

State of Florida



Public Service Commission

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DATE: AUGUST 22, 2002

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

FROM: DIVISION OF ECONOMIC REGULATION (MERTA, RENDELL) *AF to 5/4*
OFFICE OF THE GENERAL COUNSEL (JAEGERY) *RD* *Walt* *RCM* *198*

RE: DOCKET NO. 020331-SU - INVESTIGATION INTO ALLEGED IMPROPER
BILLING BY SANIBEL BAYOUS UTILITY CORPORATION IN LEE
COUNTY IN VIOLATION OF SECTION 367.091(4), FLORIDA
STATUTES.
COUNTY: LEE

AGENDA: 09/03/02 - REGULAR AGENDA - PROPOSED AGENCY ACTION EXCEPT
FOR THE DECISION ON TEMPORARY RATES AND CHARGES AND ISSUES
2 THRU 5 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020331.RCM

DOCUMENT W/ MESA-0771

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CASE BACKGROUND

Sanibel Bayous Utility Corporation (SBUC or utility) is a Class C wastewater utility located in Lee County. The utility provides wastewater service to approximately 258 residential customers and 3 general service customers in Sanibel Bayous Subdivision, Heron's Landing Subdivision, the Ridge Subdivision and Blind Pass Condominiums on Sanibel Island. Water service is supplied by Island Water Association. Tariff rates were approved during the grandfather process on June 4, 1976.

The utility was granted Wastewater Certificate No. 207-S pursuant to Order No. 7402, issued August 24, 1976, in Docket No. 760364-S. The utility has never had a rate case or other proceeding before the Commission. The utility's 2001 Annual Report shows annual operating revenue of \$46,239, operating expenses of \$91,712 and a net operating loss of \$45,473.

According to annual reports filed with the Commission, SBUC was owned by Mr. William Broeder from 1976 until 1989. In 1990, the utility was jointly owned by Mr. Broeder (50%) and Mr. Gary Winrow (50%). Mr. Winrow has been actively involved in the management and day-to-day operations of the utility since 1994 as part of an arrangement to obtain wastewater service for his development of some real estate units. Although Mr. Winrow was able to compile billing information from 1988 to date, detailed records for earlier years were not available.

On September 5, 2001, staff notified SBUC that it appeared, in reviewing its 2000 Annual Report, that the utility was in violation of Section 367.091(4), Florida Statutes, which specifies that a utility may only impose and collect those rates and charges approved by the Commission. Staff requested that billing information be provided within 30 days of the date of the letter. On October 2, 2001, the utility's accountant provided part of the billing information requested in staff's September 5th letter.

Following a review of the information provided by the utility, on October 8, 2001, staff notified SBUC that it was, indeed, in violation of Section 367.091(4), Florida Statutes, and that it must immediately reduce customer charges to the authorized tariff rates and that the increase in rates must be refunded. In addition, staff requested, within 30 days of the letter, that the utility provide additional billing information to calculate the amount of

the customer refunds. Staff provided a list of individuals who could assist the utility with the refund calculation and enclosed a staff assisted rate case (SARC) application along with a copy of Rule 25-30.455, Florida Administrative Code, which details the SARC process.

The utility failed to respond within the timeframe requested. On two subsequent occasions, staff telephoned the utility, inquiring as to the status of SBUC's response to staff's data requests. To the first inquiry, the utility indicated the information would be provided by November 30, 2001; to the second inquiry, SBUC stated that staff would receive its response by December 21, 2001. On January 3, 2002, staff attached a copy of the October 8th letter and requested that the utility respond or staff would recommend the initiation of a show cause proceeding. On January 14, 2002, the utility provided the requested information on the rates and charges collected by the utility.

In an effort to reach a resolution to this matter, on March 6, 2002, Mr. Winrow, Mr. John Guastella, the utility's consultant, and Mr. Mike Jenkins, Office of Public Counsel, met with staff to discuss the improper increases in rates, possible refunds, and the possibility of the utility filing for a SARC. Mr. Winrow provided staff additional billing, plant and CIAC information and a pro forma income statement. The utility offered: to refund to residential customers the rate increase initiated in April 2000; to continue charging rates of \$12 and \$14 per month for multiple dwelling and single family residential customers and \$25 per month for general service customers, respectively; to record connection fees as CIAC; and to file a SARC. Mr. Winrow stated that the utility's method of refund was to provide free service to residential customers for the last quarter of 2001. He claimed that adjustment nearly offset all of the additional amounts collected under the \$2.67 monthly increase from April 2000 through September 2001.

