

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: August 5, 2004

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

FROM: Office of the General Counsel (Fleming)
Division of Economic Regulation (Brady, Rieger)

RE: Docket No. 980876-WS – Application for certificates to operate a water and wastewater utility in Marion County by Ocala Springs Utilities Inc.
County: Marion

AGENDA: 08/17/04 – Regular Agenda – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\980876.RCM.DOC

Case Background

Ocala Springs Utilities, Inc. (OSUI or utility) is a wholly-owned subsidiary of Avatar Utilities, Inc. (Avatar), which is a wholly-owned subsidiary of Avatar Holdings, Inc. (Avatar Holdings). OSUI was established by Avatar for the specific purpose of providing water and wastewater service to an undeveloped tract of land consisting of 4,666 acres known as Ocala Springs. The entire tract of land is owned by another wholly-owned subsidiary of Avatar Holdings, Avatar Properties, Inc. (API). Based on the magnitude of Ocala Springs' acreage, it is expected that OSUI will be a Class A water and wastewater utility at build-out.

On July 13, 1998, OSUI submitted an application for original certificates to operate a water and wastewater utility in Marion County along with a petition requesting a temporary variance from or a temporary waiver of Rules 25-30.033(1)(h), (j), (m), (o), (r), (t), (u), (v), (w), (2), and (3) and 25-30.433(10), Florida Administrative Code. On July 31, 1998, the utility filed an amended petition requesting a temporary variance from, or a temporary waiver, of Rules 25-30.033(1)(k) and (4), Florida Administrative Code, in addition to the above-mentioned rules.

By Order No. PSC-98-1374-PCO-WS, issued October 12, 1998, the Commission granted OSUI's amended petition for the temporary rule waivers and required the utility to submit a separate application in this docket for initial rates and charges within 24 months of a Commission order granting original certificates. By Order No. PSC-98-1644-FOF-WS, issued December 7, 1998, OSUI's application for original certificates was approved, and Certificate Nos. 604-W and 520-S were issued to the utility. Order No. PSC-98-1644-FOF-WS reiterated that the utility was required to file an application to establish initial rates and charges within 24 months of the Order, which made the filing deadline December 7, 2000.

On September 12, 2000, as amended on October 11, 2000, the utility requested an extension of time, until February 7, 2002, to file an application to establish initial rates and charges. By Order No. PSC-00-2387-FOF-WS, issued December 13, 2000, the Commission granted the utility's request for extension of time.

On December 4, 2001, OSUI filed a Motion for Extension of Time, requesting that it be allowed until December 7, 2003, to file an application for initial rates and charges. In support of its motion, OSUI stated that it had been informed by API that it would not be prudent to proceed with the Ocala Springs development under the prevailing market and economic conditions. By Order No. PSC-02-0180-PCO-WS, issued February 11, 2002, the Commission granted the extension. Pursuant to that order, the Commission put OSUI on notice that, if it failed to file the information required by Order Nos. PSC-98-1644-FOF-WS and PSC-98-1374-PCO-WS by December 7, 2003, Commission staff would bring a recommendation for the Commission's consideration addressing whether certificate revocation proceedings should be initiated pursuant to Section 367.111, Florida Statutes.

On December 5, 2003, as amended on March 25, 2004, OSUI filed a Second Motion for Extension of Time, requesting that it be allowed a one year extension of time until December 7, 2004, in which to file the information required by Order Nos. PSC-98-1374-PCO-WS and PSC-98-1644-FOF-WS.¹ OSUI also requested that the Commission refrain from initiating revocation proceedings at this time. On July 12, 2004, OSUI amended its Second Motion for Extension of Time and requested that it be allowed until April 7, 2005, to file the required information. The Commission has jurisdiction to consider this matter pursuant to Sections 367.031, 367.045, 367.111, and 120.542, Florida Statutes.

¹ Staff notes that this is in fact the Third Request for Extension of time. The first was requested on September 12, 2000, the second was requested on December 4, 2001.

