



Public Service Commission

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MAY - 3 AM 11:35
RECORDS AND REPORTING

DATE: MAY 3, 2001

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

FROM: DIVISION OF LEGAL SERVICES (BRUBAKER) *BCA*
DIVISION OF REGULATORY OVERSIGHT (JOHNSON) *PP BSM*

RE: DOCKET NO. 001219-WU - REQUEST FOR APPROVAL OF REVISIONS TO WATER TARIFF IN LEE COUNTY BY MHC-DEANZA FINANCING LIMITED PARTNERSHIP D/B/A BUCCANEER WATER SERVICE.

AGENDA: MAY 15, 2001 - REGULAR AGENDA - DECISION ON RULE VARIANCE - PROPOSED AGENCY ACTION FOR ISSUES NO. 1 AND TARIFF FILING FOR ISSUE NO. 2 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 60-DAY SUSPENSION DATE (TARIFF) - 10/10/00 - WAIVED

90-DAY STATUTORY TIME LIMIT (PETITION FOR RULE VARIANCE) - 5/24/01 - WAIVED UNTIL 6/28/01

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\001219.RCM

CASE 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.

On August 11, 2000, Buccaneer submitted a tariff to implement a change to paragraph 17.0 of its service rules to address the

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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 staff believes is relevant to the Commission's 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 dated May 14, 1976 from the Florida Public Service Commission, 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).

The Commission 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 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, the Commission 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 their bills pursuant to Rule 25-30.320, Florida Administrative Code, Commission staff proposed mediation of the dispute. Four

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separate 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 with the Commission 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 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), who 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.

Staff initially filed a recommendation on September 14, 2000, recommending suspension of the proposed tariff pending further investigation by staff. Pursuant to Section 367.091(5), Florida Statutes, the tariff schedule proposed by the utility shall become effective within 60 days after filing, unless the Commission votes to withhold consent to the implementation of the requested rates. However, the Commission 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.

Staff had some initial concerns regarding the tariff filing, which is addressed in greater detail in Issue 1. On December 6, 2000, Buccaneer filed a letter addressing staff's concerns. In addition, 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.

Pursuant to Section 120.542(6), Florida Statutes, on February 28, 2001, the Commission 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. The Commission did not receive any comments regarding the utility's 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 Commission staff time for further investigation and allow staff's recommendation to be considered at the May 15, 2001 Agenda Conference.

Issue 1 of this recommendation addresses Buccaneer's petition for rule variance; Issue 2 addresses the utility's proposed tariff revision. The Commission has jurisdiction pursuant to Sections 120.542, 367.011, 367.121, and 367.091, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the Petition for Variance from Rule 25-30.320(2), Florida Administrative Code, filed by MHC-DeAnza Financing Limited Partnership d/b/a Buccaneer Water Service?

RECOMMENDATION: Yes, the Commission should grant Buccaneer's Petition to Approve Service Tariff and for Variance from Rule 25-30.320(2), Florida Administrative Code, because the petition meets the requirements of Section 120.542, Florida Statutes. (BRUBAKER)

STAFF ANALYSIS: 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, the Commission 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. The Commission did not receive any comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, the Commission is required to issue an order in writing granting or denying the petition for waiver or variance stating the relevant facts and reasons supporting the Commission's decision within ninety 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 Commission staff time for further investigation and allow staff's recommendation to be considered at the May 15, 2001 Agenda Conference.

Statutory Requirements

Section 120.542(2), Florida Statutes, in pertinent parts, 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 the Commission 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. Staff notes 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 the jurisdiction and broad discretion of the Commission pursuant to Sections 367.011(2) and (3), Florida Statutes, and within the Commission's 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 should 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.

Staff notes that in Order No. PSC-97-1362-FOF-WU, issued October 28, 1997, in Docket No. 961529-WU, the Commission exercised its 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, the Commission 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, the Commission did not regulate the governmental authority providing wastewater service, which is exempt pursuant to Section 367.022(2), Florida Statutes. Rather, the Commission exercised its authority over the jurisdictional entity, the water utility, to allow the water utility to disconnect water service to any customer who does not pay its bill to the exempt wastewater utility service. Buccaneer asserts that similarly, in this case, the Commission does not regulate the park owner, which is an exempt reseller of wastewater utility service pursuant to Section 367.022(8), Florida Statutes. However, the Commission may exercise its 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.

Staff agrees 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 the Commission 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 underlying statute. Staff agrees that the circumstances in the instant case are analogous to those approved by the Commission 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 this exempt entity is not enumerated in the rule, it is analogous and logical to treat it the same.

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.

Staff believes 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, staff recommends that Buccaneer's petition for variance should be granted 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 the application of the rule would create a substantial hardship for the utility.

As discussed in Issue 2, staff recommends that the proposed tariff revision should also be approved.

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ISSUE 2: Should the Commission approve Buccaneer's proposed tariff revision implementing water disconnection in lieu of wastewater disconnection for failure to pay wastewater bills?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, the proposed tariff revision, filed on August 11, 2001, should be approved as filed. Pursuant to Rule 25-30.475(2), Florida Administrative Code, the revised tariff sheets should 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 should be approved upon staff's verification that the proposed customer notice is adequate. The utility should provide proof that the customers have received notice within ten days of the date of the notice. In no event should the revised tariff provisions be effective for service rendered prior to the stamped approval date. (BRUBAKER, JOHNSON)

STAFF ANALYSIS: Staff has reviewed the proposed revised tariff sheets submitted by Buccaneer. Provided the Commission approves staff's recommendation in Issue 1, and for the reasons discussed therein, staff recommends that the Commission approve the revised tariffs as submitted, consistent with staff's recommendation in Issue 1.

Through conversations with 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, who provides the five day notice of discontinuance of service to the customer.

Pursuant to Rule 25-30.475(2), Florida Administrative Code, the revised tariff sheets should 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 should provide

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proof that the customers have received notice within ten days of the date of the notice. In no event should the revised tariff provisions be effective for service rendered prior to the stamped approval date.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. This docket should 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. (BRUBAKER)

STAFF ANALYSIS: This docket should 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.