BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Objection by ST. JOHNS NORTH UTILITY CORP. to Notice by GENERAL DEVELOPMENT UTILITIES, INC., of Intent to Amend Certificates Nos. 451-W and 396-S in St. Johns County and Application for Amendment | ) | DOCKET NO. 880207-WS |
| | ) | ORDER NO. 20668 |
| | ) | ISSUED: 1-27-89 |

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, CHAIRMAN
THOMAS M. BEARD

Upon proper notice, a public hearing was held in the above-noted docket on September 30, 1988, in Orange Park, Florida.

APPEARANCES:

RICHARD D. MELSON, Esquire, and CHERYL G. STUART, Esquire, P. O. Box 6526, Tallahassee, Florida 32314
On behalf of General Development Utilities

JOSEPH E. WARREN, Esquire, 24 North Market Street, Jacksonville, Florida 32202
On behalf of St. Johns North Utility Corp.

WAYNE L. SCHIEFELBEIN, Esquire, 101 East Gaines St., Tallahassee, Florida 32399-0863
On behalf of the Commission Staff

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Counsel to the Commissioners

ORDER DISMISSING OBJECTION, AMENDING CERTIFICATES, AWARDING REASONABLE ATTORNEY'S FEES AND COSTS, AND RESERVING JURISDICTION TO DETERMINE AMOUNT OF ATTORNEY'S FEES

BY THE COMMISSION:

CASE BACKGROUND

General Development Utilities, Inc., (GDU or the Utility) is authorized to provide water and sewer service in St. Johns County by Certificates Nos. 451-W and 396-S. GDU completed the notice requirements for an extension of its service area in St. Johns County, pursuant to Section 367.061, Florida Statutes, on January 27, 1988. GDU also prematurely filed an extension application on February 9, 1988. St. Johns North Utility Corp. (SJN) timely filed an objection to the notice and a request for hearing on February 5, 1988, essentially contending that such extension would result in competition with or duplication of SJN's systems and that SJN was better qualified to serve the disputed area. SJN's request for hearing was granted.

By Order No. 18949, issued on March 4, 1988, the prehearing officer established procedures and scheduled all key activities of this case. Pursuant to said Order, the parties

and our Staff participated in an informal conference to discuss the issues requiring resolution. It became apparent that GDU's intended extension was not one which could readily be accomplished within the one-year parameter generally applicable to an extension pursuant to Section 367.061, Florida Statutes. On March 29, 1988, GDU, therefore, gave new notices of its proposed extension, pursuant to Section 367.041, Florida Statutes. By Order No. 19148, issued on April 15, 1988, the prehearing officer granted GDU's motion to amend the case schedule and approved revisions of dates for submittals by the parties, given the transformation of this case to a Section 367.041 extension. Pursuant to said Order, GDU timely filed its Section 367.041 application on May 4, 1988. SJN timely renewed its objection to the application on May 6, 1988.

By Order No. 19446, issued on June 6, 1988, the prehearing officer partially granted GDU's motion to compel SJN to produce documents and respond to interrogatories.

On June 2, 1988, the parties filed a Joint Motion for Continuance. The motion indicated that the parties had entered into a settlement agreement which, if approved by this Commission, would resolve the objection filed by SJN. The motion requested that the dates for filing direct and rebuttal testimony (June 3 and July 8, respectively) be indefinitely extended pending Commission action on the settlement agreement. On June 7, 1988, the parties provided our Staff with a discussion draft of a Joint Motion to Approve Settlement Agreement. On June 9, 1988, counsel for the parties and our Staff held a meeting to discuss the draft. Staff advised the parties of its opposition to the terms of the agreement and suggested modifications. On June 14, 1988, the parties filed the Joint Motion to Approve Settlement Agreement, without modifications. Order No. 19676, issued on July 14, 1988, reflects our denial of the joint motion.

GDU promptly requested that expedited testimony filing dates be approved, designed to allow the original August 29, 1988, hearing date to be honored. However, on July 7, 1988, SJN filed a Motion to Amend Case Schedule, indicating that the schedule proposed by GDU did not provide the time necessary for SJN to prepare its case in response to GDU's application. SJN further indicated its intent to file a competing application for certain territory sought by GDU's application. SJN asked that the case schedule be amended, without specifying the time required. By Order No. 19665, issued on July 13, 1988, the prehearing officer rescheduled the proceedings, establishing filing dates designed to allow the August 29, 1988, hearing to proceed.

On July 15, 1988, SJN filed a Motion to Dismiss, contending that GDU's notices were defective, given an alleged failure to notify various governmental agencies of its intent to apply for the extension of its service area. On July 18, 1988, GDU filed its response. By Order No. 19770, issued on August 8, 1988, the motion was denied.

On July 15, 1988, SJN also filed a Motion for Reconsideration of Order No. 19665, again seeking a delay in the proceedings. On July 18, 1988, GDU filed its response. On

July 19, 1988, the prehearing officer denied SJN's motion.

