State of Florida

Public Service Commission

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

DATE: January 24, 2002

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

FROM: OFFICE OF THE GENERAL COUNSEL (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: 02/05/02 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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

CASE BACKGROUND

On May 11, 2001, Bayside Mobile Home Park (Developer) filed a complaint against Bayside Utility Service, Inc. (BUSI or utility), saying that the utility was improperly refusing to provide service in its territory. In its complaint, the Developer claims that the only applicable charges listed in the utility's tariff are the $15 Initial Connection Fee and the "$300 Service Availability Fee for Main Extension Charge." The Developer claims that the utility should be responsible for paying Panama City Beach's (City's) impact fees and for incurring the cost of installing the water distribution and wastewater collection lines.

The utility states that it is not refusing to provide service and argues that the Developer should be responsible for paying the City's impact fees and for paying the costs of installing the water distribution and wastewater collection lines. The utility, a

wholly-owned subsidiary of Utilities, Inc., is a Class C water and wastewater utility that purchases water and wastewater services from the City.

Bayside Mobile Home Park, the Developer, was established in 1972, and was 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.

Through an Asset Purchase Agreement (sales contract) executed on October 7, 1998, and for a cash purchase price of $190,000, BUSI, the current utility, purchased the assets of Bayside Utilities, Inc. By Order No. PSC-99-1818-PAA-WS, issued September 20, 1999, the Commission approved the transfer of Certificates Nos. 469-W and 358-S from Bayside Utilities, Inc., to BUSI.

The Developer states that it began plans for expansion in 1997, and hired engineers to assist in plans for the development of the vacant property. 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 utility's service area. The area is currently being used for garbage receptacles and parking for various sports recreation equipment.

An ordinance of the City 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 the City totaled $185,310.90. The Developer stated that the utility should pay the fees. The utility disagreed, and advised the Developer that the Developer would be 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 the utility'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. In addition, the Developer suggested to the utility that the tariff should be changed to accommodate the impact fee imposed by the City.

The Developer's General Manager, Leonard Jeter, met with the City Manager of the City, Richard Jackson, on the matter of the impact fees. Mr. Jackson informed Mr. Jeter that it is typical for the end user or purchaser of a lot to pay the impact fees for the water and sewer connections at the time the lot is purchased and construction is initiated. Although staff initially thought that the conflict had been resolved, the Developer advised staff that this was not the case.

The Developer maintains that the City's impact fees are owed by and should be paid by the utility. Notably, by letter dated March 21, 2000, Mr. Jeter 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 the Developer acknowledges the lot purchaser should pay the impact fee, the Developer believes that the utility should still consider revising its tariff to include the impact fees to the City.

In addition, the parties continue to disagree as to who is 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 thought 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 utility to make a profit. The Developer further stated that it thought 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 contributions in aid of construction (CIAC). The Developer also made it clear that it wished to be reimbursed for the engineering expenses that 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 extension. The proposed agreement indicated that the Developer would be liable for the installation of the proposed water distribution and wastewater collection lines and that the Developer would have to essentially warranty the lines against malfunctions or breaks for a period of one year. The Developer refused to sign the proposed developer 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 development 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 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 alleges that the utility is in violation of Rule 25-30.520, Florida Administrative Code, which provides, "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 complaint, the Developer asks the Commission to determine who is financially responsible for the installation of the water distribution and wastewater collection lines. Staff filed its original recommendation in this complaint docket on August 23, 2001, for consideration at the September 4, 2001, Agenda Conference. However, at the Developer's request, consideration of this item was deferred. Moreover, the Developer submitted additional responses to staff discovery.

By letter dated September 12, 2001, the utility stated that it agreed with staff's original recommendation, which was that the Developer was responsible for installation of the water distribution and wastewater collection lines. Moreover, the utility noted that the additional responses to discovery filed by the Developer would not affect staff's original recommendation.

