

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

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COMMISSION
CLERK

DATE: November 13, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Bennett) *deb jsc*
Division of Accounting and Finance (T. Brown, Maurey) *ALM*
AB

RE: Docket No. 080562-WU – Request for approval of amendment to connection/transfer sheets, increase in returned check charge, amendment to miscellaneous service charges, increase in meter installation charges, and imposition of new tap-in fee, in Marion County, by East Marion Sanitary Systems Inc.

AGENDA: 11/27/12 – Regular Agenda – Recommended Final Order

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Participation is governed by Rule 25-22.0021(4) and 25-22.0022, Florida Administrative Code.

FILE NAME AND LOCATION: S:\PSC\AFD\WP\080562.RCM.DOC

Case Background

East Marion Sanitary Systems Inc. (East Marion or Utility) is a Class C utility providing water and wastewater service to approximately 96 customers in Marion County. Water and

wastewater rates were last established for this Utility in a staff-assisted rate case in 2002.¹ On August 19, 2008, the Utility filed an application for approval to amend its tariff sheets to reflect the following: an amendment to its tariff to require each customer to provide his social security number to obtain service, an increase in returned check charge, an amendment to miscellaneous service charges, an increase in meter installation charges, and the imposition of a new tap-in fee. By Order No. PSC-09-0263-TRF-WU, issued April 27, 2009, the Commission denied in part and granted in part the Utility's application. Specifically, the Commission ordered that any customer who has requested an irrigation meter from East Marion prior to April 7, 2009, shall only be charged the rates in effect at the time of the customer's application.

The Utility timely protested the portion of the Commission's order addressing previous applications for irrigation meters. East Marion protested the Commission's requirement that the Utility install irrigation meters at its prior tariffed rate for certain customers. Seven customers and the Office of Public Counsel(OPC) were granted intervention in the docket. On September 29, 2011, East Marion, a majority of the intervenors, and OPC on behalf of all ratepayers entered into a Settlement Agreement, which was approved by the Commission. Intervenors Terry Will and Millicent Mallon did not enter into the Settlement Agreement. The Settlement Agreement was approved by Order No. PSC-11-0566-WU, issued December 12, 2011. Intervenors Will and Mallon and the Utility requested that their dispute continue to hearing.

The Commission transferred the dispute to the Division of Administrative Hearings (DOAH). The case was assigned DOAH Docket No. 12-0909, East Marion Sanitary Services, Inc. v. Public Service Commission, and the Administrative Law Judge set the matter for a June 12, 2012 hearing in Ocala, Florida. Intervenor's Will and Mallon attended the hearing and presented evidence and testimony, as did Public Service Commission staff on behalf of the Commission. East Marion did not attend the hearing in person, by attorney, or by qualified representative. The Utility did send a messenger, Mike Smallridge, to convey a message to the Administrative Law Judge that the Utility would install meters for Intervenors Will and Mallon, but the message did not include the cost at which the Utility would install the meters. Accordingly, the hearing was held and the Administrative Law Judge submitted the Recommended Final Order (see Attachment A).

On October 2, 2012, Marty Smith, attorney for East Marion, filed a Notice of Appearance and Petitioner's Exceptions to Recommended Order in this docket. No other party filed exceptions.

This recommendation addresses the Recommended Final Order, the Petitioner's exceptions and the disposition of this docket. The Commission has jurisdiction pursuant to Sections 120.57 and 367.091, Florida Statutes (F.S.).

¹ See Order No. PSC-02-1168-PAA-WS, issued August 26, 2002, in Docket No. 010869-WS, In re: Application for staff-assisted rate case in Marion County by East Marion Sanitary Systems, Inc.

Discussion of Issues

Issue 1: Should the Commission approve the Recommended Final Order submitted by the Administrative Law Judge?

