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State of Florida

Public Service Commission

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

DATE: SEPTEMBER 20, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (JAEGER)
DIVISION OF ECONOMIC REGULATION (WALKER, RENDELL)

RE: DOCKET NO. 010726-WS - COMPLAINT BY BAYSIDE MOBILE HOME PARK AGAINST BAYSIDE UTILITY SERVICES, INC. REGARDING DENIAL OF REQUEST FOR WATER AND WASTEWATER SERVICE IN BAY COUNTY.

AGENDA: OCTOBER 2, 2001 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUES 1 and 2 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\010726R2.RCM

CASE BACKGROUND

Commission staff filed its original recommendation in this complaint docket on August 23, 2001 for consideration at the September 4, 2001 Agenda Conference. However, Bayside Mobile Home Park (complainant, developer, or BMHP) requested that this item be deferred. The request for deferral was granted.

Moreover, on September 4, the complainant filed its Second Response to Staff's First Data Request (Second Response), in which it took exception to several statements made in staff's original recommendation dated September 4, 2001. By letter dated September 12, 2001, BUSI responded to BMHP's Second Response to Staff's First Data Request. In this letter, Bayside Utility Services, Inc. (BUSI or utility) stated that it agreed with staff's original analysis. Moreover, BUSI states that "even if everything in the 'Second

Response' were accepted as correct and accurate (much of which the utility disputes), it is evident that there is nothing therein which would change the result of the Staff Recommendation dated August 23, 2001." Also, on September 12, 2001, BMHP submitted what it entitled its Third Response to Staff's First Data Request (Third Response). This recommendation revises the original recommendation to address the exceptions raised in BMHP's Second Response, BUSI's letter dated September 12, 2001, and BMHP's Third Response.

BUSI is a Class C water and wastewater utility serving Bayside Mobile Home Park in Bay County. The utility purchases water and wastewater services from the City of Panama City Beach (City). According to the utility's 2000 annual report, it has approximately 287 water and 287 wastewater active connections.

Order No. PSC-99-1818-PAA-WS issued September 20, 1999, approved the transfer of Certificates Nos. 469-W and 358-S from Bayside Utilities, Inc., to BUSI. BUSI was incorporated on November 6, 1998, as a Florida corporation and is a wholly-owned subsidiary of Utilities, Inc., a corporation based in Illinois. Prior to the transfer of the utility to BUSI, BMHP had been established in 1972, and had been purchased by Bayside Partnership in 1984. Bayside Utilities, Inc., the former utility, was formed in 1987, and was a wholly owned subsidiary of Bayside Partnership.

As required by Rules 25-30.037(2) (g), (h), (i), and (k), Florida Administrative Code, the application was accompanied by the Asset Purchase Agreement (sales contract) executed on October 7, 1998. However, the closing did not occur until June 17, 1999. The agreed upon purchase price was $190,000 and it was a cash transaction. At that time, BUSI took over the utility and the remaining portion of the business became known as Bayside Mobile Home Park.

Apparently, BMHP began plans for expansion as early as 1997, and BMHP hired Mr. George Walrond, P.E., on July 13, 1998, to begin the process of doing the engineering to develop the vacant property. Mr. Walrond was replaced by Mr. Sam McNeil, P.E., on July 7, 1999. The new expansion area is to include 65 new lots for mobile homes and 10 lots for single-family, waterfront residences on the bay. This expansion was to take place in an unoccupied area in the northwest section of the service area. The area is currently being used for garbage receptacles and parking for various sports recreation equipment.

An ordinance of the City of Panama City Beach imposes an impact fee on additional connections to the water and wastewater systems. The developer forwarded a schedule of these proposed fees to the utility which included a fee of $2,420.78 for each mobile home added to the system and $2,796.02 for each single family residence added to the system. The total impact fees required by Panama City Beach totaled $185,310.90 and were expected, by the developer, to be paid by the utility.

Upon receipt of this information, the utility took the position that the developer was responsible for the impact fees imposed by the City. In a letter to the utility and the Commission dated March 6, 2000, the developer argued that BUSI's tariff indicates that the main extension charge is $300 per connection. The developer also argued that the utility is responsible for supplying water and wastewater service to the proposed lots since they were in the prescribed service area. The developer also suggested to BUSI that the tariff should be changed to accommodate the impact fee imposed by the City.

