

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for staff-assisted rate case in Lee County by Sanibel Bayous Utility Corporation.

DOCKET NO. 020439-SU

In re: Investigation into alleged improper billing by Sanibel Bayous Utility Corporation in Lee County in violation of Section 367.091(4), Florida Statutes.

DOCKET NO. 020331-SU
ORDER NO. PSC-05-0104-SC-SU
ISSUED: January 26, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

ORDER TO SHOW CAUSE

AND

NOTICE OF PROPOSED AGENCY ACTION GRANTING REQUEST FOR TEMPORARY RELIEF, FINDING NO RATE ADJUSTMENT NECESSARY, AND CLOSING DOCKETS

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein, except for the show cause proceeding, 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

Sanibel Bayous Utility Corporation (Sanibel Bayous or utility) is a Class C wastewater utility serving approximately 150 residential, 116 multi-family, and four general service customers in Sanibel Bayous Subdivision, Heron's Landing Subdivision, the Ridge Subdivision, and Blind Pass Condominiums on Sanibel Island. On May 16, 2002, the utility filed an application for a staff assisted rate case and paid the appropriate filing fee. By Order No. PSC-03-0699-PAA-SU (PAA Order), issued June 9, 2003, we approved the utility's current rates, charges, rate base and expenses. A portion of the rate base and expenses approved included pro forma additions to plant and expenses.

In the PAA Order, we required the utility to complete six pro forma improvements within six months of the Consummating Order, which was issued July 1, 2003. Therefore, the six-month period ended January 1, 2004. A number of the pro forma items approved were

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apparently required by the Florida Department of Environmental Protection (FDEP). Based on an inspection by FDEP and responses to staff inquiries, the utility has not completed two of the pro forma improvements, and completed the other four pro forma improvements subsequent to the January 1, 2004 deadline, and only after our staff had made inquiries. By letter dated July 8, 2004, the utility requested that it be relieved from the requirement to complete the last two pro forma improvements until it can be ascertained by FDEP that these improvements are actually needed. Also, the utility was required to provide proof of insurance and post emergency telephone numbers at the plant and the lift stations by September 29, 2003. It appears that these last two requirements were also not completed in a timely manner.

This Order addresses: 1) whether Sanibel Bayous should be ordered to show cause in writing, within 21 days, why it should not be fined for its failure to comply with the requirements of the PAA Order; 2) whether Sanibel Bayous should be temporarily relieved from being required to complete the two remaining pro forma requirements in the PAA Order; and 3) whether rates should be reduced to remove the rate impact of the pro forma plant items not completed by the utility. We have jurisdiction pursuant to Sections 367.081 and 367.161, Florida Statutes.

SHOW CAUSE PROCEEDING

Pursuant to the PAA Order, we required Sanibel Bayous to:

- (1) complete any and all improvements to the system necessary to satisfy the standards set by FDEP within the time frames set by FDEP, or within one year, whichever is longer;
- (2) post no later than 90 days after the Consummating Order a local emergency phone number, which can be easily seen, at the plant and at each lift station;
- (3) complete the pro forma surge tank, fence, and lift station overhaul within six months of the Consummating Order;
- (4) complete the removal of vegetation from the pond berm, the addition of baffles in the chlorine contact chamber, and the addition of new diffusers in some of the aeration tanks within six months of the Consummating Order; and
- (5) provide Commission staff with a signed contract with Sutton and Associates or other insurer and proof of the insurance policy within 90 days of the Consummating Order.

The PAA Order was consummated on July 1, 2003. Therefore, the posting of the emergency telephone numbers and the submission of proof of insurance should have been completed by September 29, 2004. The surge tank, the fence, the lift station overhaul, the removal of vegetation from the pond berm, the addition of baffles in the chlorine contact chamber, and the addition of new diffusers in some of the aeration tanks should have been completed by January 1, 2004.

After repeated inquiries from our staff, it appears that Sanibel Bayous has now completed all of the requirements except for the pro forma surge tank and baffles in the chlorine contact chamber. However, it does not appear that the requirements have been completed in a timely manner.