On April 5, 2002, staff received a Memorandum from Mr. Guastella that proposed a resolution, outlined the events that have transpired since October 3, 2001, and provided informational schedules. The utility proposed to (1) maintain the \$12 and \$14 rates it claims that it has always charged residential customers, (2) maintain the \$25 rate charged to General Service customers, (3) treat connection fees as CIAC, and (4) seek a staff assisted rate case. In addition, the utility intends to undertake substantial

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improvements to its system, estimated at \$47,000, in order to comply with anticipated DEP requests with respect to the utility's pending renewal of its Operating Permit. Finally, the Memorandum described SBUC's refund of amounts collected under the \$2.67 increase from April 2000 through September 2001.

In a May 8, 2002 letter, staff reminded the utility of the need to file its SARC prior to staff's filing a recommendation addressing the proposal. Applying for the SARC was an element of the proposal and demonstrated the utility's good faith effort to come into compliance with Florida Statutes. SBUC was also reminded to file its Annual Report and to pay its Regulatory Assessment Fee (RAF). Pursuant to Rule 25-30.455(8)(c) and (d), Florida Administrative Code, to qualify for a SARC, a current annual report must be on file with the Commission and the utility must be current in its payment of RAFs.

The utility applied for a SARC on May 16, 2002, and Docket No. 020439-SU was opened to address this application.

This recommendation addresses the proposed resolution offered by SBUC. Staff originally intended to rely on audit findings in the SARC docket in making a recommendation in this docket and to bring it to an earlier agenda. However, due to delays in obtaining requested information from the utility, the audit due date has been postponed. Staff believed the importance of establishing temporary rates outweighed waiting for more accurate accounting information. Therefore, several issues arising in this docket will be addressed in the SARC.

DISCUSSION OF THE ISSUES

ISSUE 1: Should the Commission approve the proposed resolution offered by Sanibel Bayous Utility Corporation?

RECOMMENDATION: Yes, the proposed resolution should be approved with the following modifications: (1) The proposed rates, as shown in the staff analysis, should be approved temporarily; (2) the utility should file revised tariff sheets within 20 days of the date of the Consummating Order in this docket to reflect the Commission approved rates; staff should be given administrative authority to approve the tariff sheets upon staff verification that the tariffs are consistent with the Commission's decision; (3) the utility should hold the difference between the proposed temporary rates and the current tariff rates (\$14 - \$12 = \$2; \$12 - \$10 = \$2) subject to refund, pursuant to Rule 25.30-360, Florida Administrative Code, during the pendency of the SARC, in Docket No. 020439-SU; (4) Pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility shall provide a report by the 20th day of each month indicating the monthly and total revenue collected subject to refund; and (5) the amount of any additional refunds and the appropriate disposition and amount of CIAC should be determined in the SARC. (MERTA)

STAFF ANALYSIS: Section 367.091(4), Florida Statutes, provides that "A utility may only impose and collect those rates and charges approved by the commission for the particular class of service involved. A change in any rate schedule may not be made without commission approval."

SBUC's Original Tariff Sheet No. 17.0, approved June 4, 1976, authorized a rate of \$12.00 per month for residential service and Original Tariff Sheet No. 17.1 authorized a rate of \$10 per month per unit for multiple dwelling units. There are no tariffs authorizing general service or service availability charges. Based on data supplied by the utility on March 8, 2002, SBUC has charged \$14 per month for residential service and \$12 per month for multiple dwelling service, \$25 per month for general service service and \$2,625 for connection fees since 1976. The utility increased its residential rate to \$16.67 per month in April 2000. The multiple dwelling rate has never been changed. Staff believes that SBUC is in violation of Section 367.091(4), Florida Statutes, because it has been charging unauthorized rates and charges. The

following table shows the monthly rates and connection fees charged by SBUC and the proposed rates.

	COMMISSION APPROVED TARIFF RATES June 4, 1976	RATES CHARGED 1976 - 3/2000	RATES CHARGED 4/2000 - 9/2001	PROPOSED RATES
Residential	\$12	\$14	\$16.67	\$14
Multi dwelling	\$10	\$12	\$12	\$12
General Service		\$25	\$25	\$25
Connection Fee		\$2,625	\$2,625	\$2,625

As discussed in the Case Background, staff met with the utility in an effort to efficiently resolve this matter. As a result, on April 5, 2002, staff received a Memorandum from Mr. Guastella that proposed a resolution, outlined the events that have transpired since October 3, 2001, and provided informational schedules. The utility's proposal and staff's analysis is addressed below.