On July 22, 1988, GDU timely filed its direct testimony. No testimony was filed on behalf of SJN. On July 22, 1988, GDU also filed an Emergency Motion to Compel Discovery and to enforce Order No. 19446.

Order No. 20026 severed this matter from Docket No. 881061-WS, which was established to process SJN's application for a portion of the proposed territory requested in this docket by GDU.

This matter went to hearing on September 30, 1988, before Commissioner Beard. The other member of the panel, Commissioner Wilson, was ill. GDU filed a Motion on September 23, 1988, regarding the procedure for determination of attorneys' fees which was taken under advisement by Commissioner Beard at the hearing. At the hearing, SJN moved to continue the hearing or defer the decision. This motion was denied by Commissioner Beard. GDU timely filed its post-hearing brief. SJN did not file any post-hearing statement or brief.

NEED FOR SERVICE

At the prehearing, both parties agreed that there is a need for service in the requested territory. The difference of opinion arises when the timing of this need is considered--immediate need, or some time in the future.

General Development Corporation (GDC) and GDU plan to provide water and sewer service to the Julington Creek development. Representations to this effect are included in the project's Development of Regional Impact (DRI). The area is being developed in phases: Phase I for the years 1984-1990; Phase II for the years 1991-1995; and Phase III for the years 1996-2004. The Mill Creek parcel is expected to be served within two years. The areas needing service, as projected by GDC, will need such within the next two, seven or sixteen years. Land sales contracts and property offering statements make these representations. The need for service, the expansion of the infrastructure to provide roads, storm water management, and central water/sewer service all hinge on the development dates in those contracts.

Most of the property applied for in this proceeding is owned by GDC. The exceptions to this are two "out-parcels" owned by others. According to GDC's engineering witness, Mr. Hammack, public facilities are required. GDU was designated in the DRI as the entity that would operate the water and sewer utilities for the community. GDC has made a large investment in land and development in this community, and therefore, timely utility service is very important to GDC's plans.

In referring to the Mill Creek parcel, Mr. Kisela, GDU's Assistant Vice President-Operations, testified that the parcel, while not platted, is zoned for approximately 650 multi-family units. It was included in the original DRI. The parcel is currently for sale by GDC, but no contract with a buyer has been signed. GDU has plans to provide service to the

parcel and has developed its master plan accordingly. The progress of the development will require utility service, which GDU could not provide unless the Mill Creek parcel were included in its certificated area. There is no contractual obligation to provide service.

At build-out, the Mill Creek parcel will contain about 600 units. Between 1984 and 1990, 135 units would be added, with 250 additional units added from 1991 and 1995, and the remaining units added later. GDU asserts it has the present capacity to serve 135 units.

We conclude that, as a result of the DRI, land sales contracts, property offering statements, and master planning, sufficient need for service has been demonstrated in this proceeding. However, we recognize that some of this need is immediate and some is in the future.

GDU'S ABILITY TO SERVE THE REQUESTED TERRITORY

GDU is one of the largest privately-owned water and wastewater utilities in the state. It currently operates twenty-three facilities throughout the state in nine communities. The requested territory is part of its Julington Creek Subdivision. Julington Creek is a development of approximately 4300 acres in northwest St. Johns County. GDU was granted its existing service territory of approximately 1500 acres in Order No. 16473, issued on August 14, 1986. This application involves the balance of this development, 2800 acres.

We have analyzed GDU's ability to serve the requested territory by considering its technical, financial, and operational abilities. To discuss its technical abilities to serve the requested territory, GDU provided John Albert Hammack, Vice President of Bessent, Hammack & Ruckman, Inc., a consulting engineering firm in Jacksonville, Florida, as a witness in this docket. Mr. Hammack's firm provided the planning, engineering, and surveying for the Julington Creek development. Mr. Hammack discussed the importance of master planning and how it avoids the proliferation of small independently-operated utilities that cannot achieve the economies of scale or the environmental advantages of a large utility.

Mr. Hammack also provided the detail of GDU's master plan. The water treatment facilities will be constructed in three phases and the wastewater in six phases. The basic master plan currently remains unchanged. Mr. Hammack also testified regarding the extensive DRI process that GDC and GDU went through prior to the start up of this development and all the various agencies that reviewed it. He also stated that his firm is currently involved in the replanning of Unit 9 due to some problems with wetlands jurisdictional lines. He also stated that changes will be made to the master plan to respond to market conditions.

SJN's position is that it can more cost-effectively serve the Mill Creek and East Parcel than GDU. SJN's contention is that GDU will have to cross Cunningham Creek and State Road 13

in order to provide service to the Mill Creek Parcel, and that SJN's plants are adjacent to the East Parcel. Mr. Hammack testified that the cost to GDU of crossing Cunningham Creek and State Road 13, by the construction of a culvert and placing of the water main and force main, would be insignificant compared to the overall cost of constructing the distribution and collection systems within the Mill Creek Parcel.

