

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment of Certificate No. 361-S to extend and to delete wastewater service area in Highlands County by Highlands Utilities Corporation.

DOCKET NO. 001660-SU
ORDER NO. PSC-02-1732-FOF-SU
ISSUED: December 9, 2002

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS,
APPROVING SETTLEMENT AGREEMENT, GRANTING AMENDMENT APPLICATION
TO AMEND CERTIFICATE NO. 361-S, AUTHORIZING FILING OF
APPLICATION FOR REFUND, AND CLOSING DOCKET

BY THE COMMISSION:

BACKGROUND

Highlands Utilities Corporation (HUC or utility) is a Class B utility which provides wastewater service to approximately 1,411 customers in Highlands County. The utility's 2001 annual report shows an annual operating revenue of \$579,211 and a net operating income of \$32,798. The utility's service area is within a Water Use Caution Area, as designated by the Southwest Florida Water Management District. There are two main service areas: one in the Sebring area and the other in the Lake Placid area.

In 1995, HUC sued the City of Sebring (Sebring), Florida, over an infringement of its certificated service area. The result of that lawsuit was a settlement agreement establishing exclusive and competitive service areas between the two parties. As a result of the lawsuit, HUC learned that it was serving customers outside of its certificated territory. Therefore, it filed this application

DOCKET NO. 001660-SU

13436 DEC-98

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to amend its certificated service area consistent with the settlement agreement.

Pursuant to Section 367.045, Florida Statutes, the utility applied for an amendment to Wastewater Certificate No. 361-S to add to its certificated territory eight areas presently being served by the utility. On July 26, 2001, the Town of Lake Placid (the "Town" or Lake Placid) timely filed an objection to the utility's territory amendment application. The utility's existing and proposed amended territory lies partially within the incorporated area of Lake Placid.

In its objection, Lake Placid stated that its substantial interests would be affected because it was constructing a wastewater facility, and that it would soon be technically and financially capable of serving territory claimed by HUC. Lake Placid claimed that HUC was not technically and financially able to provide adequate service, and that the residents in the disputed territory might be precluded from obtaining wastewater service at better quality and less cost if the utility's request to amend its certificate was granted.

Pursuant to Order No. PSC-01-2187-PCO-SU, issued November 7, 2001, this matter was scheduled for an administrative hearing to be held August 27 and August 28, 2002.

On April 17, 2002, we received from the utility a motion to abate the hearing process because the utility and Lake Placid had reached a tentative agreement on who should provide wastewater service to certain areas in Highlands County. However, pending a May 6, 2002, meeting, the Town Council had not yet formally approved the matter. Pursuant to Order No. PSC-02-0566-PCO-SU, issued April 25, 2002, we granted the utility's motion for abatement and effectively suspended the need for the scheduled hearing and related filing dates.

On May 29, 2002, HUC filed a Settlement Agreement between it and Lake Placid. That agreement resolved Lake Placid's objection to the utility's application, and the hearing was cancelled.

This Order addresses: 1) whether the utility should be made to show cause why it should not be fined for serving outside its

certificated territory in apparent violation of Section 367.045(2), Florida Statutes; 2) whether the Settlement Agreement between the utility and Lake Placid should be approved; 3) whether HUC's application for amendment of its certificated territory should be approved; and 4) whether the utility's request for a filing fee refund should be granted. We have jurisdiction pursuant to Section 367.045, Florida Statutes.

SHOW CAUSE PROCEEDING

As stated above, in processing its lawsuit against Sebring, the utility discovered that it was serving outside its certificated territory in apparent violation of Section 367.045(2), Florida Statutes. Section 367.161(1), Florida Statutes, authorizes this Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission.

Utilities are charged with the knowledge of our rules and statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, entitled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., this Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's failure to obtain an amended certificate prior to serving additional territory would meet the standard for a "willful violation."

By letter dated January 30, 2001, in reference to the utility serving customers outside its certificated territory, our staff requested the utility to provide a detailed explanation as to why the utility had not amended its certificate prior to serving those customers outside its certificated territory. The utility responded that it thought it was within its certificated territory,

that, at the time it began serving those customers, there were no other wastewater providers in the area to bring to HUC's attention that the properties were not within its certificated service area, and that it was only when it began preparing maps for settling its lawsuit with Sebring that it realized it was serving outside of its service area.

