

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for rate increase in Bay  
County by Bayside Utility Services, Inc.

DOCKET NO. 030444-WS  
ORDER NO. PSC-04-1155-PCO-WS  
ISSUED: November 22, 2004

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON  
LILA A. JABER  
CHARLES M. DAVIDSON

ORDER DENYING OFFICE OF PUBLIC COUNSEL'S MOTION FOR COMMISSION TO  
RELINQUISH JURISDICTION

BY THE COMMISSION:

BACKGROUND

Bayside Utility Services, Inc. (Bayside or utility), a wholly-owned subsidiary of Utilities, Inc. (UI), is a class C water and wastewater utility currently serving approximately 283 residential customers and 4 general service customers. Bayside is a reseller utility that purchases water and wastewater service from the City of Panama City Beach. The utility completed its filing of an application for a rate increase on February 17, 2004, and this date was established as the official date of filing.

By Order No. PSC-04-0414-PCO-WS (Interim Order), issued April 22, 2004, we suspended the utility's proposed final rates and approved an interim revenue increase of \$42,547 (or 64.57%) for water and \$51,145 (or 55.22%) for wastewater. We also calculated the amount of security for any potential interim refund.

By Order No. PSC-04-0729-PCO-WS, issued July 28, 2004, we granted Bay County's (County) Petition to Intervene. Moreover, at the August 3, 2004 Agenda Conference, in which we considered the appropriate proposed agency action on final rates, we allowed the County to participate and voice its concerns and objections on the proposed rate increase. Subsequent to that agenda conference, and in accordance with our vote, we issued Proposed Agency Action Order No. PSC-04-0820-PAA-WS (PAA Order) on August 23, 2004, whereby we proposed to approve a \$31,517 (or 47.83%) water increase and a \$39,609 (or 42.77%) wastewater increase.

After we issued that PAA Order, Bay County adopted Resolution No. 2570 on September 7, 2004, rescinding Commission jurisdiction over investor-owned water and wastewater utilities in Bay County effective immediately. Moreover, on September 13, 2004, the Office of Public Counsel (OPC) filed a protest of the PAA Order. Pursuant to Section 367.081(8), Florida Statutes (F.S.), we must render a final decision within 8 months of the date OPC filed its protest.

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FPSC-COMMISSION CLERK

Bayside notified our staff that it would maintain the interim rates pending our final decision. By Order No. PSC-04-1064-PCO-WS, issued October 29, 2004, we required the corporate undertaking guaranteed by Utilities, Inc., to be increased from \$46,964 to \$102,733.

Because of OPC's protest to the PAA Order, we scheduled a hearing to be held on January 20-21, 2005, in the utility's service area, and issued an Order Establishing Procedure, Order No. PSC-04-0914-PCO-WS, on September 20, 2004. On October 4, 2004, OPC filed its Motion for Commission to Relinquish Jurisdiction to the County (Motion). Bayside responded in opposition on October 8, 2004, and also filed its request for oral argument on that same date. Also, on October 11, 2004, the County filed its Response to and Joinder in the Citizens of the State of Florida Motion to Relinquish Jurisdiction (Joinder). Moreover, the tentative hearing date was changed from January 20-21, 2005, to February 21-22, 2005.

This Order addresses OPC's Motion for this Commission to relinquish jurisdiction with the County's Joinder, and the utility's response. We allowed oral argument on November 2, 2004. We have jurisdiction pursuant to Sections 367.081, 367.082, and 367.171(5), F.S.

#### OPC'S MOTION TO RELINQUISH JURISDICTION TO THE COUNTY

In its Motion for us to relinquish jurisdiction, OPC requests that we issue our "final order" relinquishing jurisdiction of this case to the County, so that the County can "conduct such further proceedings to resolve this case on the merits, as prescribed by its rules and regulations." In support of its Motion, OPC notes that Section 367.081(8), F.S., requires this Commission to enter its final order within eight months of the protest. Also, OPC notes that Section 367.171(5), F.S.,

provides that cases pending before the Commission at the time a County reassumes jurisdiction shall remain within the jurisdiction of the Commission "... until disposed of in accordance with the law in effect on the day such case was filed by any party with the Commission."

