BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation of unauthorized testing fees for backflow prevention devices by BETMAR UTILITIES, INC. in Pasco County.	DOCKET NO. 931002-WU ORDER NO. PSC-94-0991-FOF-WU ISSUED: August 16, 1994

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
JULIA L. JOHNSON

ORDER DENYING BETMAR'S MOTION TO STRIKE OFFICE OF PUBLIC COUNSEL'S PLEADING AND RESOLVING SHOW CAUSE PROCEEDING

BY THE COMMISSION:

BACKGROUND

On September 17, 1991, Betmar Utilities, Inc. (Betmar or utility) filed a limited proceeding pursuant to Section 367.0822, Florida Statutes, wherein it requested an increase in rates for the purpose of recovering the cost of maintaining and testing backflow prevention devices previously installed by the utility. Docket No. 910963-WU was opened to process the utility's request. By Order No. PSC-93-1719-FOF-WU, issued November 30, 1993, this Commission, after a Section 120.57, Florida Statutes, hearing, denied Betmar's request to recover the cost of maintaining and testing the backflow prevention devices.

During the course of the hearing, the Office of Public Counsel (OPC) proposed to add a new issue to the Prehearing Order. The proposed issue was to address OPC's belief that the utility sent notices to its customers representing that 1) the Department of Environmental Protection (DEP) required every residential connection to be fitted with a backflow prevention device; 2) the customers had the responsibility to purchase, install, and inspect the devices annually; 3) the customers could use Environmental Specialists Group (ESG); and 4) the notice included an authorization for the "required" work. At hearing, OPC's Motion to Add an Additional Issue was denied. However, the Commission Panel directed staff to open a separate investigation docket for the purpose of determining whether the Betmar customers were charged

improperly for maintenance of the backflow prevention devices. This docket was opened to address that very issue.

Staff completed its review of the notices, dated April 4, 1991, and June 5, 1991, and all of the documents sent by Betmar to its customers. Copies of these notices and cancelled checks were provided to staff at and after the hearing by the utility customers. The notices sent to the Betmar customers included authorization of work forms, providing the customers with three companies willing to do the testing. The least expensive company was ESG which offered a $25.00 flat rate.

On December 8 and 9, 1993, our Staff audited the revenues of Betmar and ESG, reviewed the signed authorization forms for testing, and traced them to the validated deposit slips for ESG. The information received as a result of Staff's audit indicates that $7,460 was collected for the testing fees from 298 Betmar residential customers. However, the audit revealed that the money collected for the testing did, in fact, go to ESG and not to Betmar. Although Betmar appears to be operated by Mr. Joe Turco, it is actually owned by Eve Turco, Joe Turco's daughter. ESG is a company owned by Mrs. Jackie Turco, Joe Turco's wife.

By Order No. PSC-94-0437-FOF-WU, issued April 12, 1994, the Commission ordered Betmar to show cause, in writing, within twenty days, why it should not be fined $7,460, for misrepresenting to its customers that the installation and testing of backflow prevention devices was required. On May 3, 1994, Betmar filed its Response to Order to Show Cause. Betmar did not request a Section 120.57, Florida Statutes, hearing.

In its Response, Betmar states that: 1) Betmar acknowledges that it sent the notices, but denies that any grounds exist for imposing a fine; 2) the notices stemmed from observations of the existence of physical cross-connections within Betmar, knowledge of the potentially hazardous nature of such cross-connections, and a good faith interpretation of the requirements of Rule 17-555.360, Florida Administrative Code; 3) to be guilty of a misrepresentation, Betmar would have had to deliberately state something it believed to be erroneous or untrue; 4) the Commission implicitly approved Betmar's program by allowing Betmar to increase rates to recover the costs of the devices; and therefore, the Commission's own view of the measures that are appropriate given the DEP requirement has evolved over time; 5) this situation is simply an instance of a regulated utility caught between the conflicting interpretations and different spheres of interests of two agencies to whom Betmar must answer; 6) the order to show cause is fueled primarily by the fact that ESG, a company in which the

utility's manager is a principal, performed maintenance services for Betmar customers; and 7) by statute, the Commission has the authority to impose sanctions only where the regulated utility "knowingly refuses to comply with, or willfully violates" a statute, rule, or order. Betmar further states that "artificially equating a fine with the amount received by ESG, an unregulated entity, for services provided to Betmar's customers would be impermissibly arbitrary and an abuse of agency discretion."

On May 16, 1994, OPC filed a Response to Betmar Utilities, Inc.'s Response to Order to Show Cause, wherein OPC alleges that: 1) Betmar did wilfully and intentionally devise a scheme to impose and collect a charge not authorized in its tariff for the pecuniary benefit of a wholly-owned subsidiary; 2) the customers who were wrongfully coerced into paying this unauthorized charge should be refunded their money with interest; 3) Section 367.091, Florida Statutes, allows the utility to only impose and collect those rates and charges approved by the Commission for the particular class of service involved; and 4) pursuant to Section 367.121, Florida Statutes, the Commission has authority to initiate a show cause proceeding questioning why the utility should not be ordered to refund the money wrongfully taken from its customers, with interest.

