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Public Service Commission

COMMISSION CLERK

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: January 6, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Merta Bendell) *SM*
Office of the General Counsel (Jaeger) *Maet*

RE: Docket No. 020439-SU – Application for staff-assisted rate case in Lee County by Sanibel Bayous Utility Corporation.

Docket No. 020331-SU – Investigation into alleged improper billing by Sanibel Bayous Utility Corporation in Lee County in violation of Section 367.091(4), Florida Statutes.
County(ies): LEE

AGENDA: 01/18/05 – Regular Agenda – Proposed Agency Action for Issues 2 and 3 - Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020439.RCM.DOC

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Case Background

Sanibel Bayous Utility Corporation (Sanibel Bayous or utility) is a Class C wastewater utility serving approximately 150 residential, 116 multi-family, and four general service customers in Sanibel Bayous Subdivision, Heron's Landing Subdivision, the Ridge Subdivision, and Blind Pass Condominiums on Sanibel Island. On May 16, 2002, the utility filed an application for a staff assisted rate case (SARC) and paid the appropriate filing fee. By Order No. PSC-03-0699-PAA-SU, issued June 9, 2003, the Commission approved the utility's current rates, charges, rate base and expenses. A portion of the rate base and expenses approved included pro forma additions to plant and expenses.

In the above-referenced order, the utility was ordered to complete six pro forma improvements within six months of the Consummating Order. The Consummating Order, PSC-03-0777-CO-SU, was issued July 1, 2003. Therefore, the six-month period ended January 1, 2004. A number of the pro forma items approved were required by the Department of Environmental Protection (DEP). Based on an inspection by DEP and responses to staff inquiries, the utility has not completed two of the pro forma improvements, and completed the other four pro forma improvements only after staff inquiries and subsequent to the January 1, 2004 deadline. Also, the utility was required to provide proof of insurance and post emergency telephone numbers at the plant and the lift stations by September 29, 2003. These last two requirements were also not completed in a timely manner.

This recommendation addresses 1) Sanibel Bayous' request that it be temporarily relieved from two requirements found in Order No. PSC-03-0699-PAA-SU, and 2) whether Sanibel Bayous should be ordered to show cause in writing, within 21 days, why it should not be fined for its failure to comply with several requirements in Order No. PSC-03-0699-PAA-SU, issued June 9, 2003, in this docket. It also addresses whether rates should be reduced to remove the rate impact of the pro forma plant items not completed by the utility. The Commission has jurisdiction pursuant to Sections 367.081 and 367.161, Florida Statutes.

Discussion of Issues

Issue 1: Should Sanibel Bayous Utility Corporation be ordered to show cause in writing, within 21 days, why it should not be fined for its apparent failure to comply with the requirements of Order No. PSC-03-0699-PAA-SU?

Recommendation: Yes. Sanibel Bayous Utility Corporation should be ordered to show cause in writing, within 21 days, why it should not be fined a total of \$500 for its apparent failure to timely comply with the requirements of Order No. PSC-03-0699-PAA-SU. The order to show cause should incorporate the conditions stated below in the staff analysis. (Jaeger, Merta, Massoudi)

Staff Analysis: Pursuant to Order No. PSC-03-0699-PAA-SU (PAA Order), issued June 9, 2003, in this docket, the Commission required Sanibel Bayous to:

(1) complete any and all improvements to the system necessary to satisfy the standards set by the Florida Department of Environmental Protection (FDEP) within the time frames set by FDEP, or within one year, whichever is longer;

(2) post no later than 90 days after the Consummating Order a local emergency phone number, which can be easily seen, at the plant and at each lift station;

(3) complete the pro forma surge tank, fence, and lift station overhaul within six months of the Consummating Order;

(4) complete the removal of vegetation from the pond berm, the addition of baffles in the chlorine contact chamber, and the addition of new diffusers in some of the aeration tanks within six months of the Consummating Order; and

(5) provide Commission staff with a signed contract with Sutton and Associates or other insurer and proof of the insurance policy within 90 days of the Consummating Order.

That PAA Order was consummated by Order No. PSC-03-0777-CO-SU, issued July 1, 2003. Therefore, the posting of the emergency telephone numbers and the submission of proof of insurance should have been completed by September 29, 2004. The surge tank, the fence, the lift station overhaul, the removal of vegetation from the pond berm, the addition of baffles in the chlorine contact chamber, and the addition of new diffusers in some of the aeration tanks should have been completed by January 1, 2004.