Recommendation: Yes. The Commission should approve and adopt the attached Recommended Final Order submitted by the Administrative Law Judge as the Final Order in this docket. (Bennett)

Staff Analysis: This proceeding was referred to the Division of Administrative Hearings pursuant to Section 120.569, F.S., after both East Marion and Intervenor Will protested Order No. PSC-11-0566-AS-WU, issued in this docket. An administrative hearing was held by the Administrative Law Judge in Ocala. Commission staff, and Intervenor Will and Mallon attended the Ocala hearing. East Marion did not attend or send a qualified representative or attorney to represent it.

Pursuant to Section 120.57(1)(k), F.S., after the hearing the Administrative Law Judge must file a Recommended Final Order with the Commission for the Commission's consideration in issuing its Final Order. The Administrative Law Judge issued his Recommended Final Order in Division of Administrative Hearings Case No. 12-0909, East Marion Sanitary Systems, Inc. v. Public Service Commission on September 17, 2012. The Administrative Law Judge recommends that the Public Service Commission enter a Final Order dismissing Petitioner's protest and ordering the Utility to install irrigation meters with a dedicated line for Intervenor Will and Mallon at the prior tariffed rate of \$70. East Marion filed exceptions to the Recommended Final Order.

When considering a Recommended Final Order, and exceptions thereto, the Commission is governed by Section 120.571(1)(l), F.S. The Commission may adopt the recommended order as the final order of the agency, Section 120.57(1)(l), F.S. Alternately, the Commission may modify or reject an Administrative Law Judge's Recommended Final Order. Modification or rejection of a Recommended Final Order is limited as specifically set forth in Section 120.57(1)(l), F.S., and as discussed more thoroughly below.

As stated above, East Marion filed exceptions to the Recommended Final Order. East Marion alleges that it chose not to defend the proceeding against it because it believed that the maximum exposure it faced was connection of irrigation meters in the same manner as it agreed to in the Settlement Agreement. East Marion points to one paragraph in the Order approving the Settlement Agreement that the Utility asserts it relied upon to limit its exposure.² Additionally, the Utility asserts that the Notice of Hearing entered by the Administrative Law Judge specifically identified the issue for hearing as follows: "Are Intervenor Mallon and Will entitled to an irrigation meter at the prior tariffed rate?" East Marion contends that a detailed review of the documents and pleadings, from the inception of the case until the Recommended

² "The remaining non-signatory parties are advised that the maximum relief that we will be able to grant either Intervenor was that set forth in the original Order, an irrigation meter at the cost of \$70.00. In other words, if either or both Mr. Will or Ms. Mallon is successful in proving that they properly requested a meter, the only advantage they would gain over not signing the Settlement Agreement is that they will not be obligated to keep the irrigation meter for three years." Order No. PSC-11-0566-AS-WU, issued December 12, 2012, in this docket.

Docket No. 080562-WU
Date: November 13, 2012

Order, showed no mention of a dedicated irrigation line. East Marion contends that because the Commission did not identify a dedicated irrigation line as an issue in the proceeding, the issue was not properly before the Hearing Officer.

East Marion contends that the record before the Hearing Officer reflects that a dedicated line is a more expensive installation. East Marion states that if this had been a specified issue for determination, the Utility would have taken a different approach and defended the case. The Utility concludes that it relied upon the Commission's Order, and the Notice of Hearing in deciding to minimally defend Intervenor Will and Mallon's claim.

East Marion asks that Paragraphs 26 and 37 be stricken in their entirety. East Marion asks that Paragraph 36, to the extent it references a configuration other than the one imposed by the Settlement Agreement, be removed from the Final Order. East Marion recommends that the portion of Paragraph 39 regarding a dedicated line be stricken. East Marion asks that Paragraph 40 and the Hearing Officer's concluding recommendation be modified by removing reference to a dedicated line. Instead, according to East Marion, Intervenor Will and Mallon should be entitled to an irrigation line in accordance with the Settlement Agreement signed by the other intervenors.