Mr. Hammack also testified that GDU's master plan, calling for the looping of a twelve-inch water main throughout the development, is the only way to be sure that the required 1500 gallons per minute (gpm) fire flow is maintained in the multi-family areas. He stated that mains of a smaller size, six or eight-inch, would be inadequate to provide this required fire flow.

Mr. Charles E. Fancher, Jr., Senior Vice President of GDU and Vice President of GDC, testified concerning GDU's financial strength. Mr. Fancher stated that GDU has the financial resources to provide service to the proposed service territory. He indicated that GDU managed gross utility plant of approximately $239 million and had net assets in excess of $180 million at year end 1987. GDU also had retained earnings and stockholder's equity of over $84 million at that time. He also stated that GDU has issued $3.2 million of Industrial Revenue Bonds (IRBs) specifically to provide a source of debt funding for water and sewer facilities at Julington Creek. Approximately one-half of those funds have been expended on construction to date, leaving $1,688,000 of IRB proceeds available to support future expansion. The IRBs are tax-free instruments which result in a relatively low cost of debt. Currently the cost of debt related to these instruments is in the 7% to 8% range.

Mr. Fancher believes that no one can match the commitment of GDU to assure that the utility facilities are financed in an adequate and timely manner. He is comfortable with the fact that GDU has the financial resources to get the job done. He stated that GDU's shareholder, GDC, has an absolute commitment to assure that utility facilities are constructed and utility services are provided. This commitment stems from the fact that GDC has $75 - $100 million invested in this project to date.

We examined the audited financial statements of GDU, prepared by Peat Marwick, Certified Public Accountants, and confirmed Mr. Fancher's testimony as it related to the level of assets and retained earnings at the end of 1987.

During cross-examination by counsel for SJN, Mr. Fancher stated that the IRBs were issued in St. Johns County's name. They were issued for GDU strictly for construction of utility facilities and were guaranteed by GDC with letters of credit that support the bonds. The IRB proceeds were used to construct the initial phase of the water and wastewater plants, including the expansion to 200,000 gallons per day (gpd) at the wastewater plant. The funds are not for expansion into the proposed service area due to tax code requirements that limit their applicability for construction to be completed no later than three years in the future. Mr. Fancher continued

that GDU was obligated to repay the bonds from all sources of funding, not just the revenues from the Julington Creek project.

Based on the testimony and exhibits submitted at the hearing, we believe that GDU will have the financial resources to provide utility service to the proposed service area. The amount of funding necessary for completion of Phase I is only a fraction of the total amount of utility plant managed by GDU. The parent corporation has a very large investment in the Julington Creek project and certainly will protect that investment by making sure utility service is available.

Mr. Kisela discussed the operational abilities of GDU. He stated that GDU operates twenty-three other systems throughout the state in seven other operating divisions. He also stated that GDU has approximately thirty years' experience in utility management and operation.

GDU has acquired the services of Jax Utilities Management (JUM) to provide the operation and maintenance in the Julington Creek development. The reason for the management agreement was that, currently, JUM could provide more cost-effective services, given the small size of the existing system. This management agreement is reviewed annually and, thus far, GDU has been satisfied with JUM's services. If JUM ever fails to provide satisfactory service, GDU has the option to terminate the contract with ten days' notice. Mr. Kisela stated that GDU would be able to transfer experienced personnel from other divisions to operate the system if necessary.

In summary, GDU has the technical expertise to provide service based on its master plans to provide the necessary water and sewer services to the Julington Creek development. Its financial strength is demonstrated by the availability of Industrial Revenue Bonds and the support of its parent, GDC. GDU's operational abilities are evidenced by its many other systems throughout the state and the contractual arrangement for the services of JUM in the current operations at Julington Creek. Based on our review of the record in this proceeding, which demonstrates GDU's financial resources, technical expertise and operational capabilities, we find that GDU has the ability to serve the requested territory.

## ST. JOHNS NORTH UTILITY CORP.'S ABILITY TO SERVE THE REQUESTED TERRITORY

No financial capability was demonstrated by SJN other than a blanket statement in its answer to Interrogatory 18 in which the utility responded that it relies upon its principal shareholder, Mr. Bohannon, to provide funds or arrange for credit from banks. SJN also stated that it relies upon CIAC and upon revenues. Mr. Bohannon is allegedly prepared to provide an additional $1,000,000, with reference given to a personal financial statement. No financial statement was attached.

Mr. Fancher reviewed the SJN Annual Reports and testified that, based on those documents, SJN has insufficient operating revenues to cover its cost of operations or interest expense. He had the understanding that SJN had a debt agreement which

required the payment of $7,000 a month. He also pointed out that SJN has negative equity and its debt is in excess of its net plant. He stated that he believed the utility was totally reliant on Mr. Bohannon.