We believe that the initial action of serving the customers outside its territory was inadvertent and does not rise to the level warranting the initiation of a show cause proceeding. Also, it is readily apparent that the utility had a difficult time in determining where it was authorized to serve and which territory it needed to request to be added to its certificate. Each of the uncertificated areas the utility is serving is contiguous or in close proximity to its approved service territory.

Therefore, we will not make the utility show cause at this time. However, the utility is admonished on the need to comply with all the applicable statutes, Commission rules, and Commission orders, and that fines could be imposed for future violations.

SETTLEMENT AGREEMENT

As stated above, Lake Placid initially objected to the utility's territory amendment application. Noting that the utility's existing and proposed amended territory lay partially within its incorporated area Lake Placid stated that its substantial interests would be affected because it was constructing a wastewater facility. Therefore, a hearing was originally scheduled for August 27-28, 2002.

However, on May 29, 2002, HUC filed a Settlement Agreement between it and Lake Placid, and the hearing was cancelled. In the Settlement Agreement, the agreed upon items between the utility and Lake Placid are as follows:

1) HUC will amend its application to delete the following areas:

A. That area north of Lake Clay Drive and East of U.S. Highway 27 (part of the utility's existing territory located within the incorporated municipal limits of the

Town [Lake Placid]). The utility has no customers in this area at the present time. Therefore, there will be no negative effect incurred by existing customers as a result of this deletion.

B. That area west of the Commercial strip which abuts U.S. Highway 27 (part of the proposed territory located within the incorporated municipal limits of the Town [Lake Placid]). This area also has no existing customers served by the utility. Therefore, there will be no negative effect incurred by existing customers as a result of the utility modifying its application to not include this proposed area.

2) When the Town [Lake Placid] has wastewater collection lines to connect Heron's Landing (part of the proposed territory located within the incorporated municipal limits of the Town), the Town may purchase from HUC the lift Station at Heron's Landing and the force main from the lift station to Lake Clay Drive for a price to be negotiated between the parties.

3) HUC will not object to the Town [Lake Placid] installing wastewater lines which are adjacent to or across the wastewater lines of HUC.

We find that it is in the public interest to approve the Settlement Agreement between the utility and Lake Placid. The Settlement Agreement is a reasonable resolution of Lake Placid's protest which benefits all participants in this proceeding by alleviating the time and expense of a hearing in this matter. As noted in the Settlement Agreement, ". . . the parties seek to resolve their dispute without time and expense and uncertainty of litigation." With these deletions and concessions made by the utility, Lake Placid no longer objects to the utility's amended application for amendment of certificated territory.

For the foregoing reasons, we approve the Settlement Agreement, filed May 29, 2002, between HUC and Lake Placid, and acknowledge the withdrawal of Lake Placid's protest.

AMENDMENT APPLICATION

On November 2, 2000, the utility applied for an amendment to its Certificate No. 361-S in Highlands County, Florida, in order to add to its certificated territory eight areas presently being served by the utility. The areas include the Sebring Lakeshore Mall with 185 proposed equivalent residential connections (ERCs), the Lake Country Elementary School with 25 proposed ERCs, the Heron's Landing Apartments with 30 ERCs, the Placid Arms apartments with 26 ERCs, the Watersedge Subdivision, a residential area with 56 proposed ERCs, the Yesteryears Subdivision with 6 ERCs, the Pines of Lake Huntley Condominiums with 14 ERCs, and a four connection commercial area with 4 ERCs. The utility presently serves 297 ERCs of the proposed 346 ERCs. The application is in compliance with the governing statute, Section 367.045, Florida Statutes, and other pertinent statutes and administrative rules concerning applications for amendment of certificate.

This application contained a check in the amount of \$1,000, which at the time of the original application was believed to be the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. However, since the time of the filing the utility has requested a partial refund of the fee due to revised proposed ERC numbers. We will discuss that request later in this Order.

