

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: December 22, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Lherisson, Crawford) *JSC*
Division of Accounting and Finance (Bennett, Norris)
Division of Engineering (Watts, King, Knoblauch, Ramos) *TB*

RE: Docket No. 20190168-WS – Application for water and wastewater service in Duval, Baker, and Nassau Counties, by First Coast Regional Utilities, Inc.

AGENDA: 01/05/21 – Regular Agenda – Oral Argument Requested on Issues 2, 3, and 4 - Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On August 27, 2019, pursuant to Sections 367.031 and 367.045, Florida Statutes (F.S.), and Rule 25-30.033, Florida Administrative Code (F.A.C.), First Coast Regional Utilities, Inc. (First Coast or Company) filed with the Florida Public Service Commission (Commission) an application for original certificate of authorization and initial rates and charges for water and wastewater service (Application). In First Coast’s Application, the Company proposes to operate a water and wastewater utility in Duval, Baker, and Nassau Counties with a capacity to serve over 4000 equivalent residential connections (ERCs). The territory First Coast proposes to serve consists of approximately 11,800 acres, of which 301 Capital Partners, LLC¹ either owns or has exclusive

¹ First Coast is a wholly-owned subsidiary of developer 301 Capital Partners, LLC. Developer 301 Capital Partners, LLC states that it “either owns or has exclusive purchase rights to 10,000 contiguous acres of property located in Duval, Nassau, and Baker Counties.” First Coast’s Application p.3.

purchase rights to 10,000 acres of contiguous property and Chemours Company FC, LLC owns 1,800 acres. In its Application, First Coast states that it is a newly formed single purpose entity created for the sole purpose of providing water, wastewater, and irrigation utility services to the proposed service territory. The owner of First Coast is 301 Capital Partners, LLC, the Developer of the proposed service territory.

On December 26, 2019, JEA, previously known as Jacksonville Electric Authority, timely filed an Objection to First Coast's Application.² JEA is a governmental entity created by law. In JEA's Objection, JEA states that it provides both water and wastewater services throughout Duval and Nassau Counties and is a "governmental authority" and "utility" as those terms are used in section 367.045(4), F.S. JEA contends that its substantial interests will be affected by the Commission's determination of First Coast's Application because (a) JEA has exclusive franchise agreements with the City of Jacksonville and Nassau County to provide water and wastewater service, (b) issuance of a certificate of authorization to First Coast would be contrary to the City of Jacksonville's comprehensive plan, and (c) residents within the proposed service area may be precluded from obtaining water and wastewater services of better quality and at lower cost through JEA if the Application is granted. JEA argues that there are many disputed issues of material fact which include but are not limited to: (1) whether First Coast provided appropriate notice as required by the Florida Statutes and Florida Administrative Code; (2) whether First Coast has a franchise agreement with the City of Jacksonville, Nassau, and Baker counties; and (3) whether the issuance of a certificate of authorization to First Coast would violate the City of Jacksonville's comprehensive plan or the planned unit development approved for the proposed service area.

JEA asserts that First Coast has no franchise agreement with the City of Jacksonville, Nassau County, or Baker County that would permit the provision of water and wastewater services described in the Application. JEA argues that the issuance of a certificate of authorization to First Coast would violate JEA's exclusive franchise agreements with the City of Jacksonville and Nassau County to provide water and wastewater service.

On March 4, 2020, First Coast sent an email to Commission staff requesting that this matter be scheduled for hearing to resolve JEA's Objection and move forward with the Application. On March 25, 2020, First Coast filed a motion to strike JEA's Objection to First Coast's Application. An Order Establishing Procedure, Order No. PSC-2020-0112-PCO-WS, was issued on April 17, 2020, setting this matter for hearing. On May 15, 2020, First Coast filed direct testimony. On June 26, 2020, JEA filed intervenor testimony. On July 31, 2020, First Coast filed rebuttal testimony.

On July 17, 2020, First Coast filed an Unopposed Motion to Stay the Proceedings Relating to First Coast's Application,³ for a period of ninety days to allow the parties additional time to conduct discovery and increase the likelihood of settlement of all issues. On July 28, 2020, First Coast's Motion to Stay the Proceedings was granted by Order No. PSC-2020-0270-PCO-WS. The order required that the parties update the Commission on the status of the docket and any settlement negotiations no later than sixty days from the date of the order.

² Document No. 11478-2019.

³ Document No. 03832-2020.

On September 1, 2020, First Coast filed a motion to strike⁴ select provisions of JEA's Objection and a request for oral argument⁵ on its motion to strike. In its motion to strike, First Coast argues that JEA's use of the term "exclusive" in the context of franchise agreements is improper and should be stricken.