We have reviewed Exhibits 6, 17, and 18. Exhibit 6 is an excerpt from Page 17 of Order No. 19428. Regarding SJN's lack of ability to serve, in that Order it was stated that:

> Our careful review of the record indicates that St. Johns North has not provided sufficient evidence to support its contention that Mr. Bohannon has the funds necessary to finance St. Johns' provision of service to the disputed area...

The record which has been developed in this case contains nothing at all to show the financial ability of Mr. Bohannon to support SJN. Exhibit 17 is the answer to Question 20 of GDU's First Set of Interrogatories. This interrogatory explores whether or not the 1985-1987 SJN Annual Reports reflect all of the expenses incurred by SJN. The answer indicates that 1985 and 1986 do not, but it is contemplated that the 1987 Annual Report would. We reviewed Exhibit 18, the SJN 1987 Annual Report, to attempt to verify the observations made by Mr. Fancher. His statement that the utility had negative equity is true according to the 1987 Annual Report. SJN has a negative balance of $97,411.37 in total capital and a negative balance of $239,251.37 in retained earnings. The annual report shows negative retained earnings of $157,699.00 for the end of the previous year. Therefore, SJN's negative retained earnings increased by $81,552.37 during 1987. SJN had long-term debt of $551,458.64 and Accounts Payable of $86,838.22. The total of these two items is $638,296.86. The utility's net plant minus net contributions-in-aid-of-construction (CIAC) is $364,876.45 which is $146,582.19 less than the long-term debt. Net plant of $768,754.82 (Plant minus Accumulated Depreciation) exceeds long-term debt. The income statement shows a total net operating loss of $46,016.19 for 1987.

It was stated in SJN's answers to the interrogatories that the 1987 SJN Annual Report would reflect all expenses related to the utility. We have no way of knowing whether this is true. While the reliability of the 1987 SJN Annual Report is questionable, it still suggests that SJN does not have the financial ability to provide service. The negative total capital suggests the owner is not willing to support the utility. Further, no evidence was produced to show that Mr. Bohannon could fund the utility if that was his desire. Therefore, we cannot conclude that SJN has the financial ability to provide service.

Based on its responses to GDU's interrogatories, SJN believes its plant capacity will be committed in mid-1989, with full build-out within three years. Its existing facilities are not sufficient to serve Mill Creek or the East Parcel, much less the remainder of the territory requested by GDU. Cost projections for plant expansion by SJN are incomplete.

Both Mill Creek and the East Parcel are planned for multi-family development. Fireflow protection to multi-family areas requires 1000-2000 gpm from the water supply. Generally, 1500 gpm is determined to be required. GDU's engineer, Mr. Hammack, reviewed the DER files and the Annual Report of SJN for engineering data and concluded that SJN cannot provide the needed fire protection, has inadequate storage, and undersized water lines. He further explained that, in his opinion, substantial plant and line construction would have to occur to allow SJN to provide adequate quantities of water to Mill Creek and the East Parcel.

SJN will have to cross State Road 13 to serve the Mill Creek Parcel due to the location of the SJN plant site, however, SJN will not be required to cross Cunningham Creek.

From the uncontroverted testimony of Mr. Hammack, we must conclude that significant improvements will have to be made to the SJN plant and lines to provide service to the multi-family areas situated in the Mill Creek Parcel and the East Parcel. SJN has admitted, in its interrogatory responses, that expansion of plant capacity is necessary to serve these two parcels, and that cost projections are incomplete. Because it is evident that SJN does not currently have the necessary operational capability or the financial resources needed, we find that SJN does not have the ability to serve the proposed territory.

NO DETERMINATION OF WHICH UTILITY COULD PROVIDE THE MOST COST-EFFECTIVE SERVICE TO THE DISPUTED TERRITORY

If this docket involved competing applications for the same territory, if engineering plans and associated costs were available for comparison, and if the persons responsible for such costs were available for cross-examination, a determination of cost effectiveness could be attempted. Any analysis of which utility can provide service in the most cost-effective manner must be done based upon cost comparisons as opposed to statements of cost efficiency not supported by cost data.

In this case, neither party has provided solid cost data on the extension of facilities into the disputed area. As Mr. Hammack stated, cost estimates have not been prepared for the provision of service to either the East Parcel or Mill Creek area. Likewise, SJN has stated, in its interrogatory responses, that its cost projections for serving the disputed territory are incomplete.

Without any cost foundation, SJN contended, in its prehearing statement of position, that it can provide service to the disputed area more cost-effectively since its facilities can be extended without crossing Cunningham Creek. GDU contends that SJN's existing water system is not able to accommodate expansion to serve the disputed territory and the present system would need to be essentially rebuilt from scratch.

GDU contends that it can provide service in an efficient

and cost-effective manner. This claim is based upon economies of scale and efficiencies resulting from master planning its utility systems to accommodate fire flow and customer growth. Although no cost figures were provided, GDU's witness Fancher testified that the cost of crossing Cunningham Creek should represent less than 2% of the unknown cost to serve the East Parcel.

