

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (VACCARO) *[Handwritten initials]*
DIVISION OF WATER & WASTEWATER (BRADY) *[Handwritten initials]*

RE: DOCKET NO. 960695-WS - SOUTH BROWARD UTILITY, INC. -
JOINT APPLICATION FOR APPROVAL OF TRANSFER OF
CERTIFICATES NOS. 359-W AND 290-S AND UTILITY FACILITIES
FROM SOUTH BROWARD UTILITY, INC. TO CLAY UTILITY COMPANY.
COUNTY: BROWARD

AGENDA: AUGUST 5, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960695-R.RCM

CASE BACKGROUND

South Broward Utility, Inc., (SBU or utility) is a Class A utility which provides service to approximately 2,446 water and 2,023 wastewater customers in Broward County. The utility's 1995 income statement shows combined annual revenues of \$1,836,000 and a combined operating income of \$527,000. The Commission granted SBU Certificate Nos. 359-W and 290-S by Order No. 9806, Docket 790946-WS, issued February 18, 1981. SBU is currently 100% owned and operated by the Hugh F. Culverhouse Trust (Culverhouse Trust).

On October 20, 1996, SBU filed an application for amendment of its water and wastewater certificates to add additional territory in Broward County. The City of Sunrise (Sunrise) objected to this application, and a formal hearing was held by the Commission on April 8-9, 1996. By Final Order No. PSC-96-1137-FOF-WS, issued September 10, 1996, in that docket, the Commission approved SBU's application. By Order No. PSC-96-1137A-FOF-WS, issued December 13, 1996, the Commission amended its final order to correct a

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scrivener's error. Sunrise filed a motion for reconsideration of the final order, which the Commission denied by Order No. PSC-96-1527-FOF-WS, issued December 16, 1997. On December 18, 1996, Sunrise filed a Notice of Appeal of the Commission's final order, amendatory order and order on reconsideration, in the First District Court of Appeal. The appeal is pending.

Clay Utility Company (Clay) was a Class A water and wastewater utility in Clay County. On December 29, 1993, Clay's water and wastewater facilities were sold to Clay County through a condemnation proceeding. The Commission recognized the transfer by Order No. PSC-94-0198-FOF-WS, Docket No. 940051-WS, issued February 17, 1994, and cancelled Clay's certificates. However, Clay's corporate structure still exists and is also 100% owned by the Culverhouse Trust.

In 1996, unrelated tax issues involving the two separate corporate structures caused the Culverhouse Trust to undertake the sale of the utility from SBU's corporate structure to Clay's corporate structure. A joint application by SBU and Clay to transfer the utility facilities was filed on June 3, 1996.

On July 3, 1996, Sunrise filed a timely objection to the joint application for transfer. On August 5, 1996, SBU and Clay filed a motion to dismiss or strike Sunrise's objection. On August 12, 1996, Sunrise filed a response to the joint motion to dismiss or strike. On December 30, 1996, Sunrise filed a notice of withdrawal of its objection. On January 7, 1997, SBU and Clay, in turn, filed a joint notice of withdrawal of their motion to dismiss or strike Sunrise's objection. By Order No. PSC-97-0579-FOF-WS, issued May 20, 1997, the Commission approved the transfer of SBU to Clay. On May 30, 1997, Sunrise filed a Motion for Clarification of Order No. PSC-97-0579-FOF-WS. On June 10, 1997, SBU and Clay timely filed a joint response to Sunrise's motion. This recommendation addresses Sunrise's motion for clarification.

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ISSUE 1: Should the Commission grant the City of Sunrise's Motion for Clarification of Order No. PSC-97-0579-FOF-WS?

RECOMMENDATION: No. The Commission should deny the City of Sunrise's Motion for Clarification of Order No. PSC-97-0579-FOF-WS. (VACCARO)

STAFF ANALYSIS: As stated earlier, Sunrise filed a motion for clarification of Order No. PSC-97-0579-FOF-WS, wherein it requests that the Commission clarify its transfer order to acknowledge and provide that the amended territory portion of the water and wastewater certificates transferred from SBU to Clay is subject to the pending appeal, and that the final order in Docket No. 941121-WS is stayed. In support of its motion, Sunrise states the following:

1. By Order No. PSC-96-1137-FOF-WS, the Commission granted SBU an amendment to add additional territory in Broward County and Sunrise has filed a Notice of Appeal of that Order;
2. By Order No. PSC-97-0579-FOF-WS, the Commission transferred Certificates Nos. 359-W and 290-S, from SBU to Clay. The territory descriptions attached to the Order include the territory sought by SBU in its application for amendment to add additional territory in Docket No. 941121-WS; and
3. Pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure, Sunrise's filing of its appeal acts an automatic stay of the Commission's amendment order.

