

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Objection to notice of)
application of BETMAR UTILITIES,)
INC. for amendment of Certificates)
Nos. 137-W and 98-S in Pasco County)

DOCKET NO. 891280-WS

ORDER NO. 25215

ISSUED: 10/14/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
MICHAEL MCK. WILSON

Pursuant to notice, an administrative hearing was held before Veronica E. Donnelly, Hearing Officer with the Division of Administrative Hearings, on May 9, 1991, in Dade City, Florida.

APPEARANCES:

For Petitioner: Scott L. Knox, Esquire
28870 U.S. Highway 19 North,
Suite 230, Clearwater, Florida
34621

For Respondent: Thomas P. McAlvanah, Esquire
37818 Highway 54 West,
Zephyrhills, Florida 33541

For Intervenor: Robert J. Pierson, Esquire
101 East Gaines Street
Tallahassee, Florida 32399-0863

The Hearing Officer's Recommended Order was entered on July 16, 1991. Exceptions were timely filed by Betmar Utilities, Inc., and the Florida Public Service Commission as Intervenor. After consideration of the evidence, we now enter our order.

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FINAL ORDER GRANTING
CERTIFICATE AMENDMENT

BY THE COMMISSION:

CASE BACKGROUND

Both Pasco County (County) and the City of Zephyrhills (City) filed timely objections to Betmar Utilities, Inc.'s (Betmar or utility) application to amend its certificated territory. The case was referred to the Division of Administrative Hearings (DOAH) for hearing. Subsequently, the County and Betmar resolved their differences. The case was returned to the Commission whereupon it was discovered that the City's objection had not been resolved. It was referred again to DOAH for resolution of the remaining objection.

The text of the Hearing Officer's Recommended Order beginning with the Hearing Officer's Statement of the Issues is set forth below.

STATEMENT OF THE ISSUES

Whether Betmar Utilities, Inc.'s application for an expansion of territory under its water and wastewater certificates in Pasco County should be approved by the Public Service Commission.

PRELIMINARY STATEMENT

On November 13, 1989, Betmar Utilities, Inc. (Betmar) filed an application with the Public Service Commission (Commission) for an expansion of territory serviced under its water and wastewater certificates in Pasco County, Florida. Betmar seeks to enlarge its certified service area to the north and south in an unincorporated portion of the county. Pasco County (County) and the City of Zephyrhills (City) timely objected to the application, and requested a formal administrative hearing. The case was referred to the Division of Administrative Hearings (Division) by the Commission on February 26, 1990.

Jurisdiction was relinquished back to the Commission on November 8, 1990, based upon the assumption that the case had settled. When it was determined that settlement would not occur, the case was again referred to the Division on

February 20, 1991. Final hearing was scheduled for May 9, 1991.

Prior to the commencement of the hearing, the Hearing Officer was advised that the County would not be participating in the proceeding. The case style was amended to reflect the County's removal as a Respondent. As a preliminary matter, the City announced that its objection to the extension application was limited to a territorial dispute regarding the property abutting Geiger Road which extends 330' south of the road.

As a preliminary matter, all parties agreed that the Commission rules with the revision date of February 1991 would be used in the Recommended Conclusions of Law as the April rule revisions were not available at hearing. It was further agreed that the statute in effect at the time the application was filed would be the controlling statutory law.

During the hearing, two witnesses were presented by Betmar and four exhibits were moved into evidence. The City submitted three exhibits, and applicable portions of the Pasco County Land Use Plan were admitted as Hearing Officer Exhibit #1. Leave to file the land use plan and the Tariff Sheet marked Petitioner's Exhibit #4 posthearing was granted by the Hearing Officer. These exhibits were filed May 20, 1991, and all exhibits were admitted without objection.

The transcript of the hearing was filed May 22, 1991. Proposed Recommended Orders were filed by all parties by June 3, 1991. Rulings on the proposed findings of fact are in the Appendix to the Recommended Order.

FINDINGS OF FACT

1. Betmar Utilities, Inc. is a private utility company who owns and holds Florida Public Service Commission Certificates Number 137W and No. 98S. These certificates grant Betmar the right to operate a water and wastewater system in a specified territory within an unincorporated area of Pasco County.

2. Betmar seeks an extension of its certified territory into the areas immediately to the north and south in an unincorporated area of the county. There is, or will be in the near future, a need for water and wastewater

services in the proposed amended territory. An Application for Amendment of Territory was filed with the Commission to allow Betmar to service the area on November 13, 1989.