Refunds

SBUC's proposal states that upon notification by staff that it was in violation of Florida Statutes, the utility on its own initiative, provided free service to the residential customers for the last quarter of 2001. According to SBUC, that action offset nearly all of the additional amounts collected under the \$2.67 increase from \$14 to \$16.67 to residential customers from April 2000 through September 2001. The utility asserts that the increase generated \$6,921 of additional revenues through September 2001, and the amount refunded was \$6,258.

As previously described, the utility has charged unauthorized rates to customers since approximately 1976. Staff has estimated the amount of refund SBUC might be required to make under two scenarios. Should SBUC be required to make a total refund to residential, general service and multiple dwelling customers of all the revenues collected in violation of its tariff from 1976 through December 31, 2001, the estimated refund would be approximately

\$142,897. Should SBUC be required to refund the revenues collected from residential customers due to the rate increase from \$14 to \$16.67 in April 2000 through September 31, 2001, the estimated refund would be approximately \$6,921.

Staff is not recommending that the overcollections from 1976 to March 2000 be refunded at this time. Staff believes that this would place an insurmountable burden on the utility. Staff believes the Commission should take into consideration a utility's financial viability and ability to raise debt in determining any refund. Requiring a full refund would probably bankrupt the utility, and such a remedy would be too harsh given that the rates the utility was charging are not unreasonable. In addition, many of the customers from whom the charges were collected are probably no longer customers of the utility and a large refund will provide new customers an undeserved windfall. When possible, refunds should be given only to those customers who were overcharged. Staff will calculate the appropriate amount of any further refunds in the utility's SARC, Docket No. 020439-SU. Therefore, staff recommends that no decision be made on the refund at this time.

CIAC

SBUC estimated that it collected \$226,576 in connection fees from 1976 through 2001; the utility estimated \$69,490 in amortization, for a net amount of \$157,086. Staff was unable to estimate CIAC because the audit report has been delayed and staff intended to rely on the number of billing units identified in the audit report to estimate CIAC. The utility was not authorized by the Commission to collect these fees. In its proposal, SBUC agreed to record connection fees as CIAC, which is a reduction to rate base. This treatment will benefit customers by reducing rate base, thereby reducing the return the utility is allowed to earn on its investment. In Order Nos. PSC-01-2511-PAA-WS, issued December 24, 2001, in Docket No. 010396-WS, and PSC-00-1676-PAA-SU, issued September 19, 2000, in Docket No. 000715-SU, the Commission allowed Burkim Enterprises, Inc., and North Peninsula Utilities Corporation to keep unauthorized CIAC collections from the developer, which benefitted the customers.

Staff believes that requiring a refund of CIAC would place SBUC in a bankruptcy situation. It does not appear that the utility has the financial ability to make such a large refund. In

addition, many customers from whom the connection fees were collected may no longer be customers of SBUC.

Staff recommends that the utility be allowed to continue collecting CIAC, as a temporary charge, subject to refund, pending the proper disposition and determination of the amount of the CIAC collection in the SARC.

Residential and General Service Rates

In its proposal, SBUC offers to continue charging residential rates of \$14 per month, multi dwelling rates of \$12 per month and general service rates of \$25 per month. Staff recommends that the utility be allowed to charge these rates temporarily so that customers will not experience the confusion of multiple rate changes. The utility applied for a SARC on May 16, 2002, and new rates could become effective as early as the end of January 2003. By continuing the current rates, the customers will avoid frequent rate changes and the utility will avoid the expense of changing its billing system several times.

Staff has reviewed the revenues and expenses reported in the utility's 2001 Annual Report. The utility reported a net operating loss of \$45,473 for 2001. The utility should be allowed to recover reasonable costs of providing service. It appears that the utility's proposed rates and charges are not unreasonable given the cost of providing service. However, during the SARC, the utility's books and records will be audited and issues concerning the appropriate revenue requirement and rate structure will be addressed.