On June 10, 1997, SBU and Clay timely filed a joint response to Sunrise's motion for clarification. SBU and Clay argue that the Commission should deny Sunrise's motion and states, in part, the following:

1. Motions for rehearing, reconsideration and clarification are "merely to bring to the attention of the trial court . . . or administrative agency . . . some point which it overlooked or failed to consider when it reached the order in the first instance." Diamond Cab Co. of Miami v. King, 146

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So. 2d 889, 891 (Fla. 1962); See also Rule 9.330(a), Florida Rules of Appellate Procedure. Such motions cannot be used to raise new issues. See Fiesta Fashions, Inc. v. Capin, 450 So. 2d 1128 (Fla. 1st DCA 1984). Sunrise's motion raises a new issue which it did not raise prior to withdrawing its objection in this docket. Therefore, the issue raised by Sunrise is inappropriate for reconsideration.

2. Rule 25-22.060(1)(a), Florida Administrative Code, provides, in part, that "[a]ny party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order." Sunrise withdrew its objection to the transfer of SBU to Clay, which was acknowledged by the Commission. Therefore, Sunrise is not a party in this docket and does not have a right to file a motion for reconsideration.
3. Rule 25-22.061(2), Florida Administrative Code, sets forth the factors which the Commission may consider in determining whether to grant a motion to stay a final order pending appeal. Sunrise has failed to allege any of the factors set forth in the rule.
4. Any stay relating to Sunrise's appeal of the amendment order does not undo or set aside the Commission's decision in the amendment docket. See City of Plant City v. Mann, 400 So. 2d 952, 953 (Fla. 1981)

Staff notes that Sunrise's motion for clarification does not request the Commission to reconsider a mistake of fact or law. Sunrise merely asks the Commission to acknowledge occurrences in a separate docket and how those occurrences relate to the transfer order in the current docket. Therefore, staff believes that Rule 25-22.060(1)(a), Florida Administrative Code, regarding motions for reconsideration, is inapplicable, as well as SBU's arguments regarding the standard of review for motions for reconsideration. Further, staff does not believe that SBU's other arguments are

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applicable, because Sunrise has not requested a stay, nor has it made any allegations regarding the affect of the stay in Docket No. 941121-WS.

Staff does agree, however, that Sunrise is not a party to this docket. This raises an interesting question as to whether Sunrise has a right to the relief it seeks. Rule 25-22.037(2), Florida Administrative Code, provides that "[m]otions may be filed in opposition to a proceeding, or for other purposes during the proceeding." Rule 25-22.037(2)(a), Florida Administrative Code, provides in part that "[m]otions in opposition to an order, notice, complaint or petition . . . may be filed by any **party**." (Emphasis added.) Although the rule provides that a party may file motions in opposition to proceedings, it does not address who may file "motions for other purposes." It is unclear to staff whether the Commission's rules, which do not specifically address motions for clarification, include such motions under the heading of "other purposes." Further, a search of Commission orders did not uncover any incident in which the Commission has ruled upon a motion for clarification filed by a non-party. Therefore, staff is unclear as to whether Sunrise's party status affects its right to relief sought in its motion.

However, as discussed earlier, Sunrise requests the Commission to acknowledge occurrences from another docket and how they relate to the transfer order in this docket. There is no such standard for clarification of an order. Clarification of an order simply reiterates or explains what an order already states, based on the same facts and law considered at the agenda conference when the Commission voted. Sunrise's appeal in Docket No. 941121-WS, was not a part of the record in the present docket. Therefore, in consideration of all the foregoing, staff recommends that the Commission should deny Sunrise's motion for clarification.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the outcome of Sunrise's appeal of Orders Nos. PSC-96-1137-FOF-WS and PSC-96-1137A-FOF-WS, in Docket No. 941121-WS.

STAFF ANALYSIS: Sunrise's appeal of Orders Nos. PSC-96-1137-FOF-WS and PSC-96-1137A-FOF-WS is pending. Therefore, this docket should remain open pending the outcome of that appeal, in the event that any deletions are required to be made to Clay's water and wastewater certificates. (VACCARO)