3. When Betmar noticed the City of its pending application, an objection was filed to the proposed expansion. The objection specifically relates to the property on the south side of Geiger Road, which extends 330 feet south of the roadway, and adjoins the City's boundaries.

4. Although the City does not currently provide services to this locale, it does own water and sewer lines on the northern side of Geiger Road in the Silver Oaks area. Other water and sewer lines in the City's system extend below the south side of Geiger Road at the far eastern portion of the area for which Betmar is seeking the extension of territory.

5. In an interlocal agreement between the City and the County dated February 9, 1988, these governmental entities established designated service areas for water and wastewater services in this particular area of the county. The purpose of the agreement was to promote the economic delivery of services to citizens in the area, and to provide for the necessary long-range planning inherent in the provision of these services. Prior to the agreement, the County was authorized to provide the services to the areas for which an extension is sought by Betmar.

6. The service area boundaries delineated in the agreement were to be periodically reviewed in conjunction with the review of each party's respective comprehensive plans.

7. Pursuant to this agreement, the City and County determined that the City's Service Area Boundary would include the area south of Geiger Road that abuts Betmar's current service area.

8. The City and the County each relied upon this interlocal agreement in the creation of their respective comprehensive plans. However, no additional action has been taken by the City to service the area.

9. The City is not actually operating within the disputed area for a number of reasons. First of all, the

City has adopted an ordinance which requires annexation of contiguous property as a condition of receiving its water and sewer services. The disputed portion of the proposed amended territory is not within the city limits and has not been annexed. Secondly, the City is not prepared to build utility lines to service the disputed proposed amended territory until the new bypass road along Geiger Road is built, and the proper right-of-way is obtained. At that time, the City would like to extend the Silver Oaks line under Geiger Road to the south, and the line along the eastern side of the disputed portion of territory to the west. These anticipated expansions correlate with the City's Service Area Boundary in the interlocal agreement which remains unchanged between the City and the County. A proposed service date was not provided by the City at the formal hearing.

10. The City seeks to control land use and development of property along the Geiger Road corridor though its ability to provide or withhold utility services.

11. Betmar also has water and sewer lines abutting or located on all properties described in its application for extension, including the area in controversy. These lines are currently active due to Betmar's water and sewer system which is in the center of the area targeted for expansion.

12. Both Betmar and the City have the technical and financial ability to provide water and wastewater services in the proposed amended territory.

13. Betmar has a tariff approved by the Commission which allows it to charge 110% of the cost of the extension of service from its existing lines to any property seeking service.

14. Owners of property abutting Geiger Road have contacted Betmar about the possibility of providing service. A formal request for service has been made by Jake Developers for service in that area.

15. Betmar's sewage collection facilities abutting the Geiger Road property are gravity lines. The City's sewage collection facilities in close proximity to the area are force mains.

16. Betmar does not charge impact fees for connection into its system. The City charges a water impact fee of \$350.00 and a sewer impact fee of \$1,278.00 for connection into its system.

17. Betmar anticipates a reduction in water and sewer rates if the extension is approved.

18. Betmar presented no evidence about plans for further financial investment which would enable the utility to provide service in the area for which the extension has been requested because Betmar believes further investment is unnecessary.

19. Betmar has an agreement with the County that states the County will provide bulk wastewater treatment to Betmar for the purpose of offering centralized wastewater services from the County's Southeast Subregional Wastewater Treatment Plant for a twenty-five year term.

20. The County has placed a possible qualification on the term of years in the agreement by inserting the following clause:

... its first responsibility is to the customers inside its own service limits and that it reserves the right to act in the best interest of those customers in all circumstances.

21. The agreement between the County and Betmar has not been approved by the Commission.

CONCLUSIONS OF LAW

The Division of Administrative Hearing has jurisdiction over the parties and the subject matter pursuant to Section 367.045(4) and 120.57(1), Florida Statutes.

When a utility applies for an amended certificate of authorization from the Commission, it is required to provide all information required by rule or order of the Commission. Section 367.045(2), Florida Statutes.

Rule 25-30.036(d), Florida Administrative Code, requires a utility proposing to extend its service area to provide:

[E]vidence that the utility owns the land upon which the utility treatment facilities that will serve the proposed territory are located or a copy of an agreement, such as a 99-year lease, which provides for the continued use of the land.