On September 8, 2020, JEA filed a response in opposition to First Coast's motion to strike, together with a Motion for Summary Final Order (JEA's Motion).⁶ In opposition to First Coast's motion to strike, JEA argues that First Coast asserts no basis germane to the standard for striking material in pleadings. JEA also argues that First Coast's motion to strike is untimely. With regard to its motion for summary final order, JEA states that at issue is whether the Commission has the authority to grant a certificate of authorization to First Coast for service territory within the municipal boundaries of the City of Jacksonville and within Nassau County. JEA contemporaneously filed a request for oral argument.⁷

On September 15, 2020, First Coast filed a response to JEA's Motion together with a Motion for Partial Summary Final Order (First Coast's Motion).⁸ In its Motion, First Coast contends that the Commission alone has "exclusive jurisdiction and exclusive authority over First Coast's proposed authority, service, and rates." First Coast argues that JEA's Motion limits the Commission's jurisdiction, while First Coast's Motion only further clarifies the Commission's jurisdiction to the full extent granted by the legislature. First Coast contemporaneously filed a request for oral argument.⁹ On September 22, 2020, JEA filed a response in opposition to First Coast's Motion.¹⁰

On September 24, 2020, as required by Commission's Stay Order No. PSC-2020-0270-PCO-WS, First Coast filed a letter advising the Commission that the parties have been unable to resolve the matter and requested that the matter be set for hearing.¹¹ On September 25, 2020, JEA filed a separate update in response to the Commission's July 28, 2020 Stay Order, contending that a settlement appears unlikely.¹² JEA asserts that a week after the Stay Order was issued, the developer filed an application with the City of Jacksonville to amend the Jacksonville Planned Unit Development Ordinance 2010-874-E (PUD Ordinance). In JEA's update, JEA suggests that this case be dismissed or stayed until a court amends the PUD Ordinance or declares it to be unconstitutional.

On October 2, 2020, First Coast filed a response to JEA's update in response to Commission's Stay Order.¹³ In its response, First Coast argues that JEA's update is more than a status report because it asks for the dismissal of First Coast's Application or an indefinite stay pending a court's review.

⁴ Document No. 05538-2020.

⁵ Document No. 05545-2020.

⁶ Document No. 06121-2020.

⁷ Document No. 06122-2020.

⁸ Document No. 07384-2020.

⁹ Document No. 07385-2020.

¹⁰ Document No. 08427-2020.

¹¹ Document No. 09262-2020.

¹² Document No. 09392-2020.

¹³ Document No. 10310-2020.

Docket No. 20190168-WS

Date: December 22, 2020

This recommendation addresses the parties' requests for oral argument, and the appropriate disposition of JEA's Motion for Summary Final Order, First Coast's Motion for Partial Summary Final Order, and First Coast's Motion to Strike. The Commission has jurisdiction over these matters pursuant to Sections 367.011, 367.031, and 367.045, F.S.

Discussion of Issues

Issue 1: Should the parties' request for oral argument be granted?

Recommendation: Yes, oral argument would aid the Commission in understanding and evaluating the issues to be decided. The parties should be allowed ten (10) minutes each for oral argument to address all pending motions. (Lherisson)

Staff Analysis: Rule 25-22.0021(3), F.A.C., specifies that informal participation is not permitted on dispositive motions and participation on such is governed by Rule 25-22.0022, F.A.C. Rule 25-22.0022(7), F.A.C., states that oral argument at an Agenda Conference will only be entertained for dispositive motions, such as a motion for summary final order.

The Commission may grant oral argument if the request: 1) is contained in a separate document; 2) is filed concurrently with the motion on which argument is requested; and 3) states with particularity why oral argument would aid in understanding and evaluating the issues to be decided. Rule 25-22.0022(3), F.A.C., provides that granting a request for oral argument is solely at the Commission's discretion.

On September 1, 2020, First Coast requested oral argument concurrent with its Motion to Strike¹⁴ select provisions of JEA's Objection. First Coast requests oral argument of ten (10) minutes, per side, be permitted.

JEA's Request for Oral Argument on its Motion for Summary Final Order was filed on September 8, 2020, concurrent with that Motion. JEA states that JEA's Motion raises issues of law relating to the Commission's authority to issue a water and wastewater utility certificate of authorization to First Coast where JEA has previously been given exclusive franchises to provide such service by the City of Jacksonville and by Nassau County. JEA requests oral argument of ten (10) minutes, per side, be permitted.