Staff recommends that the Commission adopt the Administrative Law Judge's findings of fact. According to the Florida Administrative Procedures Act, the Commission may not reject or modify the recommended findings of fact unless it first determines from a review of the entire record, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Section 120.57(1)(I), F.S.

East Marion's argument is that the notice was ineffective and therefore the order, to the extent it calls for a separate dedicated irrigation line, does not comply with the requirements of law. However, staff believes that the record reflects that East Marion was on notice that a separate dedicated irrigation line was a subject of the proceeding. Staff believes that East Marion had actual notice that a separate dedicated irrigation line might be required of the Utility. The Order approving the Settlement Agreement, Order No. PSC-11-0566-WU on page 5, paragraph 3, references the installation of an irrigation meter with a dedicated line when it states:

The remaining non-signatory parties are advised that the maximum relief we will be able to grant either intervenor was that set forth in the original order, an irrigation meter at the cost of \$70. ... If either party fails to convince us that they properly requested the meter, then they would be obligated to pay for the meter at the new meter installation fee of \$195 and the applicable tap-in fees of \$1,400, \$1,800, and \$2,600 for the short, long, and extra-long irrigation service line installation, respectively.

(Emphasis added). East Marion stated in its petition protesting Order No. PSC-11-0566-WU that it was protesting the Order's page 5, paragraph 5. This paragraph in the Order states:

Furthermore, the Utility is advised that it must bear the burden of proving that Ms. Mallon and Mr. Will did not request a meter. If the Utility is unsuccessful, it will

be required to connect the two customers at the \$70.00 fee and any additional costs it incurs will likely not be considered a prudent expenditure.

(Emphasis added.)

Additionally, in East Marion's original Petition protesting Order No. PSC-09-0263-TRF-WU, East Marion specifically stated that its interests would be substantially affected by requiring the installation of irrigation meters because the meter installation required additional piping, valves and meter boxes and would cost \$1400 or more. Thus, East Marion was fully aware that the issue in this Docket for Will and Marion specifically involved the installation of irrigation meters with a dedicated line for Will and Mallon and was the reason Will and Mallon did not settle for the meter without a dedicated line. East Marion cannot now say it did not know this was the subject of the action.

Both East Marion and Intervenor Will protested the Order approving the Settlement Agreement as it related to Intervenor Will and Mallon's interests. Intervenor Will's protest included all of pages 3, 5, and 6 of the Order Approving the Settlement Agreement. Thus the paragraph that East Marion states it relied upon to decide not to participate in the hearing was protested. From the date that East Marion protested the Order Approving the Settlement Agreement forward, it did nothing to inquire as to the nature of Intervenor Will's protest of the Order. Moreover, based upon evidence produced at the hearing, East Marion had previously stated to the Public Service Commission that there was no way an irrigation meter could be installed on existing lines. See, Recommended Order Paragraph 9. Accordingly, East Marion had actual notice that the installation of an irrigation meter inclusive of a separate dedicated line would be the subject of the hearing on the protest of the Commission's order approving the Settlement Agreement.

Staff has reviewed the Recommended Final Order and believes that the findings of fact are consistent with the evidence presented by both Commission staff, and Intervenor Will and Mallon. As referenced previously, the Utility did not participate in or submit any evidence at the hearing. Further, staff believes that the proceedings before the Administrative Law Judge comported with essential requirements of law. All parties were afforded notice and an opportunity to be heard before the Administrative Law Judge. Intervenor Will and Mallon took advantage of the opportunity. The Utility did not. Accordingly, staff recommends the Commission adopt the findings of fact without modification. Staff recommends that the Commission reject each of East Marion's exceptions regarding the findings of fact, as follows:

Paragraph 26, the issue of whether an irrigation meter could be installed without a separate irrigation line was disputed by Intervenor Will and Mallon and was properly before the Prehearing Officer.