While the record contains much discussion on the planning and utility facilities needed to provide service by either utility to the disputed territory, comparable cost data is not contained in the record. As we have already found, GDU does have the ability to serve the disputed area. However, if such provision of service would be more cost-effective than SJN's, we cannot determine it based upon the record in this proceeding.

GDU'S REQUESTED TERRITORY DOES NOT INCLUDE TERRITORY SJN IS CURRENTLY AUTHORIZED TO SERVE

At the hearing, the parties and our Staff agreed that, at the time this Commission obtained jurisdiction in St. Johns County in July 1985, SJN was serving Cunningham Creek I, Cunningham Creek II, and Fruit Cove Woods II subdivisions. In addition, it was stipulated that SJN was not serving the Mill Creek parcel or the East Parcel in July, 1985, nor is it serving either of these parcels now.

Subsection 367.171(2)(b), Florida Statutes, the "grandfather" provision of Chapter 367, provides that a utility is only entitled to receive a certificate for the area served as of the jurisdictional date. In light of the above stipulation, the legal description contained in Order No. 16199 must be construed to include no more than those three subdivisions. By any other interpretation, the Order would exceed our authority. Therefore, we find that SJN's interpretation that its territory includes the entire land section listed on page 4 of Order No. 16199, expressed in its prehearing statement of position, must be rejected. SJN's territory is limited to the three subdivisions for which it was legally entitled to receive a certificate.

NO PARTICULAR WEIGHT GIVEN TO THE SERVICE PREFERENCE OF MAJORITY LANDHOLDER IN THE DISPUTED TERRITORY

It is clear from the record in this proceeding that the majority landholder in the disputed territory is GDC, the parent of the applicant, GDU. It is also evident that GDC prefers that service to the disputed territory be provided by GDU. We may certainly consider the service preference of the majority landholder in the disputed territory, even though such preference is not enumerated in the criteria for certification provided for by Section 367.041, Florida Statutes, and Rule 25-30.035, Florida Administrative Code. That such preference may be a factor in certification cases has been recognized by the Supreme Court in Davie Utilities, Inc. v. Yarborough, 263 So.2d 215 (Fla. 1972), at 218.

However, this Commission is not bound by the service preference of the majority landholder in the disputed

territory. In the context of a territorial dispute between a privately-owned electric utility and a municipal electric utility, the Supreme Court stated, "an individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Storey v. Mayo, 217 So.2d 304, (Fla. 1968), at 307-308.

Because GDC, as the parent of the applicant utility and the owner of the disputed territory, has a significant stake in the provision of adequate water and sewer service to the territory, its preference for service by GDU seems logically-based on its concern for the long-term development of the service area by GDU and GDC. We have considered the service preference of GDC in this case, however, we do not give this preference any particular weight.

SOME WEIGHT GIVEN TO PREFERENCE OF ST. JOHNS COUNTY FOR SERVICE BY GDU

The evidence presented in this proceeding clearly indicates that St. Johns County prefers that GDU provide water and sewer service to the disputed area. GDU's Witness Fancher testified that St. Johns County has expressed its preference in several ways, first by adopting a development of regional impact order, which is St. Johns County Resolution No. 82-37. Secondly, St. Johns County granted GDU an exclusive 30-year franchise to provide water and sewer services to all the territory sought by GDU. Third, St. Johns County has recently adopted Resolution No. 88-202, on July 26, 1988, expressing its support for this application by GDU.

This Commission is not bound by any actions taken or expressions of preference made by St. Johns County. The Commission has exclusive jurisdiction over all water and sewer utilities in St. Johns County not explicitly exempted by the Commission or by law. This jurisdiction was most recently established on July 25, 1985, when St. Johns County passed a resolution voluntarily giving that jurisdiction to this Commission pursuant to Section 367.171, Florida Statutes.

Section 367.051, Florida Statutes, requires that we give some consideration to local comprehensive plans if an objection is timely raised to a certificate application, although it expressly states that this Commission is not bound by local comprehensive plans. Although the DRI Order was not adopted as a local comprehensive plan, it does result from an effort to "plan" on a regional basis for growth. St. Johns County has carefully reviewed GDC's plans for Julington Creek, which have included the provision of water and sewer services by GDU. The County has, evidently, been favorably impressed. Indeed, this record supports that GDC and GDU have made an effort to "master plan" this development, taking into account the many different elements involved in the growth of an area, including the need for a regional approach to the provision of water and sewer services. GDC and GDU have participated in the complicated and time-consuming DRI application process and GDC's application has survived the scrutiny of several state and regional planning agencies, as well as St. Johns County's review. Accordingly, we give some weight to St. Johns County's preference for service to the disputed territory by GDU.