On September 15, 2020, concurrent with the Motion for Partial Summary Final Order, First Coast timely filed a Request for Oral Argument on its Motion. First Coast states that JEA has taken the position that certain franchise agreements characterized as "exclusive" are the determinative authority, while First Coast has taken the position that the Commission has exclusive jurisdiction over its application. First Coast requests oral argument of ten (10) minutes, per side, be permitted.

Staff believes that, due to the complexity of this case, oral argument would be helpful for the Commission to better understand the entirety of the series of events and legal issues in this case. Thus, staff recommends that the Commission 1) allow oral argument on both of the Motions for Summary Final Order and First Coast's Motion to Strike in this case, and 2) grant the parties ten (10) minutes each for oral argument to address all pending motions. Staff believes that 10 minutes for each party is sufficient, given that there is a certain amount of overlap in the issues raised by the parties' various motions and responses.

¹⁴ Document No. 05538-2020.

Issue 2: Should JEA’s Motion for Summary Final Order be granted?

Recommendation: No. Based on staff’s review of JEA’s Motion, it appears that conflicting reasonable inferences may be drawn from the facts giving rise to the territorial dispute. Therefore, JEA’s Motion for Summary Final Order should be denied. (Lherisson)

Staff Analysis:

Standard of Review for Motion for Summary Final Order

Section 120.57(1)(h), F.S., requires that, in order to grant a motion for summary final order, it must be determined from “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.” The Commission has previously stated that “the standard for granting a summary final order is very high.”¹⁵

In general, “a summary judgment should not be granted unless the facts are so crystalized that nothing remains but questions of law,” and “must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought.” *Moore v. Morris (Moore)*, 475 So. 2d 666, 668 (Fla. 1985); see also *City of Clermont, Fla. v. Lake City Util. Servs., Inc.*, 760 So. 2d 1123, 1124 (Fla. 5th DCA 2000), and *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977). If the record “raises even the slightest doubt” that an issue of material fact may exist, a summary final order would not be appropriate. *Albelo v. S. Bell (Albelo)*, 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996). Even if the parties agree as to the facts, “the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts.” *Albelo*, 682 So. 2d at 1129. The Commission has also previously found that “it is premature to decide whether a genuine issue of material fact exists when [a party] has not had the opportunity to complete discovery and file testimony.”¹⁶

In addition, the Commission has acknowledged that the purpose of summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts.¹⁷ The record is reviewed in the light most favorable toward the party against whom the summary judgment is to be entered. The movant carries a heavy burden to present a showing that there is no genuine issue as to any material fact. Subsequently, the burden shifts to party against whom summary judgment is sought to demonstrate the falsity of the showing. If they do not do so, summary judgment is proper and should be affirmed. Even if the facts are not disputed, a

¹⁵ Order No. PSC-11-0244-FOF-GU, issued June 2, 2011, in Docket No. 090539-GU, *In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department*, p. 4.

¹⁶ Order No. PSC-01-1554-FOF-WU, issued July 27, 2001, in Docket No. 991437-WU, *In re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*, p. 2, citing *Brandauer v. Publix Super Markets, Inc.*, 657 So. 2d 932, 933-34 (Fla. 2d DCA 1995).

¹⁷ Order No. PSC-11-0291-PAA-TP, issued on July 6, 2011, in Docket No. 110071-TP, *In re: Emergency Complaint of Express Phone Service, Inc. against Bellsouth Telecommunications, Inc. d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement*, p. 5.

summary judgment is improper if different conclusions or inferences can be drawn from the facts.¹⁸

JEA's Motion for Summary Final Order

On September 8, 2020, JEA filed a response in opposition to First Coast's motion to strike and a Motion for Summary Final Order.¹⁹ JEA requests that the Commission grant JEA's Motion and issue a final order denying First Coast's Application. In JEA's 21-page Motion, JEA also requested that the Commission deny First Coast's motion to strike select provisions of JEA's Objection. JEA lists thirty-one points under the heading "Background and Undisputed Facts," where it discusses the City of Jacksonville Planned Unit Development Ordinance 2010-874-E (PUD Ordinance). Exhibit B of JEA's Motion appears to be an excerpt of the PUD Ordinance titled Zoning Compliance and Minimum PUD Requirement, and a complete copy of the PUD Ordinance is attached to First Coast's Application as Exhibit B on pages 22-56. The PUD Ordinance states "[t]he Applicant shall provide, at its expense, on-site treatment capacity to serve the needs of this Rural Village PUD for potable water, wastewater, and reuse water at levels and to standards acceptable to JEA, to be dedicated to JEA for operation and maintenance or for contract operation."