After repeated inquiries from staff, it appears that Sanibel Bayous has now completed all of the requirements except for the pro forma surge tank and baffles in the chlorine contact chamber. However, only a few of the requirements appear to have been accomplished in a timely manner.

With respect to the FDEP required system improvements, the Commission gave Sanibel Bayous a minimum of one year to complete the improvements that are necessary to satisfy the standards set by the FDEP, and that time has not yet run. However, from staff conversations with FDEP, it appears that the utility has not taken the steps necessary to correct 21 separate

violations noted by FDEP in its two inspections conducted on September 19, 2002, and March 12, 2003. On March 1, 2004, FDEP issued its Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment (Notice of Violation). In the Notice of Violation, FDEP listed eight separate counts against the utility and in Count II specifically noted:

The chlorine contact chamber had an accumulation of sludge; the diffusers in the aeration tanks were missing or not functioning as intended; the weirs contained excessive algae growth; the skimmer on the south clarifier had a collapsible hose; the air supply line system contained several air leaks; neither of the blowers had air filters and one blower was inoperable; ponds were overgrown with trees growing in the berms; and one of the two pump motors on the main lift station was inoperable.

For the first seven counts, FDEP assessed penalties totaling \$9,000. FDEP also ordered the utility to "retain the services of a Florida professional engineer for the purpose" of bringing the utility into compliance with FDEP standards. Moreover, FDEP gave the utility 30 days to remove all trees and vegetation (except grass) from the berms of the percolation pond and all accumulated solids and detritus material from the existing percolation/evaporation ponds at the plant and properly dispose of them (cleaning is an attempt to stop lateral seepage through the berms). However, since the PAA Order gave the utility a minimum of one year "to complete any and all improvements to the system that are necessary to satisfy the standards set by" FDEP, the utility cannot yet be said to be in violation of the time period established in the Commission Order for the FDEP required improvements.

The Commission required the emergency number and insurance requirement to be completed by September 29, 2003. The utility does appear to have posted a local emergency telephone number at the plant and at each lift station, but the invoices for the signs were dated February 25, 2004, and March 8, 2004. Also, the utility submitted a binder for insurance on October 22, 2003, but did not submit a contract for insurance until May 24, 2004. The insurance contract was dated April 21, 2004.

The Commission required the fence, lift station overhaul, addition of diffusers, and removal of pond berm vegetation to be accomplished by January 1, 2004. The invoice for the fence completion was dated February 20, 2004. The invoices showing work done on the lift stations were dated February 6, 2004, and May 10, 2004. An invoice dated April 26, 2004 showed that installation of the new diffusers was completed on April 9, 2004. Also, work on removing the pond berm vegetation began during the week of May 3-8, 2004, and the utility paid a total of \$10,020 for labor and \$825 for a backhoe in that week. However, because of nesting birds and Hurricane Charlie, the utility did not complete the removal of the pond berm vegetation until November 20, 2004, with an additional expenditure of \$14,960 for labor and a total of \$3,650 for rental of a backhoe and chipper. Therefore, while the utility has now completed the above-noted tasks, most were not done in a timely manner.

Also, the utility has not completed the pro forma surge tank and has not added baffles in the chlorine contact chamber, which were required to be completed by January 1, 2004. By letter dated July 8, 2004, the utility requested that it be granted temporary relief from those two

requirements, plus an extension of time to complete the pond berm vegetation. As justification for this relief, the utility stated that it had hired Johnson Engineering and that Johnson Engineering was working with FDEP to determine if there was a need for the surge tank. With the addition of the new lift station time clocks, the FDEP monthly operating reports indicate flows lower than anticipated and the utility claims there may not be a need for a surge tank. Also, the utility has hired Schaffer Utility Management Company (Schaffer) and the operating reports since January indicate that chlorine residuals have been maintained without the addition of the baffles. Again, Johnson Engineering is working with FDEP to determine if the addition of the baffles will be required. Although the utility requested temporary relief from the Order on the above requirements, it did not make such request until over six months after the improvements were due to be completed.

Utilities are charged with the knowledge of the Commission's rules and statutes. 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). Section 367.161(1), Florida Statutes, authorizes the 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 order of the Commission. By failing to comply with the above-noted requirements of the PAA Order in a timely manner, the utility's acts were "willful" in the sense intended by Section 367.161, Florida Statutes. In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled 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., the 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.