OPC argues that the term "final order" is broadly defined pursuant to Section 120.52(7), F.S., to mean:

A written final decision which results from a proceeding under s. 120.56, 120.565, s. 120.569, s. 120.57, s. 120.573, or s.120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. A final order includes all materials explicitly adopted in it. The clerk shall indicate the date of filing on the order.

OPC argues that we can enter a final order "in accordance with the law" that meets the final order definition of Section 120.52(7), F.S., by issuing a "final order" relinquishing jurisdiction of this case to the County.

OPC further notes that UI purchased Bayside at approximately two-third's of Bayside's book value, and that we approved the transfer of the certificate to UI without the application of a negative acquisition adjustment. OPC also cites Rule 25-30.0371, Florida Administrative Code (F.A.C.), and opines that, apparently based on the last sentence of Rule 25-30.0371(3)(b), F.A.C., if we issued a final order in 2005, that this rule would still allow the utility to earn a return on this "phantom investment," i.e., the one-third of the original investment which was not included in the purchase price. OPC then argues that it does not believe the County would reach this same decision.

Noting that Bayside is a small utility with few customers, OPC argues that the utility and the customers would then have to immediately endure a second hearing to be conducted by the County. OPC's arguments are apparently based on the assumption that if we enter a final order on the merits, then the County would immediately set an evidentiary hearing to consider overearnings. Therefore, OPC argues that it is administratively inefficient and more costly to the Commission, Bayside, and Bayside's customers for the Commission to conduct a formal hearing, which will produce an order that is sure to be revisited by the County with an overearnings investigation.

Citing Penn General Casualty Co. v. Pennsylvania ex Rel. Schnader, 294 U.S. 189 (1935), OPC argues that absent "a showing that the interests of the parties would not be adequately protected with the change in jurisdiction, a court or other tribunal, may exercise its judicial discretion to relinquish its jurisdiction in favor of another who also possesses jurisdiction to dispose of the case." OPC notes that Sections 367.081(1), (2), (3), and (6), F.S., also apply to the County, and requests this Commission, in order to promote "the efficient administration of justice," to issue a final order relinquishing jurisdiction to the County.

In the County's Joinder filed on October 11, 2004, citing Florida Public Service Commission v. Bryson, 569 So. 2d 1253 (Fla. 1990), and Stuart v. State ex rel. Miller, 629 So. 2d 288 (Fla. 3d DCA 1993), the County states that this Commission has the statutory authority to determine whether "it should retain jurisdiction of a case, or otherwise dispose of a case." The County believes that, if we conduct a formal hearing, the customers "are likely to petition Bay County to reduce their water and wastewater rates, regardless of what this Commission's final action is in this Docket." Therefore, the County states that in "the interests of fundamental fairness," and "in order to avoid unnecessary litigation expenses and additional substantial hardship to the ratepayers," we should relinquish jurisdiction to the County.

In its Response, Bayside argues that OPC has misinterpreted the meaning and impact of Section 367.171(5), F.S., which states as follows:

When a utility becomes subject to regulation by a county, all cases in which the utility is a party then pending before the commission, or in any court by appeal from any order of the commission, shall remain within the jurisdiction of the commission or court until disposed of in accordance with the law in effect on the day such case was filed.

Bayside argues that this statute, coupled with the requirement of Section 367.081(8), F.S., for us to render a final decision within eight months of the protest, requires us to “retain jurisdiction and render a decision on the merits of the case that affects all parties properly before it.”

Bayside also states that it does not understand why OPC believes that it will get a different outcome if the County conducts the hearing, and believes that if OPC does know the outcome of the case if it was handled by Bay County, then Bayside would not receive a fair hearing before the County. Because the County is bound by the same statutes governing the setting of final rates, Bayside contends that there is no reason to believe the County would arrive at a different conclusion, and Bayside disputes the allegation that the County would have to conduct another duplicate proceeding, resulting in increased rate case expense.

Bayside also argues that OPC’s reliance on Penn Central is misplaced. That case involved the concurrent jurisdiction of the federal and state courts over the liquidation of an insolvent insurance company. Bayside notes that the Supreme Court ruled that the federal court, which first exercised jurisdiction over the insurance company, had the exclusive jurisdiction to proceed. Moreover, Bayside argues that the case is not applicable to the case at hand because the statute states that the Commission shall maintain jurisdiction.

