

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for
certificates to operate a water
and wastewater utility in
Charlotte and DeSoto Counties by
Lake Suzy Utilities, Inc.

DOCKET NO. 970657-WS
ORDER NO. PSC-98-1089-PCO-WS
ISSUED: August 11, 1998

The following Commissioners participated in the disposition
of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER CONSOLIDATING DOCKETS NOS. 970657-WS AND 980261-WS
AND SETTING MATTER FOR HEARING, GRANTING INTERVENTION,
DENYING MOTION FOR CEASE AND DESIST ORDER,
AND DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS

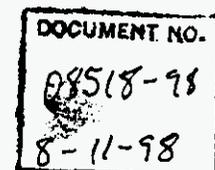
BY THE COMMISSION:

Background

Lake Suzy Utilities, Inc. (Lake Suzy or utility) provides
water and wastewater service to approximately 142 water customers
and 141 wastewater customers in DeSoto and Charlotte Counties,
Florida. The utility's 1996 annual report shows an annual
operating revenue of \$182,904 and a net operating income of \$2,546.
The utility is a Class C utility company.

By Order No. PSC-97-0603-FOF-WS, issued May 27, 1997, in
Docket No. 970411-WS, the Commission canceled the certificates held
by regulated utilities in DeSoto County following County Resolution
97-21 rescinding Commission jurisdiction. However, because Docket
No. 960799-WS remained pending, the Commission voted to delay
canceling Lake Suzy's certificates until the rate case proceeding
was concluded. The rate case became final on July 24, 1997, when
the protest period expired, and Docket No. 960799-WS was closed.

On June 3, 1997, Lake Suzy filed an application for amendment
to include additional territory in DeSoto and Charlotte Counties.
On August 8, 1997, the utility was advised that it needed to file



an application for original in existence certificates instead of an application for amendment of certificates. On September 11, 1997, Lake Suzy filed an original certificate application to provide water and wastewater service in DeSoto and Charlotte Counties. On October 22, 1997, DeSoto County timely filed an objection to the application for original certificate. On October 24, 1997, Charlotte County timely filed an objection to Lake Suzy's application. On January 13, 1998 DeSoto County filed a withdrawal of the objection to Lake Suzy's application and a notice of voluntary dismissal. On January 14, 1998, Charlotte County also withdrew its objection and included a copy of the settlement agreement reached between the County and Lake Suzy. The official filing date for this application was March 17, 1998, when all the deficiencies were complete.

On March 4, 1998, Florida Water Services Corporation (FWSC) filed an Objection to Application(s) for Territory Amendment & Original Certificates by Lake Suzy Utilities, Inc. and Petition for Leave to Intervene. On March 20, 1998, Lake Suzy filed a Response to Objection of Florida Water Services Corporation and Florida Water Services Corporation's Petition to Intervene. On April 13, 1998, FWSC filed a Motion to Consolidate Dockets Nos. 970657-WS and 980261-WS (Application for amendment of Certificates Nos. 570-W and 396-S in Charlotte County by FWSC). On April 20 and 28, 1998, Lake Suzy and Haus Development, Inc. (Haus Development) respectively filed responses to FWSC's Motion to Consolidate. Finally, on April 21, 1998, FWSC filed a Motion in Limine and Motion for Cease and Desist Order. On April 23, 1998, Lake Suzy filed a Response to FWSC's Motion in Limine and Motion for Cease and Desist Order.

In addition, on March 4, 1998, FWSC served its First Request for Production of Documents and First Set of Interrogatories upon Lake Suzy. On March 20, 1998, Lake Suzy filed a Motion for Protective Order requesting that discovery not be had by FWSC in this proceeding. On April 10, 1998, FWSC filed a Notice of Withdrawal of its discovery request, and on April 17, 1998, Lake Suzy filed a Notice of Withdrawal of Motion for Protective Order.

FWSC's Objection

On September 26, 1997, Lake Suzy provided notice of its application for original certificates, and on March 4, 1998, FWSC filed an objection and petition to intervene. Section 367.045, Florida Statutes, provides that written objections to a notice of application must be received within 30 days after the last day the

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notice was mailed or published by the applicant. Because FWSC's objection was not filed until March 4, 1998, it appears that the objection is untimely.