On September 20, 2001, staff filed a revised recommendation to address the additional discovery responses, but did not change its ultimate recommendation. Upon consideration of this revised recommendation, the Commission issued Proposed Agency Action (PAA) Order No. PSC-01-2095-PAA-WS on October 22, 2001. By that Order, the Commission's proposed action was to recognize that the Developer (or the purchasers of the lots) was responsible for City impact fees, and that the Developer was also responsible for the installation of the water distribution and wastewater collection lines. In addition, that Order required the utility to timely inspect and respond to plans and specifications for on-site

development. Also, in that Order, by final agency action, the Commission declined to initiate an investigation into deletion of service territory.

On November 13, 2001, the Developer filed its Petition Filing a Formal Protest to the Proposed Agency Action by a Substantially Affected Person (Original Protest). In that Original Protest, the Developer initially requested either mediation, arbitration, or a formal hearing. The Developer alleged that the Commission wrongly relied on Rule 25-30.580 (Guidelines for Designing Service Availability Policy), Florida Administrative Code, when it should have been following Rule 25-30.520 (Responsibility of Utility to Provide Service), Florida Administrative Code.

Two days after filing the Original Protest, the Developer filed its Petition to Amend Petition as Per Rule 28-106.202, Florida Administrative Code (Amended Protest). In this Amended Protest, the Developer requests that pursuant to Rule 28-106.201(3), Florida Administrative Code, the Commission "'refer this matter to the Division of Administrative Hearings [DOAH] and request that an Administrative Law Judge be assigned to conduct the hearing' as soon as possible." Moreover, the Developer requests that pursuant to Rule 28-106.207(1), Florida Administrative Code, the hearing be conducted in Panama City Beach.

On November 15, 2001, the utility filed its Response and Motion to Dismiss the Developer's Petitions, Protests and Requests for Hearing. This recommendation addresses the Developer's Petitions (Protests) and the Response and Motion to Dismiss of the utility.

The Commission has jurisdiction pursuant to Sections 367.101 and 367.121, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Bayside Utility Services, Inc.'s Motion to Dismiss the Developer's Petitions, Protests and Requests for Hearing?

RECOMMENDATION: No. The Commission should deny Bayside Utility Services, Inc.'s Motion to Dismiss the Developer's Petitions, Protests and Requests for Hearing. The petitions serve as adequate notice that there is a dispute as to the applicable law and proper application of the Commission's rules. There being no apparent dispute of material fact, staff recommends that an informal proceeding in accordance with Rule 28-106.301, Florida Administrative Code, be initiated. (JAEGER)

STAFF ANALYSIS: On November 15, 2001, the utility filed its Motion to Dismiss the Developer's Petitions, Protests and Requests for Hearing (Motion to Dismiss). The Developer did not respond to this Motion to Dismiss.

The utility argues that the two petitions filed by the Developer do not state a specific basis, whether factual or legal, for the Developer's request for action by the Commission. The utility notes that the Developer quotes Rule 25-30.520, Florida Administrative Code, regarding the "responsibility of the utility to provide service within its certificated territory," and states that the utility has not refused service to the Developer.

Moreover, The utility states that the Commission's actions are in conformance with Rules 25-30.585 and 25-30.580, Florida Administrative Code. Rule 25-30.585, Florida Administrative Code, states:

> Subject to the limitation in Rule 25-30.580, service availability charges for real estate developments shall not be less than the cost of installing the water transmission and distribution facilities and sewage 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 system.

Rule 25-30.580, Florida Administrative Code, states that the maximum amount of CIAC, "net of amortization, should not exceed 75%

of the total original cost" of the utility's facilities and plant, and that the minimum amount "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." The utility alleges that its current level of CIAC is only 4.5%, which is far below the 75% maximum level, and that acceptance of the distribution and collection systems would only raise its level to 27%.

