BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 Certificates 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.	DOCKET NO. 940091-WS ORDER NO. PSC-95-0062-FOF-WS ISSUED: January 11, 1995

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER GRANTING SOUTHERN STATES UTILITIES, INC.'S MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

On January 24, 1994, Southern States Utilities, Inc., (SSU or utility) filed an application for transfer of Lakes Utilities, Ltd.'s (Lake Utilities) facilities to SSU. Lake Utilities has two systems. One is the Valencia Terrace Park system in Lake County, and the other is the Spring Gardens system in Citrus County. On January 26, 1994, pursuant to Section 367.071, Florida Statutes, SSU filed a copy of its notice of application.

On February 4, 1994, Mr. Ivan Chastain filed his protest to SSU's transfer request. Mr. Chastain stated that "SSU is well-known for their poor service, poor water quality, and their $200 water bills [sic]." Mr. Chastain, a customer of Valencia Terrace, asked the Commission to deny SSU's transfer request.

On February 17, 1994, on behalf of the Spring Gardens Property Owners Association (GPOA), Mr. Gene Gift, a customer and the

president, filed a letter expressing GPOA's concern that SSU would increase its rates once SSU receives its transfer request.

On February 22, 1994, the City of Fruitland Park (City), filed a protest against SSU's transfer application. Earlier, on November 30, 1989, by Ordinance No. 89-022, the City established a Chapter 180 utility district, which is located within SSU's requested service area. The City has asserted that it has sufficient potable water and can serve its residents better.

On June 13, 1994, SSU filed a Motion to Dismiss the City's Objection and to deem Messers. Chastain's and Gift's letters as correspondence. On June 27, 1994, the City filed a Memorandum in Opposition to SSU's Motion to Dismiss Objection. On July 20, 1994, SSU filed its Reply to the City's Memorandum in Opposition to SSU's Motion to Dismiss.

On November 3, 1994, the City filed an Amended Objection and Request for Hearing. On November 15, 1994, SSU filed a Motion to Strike the City's Amended Objection. On December 14, 1994, this Commission received a facsimile transmittal from Mr. Gift stating that his February 17, 1994, letter was not a protest against SSU's transfer application.

MESSERS. CHASTAIN'S AND GIFT'S LETTERS

As stated in the case background, on January 24, 1994, SSU filed an application to transfer the Lake Utilities' facilities to SSU. On January 31, 1994, pursuant to Section 367.045, Florida Statutes, and Rule 25-30.037, Florida Administrative Code, SSU complied with all noticing provisions. On February 4 and 17, 1994, Messers. Chastain and Gift, respectively, filed letters regarding SSU's transfer application. On June 13, 1994, SSU filed a Motion to Dismiss the City's Objection and to deem Messers. Chastain's and Gift's letters as correspondence not requiring a Section 120.57 hearing. Messers. Chastain and Gift did not file responses to the utility's motion. Further, Mr. Chastain informed the Commission Staff that he did not intend to pursue this matter or offer testimony if this matter proceeded to a hearing. On December 14, 1994, Mr. Gift sent this Commission a facsimile transmittal stating that his February 17, 1994, letter was not a protest against SSU's transfer application. Therefore, based on Mr. Chastain's statements and Mr. Gift's fax, we found that the issue pertaining to their correspondence was moot.

FRUITLAND PARK'S AMENDED OBJECTION

On February 22, 1994, the City filed an objection to SSU's transfer request and requested a hearing. Specifically, the City's objection appeared to be related only to the Valencia Terrace system in Lake County. On June 13, 1994, SSU filed a Motion to Dismiss the City's Objection. On June 27, 1994, the City filed a Memorandum in Opposition to SSU's Motion to Dismiss Objection. On July 20, 1994, SSU filed a Reply to the City's Memorandum in Opposition to SSU's Motion to Dismiss Objections. On November 3, 1994, the City filed an Amended Objection and Request for Hearing. On November 15, 1994, SSU filed a Motion to Strike the City's Amended Objection.

In its Motion to Strike, SSU asserted that: 1) the City's amended objection was not timely, pursuant to Rules 25-22.036(8) and 25-22.037(2), Florida Administrative Code; 2) the City did not seek nor receive permission from the Prehearing Officer, pursuant to Rule 25-22.036(8); 3) the City's original and amended objections lacked merit because the City lacked standing; and 4) the City's amended objection contained numerous legal and factual allegations, which were totally without merit.

