BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate increase in Lee County by HARBOR UTILITIES COMPANY, INC.	)	DOCKET NO. 921261-WS ORDER NO. PSC-97-0514-FOF-WS ISSUED: May 5, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
JOE GARCIA

ORDER ACKNOWLEDGING VOLUNTARY DISMISSAL OF PROTEST, VACATING A PART OF ORDER NO. PSC-95-0884-FOF-WS, AND CLOSING DOCKET

BY THE COMMISSION:

BACKGROUND

Harbor Utilities Company, Inc., (Harbor or utility) is a Class C utility located in Lee County. It was certificated in 1975. At the time of its last rate case in 1993, the utility served 644 water customers and 439 wastewater customers. The utility's 1993 annual report indicated that it received gross revenues of $108,309 and $50,430 from its water and wastewater systems, respectively.

On June 14, 1993, Harbor filed an application for approval of interim and permanent rate increases pursuant to Sections 367.081 and 367.082, Florida Statutes. This docket was opened to address Harbor's application.

By Order No. PSC-93-1450-FOF-WS, issued October 5, 1993, we granted Harbor interim rates designed to generate annual water revenues of $135,235 and wastewater revenues of $98,826. Those revenues exceeded test year water revenues by $27,072, or 25.03 percent, and test year wastewater revenues by $48,361, or 95.83 percent. The interim rates were secured by a letter of credit in the amount of $42,000, pursuant to the Order.

By PAA Order No. PSC-94-0075-FOF-WS, issued January 21, 1994, we denied Harbor's request for an increase in final water and wastewater rates. On February 11, 1994, Harbor timely filed a protest to that Order. An administrative hearing was scheduled for September 21-23, 1994.

On September 12, 1994, Harbor filed a Notice of Voluntary Dismissal of Rate Case Application. Along with the notice, Harbor filed revised tariff sheets reflecting the rates that were in effect prior to the rate case. As a result, on September 13, 1994, the hearing was canceled. In the notice, Harbor stated that the process of calculating the interim rates refund due to its customers was already in process. Accordingly, we issued Order No. PSC-94-1316-FOF-WS on October 26, 1994, acknowledging Harbor's voluntary dismissal and requiring the refund of interim rates. In that Order, we stated:

> The utility shall refund all interim rates collected. The refund shall be made with interest in accordance with Rule 25-30.360, Florida Administrative Code. The utility shall file refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. Pursuant to Rule 25-30.360(8), Florida Administrative Code, the utility shall treat any unclaimed refunds as contributions in aid of construction.

On October 4, 1994, Harbor filed a Notice of Refund. The notice indicated that the previously Commission-approved rates would become effective again and the customers would receive a credit on their bills reflecting the rescission of interim rates. Harbor failed to submit the computation of refunds, a proposed refund plan, or the required refund reports, and the noticed refund never occurred. Upon further investigation, our staff discovered that the letter of credit had expired on September 30, 1994.

On October 21, 1994, James J. Ryan, president of Harbor, filed a notice of abandonment with this Commission and the Florida Department of Environmental Protection (FDEP). Mr. Ryan stated that the utility did not have the required financial resources to bring the facility into compliance with FDEP standards. Mr. Ryan stated that the utility's efforts to obtain meaningful rate relief through this Commission had been unsuccessful, as had its efforts to secure the necessary funds by means of a municipal services benefit unit. By Order No. PSC-95-1588-FOF-WS, issued December 22, 1994, in Docket No. 951178-WS, we acknowledged Harbor's abandonment.

On December 22, 1994, the Circuit Court for Lee County appointed Bonita Springs Utilities, Inc., (BSU) receiver for Harbor. On March 13, 1995, we issued Order No. PSC-95-0346-FOF-WS, acknowledging BSU's appointment. In that Order, we directed BSU, as receiver for the utility, to make the refunds required in Order No. PSC-94-1316-FOF-WS.

