?

RECOMMENDATION: Yes, if no party appeals the final order issued in this docket, the docket should be closed upon the expiration of the time for filing a notice of appeal.

STAFF ANALYSIS: If no party appeals the final order issued in this docket, the docket should be closed upon the expiration of the time for filing a notice of appeal.