In paragraph number 16, JEA asserts that the plain language of the PUD Ordinance requires that water and wastewater capacity be built to standards acceptable to JEA and then be dedicated to JEA. However, JEA contends that First Coast, in the rebuttal testimony of Robert Kennelly, takes the position that this language "is different from dedication language" and means simply that "JEA would have the option to bid on a contract for operation of the subject facilities, should it desire to do so."

In paragraphs 23 through 25, JEA discusses its exclusive franchise in the City of Jacksonville. To expand on the position that Florida law gives municipalities authority to provide water and wastewater service, JEA states that:

Section 21.07(1) of the City of Jacksonville Charter provides in part: "This franchise fee [paid by JEA] is in consideration of the administrative costs incurred by the City to coordinate functions and services with JEA, for the exclusive right to serve electric, water and sewer customers, for use by JEA of the public rights-of-way used by it in connection with its electric distribution system and its water and sewer distribution and collection system, and in further consideration of the unique relationship of JEA and the City, in which JEA is a wholly owned public utility, and such other good and valuable consideration that has been agreed to between JEA and the City of Jacksonville."

In paragraphs 26 through 28, JEA asserts that in 2001 Nassau County, while it was a non-jurisdictional county, granted JEA the exclusive authority to provide water and wastewater service to a portion of the County in which the subject development is located. JEA states that

¹⁸ See Trawick's Florida Practice and Procedure, Section 25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (2020).

¹⁹ Document No. 06121-2020.

the franchise right was granted to JEA in the Nassau County/JEA Water and Wastewater Interlocal Agreement, and JEA paid Nassau County \$1.5 million in addition to other valuable consideration for the County's consent to the Agreement. Additionally, in paragraph 31, JEA asserts that it is not on its own attempting to decide what utilities operate in the proposed service area, because the "City of Jacksonville and Nassau County have already decided that JEA is to be the exclusive provider."

JEA argues that because it has an existing franchise and the ability to serve, JEA's rights cannot be taken away by the Commission and given to First Coast. In support of this claim JEA referenced the case *City of Mount Dora v. JJ's Mobile Homes, Inc.*, 579 So. 2d 219, 225 (Fla. 5th DCA 1991), which held when each of two public service utility entities have a legal basis for the claim of a right to provide similar services in the same territory, the "entity with the earliest acquired (prior) legal right has the exclusive legal right to provide service in that territory without interference from the entity with the later acquired (subsequent) claim of right."

JEA argues that the controlling law is that "the entity, whether governmental or private, which first acquired the legal right to provide water service to the subject area and which has the ability to do so is the entity with the exclusive legal right to do so." JEA supports this claim by citing the case *Lake Utility Services, Inc. v. City of Clermont*, 727 So. 2d 984, 987 (Fla. 5th DCA 1999), which held although the city acquired its right to provide water service to subject area through an ordinance before the private (in this instance, a regulated investor-owned) utility service acquired its right through the Commission, the city's failure to exercise its concomitant duty to provide the services promptly and efficiently resulted in waiver of right to do so.

JEA contends that the Commission has subject matter jurisdiction over utility systems that transverse county boundaries. However, JEA claims that the Commission's subject matter jurisdiction over the Application confers no authority on the Commission to "take" JEA's franchise rights in the City of Jacksonville and Nassau County. JEA asserts that Section 367.171(7), F.S., confers no authority on the Commission to "disturb" existing franchise rights and the Commission has "no authority to award First Coast the franchises currently held by JEA in the City of Jacksonville and Nassau County given that JEA has the immediate ability to serve." JEA claims that with regard to water utility franchises the policy of first in time is first in right applies. JEA argues that at issue in its Motion is whether the Commission has the authority to grant First Coast's Application for authority to serve "territory within the municipal boundaries of the City of Jacksonville and within Nassau County, given JEA's exclusive franchises in those areas and given JEA's immediate ability to serve the development in accordance with the PUD Ordinance." JEA asserts that there are no disputed issues of material fact on this issue.