According to statutes, the Commission may reject or modify the conclusions of law or the interpretation of administrative rules over which it has substantive jurisdiction. When doing so, the Commission must state with particularity its reasons for modifying or rejecting the conclusion or interpretation. In addition, the Commission must make a finding that its substituted conclusions of law or interpretations of rule are as, or more reasonable than, that of the Administrative Law Judge. Section 120.57(1)(l), F.S. Commission staff has reviewed the

conclusions of law and believe that those conclusions are consistent with prior Commission interpretations and decisions. Accordingly, Commission staff recommends that the Administrative Law Judge's conclusions of law be adopted without modification. Staff further recommends that the Commission reject East Marion's exceptions as follows:

Paragraph 36. Will protested the Commission order, including the configuration of the irrigation meters. Accordingly, the issue of the configuration of installation of the irrigation meter was properly before the Hearing Officer.

Paragraph 37. Will protested the Commission order including the manner of the installation of the irrigation meter. Therefore the conclusion regarding a dedicated line is relevant as it was properly before the Hearing Officer. The protest of the settlement agreement included a protest of the irrigation meter configuration.

Paragraph 39. No portion of this recommended conclusion should be stricken. The configuration of the irrigation meter was protested and properly before the Commission.

Paragraph 40 and the Administrative Law Judge's concluding recommendation should not be modified as it relates to a dedicated line. As set forth above, the protest of the Commission's order approving the settlement agreement placed the configuration of the line squarely before the Hearing Officer. The Utility's prior position before the Commission in Docket No. 080064-WU was that a dedicated line was necessary for the installation of an irrigation meter. Therefore, the utility had actual notice that the Hearing Officer may rule in favor of Will and Mallon and require that an irrigation meter with a separate dedicated line be installed.

Based on the foregoing, Commission staff recommends that the Commission adopt the Recommended Final Order of the Administrative Law Judge, found in Attachment A, as its Final Order regarding the petition.

Docket No. 080562-WU
Date: November 13, 2012

Issue 2: Should East Marion Sanitary Systems, Inc. be required to install irrigation meters with a dedicated line for Intervenors Will and Mallon at the prior tariff rate of \$70?

Recommendation: Yes. Staff believes that, consistent with the Final Order, East Marion Sanitary Systems, Inc. should be directed to install irrigation meters with a dedicated line for Intervenors Will and Mallon at the tariff rate of \$70. (Bennett)

Staff Analysis: Staff believes that, consistent with the Recommended Final Order, East Marion should be directed to install irrigation meters with a dedicated line for Intervenors Will and Mallon at the prior tariff rate of \$70. Staff believes that East Marion should be required to install the dedicated line and irrigation meters within 60 days of the issuance of the Commission's order. Staff recommends that East Marion be directed to file a confirmation that the irrigation meters and lines were installed for Intervenors Will and Mallon upon completion of the work.

Docket No. 080562-WU
Date: November 13, 2012

Issue 3: Should this docket be closed?

Recommendation: Yes. Upon issuance of the Final Order by the Commission, the Utility's protest should be dismissed and this docket closed. (Bennett)

Staff Analysis: Upon issuance of the Final Order by the Commission, the Utility's protest should be dismissed and this docket closed.

State of Florida
Division of Administrative Hearings

080562.WU

Rick Scott
Governor

Robert S. Cohen
Director and Chief Judge

Claudia Lladó
Clerk of the Division



David M. Maloney
Deputy Chief
Administrative Law Judge

David W. Langham
Deputy Chief Judge
Judge of Compensation Claims

September 17, 2012

Ann Cole, Commission Clerk
Office of the Commission Clerk
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RECEIVED - FPSC
12 SEP 19 PM 2:19
COMMISSION
CLERK

Re: EAST MARION SANITARY SYSTEMS, INC. vs. PUBLIC SERVICE
COMMISSION, DOAH Case No. 12-0909

Dear Ms. Cole:

Enclosed is my Recommended Order in the referenced case. Also enclosed is the one-volume Transcript, together with the Respondent's Exhibits numbered 1, Intervenor's Exhibits numbered 1 through 5, and Joint Exhibits 1 through 9. Copies of this letter will serve to notify the parties that my Recommended Order and the hearing record have been transmitted this date.

