

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: October 21, 2004

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

FROM: Office of the General Counsel (Jaeger)
Division of Economic Regulation (Fletcher, Merchant, Willis)

RE: Docket No. 030444-WS – Application for rate increase in Bay County by Bayside Utility Services, Inc.

AGENDA: 11/02/04 – Regular Agenda – Participation Dependent on Commission Vote on Issue 1.

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\030444.RCM.DOC

Case Background

Bayside Utility Services, Inc. (Bayside or utility), a wholly-owned subsidiary of Utilities, Inc. (UI), is a class C water and wastewater utility currently serving approximately 283 residential customers and 4 general service customers. Bayside is a reseller utility that purchases water and wastewater service from the City of Panama City Beach. The utility completed its filing of an application for a rate increase on February 17, 2004, and this date was established as the official date of filing.

By Order No. PSC-04-0414-PCO-WS (Interim Order), issued April 22, 2004, the Commission suspended the utility's proposed final rates and approved an interim revenue increase of \$42,547 (or 64.57%) for water and \$51,145 (or 55.22%) for wastewater. The Commission also calculated the amount of security for any potential interim refund.

On July 22, 2004, staff filed its recommendation on Bayside's request for increased rates, in which staff recommended an increase for both the water and wastewater divisions, but not as

much as had been granted by the Interim Order. Noting that a large number of customers of Bayside had requested that the County intervene in the rate case proceeding, Bay County (County) filed its Petition to Intervene in Rate Increase Proceedings and Objection to Rate Base and Proposed Rates on July 27, 2004. By Order No. PSC-04-0729-PCO-WS, issued July 28, 2004, the Commission granted the County's Petition to Intervene.

The Commission considered staff's recommendation at the August 3, 2004 Agenda Conference, and the County was allowed to participate and voice its concerns and objections. Pursuant to its vote at that agenda conference, the Commission issued its Proposed Agency Action Order No. PSC-04-0820-PAA-WS (PAA Order) on August 23, 2004, whereby the Commission proposed to approve a \$31,517 (or 47.83%) water increase and \$39,609 (or 42.77%) wastewater increase.

After the Commission issued its PAA Order, Bay County adopted Resolution No. 2570 on September 7, 2004, rescinding Commission jurisdiction over investor-owned water and wastewater utilities in Bay County effective immediately. Moreover, on September 13, 2004, the Office of Public Counsel (OPC) filed a protest of the Commission's PAA Order. Pursuant to Section 367.081(8), Florida Statutes (F.S.), the Commission must render a final decision within 8 months of the date OPC filed its protest.

Bayside notified staff that it will maintain its interim rates pending the Commission's final decision. On October 7, 2004, Staff filed its recommendation concerning the need for additional security for the anticipated increased time that interim rates would be in effect. Based on an estimated seven more months of interim rates, the Commission required the corporate undertaking guaranteed by Utilities, Inc., to be increased from \$46,964 to \$102,733.

Because of the protest, the Commission scheduled a hearing to be held on January 20-21, 2005, in the utility's service area, and issued an Order Establishing Procedure, Order No. PSC-04-0914-PCO-WS, on September 20, 2004. On October 4, 2004, OPC filed its Motion for Commission to Relinquish Jurisdiction to the County (Motion). Bayside responded in opposition on October 8, 2004, and also filed its request for oral argument on that same date. Also, on October 11, 2004, Bay County filed its Response to and Joinder in the Citizens of the State of Florida Motion to Relinquish Jurisdiction (Joinder). Moreover, the tentative hearing date was changed from January 20-21, 2005, to February 21-22, 2005.

Staff's recommendation addresses Bayside's request for oral argument, OPC's Motion for Commission to relinquish jurisdiction with the County's Joinder, and the utility's response. The Commission has jurisdiction pursuant to Sections 367.081, 367.082, and 367.171(5), F.S.

Discussion of Issues

Issue 1: Should the Commission grant Bayside's Request for Oral Argument?

