

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original
certificates to operate water
and wastewater utility in Duval
and St. Johns Counties by
Nocatee Utility Corporation.

DOCKET NO. 990696-WS
ORDER NO. PSC-99-1603-PAA-WS
ISSUED: August 16, 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.

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING PETITION FOR TEMPORARY VARIANCE FROM OR TEMPORARY
WAIVER OF RULES 25-30.033(1)(h), (j), (k), (m), (o),
(r), (t), (u), (v), (w), (2), (3), AND (4),
AND 25-30.433(10), FLORIDA ADMINISTRATIVE CODE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission that the action discussed herein 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

On June 1, 1999, Nocatee Utility Corporation (NUC or utility)
filed an application for original certificates to operate a water
and wastewater utility in Duval and St. Johns Counties, Florida.
Along with its application, the utility included a petition
requesting a temporary variance from or a temporary waiver of Rules
25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2),
(3), and (4), and 25-30.433(10), Florida Administrative Code. On
June 30, 1999, Intercoastal Utilities, Inc. (Intercoastal) timely
filed a protest to NUC's application for original certificates and
requested a formal hearing. Also, on June 30, 1999, Intercoastal

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timely filed comments in regard to NUC's petition for temporary variance from or waiver of the above-mentioned rules.

NUC is a wholly-owned subsidiary of DDI, Inc. (DDI), a development company. NUC has been created for the specific purpose of providing water and wastewater service to a large-scale, multi-use development to be known as Nocatee. DDI and Estuary Corporation own all the land, consisting of approximately 15,000 acres, included within the boundary of Nocatee.

This action pertains to NUC's petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code. Because NUC's application for original certificates was protested, it has been scheduled for hearing, and thus will be addressed at a later date.

PETITION FOR TEMPORARY RULE WAIVERS OR VARIANCES

Rule 25-30.033(1)(h), (k), (o), (r), (t), (u), (v), and (w), Florida Administrative Code, pertains to the establishment of rates and charges and requires the utility to submit: information regarding the number of equivalent residential connections proposed to be served; one original and two copies of a sample tariff containing all rates, classifications, charges, rules, and regulations; a statement regarding the capacities of the proposed lines and treatment facilities; a statement of the financial condition of the applicant; a cost study supporting the proposed rates, charges, and service availability charges; schedules showing the projected cost of the proposed system; the proposed operating expenses of the proposed system; and the projected capital structure including methods of financing the construction. Rule 25-30.033(1)(j) and (m), Florida Administrative Code, applies to certification and requires the applicant to provide evidence of ownership or continued use of the land upon which the facilities are or will be located and to submit a detailed system map showing the location of the proposed lines, treatment facilities, and territory proposed to be served.

Rules 25-30.033(2), (3), and (4), Florida Administrative Code, require the utility to implement the base facility and usage rate structure, to establish a return on common equity using the Commission's approved leverage formula, and authorize the accrued allowance for funds used during construction. Rule 25-30.433(10), Florida Administrative Code, also requires the utility to provide

proof that it owns the land upon which the facilities are or will be located.

NUC requests that submittal of detailed system maps and evidence of ownership of the plant site be deferred until NUC submits its application for a consumptive use permit with the St. Johns River Water Management District (for water) and its application for construction permits with the Florida Department of Environmental Protection (for wastewater). NUC requests that the submittal of a separate application for initial rates and charges be deferred until 24 months following the issuance of any Commission order granting the utility original certificates.

Statutory Requirements

On June 18, 1999, notice of the petition to temporarily waive or vary the above-mentioned rules was published in the Florida Administrative Weekly pursuant to Section 120.542(6), Florida Statutes. As noted above, on June 30, 1999, Intercoastal timely filed comments to the notice of the petition for the temporary waiver. Intercoastal's comments are discussed in greater detail later in this Order.

Pursuant to Section 120.542(8), Florida Statutes, we are required to grant or deny a petition for variance or waiver within 90 days after receipt of the completed petition. Therefore, we must rule on NUC's petition by August 30, 1998.