As required by section 120.57(1)(m), Florida Statutes, you are requested to furnish the Division of Administrative Hearings with a copy of the Final Order, along with any exceptions to the Recommended Order, within 15 days of its rendition.

Sincerely,

W. DAVID WATKINS
Administrative Law Judge

WDW/bjs
Enclosures

cc: Lisa C. Bennett, Esquire
Herbert Hein
Millicent Mallon
Terry Will
Mike Smallridge
Martha F. Barrera, Esquire
S. Curtis Kiser, General Counsel
Timothy J. Devlin, Executive Director

DOCUMENT NUMBER-DATE

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The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EAST MARION SANITARY SYSTEMS,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 12-0909
)
PUBLIC SERVICE COMMISSION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before W. David Watkins, Administrative Law Judge of the Division of Administrative Hearings, on June 12, 2012, in Ocala, Florida.

APPEARANCES

For Petitioner: No appearance
For Respondent: Martha F. Barrera, Esquire
Lisa Bennett, Esquire
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
For Intervenor: Millicent Mallon, pro se
1075 Northeast 130th Terrace
Silver Springs, Florida 34488
For Intervenor: Terry Will, pro se
1385 Northeast 130th Terrace
Silver Springs, Florida 34488

STATEMENT OF THE ISSUE

Are Intervenor Mallon and Will each entitled to the installation of an irrigation meter with a "dedicated line configuration" at the prior tariffed rate of \$70.00?

PRELIMINARY STATEMENT

On August 19, 2008, East Marion Sanitary Systems, Inc. (East Marion or Utility) filed an application with the Florida Public Service Commission (Commission) for approval to amend its tariff sheets. Among the changes requested was an increase in meter installation charges, and the imposition of a new tap-in fee. The application was processed and on April 27, 2009, the Commission issued Order No. PSC-09-0263-TRF-WU (2009 Order) approving a new meter installation fee of \$195 and tap-in fees of \$1,400, \$1,800, and \$2,600 for the short, long, and extra-long irrigation service line installations, respectively.

In the 2009 Order, the Commission ordered that any customer who requested an irrigation meter from the Utility prior to April 7, 2009, would only be charged the \$70 rate in effect at the time of their request. On May 15 and 18, 2009, the Utility timely protested the portion of the Commission's order requiring the Utility to install irrigation meters at the prior tariff rate for customers requesting the meters prior to April 7, 2009. On September 15, 2010, the Commission granted Terry Will and Millicent Mallon's motions to intervene wherein they alleged

they were entitled to the installation of irrigation meters at the \$70 rate. Several other Utility customers who had requested meters also intervened in the action.

On September 29, 2011, East Marion, a majority of the intervenors, and the Office of Public Counsel (on behalf of all ratepayers), filed a joint motion for Commission approval of a settlement agreement wherein East Marion would install irrigation meters for the customers signing the agreement at the prior tariff rate of \$70 using an agreed-upon meter configuration. Intervenors Will and Mallon did not sign the agreement. On December 12, 2011, the Commission entered an order (2011 Order) approving the settlement agreement only as to the customers/intervenors who signed the agreement.

On December 29, 2011, East Marion protested the December 12, 2011, Order stating Will and Mallon were not entitled to a meter at the prior tariff rate. On January 11, 2012, Will filed a protest of the 2011 Order. On March 14, 2012, the Commission referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing.

Pursuant to notice, the hearing was convened on June 12, 2012, in Ocala, Florida. East Marion did not appear at the hearing and did not present any evidence. Mr. Mike Smallridge appeared at the hearing and represented that the Utility's

owner, Herbert Hein, asked him to state that the Utility had now agreed to install irrigation meters for Will and Mallon.

Mr. Smallridge stated, however, that Mr. Hein did not indicate that he would install the meters at the \$70 fee.