First Coast's Response in Opposition to JEA's Motion

In its response to JEA's Motion for Summary Final Order, First Coast argues that JEA failed to establish the threshold burden, the requisite lack of factual disputes, for the adjudication of its summary motion. First Coast asserts that JEA's Motion is "heavily dependent on facts," contrary to First Coast's Motion which is "not dependent upon the resolution of any question of fact." First Coast argues that JEA's Motion limits the Commission's jurisdiction. First Coast asserts that the Commission has jurisdiction in this case, and that even if the Commission granted First

Coast's Motion the case would not end nor would it deprive JEA of "its day in court" regarding the merits of the application. First Coast asserts that the *JJ's Mobile Homes* and *Lake City Utility Services* cases referenced above, should not be interpreted how JEA interprets the cases in its motion. First Coast states:

JEA's reading of *JJ's [Mobile Homes]* and *Lake [City] Utility Services* in actuality turns those cases on their head, to effectively proffer that these decisions not only favor municipal utilities over private [footnote removed], but also to declare that the PSC is somehow compelled to deny the application of First Coast, so JEA will never have to be bothered by proving that it meets the standards of *JJ's [Mobile Homes]* and *Lake [City] Utility Services*, since it will have extinguished at the PSC the only viable alternative, First Coast. Neither *JJ's [Mobile Homes]* nor *Lake [City] Utility Services* can be fairly read to restrict the PSC's exclusive jurisdiction nor to support denial of First Coast's application if all other criteria for certification are met.

First Coast argues that neither the City of Jacksonville nor JEA can restrict the exclusivity of the Commission's jurisdiction. First Coast also argues that none of JEA's arguments should force the Commission to act summarily to dismiss the Application nor to limit the Commission's jurisdiction.

First Coast also asserts that JEA fails to persuasively address how its franchise is superior to the Commission's exclusive authority over the territory, rates, and service to be provided by First Coast pursuant to Section 367.011, F.S.

Staff Recommendation

A. Commission Jurisdiction

Section 367.011(1), F.S., provides that the Commission has exclusive jurisdiction over each investor-owned water and wastewater utility with respect to the utility's authority, service and rates.²⁰ Section 367.011(4), F.S., provides that Chapter 367 supersedes all other laws on the same subject, and that subsequent inconsistent laws supersede Chapter 367 only to the extent that they do so by express reference. Section 367.022(2), F.S., provides an exemption from regulation by the Commission for water systems owned, operated, managed or controlled by governmental authorities. The courts have repeatedly interpreted the Commission's regulatory jurisdiction over investor-owned utilities as broad, exclusive and preemptive. See, for example, *Hill Top Developers v. Holiday Pines Service Corp.*, 478 So. 2d 368, 371 (Fla. 2d DCA 1985) (power and authority of the Public Service Commission is preemptive); and *Florida Power Corp. v. Seminole County*, 570 So. 2d 105, 107 (Fla. 1991) ("While the authority given to cities and counties in Florida is broad, both the constitution and statutes recognize that cities and counties have no authority to act in areas that the legislature has pre-empted."). The Commission similarly has interpreted its jurisdiction this way in 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*

²⁰ See also Section 367.171, F.S., which provides that the Commission regulates some, but not all, counties in Florida.

original certificate in Brevard, Orange, and Osceola Counties, where the Commission found that its jurisdiction pursuant to Section 367.011, F.S., preempted the local governments' claim to control the service area and certification process of a investor-owned water and wastewater utility.

It appears that First Coast and JEA both agree that Chapter 367, F.S., provides the Commission jurisdiction over the certification of utilities and over utility systems that transverse county boundaries. However, JEA states that the Commission's subject matter jurisdiction confers no authority on the Commission to take JEA's franchise rights in the City of Jacksonville and Nassau County. In JEA's Motion, JEA does not address Section 367.045(5)(b), F.S., but Commission staff believes that it is worth noting that Section 367.045(5)(b) provides that "the Commission shall consider, *but is not bound by*, the local comprehensive plan of the county or municipality." (Emphasis added.) *City of Oviedo v. Clark*, 699 So. 2d 316, 318 (Fla. 1st DCA 1997) (Holding "that the PSC correctly applied the requirements of section 367.045(5)(b). The plain language of the statute only requires the PSC to consider the comprehensive plan. The PSC is expressly granted discretion in the decision of whether to defer to the plan."). Based on the provisions of Chapter 367, F.S., court decisions, and prior Commission orders, staff believes that the Commission has exclusive preemptive jurisdiction over the certification of investor-owned water and wastewater utilities.

B. Staff Analysis and Conclusion

In this docket, JEA filed an objection to First Coast's Application claiming that JEA has the exclusive franchise right and ability to provide water service to the subject area. JEA alleges that the Commission has no authority to subsequently grant First Coast the right to serve the subject area.

In *City of Mount Dora v. JJ's Mobile Homes, Inc.*, 579 So.2d 219, 225 (Fla. 5th DCA 1991), the Fifth District Court of Appeals declared and adjudicated:

In Florida the basis for the right of both governmental and private entities to provide utility services to the public is statutory and the franchise right of each is equal and neither entity is, per se, superior or inferior to the other. A franchise granted to an entity, either governmental or private, authorized by law to provide utility service to the public, may be exclusive as to both type of service and territory. See, *St. Joe Natural Co. v. City of Ward Ridge*, 265 So.2d 714 (Fla. 1st DCA 1972), cert. denied, 272 So.2d 817 (Fla.1973).