Section 120.542(1), Florida Statutes, states that agencies are authorized to grant variances and waivers of their rules. Section 120.542(2), Florida Statutes, requires the entity requesting a rule waiver or variance to demonstrate that the "purpose of the underlying statute will be or has been achieved by other means" and that the "application of the rule would create a substantial hardship or would violate the principles of fairness." Section 120.542(2), Florida Statutes, defines "substantial hardship" as demonstrated economic, technological, legal, or other type of hardship.

The Underlying Statutes

The underlying statutes pertaining to the rules in this instance are Sections 367.031 and 367.045, Florida Statutes. Section 367.031, Florida Statutes, requires a utility to obtain from the Commission a certificate of authorization to provide water

and wastewater service. Moreover, Section 367.045(5)(a), Florida Statutes, states that the Commission may grant a certificate of authorization in the public interest. The purpose of Sections 367.031 and 367.045, Florida Statutes, is to ensure that: 1) the utility has the financial ability to provide service; 2) the utility has the technical ability to provide service; 3) there is a need for service in the proposed service area; and 4) service cannot be provided from other sources within geographical proximity to the area.

Financial Ability to Provide Service

Although NUC has requested a temporary waiver of the rule requiring the utility to submit its financial statements, NUC provided an agreement made with its parent company, DDI, in which DDI promises to finance the initial operation of the proposed facility. Also, NUC included the consolidated financial statements of DDI which show that NUC has the financial backing to operate a water and wastewater system. We find that the submittal of DDI's financial statements and DDI's agreement to finance the initial operation of NUC are sufficient proof to demonstrate financial ability to provide service, and therefore fulfill the purpose of the underlying statutes.

Technical Ability to Provide Service

To demonstrate its technical ability, NUC submitted a Letter of Intent between its parent company, DDI, and JEA (formerly Jacksonville Electric Authority). NUC states that pursuant to this Letter of Intent, it expects to obtain wholesale water, wastewater, and reuse service from JEA under a service agreement that will be negotiated at the time NUC obtains water and wastewater certificates from the Commission. NUC also states that it expects to obtain operations, management, and billing services from a third-party provider with experience in water and wastewater utility management, and the Letter of Intent with JEA gives NUC the option to obtain such services from JEA.

In its petition, NUC cites to Order No. PSC-98-1374-PCO-WS, issued October 12, 1998, in Docket No. 980876-WS, titled In re: Application for certificate to operate water and wastewater utility in Marion County by Ocala Springs Utilities, Inc., as an example of the Commission granting a temporary waiver of the same rules that NUC is requesting a temporary waiver of in this instance. Although Order No. PSC-98-1374-PCO-WS also involved development plans which

were dependent on the issuance of certificates for water and wastewater service, the facts of that case can be distinguished from the circumstances of this case in that Ocala Springs Utilities, Inc. (Ocala Springs Utilities), a subsidiary of Avatar Utilities, Inc. (Avatar), stated that it will receive technical support from Avatar and Avatar's subsidiaries, which include Florida Cities Water Company and Avatar Utility Services. In contrast, NUC states that its parent company, DDI, only has a Letter of Intent with JEA to obtain wholesale water, wastewater, and reuse service and that a service agreement will not be negotiated until after NUC obtains original certificates from the Commission. We find that the Letter of Intent between DDI and JEA does not demonstrate that NUC's technical ability "will be or has been achieved by other means" because NUC does not yet have a concrete agreement to obtain wholesale water, wastewater, and reuse service from JEA.

Need for Service

NUC's petition states that the future development of Nocatee will require water and wastewater service. We find that the utility's statement as to Nocatee's need for service achieves the underlying purpose of the statutes in this respect.