In addition to the above, the utility argues that the Developer has not complied with the requirements of Rule 28-106.201(2), Florida Administrative Code, and in particular, subsections (2)(d) and (e), which provide:

> (2) All petitions filed under these rules shall contain:
>
> * * *
>
> (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
>
> (e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief.

Staff agrees that the Developer has not complied with subparagraph (2)(d) above. Moreover, it is implicit in the Developer's petitions that there are no disputed issues of material fact, and Rule 28-106.301, Florida Administrative Code, the rule governing the initiation of proceedings for cases that do not involve disputed issues of material fact, does not require a statement that there are no disputed issues of material fact.

The Developer is arguing that the Commission is improperly considering Rules 25-30.580 and 25-30.585, Florida Administrative Code, the rules on service availability charges. The Developer argues that, instead, the Commission should be applying Rule 25-30.520, Florida Administrative Code, the rule on the responsibility of the utility to provide service.

In its Original Protest, the Developer requested an administrative hearing. Because the Original Protest and Amended Protest show that there is no disputed issues of material fact, the proceeding, if any, should be an informal one involving no disputed issues of material fact as set forth in Rule 28-106.301, Florida Administrative Code. Rule 28-106.301, Florida Administrative Code, provides in pertinent part:

> (3) If the petition does not set forth disputed issues of material fact, the agency shall refer the matter to the presiding officer designated by the agency with a request that the matter be scheduled for a proceeding not involving disputed issues of material fact. . . .
> (4) A petition may be dismissed if it is not in substantial compliance with subsection (2) of this Rule or it has been untimely filed. . . .

The utility also argues that the protests are untimely. The PAA Order was issued on October 22, 2001, and stated that any protest had to be filed by no later than November 12, 2001. However, November 12, 2001, was a holiday. In considering protests of PAA Orders, the Commission has recognized that where the twenty-first day falls on a holiday or weekend, then the time should be extended to the next working day. This comports with Rule 28-106.103, Florida Administrative Code. Therefore, staff believes that the Order should have referred to November 13, 2001, and not November 12, 2001. The Original Protest was filed with this Commission on November 13, 2001, and the Amended Protest was filed on November 15, 2001. Also, staff notes that the utility received both protests by facsimile on November 13, 2001. Therefore, staff believes that the argument that the protests were untimely is not valid.

In its prayer for relief, the utility states that both petitions fail to allege any factual or legal basis upon which the Commission either must or even may require a hearing or grant any other relief, and requests that the petitions be dismissed. Staff has considered these allegations, and believes that the Commission did thoroughly consider Rules 25-30.520, 25-30.580, and 25-30.585, Florida Administrative Code, and reached the correct result when it issued PAA Order No. PSC-01-2095-PAA-WS.

The standard used in considering the utility's Motion to Dismiss is set forth in Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In that case, the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Court further stated that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint, . . . nor consider any evidence likely to be produced by the other side." See also, Holland v. Anheuser Busch, Inc., 643 So. 2d 621 (Fla. 2d DCA 1994)(stating

that it is improper to consider information extrinsic of the complaint).

In considering this Motion to Dismiss, staff notes that the Order was issued as proposed agency action. Judicial interpretations of the Administrative Procedures Act have consistently recognized that agencies must provide a "clear point of entry" into the formal or informal processes set forth in Sections 120.569 and 120.57, Florida Statutes. See, e.g., McIntyre v. Seminole County School Board, 779 So. 2d 639 (Fla. 5th DCA 2001).

Moreover, staff believes that the two protests, while having deficiencies, could be said to substantially comply with Rule 28-106.301(2), Florida Administrative Code (for initiation of informal proceedings). That rule provides as follows:

> (2) All petitions filed under these rules shall contain:
> (a) The name and address of each agency affected and each agency's file or identification number, if known;
> (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
> (c) A statement of when and how the petitioner received notice of the agency decision;
> (d) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and
> (e) A demand for relief.

