

State of Florida



Public Service Commission

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DATE: June 7, 2012
TO: Office of Commission Clerk (Cole)
FROM: Division of Economic Regulation (McRoy, Hudson, Roberts, Trueblood) and
Office of the General Counsel (Barrera)
RE: Docket No. 120104-WU – Notice of abandonment of water system in Lee County by Bayshore Utilities, Inc.

AGENDA: 06/19/12 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\120104.RCM.DOC

Case Background

Bayshore Utilities, Inc. (Bayshore or Utility) is a Class C water utility providing service in Lee County. The Utility was issued Certificate No. 129-W on April 6, 1973,¹ and currently serves approximately 191 residential customers in the Yacht Club Colony subdivision located in North Fort Myers, Florida. The Utility is located in the South Florida Water Management District. Bayshore's 2010 Annual Report indicates that the Utility had gross operating revenues of \$13,763 and a net operating loss of \$5,874.

¹ See Order No. 5707, issued April 6, 1973, in Docket No. C-71599-W, In re: Application of James L. and Leta M. Nolton d/b/a Bayshore Utility Company for a certificate to operate an existing water system in Lee County.

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During 2008 and 2009, Bayshore was found to be in violation of several Department of Environmental Protection (DEP) drinking water standards. DEP determined that nothing could be done to the existing facilities to ensure that the water supplied to customers would meet DEP's primary and secondary drinking water standards. On April 15, 2010, Bayshore and DEP entered into a Consent Order that required the Utility to either connect to Lee County Utilities or construct a membrane water treatment plant. Further, the Utility was required to abandon the existing water treatment facility following construction of the county interconnect or membrane plant.

Bayshore was subsequently issued a permit to construct a reverse osmosis (RO) membrane water treatment facility. However, the Utility failed to commence construction of the RO plant in accordance with the Consent Order. DEP determined that the water quality was continuing to deteriorate and the Utility was jeopardizing the public health of its customers by failing to upgrade its facility. DEP petitioned the Circuit Court to request enforcement of the Consent Order and injunctive relief. On January 6, 2012, the Court ordered Bayshore to commence construction of the RO system with 20 days and complete construction within 120 days of the entry of the Order. The enforcement proceedings were finalized on April 5, 2012, when the Circuit Court² ruled that by failing to comply with the Court's Order to commencing construction within 20 days, the owner of Bayshore had constructively abandoned the Utility. The Circuit Court's Order serves as the Utility's 60-day notice of abandonment, in conformance with Section 367.165(1), Florida Statutes (F.S.). On May 7, 2012, the Circuit Court appointed Lee County as receiver of the Utility.

This recommendation is to acknowledge the abandonment of the utility system by Bayshore and the appointment of Lee County as the receiver, and to cancel Certificate No. 129-W. The Commission has jurisdiction pursuant to Sections 367.022 and 367.165, F.S., and Rule 25-30.090, Florida Administrative Code (F.A.C.).

² Case No. 11-CA-003289, Twentieth Judicial Circuit in and for Lee County, Florida.

Discussion of Issues

Issue 1: Should the Commission acknowledge the abandonment of the utility system by Bayshore Utilities, Inc., and the appointment of Lee County as receiver, and cancel Certificate No. 129-W?

Recommendation: Yes, the Commission should acknowledge the abandonment of Bayshore pursuant to Section 367.165, F.S., and appointment of Lee County as the receiver for the Utility. Certificate No. 129-W should be cancelled effective May 7, 2012. (McRoy, Hudson, Roberts, Trueblood)

Staff Analysis: When a utility is abandoned, Section 367.165(2), F.S., requires the county to petition the circuit court for the appointment of a receiver. Such receiver can be the county or any other person or entity approved by the court such as a homeowners association. The responsibility of the receiver is to operate the utility efficiently and effectively from the date of abandonment until disposition of the property. By Order dated May 7, 2012, the Circuit Court acknowledged Lee County's petition to appoint a receiver, and appointed the County as receiver of the Utility in Case No. 12CA-1245.³ Pursuant to Rule 25-30.090(3), Florida Administrative Code (F.A.C.), within 10 days of the appointment of the receiver by the Circuit Court, the receiver shall request from the Commission a copy of the Utility's tariff and most recent annual report. A copy of the Utility's tariff and most recent annual report has been sent to the County.

As discussed in the case background, this case is unique because the abandonment was required by court order rather than being initiated by the Utility, in order to protect the health and welfare of the utility's customers. The Circuit Court's Order specified that all ownership interests in the Utility's water system would be transferred to the County if the assets were not sold or otherwise disposed of by the receiver within 90 days. On May 9, 2012, the County advised the Commission of its intent to accept ownership of the Utility's facilities and requested that the Commission expressly release Bayshore from its jurisdiction. Pursuant to Section 367.022(2), F.S., utility systems owned, operated, managed, or controlled by governmental authorities are exempt from Commission regulation.

Rule 25-30.110(3), F.A.C., requires that a water or wastewater utility which is subject to this Commission's jurisdiction as of December 31 of that year file an annual report. Bayshore is current on its annual reports through 2010, however, the Utility has not filed its annual report for 2011. Staff calculates the assessed penalty to be \$123 as of May 11, 2012. The penalty will continue to accrue at \$3/day until the annual report is filed. Because the Utility will not be jurisdictional as of December 31, 2012, no annual report needs to be filed for 2012.

It should be noted that cancellation of the Utility's certificate does not relieve the Utility's obligation regarding outstanding regulatory assessment fees (RAFs) for 2011 and RAFs accrued through appointment of the receiver on May 7, 2012. Notices of delinquency for failure to remit the RAFs for 2011 have been sent to the Utility and no payment has yet been received.

³ Order Appointing Receiver, Case No. 12CA-1245, In re: Lee County, Florida a political subdivision of the State of Florida vs. Bayshore Utilities, Inc., a/k/a Bayshore Utility Company (Fla 20th Cir. Ct. May 7, 2012).

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Since the 2011 Annual Report is delinquent, staff is unable to calculate the 2011 RAFs. However, based on the Utility's 2010 revenues of \$13,763, staff estimates that Bayshore owes 2011 RAFs of \$619 plus penalty and interest of \$93 and \$19, respectively, through May 7, 2012. In addition, Bayshore is responsible for the RAFs for January 1, 2012 through May 7, 2012, which will be due by March 31, 2013. Staff will continue to work with the Utility to obtain the outstanding annual report and RAFs, and will bring the matter to the Commission in a separate docket in the future if necessary.

Based on all the above, staff recommends that the Commission acknowledge the abandonment of Bayshore pursuant to Section 367.165, F.S., and appointment of Lee County as the receiver for the Utility. Certificate No. 129-W should be cancelled effective May 7, 2012.

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Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, this docket should be closed because no further action is necessary. (Barrera)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, this docket should be closed because no further action is necessary.