

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Residents of) DOCKET NO. 940229-SU
Betmar Acres to be deleted from) ORDER NO. PSC-94-1476-FOF-SU
territory in Pasco County served) ISSUED: December 1, 1994
by BETMAR UTILITIES, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

NOTICE OF PROPOSED AGENCY ACTION
ORDER REQUIRING UTILITY TO FILE SERVICE AVAILABILITY CASE

AND

ORDER GRANTING REQUEST FOR OFFICIAL RECOGNITION
AND MOTION TO DISMISS

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action requiring Betmar Utilities, Inc., to file a service availability policy is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Background

Betmar Utilities, Inc. (Betmar or utility) is a Class B water and wastewater utility in Pasco County. According to the 1993 annual report, the utility serves approximately 1,580 water and 980 wastewater customers.

This docket was opened when residents of Betmar Acres, hereinafter referred to as "residents", filed a petition requesting that the Commission remove their properties from Betmar's wastewater service area. There are approximately 600 residents in the Betmar Acres subdivision, 483 of which participated in filing the petition. In order to fully understand the residents' position, a discussion of the provisions of Section 381.00655, Florida Statutes, is appropriate.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

Section 381.00655, Florida Statutes, was enacted by the Florida Legislature in 1993. It provides, in part that:

The owner of a properly functioning onsite sewage treatment and disposal system,... must connect the system or the building's plumbing to an available publicly owned or investor-owned sewerage system within 365 days after written notification by the owner of the publicly owned or investor-owned system that the system is available for connection. ...No less than 1 year prior to the date the sewerage system will become available, the publicly owned or investor-owned sewerage system shall notify the affected owner of the onsite sewage treatment and disposal system of the anticipated availability of the sewerage system and shall also notify the owner that the owner will be required to connect to the sewerage system within 1 year of the actual availability.

In addition, the statute provides that:

The local governing body of the jurisdiction in which the owner of the onsite sewage treatment and disposal system resides may provide that any connection fee charged under this section by an investor-owned sewerage system may be paid without interest in monthly installments, over a period of time not to exceed 5 years from the date the sewerage system becomes available if it determines that the owner has demonstrated a financial hardship. The local governing body shall establish criteria for making this determination which take into account the owner's net worth, income, and financial needs.

On or about January 11, 1994, Betmar provided notice, pursuant to the provisions of Section 381.00655, Florida Statutes, to residents in its service territory using septic tanks. The notice sets forth the statute and states that customers are to notify Betmar as soon as possible if they believe they fall into the financial hardship section of the statute.

After receiving the notice, the residents began contacting this Commission with concerns over the statute. Since the Commission has no enforcement or oversight authority over Section 381.00655, Florida Statutes, our Staff initially referred the residents to the Department of Health and Rehabilitative Services (HRS) and to Pasco County. By letter dated February 10, 1994, our Staff advised the utility that Staff was attempting to ascertain as much information as possible regarding the implementation of the statute as it relates to the Commission. Our Staff also requested

that the utility refrain from any further action until a meeting with HRS and other interested parties regarding the statute and its impact on Commission regulated utilities could be held.

On March 2, 1994, the residents filed their petition and requested that the Commission remove their properties from Betmar's wastewater service area. On July 15, 1994, Betmar filed a Motion to Dismiss the residents' petition.

Concerns With the Statute

We have identified potential problems with Section 367.00655, Florida Statutes. For example, with respect to the actual connection to the wastewater system, utilities may have the bulk of the enforcement responsibility, but no guidelines or agency approval. If a septic tank owner refuses to connect to an available system, there is no mention in the statute of who enforces the statute and the recourse one must take. Further, according to the statute, the utility must notify owners of properly functioning septic tanks that a central sewage system is available. However, it is unclear who ensures that notice is proper, that it was indeed sent to each customer, or, if it is not proper, what action can be taken and by whom. Additionally, the statute is silent as to who is responsible for seeing that all utilities comply with the statute.

