

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: September 21, 2006

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

FROM: Office of the General Counsel (Fleming, Brubaker)
Division of Economic Regulation (Clapp, Rieger, Romig)

RE: Docket No. 030458-WU – Application for transfer of majority organizational control of Holiday Utility Company, Inc. in Pasco County to Holiday Waterworks Corporation, and amendment of Certificate No. 224-W.

AGENDA: 10/03/06 – Regular Agenda – Motion to Dismiss - Oral argument has not been requested for Issue 1, but may be heard at the Commission’s discretion.

COMMISSIONERS ASSIGNED: Arriaga, Carter, Tew

PREHEARING OFFICER: Tew

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030458.RCM.DOC

Case Background

On May 23, 2003, Holiday Utility Company, Inc. (Holiday or utility) filed an Application for Transfer of Majority Organizational Control (TMOC). On March 16, 2004, Holiday filed an Amended and Restated Application for Transfer of Majority Organizational Control and Amendment of Certificate No. 224-W to add territory in Pasco County (County). Pasco County filed a timely objection to Holiday’s restated application for amendment but did not object to the TMOC transfer. As a result, the certification process was bifurcated and the TMOC was approved by Order No. PSC-06-0380-FOF-WU, issued May 8, 2006. The amendment portion of the application is currently scheduled for an evidentiary hearing on January 17, 2007.

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In Order No. 6780, issued July 17, 1975, in Docket No. 73489-W, In re: Application of Holiday Utility Company for a Certificate to operate a water system in Pasco County, Florida, the Commission granted Holiday certificate No. 224-W to serve only the northeast and southwest parcels of the requested territory. However, when the tariff was approved, the territory description in the tariff reflected more territory than was granted by the Commission in the Order. Staff believes the utility is authorized to serve only that territory described in Order No. 6780, as revised by Order No. PSC-06-0380-FOF-WU, issued May 8, 2006. The purpose of Holiday's amendment is to correct deficiencies in the territory Holiday believed was part of the service territory it was authorized to serve.

At issue here is Pasco County's motion to dismiss Holiday's application filed August 16, 2006. Holiday responded in opposition to the motion on August 21, 2006. For the reasons discussed below, staff recommends that Holiday's amendment application be dismissed.

The Commission has jurisdiction over this matter pursuant to Section 367.045, Florida Statutes, as well as Chapters 120 and 367, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Pasco County's Motion to Dismiss Holiday Utility's Amendment Application?

Recommendation: Holiday's application for amendment should be dismissed without prejudice, with leave for Holiday to refile its application pursuant to the Chapter 367, Florida Statutes, and the Commission's rules. (Fleming, Brubaker)

Staff Analysis:

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See Id. at 350. In determining the sufficiency of the petition, the Commission must confine its consideration to the petition and documents incorporated therein and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958); Rule 1.130, Florida Rules of Civil Procedure.

Pasco County's Motion to Dismiss (Motion)

In its motion, Pasco County contends that Holiday's amendment application should be dismissed because Holiday failed to prosecute its case, delayed progress towards a final hearing, and failed to promote the just, speedy, and inexpensive determination of all aspects of this case.

Pasco County also argues that the prefiled direct testimony Holiday filed in April of 2006 failed to meet the petitioner's burden of proof. For this reason, the prehearing officer adjusted the prehearing schedule to afford Holiday more time to file direct testimony to replace the testimony that it had filed in April, and rescheduled the hearing.¹ In addition, Holiday failed to meet the revised testimony filing deadline of August 14, 2006, and thus, according to Pasco County, Holiday failed to comply with the procedural orders of this case. Finally, Pasco County states that Holiday did not timely respond to the County's discovery requests served on May 19, 2006, and that Holiday responded on August 15, 2006, only after the prehearing office granted the County's motion to compel and required Holiday to respond by August 15, 2006.² According to Pasco County, Holiday's delay in filing testimony and responding to discovery requests has prejudiced the County and impaired its ability to fully and timely prepare its testimony.

¹ Order No. PSC-06-0643-PCO-WS, issued on May 25, 2006.

² Order No. PSC-06-0768-PCO-WU, issued on August 8, 2006.

Holiday's Response

Holiday denies that it has failed to prosecute this matter or has delayed this proceeding. Holiday contends that it has complied with all applicable deadlines and has in no way prejudiced Pasco County or impaired the County's ability to fully and timely prepare its testimony. Holiday claims that because of the bifurcation of the certificate issues in this docket, staff believed that the utility's testimony should be expanded, and for this reason the testimony filed in April, 2006, was not sufficient. Holiday acknowledges that its testimony was due on August 14, 2006 pursuant to the Order Modifying Procedural Order. According to Holiday, its replacement direct testimony and exhibits were ready for filing on the August 14 due date, but the person delivering the documents arrived at the Commission Clerk's office at 5:05 p.m., after the clerk's office had closed. Holiday states that it informed staff and Pasco County of the delay. Holiday further states that it provided responses to Pasco County's discovery on August 15, 2006, as required by the prehearing officer.