We will address the City's standing in more detail later in this Order. With respect to the timeliness of the City's amended objection, Rule 25-22.036(8), Florida Administrative Code, states that:

> A petition, application or complaint may be amended prior to the filing of a responsive pleading or the designation of a presiding officer by filing or serving an amended initial pleading in the manner prescribed for filing and serving an original petition, application, or complaint. The petitioner, complainant, or applicant may amend its initial pleading after the designation of the presiding officer only upon order of the presiding officer.

Technically, SSU's Motion to Dismiss was a responsive pleading. Accordingly, pursuant to Rule 25-22.036, Florida Administrative Code, the City's amended objection was not timely and the City should have sought the Prehearing Officer's approval before filing its amended objection. However, we have accepted amended objections in the past and have also accepted other pleadings which our rules do not contemplate, for example, SSU's Reply to the City's Memorandum in Opposition.

We believe that SSU will not be prejudiced by our consideration of the City's Amended Objection. We also find that

a complete analysis of all of the pleadings will give us a better overview and insight in making our final decision.

SSU'S MOTION TO DISMISS THE CITY'S OBJECTION

In its objection, the City states that the area affected by the transfer request is currently within its Chapter 180 utility district and that it is in the public's best interest to disallow a transfer to SSU. Further, the City states that it currently has the capacity to handle the connections to the Lake Utilities system.

In its Motion to Dismiss, SSU makes numerous arguments. First, SSU asserts that the City does not meet the two-pronged test set forth in Agrico, in that the City has not demonstrated that it will suffer an injury in fact of sufficient immediacy to entitle it to a hearing, nor has it demonstrated that the injury is within the zone of interests which this proceeding is designed to protect. Second, SSU asserts that a municipality must demonstrate that the interests it seeks to protect are its own, and not the general interests of its citizens. City of Panama City v. Board of Trustees, 418 So.2d 1132 (Fla. 1st DCA 1988) and Battaglia Fruit Co. v. City of Maitland, 530 So.2d 940 (Fla. 5th DCA 1988). Third, SSU asserts that Fruitland Park is not a Lake Utilities customer. Fourth, SSU asserts that, in its objection, the City does not dispute SSU's financial ability, technical ability or SSU's ability to fulfill the transferor's obligations.

In its Memorandum in Opposition to SSU's Motion to Dismiss Objections, the City alleges that: 1) Lake Utilities' total certificated area falls within its Chapter 180 utility district; 2) Section 367.045, Florida Statutes, requires that a hearing be held upon the objection of a governmental authority, and that Section 367.045 does not require that the governing body be substantially affected; 3) Agrico does not deal with governmental entities, and 4) as a municipality whose citizens are served by the municipality, and which has established a Chapter 180 utility district surrounding the service area, the City is an affected municipality which is accorded notice and the right to appear.

In its Reply to the City's Memorandum in Opposition to SSU's Motion to Dismiss Objections, SSU states that Section 367.045, Florida Statutes, does not give the City an unconditional right to an administrative hearing; and furthermore, if the Legislature had intended to confer unconditional standing on municipalities, they would not have required a conflict with municipalities' comprehensive plans. SSU cites to Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452 (Fla. 1992), which holds that

in interpreting statutes, the entire statute must be read as a whole and that a court should avoid any interpretation that renders part of the statute meaningless.

In its amended objection, the City reiterates its earlier position that it has the capacity to provide water and wastewater services to the Valencia Terrace Park area and that, as a municipality, it has statutory standing pursuant to Section 367.045(4), Florida Statutes. The City also states that as a municipality presently providing water and wastewater services to the customers of Valencia Terrace, it has a substantial interest in the outcome of this docket. The City further maintains that since it can provide the same quality at lower rates, it is the best provider of services for the Valencia Terrace Park customers.

When addressing a motion to dismiss, we always examine, assuming that all allegations in the objection are facially valid, whether the objection states a cause of action for which relief may be granted. In this instance, we find that, even assuming that all allegations in the City's objection are facially valid, we lack jurisdiction to remedy a Chapter 180 utility dispute; accordingly, we cannot grant the City's requested relief. Whether we choose to interpret Section 356.045, Florida Statutes, as allowing a governmental authority an automatic right to a hearing or find it necessary to apply the Agrico test in determining whether the City has standing, we find it appropriate to grant SSU's Motion to Dismiss. Set forth below is our analysis regarding our decision.

The Application of Agrico to Municipalities

The City is correct that Agrico specifically involves a protest in a Section 403 permit proceeding. However, the test by which an administrative agency determines substantial interest has been set forth in Agrico, and that test does not specifically exclude governmental authorities. Therefore, the argument that Agrico should apply has some merit. We have used Agrico to determine a municipality's standing in other proceedings. In Order No. PSC-93-0363-FOF-WS, issued March 9, 1993, Docket No. 921237-WS, In re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc., we used Agrico to grant a motion to dismiss for the City of Eustis' objection and to deny a motion to dismiss for the City of Mount Dora's objection.