Bayside concludes its argument by stating that we have knowledge of the facts of this case, and possess “the expertise to determine and resolve the issues efficiently and without undue cost to Bayside’s customers.” If jurisdiction is relinquished to the County, Bayside argues that “Bayside will have to start all over again with new Bay County staff,” which will cause increased costs and delay in resolving the issues to the prejudice of Bayside and its customers, and there would be no efficient administration of justice.

In reviewing the argument of Bayside, we note that Sections 367.081(8) and 367.171(5), F.S., do not specifically require us to “render a decision on the merits of the case that affects all parties properly before it.” These words are not in the statutes.

However, in the past, where a county had taken back jurisdiction, we maintained jurisdiction to conclude the rate case. See, Order No. PSC-97-0552-FOF-WS, issued May 14, 1997, in Docket No. 920199-WS, In re: Application For Rate Increase In Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, And Washington Counties By Southern States Utilities, Inc.; Collier County By Marco Shores Utilities (Deltona); Hernando County By Spring Hill Utilities (Deltona); And Volusia County By Deltona Lakes Utilities (Deltona) (on page four of the Order, this Commission noted that even though Hernando County had rescinded the Commission’s jurisdiction, pursuant to Section 367.171(5), F.S., we retained jurisdiction of the pending case over the appropriate rates for Spring Hill which was in Hernando County); and Order No. PSC-00-1879-AS-WS, issued October 16, 2000, in Docket No. 951056-WS, In re: Application for rate increase in Flagler County by Palm Coast Utility Corporation. We have retained jurisdiction even when the county rescinded jurisdiction prior to our issuing a proposed agency action order. See Order No. PSC-94-1050-FOF-WU, issued August 29, 1994, in Docket No. 940087-WU, In

re: Application for a Staff Assisted Rate Case by Rolling Hills Water, Inc. Also, this has been the case when there were refunds involved. See, Order No. PSC-98-0507-FOF-WS, issued April 13, 1998, in Docket No. 980182-WS, In re: Distribution of contributions-in-aid-of-construction gross-up funds collected by Palm Coast Utility Corporation in Flagler County.

In cases involving the rescission of Commission jurisdiction by the County, we have repeatedly concluded all rate case proceedings by setting final rates and disposing of any refund requirement. Pursuant to Subparagraph 120.68(7)(e)3., F.S., agency decisions that are inconsistent with stated agency policy or a prior agency practice, must be adequately explained. See also, Florida Cities Water Company v. Florida Public Service Commission, 705 So. 2d 620, 626 (Fla. 1<sup>st</sup> DCA 1998), (“inconsistent results based upon similar facts, without reasonable explanation, is improper.”)

OPC has noted a possible disagreement by the County with our policy and rule for imposing negative acquisition adjustments and the almost certainty of a second formal hearing (with its attendant rate case expense) being held by the County if we again decide that a negative acquisition adjustment is not warranted. OPC appears to believe that this is sufficient justification or reason for us to relinquish jurisdiction in this specific instance.

When a county takes back jurisdiction, there is always the possibility that there will be a difference in philosophy as to what constitutes a valid expense or investment. Therefore, we find that the possibility of a second formal hearing to be held by the County would not constitute a reasonable basis for us to determine that we need not proceed with the formal hearing and the setting of final rates.

In addition, Bayside has been collecting interim rates for approximately six months. If we were to relinquish jurisdiction to the County, it is unclear how or if the issue of the appropriate disposition of interim rates would be handled by the County. If OPC is correct and the County were to address the refund question, the County may use different criteria than that used by this Commission on the appropriate refund amount. Also, we find that it is more efficient for us to use our background, knowledge, and expertise to conclude this rate case which was started here, and in which the utility has already prefled its testimony.

Based on the above, we deny OPC's Motion to relinquish jurisdiction, and we shall proceed with the formal hearing to set final rates and dispose of the interim rates collected by Bayside. Although we have decided to proceed with the processing of this rate case, we urge the parties to engage in informal discussions to resolve this case and reach a settlement if possible.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion for Commission to Relinquish Jurisdiction is denied. It is further

ORDERED that this docket shall remain open to allow this Commission to conduct an evidentiary hearing, and subsequently enter a final order setting rates and disposing of the interim rates collected by Bayside, if the parties are not able to reach a settlement.

By ORDER of the Florida Public Service Commission this 22nd day of November, 2004.

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

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

(SEAL)

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.