Analysis and Conclusions

For the reasons discussed below, staff recommends that Holiday's application be dismissed without prejudice to file another amendment application.

On May 23, 2003, Holiday filed its application for transfer of majority organizational control. When the utility provided notice to its customers of the TMOC, staff advised the utility that the territory description in the notice included more territory than the utility was authorized to serve. Holiday filed an amended and restated application for TMOC and amendment of certificate on March 16, 2004, in which the utility sought to amend its certificate to add the territory that the utility believed was part of the service territory it was authorized to serve. Pasco County filed an objection with the Commission on June 15, 2004, after which Holiday asked for time to negotiate a settlement with the County. Over a year after the objection was filed, on July 19, 2005, staff sent Holiday a letter requesting a status report on the negotiations. Staff also requested Holiday to file a second amended application by August 22, 2005 because of deficiencies in the first amended application, if no settlement had been reached. Holiday failed to meet the deadline established by staff. Instead, on September 15, 2005, Holiday filed a letter advising the Commission that Holiday and Pasco County were unable to reach an agreement concerning the service areas. The letter also included a modified legal description of the amended service area sought by Holiday, including the area to be deleted from the utility's approved service territory. After Holiday's second amended application was filed, numerous discussions ensued, including bifurcation of the TMOC portion of this proceeding since the County did not object to the TMOC transfer. On December 15, 2005, staff confirmed with both parties that neither would object to bifurcation and an evidentiary hearing was set for the amendment portion on July 26-27, 2006, with the utility's direct testimony due on April 10, 2006. Although the utility filed its testimony on the due date, the testimony was deficient because, among other things, it failed to provide the territory description of the additional territory it sought to serve. Because of the deficiency, the parties agreed to reschedule the hearing and establish new controlling dates.

By Order No. PSC-06-0483-PCO-WU, issued on May 25, 2006, a new hearing date was set for January 17-18, 2007, and Holiday was required to prefile its direct testimony and exhibits

by August 14, 2006. Holiday argues that it missed the revised testimony deadline by only five minutes. In actuality, however, Holiday attempted to file its testimony at 5:05 p.m. one day later, on August 15, and thus the testimony was not deemed filed with the clerk until August 16, 2006, two days after the due date. Further, Holiday did not request that it be allowed to file its testimony late, as required by Rule 28-106.204(5), Florida Administrative Code. Thus, Holiday failed to timely file its prefiled testimony due on August 14, 2006.

Holiday also failed to timely respond to the discovery requests propounded by Pasco County. Holiday states that it provided responses to Pasco County's interrogatories and document requests on August 15, 2006. However, these responses should have been served by June 23, 2006. Holiday was nonresponsive to the County's requests to obtain discovery until the Prehearing Officer granted the County's motion to compel and stated: "Holiday is cautioned that it is expected to familiarize itself and comply with the requirements of Order No. PSC-06-0198-PCO-WU, and this Commission's rules and statutes. To the extent Holiday needs assistance with the Commission's procedures, it should avail itself of the opportunity to contact the Commission staff attorney assigned to this docket."³

In addition to its failure to timely file testimony or discovery responses, the utility failed to make a prima facie showing in its prefiled direct testimony that it is entitled to an amendment of territory. The utility has not met its burden of proof.⁴ Holiday failed to specify with particularity the additional territory it seeks to serve through its amendment application. The legal description includes no new territory – it contains only that territory the utility is currently authorized to serve. Section 367.045(5)(a), Florida Statutes, provides that the Commission "may not grant authority greater than that requested in the application or amendment thereto." Also, the prefiled testimony is irrelevant and misleading. For example, Holiday's witness Deremer described land owners' agreements to receive water service in his prefiled testimony, and included them in his Exhibit GD-3. Exhibit GD-3 is made of up two agreements: one for the Estate of Bartley L. Mickler (Mickler) and one for Gulfwinds, LLP (Gulfwinds). The portion of territory designated for Gulfwinds, however, was deleted from Holiday's service area by Order No. PSC-06-0380-FOF-WU, issued on May 8, 2006, and is now being served by Pasco County. Since Gulfwinds no longer exists as a potential customer for Holiday, this portion of exhibit GD-3 is irrelevant and misleading. Finally, staff is not able to determine with specificity the territory Holiday is seeking to amend because the prefiled testimony identifies exhibits that were not filed, contains duplicative information, or information relating to the transfer application that was previously approved by Order No. PSC-06-0380-FOF-WU.

Pursuant to the Order Establishing Procedure issued in this docket, "[f]ailure of a party to timely prefile exhibits and testimony from any witness . . . may bar admission of such exhibits and testimony." Even though the utility has had ample opportunity to timely prefile relevant and accurate testimony, it has failed to do so. Further, the utility has a history in this docket of not meeting required deadlines and failing to file accurate or sufficient information. Staff believes that Holiday's conduct throughout this proceeding, especially its failure to timely file relevant

³ Order No. PSC-06-0686-PCO-WU, issued August 8, 2006.

