

State of Florida



Public Service Commission

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DATE: March 1, 2007

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Gervasi) *PO Gervasi PO pb JS*
Division of Economic Regulation (Brady, Marsh, Redemann, Slemkewicz) *BR*

RE: Docket No. 060741-WS – Application for certificates to provide water and wastewater service in Duval County by Timucuan Utilities, LLC.

AGENDA: 03/13/07 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrin

CRITICAL DATES: 03/13/07 (Extended 90-Day Rule Waiver Statutory Deadline)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\060741.RCM.DOC

Case Background

On November 13, 2006, Timucuan Utilities, LLC (Timucuan or applicant) filed an application for original water and wastewater certificates in Duval County, Florida, along with a motion for temporary rule waiver from Rule 25-30.033(1)(j), (k), (m), (p), (r), (t), (u), (v), and (w), Florida Administrative Code (F.A.C), in order to bifurcate the certification and rate setting aspects of the case. On December 11, 2006, Timucuan filed an amendment to its motion, to add a request for a temporary waiver from Rule 25.30.033(1)(o), F.A.C., for the same reason.

According to the application, Timucuan's proposed territory consists of 6,070 acres owned or controlled by related parties that intend to develop the property as a Development of

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Regional Impact (DRI) called The Preserve at Thomas Creek. Timucuan proposes to provide water and wastewater service within the entire service territory, and states that treated effluent will be used for irrigation when sufficient quantity is available. There are projected to be 6,987 equivalent residential connections (ERCs) and approximately one million square feet of commercial development requiring 112 ERCs, including offices, retail stores, a hotel, schools, and a fire station. The applicant is expected to begin service in 2008.

Also according to the application, JEA (owned by the City of Jacksonville), is the only other water and wastewater utility near the proposed service territory, but JEA cannot provide service in an economically feasible manner. However, on December 13, 2006, JEA filed a petition to intervene, objection to the application, and objection to the motion for temporary rule waiver. JEA states, among other things, that it has a prior statutory right to provide the service within Timucuan's proposed service territory pursuant to Chapter 180, Florida Statutes (F.S.), and that it has the capability to provide service to the proposed territory promptly and efficiently, consistent with the Timucuan DRI's anticipated need for service. JEA's petition to intervene was granted by Order No. PSC-07-0131-PCO-WS, issued February 15, 2007, and the docket will be set for a formal administrative hearing.

Pursuant to Section 120.542, F.S., notice of the motion for temporary rule waiver was published on December 1, 2006, and notice of the amendment to the motion was published on December 29, 2006, in the Florida Administrative Weekly. Written comments to the motion were timely filed by JEA in its December 13, 2006, filing.¹

This recommendation addresses the motion for temporary rule waiver of Rule 25-30.033(1) (j), (k), (m), (o), (p), (r), (t), (u), (v), and (w), F.A.C. A recommendation on the merits of the application and the setting of appropriate rates and charges will be addressed at a later time, after a hearing as requested by the JEA. The Commission has jurisdiction pursuant to Sections 120.542, 367.031, 367.045, and 367.045, F.S.

¹ See Rule 28-104.003, F.A.C.

Discussion of Issues

Issue 1: Should the Commission grant Timucuan Utilities, LLC's motion for temporary rule waiver from Rule 25-30.033(1)(j), (k), (m), (o), (p), (r), (t), (u), (v), and (w), F.A.C.?

Recommendation: Yes, the Commission should grant Timucuan Utilities, LLC's motion for temporary rule waiver until Timucuan Utilities, LLC has completed its permitting and is closer to commencement of operations. (Gervasi, Brady, Redemann)

Staff Analysis:

Motion

Rule 25-30.033(1)(j), (k), (m), (o), (p), (r), (t), (u), (v), and (w), F.A.C., directs the applicant for an original certificate to file information necessary for setting initial rates and charges, including: evidence that the utility owns the land or has continued use of the land upon which the utility treatment facilities are or will be located; the filing of the original and two copies of tariffs; the filing of a detailed system map showing the proposed lines, treatment facilities, and the territory to be served; a statement regarding the separate capacities of the proposed lines and treatment facilities in terms of ERCs and gallons per day; a written description of the type of water and wastewater treatment and method of effluent disposal; a detailed financial statement;² a cost study supporting proposed rates and charges; a schedule showing the projected costs of the systems; a schedule showing projected operating expenses; and a schedule showing the projected capital structure. The applicant has asked for a temporary waiver of these parts of the rule so that it may receive its certificates expeditiously in order to proceed with its water use permitting and wastewater treatment plant permitting.

