

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer  
of Certificate Nos. 469-W and  
358-S in Bay County from Bayside  
Utilities, Inc. to Bayside  
Utility Services, Inc.

DOCKET NO. 981403-WS  
ORDER NO. PSC-99-0607-PCO-WS  
ISSUED: April 2, 1999

The following Commissioners participated in the disposition of  
this matter:

JOE GARCIA, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JULIA L. JOHNSON  
E. LEON JACOBS, JR.

ORDER DENYING MOTION TO DISMISS THE OBJECTION AND PROTEST

BY THE COMMISSION:

BACKGROUND

On October 26, 1998, Utilities, Inc. (utility) filed an application for transfer of Certificates Nos. 469-W and 358-S in Bay County from Bayside Partnership a/k/a Bayside Utilities, Inc. (Bayside) to Bayside Utility Services, Inc., pursuant to Section 367.071, Florida Statutes. Bayside Utility Services, Inc. is in the process of incorporating as a Florida corporation. It will be a wholly-owned subsidiary of Utilities, Inc.

On November 12, 1998, three customers timely filed a letter objecting to the application. The customers have subsequently indicated that they request a hearing on the matter. Accordingly, this matter is set for an administrative hearing on February 2-3, 2000.

MOTION TO DISMISS

By their November 12, 1998, letter objecting to the application filed in this docket, the customers stated their reasons why they believed it would be improper for the utility to transfer ownership. The letter was signed by one of three

DOCUMENT NUMBER-DATE

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customers, with Bayside Homeowners Association and the names and addresses of the three customers typed at the bottom of the letter.

Because the customers did not indicate in the letter whether they were seeking a hearing on the matter, by letter dated November 24, 1998, our staff requested the customer who signed the letter to advise us, in writing, by January 7, 1999, whether the customer(s) intended to pursue the objection through a hearing. By facsimile received on January 7, 1999, signed by all three customers, as well as by a fourth additional customer, the customers indicated that they object to the transfer application and that they do request that a hearing be scheduled.

On January 26, 1999, Utilities, Inc. filed a Motion to Dismiss the Objection and Protest. The utility argues that the letter of objection to the transfer is insufficient as a protest. The utility points out that the original letter of objection was signed by only one person, but had the names and addresses of three individuals at the bottom of the letter. The utility further points out that the letter of objection was purported to be made on behalf of Bayside Homeowners Association, although there is no indication that the Association or its Board of Directors represents all or even a majority of the residents in the area, whether the homeowners were notified of the decision of the individual(s) to file an objection or protest, whether the purported action was approved by a majority vote of the members of the Association, whether there was a vote of the Board of Directors, or whether the Association was lawfully created, if it even exists.

Moreover, the utility argues that the letter of objection does not allege that Utilities, Inc. lacks the technical expertise and the financial ability to provide the required utility services. According to the utility, the only thing the letter does is to pose several questions regarding the acquiring utility's plans for the service area, which are not grounds to protest the transfer. The utility responded to these questions by letter to the Commission and to the customers on November 25, 1998.

Further, the letter of objection recites that the customers believe it would be improper to transfer ownership at this time because the recently approved staff-assisted rate case for Bayside was currently under litigation in Docket No. 971401-WS. However, the customers subsequently filed a voluntary notice of dismissal of

their protest of the proposed agency action (PAA) order filed in that case.

The utility argues that the letter of objection fails to allege appropriate or sufficient grounds to protest the transfer and is frivolous. The utility states that it reserves its right to seek the inclusion of any attorneys fees or costs incurred in relation to the objection as a recovery from its utility customers in this service area, as well as such other rights and remedies for damages, attorneys fees or other costs as may be available under the statutes and rules governing the Commission and the Circuit Courts or other tribunals of this State, including but not limited to claims under Section 57.105, Florida Statutes.

On February 8, 1999, three of the four customers who signed the faxed document indicating their intent to seek a hearing on the matter signed and filed a response to the utility's motion to dismiss. The customers argue that they are consumers of Bayside and, as ratepayers, are substantially affected by the outcome of this proposed transfer. They argue that they filed an objection to the transfer, in writing, within thirty days of the notice of the proposed transfer, and that as laypeople, they have followed the procedure necessary to obtain their rights under Florida Statutes.