On March 3, 1995, upon instruction from this Commission, Capital City Bank issued a personal money order in the amount of $43,521.20 to BSU, discharging the letter of credit. On April 28, 1995, BSU filed an Interim Rate Refund Plan with us. The total amount subject to refund plus interest was $58,466.49. On July 19, 1995, we issued PAA Order No. PSC-95-0884-FOF-WS, in which we approved the refund plan proposed by BSU in the amount secured by the letter of credit and directed BSU, as receiver, to credit Harbor's contributions-in-aid-of-construction (CIAC) accounts in the unsecured amount. On July 19, 1995, Albert DeHavens, on behalf of the Imperial Harbor Civil Rights Unit (IHCRU), filed a protest of Order No. PSC-95-0884-FOF-WS, taking issue with our decision regarding the unsecured portion of the refund we had ordered. The IHCRU consists of Imperial Harbor residents who were Harbor customers. An administrative hearing was scheduled for August 13-14, 1996. By Order No. PSC-95-1576-FOF-WS, issued December 20, 1995, we denied Harbor's October 9, 1995, motion to dismiss the protest.

On July 3, 1995, BSU filed a Petition for Recognition of the Transfer of the Facilities of Harbor to BSU. Docket No. 950758-WS was opened to address the transfer application. On August 9, 1995, BSU filed a revised Application for Expedited Transfer. On August 21, 1995, several Harbor customers filed objections to the transfer.

On May 17, 1996, with BSU's transfer application still pending before this Commission, the Circuit Court issued an Order Discharging Receivership. Finding the receivership objectives fulfilled, the Court ordered that Harbor's assets shall be the "sole, absolute and unencumbered property" of BSU and that Harbor customers shall be the "sole and absolute customers" of BSU. Further, the Court ordered that Harbor customers shall be charged the "approved final Special Service Charges," in addition to charges for utility services applicable to all BSU customers. The Court conditioned its order on our approval of the transfer in an acceptable manner.

Following an administrative hearing on September 30, 1996, we issued Order No. PSC-97-0283-FOF-WS on March 13, 1997, in Docket No. 950758-WS, approving the transfer of the former Harbor assets to BSU and canceling Harbor Certificates Nos. 272-W and 215-S. On February 20, 1997, following our decision on the transfer to BSU, Barbara J. Fagan, who succeeded Mr. DeHavens upon his death as spokesperson for the IHCRU, advised our staff by letter that the IHCRU did not wish to continue with its protest of Order No. PSC-95-0884-FOF-WS.

PROTEST DISMISSAL

As we have noted, the IHCRU filed a protest of PAA Order No. PSC-95-0884-FOF-WS on July 19, 1995. The IHCRU took issue with our decision therein to impute the unsecured amount of the interim rate refund we had ordered in Order No. PSC-94-1316-FOF-WS to Harbor's CIAC accounts, rather than to require BSU to make that part of the refund to the Harbor customers through its own funds. As we have also noted, on February 20, 1997, the IHCRU advised our staff by letter that it did not wish to continue with its protest, in effect, voluntarily dismissing the protest. Therefore, we find it appropriate to acknowledge the IHCRU's dismissal of its protest of Order No. PSC-95-0884-FOF-WS. Thus, we make Order No. PSC-95-0884-FOF-WS final and effective April 14, 1997.

UNSECURED REFUNDS

As an initial matter, we declare that we retain subject matter jurisdiction of the IHCRU protest following the transfer of the Harbor assets to BSU pursuant to Order No. PSC-97-0283-FOF-WS. In Charlotte County v. General Development Utilities, Inc., 653 So.2d 1081, rhg. den.,(Fla. 1st DCA 1995), the court held that we had jurisdiction to resolve a question of alleged overcharges that arose before jurisdiction over a facility of the utility passed to the county by means of an eminent domain proceeding. In this case, our decision that precipitated the protest likewise occurred before our prospective jurisdiction over BSU as receiver for Harbor ceased with our approval of the transfer on February 18, 1997.