For the above reasons, staff recommends that the utility continue charging residential rates of \$14 per month, multi dwelling rates of \$12 per month, and general service rates of \$25 per month temporarily until a change in rates is approved by the Commission in a subsequent proceeding. The utility should hold the difference between the proposed temporary rates and the tariff rates ($\$14 - \$12 = \$2$; $\$12 - \$10 = \$2$) subject to refund, during the pendency of the SARC, in Docket No. 020439-SU. SBUC should keep an accurate and detailed account of the unauthorized rate increase from \$10 to \$12 and from \$12 to \$14 on a going forward basis until the resolution of the SARC. Pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility shall provide a report by the 20th day of each month indicating the monthly and

total revenue collected subject to refund. In addition, the utility should file revised tariff sheets within 20 days of the date of the Consummating Order in this docket to reflect the Commission approved temporary rates and staff should be given administrative authority to approve the tariff sheets upon staff verification that the tariffs are consistent with the Commission's decision.

In no instance should the maintenance and administrative costs associated with a refund be borne by the customers. These costs are the responsibility of, and should be borne by, the utility.

Staff Assisted Rate Case

In telephone conversations with Mr. Winrow, staff was made aware of the utility's many net losses over the years and of the need for SBUC to make \$47,000 in improvements this year in order to obtain a renewal of its DEP Operating Permit. Staff discussed the utility's options and explained the regulatory impact to Mr. Winrow. As a result, the utility decided to seek rate relief.

Staff has reviewed the proposal submitted by the utility and believes that it is a reasonable resolution to this matter. Staff recommends that SBUC's proposal be approved with the following modifications: (1) The proposed rates should be approved temporarily, pending the decision in Docket No. 020439-SU; (2) the utility should file revised tariff sheets within 20 days of the date of the Consummating Order in this docket to reflect the Commission approved rates; staff should be given administrative authority to approve the tariff sheets upon staff verification that the tariffs are consistent with the Commission's decision; (3) the utility should hold the difference between the proposed temporary rates and the current tariff rates (\$14 - \$12 = \$2; \$12 - \$10 = \$2) subject to refund, pursuant to Rule 25.30-360, Florida Administrative Code, during the pendency of the SARC, in Docket No. 020439-SU; (4) Pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility shall provide a report by the 20th day of each month indicating the monthly and total revenue collected subject to refund; and (5) the amount of any additional refunds and the appropriate disposition and amount of CIAC should be determined in the SARC.

ISSUE 2: Should the utility be required to provide security for money being collected subject to refund?

RECOMMENDATION: Yes. The utility should be required to file a bond, letter of credit or escrow agreement to guarantee any potential refunds of wastewater revenues collected under temporary rates. The letter of credit or bond should be in the amount of \$4,283. In lieu of a letter of credit or bond, SBUC may obtain an escrow agreement which requires the utility to deposit the amount of revenue subject to refund within seven days of receipt, until completion of the rate case. (MERTA)

STAFF ANALYSIS: In Issue 1, staff is recommending that SBUC hold the difference between the proposed temporary rates and the original tariffed rates subject to refund during the pendency of the SARC. Rule 25-30.360(6), Florida Administrative Code, requires that utilities provide security for money being collected subject to refund; the money shall be secured by a bond unless the Commission specifically authorizes some other type of security such as placing the money in escrow, approving a corporate undertaking, or providing a letter of credit. Staff recommends that the utility provide security in the form of a bond or letter of credit in the amount of \$4,283. Alternatively, the utility could establish an escrow agreement with an independent financial institution.

If the utility chooses a bond as security, the bond should contain wording to the effect that it will be terminated only under the following conditions:

- 1) The Commission either approves the rates permanently or grants the utility a rate increase in the SARC; or
- 2) If the Commission denies any increase above the tariff rates, the utility shall refund the difference between the temporary rates and the tariff rates.

If the utility chooses a letter of credit as a security, it should contain the following conditions:

- 1) The letter of credit is irrevocable for the period it is in effect.

- 2) The letter of credit will be in effect until a final Commission order is rendered in the SARC, either approving or denying the temporary rates and/or approving or denying a rate increase.

If security is provided through an escrow agreement, the following conditions should be part of the agreement:

- 1) No refunds in the escrow account may be withdrawn by the utility without express approval of the Commission.
- 2) The escrow account shall be an interest bearing account.
- 3) If a refund to the customers is required, all interest earned by the escrow account shall be distributed to the customers.
- 4) If a refund to the customers is not required, the interest earned by the escrow account shall revert to the utility.
- 5) All information on the escrow account shall be available from the holder of the escrow account to a Commission representative at all times.
- 6) The amount of revenue subject to refund shall be deposited in the escrow account within seven days of receipt.
- 7) This escrow account is established by the direction of the Florida Public Service Commission for the purpose(s) set forth in its order requiring such account. Pursuant to Cosentino v. Elson, 263 So. 2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.
- 8) The Director of Commission Clerk and Administrative Services must be a signatory to the escrow agreement.