With respect to the FDEP required system improvements, we gave Sanibel Bayous a minimum of one year to complete the improvements that are necessary to satisfy the standards set by the FDEP. Because FDEP issued its Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment (Notice of Violation) on March 1, 2004, the time for completion of FDEP requirements has not yet run and the utility is not in violation of the time period established in the PAA Order for compliance with FDEP standards.

We required the emergency number and insurance requirement to be completed by September 29, 2003. The utility does appear to have posted a local emergency telephone number at the plant and at each lift station, but the invoices for the signs were dated February 25, 2004, and March 8, 2004. Also, the utility submitted a binder for insurance on October 22, 2003, but did not submit a contract for insurance until May 24, 2004. The insurance contract was dated April 21, 2004.

We required the fence, lift station overhaul, addition of diffusers, and removal of pond berm vegetation to be accomplished by January 1, 2004. The invoice for the fence completion was dated February 20, 2004. The invoices showing work done on the lift stations were dated February 6, 2004, and May 10, 2004. An invoice dated April 26, 2004 showed that installation of the new diffusers was completed on April 9, 2004. Also, work on removing the pond berm vegetation began during the week of May 3-8, 2004, and the utility paid a total of \$10,020 for labor and \$825 for a backhoe in that week. However, because of nesting birds and Hurricane Charlie, the utility did not complete the removal of the pond berm vegetation until November 20, 2004, with an additional expenditure of \$14,960 for labor and a total of \$3,650 for rental of a backhoe and chipper. Therefore, while the utility has apparently now completed the above-noted tasks, it appears that most were not done in a timely manner.

Also, the utility has not completed the pro forma surge tank and has not added baffles in the chlorine contact chamber, which were required to be completed by January 1, 2004. As noted above, on July 8, 2004, the utility requested that it be granted temporary relief from those two requirements, plus an extension of time to complete the pond berm vegetation. As justification for this relief, the utility stated that it had hired Johnson Engineering and that Johnson Engineering was working with FDEP to determine if there was a need for the surge tank. With the addition of the new lift station time clocks, the FDEP monthly operating reports indicate flows lower than anticipated and the utility claims there may not be a need for a surge tank. Also, the utility has hired Schaffer Utility Management Company (Schaffer) and the operating reports since January indicate that chlorine residuals have been maintained without the addition of the baffles. Again, Johnson Engineering is working with FDEP to determine if the addition of the baffles will be required. Although the utility requested temporary relief from the Order on the above requirements, it did not make such request until over six months after the improvements were due to be completed.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Section 367.161(1), Florida Statutes, authorizes this Commission to assess a penalty of not more than \$5,000 for each offense if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, Florida Statutes, or any lawful order of the Commission. By failing to comply with the above-noted requirements of the PAA Order in a timely manner, the utility's acts were "willful" in the sense intended by Section 367.161, Florida Statutes. In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., this Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "willful" implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

We find that the circumstances in this case are such that show cause proceedings should be initiated. In the very PAA Order that it appears the utility is now violating, the utility was required to show cause for three separate violations of the statutes and rules of this Commission. Further, the utility had been previously warned in another order that it must comply with the Commission's rules and statutes. For the prior show cause proceeding, the utility ultimately paid a \$300 fine (\$100 for each violation). The PAA Order specifically stated that "subsequent violations could result in higher fines."

Although the utility has apparently not timely complied with eight requirements of the PAA Order, there are mitigating circumstances which contributed to Sanibel Bayou's violations. Since January 1, 2004, and the hiring of Johnson Engineering and Schaffer, there has been a marked change for the better in the attitude of the utility, and the utility has taken extraordinary measures to bring the utility into compliance with both FDEP standards and Commission requirements. This is a small utility, and since January 1, 2004, the utility has spent approximately \$98,000 to make necessary improvements and bring the utility into compliance. Also, it is unclear whether the addition of a surge tank and the baffles in the chlorine contact chamber will now be required by FDEP. However, that does not excuse the utility from complying with the orders of this Commission.