Recommendation: Yes. Because oral argument may aid the Commission in comprehending and evaluating the issue of maintaining or relinquishing jurisdiction, staff recommends that oral argument be granted. Combined oral presentations on the Office of Public Counsel's Motion for Commission to Relinquish Jurisdiction should be limited to fifteen minutes per side. (Jaeger)

Staff Analysis: OPC did not request oral argument on its Motion. However, Bayside timely filed its Response and Request for Oral Argument on October 8, 2004. In its request for oral argument, Bayside notes that OPC's Motion "presents a new and unprecedented theory as a basis on which this Commission should relinquish jurisdiction." Also, Bayside argues that "neither this Commission, nor any other regulatory body, has ever made a final disposition of a case by relinquishing jurisdiction to another fact-finder, where there is no express grant of discretion to do so." Bayside concludes by stating that granting the Motion would "set an unfortunate precedent that violates the clear directive of the Florida Legislature," and asserting that oral argument would assist the Commission in making its decision.

Staff believes that Bayside has complied with Rule 25-22.058(1), Florida Administrative Code, and believes that oral argument will "aid the Commission in comprehending and evaluating the" issue before it. Therefore, staff recommends that the Commission grant oral argument.

Bayside has requested that it be given 15 minutes to present its position, and fifteen minutes for rebuttal. Staff notes that the Motion is OPC's Motion and believes that OPC should be given the opportunity to present its Motion first and then Bayside should be allowed to respond. Also, staff believes that 15 minutes per side would be adequate, and recommends that oral argument be limited to 15 minutes per side.

Issue 2: Should OPC's Motion for the Commission to Relinquish Jurisdiction to the County be granted?

Recommendation: No. The Commission should maintain jurisdiction and proceed with the formal hearing to set final rates and dispose of the interim rates collected by Bayside. (Jaeger, Fletcher)

Staff Analysis: As stated above, this rate case was officially filed on February 17, 2004, and interim rates were set by the Commission through issuance of the Interim Order on April 22, 2004. The utility implemented those interim rates approximately six months ago and continues to charge the interim rates pending the outcome of OPC's protest to the PAA Order. In the PAA Order that OPC protested, the Commission proposed to approve rates slightly less than the interim rates.

On October 4, 2004, OPC filed its Motion requesting the Commission to issue its "final order" relinquishing jurisdiction of this case to Bay County, so that the County could "conduct such further proceedings to resolve this case on the merits, as prescribed by its rules and regulations." In support of its Motion, OPC notes that Section 367.081(8), F.S., requires the Commission to enter its final order within eight months of the protest. Also, OPC notes that Section 367.171(5), F.S.,

provides that cases pending before the Commission at the time a County reassumes jurisdiction shall remain within the jurisdiction of the Commission ". . . until disposed of in accordance with the law in effect on the day such case was filed by any party with the Commission."

OPC argues that the term "final order" is broadly defined pursuant to Section 120.52(7), F.S., to mean:

A written final decision which results from a proceeding under s. 120.56, 120.565, s. 120.569, s. 120.57, s. 120.573, or s.120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. A final order includes all materials explicitly adopted in it. The clerk shall indicate the date of filing on the order.

OPC argues that the Commission can enter a final order "in accordance with the law" that meets the final order definition of Section 120.52(7), F.S., by issuing a "final order" relinquishing jurisdiction of this case to Bay County.

OPC further notes that UI purchased Bayside at approximately two-third's of Bayside's book value, and the Commission approved the transfer of the certificate to UI without the application of a negative acquisition adjustment. OPC also cites Rule 25-30.0371, Florida Administrative Code (F.A.C.), and opines that, apparently based on the last sentence of Rule 25-30.0371(3)(b), F.A.C., if the Commission issued a final order in 2005, that this rule would still allow the utility to earn a return on this "phantom investment," i.e., the one-third of the original

investment which was not included in the purchase price. OPC then argues that it does not believe the County would reach this same decision.

Noting that Bayside is a small utility with few customers, OPC argues that the utility and the customers would then have to immediately endure a second hearing to be conducted by the County. OPC's arguments are apparently based on the assumption that if the Commission enters a final order on the merits, then the County would immediately set an evidentiary hearing to consider overearnings. Therefore, OPC argues that it is administratively inefficient and more costly to the Commission, Bayside, and Bayside's customers for the Commission to conduct a formal hearing, which will produce an order that is sure to be revisited by the County with an overearnings investigation.