In reference to land ownership, as required by Rule 25-30.036(3)(d), Florida Administrative Code, the applicant has provided evidence that the utility owns the land upon which the existing wastewater treatment plants are located. Furthermore, adequate service territory and system maps and territory descriptions have been provided as prescribed by Rule 25-30.036(3)(e), (f) and (i), Florida Administrative Code. A description of the territory to be amended by the utility is appended to this recommendation as Attachment A. The amended areas include all eight areas originally proposed by the utility. This includes a new version of the commercial area agreed upon with Lake Placid.

In addition, the proposed deleted area due to the Settlement Agreement with Lake Placid is also included in Attachment A. The area to be deleted was legally noticed by the utility on July 25,

2002. Also, the utility has filed an affidavit consistent with Section 367.045(2)(d), Florida Statutes, that it has tariffs and annual reports on file with this Commission.

In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code. The local planning agency was provided notice of the application and did not file a protest to the amendment. The utility states that its wastewater service to the proposed additional area has been and will continue to be consistent with the water and wastewater section of the local comprehensive plan as approved by the Department of Community Affairs (DCA). DCA has reviewed the proposed territory expansion, found it consistent with the Highlands County Comprehensive Plan, and had no objection to the utility's proposed expansion.

Wastewater service is being provided to the existing customers of the proposed amended areas through three of the utility's four wastewater treatment plants. Since the utility is already serving 297 ERCs of the proposed 346 ERCs, our staff has confirmed through the Department of Environmental Protection (DEP) that the daily flows associated with these connections are providing no adverse flow demands that affect the present treatment capability of these facilities. HUC serves these areas through its South Plant with a permitted capacity of 0.060 Million Gallons Per Day (MGD) (presently near capacity with an average daily flow of 0.044 MGD, and is not allowing any more line construction to be added to this facility), the Western Plant with a permitted capacity of 0.200 MGD (present average daily flow of 0.131 MGD), and the Clearview Plant with a permitted capacity of 0.035 MGD (present average daily flow of 0.024 MGD). The fourth plant owned by the utility is the Brunner Plant with a permitted capacity of 0.015 MGD (present average daily flow of 0.006 MGD). Due to its location, the Brunner plant does not receive any flows from the proposed amended areas. These facilities use a secondary treatment, activated sludge process known as extended aeration and employ percolation ponds for effluent disposal. There are presently no plans to upgrade any of the plants to provide reuse.

With respect to financial ability, the utility's 2001 annual report showed a net operating income of \$32,798. The comparative balance sheet showed total assets which include cash, plant, and

other receivables to be \$1,094,013. Considering the current and accrued liabilities of \$853,637, the net assets of this utility are \$240,376. HUC also stated the amendment would have no material impact on its capital structure, since it is already serving the areas.

With respect to technical ability, the application states that the utility has the technical ability to render reasonably safe, sufficient, adequate, and efficient service to the territory. To show that expert personnel are available to provide the technical ability, the utility supplied a list of the four operators employed by the utility, which included DEP certification levels and identification numbers. At the time of the application filing, the utility indicated that the above mentioned facilities have no current outstanding notices of violation issued from the DEP.

However, our staff has learned through a October 28, 2002, conversation with DEP that the utility has not fully complied with an August 16, 2002, warning letter to the utility concerning plant deficiencies. The warning letter addressed concerns at the utility's South Plant. The violations included spilled sludge on the plant grounds, the percolation ponds heavily overgrown with vegetation, and leaks in an air line. In an August 30, 2002, written response, the utility addressed DEP's concerns by indicating that these problems have been, or will soon be corrected. The DEP is currently reviewing the situation, and will be contacting the utility concerning non-compliance with its warning letter. Since there are presently no complaints against this utility of any kind on file at the Commission, and it appears that the utility is cooperating with DEP in this matter, we believe that we should focus on coordinating with the DEP to affirm that compliance is achieved by the utility.