However, in support of its objection, FWSC asserts, among other things, that Lake Suzy did not provide written notice as required by Sections 367.045(1) and (2), Florida Statutes, and Rule 25-30.030, Florida Administrative Code, which require that notice be provided by mail or personal delivery to all Commission-regulated utilities within the county where the requested territory lies. FWSC attached an affidavit of Mr. Charles Sweat, Vice President of Corporate Development for FWSC, averring that FWSC did not receive notice of Lake Suzy's applications. Furthermore, on June 26, 1998, FWSC filed the supporting affidavits of Mr. Brian Armstrong, Vice President and General Counsel, and Ms. Donna Henry, Executive Legal Assistant, averring that the notice receipt files kept by FWSC in the ordinary course of business reveal that FWSC did not receive any written notice of Lake Suzy's application.

Additionally, FWSC argues that a sufficient factual basis exists for the Commission to find that Lake Suzy did not properly issue written notice in accordance with the law in light of the prior complaints by both Charlotte County and DeSoto County that they did not receive proper written notice. Additionally, FWSC contends that technical defects in Lake Suzy's applications and supporting documents cast doubt on the sufficiency and validity of the filing. Additionally, FWSC argues that neither Section 367.045, Florida Statutes, nor Rule 25-30.030, Florida Administrative Code, directly authorize the Commission to consider issues of constructive notice in amendment or original certification proceedings, and even if constructive notice may be properly considered, the facts, if any, which may tend to establish constructive notice did not occur until after the 30-day objection period would have expired had written notice been properly given.

On March 20, 1998, Lake Suzy filed a Response to Objection of Florida Water Services Corporation and Florida Water Services Corporation's Petition to Intervene. Lake Suzy's response appears untimely pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, which provides that a written memorandum in opposition to a motion may be filed within seven days, plus an additional five days if service is by mail. Lake Suzy, however, contends that its response is timely because FWSC's pleading clearly falls within the definition of a petition pursuant to Rule 25-22.036, Florida Administrative Code, and FWSC's pleading states that it is a

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petition filed pursuant to Rules 25-22.036 and 25-22.039, Florida Administrative Code.

While Rule 25-22.039, Florida Administrative Code, employs the term "petition" as the pleading which is to be filed to request intervention, we have previously interpreted such a pleading as a motion for purposes of determining whether a response is timely. See Order No. PSC-97-0470-FOF-WU, issued April 23, 1997, in Docket No. 960867-WU. Accordingly, we find that Lake Suzy's response is untimely. However, because Rule 25-22.039, Florida Administrative Code, employs the term "petition", we believe that Lake Suzy in good faith may have believed it had twenty days in which to file a response. In light of this fact and given that no one will be prejudiced by our consideration of the utility's response, we find it appropriate to give Lake Suzy's response consideration.

In its response, Lake Suzy argues that the initial and fatal deficiency in FWSC's objection is that it is untimely. Lake Suzy further argues that the affidavit of Mr. Sweat does not create a factual issue as to whether Lake Suzy gave the required notices. Lake Suzy also included with its response an affidavit by Mr. Dallas Shepard, President of Lake Suzy, stating that not only did Lake Suzy provide notice to FWSC, but that representatives of the two utilities met on one occasion and had telephone conferences on two occasions regarding Lake Suzy's pending application which occurred prior to the time for filing an objection had run. Lake Suzy further argues that the name and address for FWSC on the Commission's list of water and wastewater utilities in Charlotte County is the same as the one used by FWSC's attorney in FWSC's pleadings and thus must be presumed to be correct. Lake Suzy also argues that FWSC had constructive notice through newspaper publication.

Section 367.045, Florida Statutes, provides that if the Commission does not receive a written objection within 30 days after the last day that notice was mailed or published by the applicant, the Commission may dispose of the application without hearing. FWSC has made an assertion that it did not receive notice, and Lake Suzy has asserted that it provided the notice as required by Section 367.045, Florida Statutes. We have competing affidavits in this regard. Based on the foregoing assertions and in order to allow us to fulfill our statutory duty to determine whether Lake Suzy's application is in the public interest, we find it appropriate to exercise our discretion under Section 367.045,

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Florida Statutes, to schedule this matter for hearing on our own motion.