Pursuant to Section 180.06(3), F.S., municipalities are authorized to provide water for domestic, municipal or industrial uses. Pursuant to Section 180.02(2), F.S., municipalities may extend their corporate powers outside of their corporate limits as is desirable or necessary for the promotion of the public health, safety and welfare or for the accomplishment of the purposes of Chapter 180. Once a municipality proposes to exercise its powers as provided for in Chapter 180, it shall pass a resolution or ordinance designating the utility to be extended and its purpose, the proposed territory, the mortgage revenue certificates or debentures deemed necessary, if any, the cost thereof, and any other relevant provisions. Section 180.03(2), F.S., requires that an objection to any resolution or ordinance must be filed in writing with the municipality's governing body and

a hearing held within 30 days after its passage. Section 180.04, F.S., sets forth the requirements for passing an ordinance or resolution pertaining to the construction of a utility or an extension thereof.

A franchise constitutes a private property right. *West Coast Disposal Service, Inc. v. Smith*, 143 So. 2d 352 (Fla. 2d DCA 1962). In Florida, the basis for the right of both governmental and investor-owned entities to provide utility services to the public is statutory, and the franchise right of each is equal. *JJ's Mobile Homes, Inc.*, 579 So. 2d at 225. Neither entity is, per se, superior or inferior to the other. *Id.* If the franchisee has the ability to promptly and efficiently meet its duty to provide the service prescribed by the franchise agreement, the franchisee's right can be alienated only by its consent unless full compensation is paid. *West Coast Disposal Service, Inc.*, 143 So. 2d at 354.

When there is a conflict between a utility and a municipality over franchise rights, "the entity, whether governmental or private, which first acquired the legal right to provide water service to the subject area and which has the ability to do so is the entity with the exclusive legal right to do so." *Lake Utility Services, Inc.*, 727 So. 2d at 988. The controlling principle of law is set forth in the Fifth District Court of Appeal of Florida's decision in *JJ's Mobile Homes, Inc.*, 579 So. 2d at 255, as follows:

. . . When each of two public service utility entities, whether governmental or private, have a legal basis for the claim of a right to provide similar services in the same territory and each has the present ability to promptly and efficiently do so, that entity with the earliest acquired (prior) legal right has the exclusive legal right to provide service in that territory without interference from the entity with the later acquired (subsequent) claim of right.

Staff believes that in order for the Commission to determine whether summary final judgment should be granted, there would need to be no genuine issue of material fact regarding: (1) whether JEA acquired the legal right to provide water service to the subject area and has the ability to do so; (2) whether the PUD Ordinance and franchise agreement were authorized by law; (3) whether the PUD Ordinance and franchise agreement obligate JEA to provide water service to the subject area or does it merely reserve the JEA's right to so; (4) if JEA acquired its right to provide water service to the subject area, has JEA failed to exercise its concomitant duty to promptly and efficiently provide those services, which would result in a waiver of the right to do so; and (5) whether any changes or updates to the PUD Ordinance have been made or requested. Although it is not addressed in JEA's Motion, in a JEA subsequent filing, Response in Opposition to First Coast, JEA asserts that the developer filed an application with the City of Jacksonville to amend the City's PUD Ordinance. Staff believes that the outcome of the application to amend the City's PUD Ordinance would also be helpful information for the Commission to consider.

Based on staff's review of JEA's Motion, it appears that some of JEA's points demonstrate that conflicting reasonable inferences may be drawn from the facts. In this case, the extensive pleadings of the parties clearly demonstrate that conflicting reasonable inferences may be drawn from the facts giving rise to the territorial dispute. However, staff does not agree that the mere existence of JEA's franchise automatically precludes the Commission from asserting jurisdiction

and rendering a decision with respect to First Coast's application for a certificate. Such a result is not borne out under the statutes or case law. Having failed to show conclusively there is an absence of any genuine issue of material fact, staff recommends that the Commission deny JEA's Motion.

Issue 3: Should First Coast’s Motion for Partial Summary Final Order be granted?