THE RIGHTS AND OBLIGATIONS OF GDU TO SERVE THE DISPUTED TERRITORY RESULTING FROM THE DRI ORDER GRANTED GDC BY ST. JOHN'S COUNTY

The DRI Order granted to GDC by St. Johns County does not give GDU any obligation to serve the disputed territory nor does it give GDU any right to serve the disputed territory. Under the terms of the DRI Order, GDC has been given the right to develop the 4,150 acres of land known as the Julington Creek subdivision. GDC has also been given the obligation to make certain that water and sewer services are provided to this area by a utility holding a franchise from St. Johns County to serve this area. GDU has been given a franchise by St. Johns County to serve the territory it is requesting certification for in this proceeding. However, GDU has not taken the position that this DRI Order or the franchise compels this Commission to grant GDU the territory it has requested.

Although this Commission is not bound to certificate GDU for the requested territory by any action previously taken by St. Johns County, we believe that the fact that GDU has participated in the extensive planning process involved in obtaining a DRI Order for its parent corporation, GDC, should be taken into consideration in the evaluation of GDU's level of commitment to serve the disputed territory. By applying for and receiving a franchise from St. Johns County to serve the disputed territory, GDU has demonstrated that it is capable of complying with the regulatory requirements involved in providing utility service. It has also demonstrated an intent to serve the entire area on a regional basis and the ability to plan ahead to achieve that goal.

Accordingly, we find that GDU has no rights or obligations to serve the disputed territory resulting from the DRI Order granted GDC by St. John's County. However, we also find that granting the requested territory to GDU is in the public interest.

SUFFICIENCY OF GDU'S APPLICATION

On January 7, 1988, GDU noticed its intention to apply for additional territory pursuant to Section 367.061, Florida Statutes. On February 5, 1988, SJN filed its objection to GDU's notice of intent. As a result of an informal conference, GDU converted its application to one provided for by Section 367.041, Florida Statutes. Thus, on March 29, 1988, GDU provided notice pursuant to Section 367.041, Florida Statutes. Therefore, pursuant to Section 367.041(4), Florida Statutes, and Rule 25-30.030, Florida Administrative Code, GDU has provided the proper notice of its intention.

On July 15, 1988, SJN filed a Motion to Dismiss. It stated that GDU's application was incomplete since it had not provided notice to the governing body, St. Johns County, the City of Jacksonville, as a municipality within four miles of the requested territory, and the local planning agency. GDU filed a response to SJN's Motion to Dismiss on July 19, 1988, stating it had inadvertently failed to notice the city and county. GDU promptly provided notice to the city and county, and on July 28, 1988, GDU provided a supplement to its response

which contained responses from the county and city stating that they had no objection to GDU's application. At the August 1, 1988, motion hearing, GDU provided a letter from the Environmental Protection Agency stating that there is no local planning agency for St. Johns County, but that the Florida Department of Environmental Regulation would be substituted.

On August 5, 1988, GDU noticed a supplement to its application to include a small parcel of property that had been inadvertently omitted. GDU completed its noticing on August 22, 1988, with its final newspaper publication. SJN filed an objection to GDU's supplement on September 6, 1988. As of September 21, 1988, GDU had completed its noticing and the time for objections had passed. The proper filing fee has been paid by GDU.

An application for an extension pursuant to Section 367.041, Florida Statutes, must also conform to Rule 25-30.035, Florida Administrative Code. We have reviewed the application and have determined that it is in substantial compliance with the Rule. However, the application did not include the requirements of subsections (3)(o), (p), and (q) of Rule 25-30.035. During cross-examination by staff counsel of Mr. Kisela, Assistant Vice President-Operation of GDU, counsel for GDU stipulated that GDU's application did not include the schedules required by Rule 25-30.035(2)(o), (p), and (q). Rule 25-30.035(2)(o), Florida Administrative Code, requires a schedule showing the projected cost of the proposed system(s) by NARUC (National Association of Regulatory Utility Commissions) account numbers and the related capacity of each system in equivalent residential connections (ERCs) and gallons per day. Rule 25-30.035(2)(p), Florida Administrative Code, requires a schedule showing the projected operating expenses of the proposed system by NARUC account number when 80% of the designed capacity of the system is being utilized. Rule 25.30-.035(2)(q), Florida Administrative Code, requires a schedule showing the projected capital structure including the methods of financing for the construction and operation of utility in the initial years of the development.

Mr. Fancher stated that the company originally considered this application an extension under Section 367.061, Florida Statutes, the provision that normally would be used for an expansion from an existing system, as opposed to an original application for a new system. He continued that they were subsequently requested to file under Section 367.041, Florida Statutes, the provision for an original certificate and, had GDU provided the information required by Rule 25-30.035(2)(o), (p), and (q), it would have been the same information as provided in the original certificate application.

We believe that the facts are clear. The application is not in strict compliance with Rule 25-30.035, Florida Administrative Code. We also believe that the provisions of that Rule which have not been met in this application relate more to systems which are not in existence. If this were an application for a new certificate related to a new system, then additional information would be required. However, this application relates to an existing system which is expanding its service territory. The primary thrust of Rule 25-30.035 is

to require sufficient information to allow this Commission to grant an original certificate, and set rates and charges for a brand new utility. To require GDU to provide all the data specified in the Rule is unnecessary because GDU has already furnished this information in its certificate proceeding, Docket No. 860036-WS. We evaluated GDU's projections as part of the original certificate analysis. The Commission granted certificates, and set rates and charges for this system, in Order No. 16473. Mr. Fancher stated that he thought the charges set in that Order will enable GDU to recover 75% CIAC which will meet our guidelines for CIAC. We find that nothing is to be gained by requiring or reviewing new financial information.