For subparagraph (a) above, the two protests list the Commission as the agency affected and set out the Order number and docket number. For subparagraph (b), the Developer gives its name, address, and telephone number. It is questionable whether there is an explanation of how the Developer's substantial interests will be affected; however, staff believes that through the Order and the protests, the Developer has shown how his substantial interests will be affected, because the Developer believes it should only pay $22,500 and not the full cost of the lines, which is estimated to be from $100,000 to $150,000. For subparagraph (c), there is also some question of when and how the Developer received notice, but,

again, it is abundantly clear that the Developer received a copy of the Order in time for it to file its Original Protest on November 13, 2001. For subparagraph (d), it appears that the Developer agrees with the facts set forth in the Order, but believes that the Commission has ignored the appropriate rule and applied the wrong rules. The Developer specifically argues that the Commission has misapplied Rules 25-30.580 and 25-30.585, Florida Administrative Code, when it was Rule 25-30.520, Florida Administrative Code, that should have controlled.

In the last subparagraph of Rule 28-106.301(2), Florida Administrative Code, is the requirement that there be a demand for relief. The Developer's ultimate demand for relief is its request that the Commission correctly apply Florida law. The Developer believes that the requirement of Rule 25-30.520 that the utility must provide service within its service area implicitly includes a requirement that the utility must pay for the water distribution and wastewater collection systems. While the Commission has already disagreed with the Developer's position, there is a small probability that the Developer could persuade the Commission to change its mind. Also, staff is concerned that the Developer be given a "clear point of entry" to an administrative hearing as required by McIntyre.

If the Commission determines that the Developer has not complied with the requirements of Rule 28-106.301(2), Florida Administrative Code, then staff believes that Rules 28-106.301(4) and (5), Florida Administrative Code, are applicable. These subsections state that if a petition is not in substantial compliance with subsection (2) of that section, then the petition may be dismissed, but that, at least, the first dismissal should be without prejudice, and the agency should state the deadline for filing an amended petition. Staff believes that it would serve no purpose to require the Developer to amend its petition, and would just cause additional expense for both the Developer and the utility.

Staff believes that the only question raised by the Developer is whether Rule 25-30.520, Florida Administrative Code, requires the utility to incur the costs for installation of the water distribution and wastewater collection systems in the new development area. While the Commission thoroughly considered this question in its PAA Order, staff believes that the Developer is still entitled to its "clear point of entry" into the formal or

informal processes as set forth in Sections 120.569 and 120.57, Florida Statutes.

Based on the above, staff recommends that the Commission deny the utility's Motion to Dismiss the Developer's Petitions, Protests and Requests for Hearing. The Developer's original and amended protests serve as adequate notice that there is a dispute as to the applicable law and proper application of the Commission's rules. There being no apparent dispute of material fact, staff recommends that an informal proceeding in accordance with Rule 28-106.301, Florida Administrative Code, be initiated.

ISSUE 2: Should the Commission grant Bayside Mobile Home Park's Amended Petition to refer this matter to the Division of Administrative Hearings and request that an Administrative Law Judge be assigned to conduct the hearing in Panama City Beach?

RECOMMENDATION: No. The Commission should deny in part and grant in part Bayside Mobile Home Park's Original Petition and Amended Petition Protesting Proposed Agency Action Order No. PSC-01-2095-PAA-WS. Specifically, the Commission should deny the request to assign the protests to the Division of Administrative Hearings, deny the request to hold the hearing in Panama City Beach, and deny the requests for either mediation or arbitration. However, because there appears to be no disputed issues of material fact, the Commission should initiate an informal proceeding in accordance with Section 120.57(2), Florida Statutes, and require the parties to submit legal briefs, and allow oral argument in conjunction with a designated agenda conference. If the Developer requests that it be allowed to participate by telephone, such request should be granted. (JAEGER)