Other Sources of Service

As to whether service may be provided from other sources within geographical proximity to the area, NUC states that it has considered the availability of utility service from existing utilities in the vicinity of the property and has concluded that none of the utilities have the current capability to serve the needs of a major development such as Nocatee. However, as previously stated, Intercoastal filed an objection to NUC's application for original certificates and has requested a formal hearing on the matter, stating that: 1) it has a current application pending before the St. Johns County Water and Sewer Regulatory Authority to provide service to substantially all of the same area requested by NUC in its application; 2) it is able to serve the area proposed in NUC's application and granting certificates to NUC will result in uneconomic duplication of facilities and utility services; and 3) NUC's parent company, DDI, is one of the parties in litigation against Intercoastal in regard to Intercoastal's application before the St. Johns County Water and Sewer Regulatory Authority.

Again to compare NUC's request for a temporary rule waiver with Order No. PSC-98-1374-PCO-WS, in which Ocala Springs Utilities was granted a temporary waiver of the same rules which NUC has requested a temporary waiver of in this instance, there were no protests to Ocala Springs Utilities' application for original certificates and no other utilities in close proximity were requesting authorization to provide service. Because Intercoastal has objected to NUC's application for original certificates, the question is raised as to whether there is another source able to provide service within geographical proximity to the area. Thus, we find that NUC's statement does not fulfill the underlying purpose of the statutes in regard to other sources of service.

Substantial Hardship or Violation of Principles of Fairness

NUC contends that the development plans for Nocatee are "predicated on the availability and economic feasibility of water and wastewater service on a timetable and in quantities which meet the needs of the development" and that the "assurances of such service can only be achieved through the creation of a utility entity and the construction of the required water and wastewater infrastructure to serve the development." We find that NUC does not face a substantial hardship in obtaining service because another utility, Intercoastal, has expressed a willingness to provide service to a substantial portion of the future Nocatee development.

NUC does not address in its petition whether the principles of fairness would be violated if the rules at issue were applied. We do not find that applying the rules in these circumstances would violate the principles of fairness. Although it may cause the utility additional time and resources to submit the required information in order to comply with the rules, the same is true for all regulated utilities that apply for original certificates.

Intercoastal's Comments

In its comments submitted pursuant to Section 120.542(6), Florida Statutes, Intercoastal states that: 1) it has filed an objection to NUC's application for original certificates and that the temporary waiver or variance of the rules requested by NUC will adversely affect Intercoastal's ability to fully litigate the issues at the hearing; 2) NUC's application would be more appropriately filed when it has obtained development approval, entered into a definitive service agreement with JEA, and when

information regarding the utility's infrastructure is more definite and readily available; 3) that the hardship outlined in NUC's petition is the same hardship faced by all other developers not currently served by a public or private utility; and 4) the application is an attempt to "grab" territory as Intercoastal currently has an application before the St. Johns County Water and Sewer Regulatory Authority to provide service to substantially all of the territory proposed in NUC's application before this Commission.

CONCLUSION AND FINDINGS

The underlying purpose of Sections 367.031 and 367.045, Florida Statutes, is comprised of four elements: financial ability, technical ability, need for service, and whether there are other sources of service within geographical proximity to the area. Although NUC has demonstrated two of these elements, all four elements have not been demonstrated. As all the elements must be taken in conjunction, NUC has not demonstrated that it has achieved the underlying purpose of Sections 367.031 and 367.045, Florida Statutes. Furthermore, NUC has not shown that it will face a substantial hardship or that the principles of fairness will be violated if all the provisions of Rules 25-30.033 and 25-30.433(10), Florida Administrative Code, are strictly applied. Therefore, based on Section 120.542, Florida Statutes, we hereby deny NUC's petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code.

If no timely protest is filed upon expiration of the protest period, this Order shall become final and effective upon the issuance of a Consummating Order. This docket shall remain open after the issuance of the Consummating Order pending our action on NUC's application for original water and wastewater certificates.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Nocatee Utility Corporation's petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code, is hereby denied. It is further

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ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that this docket shall remain open after the date of the Consummating Order pending this Commission's action on Nocatee Utility Corporation's application for original water and wastewater certificates.

By ORDER of the Florida Public Service Commission this 16th day of August, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

SMC

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 that is available under Section 120.57, 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 will be granted or result in the relief sought.

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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.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 6, 1999.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

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.