It is important to point out that Rule 25-30.045(2) addresses amendment of certificates and allows amendments to be filed pursuant to Sections 367.041 and 367.061, Florida Statutes, and Rule 25-30.030, 25-30.035, or 25-30.045. Therefore, we find GDU's application is not in strict compliance with the letter of the Rule, however, we find it appropriate to waive those provisions with which it has not complied.

DISMISSAL OF SJN'S OBJECTION AND
APPROVAL OF GDU'S APPLICATION IN ITS ENTIRETY

We have found there is a need for service in the requested territory. We have found that GDU has the ability to provide that service and that GDU's application for the requested territory is substantially complete. Therefore, we hereby grant GDU's application in whole and amend GDU's Certificates Nos. 451-W and 396-S to include the additional service territory described in Attachment A to this Order. Although SJN has taken the position in this proceeding that we should partially deny GDU's application and, instead, grant SJN's application to serve the Mill Creek area and the East Parcel, as of the date of the hearing in this matter, on September 30, 1988, SJN had not yet filed an application to amend its certificates to include the Mill Creek area or the East Parcel. In addition, SJN has not presented any evidence in this proceeding nor filed any post-hearing statement or brief that supports its contention that it can more cost-effectively serve the disputed territory. Therefore, we dismiss SJN's objection in its entirety.

GDU'S EXISTING RATES AND CHARGES WILL APPLY
TO THE TERRITORY IT IS BEING GRANTED IN THIS ORDER

A utility can expand its customer base in three ways. The first way in which a utility can expand its customer base is to experience growth within its existing territory. Secondly, a utility can expand its customer base by the addition of territory through an amendment under Section 367.041, Florida Statutes. And third, a utility can expand its customer base by the addition of territory under Section 367.061, Florida Statutes.

In Docket No. 860036-WS, Order No. 16473, GDU was granted initial rates and charges for the Julington Creek Area. These rates were based upon buildout of initial plant

capacities of 771 ERCs for water and 286 ERCs for sewer. In that docket, the utility was granted a 1,700 acre service territory. GDU has stated that its sewage treatment plant capacity must be doubled to serve within its existing certificated area. As plant is expanded within this area and additional lines and customers are added, these customers will be served under GDU's existing tariff without additional approval by this Commission. It has been our practice to require that a utility's tariff apply to its entire service territory.

The most common method by which a utility may expand its territory is by an amendment pursuant to Section 367.061, Florida Statutes. This statute is applicable when service will be provided in the added territory within one year of noticing. The new territory is added and the existing tariff applies throughout. The Section 367.041 extension procedure used by GDU in this proceeding differs in that service to the requested territory is not anticipated within one year. We believe that this distinction does not require us to treat GDU's rates and charges in this case differently than those of a utility in a Section 367.061 proceeding because the intent of GDU's Section 367.041 application is to add additional territory to an integrated utility system. As with any ongoing utility, GDU's earnings and contribution levels are monitored through our regular review of its annual report.

The record in this case establishes that GDU is presently operating under its initial rates set in 1986. These rates were based upon the cost of GDU's initial plant capacities and associated lines. As we have already noted, a utility's rates are based upon average costs and, as expansion occurs, the cost per unit or ERC should remain about the same. As development proceeds, the impact of inflation is offset by economies of scale.

GDU stated that the entire existing and proposed area will be served by a single integrated system and, therefore, existing rates and charges based upon average cost should apply. The record shows these rates are presently generating a negative rate of return and despite inflationary pressures, the initial service availability charges designed to recover 75% of investment should not result in a contribution level below our guidelines for contributions-in-aid-of-construction.

GDU has indicated that should costs change, it would follow the appropriate procedures for a change in rates or service availability. Further, through the review of annual reports, we can monitor GDU's earnings and contribution levels. Therefore, we find that GDU's existing tariff shall apply to the additional territory granted in this docket.

GDU IS AWARDED ATTORNEY'S FEES AND WE RESERVE JURISDICTION TO DETERMINE THE AMOUNT THEREOF

Subsection 120.59(6), Florida Statutes, was amended, effective October 1, 1987, to allow for the recovery of costs and attorneys' fees by a prevailing party, in an administrative proceeding, when the nonprevailing party is determined to have participated in the matter for an improper purpose. This is

the first time we have considered utilizing this authority. In addition to this question being designated as an issue at the outset of this proceeding, GDU filed a Motion to Approve Procedure Regarding Attorneys' Fees and Costs on September 23, 1988.