In light of our decision to set this matter for hearing, Charlotte and DeSoto Counties indicated that they would like to rescind the withdrawals of their objections. However, upon oral motion at the July 21, 1998 Agenda Conference, we granted intervention to DeSoto and Charlotte Counties because their substantial interests will be affected by these proceedings. Accordingly, it is not necessary for us to address the Counties' desire to rescind the withdrawals of their objections.

Consolidation

Rule 25-22.035(2), Florida Administrative Code, provides that if there are separate matters which involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party.

Applying the criteria set forth in Rule 25-22.035(2), Florida Administrative Code, we find it appropriate to consolidate this docket with Docket No. 980261-WS, FWSC's amendment application. Both dockets involve similar issues of law or fact, more specifically a determination of the public interest, the technical and financial ability of each utility to serve, and the need for service in the disputed area. In addition, FWSC's application is currently set for hearing, and in light of our decision to schedule Lake Suzy's application for hearing, we find that consolidation of the two dockets will promote the just, speedy, and inexpensive resolution of the two proceedings and will not unduly prejudice the rights of a party. Accordingly, Dockets Nos. 970657-WS and 980261-WS are hereby consolidated.

Motions in Limine and for Cease and Desist Order

On April 21, 1998, FWSC filed a Motion in Limine and Motion for Cease and Desist Order. FWSC states that Lake Suzy has admitted in both correspondence in this docket and in its objection in Docket No. 980261-WS that Lake Suzy began providing water service to Lot 18 in the Links Subdivision prior to receiving Commission authorization to do so. FWSC asserts that it would be improper and unlawful for FWSC's position in these proceedings to be prejudiced by virtue of Lake Suzy's violation of the statute.

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Therefore, FWSC moves this Commission to issue an order which (1) determines that any evidence showing that Lake Suzy currently provides service to the disputed area is admissible only for the limited purpose of the Commission's disposition of show cause issues, if any, raised in these proceedings, and (2) requires Lake Suzy to cease and desist from providing service to any other customers in the disputed area until receiving Commission authorization to do so.

On April 22, 1998, Lake Suzy filed its Response to FWSC's Motion in Limine and Motion for Cease and Desist Order. Lake Suzy asserts that it is not relying upon the Lot 18 service connection as the basis for its application and that it believes it is entitled to a certificate for the territory requested without regard to that service connection. Additionally, Lake Suzy states that it does not intend to provide service to any other lots within the requested territory until certificated to do so by the Commission, and thus a cease and desist order is unnecessary. Lake Suzy requests that FWSC's Motion in Limine and Motion for Cease and Desist Order be denied.

While it would be improper for this Commission to base its determination of Lake Suzy's ability to serve or the need for service in the territory solely upon the fact that Lake Suzy currently provides service to one lot in the requested territory without antecedent Commission approval, see McTyre v. Bevis, 300 So.2d 1 (Fla. 1974) and Wytrwal v. Bevis, 300 So.2d 13 (Fla. 1974), Lake Suzy has not proffered its unauthorized provision of service as evidence in its application. As previously stated, Lake Suzy states in its response that it is not relying on this provision of service as evidence in this case.

The purpose of a motion in limine is to exclude irrelevant and immaterial matters or to exclude evidence when its probative value is outweighed by the danger of unfair prejudice. Devoe v. Western Auto Supply Co., 537 So.2d 188 (Fla. 2d DCA 1989). A trial court has discretion in determining whether to rule on a motion in limine prior to trial or to rule on the admissibility of the evidence when it is actually offered. 1 Charles W. Erhardt, Florida Evidence 15 (2d ed. 1984). Given that the evidence has not been, nor does it appear that it will be, proffered as evidence by Lake Suzy in this proceeding, we find that FWSC's motion is moot.

