

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for approval of
revisions to water tariff in Lee
County by MHC-DeAnza Financing
Limited Partnership d/b/a
Buccaneer Water Service.

DOCKET NO. 001219-WU
ORDER NO. PSC-01-1248-PAA-WU
ISSUED: June 5, 2001

The following Commissioners participated in the disposition of
this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

NOTICE OF PROPOSED AGENCY ACTION ORDER GRANTING VARIANCE
FROM RULE 25-30.320 (2), FLORIDA ADMINISTRATIVE CODE,
AND
ORDER APPROVING PROPOSED TARIFF REVISION
FOR DISCONNECTION OF WATER SERVICE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission that the action discussed herein with respect to
approval of the request for rule variance 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

MHC-DeAnza Financing Limited Partnership d/b/a Buccaneer Water
Service (Buccaneer or utility) is a Class C utility which provides
water service to 19 general service and 971 residential customers
residing in Buccaneer Mobile Home Park in northern Lee County.
According to the 2000 Annual Report, the utility recorded annual
revenues of \$190,397, with a net annual operating income of
\$19,453.

DOCUMENT NUMBER-DATE

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2000 RECORDS/REPORTING

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On August 11, 2000, Buccaneer submitted a tariff to implement a change to paragraph 17.0 of its service rules to address the discontinuance of water service for nonpayment of wastewater bills. Wastewater service is provided by another utility, North Fort Myers Utility (NFMU). The instant tariff filing arose from events occurring in Docket No. 981781-SU, which concerned NFMU's application for amendment of its Certificate No. 247-S to extend service area by the transfer of Buccaneer Estates mobile home park community (Buccaneer Estates) in Lee County to NFMU. A brief summary of the events in that docket follows, which is relevant to our consideration of Buccaneer's instant tariff filing.

Buccaneer Estates had previously received wastewater service from the park owner as part of the lot rental amount. Pursuant to a letter from this Commission dated May 14, 1976, the provision of service in this manner rendered the wastewater utility system exempt from regulation pursuant to Section 367.022(5), Florida Statutes.

On December 1, 1998, NFMU filed an application to include the wastewater service area of Buccaneer Estates in NFMU's certificated area. On December 10, 1998, NFMU mailed a notice to the Buccaneer customers which stated that utility service had been assigned to NFMU pursuant to Chapter 723, Florida Statutes (Florida Mobile Home Act).

We received numerous customer protests concerning NFMU's application, and ultimately the matter was set for an administrative hearing at the request of the Office of Public Counsel (OPC) and three pro se customers. A hearing was held on October 13, 1999, in North Fort Myers, Florida, and was continued to November 16, 1999, in Tallahassee, Florida. By Order No. PSC-99-2444-AS-SU, issued December 14, 1999, in Docket No. 981781-SU, we approved the transfer and amended NFMU's certificate of authorization to include Buccaneer Estates. On March 13, 2000, a notice of administrative appeal of Order No. PSC-99-2444-AS-SU was filed by one of the pro se litigants.

A further controversy arose due to the fact that a large number of customers refused to pay their wastewater bills during the pendency of the appeal. Rather than have potentially hundreds of customers disconnected from wastewater service for nonpayment of

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their bills pursuant to Rule 25-30.320, Florida Administrative Code, our staff proposed mediation of the dispute. Four mediation sessions ultimately took place in Fort Myers, Florida on May 24, June 2, June 6 and June 12, 2000.

A "Final Wastewater Settlement Agreement" (Mediated Agreement) was subsequently filed which proposed a resolution not only of the disconnection issue, but also of the continuing dispute over the transfer of Buccaneer Estates to NFMU. By Order No. PSC-00-1522-AS-SU, issued August 22, 2000, the mediated agreement was approved and Docket No. 981781-SU was closed.

Pursuant to the Mediated Agreement which was approved by Order No. PSC-00-1522-AS-SU, NFMU charges a general service rate for wastewater service to Buccaneer Estates and renders one bill per month, directly to the owner of the mobile home park, Snowbirdland Vista, Inc., as nominee for MHC-DeAnza Financing Limited Partnership (park owner), which is also the owner of Buccaneer. In turn, the park owner then individually bills the park residents for wastewater service.

The Mediated Agreement also contains a provision that the Mediated Agreement was executed in conjunction with a complete settlement of all outstanding claims of the Buccaneer Estates residents against the park owner, filed in circuit court pursuant to Chapter 723, Florida Statutes. The settlement of the dispute under the Mobile Home Act was contained in a separate document entitled "Confidential Settlement Agreement" (Confidential Agreement), the approval of which is a stated condition precedent to the effectiveness of the Mediated Agreement. Buccaneer has disclosed that the Confidential Agreement provides in part that should a customer fail to pay his or her wastewater bill to the mobile home park, Buccaneer may discontinue potable water service to such customer in lieu of disconnection of wastewater service, until such time as the owed amount is paid. The instant tariff filing seeks to effectuate this portion of the Confidential Agreement, which was not submitted for review as part of Docket No. 981781-SU.