Staff believes that the circumstances in this case are such that show cause proceedings should be initiated. Staff notes that in the PAA Order that it appears the utility is now violating, the utility was required to show cause for three separate violations of the statutes and rules of this Commission. Further, the utility had been previously warned in another order that it must comply with the Commission's rules and statutes. For the prior show cause proceeding, the utility ultimately paid a \$300 fine (\$100 for each violation). The PAA Order specifically stated that "subsequent violations could result in higher fines."

Although the utility has apparently not timely complied with eight requirements of the PAA Order, staff believes there are mitigating circumstances which contributed to Sanibel Bayou's violations. Since January 1, 2004, and the hiring of Johnson Engineering and Schaffer, staff notes that there has been a marked change for the better in the attitude of the utility, and that the utility has taken extraordinary measures to bring the utility into compliance with both FDEP standards and Commission requirements. This is a small utility, and since January 1, 2004, the utility has spent approximately \$98,000 in making necessary improvements and bringing the utility into compliance. Also, it is unclear whether the addition of a surge tank and the baffles in the chlorine contact chamber will now be required by FDEP. However, that does not excuse the utility from complying with the orders of this Commission.

Staff believes that the continued pattern of disregard for the Commission's rules, statutes, and orders warrants more than just a warning. Moreover, the fine of \$300 did not appear to "get the utility's attention." Accordingly, staff recommends that Sanibel Bayous be made to show cause in writing, within 21 days, why it should not be fined a total of \$500 for its apparent failure to timely comply with eight requirements of Order No. PSC-03-0699-PAA-SU.

Staff recommends that the show cause order incorporate the following conditions:

1. The utility's response to the show cause order should contain specific allegations of fact and law;
2. Should Sanibel Bayous file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made;
3. A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;
4. In the event that Sanibel Bayous fails to file a timely response to the show cause order, the fine should be deemed assessed with no further action required by the Commission;
5. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order;
6. If the utility responds to the show cause order by remitting the fine, this show cause matter should be considered resolved.

However, as set forth in the next issue, the requirement to complete the surge tank and add baffles in the chlorine contact chamber should be made contingent on the requirements of the FDEP. Further, the utility should be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to \$5,000 per day per violation for each day the violation continues as set forth in Section 367.161, Florida Statutes.

Issue 2: Should the Commission grant Sanibel Bayous' request for temporary relief from the requirements of Order No. PSC-03-0699-PAA-SU to construct a surge tank and add baffles in the chlorine contact chamber?

Recommendation: Yes, the Commission should grant the request. The completion of these requirements should be contingent upon the decision of the Florida Department of Environmental Protection (FDEP) on their necessity. Sanibel Bayous should be directed to make any improvements as required by FDEP. (Massoudi, Merta, Jaeger)

Staff Analysis: In the ordering paragraphs of Order No. PSC-03-0699-PAA-SU (PAA Order), the Commission ordered Sanibel Bayous to construct a surge tank and add baffles in the chlorine contact chamber by no later than January 1, 2004. By letter dated July 8, 2004, Sanibel Bayous requested that it be granted temporary relief from those requirements.

As justification for this relief, the utility stated that it had hired Johnson Engineering and that Johnson Engineering was working with FDEP to determine if there was a need for the surge tank. With the addition of the new lift station time clocks, the FDEP monthly operating reports indicate flows lower than anticipated and the utility claims there may not be a need for a surge tank. Also, the utility has hired a management company (Schaffer), and the operating reports since January indicate that chlorine residuals have been maintained without the addition of the baffles. Again, Johnson Engineering is working with FDEP to determine if the addition of the baffles will be required.

Staff notes that the Commission allowed total pro forma plant of \$47,359, with \$25,000 of the pro forma plant being the cost for a surge tank, with the understanding that a surge tank was required by FDEP. Also, the total estimated expense for the baffles (not done) and the diffusers (completed) was \$2,000, to be amortized over five years for an annual expense of \$400. Staff further notes that even without the construction of the surge tank or the addition of the baffles in the chlorine contact chamber, Sanibel Bayous spent greatly in excess of the \$47,359 in making improvements.

When the PAA Order was issued, staff thought that both the surge tank and addition of the baffles were being required by FDEP. However, it is now unclear just what FDEP will require. Staff believes that the Commission should give FDEP and Sanibel Bayous time to determine what is the best future course of action. Therefore, staff recommends that the Commission grant Sanibel Bayous' request for temporary relief from these two requirements. The completion of these requirements should be contingent upon the decision of the FDEP on their necessity. Sanibel Bayous should be directed to make any improvements as required by FDEP.