The continued pattern of disregard for the Commission's rules, statutes, and orders warrants more than just a warning. Moreover, the fine of \$300 did not appear to "get the utility's attention." Accordingly, Sanibel Bayou shall be made to show cause in writing, within 21 days, why it should not be fined a total of \$500 for its apparent failure to timely comply with eight requirements of the PAA Order.

The following conditions shall apply:

1. The utility's response to the show cause order shall contain specific allegations of fact and law;

2. Should Sanibel Bayous file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made;
3. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;
4. In the event that Sanibel Bayous fails to file a timely response to the show cause order, the fine shall be deemed assessed with no further action required by this Commission;
5. If the utility responds timely but does not request a hearing, a recommendation shall be presented to the Commission regarding the disposition of the show cause order;
6. If the utility responds to the show cause order by remitting the fine, this show cause matter shall be considered resolved.

As set forth below, the requirement to complete the surge tank and add baffles in the chlorine contact chamber shall be made contingent on the requirements of FDEP. Further, the utility shall be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to \$5,000 per day per violation for each day the violation continues as set forth in Section 367.161, Florida Statutes.

REQUEST FOR TEMPORARY RELIEF

In the PAA Order, we required Sanibel Bayous to construct a surge tank and add baffles in the chlorine contact chamber by no later than January 1, 2004. Sanibel Bayous has now requested that it be granted temporary relief from those requirements.

As stated above, the utility has hired Johnson Engineering and Schaffer, and there is some question as to whether either the surge tank or baffles in the chlorine contact chamber are now needed. Johnson Engineering is working with FDEP to determine if either of these improvements will ultimately be required.

In the PAA Order, we allowed total pro forma plant of \$47,359, with \$25,000 of the pro forma plant being the cost for a surge tank, with the understanding that a surge tank was required by FDEP. Also, the total estimated expense for the baffles (not done) and the diffusers (completed) was \$2,000, to be amortized over five years for an annual expense of \$400. Even without the construction of the surge tank or the addition of the baffles in the chlorine contact chamber, Sanibel Bayous has spent greatly in excess of the \$47,359 in making improvements.

When the PAA Order was issued, we thought that both the surge tank and addition of the baffles were being required by FDEP. However, it is now unclear just what FDEP will require.

Therefore, we shall give FDEP and Sanibel Bayous time to determine what is the best future course of action. Therefore, we find that it is appropriate to grant Sanibel Bayous' request for temporary relief from these two requirements. The completion of these requirements shall be contingent upon the decision of the FDEP on their necessity. Sanibel Bayous shall make any improvements as required by FDEP.

In so ordering, we recognize that the Florida Supreme Court has found that:

orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.¹

Nevertheless, the Court continued by stating that:

We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on their own motion, regulatory agencies such as the commission often do so. Further, whereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.²

With the passage of time and new managers running the sewage treatment plant, it is now unclear as to just what will be required by FDEP. Therefore, we find that the public interest warrants the granting of the request, and that this action fits squarely within the reasoning of the Peoples Gas Court.

RATE IMPACT OF THE PRO FORMA PLANT ITEMS NOT COMPLETED

As discussed above, in the PAA Order, we required the utility to complete six pro forma items by January 1, 2004. This order also specified that the docket remain open pending our staff's verification that the utility had completed the pro forma improvements. The required

¹ Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966).

² Id.

improvements included a fence, a surge tank, lift station overhaul, the removal of vegetation from the pond berm, the addition of baffles in the chlorine contact chamber, and new diffusers in some of the aeration tanks.

Our staff verified that the utility completed all pro forma plant and expense items except for the surge tank and baffles in the chlorine contact chamber. As noted above, the utility may or may not be required to complete the surge tank and baffles to bring the utility into compliance with FDEP permit standards.

