



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: JULY 15, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYBRO)

FROM: DIVISION OF LEGAL SERVICES (CIBULA) *S.M.C.*
DIVISION OF WATER AND WASTEWATER (REHWINKEL, REDEMANN) *ce*

RE: DOCKET NO. 990696-WS - APPLICATION FOR ORIGINAL CERTIFICATES TO OPERATE WATER AND WASTEWATER UTILITY IN DUVAL AND ST. JOHNS COUNTIES BY NOCATEE UTILITY CORPORATION. *ppr bp*

AGENDA: JULY 27, 1999 - REGULAR AGENDA - PROPOSED AGENCY ACTION RULE WAIVER - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: AUGUST 30, 1999 - COMMISSION MUST GRANT OR DENY REQUEST FOR RULE WAIVER WITHIN 90 DAYS OF RECEIPT OF PETITION

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990696.RCM

RECEIVED - RECORDS AND REPORTING
JUL 15 AM 11:30
RECEIVED - PSC

CASE BACKGROUND

On June 1, 1999, Nocatee Utility Corporation (NUC or utility) submitted an application for original certificates to operate a water and wastewater utility in Duval and St. Johns County, 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 timely filed comments in regard to NUC's petition for temporary waiver of the above-mentioned rules.

DOCUMENT NUMBER-DATE

08423 JUL 15 115

FPSC-RECORDS/REPORTING

DOCKET NO. 990696-WS
DATE: JULY 15, 1999

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 recommendation addresses 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 is being scheduled for hearing.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant 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?

RECOMMENDATION: No. Staff recommends that the Commission deny 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, because the petition does not meet the requirements of Section 120.542, Florida Statutes. (CIBULA, REHWINKEL, REDEMANN)

STAFF ANALYSIS: 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 water management district (for water) and until NUC submits 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. 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 recommendation.

Pursuant to Section 120.542(8), Florida Statutes, the Commission is required to grant or deny a petition for variance or waiver within 90 days after receipt of the completed petition. The Commission 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) that

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. Staff believes 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 for a temporary waiver, NUC cites to Order No. PSC-98-1374-PCO-WS, issued October 12, 1998, in Docket No. 980876-WS; 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. Thus, staff does not believe that the Letter of Intent between DDI and JEA demonstrates 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 for temporary waiver states that the future development of Nocatee will require water and wastewater service. Staff believes 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 waiver with Order No. PSC-98-1374-PCO-WS, in which Ocala Springs Utilities was granted a temporary waiver of the same rules for 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,

staff believes 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." Staff does not believe that NUC faces a substantial hardship as to 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 for temporary waiver whether the principles of fairness would be violated if the rules at issue were applied. Staff does not believe 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

As mentioned above, pursuant to Section 120.542(6), Florida Statutes, Intercoastal submitted comments in regard to the notice of petition for the temporary waiver published in the Florida Administrative Weekly. In its comments, 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 in the hearing for original certificates; 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

DOCKET NO. 990696-WS
DATE: JULY 15, 1999

substantially all of the territory proposed in NUC's application before this Commission.

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 other sources of service within geographical proximity to the area. Although staff believes that NUC has demonstrated two of these elements, all four elements have not been demonstrated. Therefore, as all the elements must be taken in conjunction, staff does not believe that NUC has demonstrated that it has achieved the underlying purpose of Sections 367.031 and 367.045, Florida Statutes. Furthermore, staff does not believe that NUC has 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, staff recommends that the Commission 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.

DOCKET NO. 990696-WS
DATE: JULY 15, 1999

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open after the date of the Consummating Order pending Commission action on Nocatee Utility Corporation's application for original water and wastewater certificates. (CIBULA)

STAFF ANALYSIS: As previously stated, NUC has applied for original certificates to operate a water and wastewater utility in Duval and St. Johns County. Therefore, this docket should remain open after the date of the Consummating Order pending Commission action on NUC's application for original water and wastewater certificates.