In this case, Betmar has an agreement with the County, who currently has jurisdiction to service the area in controversy. The agreement states the county will provide bulk wastewater treatment to Betmar in the area for a twenty-five year term, subject to the County's need to use its Southeast Subregional Wastewater Treatment Plant for customers within its own service area. When this agreement was placed into evidence instead of a deed or a long-term lease as required by rule, a legal issue arose as to whether Betmar's request for an amended certificate of authorization is materially deficient under the statutory and regulatory framework.

During a cursory review of the pending amendment application, it appears that there would be numerous public benefits if Betmar were to obtain the amended certificate and expand its territory to all of the requested area. The County has no objection, and the City is unable to act ultra vires in the area due to its ordinance which prevents the provision of City utilities in an unincorporated area. Further scrutiny reveals the amendment application is materially deficient in that the required ownership or long-term 99-year lease regarding utility treatment facilities is nonexistent. Even the proposed twenty-five year permitted use agreement regarding the treatment facilities contains conditions subsequent that severely limit the County's obligations under the agreement. As a matter of law, the agreement lacks the certainty required by Rule 25-30.036, Florida Administrative Code.

The applicant has the burden to prove that his request for the amendment is in the public interest. Although the proposed amendment application contains numerous public benefits, it is contrary to the public interest to cause future Betmar customers to rely on a wastewater treatment agreement that lacks certainty. The conditions subsequent, which are out of Betmar's control, make the proposed

agreement with the County unreliable, even for the proposed twenty-five year term.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED:

The Commission should deny Betmar's application for an amendment to its certified territory in Pasco County as the applicant has failed to provide that it will be allowed the continued use of the County's Southeast Subregional Wastewater Treatment Plant for the twenty-five year term set forth in the agreement presented at hearing.

. . . .

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 91-1159

Petitioner's proposed findings of fact are addressed as follows:

1. Accepted. See HO #2.
2. Accepted. See HO #1.
3. Accepted. See HO #3.
4. Accepted. See HO #11.
5. Accepted. See HO #4.
6. Accepted. See HO #9.
7. Accepted. See HO #11.
8. Accepted. See HO #13.
9. Accepted. See HO #14.
10. Accepted. See HO #9.
11. Accepted. See HO #9.
12. Accepted. See HO #11.
13. Accepted.
14. Rejected. Improper legal conclusion.
15. Accepted. See HO #5.
16. Accepted. See HO #8.
17. Accepted. See HO #14.
18. Accepted. See HO #14.
19. Accepted.
20. Accepted.
21. Accepted.
22. Accepted.
23. Accepted. See HO #15.

24. Accepted. See HO #15.
25. Accepted. See HO #16.
26. Rejected. Improper legal conclusion. See HO #17.
27. Accepted. See Preliminary Statement.

Respondent's proposed findings of fact are addressed as follows:

1. Accepted. See Preliminary Statement.
2. Accepted. See Preliminary Statement.
3. Accepted that an interlocal agreement between City and county existed. See HO #5. The rest of the paragraph is rejected as legal argument.

Intervenor's proposed findings of fact are addressed as follows:

1. Accepted. See HO #2.
2. Accepted. See HO #12.
3. Accepted. See HO #12.
4. Accepted. See HO #3.
5. Accepted. See HO #11.
6. Accepted. See HO #4.
7. Accepted. See HO #12.
8. Accepted. See HO #9.
9. Accepted. See HO #9.
10. Accepted. See HO #9.
11. Accepted. See HO #5.

As previously indicated, Exceptions were filed by Betmar and the Public Service Commission as Intervenor (Intervenor). The Hearing Officer rejected two of the utility's proposed findings of fact, and the utility filed exceptions to these rejections. The rejected proposed findings of fact are as follows:

14. Betmar provides sewer collection services only. Sewer treatment services are provided by Pasco County under an agreement with Betmar Utilities.

26. No further investment in the sewer or water plant is required for Betmar to provide service in the area for which extension has been requested.