In a letter dated March 21, 2000, the developer sent another letter to the utility. The developer, Leonard Jeter, met with the City Manager of the City, Richard Jackson, on the matter of the impact fees. Mr. Jackson informed the developer that it is typical for the end user (purchaser of a lot) to pay the impact fees for the water and sewer connections at the time that they purchase the lot and begin building. In its original recommendation, staff indicated that it had been informed that the conflict had been resolved. In its Second Response, BMHP stated that this is not the case. BMHP still maintains that it has always been and still is the position of BMHP that the impact fees of the City are owed by and should be paid by BUSI. However, by letter dated March 21, 2000, Mr. Jeter, representing BMHP, admitted that the problem of the impact fees was solved when the City agreed that "the burden of paying the impact fees" was "on the lot purchaser, where it should be." Despite the fact that that problem appears to be resolved, BMHP believes that the utility should still consider revising its tariff to include the impact fees to the City.

Besides the question of who should pay the impact fees, the question arose as to who was responsible for the installation of the water service lines and the wastewater collection lines in the proposed development. In a letter to the utility dated April 25, 2000, the developer made its position clear that it was the responsibility of the utility to provide the water and wastewater

extensions into the proposed development. The developer stated that it would not make sense for them to install the needed system and then hand it over to the utility free of charge for the purpose of profit. The developer further stated that his understanding of Commission rules indicated that a donated system would not add to utility rate base and would not allow a return since it would be considered CIAC. The developer also made it clear that it wished to be reimbursed for the engineering expenses which were associated with the planning of the water and wastewater systems of the proposed development.

On March 2, 2001, the utility submitted a developer's agreement to the developer in an effort to clarify any misunderstanding about responsibility for the proposed utility extension. The agreement indicated the developer would be liable for the installation of the proposed water and wastewater distribution and collection lines and also required the developer to essentially warranty the lines against malfunctions or breaks for a period of one year. The developer refused to sign the agreement on the grounds that the utility has, in its tariff, main extension charges of $300 per connection. The developer believes that it should only be charged $300 for each of the additional 75 connections within the proposed developmental area. These charges would only account for $22,500 of the estimated $100,000 - $150,000 necessary to complete the extension of the water and wastewater systems.

On May 11, 2001, the developer filed a complaint with the Florida Public Service Commission pursuant to Rule 25-30.540(4), Florida Administrative Code, which states, "If an applicant (for service) believes the charges required by a utility pursuant to subsections (2) and (3) are unreasonable, the applicant may file a complaint with the Commission in accordance with Chapter 25-22, F.A.C."

The complaint states that BUSI is in violation of Rule 25-30.520, Florida Administrative Code, which states, "It is the responsibility of the utility to provide service within its certificated territory in accordance with terms and conditions on file with the Commission."

The developer is asking the Commission to determine who is financially responsible for the installation of the proposed utility extension. The Commission has jurisdiction pursuant to Sections 367.101 and 367.121, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Bayside Utility Services, Inc. be ordered to install wastewater collection lines, manholes and water distribution lines to supply water and wastewater service to the proposed development of Bayside Mobile Home Park?

RECOMMENDATION: No. Bayside Utility Services, Inc. should not be required to install wastewater collection lines, manholes or water distribution lines throughout the proposed area of development of Bayside Mobile Home Park. It is appropriate for Bayside Mobile Home Park to be responsible for the installation of the wastewater collection lines, manholes, and water distribution lines throughout the proposed development if it wishes to receive water and wastewater service from Bayside Utility Services, Inc. (WALKER)

STAFF ANALYSIS: Staff sent requests for data to both the developer and the utility in an effort to obtain additional information that may be useful in resolving the complaint by the developer. In that request, the developer was asked whether it was possible or feasible to include the cost of providing utility service in the price of the lots that are to be sold within the expansion area. In its responses the developer believes that including the costs of the utility expansion in the lot prices is placing an unfair burden on them and could jeopardize both the potential for sales and potential for a reasonable profit from the venture.

The developer went on to cite Commission Order No. 18624 issued January 4, 1988 in Docket No. 870093-WS, a staff-assisted rate case for Bayside Partnership which is now the developer. In that Order, the Commission ordered the utility to borrow approximately $250,000 to supply a needed expansion and upgrades to the utility. It is the developer's opinion that this situation is similar in that the utility should be forced to expand as they, then the utility, were in 1988. However, staff finds that the situation in 1988 was far different from the situation now.