Our staff initially filed its recommendation on September 14, 2000, recommending suspension of the proposed tariff pending further investigation. Pursuant to Section 367.091(5), Florida

Statutes, the tariff schedule proposed by the utility shall become effective within 60 days after filing, unless we vote to withhold consent to the implementation of the requested rates. However, our vote on the recommendation was deferred at the request of the utility, and on September 27, 2000, the utility filed a letter in which it agreed to waive the statutory implementation date.

We had some initial concerns regarding the tariff filing, which is addressed in greater detail below. On December 6, 2000, Buccaneer filed a letter addressing these concerns. In addition, our staff noticed and held an informal meeting in Tallahassee on February 5, 2001, which was attended by representatives for the utility and OPC. Subsequent to that meeting, on February 23, 2001, the utility filed a Petition to Approve Service Tariff and for Variance from Rule 25-30.320(2), Florida Administrative Code, which concerns refusal or discontinuance of water and wastewater service.

We have jurisdiction pursuant to Sections 120.542, 367.011, 367.121, and 367.091, Florida Statutes.

PETITION FOR RULE VARIANCE

On February 23, 2001, the utility filed a Petition to Approve Service Tariff and for Variance from Rule 25-30.320(2), Florida Administrative Code. The utility seeks a variance so that it can revise its tariff to implement an agreement whereby Buccaneer might disconnect water service to customers who are delinquent in payment for wastewater service provided by the park owner.

In relevant part, Buccaneer's proposed Service Rule 17.0 reads as follows:

BUCCANEER ESTATES MOBILE HOME PARK - PAYMENT OF WASTEWATER BILLINGS TO PARK OWNER - The Company may discontinue water service to any customer within Buccaneer Estates Mobile Home Park who fails to pay when due said customer's pro rata share of the monthly wastewater services billing submitted to the owner of Buccaneer Estates Mobile Home Park, or said owner's designee, for wastewater services provided to Buccaneer Estates Mobile Home Park. The Company shall not consider a customer delinquent in paying said wastewater billing

until the twenty first day after said billing has been mailed or presented to the customer for payment.

Water service may be discontinued due to delinquency in payment of customer's wastewater billing only after the customer has been given at least 5 working days' written notice. Such notice shall be separate and apart from any bill for water service. Water service shall be restored only after all past due wastewater billings have been paid by the customer to the park owner or its designee, and the Company has received payment for all reconnect charges.

Rule 25-30.320(2)(g), Florida Administrative Code, states that a utility may discontinue service:

for nonpayment of bills, including nonpayment of municipal sewer service under circumstances specifically provided in section 159.18(2), Florida Statutes, or noncompliance with the utility's rules and regulations in connection with the same or different type or a different class of utility service furnished to the same customer at the same premises by the same or affiliated utility only after there has been a diligent attempt to have the customer comply, including at least 5 working days' written notice to the customers.

In support of its petition, the utility states that Rule 25-30.320, Florida Administrative Code, does not specifically permit the conditions under which Buccaneer seeks to have authority to discontinue water service. The rule implements Sections 367.081, 367.111, and 367.121, Florida Statutes, none of which specifically address the circumstances under which a utility may discontinue service.

Procedural Background

Pursuant to Section 120.542(6), Florida Statutes, on February 28, 2001, we provided notice of the requested rule waiver to the Florida Department of State, which published notice of the waiver request in the Florida Administrative Weekly of March 9, 2001. We did not receive any comments regarding the utility's petition.

Pursuant to Section 120.542(8), Florida Statutes, we are required to issue an order in writing granting or denying the petition for waiver or variance stating the relevant facts and reasons supporting our decision within 90 days after receipt of the original petition. By letter filed March 13, 2001, counsel for Buccaneer agreed to extend the statutory time limitations set forth in Section 120.542, Florida Statutes, to June 28, 2001, to allow our staff time for further investigation and allow us to consider our staff's recommendation at the May 15, 2001 Agenda Conference.

Statutory Requirements

Section 120.542(2), Florida Statutes, provides that variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and that application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, substantial hardship means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.