The Hearing Officer rejected Proposed Finding of Fact 14 as an improper legal conclusion. We believe the two sentences are statements of fact and are supported by competent substantial evidence in the record. (See T.18, 32, 33)

The Hearing Officer rejected Proposed Finding of Fact 26 as an improper legal conclusion, referring the reader to Hearing Officer Finding of Fact 17. That finding states: "Betmar anticipates a reduction in water and sewer rates if the extension is approved." We believe Betmar's Proposed Finding of Fact 26 is not a legal conclusion and is supported by competent substantial evidence in the record. (See T. 45, 46) Further, the Hearing Officer's reference to her Finding of Fact 17 is confusing because that finding addresses Betmar's anticipated reduction in water and sewer rates and has nothing to do with the issue of need for additional investment.

Based on the foregoing, we accept these exceptions.

The utility also filed exceptions to the Hearing Officer's Findings of Fact 20 and 21. The utility stated Finding of Fact 20 is improper since it is a speculative conclusion unsupported by competent substantial evidence and that Finding of Fact 21 is irrelevant. Finding of Fact 20 states that the County has placed a possible qualification on the term of years (in the bulk services agreement) in stating its first responsibility is to its own customers. Finding of Fact 21 states the bulk services agreement has not been approved by the Public Service Commission.

We believe the Hearing Officer's Finding of Fact 20 is supported by the record and the utility's exception should be rejected. (See Ex. 3 and T. 33) We agree that the Hearing Officer's Finding of Fact 21 is irrelevant. It is also not supported by competent substantial evidence in the record. Therefore, the utility's exception is accepted.

Intervenor's exception is that the Hearing Officer failed to find that the utility's wastewater service was a wastewater collection system only. Her rejection of the utility's proposed Finding of Fact 14 led to an improper legal conclusion and overlooked the record support showing that the utility provides collection services, not treatment services. This exception is, therefore also accepted.

The utility also filed exceptions to the Hearing Officer's Conclusions of Law in two areas.

The Hearing Officer concluded that the 25-year bulk services agreement does not meet the land ownership or long-term 99 year lease requirement of Rule 25-30.036, Florida Administrative Code, and that the application was thereby materially deficient.

In its exception, the utility argues that the rule does not even contemplate a situation in which treatment is provided by a governmental entity to a private utility that only provides collection service. The rule clearly pertains to a utility providing treatment facilities where it must demonstrate ownership or lease the site upon which the facilities are located. The Hearing Officer's conclusion as to the legal effect of that rule is erroneous as a matter of law.

The Hearing Officer also concluded that the amendment application is "contrary to the public interest to cause future Betmar customers to rely on a wastewater treatment agreement that lacked certainty. The conditions subsequent [See Findings of Fact 20] which are out of Betmar's control, makes the proposed agreement with the County unreliable even for the proposed 25-year term."

In its exception, the utility argues that the agreement is not proposed, but executed and in effect, and that the Hearing Officer's reliance on her Finding of Fact 20 in no way eliminates the responsibility to provide the treatment services provided for in the agreement and any conclusion to that effect is speculation and not supported by evidence of record.

The utility also takes exception to the Hearing Officer's Recommendation as contrary to the competent substantial evidence which demonstrated that the utility has an existing 25-year agreement with the County. Further, the utility asserts that there is no competent substantial evidence to establish that the utility will not receive continued use of the County's Subregional Wastewater Treatment Plant for the term of the agreement.

We agree with the utility's analysis and therefore accept both of its exceptions to the Hearing Officer's Conclusions of Law.

Intervenor also filed an exception to the Hearing Officer's Conclusions of Law, stating that the Hearing Officer misinterpreted Rule 25-30.036, Florida Administrative Code. Intervenor stated that the rule was intended to apply to utilities which own their treatment facilities. The rule would not be applicable to Betmar since it has no treatment facilities.

Intervenor further stated that the Hearing Officer also neglected to find that Betmar was a collection system only when it rejected the utility's proposed Finding of Fact 14 which so stated. Relying on that factual error and misapplying the rule, led to the Hearing Officer's erroneous ultimate conclusion, that the application for amendment should be denied.

Upon review, we accept Intervenor's exceptions.

Therefore, upon consideration and review of the complete record, we find that the Recommended Order should be adopted in part and rejected in part.