In the first issue of the original recommendation, in the third paragraph of the Staff Analysis, staff analyzed the current situation as follows:

> In 1988, Bayside Partnership had not yet interconnected with the City of Panama City Beach and the

> utility owned wastewater treatment plant and the water supply wells were still in service. The wastewater treatment plant was in violation of several Department of Environmental Protection (DEP) rules and regulations and the plant was in desperate need of extensive repair. It was also shown that the appropriate repairs and expansions would violate additional regulations and create an environmental concern. The only viable alternatives were to dismantle the wastewater treatment plant and force the utility to borrow funds to pay for interconnection with the City or to institute a certificate revocation proceeding for compliance failure and turn the utility over to the City. For the utility, there was no choice but to borrow the money for interconnection or lose the utility.

In its Second Response, BMHP notes that it never had its own wells and that the original wastewater treatment plant is currently in operation and was purchased by Utilities, Inc. to provide wastewater treatment service to the former customers of Sandy Creek Utility Services, Inc. BMHP further states that the only problems with DER (now DEP) were the operations of the percolation ponds, and that the original ponds either had to be reworked or additional ponds had to be built. BMHP states that it merely reached the conclusion that the best alternative was to pay the $200,000 to interconnect with the City, and that it was "never in a critical situation where 'forced abandonment' or loss of the utility was an option."

Staff agrees with BUSI's September 12, 2001 letter and the above-noted facts do not change staff's analysis. Pursuant to Order No. 18624, the Commission found that the wastewater treatment facility was in violation of DER requirements, and that, in addition to the noted problems with the percolation ponds, there were "additional requirements needing the utility's attention." Although a consent order was drafted, the utility never signed the consent order. Instead, the utility pursued interconnection with the City and retired its sewer treatment plant.

In any event, the utility, at the time of the interconnection with the City, had to take some action to bring it in compliance with the rules and regulations of DEP. Moreover, all of its customers were already connected and receiving service. In Order No. 18624, the Commission determined that the utility, and not the customers, should bear the cost of the interconnection. However,

the Commission did allow the utility to recover the costs of the interconnection through its rates.

In the current situation, the utility is not in violation of any DEP or Commission rules nor is the utility in a situation where forced abandonment is on the horizon for failure to comply. Service is being requested by the developer for an area of future development. The utility is being asked to spend in excess of $100,000 by the developer for a proposed development that essentially has an uncertain future.

In its data request to each entity, staff requested an estimate of time before the proposed expansion area would be built out. The developer estimated that it would be from two to three years before the entire area was built out. The utility was unsure of how long full occupancy would take if it ever achieved full occupancy at all. The utility further argued that it would be unfair for it to install a system that may lay dormant for years as nonused and useful. It further argued that if the system was considered used and useful, it would be included in rate base and place an unfair burden on the current residents who are receiving no benefit from the lines being added for the expansion.

Staff agrees with the utility in that there is no guaranteed time frame that would allow the utility full use of the lines and system within the development area. Staff further concurs with the utility in that if the system were put in place, the utility would see no immediate return on investment and that the system would be considered nonused and useful until the expansion area was built out. If the system is considered nonused and useful, the utility will receive no return on investment until the system is determined to be used and useful in a future rate case. Staff also concurs that since the company is a reseller, a large increase in rate base would place an unfair burden on current customers of the utility as well. The current customers could see a large increase in rates due only to the expansion of the water and wastewater lines.

Also in the data requests, staff inquired as to whether the terms of the expansion were discussed during the negotiation phase of the sale of the utility. The developer indicated that it was discussed with all parties involved with the sale.

The utility asserts that the expansion was mentioned only after the closing of the sale. During the negotiations, there was no discussion of expansion, there was no developer agreement

drafted, nor were there any terms included as part of the sale of the utility that would indicate that the utility would install the lines for the proposed expansion. The utility goes on to state that in Article I, Section 5, of the asset purchase agreement for the utility, the seller (developer) was selling ". . . a complete water distribution system, and a complete central sewer collection system."

In its Second Response to the request for data, the developer cited Rule 25-30.520, Florida Administrative Code, which states: "It is the responsibility of the utility to provide service within its certificated territory in accordance with terms and conditions on file with the Commission."

In its Second Response, BMHP states that BUSI was fully aware of the expansion plans and purchased the system knowing that it would eventually have to provide service to the proposed development. The developer also contends that the utility is obligated to install the water and wastewater extensions for the $300 per unit main extension charge set forth within the tariff of the utility.