In acknowledging the court-appointment of BSU as receiver for Harbor in Order No. PSC-95-0346-FOF-WS, we directed BSU, as receiver, to go forward with the refund of interim rates that we had prescribed in Order No. PSC-94-1316-FOF-WS. In its April 28, 1995, refund plan, BSU proposed to refund to the Harbor customers by means of credits only the amount of $43,521.20, the amount it received on discharge of Harbor's letter of credit. That represented approximately 74 percent of the total amount of $58,466.49 refundable to the Harbor customers. We approved the plan in Order No. PSC-95-0884-FOF-WS and directed that BSU, as receiver for Harbor, credit Harbor's CIAC accounts with the amount that was unsecured, $14,945.20.

In support of its plan, BSU relied on the following provision in the court's order appointing it receiver:

> The Receiver and its agents and employees are hereby held harmless and not legally responsible for any or all claims, liability, demands, damages, expenses, fees, fines,

> penalties, suits, proceedings, actions and fees, including attorney fees, that might have arisen or may arise out of (or be the result of) the past design, construction, operation, and maintenance of the Harbor Utilities Company, Inc. System.

We concluded that the unsecured amount of the refund was a liability of the utility incurred prior to the receivership, and one for which BSU itself could not be held responsible through the application of its own funds. We found, moreover, that the utility's revenue streams were inadequate to cover the refund shortfall. The Court only required BSU to operate the utility as its receiver with the revenues collected from the utility's customers. Thereupon, we ordered that BSU shall not be required to refund the unsecured amount from its own resources, but that it shall impute that amount, $14,945.20 plus interest accruing since April 25, 1995, to the utility's CIAC accounts. The effect of this was to benefit the customers by reducing the utility's rate bases.

The IHCRU filed a protest of our decision, asserting that we had inappropriately deprived the Harbor customers of the full measure of the interim rates refund. Litigation of the protest, however, was placed in abeyance while we addressed BSU's application for transfer approval in Docket No. 950758-WS.

With the transfer of Harbor's assets to BSU, the CIAC imputation directive in Order No. PSC-95-0884-FOF-WS no longer is of any benefit to the former Harbor customers. BSU, as a nonregulated utility, can be expected to record the assets of Harbor on its books using generally accepted accounting practices at the actual cost of acquisition. The rates of BSU, to which the former Harbor customers are now subject, are not set using the same cost of service methodology that we apply.

We have considered directing BSU to credit members' equity in the amount of the refundable, unsecured interim rates collected. There are no funds available, however, to assign to BSU and to use to credit the individual members' equity accounts. If BSU were a regulated entity, we could create a regulatory liability by imputing the amount in question to those accounts, but BSU is not a regulated entity for which this type of accounting treatment is permissible. Thus, we conclude that we are unable to make a disposition of these funds.

The money in question was collected by Harbor and presumably applied in the interests of the utility or its owner. It was never in BSU's possession or under its control. We observe that the former Harbor customers could consider bringing a lawsuit against

either Harbor or Mr. Ryan, or both, if they wish to obtain the unsecured amount of the refundable rates. In State of Florida Department of Environmental Protection v. Harbor Utilities Co., Inc., 684 So.2d 301 (2d DCA 1996), the court reversed the trial court's order dismissing Mr. Ryan as an individual in an FDEP enforcement action brought against both the utility and Mr. Ryan.

Accordingly, we find it appropriate to vacate that part of Order No. PSC-95-0884-FOF-WS directing BSU to impute to Harbor's CIAC accounts the amount of the refundable unsecured interim rates. We note that, while this decision is of a kind that would affect substantial interests, we could provide no relief to one who might file a protest were we to issue this order as proposed agency action. Thus, this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Imperial Harbor Civil Rights Unit's voluntary dismissal of its protest of PAA Order No. PSC-95-0884-FOF-WS is hereby acknowledged. It is further

ORDERED that Order No. PSC-95-0884-FOF-WS is made final and effective April 14, 1997. It is further

ORDERED that the part of Order No. PSC-95-0884-FOF-WS imposing the requirement that Bonita Springs Utilities, Inc., credit the contributions-in-aid-of-construction accounts of Harbor Utilities Company, Inc., with the amount of the unsecured refundable interim rate revenues is hereby vacated. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 5th day of May, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

CJP

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 Records and Reporting, 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 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.