The Hearing Officer concludes that the placing of the bulk service agreement into the record, instead of a deed or long term lease as required by Commission rule, triggered a legal issue as to whether Betmar's application was materially deficient. The Hearing Officer concluded it was deficient and that even the "proposed 25-year agreement" contained conditions subsequent that severely limit the County's obligation under the agreement. The Hearing Officer further concluded that although the application contains numerous public benefits, "it is contrary to the public interest to cause future Betmar customers to rely on a wastewater treatment agreement that lacks certainty." The Hearing Officer then recommended that the application be denied because the utility "has failed to provide that it will be allowed the continued use" of the County's plant for the 25-year term in the agreement.

Findings of Fact 1 through 20 are hereby adopted since they are supported by competent substantial evidence in the record. Finding of Fact 21 is hereby rejected as we were unable to find any record support for the statement. The exceptions to the Hearing Officer's rejection of the utility's proposed Finding of Fact 14 and the exception regarding the omission of a specific finding that Betmar is a collection system only, and not a treatment system, have been discussed above.

Based on our review of the record, we conclude that the Hearing Officer's Conclusion of Law and Recommendation must be rejected as a matter of law because the Hearing Officer has misapplied Rule 25-30.036(d), Florida Administrative Code. That rule does not apply to a utility such as Betmar since it owns no treatment facilities. Therefore, Betmar did not need to present evidence of ownership of, or long-term access to, the land underlying the treatment facilities. This rule is not applicable to the bulk services agreement. The statement in the bulk services agreement about the County's first responsibility is to its

customers is irrelevant because the term of the bulk services agreement has no relationship to the rule which is intended for a utility that has treatment facilities.

The material deficiency in the application asserted by the Hearing Officer does not exist. Thus, we find that the application of Betmar should be granted based on the Findings of Fact discussed above which show that Betmar has the ability to provide service, that it is ready, willing and able to provide service, and that there is a need for service. Accordingly, the objection of the City is denied.

Betmar's application for amendment of its water and wastewater certificates included adequate service territory and system maps and a territory description. A description of the territory granted herein is appended to this order as "Attachment A" and is by reference incorporated herein. The utility has submitted an affidavit consistent with Section 367.045(2)(d), Florida Statutes, that it has tariffs and annual reports on file with the Commission.

The utility should return Certificates Nos. 137-W and 98-S for entry to include the additional territory granted and file revised tariff sheets which reflect the amended territory description. Betmar shall charge its currently approved rates and charges in the amended territory.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the application filed by Betmar Utilities, Inc., 9826 Highway 19, P.O. Box 370, Port Richey, Florida 34673-0370, for amendment of its water and wastewater Certificates Nos. 137-W and 98-S, to include the territory described in Attachment A to this Order, is hereby granted. It is further

ORDERED that each and every finding herein is hereby specifically approved. It is further

ORDERED that Betmar Utilities, Inc., shall return Certificates Nos. 137-W and 98-S for proper entry within 30 days of this Order. It is further

ORDERED that Betmar Utilities, Inc., shall file revised tariff sheets reflecting the amended territory description within 30 days of this Order. It is further

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ORDERED that Betmar Utilities, Inc., shall charge its currently approved rates and charges to customers in the amended territory. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission, this 14th day of OCTOBER, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

NSD

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 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 or sewer 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.

ATTACHMENT A

BETMAR UTILITIES, INC.

TERRITORY DESCRIPTION

The following described lands located in portions of Sections 9 and 10, Township 26 South, Range 21 East, Pasco County, Florida:

The East 1/2 of Section 9, Township 26 South, Range 21 East, Pasco County, Florida, AND the West 1/2 of Section 10, Township 26 South, Range 21 East, Pasco County, Florida

LESS AND EXCEPT: The East 1/4 of the North 1/2 of the Northwest 1/4 of Section 10; the North 124.81 feet of the Northeast 1/4 of the Southeast 1/4 of the Northwest 1/4 of Section 10; the East 174.02 feet of the Northeast 1/4 of the Southeast 1/4 of the Northwest 1/4 of Section 10, LESS the North 124.81 feet; the East 1/4 of the North 1/4 of the Southwest 1/4 of Section 10; the West 1/2 of the North 259.32 feet of the Southeast 1/4 of the Northeast 1/4 of the Southwest 1/4 of Section 10; the East 1/2 of the North 213.63 feet of the Southeast 1/4 of the Northeast 1/4 of the Southwest 1/4 of Section 10; the North 1/2 of the Southwest 1/4 of the Southeast 1/4 of Section 9; AND the Southwest 1/4 of the Southwest 1/4 of the Southeast 1/4 of Section 9.