STAFF ANALYSIS: As stated in the Case Background, the Developer filed its Original Protest and Amended Protest of PAA Order No. PSC-01-2095-PAA-WS on November 13 and 15, 2001, respectively. In the Amended Protest, the Developer requests that the Commission "'refer this matter to the Division of Administrative Hearings and request that an Administrative Law Judge be assigned to conduct the hearing' as soon as possible" in Panama City Beach. In the Original Protest, the Developer requested:

1) Mediation; Either binding or non binding but preferably binding.
2) Arbitration, binding on all parties including the PSC and The Commissioners.
3) Administrative Hearing, binding on all parties including the PSC and The Commissioners.

It is unclear whether the Developer abandoned these original requests when it filed the Amended Protest. In any event, staff will consider each request in turn starting with the Amended Protest.

First, the Developer asks that its protest be assigned to DOAH and an administrative law judge. Staff believes that the rules governing who will pay for the costs of the water distribution and wastewater collection system and the provision of service by a

utility are imbued with public policy considerations, and this is the type of situation where the special expertise of the Commissioners is warranted. Because of these policy considerations, staff believes that the Commission should preside over the hearing. Moreover, DOAH is authorized by statute to hear only matters involving disputed issues of material fact.

In McDonald v. Department of Banking and Finance, 346 So. 2d 569, 579 (Fla. 1st DCA 1977), and Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081, 1085 (Fla. 1st DCA 1995), the District Court recognized that agencies had special expertise and that many decisions concerning ultimate facts are actually opinions infused by policy considerations for which the agency has special responsibility. It would seem incongruous that where these policy considerations appear to be the main issue, the Commission would take an action that would limit its ability to use its special expertise. Also, it appears that the Developer is merely unhappy with the Commission's interpretation of its own rules, and its simply seeking a different forum.

In summary, staff believes that the Developer has failed to demonstrate why this case should be assigned to DOAH. Therefore, while the Commission could assign this case to DOAH, staff recommends that this request be denied.

Secondly, the Developer requests that the hearing be held in Panama City Beach. Rule 28-106.207(1), Florida Administrative Code, states:

> Whenever practicable and permitted by statute or rule, hearings shall be held in the area of residence of the non-governmental parties affected by agency action, or at the place most convenient to all parties as determined by the presiding officer.

As stated in Issue 1 above, staff is recommending that the Developer be afforded an informal hearing pursuant to Section 120.57(2), Florida Statutes. Because this should consist of a short oral argument, and the filing of briefs, it would be inefficient to hold the hearing in Panama City Beach. If this proves to be a hardship on the Developer, the Developer (or its attorney) should be allowed to present oral argument by telephone.

Finally, in its Original Protest, the Developer requested either "binding" mediation or arbitration. Staff notes that at the

beginning of this proceeding and as noted in the original complaint, staff attempted to mediate the dispute. However, an impasse was reached, and the attempts at mediation were unsuccessful. Staff believes that any future mediation attempts would be equally unsuccessful. The Developer is adamant that it should not be made to invest in the water distribution and wastewater collection lines and then merely hand them over to the utility. The utility is equally adamant that it should not be made to incur the costs of installing these lines to the benefit of the Developer.

Also, staff does not believe arbitration is appropriate. Pursuant to Section 367.101, Florida Statutes, the Commission "shall set just and reasonable charges and conditions for service availability." Staff does not believe that this responsibility can or should be abdicated. Therefore, staff recommends that the requests for either mediation or arbitration be denied.

Based on the above, the Commission should deny the request to assign the protests to DOAH, deny the request to hold the hearing in Panama City Beach, and deny the requests for either mediation or arbitration. However, there appearing to be no disputed issues of material fact, the Commission should initiate an informal proceeding in accordance with Section 120.57(2), Florida Statutes, and require the parties to submit legal briefs, and allow oral argument in conjunction with a designated agenda conference. If the Developer requests that it be allowed to participate by telephone, such request should be granted.