Mr. Smallridge, who is not an attorney, also stated that he was not appearing on behalf of the Utility and was not an agent, employee or representative of East Marion.

The Commission presented the testimony of Bart Fletcher and James McRoy, and introduced one exhibit into evidence.

Intervenors Will and Mallon each testified on their own behalf. Mallon submitted five exhibits into evidence and the parties offered 9 joint exhibits, all of which were admitted. The Commission's motion to deem the request for admissions propounded by the Commission on East Marion was granted.

At the conclusion of the hearing the parties requested, and were granted, leave to submit their proposed recommended orders 30 days after the transcript was filed. The Transcript was filed at the Division on June 19, 2012, and on July 18, 2012, the Commission filed its Proposed Recommended Order. On August 16, 2012, Petitioner filed a Proposed Recommended Order, which Respondent moved to strike as untimely. On August 31, 2012, the undersigned entered an order denying the motion to strike. However, the order also noted that the documents attached to Petitioner's Proposed Recommended Order, which were

not offered into evidence at the hearing and were not part of the record in this case could not form the basis for any findings of fact. The Proposed Recommended Orders of both parties have been carefully considered in the preparation of this recommended order.

All citations are to Florida Statutes (2012) unless otherwise indicated.

FINDINGS OF FACTS

1. Petitioner, East Marion Sanitary Systems Inc., is a Class C investor-owned utility providing water and wastewater service to approximately 96 customers in Marion County, Florida.

2. Respondent, Public Service Commission, is an arm of the legislative branch of the State of Florida responsible for regulating investor-owned water and/or wastewater utilities pursuant to chapters 350 and 367, Florida Statutes.

3. Intervenors Terry Will and Millicent Mallon are two water/wastewater customers of the Utility.

4. A utility's rates and charges must be contained in a tariff approved by the Commission. A utility may only charge rates and charges that are approved by the Commission.

5. The purpose of an irrigation meter is to avoid being charged a sewage rate for any water used to water lawns. Without a separate irrigation meter, a consumer is charged the

sewage rate based on the amount of potable water that the consumer uses.

6. In East Marion's tariff, approved by the Commission in 2002, the charge for installation of a meter was \$70. The tariff contained no provision for tap-in fees.

7. On February 14, 2007, Ms. Mabelle Gregorio, a customer of East Marion, filed a complaint with the Commission regarding the cost of an irrigation meter. East Marion charged, and Ms. Gregorio paid, a total of \$897 for the installation of the irrigation meter.

8. On October 2, 2007, Angela and Dennis Fountain, also customers of East Marion, filed a complaint with the Commission regarding the \$597 they were required to pay the Utility for the installation of an irrigation meter.

9. In response to the complaints, Mr. Hein, the Utility owner, stated in a letter to the Commission that there was no way to install an irrigation meter to the existing piping.

10. By Commission Order No. PSC-08-0182-PAA-WU, issued March 25, 2008, East Marion was required to refund the sum of \$824 to Ms. Gregorio, and the sum of \$527, with interest, to the Fountains.

11. In the March 25, 2008, Order, the Commission stated: "[w]hile we agree that the actual cost of the meter installation

may have exceeded \$70, the utility may only charge the fees contained in its approved tariff."

12. East Marion did not request that the Commission approve a change to its tariff charges for installation of irrigation meters until August 2008. On August 19, 2008, East Marion filed an application for Commission approval to amend its tariff sheets to reflect, among other items, an increase in meter installation charges, and the imposition of new tap-in fees.

13. Prior to April 27, 2009, a notice was placed on the locked bulletin board located at the Utility's office stating that no irrigation meters would be put in place until the requested new rates went into effect.

14. On September 26, 2008, Mr. Herbert Hein, owner and operator of East Marion, left a voicemail message to Commission staff member, Shannon Hudson, regarding a customer of the Utility and the installation of irrigation meters. In the voicemail message, Mr. Hein stated that he was "in the middle of asking for an irrigation meter tariff and until that is approved, I am not installing irrigation meters."