The amounts included in the PAA Order for pro forma improvements were estimates, and the actual costs for these items were different from the estimated costs. In order to determine whether rates should be reduced, we have calculated the associated revenue requirements. The revenue requirement for the items required by the PAA Order was \$10,260. The revenue requirement associated with actual costs incurred for the completed items is \$20,702. Because the revenue requirement of the costs actually incurred is greater than the revenue requirement of the items required by the PAA Order, we find that no rate adjustment is necessary. Our calculation of the pro forma impact on the annual revenue requirement, discussed above, is shown on Schedule A.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Sanibel Bayous Utility Corporation shall show cause in writing within 21 days of the issuance of this Order why it should not be fined \$500 for its apparent failure to timely comply with the requirements of Order No. PSC-03-0699-PAA-SU. It is further

ORDERED that Sanibel Bayous Utility Corporation's written response shall contain specific allegations of fact and law. It is further

ORDERED that should Sanibel Bayous Utility Corporation file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made. It is further

ORDERED that failure to file a timely written response to the show cause order shall constitute an admission of the facts alleged in the body of this Order and a waiver of the right to a hearing. It is further

ORDERED that in the event that Sanibel Bayous Utility Corporation fails to file a timely response to the show cause order, the fine shall be deemed assessed with no further action required by this Commission. It is further

ORDERED that if Sanibel Bayous Utility Corporation responds timely but does not request a hearing, a recommendation shall be presented to the Commission regarding the disposition of the show cause order. It is further

ORDERED that if Sanibel Bayous Utility Corporation responds to this show cause order by remitting the fine, this show cause matter shall be considered resolved. It is further

ORDERED that, except for the show cause proceeding, the provisions of this Order are issued as proposed agency action and 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 the Commission Clerk and Administrative Services, 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 Sanibel Bayous Utility Corporation's request that it be temporarily relieved from the requirement to construct a surge tank and add baffles in the chlorine contact chamber is granted as set forth in the body of this Order. It is further

ORDERED that the completion of the surge tank and addition of baffles shall be contingent upon the decision of the Department of Environmental Protection, and Sanibel Bayous Utility Corporation shall make any improvements as required by the Department of Environmental Protection. It is further

ORDERED that no rate adjustment is required for the failure of Sanibel Bayous Utility Corporation to construct a surge tank and add baffles in the chlorine contact chamber. It is further

ORDERED that if no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of this Order, these dockets shall be closed upon the issuance of a Consummating Order.

By ORDER of the Florida Public Service Commission this 26th day of January, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

RRJ

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.

The show cause portion of this Order is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by this Show Cause Order may file a response within 21 days of issuance of the Show Cause Order as set forth herein. This response must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 16, 2005.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to the show cause portion of this Order within the time prescribed above, that party 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 the Commission Clerk and Administrative Services, 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.

As identified in the body of this Order, all action, except for the show cause proceeding, 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 the Commission Clerk and Administrative Services, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 16, 2005. If such a petition is filed, 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.

SANIBEL BAYOUS UTILITY CORPORATION
TEST YEAR ENDING MARCH 31, 2002

SCHEDULE NO. A
DOCKET NO. 020439-SU

PRO FORMA IMPACT ON ANNUAL REVENUE REQUIREMENT

	<u>PER</u> <u>ORDER</u>	<u>ACTUAL</u>	<u>DIFFERENCE</u>
Surge Tank	25,000	0	(25,000)
Fence	9,500	1,465	(8,035)
Overhaul Lift Station	<u>12,859</u>	<u>9,747</u>	<u>(3,112)</u>
Total Pro Forma Plant	47,359	11,212	(36,147)
Accumulated Depreciation	1,267	222	(1,045)
Non-Used and Useful	0	0	0
Working Capital	<u>529</u>	<u>2,290</u>	<u>1,762</u>
Rate Base	46,621	13,280	(33,341)
Rate of Return	<u>9.23%</u>	<u>9.23%</u>	<u>9.23%</u>
Return on Rate Base	4,304	1,226	(3,078)
O&M Expense			
Removal of Pond Berm Vegetation	1,000	5,912	4,912
Baffles and Diffusers	400	1,848	1,448
General Liability Insurance	2,828	10,562	7,734
Depreciation Expense	<u>1,267</u>	<u>222</u>	<u>(1,045)</u>
Total	9,799	19,770	9,972
True-up (RAF)	<u>0.9550</u>	<u>0.9550</u>	<u>0.9550</u>
Revenue Requirement Impact	<u>\$10,260</u>	<u>\$20,702</u>	<u>\$10,441</u>