Discussion of Issues

Issue 1: Should the Commission grant Ocala Springs Utilities, Inc.’s Motion for Extension of Time?

Recommendation: Yes. The Commission should grant Ocala Springs Utilities, Inc.’s Motion for Extension of Time. As requested in its motion, the utility should be allowed until April 7, 2005, to file an application to establish initial rates and charges for the utility, along with other supporting information required by Order Nos. PSC-98-1644-FOF-WS and PSC-98-1374-PCO-WS. (Fleming, Brady)

Staff Analysis:

Status of the Proposed Development

In early 2003, the State of Florida (State) and API began preliminary discussions regarding the State’s possible purchase of the Ocala Springs property for preservation and conservation pursuant to the Florida Forever Program. API expected to receive a written offer from the State sometime in early 2004. As a result of the ongoing negotiations, OSUI filed a Second Motion for Extension of Time on December 5, 2003, and an Amended Second Motion for Extension of Time on March 25, 2004, to file the information required by Order Nos. PSC-98-1644-FOF-WS and PSC-98-1374-PCO-WS. According to OSUI, at the time the motion was filed, the State and API were in active negotiations, and therefore OSUI has not been able to proceed with the permitting and construction of the utility infrastructure for the development. OSUI also indicated that API intended to develop the property if the property was not sold to the State. On July 12, 2004, staff was informed that the State and API were unable to reach an agreement on the sale and purchase of the property and API is now planning to develop the property as a primary residential community or active adult community. Thus, OSUI requests that it be allowed until April 7, 2005, to file the information required by Order Nos. PSC-98-1374-PCO-WS and PSC-98-1644-FOF-WS.

OSUI has provided the current estimated timeframe for permitting and construction as follows:

| ACTION | EXPECTED COMPLETION DATE |
|---|---------------------------------|
| Final decision as to type of development (active adult vs. traditional) | October 2004 |
| Commencement of replanning and replatting of development with Marion County | December 2004 |
| Consumptive use permit application submitted to Water Management District | February 2005 |

| ACTION | EXPECTED COMPLETION DATE |
|---|--------------------------|
| Construction permit application for water and wastewater facilities submitted to DEP | February 2005 |
| Submit to PSC copies of detailed system maps and evidence of ownership of plant sites | April 2005 |
| File with PSC application to establish initial water and wastewater rates | April 2005 |
| Major advertising effort begins for the Ocala Springs development | May 2005 |
| Construction to begin on water and wastewater facilities | July 2005 |

Temporary Rule Waiver /Motion for Extension of Time

As discussed in the case background, the Commission granted OSUI a temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code, by Order No. PSC-98-1374-PCO-WS. OSUI seeks an extension of that waiver. When considering an extension of a temporary rule waiver, it is appropriate to consider whether the petitioner still meets the waiver requirements in Section 120.542, Florida Statutes. See, In Re: Application for Original Certificate to Operate Water and Wastewater utility in Bay County by Dana Utility Corporation, Order No. PSC-00-1376-PCO-WS, issued July 31, 2000, in Docket No. 991632-WS. Section 120.542(2), Florida Statutes, provides a two-pronged test for determining when waivers and variances from agency rules shall be granted:

. . . when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, “substantial hardship” means demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. . . .

When the Commission granted the original temporary waiver, it found that OSUI met the underlying purpose of Sections 367.031 and 367.045, Florida Statutes, because the utility demonstrated its technical and financial ability to provide service and that there was a need for service in the area. The Commission also found that the utility would suffer a substantial hardship if all of the provisions of Rule 25-30.033, Florida Administrative Code, were strictly applied, because OSUI needed water and wastewater certificates to proceed with its development plans, and initial rates and charges could not be established until the development plans were complete.