Another concern involves the hardship provision of the statute. Section 381.00655, Florida Statutes, provides that local governing bodies establish financial hardship criteria so that septic tank owners who demonstrate hardship can pay the connection fee in five years, without interest. Local governing body is not defined. Further, the statute does not address who is to make the determination of financial hardship, nor who arbitrates disputes. On June 23, 1994, our Staff sent a survey to the counties and municipalities within each county to ascertain how many have set hardship criteria. Out of approximately 350 surveys, we received 61 responses. None of the respondents had set up hardship criteria for customers of investor-owned utilities, nor were they aware that it was their responsibility to do so. If the responsibility to determine hardship criteria falls on investor-owned utilities, such action may have to be approved by the Commission and such approval must be placed in the regulated utility's tariff.

Our last concern is that the statute is unclear as to whether septic tank owners can request a waiver from the mandatory connection. The only waiver provision in the statute is for a utility which, with HRS' approval, may waive the requirement of mandatory connection if it is determined that the public interest

does not require connection due to public health considerations. HRS indicates that it is the intent of the statute that septic tank owners may request a waiver from the utility, which then must obtain HRS approval. However, it does not appear that utilities are advising residents of this option. HRS staff has indicated that, to date, no requests for waiver of the statute have been made by utilities.

We agree that HRS is the agency responsible for enforcing Chapter 381, Florida Statutes. However, we are concerned with the statute because of the portions which appear to conflict with the Commission's exclusive jurisdiction over a utility's service, authority, and rates. The HRS staff has advised our staff that it has no intention of enforcing the statute. Instead, HRS believes that Section 381.00655, Florida Statutes, leaves the issue of enforcement with the local governing bodies. However, the local governing bodies (city and county) have not enforced this statute. At a meeting held on September 13, 1994, and attended by representatives of the Commission Staff, Office of Public Counsel, HRS, Hudson Utility Company, and Southern States Utilities, Inc., representatives of SSU stated that they believe that in the absence of action by the local city or county governments, enforcement of the statute should be left with the utilities.

It has been the position of HRS that it lacks authority to adopt rules on this subject except as to the process for mandatory connection in a failing septic tank, and the criteria to be used in determining HRS approval for waiving mandatory connection when requested by a publicly owned or investor-owned utility. HRS representatives acknowledged that portions of the statute are vague and unclear. While HRS does not intend to propose any changes to the statute, HRS staff has indicated its willingness to take the following action:

1. Pursue rulemaking to specify the content of the notice to residents required by subsection (1) of the statute. According to HRS staff, it is their intention that the notice will be required to contain a clear explanation of the rights of the septic tank owners, including procedures for requesting waiver of the statute and hardship criteria for qualification for a payment plan.
2. Advise the county health units to work with the county and other local governments in establishing hardship criteria pursuant to Section 381.00655(2)(a), Florida Statutes.

3. Issue a Policy Statement from the HRS to all investor-owned utilities regulated by the PSC advising them of their requirements in issuing notices pursuant to this statute.

Our concerns have been identified sufficiently in this Order. The purpose, however, of this Order is to dispose of the residents' petition and the utility's motion to dismiss. Both are discussed in greater detail below.

Request for Official Recognition

On September 12, 1994, Betmar filed a Request for Official Recognition, whereby it requested that the Commission take official notice of Order No. PSC-94-0472-DS-SU, issued April 20, 1994 in Docket No. 940083-SU; Section 381.0065, Florida Statutes (1993); and Rule 10D-6.041, Florida Administrative Code.

Section 120.61, Florida Statutes, provides that when official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material. Betmar served its request and copies of the Commission Order, and the above-referenced statute and rule on September 12, 1994, with the Commission, Office of Public Counsel, Clifton A. White, Chairman, Betmar Acres and Owen York, Betmar Acres. Therefore, the parties were given an opportunity to review the material.

Section 90.201, Florida Statutes (Florida Evidence Code) sets forth the matters which must be judicially noticed. Specifically, Section 90.201(1), Florida Statutes, requires a court to notice decisional, constitutional, and public statutory law of the Florida Legislature. Section 90.202, Florida Statutes, sets forth the matters which may be judicially noticed. Specifically, Section 90.202(5), Florida Statutes, provides that official actions of the legislative, executive, and judicial departments of the United States and of any state, territory, or jurisdiction of the United States may be judicially noticed. In addition, Section 90.202(9), Florida Statutes, provides that rules promulgated by governmental agencies of this state which are published in the Florida Administrative Code or in bound written copies may be judicially noticed. Lastly, Section 90.203, Florida Statutes, provides that a court shall take judicial notice of any matter in Section 90.202, Florida Statutes, when a party requests it and provides timely written notice and sufficient information.