In addition, we find it appropriate to deny FWSC's motion for a cease and desist order because Lake Suzy has stated that it has

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no intention of serving any other lots within the requested territory until it receives the requisite authorization from the Commission and that the provision of service to Lot 18 prior to Commission approval was done out of public necessity and convenience. Other than the connection of Lot 18, FWSC has not asserted any other basis for its belief that Lake Suzy will connect other customers in the disputed area in the absence of Commission approval, and based on Lake Suzy's response, we do not believe Lake Suzy intends to pursue such a course of action.

In addition, Section 367.031, Florida Statutes, speaks for itself, and we see no need to issue an order telling Lake Suzy not to violate the statute. Section 367.031, Florida Statutes, provides that "[e]ach utility subject to the jurisdiction of the commission must obtain . . . a certificate of authorization to provide water or wastewater service." Pursuant to Section 367.171, Florida Statutes, if a utility knowingly refuses to comply with, or willfully violates, any provision of Chapter 367, such utility shall incur a penalty for each offense to be fixed, imposed, and collected by the Commission. Therefore, any violations of the statute by Lake Suzy will be dealt with accordingly. Based on the foregoing, FWSC's motion for a cease and desist order is denied.

Show Cause

As stated previously, on August 26, 1997, without prior Commission approval, Lake Suzy began providing service to Lot 18 of the Links Subdivision which is located in Charlotte County and is part of the territory requested in Lake Suzy's application.

Section 367.031, Florida Statutes, provides that each utility subject to the jurisdiction of the Commission must obtain from the Commission a certificate of authorization to provide water or wastewater service. Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, Florida Statutes.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's failure to obtain a certificate of authorization

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prior to providing water or wastewater service, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Failure to obtain a certificate of authorization prior to providing water or wastewater service is an apparent violation of Section 367.031, Florida Statutes. However, Lake Suzy has stated in its application that it began providing service to Lot 18 out of public necessity and convenience as requested by the owner of the property. The owner was experiencing taste and odor problems, as well as low water pressure, with their well system. In addition, Lot 18 was in close proximity to the Lake Suzy system. On May 5, 1998, we received a letter from the lot owner confirming these assertions, as well as further explaining the problems the owner had experienced in trying to treat sulfur well water and the destruction of the household appliances caused by the corrosive nature of the water. Lake Suzy further states that it felt it was in the public's best interest to serve this single house and was able to do so without any adverse affects to the existing ratepayers. Finally, Lake Suzy asserts that it was under the jurisdiction of DeSoto County at the time of the connection and states that it was not aware of any rule or regulation that prohibited such connection.

Pursuant to Section 367.171(7), Florida Statutes, the Commission is vested with exclusive jurisdiction over all utility systems whose service transverses county boundaries whether the counties involved are jurisdictional or nonjurisdictional. Therefore, the Commission, not DeSoto County, was vested with jurisdiction at the time of the connection since Lot 18 is located in Charlotte County which resulted in Lake Suzy's water facilities transversing counties boundaries from DeSoto County into Charlotte County. Accordingly, we find that Lake Suzy was legally required to obtain prior Commission approval before serving Lot 18.

However, we do not believe that this utility's apparent violation of Section 367.031, Florida Statutes, rises to the level of warranting that a show cause order be issued given the problems

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the owner was experiencing with his well. Accordingly, we hereby decline to initiate a show cause proceeding against Lake Suzy for its failure to obtain Commission approval prior to providing water service in Charlotte County.

Based on the foregoing, it is

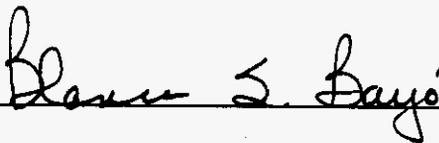
ORDERED by the Florida Public Service Commission that Dockets Nos. 970657-WS and 980261-WS are hereby consolidated and scheduled for hearing. It is further

ORDERED that Charlotte County and DeSoto County are hereby granted intervention in this matter. It is further

ORDERED that Florida Water Services Corporation's motion for a cease and desist order is hereby denied. It is further

ORDERED that a show cause proceeding shall not be initiated against Lake Suzy Utilities, Inc. for its failure to obtain Commission approval prior to providing water service in Charlotte County.

By ORDER of the Florida Public Service Commission this 11th day of August, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.