Recommendation: No. Based on staff’s review of First Coast’s Motion, it appears that conflicting reasonable inferences may be drawn from the facts giving rise to the territorial dispute. Therefore, First Coast’s Motion for Partial Summary Final Order should be denied. (Lherisson)

Staff Analysis:

First Coast’s Motion for Partial Summary Final Order

On September 15, 2020, First Coast filed a response to JEA’s Motion and a Motion for Partial Summary Final Order.²¹ First Coast requests that the Commission grant First Coast’s Motion and find that the Commission alone has “exclusive jurisdiction and exclusive authority over First Coast’s proposed authority, service, and rates, JEA’s local documentation and ordinances to the contrary notwithstanding.” First Coast argues that in JEA’s Motion, JEA failed to establish the threshold burden, the requisite lack of factual disputes, for the adjudication of its summary motion. First Coast asserts that JEA’s Motion is “heavily dependent on facts,” contrary to First Coast’s Motion which is “not dependent upon the resolution of any question of fact.”

First Coast argues that JEA’s Motion limits the Commission’s jurisdiction, while First Coast’s Motion only further clarifies the Commission’s jurisdiction to the full extent granted by the legislature. First Coast believes that JEA’s theory is that the Commission has no jurisdiction to proceed any further in this case. First Coast asserts that the Commission has jurisdiction in this case, and that even if the Commission granted First Coast’s Motion the case would not end nor would it deprive JEA of “its day in court” regarding the merits of the application.

First Coast asserts that the *JJ’s Mobile Homes* and *Lake City Utility Services* cases referenced above should not be interpreted how JEA interprets the cases in its motion. First Coast states:

JEA’s reading of *JJ’s [Mobile Homes]* and *Lake [City] Utility Services* in actuality turns those cases on their head, to effectively proffer that these decisions not only favor municipal utilities over private [footnote removed], but also to declare that the PSC is somehow compelled to deny the application of First Coast, so JEA will never have to be bothered by proving that it meets the standards of *JJ’s [Mobile Homes]* and *Lake [City] Utility Services*, since it will have extinguished at the PSC the only viable alternative, First Coast. Neither *JJ’s [Mobile Homes]* nor *Lake [City] Utility Services* can be fairly read to restrict the PSC’s exclusive jurisdiction nor to support denial of First Coast’s application if all other criteria for certification are met.

First Coast argues that neither the City of Jacksonville nor JEA can restrict the exclusivity of the Commission’s jurisdiction. In its motion First Coast states that “no proclamation in any self-serving franchise agreement, between related parties as here or otherwise . . . can create exclusive jurisdiction where none otherwise existed” First Coast alleges that JEA’s

²¹ Document No. 07384-2020.

arguments would require the Commission to issue an order that is counter to Florida Statutes, while First Coast's arguments would require the Commission to simply exercise the Commission's "exclusive and superior jurisdiction." First Coast argues that none of JEA's arguments should force the Commission to act summarily to dismiss the Application nor to limit the Commission's jurisdiction.

In its Motion, First Coast states that there are disputed issues of material fact which stand in opposition to JEA's Motion. First Coast alleges that a fact in dispute in this case is whether JEA is prepared to serve the proposed service territory. First Coast asserts that since JEA offered an affidavit with the proposition that it was prepared to serve some of the territory that First Coast proposes to be certificated, First Coast has offered an affidavit to the contrary. First Coast argues that JEA is not in a position to provide service to the territory and is unable to do so for an extended timeframe, which does not work for First Coast or the development.

Finally, First Coast argues that its motion, in contrast to JEA's motion, does not request the summary disposition of the entire case, but rather it requests a ruling to the benefit of the parties on a single issue of the Commission's jurisdiction. First Coast claims that JEA's interpretation of franchise agreements, which prohibits the Commission from granting a certificate to a utility, would in fact mean that the Commission's jurisdiction is subservient to all local government action. First Coast asserts that JEA's conclusions are contrary to the Commission's authority.

JEA's Response in Opposition to First Coast's Motion

On September 22, 2020, JEA filed a response in opposition to First Coast's Motion. In JEA's response, JEA argues that the Commission's exclusive jurisdiction does not impact JEA's existing franchises. JEA argues that the franchises of governmental entities are equal to franchises granted by the Commission to investor-owned entities, and first in time between such entities is first in right provided there is an ability to serve. JEA asserts that under the City's PUD Ordinance, there can be no First Coast Regional Utilities serving the development. The PUD Ordinance requires the developer to provide the facilities at its expense and dedicate them to JEA as the provider of water and wastewater service to the development. JEA argues that by filing its Application, First Coast attempts to disregard the PUD Ordinance. JEA asserts that the developer filed an application with the City of Jacksonville to amend the City's PUD Ordinance. JEA, again, requests that the Commission grant JEA's Motion and deny First Coast's Motion and Application.