OSUI's circumstances have not changed since the Commission granted the temporary waiver. The utility continues to have the financial and technical ability to provide service. OSUI's parent company, Avatar, promises to finance the initial operation of the utility, and Avatar has demonstrated technical knowledge and ability to operate utilities for over forty years. With respect to whether there is a need for service, the future Ocala Springs development will need water and wastewater service. In addition, OSUI states in its motion that there is no water or wastewater utility service provider available to the proposed Ocala Springs development except OSUI. OSUI further contends that granting the extension of time would be in the public interest because it would allow a certificated utility to remain in existence to be ready to serve a proposed development where there is no other utility provider. OSUI continues to need its certificates to proceed with the development plans for Ocala Springs, and initial rates and charges cannot be established until the development plans are complete. Because OSUI continues to meet the requirements of Section 120.542, Florida Statutes, for a rule waiver, the utility's motion for extension of time should be granted until April 7, 2005.

Revocation Proceedings

The Commission is authorized, pursuant to Section 367.111, Florida Statutes, to revoke a utility's certificate of authorization, after five years if service is not being provided:

If a utility has not provided service to any part of the area which a utility is authorized to serve, whether or not there has been a demand for such service, within 5 years after the date of authorization for service to such part, such authorization may be reviewed and amended or revoked by the [C]ommission.

(Emphasis added)

The Commission has previously revoked certificates when no service has been provided after five years. See, In Re: Revocation by Florida Public Service Commission of St. George Island Utility Company, Ltd., Certificate No. 356-S in Franklin County, Pursuant to Section 367.111(1), Florida Statutes, Order No. 24798, issued July 11, 1991, in Docket No. 900223-SU (utility's wastewater certificate revoked, in part, because the utility had not provided service to its territory after five years); In Re: Monument Utility Company – Revocation of Authority to Provide Service and Cancellation of Certificates Nos 319-W and 267-S, Order No. 14012, issued January 18, 1995, in Docket No. 840440-WS (utility's certificates cancelled because the utility had no facilities, no customers, and had not provided service after five years).

OSUI states that granting its motion would be wholly consistent with Section 367.111, Florida Statutes, because the statute gives the Commission discretionary authority to review a utility's authority to serve an area if service has not been provided within five years after the date of authorization for service. In addition, OSUI argues that the statute does not provide that a certificate must or should be revoked if service has not been provided within five years.

By Order No. PSC-02-0180-PCO-WS, issued on February 11, 2002, the utility was put on notice that if it failed to file the information required by Order Nos. PSC-98-1644-FOF-WS and PSC-98-1374-PCO-WS by December 7, 2003, staff would bring a recommendation to the Commission addressing whether revocation proceedings should be initiated pursuant to Section

367.111, Florida Statutes. Notwithstanding this language, based on the information provided, staff believes that the initiation of revocation proceedings would not be appropriate at this time because development was delayed, in part, due to good faith negotiations to sell the Ocala Springs property to the State. Moreover, even though the utility's parent company was not ready to develop the land and tried to sell the land to the State, the utility is now in the same posture as when the certificate was granted.

Conclusion

In light of the circumstances mentioned above, staff believes that the motion for extension of time until April 7, 2005, is reasonable and should be granted. However, if the Commission determines that OSUI's motion for extension of time should be denied, the Commission should initiate revocation proceedings. In order for the Commission to properly initiate proceedings for a possible revocation of OSUI's certificates, 30 days notice must be given pursuant to Section 367.045(6), Florida Statutes. If the Commission denies staff's recommendation, the notice should be issued in accordance with Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Administrative Code. Subsections (2) and (6) of Rule 25-30.030, Florida Administrative Code, require that certain governing bodies, governmental agencies, and affected persons, including customers in the utility's certificated territory, be noticed by regular mail or personal service. Subsection (7) of Rule 25-30.030, Florida Administrative Code, requires that notice be published in a newspaper of general circulation in the territory proposed to be deleted. In addition to the above noticing requirements, the notice should be published in the Florida Administrative Weekly.

Docket No. 980876-WS

Date: August 5, 2004

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open pending completion of the filing requirements by Ocala Springs Utilities, Inc. and the establishment of initial rates and charges for the utility. (K. Fleming)

Staff Analysis: No. This docket should remain open pending completion of the filing requirements by Ocala Springs Utilities, Inc. and the establishment of initial rates and charges for the utility.