Concerning its system which serves the Lake Placid area, the utility has acknowledged that because of a plant capacity situation requests for service have been denied. These applicants are currently on septic tanks, and are not part of an existing collection system which has already received service availability allocations from the utility. The utility has expressed no plans to expand plant capacity to accommodate those who have been previously denied service. However, it has deleted some territory and agreed to give Lake Placid the right to serve the 30 ERCs in

Hérons Landing when Lake Placid is able to provide such service. As Lake Placid develops its sewer system and goes into the areas that were identified in the Settlement Agreement, then capacity at HUC's Lake Placid area treatment plant may be "freed up" and HUC will be better able to serve within its certificated area. It appears that this application by the utility to amend its certificate is not so much to give HUC new customers in the future, but to recognize the customers that it is currently serving. Moreover, HUC states that it does not intend to expand its service in the Lake Placid area.

Pursuant to Chapter 367.111(1), Florida Statutes, the utility shall provide service to its certificated area within a reasonable time. If we find that the utility has failed to provide service to any reasonably entitled person, we may delete that area not properly serviced by the utility. However, before taking any action to delete territory, we believe the Settlement Agreement should be given time to see if it has the desired effect to enhance service availability for this area. Therefore, we will make no adjustment at this time.

The utility has filed revised tariff sheets incorporating the additional territory into its tariff, and states that there will be no material impact on the current monthly rates. The utility's current monthly service rates were approved by us in an administrative price index proceeding effective September 9, 2002. The utility's last general rate case was in Docket No. 931052-SU, resulting in Order No. PSC-94-1234-FOF-SU issued October 11, 1994. Service availability charges were discontinued by the above-mentioned order. These same rates and charges shall be applied to customers in the new service territory.

Based on the above information, we find that there is a need for service, and that the utility has demonstrated the financial and technical expertise necessary to provide service to these customers. Therefore, pursuant to Section 367.045, Florida Statutes, the utility's application for amendment of Wastewater Certificate No. 361-S, as described in Attachment A, is granted. The utility shall charge the customers in the territory added herein the rates and charges contained in the present tariff until authorized to change by this Commission in a subsequent proceeding. The utility has filed revised tariff sheets incorporating the

additional territory into its tariff and returned its certificate for entry reflecting the additional territory.

FILING FEE REFUND

Pursuant to Rule 25-30.020(2)(b), Florida Administrative Code, the utility submitted a \$1,000 filing fee attached with its amendment application. The application indicated that the extension will serve less than 2,000 ERCs. The appropriate filing fee for an amendment application where the proposed amended area serves from 501 to 2,000 ERCs, is \$1,000.

In a December 4, 2000 letter to the utility, our staff requested that the utility provide a breakdown by customer type. The utility responded by providing an itemized connection listing with a total proposed ERC number of 316. That number has since been revised upward to 346 ERCs. Using this revised number, the appropriate filing fee for an amendment application to serve from 201 to 500 ERCs, is \$500.

Realizing that the filing fee was overpaid, the utility requested in a March 30, 2001 letter, a refund of \$500 of the original \$1,000 submitted with the application. Although the number of potential ERCs affected in the area proposed to be deleted are unknown, it is unlikely the combined number of ERCs would require a higher fee. Therefore, the utility shall be allowed to submit an Application for Refund to the State of Florida, Office of the Comptroller, requesting a refund of \$500.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Certificate No. 361-S, held by Highlands Utilities Corporation, is hereby amended to include and delete the territory described in Attachment A of this Order, which by reference is incorporated herein. It is further

ORDERED that no show cause proceeding will be initiated, but Highlands Utilities Corporation is admonished on the need to comply with all applicable statutes, Commission rules, and Commission orders, and that fines could be imposed for future violations. It is further

ORDER NO. PSC-02-1732-FOF-SU
DOCKET NO. 001660-SU
PAGE 11

ORDERED that the Settlement Agreement entered into between Highlands Utilities Corporation and the Town of Lake Placid is approved. It is further

ORDERED that Highlands Utilities Corporation shall charge the customers in the territory added herein the rates and charges approved in its tariff until authorized to change by this Commission in a subsequent proceeding. It is further

ORDERED that Highlands Utilities Corporation shall be allowed to submit an Application for Refund to the State of Florida, Office of the Comptroller, requesting a refund of \$500. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 9th day of December, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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 the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 the Commission Clerk and Administrative Services 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.