In consideration of the foregoing, we believe that Betmar has provided timely written notice and sufficient information to enable the Commission to take official notice of the requested items.

Therefore, Betmar's Request for Official Recognition is granted in its entirety.

Motion to Dismiss

As stated earlier, the Betmar Acres residents filed a petition wherein they request that we remove their properties from the Betmar wastewater service area. In support of their petition, the residents assert that: 1) they are residents and/or property owners in Betmar Acres; 2) there are approximately 600 units that are serviced by individual septic tank systems; 3) these systems were installed when the mobile homes were placed on their respective lots, and do not cause any problems or concerns; 4) Betmar notified the residents that wastewater service will be available in January, 1995, and stated that in accordance with Florida Statutes, connection to the wastewater line from individual lots must be made within 365 days from notification of availability; and 5) the residents did not request Betmar to provide wastewater service.

Betmar has filed a Motion to Dismiss the petition filed by the Betmar Acres residents. In support of its Motion, Betmar basically asserts that:

1. Section 367.045, Florida Statutes, governs a utility's request to delete an area from its certificate of authorization, and specifies the criteria to be considered by the Commission (emphasis added).

2. Chapter 367, Florida Statutes, does not provide a mechanism by which the residents of a certified area may request to be deleted.

3. Petitioners' real objection is not that they are in the Betmar area, but that they are required to discontinue the use of their own septic tanks and connect to Betmar's collection system.

4. Sewage disposal facilities are governed by Chapter 381, Florida Statutes, and Rule 10D-6, Florida Administrative Code, promulgated by HRS. The Commission is not the proper agency to hear a dispute concerning either the rule or the statute, as they pertain specifically to the jurisdiction and the statutory responsibility of HRS.

5. Given the requirement of Section 381.00655, Florida Statutes, that users of septic tanks connect to central systems when they become available, accepting the residents' claim that Betmar's service is "not needed" due to the availability of their

individual septic tanks would result in impermissible conflict between the two statutes.

The standard that applies when confronted by a motion to dismiss is whether, assuming that all allegations in the petition are facially valid, the petition nevertheless fails to state a cause of action for which relief may be had. In this instance, Betmar has raised a valid argument with respect to this agency not being the appropriate forum for resolving Section 381, Florida Statutes, disputes.

We agree that the Commission's statutes do not expressly provide a mechanism by which a customer may request that his property be deleted from a utility's service area. Section 367.045(2), Florida Statutes, provides that "a utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization." However, we believe that this does not mean that we could never consider such an option. If the circumstances warrant such action, we believe that the Commission has the authority, pursuant to the general public policy provisions of Section 367.011, Florida Statutes, to consider granting a customer's deletion request. In fact, the Commission, on its own motion, pursuant to Section 367.111, Florida Statutes, could delete a portion of a utility's service territory, if we find that certain conditions with respect to service have not occurred. Section 367.111, Florida Statutes, provides that:

Each utility shall provide service to the area described in its certificate of authorization within a reasonable time. If the commission finds that any utility has failed to provide service to any person reasonably entitled thereto, or finds that extension of service to any such person could be accomplished only at an unreasonable cost and that addition of the deleted area to that of another utility company is economical and feasible, it may amend the certificate of authorization to delete the area not served or not properly served by the utility, or it may rescind the certificate of authorization.

In any case, this situation does not fall under the provisions set forth in Section 367.111, Florida Statutes. Further, as contemplated by Section 367.045, Florida Statutes, this is not a certificate dispute or a dispute over the inability of a utility to provide service, but rather, a disagreement over the implementation of Section 381.00655, Florida Statutes. In this scenario, deletion of this territory will do nothing to solve the real problem with

Section 381.00655, Florida Statutes. We recognize, however, that this was a good vehicle to bring this situation to the attention of the agencies involved.

In Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), the Supreme Court held that an individual has no economic or political right to service by a particular utility merely because he deems it advantageous to himself. The residents of Betmar Acres should address their concerns to HRS so that the concerns may be adequately addressed by necessary statutory changes or rulemaking. The Commission is not the appropriate forum for a decision regarding the mandatory connection of the septic tanks.

