

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: March 15, 2007

TO: Commission Clerk (Cole)

FROM: Office of the General Counsel (Gervasi)
Division of Economic Regulation (Brady, Redemann)

RE: Docket No. 060726-WS – Application for certificates to provide water and wastewater service in Glades County and water service in Highlands County by Silver Lake Utilities, Inc.

AGENDA: 03/27/07 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Pending

CRITICAL DATES: 3/29/07 (90-Day Rule Waiver Statutory Deadline)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060726.RCM.DOC

Case Background

On November 3, 2006, Silver Lake Utilities, Inc. (Silver Lake, utility, or applicant) filed an application for original water and wastewater certificates in Glades County and for an original water certificate in Highlands County, Florida. The utility's proposed service territory consists of approximately 350,000 acres, comprising the Lykes Bros. Inc. (LBI) Ranch, a proposed Muse Village development in Glades County, and an existing West Glades School campus. LBI primarily uses this land for cattle ranching, citrus, timber, and sugar cane production, employee housing and recreation. This proposed service territory is located in the South Florida Water Management District, and part of it is in a critical water supply problem area.

According to the certificate application, ranching and farming operations will continue and expansion of these activities is anticipated. Residential developments, like the proposed Muse Village, are also planned for the area. A need to establish the proposed utility exists due to the existing water uses associated with employee housing and company offices located on the ranch property; the request for water and wastewater service by the West Glades School campus; and the need for water and wastewater service by the proposed residential developments. Upon certification, the utility will begin providing service to the West Glades School campus. The communities and developments will be constructed on a phased basis over the period of 15 to 20 years, with the first phase involving the provision of water service to Muse Village in 2008, or sometime shortly thereafter. The development of bulk water rates are also proposed in order to supply raw and treated bulk water to meet demands outside of the proposed service area. Numerous areas surrounding the proposed service area will require potable and non-potable water in the near future as growth and development continues.

On December 29, 2006, Silver Lake filed a Motion for Rule Variance from the strict requirements of Rule 25-30.033(1)(l), Florida Administrative Code (F.A.C.). Notice of the Motion for Rule Variance was published in the Florida Administrative Weekly on January 19, 2007, pursuant to Section 120.542, Florida Statutes (F.S.). No written comments to the publication were received and the time for filing such has expired.

This recommendation addresses the Motion for Rule Variance. The issues of the granting of certificates and the setting of appropriate rates and charges will be addressed at a later date. The Commission has jurisdiction pursuant to Sections 367.031 and 367.045, F.S.

Discussion of Issues

Issue 1: Should Silver Lake Utilities, Inc.'s Motion for Rule Variance from the strict requirements of Rule 25-30.033(1)(l), F.A.C., be granted?

Recommendation: Yes, the Motion for Rule Variance should be granted. The utility should be required to provide a website reference where a full legal description can be found. (Gervasi, Brady, Redemann)

Staff Analysis: Rule 25-30.033(1)(l), F.A.C., directs the applicant for an original certificate to file "[a] description of the territory to be served, using township, range, and section references as specified in subsection 25-30.030(2), F.A.C." Rule 25-30.030(2), F.A.C., specifies that in addition to township, range, section, and county references, a complete and accurate legal description of the territory must be provided in one of two specific formats. The applicant must either 1) identify any subsections included or excluded if the territory includes partial sections; or 2) provide a metes and bounds description, including all bearings and distances necessary to provide a continuous description if the territory includes partial sections. Moreover, the legal description may not rely on references to, among other things, government lots or recorded instruments.

Within the perimeter of the proposed territory are properties conveyed to the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (Board of Trustees) in Glades County, along Fisheating Creek, and to the South Florida Water Management District (SFWMD) in Highlands County, along the Kissimmee River. The applicant has asked for a rule variance because the length of these territory descriptions make it unworkable for the utility to provide them in accordance with the strict requirements of the rule, and because the information is otherwise available on the Glades and Highlands Counties' websites and will be provided to staff at its request. The legal descriptions in these two conveyances consist of 66 pages each, of primarily metes and bounds descriptions.