⁴ See, Dept. of Banking & Finance, Division of Securities & Investor Protection v. Osburne, Stern & Co., 670 So. 2d 932 (Fla. 1996) (an applicant for licensure bears the burden of ultimate persuasion at each and every step of the licensure proceedings, regardless of which party bears the burden of presenting certain evidence).

and accurate direct testimony cannot be described as mere neglect or inadvertence. Staff took a number of extraordinary steps to give the utility, who is represented by counsel, the necessary information and additional opportunities to rectify the deficiencies in its prefiled direct testimony. Holiday was cautioned that it was expected to familiarize itself and comply with the requirements of the Order Establishing Procedure along with Chapter 367, Florida Statutes, and the Commission's rules. Holiday's persistent inability to meet the Commission's requirement to amend its testimony can only be ascribed as a complete disregard of Chapter 367, Florida Statutes, and the Commission's rules.

Accordingly, staff recommends that Holiday's amendment application be dismissed without prejudice because of the utility's failure to meet its prima facie burden of proof and its inability to comply with the amendment requirements, with leave for the utility to refile its application pursuant to Chapter 367 and the Commission's rules. Staff's recommendation is consistent with other proceedings dismissed by the Commission due to a party's failure to meet its burden of proof and comply with the Commission's requirements.⁵

⁵ See, Order No. PSC-94-1245-FOF-WS, issued on October 11, 1994, in Docket No. 930206-WS, In re: Application for water and wastewater certificates in Sumter County by Sumter Utilities, Inc., (application dismissed because of Sumter's failure to file testimony and exhibits); Order No. 12264, issued on July 18, 1983, in Docket No. 820461-TP, In re: Broward Restaurant Equipment & Repair Corporation and Restaurant Appliance Parts Corporation vs. Southern Bell Telephone and Telegraph Company (complaint dismissed without prejudice because of Broward's failure to file testimony consistent with Commission practice).

Issue 2: Should the Commission require Holiday to file an amendment application to include an area currently being served outside of its existing certificated territory?

Recommendation: Yes. Holiday should be required to file in a separate docket, within thirty days of the date of the Commission vote, an amendment application pursuant to Rule 25-30.036, Florida Administrative Code, for the uncertificated territory it is currently serving. The current docket should remain open until the amendment application has been filed and a new docket established. (Fleming, Brubaker, Rieger)

Staff Analysis: In August 1973, Holiday filed an application to provide water service in Pasco County. In Order No. 6780, the Commission granted Holiday certificate No. 224-W to serve only the northeast and southwest parcels of the requested territory. However, when the tariff was approved, the territory description in the tariff reflected more territory than was granted by the Commission in Order No. 6780. On May 23, 2003, Holiday filed an application for transfer of majority organizational control. When the application was noticed, staff advised the utility that the territory noticed in the transfer included more territory than the utility was authorized to serve. At that time, Holiday informed staff that it was not aware that the Commission had not approved all of the territory requested in 1973 and that it was currently serving a Pasco County public school that was outside its certificated area.

When it approved the TMOC transfer, the Commission recognized that the utility failed to obtain Commission approval for serving a school located outside its certificated service area. Although it was in apparent violation of Section 367.045(2), Florida Statutes, the Commission found that circumstances mitigated the utility's apparent violation:

. . . The customer that Holiday is serving outside of its territory is adjacent to Holiday's service area. When the school was connected 15 years ago, Holiday believed the school was within its service area due to the school's location and Holiday's tariff; however, based on Commission Order No. 6780, that area is not part of Holiday's certificated service area. Believing that the school was located within its service area, Holiday has paid all the necessary regulatory assessment fees for the additional area. Furthermore, upon becoming aware that the school was not located within its certificated territory, Holiday filed an application for amendment of its certificate to include the additional area.

Order No. PSC-06-0380-FOF-WU, issued on May 8, 2006, at p. 3. The Commission found that a show cause proceeding against Holiday for failing to obtain an amended certificate of authorization prior to serving outside of its certificated territory was not warranted. At the time Order No. PSC-06-0380-FOF-WU was issued, it appeared that the problem of the utility serving outside its territory would be resolved through the amendment portion of this bifurcated docket.

If Issue 1 to this recommendation is approved, there is no guarantee that the utility will voluntarily file an amendment application to address the school it is currently serving outside its authorized territory. Therefore, staff recommends that Holiday be required to file in a separate docket, within thirty days of the date of the Commission vote, an amendment application pursuant to Rule 25-30.036, Florida Administrative Code, for the uncertificated territory it is

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currently serving. The current docket should remain open until the amendment application has been filed and a new docket established.

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Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open until the amendment application referred to in Issue 2 has been filed and a new docket established. After the amendment application has been filed, this docket may be closed administratively. (Fleming, Brubaker)

Staff Analysis: This docket should remain open until the amendment application referred to in Issue 2 has been filed and a new docket established. After the amendment application has been filed, this docket may be closed administratively.