Therefore, Betmar's Motion to Dismiss Petition by Residents of Betmar Acres to be Deleted from Betmar's Service Territory in Pasco County is granted. However, Betmar shall be on notice that if it chooses to go forward with the mandatory septic tank connections, the utility must first contact Pasco County regarding the establishment of the criteria to be used in deciding which residents qualify for the payment plan required by the statute. The utility shall file an informational tariff which reflects the hardship criteria and the terms and conditions of the payment plan option prior to offering any such option for any customer and prior to any forced connection. If the County does not establish such hardship criteria, Betmar must so advise the Commission and file a tariff containing the terms and conditions of a payment plan which must be offered to all applicants for wastewater service.

Service Availability Policy

Betmar has been interconnected with Pasco County for wastewater treatment since 1990, and, thus, has no investment in treatment plant. Therefore, the utility collects no plant capacity charge. The applicant for service is required to pay the applicable Pasco County capacity charge either to the county directly or to the utility, which forwards such funds to Pasco County. However, according to the utility's approved service availability policy for wastewater service, the applicant for service must either install and donate the lines necessary to provide service or pay 110 percent of the actual cost of the main extension.

In order to provide service to the lots on septic tanks, the utility must install wastewater lines. It is Betmar's intent to collect a service availability charge of 110 percent of the cost of the line extension consistent with its current policy. We do not believe that Betmar should collect 110 percent of the cost of the extensions. The service availability policy of this utility with

regard to lines has been in effect for some time. Since Betmar no longer has a treatment plant and is now only a collection system, it is not reasonable to allow Betmar to continue to collect 110 percent of cost in service availability charges. Rule 25-30.580, Florida Administrative Code, requires that a utility's contribution in aid of construction (CIAC) ratio be no greater than 75 percent net CIAC to net plant at build out. The rationale is that if a utility has little or no investment in its system it will not be able to earn a return and may have little incentive to continue operating.

As mentioned earlier, there are approximately 600 residents in the subdivision, which represents an increase in wastewater customers of approximately 60 percent. If we allow Betmar to collect 110 percent of the cost of the lines to serve these customers, the CIAC ratio of the utility at the time all of the residents are connected will likely exceed the maximum limit prescribed by Rule 25-30.580, Florida Administrative Code. Therefore, we believe that it is appropriate to revise Betmar's service availability policy. However, the utility shall be allowed to collect a reasonable main extension charge which would recover some of the cost of the lines from the new customers. The charge should be set such that the utility has a reasonable amount of investment in its system when it is built out. In order to determine what this line extension charge should be, the utility must file a service availability case for the wastewater system in accordance with Rule 25-30.565, Florida Administrative Code.

The service availability case must be filed within 60 days of the effective date of this Order. Further, any wastewater service availability charges collected by the utility after the effective date of this Order shall be held subject to refund pending outcome of the service availability case. If a protest is filed regarding the Proposed Agency Action portion of this Order, any service availability charges for the wastewater system collected after the effective date of this Order shall be subject to refund pending final decision by the Commission. If there are no timely protests of this Order, no further action will be required in this docket, and the docket shall be closed. If the utility files tariff sheets containing criteria for a payment plan to pay service availability charges, another docket will be opened to address that issue.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Betmar Utilities, Inc.'s Request for Official Recognition is granted. It is further

ORDER NO. PSC-94-1476-FOF-SU
DOCKET NO. 940229-SU
PAGE 10

ORDERED that Betmar Utilities, Inc.'s Motion to Dismiss Petition by Residents of Betmar Acres to be Deleted from Betmar's Service Territory in Pasco County is granted to the extent set forth above. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

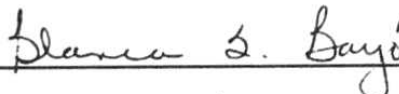
ORDERED that Betmar Utilities, Inc., must file a service availability case for its wastewater system in accordance with Rule 25-30.565, Florida Administrative Code, within 60 days of the effective date of this Order. It is further

ORDERED that any wastewater service availability charges collected by Betmar Utilities, Inc., after the effective date of this Order shall be held subject to refund pending outcome of the service availability case. It is further

ORDERED that if a protest is filed, any service availability charges for the wastewater system collected after the effective date of this Order shall be subject to refund pending final decision by the Commission. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission, this 1st day of December, 1994.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.

The action proposed herein regarding the requirement to file a service availability case is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on December 22, 1994.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water 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 of the effective date 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.