On May 27, 1994, Betmar filed a Motion to Strike Pleading of the Office of Public Counsel and, in the alternative, Betmar's Reply. In its Motion to Strike, Betmar asserts that OPC's pleading should be stricken because it constitutes a request to initiate a different show cause proceeding and is therefore outside the scope of this docket; and OPC advanced the same allegation of an "intentional scheme" that appears in the pleading during the May 22, 1994, agenda conference; and after considering everything before it, the Commission rejected it. In the event the Commission does not grant the Motion to Strike, Betmar offers the following: 1) Section 367.091, Florida Statutes, refers to the rates and charges which the utility applies to the bills it renders for regulated utility service, and the argument that this provision encompasses the notices regarding annual testing under DEP regulations and guidelines is untenable; and 2) in the pleading, OPC makes serious errors of fact, i.e. ESG is not a wholly-owned subsidiary of Betmar.

On July 1, 1994, OPC filed a Motion to Require Betmar Utilities to Return Money Wrongfully Collected, wherein OPC basically reasserts all allegations made in its previous pleadings. OPC states that the utility's threatening notice together with its no choice alternatives constitute a blatant scheme by the utility

to provide services and collect revenues which are not authorized by the company's tariff.

MOTION TO STRIKE OPC'S PLEADING

As stated earlier, on May 16, 1994, OPC filed a response to the utility's response to the show cause order. On May 27, 1994, Betmar filed a motion to strike OPC's pleading. In support of its motion to strike, Betmar asserts that OPC's pleading constitutes a request to initiate a different show cause proceeding and is therefore outside the scope of this docket.

In its pleadings, OPC repeatedly takes the position that Betmar did willfully and intentionally devise a scheme to impose and collect a charge not authorized in its tariff for the pecuniary benefit of a wholly-owned subsidiary. Further, it is OPC's belief that the Betmar customers should receive a refund, with interest, of the money paid to ESG. Our findings with respect to a refund of monies collected by ESG will be discussed in greater detail in a later portion of this Order.

First, we recognize that neither the Commission's rules nor the standard Commission practice contemplate that another party may file a response to a utility's response to a Commission show cause order. However, we believe that OPC's pleadings raise original arguments and requests which should be addressed. For that reason, we will view OPC's pleading, although styled as a response, as an original motion.

The utility is correct that in its pleading, OPC requests a different show cause proceeding. We do not believe that opening a separate docket for another show cause proceeding is necessary, and all concerns with respect to the two notices referenced above can be adequately addressed here. Based on the foregoing, we find it appropriate to deny Betmar's Motion to Strike Pleading of the Office of Public Counsel, and further, no additional show cause proceeding involving the issues at hand will be initiated at this time.

RESOLUTION OF SHOW CAUSE PROCEEDING

As stated earlier, Order No. PSC-94-0437-FOF-WU required Betmar to show cause, in writing, within twenty days, why it should not be fined $7,460, for making misrepresentations to its customers with respect to the testing of backflow prevention devices. On May 3, 1994, Betmar filed its Response to Order to Show Cause.

In its Response, Betmar basically asserts that 1) it acted in good faith in interpreting the requirements of Rule 17-555.360, Florida Administrative Code; 2) it did not deliberately state something it believed to be erroneous or untrue; 3) the Commission implicitly approved Betmar's program by allowing Betmar to initially increase rates to recover the costs of the devices; 4) Betmar, a regulated utility, was caught between the conflicting interpretations and different spheres of interests of two agencies to whom Betmar must answer; and 5) Betmar did not knowingly refuse to comply with, or willfully violate a statute, rule, or order, and therefore, the Commission should not impose sanctions against it.

We believe that the two notices sent to the Betmar customers were, in fact, misleading. However, upon reviewing all of the documents and pleadings, we do not believe that the utility acted with any malicious intent or willful manner, nor did Betmar deliberately mislead its customers. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission stated that:

> In our view, "willful" implies intent to do an act, and this is distinct from intent to violate a rule. In order to measure the intent of GTEFL, it is appropriate to examine its actions regarding: (1) the safeguards established to insure compliance with Commission rules; (2) the steps taken, or not taken, to halt destruction of documents sought by the Commission; (3) the systematic destruction of documents in violation of our Rule; and (4) the failure to seek an interpretation of the Rule in question prior to destroying documents. It is uncontroverted that GTEFL adopted a policy of destroying records and willfully implemented it. GTEFL's behavior in this instance appears to rise to the level of a "willful violation" of the Commission's Rule. Accordingly, such conduct warrants the imposition of a penalty.