Timucuan further states that the Commission has recently granted rule waivers under virtually identical circumstances, for Mariposa Utility Company, LLC, and for Central Sumter Utility Company, L.L.C.³ Timucuan points out that as the Commission recognized in those cases, the applicant faces a conundrum by virtue of section 367.031, F.S., because it cannot procure a water use permit or wastewater treatment plant permit until it procures a certificate from the Commission. However, detailed facility cost information cannot be determined until it receives its other permits.

Objection

² The detailed financial statement required by Rule 25-30.033(1)(r), F.A.C., is not required to determine whether the applicant has the financial ability to provide service. By way of a deficiency letter, staff has requested the applicant to provide the financial statement of any entity upon which it is relying to provide funding to the utility, as required by Rule 25-30.033(1)(e), F.A.C.

³ Order No. PSC-06-0835-PAA-WS, issued October 9, 2006, in Docket No. 060276-WS, In Re: Application for certificates to provide water and wastewater service in Putnam County by Mariposa Utility Company, LLC. See also Order No. PSC-05-0844-PAA-WS, issued August 18, 2005, in Docket No. 050192-WS, In Re: Application for certificates to provide water and wastewater service in Sumter County by Central Sumter Utility Company, L.L.C.

In its objection (written comments) to Timucuan's motion, JEA states that it is a municipal water and wastewater utility with the prior statutory right and capability to provide water, reclaimed water, and wastewater services to the territory that is the subject of Timucuan's application. According to JEA, the Central Sumter and Mariposa cases cited by Timucuan in support of its motion are easily distinguishable. In those cases, it was appropriate to grant the rule waivers to allow the applicants to obtain certificates from the Commission to secure necessary water management district and Department of Environmental Protection (DEP) permits because there was no other competing utility seeking to serve the proposed service territory. Moreover, in those cases, the Commission found that the utility had the financial and technical ability to provide service to the proposed service territory and that the application was consistent with the local comprehensive plan. In this case, these issues have been raised as disputed issues of material fact and can only be resolved through a formal administrative hearing.

Analysis and Recommendation

Section 120.542, F.S., authorizes the Commission to grant variances or waivers to the requirements of its rules where the person subject to the rules has demonstrated that the underlying purpose of the statute has been or will be achieved by other means, and strict application of the rules would cause the person substantial hardship or would violate principles of fairness. "Substantial hardship" as defined in this section means demonstrated economic, technological, legal, or other hardship.

The underlying statutory provisions pertaining to the above-mentioned rules are sections 367.031 and 367.045, F.S. Section 367.031 requires each utility seeking to provide water and wastewater service to obtain a certificate of authorization from the Commission prior to obtaining permits from the DEP and water management districts. Paragraph 367.045(5)(a), F.S., states that the Commission may grant a certificate of authorization if it is in the public interest. The purpose of Sections 367.031 and 367.045, F.S., is to ensure that a utility has the financial and technical ability to provide service, that there is a need for service in the proposed service area, and to determine the existence or nonexistence of service from other sources within geographical proximity to the proposed service area. Waiver of the parts of the rule that require information to be filed that is needed to set rates will not prevent the Commission from determining whether the utility is financially or technically able to provide service, whether the service is needed, or whether service can be provided from other sources when the application for original certificate is before the Commission. Rates can be set at a later date, and, as was the case in Central Sumter and in Mariposa, often are.⁴

⁴ The Commission most recently granted such temporary rule waiver by Order No. PSC-07-0076-PAA-SU, issued January 29, 2007, in Docket No. 060602-SU, In Re: Application for certificate to provide wastewater service in Lee and Charlotte Counties by Town and Country Utilities Co. See also Order No. PSC-06-1015-PAA-WS, issued December 11, 2006, in Docket No. 060601-WS, In Re: Application for certificates to provide water and wastewater service in Okeechobee County by Grove Utilities, Inc.; and Order No. PSC-98-1644-FOF-WS, issued December 7, 1998, in Docket No. 980876-WS, In re: Application for certificate to operate water and wastewater facility in Marion County by Ocala Springs Utilities, Inc.

That the Commission's decision on the certificate application in this case will be a post-hearing decision does not change the fact that waiver of the parts of the rule that require information to be filed that is needed to set rates does not prevent the Commission from determining whether the utility is financially or technically able to provide service in the public interest, whether the service is needed, or whether the service can be provided from other sources. This observation departs from the Commission's decision in Order No. PSC-99-1603-PAA-WS, issued August 16, 1999, in Docket No. 990696-WS, In Re: Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation. In the Nocatee case, the Commission denied a similar request to waive portions of Rule 25-30.033, F.A.C., pertaining to the establishment of rates and charges, in part because an objection to the certificate application had been filed by Intercoastal Utilities, Inc. (Intercoastal), an entity that stated it was better able to serve the proposed area.⁵