HIGHLANDS UTILITIES CORPORATION
ADDITIONAL WASTEWATER SERVICE AREA

TERRITORY DESCRIPTION

HIGHLANDS COUNTY

Section 26, Township 34 South, Range 28 East
(Lakeshore Mall Parcel)

All of Lakeshore Mall Subdivision described as: That portion of the Southeast 1/4 of Section 26, Township 34 South, Range 28 East, lying west of the right of way U.S. Highway 27 (State Road 25)

Less: The Southerly 440 feet of the Southeast 1/4 of Section 26, Township 34 South, Range 28 East

Less: The North 410.35 feet of the South 850.74 feet of the East 498.23 of the Southeast 1/4 of Section 26, Township 34 South, Range 28 East, lying westerly of the right of way of U.S. Highway 27 (State Road 25)

Less: The South 215 feet of the of the North 410 feet in the Northeast 1/4 of the Southeast 1/4 of the Southeast 1/4 of Section 26, Township 34 South, Range 28 East, lying westerly of the right of way of U.S. Highway 27 (State Road 25)

Less: The North 195 feet in the North 1/2 of the Northeast 1/4 of the Southeast 1/4 of the Southeast 1/4 of Section 26, Township 34 South, Range 28 East, lying westerly of the right of way of U.S. Highway 27 (State Road 25)

Section 9, Township 37 South, Range 30 East
(Highlands County School Board Parcel)

The portion lying northerly of the County Road 29 Right of Way of the East 650 feet of the South 1247 feet of the East 1485.7 feet of the South 1875 feet of the West 1/2 of Section 9, Township 37 South, Range 30 East.

Section 6, Township 37 South, Range 30 East

(Placid Arms Parcel)

The East 734.42 feet of the South 1/2 of the South 1/2 of the Southwest 1/4 of the Northeast 1/4 of Section 6, Township 37 South, Range 30 East, less 25 feet for right of way on the South side.

(Watersedge and Roberts Grove Parcel)

That portion of the Watersedge Subdivision which lies in the Northeast 1/4 of the Northeast 1/4 of Section 6, Township 37 South, Range 30 East, more particularly described as follows: The North 860 feet of the Northeast 1/4 of the Northeast 1/4 of Section 6, Township 37 South, Range 30 East, all East of Lake Saddlebags. And the East 1/2 of the East 1/2 of the Northeast 1/4 of the Northwest 1/4 of Section 6, Township 37 South, Range 30 East.

Section 31, Township 36 South, Range 30 East

(Watersedge, Yesteryears, The Pines of Lake Huntley Condo)

The South 2,050 feet of the East 1/2 of the East 1/2 all lying South of County Road 621 of Section 31, Township 36 South, Range 30 East.

(Heron's Landing Parcel)

The West 640 feet of the South 420 feet of the Southeast 1/4 of the Northwest 1/4 of Section 31, Township 36 South, Range 30 East; AND The west 640 feet of the North 130 feet of the Northeast 1/4 of the Southwest 1/4 of Section 31, Township 36 South, Range 30 East
Less: Road right of ways on the north and west sides
Less: The North 340 feet of the South 385 feet of the East 430 feet of the West 455 feet of the Southeast 1/4 of the Northwest 1/4 of Section 31, Township 36 South, Range 30 East.

Section 32, Township 36 South, Range 30 East

(Yesteryears Parcel)

The South 1,150 feet of the West 300 feet of the Southwest 1/4 of Section 31, Township 36 South, Range 30 East, all North of Lake Huntley.

ORDER NO. PSC-02-1732-FOF-SU

DOCKET NO. 001660-SU

PAGE 15

DELETED WASTEWATER SERVICE AREA

TERRITORY DESCRIPTION

HIGHLANDS COUNTY

Section 31, Township 36 South, Range 30 East

The West 1/2 of the East 1/2 which lies north of Lake Clay Drive in Township 36 South, Range 30 East, Section 31.