15. In order to offer customers a separate irrigation service, East Marion's application requested approval to implement new tap-in fees with charges dependent upon whether the tap-in required a "short," "long," or "extra-long"

installation. The short installation tap-in involved installing a dedicated service line 20 feet or less where the water main is on the same side of the road as the meter. The long installation tap-in involved installing a dedicated service line 40 feet or less where the water main is on the opposite side of the road. Finally, the extra-long installation tap-in involved installing the irrigation service line 40 feet or more on the opposite side of the meter.

16. By Order No. PSC-09-0263-TRF-WU, issued April 27, 2009, the Commission approved a new meter installation fee of \$195 and tap-in fees of \$1,400, \$1,800, and \$2,600 for the short, long, and extra-long irrigation service line installation, respectively. In that same order, the Commission directed that any customer who requested an irrigation meter from East Marion prior to April 7, 2009, would only be charged the \$70 rate, which was in effect at the time of the Utility's application.

17. Intervenor Will requested the Utility to install an irrigation meter by letter to the Utility dated March 16, 2008. Will also verbally requested the installation of the irrigation meter.

18. Mallon requested East Marion to install an irrigation meter at the \$70 tariff rate in a letter written by her late husband dated January 11, 2008.

19. On May 18, 2009, the Utility protested the portion of the Commission's order addressing previous applications for irrigation meters. Specifically, East Marion protested the Commission's requirement that the Utility install irrigation meters at its prior tariff rate for some customers who requested the meters prior to April 7, 2009.

20. On April 19, 2010, Terry Will and Millicent Mallon filed testimony in Docket 080562-WU, alleging they were entitled to the installation of irrigation meters at the \$70 rate. Several other Utility customers who had requested meters also intervened in the action.

21. On September 29, 2011, East Marion, a majority of the intervenors, and Florida's Office of Public Counsel, on behalf of all ratepayers, entered into a settlement agreement, and filed a joint motion with the Commission for approval of the settlement.

22. The Commission approved the settlement agreement by Commission Order No. PSC-11-0566-AS-WU, issued December 12, 2011.

23. At paragraph 1 of the settlement agreement, East Marion agreed to provide each settling Intervenor with an irrigation meter, installed as prescribed by the June 16, 2010, memorandum titled "Settlement of Docket No. 080562-WU

("grandfather installation")". The memorandum, dated June 16, 2010, was attached as attachment "A" to the agreement and order.

24. The June 16, 2010, Memorandum stated that the meter installation would use "the less costly configuration which uses the existing 1" line that serves two houses, rather than the more expensive dedicated line that goes directly to the main." The configuration for the agreed-upon meter installation, pictured in attachment "A," did not include a separate dedicated line leading from the Utility's main line to the irrigation meter.

25. Will and Mallon declined to enter into the settlement agreement. The Commission order issued December 12, 2011, expressly held that the settlement agreement was binding only as to the customer/intervenors who signed the agreement.

26. Will and Mallon did not agree that the installation of an irrigation meter in the configuration agreed to by the parties and intervenors, depicted in the June 16, 2010, memorandum, was an appropriate installation. This is because an irrigation meter installation that serves two houses, without a separate dedicated line, may impact one neighbor's water pressure if the other neighbor is running the irrigation system.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

28. Petitioner, East Marion, has the burden of proving, by a preponderance of the evidence, that Mallon and Will were not entitled to an irrigation meter installed at the prior tariff rate of \$70. In this case, East Marion failed to meet its burden, as it did not appear at the final hearing and did not present any evidence that Mallon and Will were not entitled to irrigation meters installed at the prior tariff rate of \$70. Fla. Dep't of Transp. v. J.W.C. Co., Inc. 396 So. 2d 778 (Fla. 1st DCA 1981).

29. Section 367.081(2)(a)1., Florida Statutes, provides that the Commission shall, either upon request or upon its own motion, fix rates for water and wastewater utilities which are just, reasonable, compensatory, and not unfairly discriminatory. Section 367.081(1) provides that a utility may only charge rates and charges that have been approved by the Commission.