While this may be true for an individual requesting an extension of services to an individual lot, Rule 25-30.585, Florida Administrative Code, sets forth service availability charges for a developer. The rule states:

> . . . service availability charges for real estate developments shall not be less than the cost of installing the water transmission and distribution facilities and sewer collection system and not more than the developer's hydraulic share of the total cost of the utility's facilities and the cost of installing the water transmission and distribution facilities and sewage collection systems.

In its Third Response, BMHP vehemently disagrees that Rule 25-30.585, Florida Administrative Code, is applicable. BMHP argues that Rule 25-30.585, Florida Administrative Code, is subject to the limitation in Rule 25-30.580, Florida Administrative Code.

Rule 25-30.580, Guidelines for Designing Service Availability Policy, merely states:

> A utility's service availability policy shall be designed in accordance with the following guidelines:
>
> (1) The maximum amount of contributions-in-aid-of-construction, net of amortization, should not exceed 75% of the total original cost, net of accumulated depreciation, of the utility's facilities and plant when the facilities and plant are at their designed capacity; and
>
> (2) The minimum amount of contributions-in-aid-of-construction should not be less than the percentage of such facilities and plant that is represented by the water transmission and distribution and sewage collection systems.

Moreover, BMHP argues that because BMHP is not a new development, Rule 25-30.585, Florida Administrative Code, does not apply. Staff disagrees.

According to this rule, if the utility chose to install the necessary lines for the systems, the developer would still be responsible for the costs associated with the extension. Therefore, staff believes that the utility is not liable for the costs of installing the additional distribution and collection lines for the proposed expansion. However, if BMHP believes that BUSI specifically contracted to pay for the expansion, other than the $300 main extension charge, then staff believes that BMHP's remedy is to file an action in Circuit Court for enforcement of such contract and reimbursement for the costs of installing the distribution and collection mains.

Based on all the above, staff believes that the current situation is entirely different from the time when Bayside Utilities, Inc., made the decision to interconnect with the City. That was a part of a DEP enforcement action. In the current situation, a developer (BMHP) merely wants service. Staff believes that BMHP should be made to pay for this expansion and that the current ratepayers should not have to endure the risks associated with this new development. Therefore, staff recommends that the utility not be required to install wastewater collection lines, manholes, and water distribution lines in the proposed expansion area. Moreover, through review of the data requests sent to the parties involved with the complaint, staff believes that the developer should be responsible for all costs of development.

In response to the data request, the developer was unable to confirm an exact date in which full occupancy of the proposed development would be reached. The proposed expansion, as with most real estate ventures, is speculative at best. Staff has no reason to believe that all of the proposed lots and building sites will be sold as downturns in the economy and a number of other factors may leave the area unoccupied for some time. Staff believes that the costs associated with a proposed real estate development should not become a burden to either the utility or the utility's current customers.

The developer also indicated that failure of the utility to expand services would require the developer to begin negotiations with the City of Panama City Beach in an effort to gain services to the proposed site. Staff contacted Albert Shortt, the Utilities Director for the City of Panama City Beach (City), in an effort to better understand the City's policy on utility installations. Mr. Shortt stated that the duty of supplying lines to a proposed development would be at the expense of the developer. In instances where the City installs the lines, the developer is usually required to reimburse the City for the cost of the lines and collection systems. Therefore, if the proposed development were to interconnect with the City, the developer would be responsible not only for the lines and collection systems in the proposed development, but also several thousand feet of additional water and wastewater lines needed to reach possible connection points with the City's main lines, plus the City's impact fees totaling $185,310.90.

The developer had indicated that the cost of installing the needed utility lines will ". . . put an unfair burden on this developer as the land acquisition costs and other development costs would jeopardize both the potential for sales and a reasonable profit on the venture." Speculative real estate development does not go without risks. It is staff's belief that, if the costs of the lines and distribution systems are evenly spread over the total number of proposed lots, the necessary price increases needed to cover utility system costs are not significant. In fact, it would be considerably less than the City-mandated impact fees that will be included with each lot.

The utility has requested that, if the developer chooses to contract for the installation of the lines, the developer should be responsible for the proper working of the lines for a period of nine months following the installation. This is a standard

practice throughout the State of Florida and staff believes this to be fair in that the developer will then be responsible if less than acceptable work was performed in the installation of the lines.