Pursuant to Subsection 120.59(6), Florida Statutes, we must first find that SJN is the "nonprevailing adverse party" in this proceeding and that SJN has participated for an "improper purpose" before we may award attorneys' fees and costs to GDU. GDU's Post-Hearing Brief contained an extensive chronology of this proceeding and a detailed discussion regarding SJN's participation in this matter. We have reviewed GDU's Brief and agree with the facts as related therein.

Based on our foregoing decisions regarding the issues in this matter, all of which are favorable to GDU, we find that SJN is a "nonprevailing adverse party." SJN did not present any testimony or witnesses or other evidence. SJN relied solely on cross-examination of GDU's witnesses for its entire case. In addition, SJN did not file any post-hearing statement. According to our Rule 25-22.056, Florida Administrative Code, failure to file a post-hearing statement results in the waiver of any positions taken by the party in a matter.

According to Subsection 120.59(6)(e), Florida Statutes, a determination of whether SJN participated in this proceeding for an improper purpose requires a finding that SJN participated "....primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity." We believe that the motivation of a party must be judged by its actions. It is unlikely that we will ever have any other basis on which to make this determination. The fact that SJN filed no direct testimony, no rebuttal testimony, presented no witnesses, and filed no post-hearing brief requires the conclusion that SJN's motivation for its participation in this proceeding was improper. That motivation might have been simply to delay the certification of this territory, to increase the expense of the certification process for GDU, or simply to harass GDU. We cannot identify the exact character of that motivation nor is such identification essential to this determination. Therefore, we find that SJN is a nonprevailing adverse party that has participated in this matter for an improper purpose. We find that GDU is entitled to a reasonable attorney's fee and costs and we hereby reserve jurisdiction to determine the amount of that award in a later proceeding. A later proceeding will be scheduled, for which SJN will be given notice and in which SJN will be afforded an opportunity for a hearing. In that proceeding, we will receive evidence regarding the appropriate amount of the award of attorney's fees and costs to GDU.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the objection of St. Johns North Utility Corp. to the Notice by General Development Utilities, Inc., of its intent to amend its Certificates Nos. 451-W and 396-S in St. Johns County

is hereby dismissed. It is further

ORDERED that each of the specific findings and conclusions of law set forth in the body of this Order are approved in every respect. It is further

ORDERED that General Development Utilities, Inc.'s application for additional territory is hereby granted, as set forth in the body of this Order. It is further

ORDERED that Certificates Nos. 451-W and 396-S, held by General Development Utilities, Inc., 1111 South Bayshore Drive, Miami, Florida 33131, are amended, effective January 3, 1989, the date of our decision, to include the territory described in Attachment A to this Order. It is further

ORDERED that General Development Utilities, Inc.'s rates and charges in its existing territory shall apply to the additional territory granted herein. It is further

ORDERED that St. Johns North Utility Corp. is a nonprevailing adverse party in this proceeding and has participated in this proceeding for an improper purpose, within the meaning of Section 120.59(6), Florida Statutes. Therefore, General Development Utilities, Inc., is awarded a reasonable attorney's fee and costs to be paid by St. Johns Utility Corp. We hereby reserve jurisdiction to address the amount of such award in a later proceeding.

ORDERED that this docket shall remain open until we make a final determination of the amount of reasonable attorney's fees and costs due General Development Utilities, Inc.

By ORDER of the Florida Public Service Commission, this 27th day of JANUARY, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15)

days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT A

GENERAL DEVELOPMENT UTILITIES, INC.

Amendment of Certificates Nos. 451-W and 396-S
St. Johns County, Florida
Julington Creek Development

Service Territory Description

Township 4 South, Range 27 East

Section 26

All of Section 26 lying South of Durbin Creek.

Section 27

All of Section 27 lying South of Durbin Creek;

Less and except the West 1950 feet, more or less, between Durbin Creek and Bishop Estates Road.

Section 28

All of Section 28 lying South of Bishop Estates Road.

Section 34

All of Section 34.

Section 35

All of Section 35 South of Durbin Creek.

Section 36

The South 1/2 of the Southwest 1/4.

Section 49

All of Section 49 lying South of Bishop Estates Road;

Less and except that portion of the South 1/2 of Section 49 lying 150 feet Northerly of Racetrack Road and all that portion lying South of Racetrack Road.

Section 57

All of Section 57 lying Westerly of State Road 13.

Township 5 South, Range 27 East

Section 2

The East 1/2 of the Northwest 1/4 of the Northeast 1/4.

Section 4

The North 1/2 and the North 1/2 of the South 1/2.

Section 5

The Northeast 1/4 of the Southeast 1/4 and the Southeast 1/4 of the Northeast 1/4.

Section 38

All of Section 38 lying Westerly of State Road 13 and Northerly of Mill Creek.

Section 39

All of Section 39 lying Westerly of State Road 13 and Northeasterly of Mill Creek.

Section 42

All of Section 42 lying Westerly of State Road 13.

SS/mf(6484s)