30. In Aloha Utilities, Inc. v. Florida Public Service Commission, 281 So. 2d 357 (Fla. 1973), the Supreme Court found that where a utility company's rate increase was not authorized by the Commission, all rates and charges were to be refunded or reduced to pre-rate hike status.

31. In 2007 and 2008, East Marion charged two customers amounts in excess of the \$70 fee for the installation of

irrigation meters. East Marion objected on the basis that the installation of the irrigation meters had required the installation of additional separate lines connected from the main line to the meter. East Marion argued that the installation of the additional lines would cost more than the existing \$70 rate. The Commission, noting that the Utility's existing tariff only provided a \$70 fee for meter installation, ordered refunds of all amounts collected in excess of the \$70 stating: "[w]hile we agree that the actual cost of the meter installation may have exceeded \$70, the utility may only charge the fees contained in its approved tariff."

32. Section 367.111 requires each utility to provide service to customers in its service territory within a reasonable time. Pursuant to Florida Administrative Code Rule 25-30.520, East Marion could not refuse to provide service within its certificated areas in accordance with the terms and conditions on file with the Commission. The terms and conditions on file with the Commission were those in East Marion's tariff, which included the installation of a meter at the rate of \$70. It is clear from the evidence presented in this case that Will and Mallon requested the irrigation meter installation prior to the April 7, 2009, date provided in the Commission's 2009 Order. It is also clear that East Marion improperly delayed providing the service to its customers when

it refused customers' requests to install meters until its application to increase the Utility's tariff was approved by the Commission.

33. Section 367.081(3), provides that in fixing rates for a water/wastewater utility, the Commission may determine the prudent cost of providing service during the period of time the rates will be in effect following the entry of a final order relating to the rate request of the utility, and may use such costs to determine the revenue requirements that will allow the utility to earn a fair rate of return on its rate base.

34. In this case, the costs of providing the meters to Will and Mallon will exceed the \$70 tariff rate. In its December 12, 2011, Order, the Commission cautioned East Marion that if it failed to prove that Mallon and Will did not request a meter, "the Utility will be required to connect the two customers at the \$70 fee and any additional costs it incurs will likely not be considered a prudent expenditure."

35. East Marion has failed to prove, by a preponderance of the evidence, that Will and Mallon did not request the meter installation prior to the April 7, 2009, deadline established in the Commission's 2009 Order. Rather, the unrebutted evidence of record established that Will and Mallon timely requested the meter installation while the approved rate was \$70 and that East Marion refused to install the meters.

36. Moreover, Will and Mallon are not bound by the stipulated meter installation configuration set forth in the settlement agreement approved by the Commission since they refused to join in the agreement.

37. The un rebutted evidence also established that an irrigation meter installation with a separate dedicated line is a superior configuration. Indeed, this was the approach used by the Utility to install the Gregorio's and Fountain's irrigation meters, believing it could recoup the full cost of the installation.

38. Section 367.091(1), (3), and (4), provide that each utility's rates, charges, and customer service policies must be contained in a tariff approved by and on file with the Commission. Further, 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 a utility's rate schedule may not be made without Commission approval.

39. Since the Utility did not have an additional fee in its approved tariff for the installation of an irrigation meter with a dedicated line at the time Will and Mallon requested installation, East Marion can only charge \$70 for the installation with the dedicated line.

40. As Will and Mallon requested the meter installation prior to the April 7, 2009, deadline, they are entitled to the installation of an irrigation meter with a separate dedicated line at the prior tariff rate of \$70.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Public Service Commission enter a Final Order dismissing Petitioner's protest and ordering the Utility to install irrigation meters with a dedicated line for Intervenor Will and Mallon at the prior tariff rate of \$70.

DONE AND ENTERED this 17th day of September, 2012, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Docket No. 080562-WU
Date: November 13, 2012

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.