Section 120.542, F.S., authorizes the Commission to grant variances or waivers to the requirements of its rules where the person subject to the rules has demonstrated that the underlying purpose of the statute has been or will be achieved by other means, and strict application of the rules would cause the person substantial hardship or would violate principles of fairness. "Substantial hardship" as defined in this section means demonstrated economic, technological, legal, or other hardship.

The underlying statutory provisions pertaining to the above-mentioned rules are Sections 367.031 and 367.045, F.S. Section 367.031, F.S., requires each utility seeking to provide water and wastewater service to obtain a certificate of authorization from the Commission prior to obtaining permits from the Department of Environmental Protection and water management districts. Paragraph 367.045(5)(a), F.S., states that the Commission may grant a certificate of authorization if it is in the public interest. The purpose of Sections 367.031 and 367.045, F.S., is to ensure that a utility has the financial and technical ability to provide service, that there is a need for service in the proposed service area, and to determine the existence or nonexistence of service from other sources within geographical proximity to the proposed service area.

The Commission must know the geographic boundaries within which a utility requests to serve in order to determine whether the utility is financially and technically able to provide service to the area at issue, whether the service is needed, and whether service can be provided from other sources when the application for original certificate is before the Commission. Nevertheless, the underlying statutes do not require a specific methodology to legally describe a service territory. Silver Lake proposes to describe the excluded property by reference to ownership by the Board of Trustees and SFWMD. The excluded property in Highlands County was acquired by the SFWMD as a part of its Kissimmee River restoration project, and the excluded property in Glades County was acquired by the Board of Trustees for the protection of Fisheating Creek and its watershed. Neither of these governmental projects will involve development to the extent that central water and/or wastewater services will be required. Staff agrees that the legal description as proposed is an adequate territory description under the circumstances of this case. Therefore, granting the requested rule variance will not affect the underlying purpose of the statutes in this instance. Moreover, the hardship created by this circumstance is the unworkability of providing 132 pages of legal descriptions which would require many hours on the part of the utility and on the part of staff to verify, and which can, in this instance, be adequately described by other means.

When a utility has met the criteria set forth in Section 120.542, F.S., the Commission has granted a waiver of or variance from the applicable rules.¹ In this case, the applicant has met the underlying purpose of Sections 367.031 and 367.045, F.S. Moreover, the applicant has shown that it will suffer substantial hardship if Rule 25-30.033(1)(l), F.A.C., is strictly applied. Therefore, staff recommends that the utility has met the requirements found in Section 120.542, F.S., and that the Commission should grant the applicant's Motion for Rule Variance from the strict requirements of Rule 25-30.033(1)(l), F.A.C. The utility should be required to provide a website reference where the full legal description can be found.

¹ See, e.g., Order No. PSC-01-1248-PAA-WU, issued June 5, 2001, in Docket No. 001219-WU, In Re: Request for approval of revisions to water tariff in Lee County by MHC-DeAnza Financing Limited Partnership d/b/a Buccaneer Water Service and Order No. PSC-00-1748-PAA-EI, issued September 26, 2000, in Docket No. 000868-EI, In Re: Petition by Florida Power & Light Company for approval of standard offer contract.

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Issue 2: Should this docket be closed?

Recommendation: No. If no timely protest is received from a substantially affected person within 21 days of the date of the Proposed Agency Action Order, the Order will become final upon the issuance of a Consummating Order. However, the docket should remain open pending Commission action on Silver Lake's application for original water and wastewater certificates. (Gervasi)

Staff Analysis: If no timely protest is received from a substantially affected person within 21 days of the date of the Proposed Agency Action Order, the Order will become final upon the issuance of a Consummating Order. However, the docket should remain open pending Commission action on Silver Lake's application for original water and wastewater certificates.