Applying the first prong of the Agrico test to the City, SSU specifically argues that the City will be in the same position, if the transfer takes place, that it currently occupies, despite the creation of its Chapter 180 utility district and its status as a utility; therefore, there is no injury in fact. Regarding the

City's Chapter 180 utility district, SSU states the City's reference to its utility district is unclear since Section 180.02(3), Florida Statutes, authorizes wastewater services only. SSU asserts that the City does not own or operate any wastewater facilities. Since the City does not have a wastewater facility, SSU asserts its transfer request cannot affect the City's utility district. SSU states that Lake Utilities received certificates to operate Valencia Terrace in 1974 and its approved territory amendment request in 1981, prior to the City establishing its utility district. Accordingly, SSU asserts that the City fails to meet the immediacy of the injury in fact prong. Addressing the City's argument that it can provide enough potable water to the Valencia Terrace area and service its residents better, SSU cites City of Sunrise v. South Florida Water Management District, 615 So.2d 746 (Fla. 4th DCA 1993), and states that the City's potential loss of economic opportunity does not constitute immediate injury in fact.

We agree with SSU's analysis of the first part of the Agrico test. The City has not adequately shown an injury in fact of sufficient immediacy to entitle it to a hearing. First and foremost, the City is not a SSU customer; instead, it is a municipality which created a subsequent Chapter 180 district encompassing the Lake Utilities service area. Further, the City's argument concerning the utility district appears to lack merit under this scenario because Lake Utilities has always served its own customers, even though the City has established the utility district. Therefore, it is not clear how a proposed transfer will cause immediate injury to the City.

Applying the second prong, zone of protection, of the Agrico two-pronged test to the City, SSU argues that Chapter 367 transfer proceedings do not address the type of economic injury that the City seems to suggest it will suffer from the transfer. Rather, transfer proceedings only address the applicant's financial or technical ability to operate the requested service area. As such, SSU asserts that we lack jurisdiction to remedy the City's potential injury; that is, under Chapter 367, Florida Statutes, we lack jurisdiction to enforce Chapter 180. SSU further argues that the City's utility district has no relevance to its transfer request. We agree that we do not have jurisdiction to remedy any violation of Chapter 180.

In transfer proceedings, we always analyze a utility's financial and technical ability and then make a determination as to whether the proposed transfer will be in the public interest. Without getting into the merits of the case (which is not appropriate when considering a motion to dismiss), we find it

significant that the City has not disputed SSU's technical and financial ability to provide service. Further, Section 367.045, Florida Statutes, does not require us to address or attempt to remedy a Chapter 180 concern. Accordingly, we find that the City has not met the second part of Agrico.

Automatic Statutory Approach

As stated earlier, it is the City's position that governmental authorities do not have to meet the Agrico test. Instead, the City argues that its objection automatically awards it the right to a hearing pursuant to Section 367.045, Florida Statutes. Again, Section 367.045(4), Florida Statutes, states:

> If, within 30 days after the last day that notice was mailed or published by the applicant, whichever is later, the commission receives from the Public Counsel, a governmental authority, or a utility or consumer who would be substantially affected by the requested certification or amendment a written objection requesting a proceeding pursuant to s. 120.57, the commission shall order such proceeding.... (emphasis added)

This argument has some merit. After reading the statute closely, it could be interpreted to mean, by virtue of the placement of the comma, that a governmental authority does not have to show that it is substantially affected to participate in a certificate-type proceeding. But, if that is the case, the City's objection should still be dismissed solely on the basis that Chapter 180 does not supersede Chapter 367. Further, as stated earlier, we agree that we lack jurisdiction to resolve a Chapter 180 dispute.

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. Lake Utilities is a regulated utility with Commission-approved territory. 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.

In consideration of the foregoing, we hereby grant SSU's Motion to Dismiss the City's Objection. This docket shall remain open pending final disposition of the transfer application.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Southern States Utilities, Inc.'s Motion to Strike the City of Fruitland Park's Amended Objection and Request for Hearing is hereby denied. It is further

ORDERED that Southern States Utilities, Inc.'s Motion to Dismiss the City of Fruitland Park's objection against its transfer application is hereby granted. It is further

ORDERED that this docket shall remain open pending final disposition of Southern States Utilities, Inc.'s transfer application.

By ORDER of the Florida Public Service Commission, this 11th day of January, 1995.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

ELS

Chairman J. Terry Deason dissented on the basis that Southern States Utilities, Inc., did not sufficiently demonstrate that the City lacked statutory standing.

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 and/or wastewater 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.