Staff Recommendation

The Commission's jurisdiction and controlling authority have been discussed in Issue 2 above. Based on staff's review of First Coast's Motion, it appears that First Coast believes its motion should be granted over JEA's Motion because First Coast's Motion is "not nearly as fact-dependent." First Coast's repetitive characterization of "JEA's fact intensive argument" as being misguided does nothing to further First Coast's Motion. As noted above in Issue 2, staff does not agree that the mere existence of JEA's franchise automatically precludes the Commission from asserting jurisdiction and rendering a decision with respect to First Coast's application for a certificate. However, staff believes that First Coast's assertions fail to show that no genuine issue as to any material fact exists and that First Coast is entitled as a matter of law to the entry of a

partial final order. It also appears that some of First Coast's points demonstrate that conflicting reasonable inferences may be drawn from the facts. Staff therefore recommends that First Coast's Motion should be denied.

Issue 4: What is the appropriate disposition of First Coast’s Motion to Strike select provisions of JEA’s Objection to First Coast’s certificate application?

Recommendation: Staff recommends that the Commission deny First Coast’s Motion to Strike select provisions of JEA’s Objection. (Lherisson)

Staff Analysis: Rule 1.140(f), Florida Rules of Civil Procedure, states that a party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time. Although Rule 1.140(f), Florida Rules of Civil Procedure, does not control in administrative proceedings, the Commission has used the rule as guidance when ruling on motions to strike, generally concerning evidentiary questions on testimony filed during the course of an administrative hearing proceeding. *E.g.* Order No. PSC-99-1809-PCO-WS, issued September 20, 1999, in Docket 971220-WS, *In re: Application for transfer of Certificates Nos. 592-W and 509-S from Cypress Lakes Associates, Ltd. to Cypress Lakes Utilities, Inc. in Polk County*. A motion to strike should only be granted if the pleadings are completely irrelevant and have no bearing on the decision. *Bay Colony Office Bldg. Joint Venture v. Wachovia Mortgage Co.*, 342 So. 2d 1005 (Fla. 5th DCA 1977).

In ruling on a party’s motion to strike, there are several important statutory requirements to consider. In administrative proceedings held under Sections 120.569 and 120.57(1), F.S., all parties must be given an opportunity to respond, to present evidence and argument on all issues involved, and to conduct cross-examination and submit rebuttal evidence. Pursuant to Section 120.569(2)(g), F.S., irrelevant, immaterial, or unduly repetitious evidence must be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in Florida courts.

In this docket, JEA filed an Objection to First Coast’s Application on December 26, 2019. On September 1, 2020, First Coast filed a Motion to Strike select provisions of JEA’s Objection and a request for oral argument on the motion to strike. First Coast argues that JEA’s use of the term “exclusive” in the context of franchise agreements is improper and should be stricken. On September 8, 2020, JEA filed a response in opposition to First Coast’s motion to strike and a Motion for Summary Final Order (discussed in Issue 2 above).

First Coast’s Motion to Strike was filed about two hundred and fifty (250) days after JEA filed its Objection. First Coast previously filed a Motion to Strike JEA’s Objection in its entirety on the basis that JEA was not a party of record. However, by Order No. PSC-2020-0112-PCO-WS, the Commission designated JEA as an official party of record.

In the subsequent motion to strike at issue here, First Coast asserted that it was only requesting that certain provisions of JEA’s Objection be stricken. In this case, First Coast’s due process rights have not been violated by JEA’s use of the term “exclusive.” The parties have had ample time to engage in discovery regarding JEA’s assertion that it can enter into an “exclusive” franchise agreement. Staff believes that First Coast is not prejudiced by JEA’s use of the term exclusive. Furthermore, JEA’s use of the term exclusive in its Objection to First Coast’s Application is akin to its stated position in this proceeding, and does not limit First Coast from taking a contrary position, nor does it limit the Commission’s jurisdiction in this matter.

Therefore, staff believes that First Coast's Motion to Strike select provisions of JEA's Objection should be denied. Staff also believes that First Coast's Motion to Strike select provisions of JEA's Objection should be denied as untimely, as it was filed two hundred and fifty (250) days after the JEA filed its Objection. For these reasons, staff recommends that First Coast's Motion to Strike should be denied.

Issue 5: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issues 2, 3, and 4, this docket should remain open and further proceedings should be scheduled to conduct an administrative hearing with respect to First Coast's Application. (Lherisson)

Staff Analysis: If the Commission approves staff's recommendation in Issues 2, 3, and 4, this docket should remain open and further proceedings should be scheduled to conduct an administrative hearing with respect to First Coast's Application.