The Underlying Statute

The underlying statute pertaining to the rule in this instance is Section 367.121, Florida Statutes, which provides that we shall have the power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and to prescribe service rules to be observed by each utility. The statute does not explicitly address the issue of termination for nonpayment of bills. However, Rule 25-30.320(2)(g), Florida Administrative Code, provides that a utility may discontinue service for nonpayment of bills, including nonpayment of municipal sewer service under circumstances specifically provided in Section 159.18(2), Florida Statutes. We note that Buccaneer and the mobile home park (which operates under these circumstances as an exempt wastewater provider) are not affiliated utilities. Nor is this an example of an agreement between a regulated utility and municipal sewer service as contemplated under the rule, and as provided for in Section 159.18(2), Florida Statutes.

In its petition, the utility asserts that approval of the proposed water tariff is within our jurisdiction and broad discretion pursuant to Sections 367.011(2) and (3), Florida Statutes, and within our authority to prescribe service rules pursuant to Section 367.121(1), Florida Statutes. There is no prohibition against the approval of the proposed tariff in either Chapter 350 or 367, Florida Statutes. Nor will any adverse precedent be set because the approval of the petition for variance shall be limited to the facts of this case, which are based on an agreement between the parties in settlement of a protracted dispute between the Buccaneer customers and the mobile home park owner (under Chapter 723, Florida Statutes), and NFMU (under Chapter 367, Florida Statutes).

Finally, the utility asserts that the Confidential Agreement provision allowing disconnection of water service to a customer who does not pay his or her wastewater billing to the park owner is analogous to the policy considerations behind Rule 25-30.320(1)(g), Florida Administrative Code, involving disconnection agreements between regulated utilities and municipal service providers. Approval of the proposed tariff allows the park owner as an exempt reseller to be treated the same as similarly situated exempt governmental entities pursuant to Rule 25-30.320(2)(g), Florida Administrative Code.

We note that in Order No. PSC-97-1362-FOF-WU, issued October 28, 1997, in Docket No. 961529-WU, we exercised our discretion and approved a tariff revision for Florida Public Utilities Company to enter into an agreement with the City of Fernandina Beach to discontinue water service for nonpayment of the City's sewer service charges. At this time, Rule 25-30.320 did not specifically address disconnections for nonpayment of municipal sewer service as contemplated by Section 159.18, Florida Statutes. Subsequent to the adoption of the Uniform Rules of Procedure, in Order No. PSC-98-0685-FOF-WS, issued May 18, 1998, in Docket No. 980112-WS, we granted a petition for waiver or variance approving a similar agreement between United Water Florida Inc. and the City of Jacksonville. By Order No. PSC-98-1306-FOF-WS, issued October 8, 1998, in Docket No. 980903-WS, the rule was modified to specifically permit disconnections as contemplated under Section 159.18(2), Florida Statutes, for nonpayment of municipal sewer

service, and give effect to agreements entered into under that Statute.

In the cases cited above, we did not regulate the governmental authority providing wastewater service, which is exempt pursuant to Section 367.022(2), Florida Statutes. Rather, we exercised our authority over the jurisdictional entity, the water utility, to allow it to disconnect water service to any customer who does not pay his or her bill to the non-jurisdictional wastewater utility. Buccaneer asserts that similarly, in this case, we would not regulate the park owner, which is an exempt reseller of wastewater utility service pursuant to Section 367.022(8), Florida Statutes. Rather, we would exercise our jurisdiction over Buccaneer to effectuate the terms of the Mediated Agreement, as well as implement the intention of the customers as expressed in the Confidential Agreement, by allowing Buccaneer the authority to disconnect water service to those customers who do not pay their wastewater bills to the park owner.

We agree with the utility that the purpose of the underlying statute will be promoted by granting the variance or waiver of Rule 25-30.320(2)(g), Florida Administrative Code. Section 367.121, Florida Statutes, authorizes us to prescribe fair and reasonable rates and charges, and service rules to be observed by each utility. As implemented by Rule 25-30.320, Florida Administrative Code, Buccaneer's requested variance is consistent with the purpose of the underlying statute. We also agree that the circumstances in the instant case are analogous to those approved in previous dockets between regulated utilities and municipal utilities, as cited above, which in fact ultimately resulted in the rule's modification to specifically accommodate such circumstances. Although an agreement of this kind between an exempt entity and regulated utility is not specifically enumerated in the rule, it is analogous to the cases cited above, and logical to treat it the same way.