Citing Penn General Casualty Co. v. Pennsylvania ex Rel. Schnader, 294 U.S. 189 (1935), OPC argues that absent "a showing that the interests of the parties would not be adequately protected with the change in jurisdiction, a court or other tribunal, may exercise its judicial discretion to relinquish its jurisdiction in favor of another who also possesses jurisdiction to dispose of the case." OPC notes that Sections 367.081(1), (2), (3), and (6), F.S., also apply to the County, and requests the Commission, in order to promote "the efficient administration of justice," to issue a final order relinquishing jurisdiction to the County.

In the County's Joinder filed on October 11, 2004, citing Florida Public Service Commission v. Bryson, 569 So. 2d 1253 (Fla. 1990), and Stuart v. State ex rel. Miller, 629 So. 2d 288 (Fla. 3d DCA 1993), the County states that the Commission has the statutory authority to determine whether "it should retain jurisdiction of a case, or otherwise dispose of a case." The County believes that, if the Commission conducts a formal hearing, the customers "are likely to petition Bay County to reduce their water and wastewater rates, regardless of what this Commission's final action is in this Docket." Therefore, the County states that in "the interests of fundamental fairness," and "in order to avoid unnecessary litigation expenses and additional substantial hardship to the ratepayers," the Commission should relinquish jurisdiction to the County.

In its Response, Bayside argues that OPC has misinterpreted the meaning and impact of Section 367.171(5), F.S., which states as follows:

When a utility becomes subject to regulation by a county, all cases in which the utility is a party then pending before the commission, or in any court by appeal from any order of the commission, **shall remain** within the jurisdiction of the commission or court until disposed of in accordance with the law in effect on the day such case was filed.

(Emphasis supplied by Bayside.)

Bayside argues that this statute, coupled with the requirement of Section 367.081(8), F.S., for the Commission to render a final decision within eight months of the protest, requires the Commission to "retain jurisdiction and render a decision on the merits of the case that affects all parties properly before it."

Bayside also does not understand why OPC believes that it will get a different outcome if the County conducts the hearing, and believes that if OPC does know the outcome of the case if it was handled by Bay County, then Bayside would not receive a fair hearing before the County. Because the County is bound by the same statutes governing the setting of final rates, Bayside contends that there is no reason to believe the County would arrive at a different conclusion, and Bayside disputes the allegation that the County would have to conduct another duplicate proceeding, resulting in increased rate case expense.

Bayside also argues that OPC's reliance on Penn Central is misplaced. That case, involved the concurrent jurisdiction of the federal and state courts over the liquidation of an insolvent insurance company. Bayside notes that the Supreme Court ruled that the federal court, which first exercised jurisdiction over the insurance company, had the exclusive jurisdiction to proceed. Moreover, Bayside argues that the case is not applicable to the case at hand because the statute states that the Commission shall maintain jurisdiction.

Bayside concludes its argument by stating that the Commission has knowledge of the facts of this case, and "possesses the expertise to determine and resolve the issues efficiently and without undue cost to Bayside's customers." If jurisdiction is relinquished to the County, Bayside argues that "Bayside will have to start all over again with new Bay County staff," which will cause increased costs and delay in resolving the issues to the prejudice of Bayside and its customers, and there would be no efficient administration of justice.

In reviewing the argument of Bayside, staff disagrees with Bayside's conclusion that Sections 367.081(8) and 367.171(5), F.S., require the Commission to "render a decision on the merits of the case that affects all parties properly before it." These words are not in the statutes.