This account must specify by whom and on whose behalf such monies were paid.

ISSUE 3: Should SBUC be ordered to show cause, in writing, within 21 days, why it should not be fined for collecting charges not approved by the Commission, in apparent violation of Section 367.091(4), Florida Statutes?

RECOMMENDATION: Show cause proceedings should not be initiated at this time. Staff can not make a determination as to the appropriateness of a show case proceeding at this time. A recommendation will be made in SBUC's upcoming SARC in Docket No. 020439-SU. (MERTA, JAEGER)

STAFF ANALYSIS: Section 367.091(4), Florida Statutes, provides that "A utility may only impose and collect those rates and charges approved by the commission for the particular class of service involved. A change in any rate schedule may not be made without commission approval." It appears that SBUC has violated this statute.

Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes. Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "it is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Thus, any intentional act, such as the utility's collection of charges not approved by the Commission would meet the standard for a "willful violation." In In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

According to the utility, from 1976 until April 2000, SBUC charged the same rates, albeit in violation of its Commission authorized tariff. In April 2000, after twenty-four years, the utility increased its residential rates from \$14 to \$16.67 per

month. The utility acknowledged its error in charging rates that were not authorized by the Commission and its ignorance of the regulatory requirements with respect to rate increases. The utility stated that rates have been too low to produce enough revenue to cover the cost of operations or generate any return on investment.

As discussed previously, the CIAC collected by SBUC is a reduction to the utility's investment and therefore a benefit to the customers. In Orders Nos. PSC-01-2511-PAA-WS, issued on December 24, 2001, in Docket No. 010396-WS, and PSC-00-1676-PAA-SU, issued September 19, 2000, in Docket No. 000715-SU, the Commission allowed Burkim Enterprises, Inc., and North Peninsula Utilities Corporation to keep unauthorized CIAC collections from the developer, which benefitted the customers.

Staff will analyze data obtained in the SARC, i.e., the audit report, billing information, the refund analysis, and customer input to determine whether it should recommend a show cause proceeding. However, staff has experienced problems and delays in obtaining the cooperation and records needed to audit this utility and to process its SARC. Therefore, staff recommends that the issue of show cause proceedings be decided in the SARC.

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ISSUE 4: Should this docket be consolidated with Docket No. 020439-SU, Sanibel Bayous Utility Corporation's staff assisted rate case?

RECOMMENDATION: Yes. Docket No. 020331-SU should be consolidated with Docket No. 020439-SU. (MERTA, JAEGER)

STAFF ANALYSIS: Rule 28-106.108, Florida Administrative Code, provides that:

If there are separate matters which involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party.

Docket Nos. 020331-SU and 020439-SU involve the same party, Sanibel Bayous Utility Corporation. Because of delays by the utility in providing requested information, several issues from this docket must be resolved in the SARC docket. Therefore the dockets involve the same or similar issues of fact, law and policy: the appropriate amount of any additional refund, the appropriate disposition and amount of CIAC, and whether SBUC should be ordered to show cause why it should not be fined for collecting charges in violation of Florida Statutes.

If the Commission decides to consolidate these dockets, it will be necessary for the Commission to order temporary rates in this docket and all other issues could be resolved in the SARC. Staff believes that consolidation of the dockets would promote the just, speedy and inexpensive resolution of both proceedings and would not unduly prejudice the rights of any party.

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ISSUE 5: Should this docket be closed?

RECOMMENDATION: No. In Issue 4, staff is recommending that this docket be consolidated with Docket No. 020439-SU. If the Commission denies consolidation, this docket should remain open to verify that the refund has been made to SBUC customers and also to address any show cause proceeding. (MERTA, JAEGER)

STAFF ANALYSIS: Staff is recommending that this docket be consolidated with the utility's SARC. Therefore, this docket should remain open pending resolution in that proceeding. If consolidation is denied, this docket should remain open so that staff may calculate the appropriate amount of the refund based on staff's audit, make recommendations to the Commission, and verify that the refund has been made to SBUC customers. As stated above, the appropriate amount of the refund will be determined in SBUC's SARC, Docket No. 020439-SU. In addition, this docket should remain open to address any show cause proceeding.