

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Approval of) DOCKET NO. 950758-WS
Transfer of Facilities of Harbor) ORDER NO. PSC-96-0992-FOF-WS
Utilities Company, Inc., to) ISSUED: August 5, 1996
Bonita Springs Utilities and)
Cancellation of Certificates)
Nos. 272-W and 215-S in Lee)
County)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON

ORDER DECLINING TO ACKNOWLEDGE NOTICE OF
WITHDRAWAL OF APPLICATION FOR TRANSFER
AND VOLUNTARY DISMISSAL

BY THE COMMISSION:

BACKGROUND

On January 23, 1995, Lee County Circuit Court, Judge Lynn Gerald, in Case No. 94-0820 CA-LGL, appointed Bonita Springs Utilities (BSU or receiver) receiver for Harbor Utilities Company, Inc. (Harbor or utility). Harbor had noticed its intent to abandon on October 19, 1994. The appointment order recognized BSU's "responsibility" to the Commission for its activities as receiver for the utility. In Order No. 5223, issued September 21, 1971, we exempted BSU's water system from our regulation, and in Order No. 24921, issued August 16, 1991, we exempted BSU's wastewater system from our regulation pursuant to Section 367.022(7), Florida Statutes, while reaffirming the water system's exemption.

On April 4, 1995, BSU filed its Receiver's Recommendation for Disposition of Assets with the court, and on June 21, 1995, the court issued a Final Order Granting Receiver's Recommendation for Disposition of Assets. The order provided for the conveyance of the utility to BSU, including all real and personal property, and was issued subject to the approval of the transfer of the utility to BSU by the Commission and the approval of the Lee County Board of Commissioners of all charges associated with the transfer. The order required BSU to wind up the business activities and affairs of the utility and to provide the county with a final accounting. By Resolution No. 95-07-27, the county commissioners, on July 19, 1995, granted their approval.

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FPSC-RECORDS/REPORTING

On July 3, 1995, BSU filed a Petition for Recognition of the Transfer of the Facilities of Harbor Utilities, Inc., to BSU with the Commission, and on August 9, 1995, a revised application for "expedited" transfer of Harbor to BSU, pursuant to Section 367.071, Florida Statutes, and Rule 25-30.037, Florida Administrative Code, the instant docket. On August 21, 1995, several Harbor customers filed objections to the transfer, taking issue with the county-approved "impact fees" (special service charges) to be charged Harbor customers upon transfer, as well as with our refunds order in Docket No. 921261-WS, alleging mismanagement on the part of Harbor's owner, and alluding to "other concerns." The objections were filed consistent with the provisions of Sections 367.045(4), and 367.071(4), Florida Statutes. Accordingly, an administrative hearing was set for September 30, 1996.

Then, on May 17, 1996, with BSU's transfer application still pending before the Commission, the court issued an Order Discharging Receivership. Finding the receivership objectives fulfilled, the court ordered that Harbor's assets are the "sole, absolute and unencumbered property" of BSU and that Harbor customers shall be the sole and absolute customers of BSU. Further, the court ordered that Harbor customers shall be charged the "approved final Special Service Charges," in addition to charges for utility services applicable to all BSU customers. The court retained jurisdiction, reserving for later ruling the issue of reabandonment by BSU in the event we fail "to acknowledge" the transfer of Harbor's assets to BSU "in a form and manner acceptable to BSU and Lee County." On June 12, 1996, BSU filed with the Commission a Notice of Withdrawal of Application for Transfer and Voluntary Dismissal (notice of withdrawal).

In Docket No. 921261-WS, a rate case filed by Harbor on December 15, 1992, the Imperial Harbor Civil Rights Unit (IHCURU), on July 19, 1995, protested the Commission's imputation to CIAC of approximately \$15,000 in unsecured refunds of interim rates in Order No. PSC-95-0884-FOF-WS, issued on the same date. An administrative hearing was set for August 9, 1996, with a prehearing conference, July 19, 1996. These were continued on July 18, 1996.

On October 17, 1995, BSU interconnected Harbor customers to its water system, and on November 28, 1995, to its wastewater system. In this order, we decline to acknowledge BSU's notice of withdrawal.

NOTICE OF WITHDRAWAL

BSU is a not-for-profit member-owned cooperative, exempt from our regulation, pursuant to Section 367.022(7), Florida Statutes. In BSU's notice of withdrawal, the receiver stated that because it is exempt from our regulation, with the court's order discharging the receivership, we lack subject matter jurisdiction over BSU's rates, charges, service or service territory and lack personal jurisdiction over BSU. Furthermore, BSU asserted that the court's order renders this docket a nullity and that we are now without subject matter jurisdiction. Moreover, BSU asserts that further action by the Commission in this docket would be taken in contempt of the circuit court and in transgression of the court's jurisdiction.

While the court's order lawfully discharges the court-appointed receivership and conveys Harbor's assets to BSU, it does no more. It does not divest us of our authority, pursuant to Section 367.071(1), Florida Statutes, to find whether or not this transfer is in the public interest and whether or not BSU will fulfill the commitments, obligations, and representations of Harbor. Indeed, the court contemplates that we may "fail to acknowledge the transfer of the Harbor Utilities assets to BSU in a form and manner acceptable to BSU and Lee County," for which eventuality the court reserved jurisdiction to rule on "reabandonment."

The objecting Harbor customers have properly invoked their right to an administrative hearing, a right that is unqualified. Section 367.071(4), Florida Statutes, provides that an application for transfer shall be disposed of as provided in Section 367.045, Florida Statutes. Section 367.045(4), Florida Statutes, permits a substantially affected person to request a proceeding pursuant to Section 120.57, Florida Statutes.

In addition, under Section 367.165(2), Florida Statutes, a receiver, acting under a temporary authorization from the Commission, is required to operate the utility from abandonment until it disposes of the property in a manner designed to continue the efficient and effective operation of utility service. BSU would appear to have satisfied this obligation. Hence, we find it appropriate to proceed to administrative hearing in this docket on September 30, 1996, and to subsequently rule on BSU's application for transfer approval pursuant to our authority in Section 367.071(1), Florida Statutes.

Accordingly, we decline to acknowledge BSU's notice of withdrawal and voluntary dismissal. We find that BSU's contention that the Commission lacks subject matter jurisdiction to take any further action with respect to this transfer is clear error. Under Chapter 367, Florida Statutes, our jurisdiction with respect to the authority, service and rates of utilities is exclusive.

BSU nevertheless presents argument that warrants our consideration in a general sense. BSU has argued that a transfer to BSU, a non-profit cooperative, is similar to a transfer to a governmental authority. Section 367.071 (4) (a), Florida Statutes, provides that the sale of facilities to a governmental authority shall be approved as a matter of right. While the concept of a transfer to an exempt entity handled in the same fashion as a transfer to a governmental authority has merit, it would require a change to the statutes.

This docket shall remain open.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that acknowledgment of Bonita Springs Utilities Notice of Withdrawal of Application for Transfer and Voluntary Dismissal is declined. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 5th day of August, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kary Flynn
Chief, Bureau of Records

(S E A L)

CJP

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 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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Records and Reporting, 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.