However, staff has reviewed many Commission orders citing both Sections 367.081(8) and 367.171(5), F.S., and in each order reviewed by staff where a county had taken back jurisdiction, the Commission maintained jurisdiction to conclude the rate case. See, Order No. PSC-97-0552-FOF-WS, issued May 14, 1997, in Docket No. 920199-WS, In re: Application For Rate Increase In Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, And Washington Counties By Southern States Utilities, Inc.; Collier County By Marco Shores Utilities (Deltona); Hernando County By Spring Hill Utilities (Deltona); And Volusia County By Deltona Lakes Utilities (Deltona) (on page four of the Order, the Commission noted that even though Hernando County had rescinded the Commission's jurisdiction, pursuant to Section 367.171(5), F.S., the Commission retained jurisdiction of the pending case over the appropriate rates for Spring Hill which was in Hernando County); and Order No. PSC-00-1879-AS-WS, issued October 16, 2000, in Docket No. 951056-WS, In re: Application for rate increase in Flagler County by Palm Coast Utility Corporation. The Commission retained jurisdiction even when the county rescinded jurisdiction prior to the Commission issuing its initial proposed agency action order. See Order No. PSC-94-1050-FOF-WU, issued August 29, 1994, in Docket No. 940087-WU, In re: Application for a Staff Assisted Rate Case by Rolling Hills Water, Inc. Also, this has been the case when there were refunds involved. See, Order No. PSC-98-0507-FOF-WS, issued April 13,

1998, in Docket No. 980182-WS, In re: Distribution of contributions-in-aid-of-construction gross-up funds collected by Palm Coast Utility Corporation in Flagler County.

Staff believes that OPC and the County make a valid point about duplicative rate cases and unnecessary rate case expense which could cause increased rates for the customers. However, in cases involving the rescission of Commission jurisdiction by the County, the Commission has repeatedly concluded all rate case proceedings by setting final rates and disposing of any refund requirement. Pursuant to Subparagraph 120.68(7)(e)3., F.S., agency decisions that are inconsistent with stated agency policy or a prior agency practice, must be adequately explained. See also, Florida Cities Water Company v. Florida Public Service Commission, 705 So. 2d 620, 626 (Fla. 1st DCA 1998), (“inconsistent results based upon similar facts, without reasonable explanation, is improper.”) Therefore, if the Commission decides not to complete this rate case, staff believes that the Commission must give a reasonable explanation for that action.

OPC has noted a possible disagreement by the County with the Commission’s policy and rule for imposing negative acquisition adjustments and the almost certainty of a second formal hearing (with its attendant rate case expense) being held by the County if the Commission again decides that a negative acquisition adjustment is not warranted. OPC appears to believe that this is sufficient justification or reason for the Commission to relinquish jurisdiction in this specific instance.

Staff believes that when a county takes back jurisdiction there is always the possibility that there will be a difference in philosophy as to what constitutes a valid expense or investment. Therefore, staff does not believe that the possibility of a second formal hearing to be held by the County would constitute a reasonable basis for the Commission to determine that it need not proceed with the formal hearing and the setting of final rates as it typically does.

In addition, staff notes that Bayside has been collecting interim rates for approximately six months. If the Commission were to relinquish jurisdiction to the County, it is unclear to staff how or if the issue of the appropriate disposition of interim rates would be handled by the County. If OPC is correct and the County were to address the refund question, the County may use different criteria than that used by the Commission on the appropriate refund amount. Also, staff believes that it is more efficient for the Commission to use its background, knowledge, and expertise to conclude this rate case which was started here, and in which the utility has already prefiled its testimony.

Based on the above, staff recommends that the Commission deny OPC’s motion to relinquish jurisdiction, and proceed with the formal hearing to set final rates and dispose of the interim rates collected by Bayside.

Docket No. 030444-WS

Date: October 21, 2004

Issue 3: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation to deny the Office of Public Counsel's Motion, and maintain jurisdiction, the docket should remain open to allow the Commission to conduct an evidentiary hearing, and subsequently enter a final order setting rates and disposing of the interim rates collected by Bayside. (Jaeger, Fletcher)

Staff Analysis: If the Commission approves staff's recommendation to deny the Office of Public Counsel's Motion, and maintains jurisdiction, the docket should remain open to allow the Commission to conduct an evidentiary hearing, and subsequently enter a final order setting rates and disposing of the interim rates collected by Bayside.