In making a general comparison of these two cases, we believe that Betmar's actions did not rise to the level of a "willful violation," warranting the imposition of a fine. Although Betmar willfully sent the notices with the threat to disconnect service, Betmar did seek interpretation of the DEP's rules, as well as our Staff's opinion of the interpretation of DEP's rules. Additionally, the utility did eventually seek and obtain a final order on a declaratory statement from DEP.

With respect to disconnection of service, Rule 17-555.360(3), Florida Administrative Code, states that:

> Upon discovery of a prohibited cross-connection, public water systems shall either eliminate the cross-connection by installation of an appropriate backflow prevention device acceptable to the Department or shall discontinue service until the contaminant source is eliminated.

Although we do not condone the utility's threat to disconnect service, we believe that the DEP rule could have been interpreted in a manner to suggest that disconnection was appropriate. Arguably, in reading this section of the Rule, it is understandable that the utility thought it was acting in a reasonable manner. The backflow prevention device issue was a very difficult issue, evidenced by the fact that a formal Section 120.57, Florida Statutes, hearing was necessary.

Further, when the notices were sent, the Commission had not yet made the finding that DEP's rules do not require that a backflow prevention device be installed on all residential connections. The only expression the Commission had made, at that point, was the approval of the utility's recovery of its investment in the devices in rate base, although not the cost for maintaining and testing the devices. The utility's argument that it did not willfully violate any statute, rule or order has merit. To the best of our knowledge, when the notices were sent, neither a statute, rule, nor order existed which clarified the Commission's view of the need for backflow prevention devices nor which prohibited Betmar from sending the notices. However, had the notices been sent after the issuance of Order No. PSC-93-1719-FOF-WU, and after we made our position clear with respect to this issue, our opinion would be different.

We do not believe that Betmar devised a scheme to allow ESG to monetarily benefit from testing the devices installed by Betmar. We agree that the whole scenario has the appearance of wrongdoing; but we believe that the utility genuinely believed that the situation was urgent based on the interpretations by DEP or the utility's analysis of DEP's rules. Further, we believe that it is only appropriate to consider levying a fine against a utility when the utility has clearly failed to comply with a statute, rule or order. The situation is not so clear here when one considers that the two notices were sent in 1991 prior to our finding that backflow prevention devices were not required on all residential connections and further, that testing was not required. However, the notices were sent after the Commission allowed the utility to

collect rates which reflected the cost of the installation of the devices.

To the best of our knowledge, Betmar did not collect any fees for the testing of the backflow prevention devices. Therefore, OPC's argument about the utility's imposing and collecting a charge must fail. The customers choosing to test these devices chose ESG as it had the lowest rates and in fact, the customers did mail the checks payable to ESG. ESG deposited the checks in its account.

Based upon all of the facts as represented above, we find Betmar's response to be persuasive, and a fine is no longer necessary.

NO REFUND REQUIRED

As stated earlier, ESG collected a total of $7,460 from the Betmar customers for testing the installed devices. In all of its pleadings, OPC requests that the customers receive a refund of monies collected with interest. First, ESG is not a utility, and therefore, is not regulated by the Commission. We believe that any dispute between ESG and the Betmar customers should be addressed by the Courts. The Commission has only those powers granted by statute expressly or by necessary implication. City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493, 496 (Fla. 1973) and Deltona Corp. v. Mayo, 342 So.2d 510, 512 (Fla. 1977).

We believe that we have the authority, under the general provisions of Sections 367.011 and 367.121(g), Florida Statutes, to order Betmar to refund the money based on the fact that misrepresentations were made to the utility's customers. However, we do not believe this is an appropriate measure because this case involved several mitigating circumstances.

First, the customers were given a choice of three companies available to do the testing. Second, the Commission initially approved the investment in a prior rate case, and the utility did operate for some time under the notion that the Commission endorsed the device itself. Third, the customers did receive service for their payment. Fourth, the utility acted in good faith to protect its water supply for the benefit of all customers. Fifth, although there appeared to be a threat to the customers, we cannot identify any customers whose service was disconnected.

We believe that there was a sincere effort on the part of the utility to do what it believed to be correct; however, we do agree that the method undertaken by the utility was inappropriate, and had the appearance of a scare-tactic. Given that, Betmar is hereby

put on notice that such behavior will not be tolerated in the future under any circumstances.

Based on the facts as stated above, we believe that requiring Betmar to refund the $7,460 is a punitive measure which is not appropriate, considering all of the mitigating circumstances. Therefore, we find it appropriate not to order Betmar to refund the $7,460. Since no further action is necessary, this docket may be closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Betmar Utilities, Inc.'s Motion to Strike Pleading of the Office of Public Counsel is denied. It is further

ORDERED that the show cause proceeding against Betmar Utilities, Inc., is hereby resolved. It is further

ORDERED that this docket may be closed.

By ORDER of the Florida Public Service Commission, this 16th day of August, 1994.

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BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.