Substantial Hardship

The utility also asserts that application of the rule so as to prohibit the proposed tariff revision would create a substantial hardship for the utility. Approval of the proposed tariff is consistent with fundamental principles of fairness, in that all

parties have agreed to the discontinuance tariff language via the Confidential Agreement, which in turn formed a part of the consideration for the Mediated Agreement. Approval of the proposed water tariff is critical to upholding that consideration. It would violate the tenets of fundamental fairness and result in a substantial hardship for the park owner, the customers, NFMU, and Buccaneer to have agreed to other provisions of the Confidential Agreement and the Mediated Agreement, including the agreement that the park residents be the customers of the park owner rather than being individual customers of NFMU, only to have a substantial portion of the consideration for their agreement denied.

In its petition, the utility states that approval of the proposed tariff is ultimately in the public interest because it supports through mediated settlement a fair and reasonable resolution of what was a rancorous dispute between multiple parties. The legal system favors the settlement of disputes by mutual agreement between the contending parties. Gulf Coast Electric Co-op v. Johnson, 727 So. 2d 259 (Fla. 1999). The Florida Supreme Court has stated that this general rule applies with equal force in utility service agreements, and that such settlement agreements should be upheld if, as a whole, they contain no detriment to the public. Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731, 732-33 (Fla. 1985). The proposed tariff revision language contains no detriment to the public, and in fact results in a substantial benefit.

We find that approval of the revised tariff, via the requested rule variance, serves the underlying purpose of the statute and is in the public interest. It accords with the express, executed intention of the parties involved, who were represented by counsel in the drafting of both the Mediated and Confidential Agreements. To deny the requested revision would frustrate consideration which was given specifically towards the resolution of a protracted dispute over the provision of utility service in Buccaneer Estates, and would present a substantial hardship to all parties involved.

Based on the foregoing, we hereby grant Buccaneer's petition for variance because the utility has demonstrated that a variance from Rule 25-30.320(2)(g), Florida Administrative Code, would serve the underlying purpose of Section 367.121, Florida Statutes, and

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the application of the rule would create a substantial hardship for the utility.

APPROVAL OF THE PROPOSED TARIFF REVISION

Through conversations with our staff, counsel for Buccaneer has described the procedure by which the tariff revision will be implemented. Buccaneer reads the water meters in the mobile home park and provides that information to NFMU for calculation of the wastewater bills. NFMU charges the mobile home park a general service wastewater rate. When the park owner receives the bill from NFMU, he divides the total amount of the wastewater bill by the 971 residential customers, and mails the bills out at the end of the month with the rent statement. If a customer does not pay the wastewater bill on time, the mobile home park notifies Buccaneer, which provides the five day notice of discontinuance of service to the customer.

We have reviewed Buccaneer's proposed revised tariff sheets and find it reasonable and appropriate to approve them as submitted. Pursuant to Rule 25-30.475(2), Florida Administrative Code, the revised tariff sheets shall become effective for service rendered or connections made on or after the stamped approval date on the tariff sheets provided customers have received notice. The tariff sheets will be approved upon staff's verification that the proposed customer notice is adequate. The utility shall provide proof that the customers have received notice within ten days of the date of the notice. In no event shall the revised tariff provisions be effective for service rendered prior to the stamped approval date.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that MHC-DeAnza Financing Limited Partnership d/b/a Buccaneer Water Service's Petition to Approve Service Tariff and for Variance from Rule 25-30.320(2), Florida Administrative Code, is granted. It is further

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

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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 MHC-DeAnza Financing Limited Partnership d/b/a Buccaneer Water Service's proposed tariff revision is hereby approved. It is further

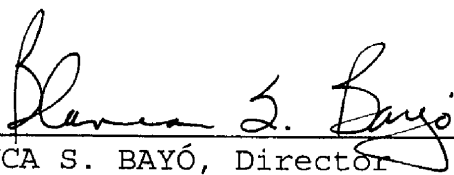
ORDERED that the revised tariff sheets shall become effective for service rendered or connections made on or after the stamped approval date on the tariff sheets provided customers have received notice. It is further

ORDERED that the tariff sheets will be approved upon staff's verification that the proposed customer notice is adequate. It is further

ORDERED that MHC-DeAnza Financing Limited Partnership d/b/a Buccaneer Water Service shall provide proof that the customers have received notice within ten days of the date of the notice. It is further

ORDERED that this docket shall be closed upon the issuance of a Consummating Order if no person whose interests are substantially affected by the proposed action, files a protest within the 21-day protest period.

By ORDER of the Florida Public Service Commission this 5th day of June, 2001.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

JSB

NOTICE OF FURTHER PROCEEDINGS

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.

As identified in the body of this Order, our decision approving the tariff is interim in nature and will become final, unless a person whose substantial interests are affected by the proposed action files 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 June 26, 2001.

As identified in the body of this order, our action approving the rule variance 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 June 26, 2001.

If a petition is filed as provided herein, 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. In the absence of such a petition, this Order shall become effective and final 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.