In Nocatee, the Commission found that because Intercoastal objected to the application, the question was raised as to whether there was another source able to provide service within geographical proximity to the area, and that therefore the underlying purpose of the statutes pertaining to the existence of service from other sources had not been fulfilled.⁶ The determination of the existence or nonexistence of service from other sources within geographical proximity to the proposed service area is an underlying purpose of Sections 367.031 and 367.045, F.S., and, as in Nocatee, is a contested issue in this case. Nevertheless, this issue can and likely will be fully addressed at the hearing requested by the JEA, regardless of whether rates and charges are determined, to the extent possible, from the record of the hearing or at a later time and with better information upon which to determine rates if the Commission grants the rule waiver request. To the extent parties raise issues for the hearing pertaining to which party is in a better position to charge reasonable rates and charges in order to show who is in a better position to serve the proposed territory, Timucuan will be charged with putting on its evidence accordingly, regardless of whether the temporary rule waiver request is granted. For this reason, staff believes that the underlying purpose of the statutes can and will be achieved by other means, as contemplated by Section 120.542(2), F.S., and that the Commission should recede from Order No. PSC-99-1603-PAA-WS for this limited purpose.⁷

The development planned for the territory to be served by the applicant will need water and wastewater service starting in 2008. Section 367.031, F.S., requires that a utility obtain a

⁵ The Commission also found that in the Nocatee case, the utility had failed to show that it met the underlying purpose of the statutes with respect to technical ability because it only had a Letter of Intent with JEA to obtain wholesale service and did not expect to negotiate a bulk service agreement with JEA until after it obtained its certificates. In the instant case, Timucuan states that it will retain qualified professionals with regard to the construction, operating and regulation of its water and wastewater systems. As such, it appears that Timucuan can demonstrate that it has the technical ability to provide service.

⁶ Id. at 3-4.

⁷ Section 120.68(7)(e)3., F.S. – Judicial Review, provides that a reviewing court shall remand a case to the agency or set aside agency action, as appropriate, when it finds that the agency's exercise of discretion was "[i]nconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency." (emphasis added).

certificate from the Commission before the DEP and the Water Management District may issue construction and operating permits. As such, the applicant cannot procure a water use permit and wastewater treatment plant construction permit until it procures a Commission certificate. The hardship created by this circumstance is the applicant's inability to determine the size and location of its facilities and costs until the permits are obtained and its inability to proceed with the development of its water and wastewater facilities to serve the proposed service area if the waiver is not granted. As of this time, the specific locations of the applicant's water and wastewater facilities have not been determined as planning for those facilities has not been completed. Once the utility's treatment facilities are selected and sized, the utility may complete its application for the necessary permits and will be able to determine how much land it requires for its treatment facilities and where those treatment facilities should be located. Timucuan states that when the location of the plant sites has been determined, it will provide a copy of a Warranty Deed by which it will acquire the real estate upon which the water and wastewater plants are to be located.

When a utility has met the criteria set forth in Section 120.542, F.S., the Commission has granted a temporary waiver of the rules regarding establishment of initial rates and charges and bifurcated the two parts of its certification proceedings. In this case, the underlying purpose of Sections 367.031 and 367.045, F.S., can be achieved by other means, either at the hearing to demonstrate, to the extent possible, which party is in the best position to serve the territory at issue, or at a later time when costs can be determined and the temporary rule waiver is lifted. Moreover, staff believes Timucuan has shown that it will suffer substantial hardship if all of the provisions of Rule 25-30.033, F.A.C., are strictly applied.

The applicant has requested a waiver of the rules until it receives its other permits and is closer to commencing operations. The applicant states that it will file its proposed tariffs and other required financial schedules to set initial rates sufficiently in advance of providing service, so that the Commission will have sufficient time for review. Staff recommends that the utility has met the requirements found in Section 120.542, F.S., and the Commission should grant the applicant's Motion for Temporary Rule Waiver of Rule 25-30.033(1)(j), (k), (m), (o), (p), (r), (t), (u), (v), and (w), F.A.C., until it has completed its permitting and is closer to commencement of operations.

Docket No. 060741-WS
Date: March 1, 2007

Issue 2: Should this docket be closed?

Recommendation: No. If no timely protest is received from a substantially affected person within 21 days of the date of the Proposed Agency Action Order, the Order will become final upon the issuance of a Consummating Order. However, the docket should remain open pending Commission action on Timucuan's application for an original water and wastewater certificate. (Gervasi)

Staff Analysis: If no timely protest is received from a substantially affected person within 21 days of the date of the Proposed Agency Action Order, the Order will become final upon the issuance of a Consummating Order. However, the docket should remain open pending Commission action on Timucuan's application for an original water and wastewater certificate.