Staff recommends that the developer should be responsible for the costs associated with the installation of the wastewater collection lines, main sewer lines, and the water distribution lines throughout the development. The developer has the option of installing the necessary lines itself or paying the utility to install the lines.

Also, as stated in BMHP's Second Response, the City has now agreed that the total amount of $185,310.90 for impact fees need not be paid up front and may be collected from each customer as each lot is purchased and construction begins.

ISSUE 2: Should Bayside Utility Services, Inc. be ordered to reimburse Bayside Mobile Home Park for its engineering costs incurred to date?

RECOMMENDATION: No. Bayside Utility Services, Inc. should not be required to repay Bayside Mobile Home Park for engineering costs incurred to date. However, pursuant to Rule 25-30.540, Florida Administrative Code, the engineering plans for the development are subject to the utility's inspection and approval. Staff recommends that the utility be directed to properly review the engineering plans and promptly respond in a timely matter so as not to further delay the development or cause any undue hardship for the developer by delaying approval of submitted plans. (WALKER)

STAFF ANALYSIS: The utility has indicated that at no time did it instruct the developer to contract the services of an engineer to perform an analysis or develop plans for the proposed system in the proposed expansion area. The developer believed that he would speed the process of development by acquiring the services of an engineer to perform analyses and plan the proposed utility expansion.

Rule 25-30.540 (2), Florida Administrative Code, states "An advance deposit may be required by the utility at the time of execution to cover the additional utility costs of engineering plans and cost estimates of construction required to serve the property ...." By this rule, staff believes that the developer would be responsible for the costs of engineering and obtaining estimates if the utility was required to install the lines.

Staff believes that the utility should not be obligated to install the lines and collection systems at its own expense in the proposed service area. Staff also believes that the utility should not be financially responsible for this expansion, and it should not be responsible for any unsolicited engineering expenses that may have been incurred by the developer. The developer contracted with the engineering firm in haste to complete the expansion. Therefore, staff believes that the developer is responsible for any expenses incurred by hiring the engineer.

Staff also recommends that, although the utility is not liable for engineering expenses of the developer, the utility will be responsible for approval of plans for the expansion area. Rule 25-30.540, Florida Administrative Code, states:

> An applicant may use its engineer to prepare plans and specifications for its on-site development. However, such plans and specifications and the on-site water or wastewater facilities will be subject to the utility's inspection and approval. An appropriate inspection and plan review fee may be charged by the utility.

Staff recommends that the utility be directed to respond in a timely manner so as not to further delay the development or cause any undue hardship for the developer by delaying approval of submitted plans.

ISSUE 3: Should the Commission initiate an investigation as to whether the portion of Bayside Utility Services, Inc.'s service territory should be deleted so that water and wastewater services may be provided by the City of Panama City Beach?

RECOMMENDATION: No. The Commission should not initiate an investigation as to whether the portion of Bayside Utility Services, Inc.'s service area in question should be deleted. (WALKER)

STAFF ANALYSIS: As discussed in Issue 2, the developer contends that failure of the utility to provide service will require discussions with the City in an effort to obtain utility services for the proposed expansion area. The developer has requested that the proposed expansion area be deleted from the service area of BUSI by the Commission so the developer may obtain services from an outside source, in this case, the City.

Staff believes that interconnection with the City will likely prove to be much more expensive for the developer than interconnection with BUSI. As mentioned in Issue 2, if the City interconnects, the developer will be responsible for the same distribution and collection lines plus several thousand feet of additional lines to get to the City's main distribution and collection lines. Also, due to the location of the proposed expansion area, the lines would have to travel through almost the entire length of the utility's service area in order to reach the City's main lines. The utility has indicated that it would not allow this to occur.

Staff believes that connection with BUSI is the best alternative for the developer nor has the utility indicated an unwillingness or an inability to provide the service. Therefore, the Commission should not initiate an investigation as to whether the portion of the utility's service area that will contain the proposed development should be deleted from the utility's certificates.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes, this docket should be closed upon the issuance of the Consummating Order if no person, whose interests are substantially affected by the proposed actions, files a protest within the 21 day protest period. (WALKER, JAEGER)

STAFF ANALYSIS: Because no further action is necessary, upon expiration of the protest period, this docket should be closed upon the issuance of the Consummating Order, if no person, whose interests are substantially affected by the proposed actions files a protest within the 21 day protest period.