In so recommending, staff recognizes that the Florida Supreme Court has found that:

orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of

the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.¹

Nevertheless, the Court continued by stating that:

We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on their own motion, regulatory agencies such as the commission often do so. Further, whereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.²

With the passage of time and new managers running the sewage treatment plant, it is now unclear as to just what will be required by FDEP. Therefore, staff believes that the public interest warrants the granting of the request, and that this action fits squarely within the reasoning of the Peoples Gas Court.

¹ Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966).

² Id.

Issue 3: Should Sanibel Bayous' rates be adjusted to remove the rate impact of the pro forma plant items not completed by the utility?

Recommendation: No, wastewater rates should not be adjusted to remove the impact of the pro forma plant items not completed by the utility. (Merta)

Staff Analysis: As discussed in the case background, the utility was required to complete several pro forma items by Order Nos PSC-03-0699-PAA-SU, issued June 9, 2003, within six months of the Consummating Order, PSC-03-0777-CO-SU, issued July 1, 2002. This six month period ended January 1, 2004. This order also specified that the docket remain open pending staff's verification that the utility completed the pro forma improvements required. The required improvements included a fence, a surge tank, lift station overhaul, the removal of vegetation from the pond berm, the addition of baffles in the chlorine contact chamber, new diffusers in some of the aeration tanks, and commercial general liability insurance coverage.

Staff verified that the utility completed all pro forma plant and expense items except for the surge tank and baffles in the chlorine contact chamber. The utility does not believe that the surge tank and baffles will be necessary to bring the utility into compliance with The Department of Environmental Protection (DEP) permit standards. In a July 8, 2004 letter, the utility requested temporary relief from these items as final action will be determined by issuance of the DEP permit.

The amounts included in the Order for pro forma improvements were estimates. Therefore, the actual costs for these items were different from the estimated costs. In order to determine whether rates should be reduced, staff calculated the associated revenue requirements. The revenue requirement for the items required by Commission Order was \$10,260. The revenue requirement associated with actual costs incurred for the items was \$20,702. Therefore, because the revenue requirement of the costs actually incurred was greater than the revenue requirement of the items required by the Order, staff recommends that no rate adjustment is necessary. The pro forma impact on the annual revenue requirement, discussed above, is shown on Schedule A.

Docket Nos. 020439-SU, 020331-SU

Date: January 6, 2005

Issue 4: Should these dockets be closed?

Recommendation: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the Order, this docket should be closed upon the issuance of a Consummating Order. (Jaeger)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the Order, this docket should be closed upon the issuance of a Consummating Order.

SANIBEL BAYOUS UTILITY CORPORATION
TEST YEAR ENDING MARCH 31, 2002

SCHEDULE NO. A
DOCKET NO. 020439-SU

PRO FORMA IMPACT ON ANNUAL REVENUE REQUIREMENT

	<u>PER</u> <u>ORDER</u>	<u>ACTUAL</u>	<u>DIFFERENCE</u>
Surge Tank	25,000	0	(25,000)
Fence	9,500	1,465	(8,035)
Overhaul Lift Station	<u>12,859</u>	<u>9,747</u>	<u>(3,112)</u>
Total Pro Forma Plant	47,359	11,212	(36,147)
Accumulated Depreciation	1,267	222	(1,045)
Non-Used and Useful	0	0	0
Working Capital	<u>529</u>	<u>2,290</u>	<u>1,762</u>
Rate Base	46,621	13,280	(33,341)
Rate of Return	<u>9.23%</u>	<u>9.23%</u>	<u>9.23%</u>
Return on Rate Base	4,304	1,226	(3,078)
O&M Expense			
Removal of Pond Berm Vegetation	1,000	5,912	4,912
Baffles and Diffusers	400	1,848	1,448
General Liability Insurance	2,828	10,562	7,734
Depreciation Expense	<u>1,267</u>	<u>222</u>	<u>(1,045)</u>
Total	9,799	19,770	9,972
True-up (RAF)	<u>0.9550</u>	<u>0.9550</u>	<u>0.9550</u>
Revenue Requirement Impact	<u>\$10,260</u>	<u>\$20,702</u>	<u>\$10,441</u>