Further, in response to the utility's complaint that the initial written objection was signed by only one person but had the names of three individuals at the bottom, as well as the name of the Homeowners Association, the customers argue that this does not invalidate the objection. The signatory of the original letter of objection and each of the other referenced objectors are customers of Bayside and thus have statutory standing to object to the transfer.

In response to the utility's argument that the objection does not specify how the proposed purchaser lacks the expertise necessary to run the system, the customers argue that the Florida Statutes do not require the objection to provide any such allegations, and that this is therefore not a valid ground for dismissal.

Moreover, the customers state that the utility's response to the questions raised by the protestors referenced by the utility does not eliminate the concerns of the customers. Neither does the customers' voluntary dismissal of their protest to the staff-assisted rate case eliminate their objection to the transfer

application. The customers argue that a hearing on the transfer is all the more important in order for us to examine some of the issues that the customers previously hoped would have been raised in the staff-assisted rate case hearing.

Additionally, also on February 8, 1999, the three customers who signed the response to the motion to dismiss filed a letter to further clarify their objection. The customers state that the one customer who signed the original objection did so on behalf of all four of the customers who signed the faxed document clarifying their intent to seek a hearing. They again state that they do object to the proposed transfer and that they request a Section 120.569 and Section 120.57 hearing on the matter. Moreover, they state that the city of Panama City Beach (City) has expressed an interest in purchasing the utility and that a transfer to the City is superior to a private transfer for several reasons. Bayside currently purchases all of its services from the City and thus acts merely as a middleman for the provision of utility services. A direct provision by the City would be more efficient and less costly. The customers state that an integrated countywide municipal system would be of general benefit to all Bay County citizens. For these reasons, as well as others that require an expanded forum for full illumination, the customers believe that the proposed transfer is not in the public interest.

We note that the utility does not allege that the customers' protest does not conform to Rule 28-106.201, Florida Administrative Code, which provides in subsection (2), that any document that requests an evidentiary proceeding and asserts the existence of a disputed issue of material fact shall contain a statement of all disputed issues of material fact and a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief.

Significantly, the rule further provides in subsection (4) that a petition may be dismissed if it is not in substantial compliance with subsection (2) or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. Upon review of the letter of objection, and the subsequent documentation provided by the customers to clarify their intent for seeking a hearing in this matter, we find that taken together, these filings sufficiently explain how their substantial interests will be affected by our

determination in this docket and sufficiently identify certain disputed issues and the ultimate facts alleged in accordance with Rule 28-106.201, Florida Administrative Code, including whether the proposed transfer is in the public interest. Therefore, the filings substantially comply with the rule, and we see no need for the customers to be required to file an amended petition to further clarify their request for a hearing on the matter.

Moreover, "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action." Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). "In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint . . . nor consider any evidence likely to be produced by either side. . . . Significantly, all material factual allegations . . . must be taken as true." Id.

Section 367.071(1), Florida Statutes, requires us to, among other things, make a determination that the proposed transfer is in the public interest. Because the customers have alleged reasons why it would not be in the public interest for us to grant the proposed transfer, we find that the customers have alleged sufficient facts to state a cause of action.

Additionally, we agree with the customers that since each customer has standing to object to the transfer, the fact that the initial letter of objection was signed by only one customer does not invalidate the objection. Nor is there a legal requirement that the customers allege that the proposed purchaser lacks the expertise necessary to run the system. The customers have alleged that the proposed transfer is not in the public interest and they have requested a hearing on the matter.

For the forgoing reasons, we find it appropriate to deny Utilities, Inc.'s Motion to Dismiss the Objection and Protest.

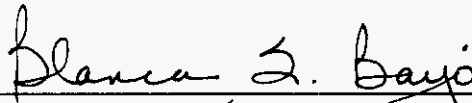
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Utilities, Inc.'s Motion to Dismiss the Objection and Protest is hereby denied. It is further

ORDERED that this docket shall remain open pending final disposition of this case.

ORDER NO. PSC-99-0607-PCO-WS  
DOCKET NO. 981403-WS  
PAGE 6

By ORDER of the Florida Public Service Commission this 2nd day  
of April, 1999.

  
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BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

RG

DISSENT

Chairman Joe Garcia dissents from the Commission's decision.

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, 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

ORDER NO. PSC-99-0607-PCO-WS  
DOCKET NO. 981403-WS  
PAGE 7

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.