BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for an evidentiary hearing regarding Backflow Prevention Device Programs and Policies, by Betmar Utilities, Inc. in Pasco County.	DOCKET NO. 960381-WS ORDER NO. PSC-96-0656-FOF-WS ISSUED: May 10, 1996

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING BETMAR UTILITIES, INC.'S REQUEST FOR HEARING

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Background

On September 17, 1991, Betmar Utilities, Inc. (Betmar or utility) filed a limited proceeding pursuant to Section 367.0822, Florida Statutes, to increase its rates to recover the cost of maintaining and testing backflow prevention devices (Docket No. 910963-WU). By Order No. PSC-92-0408-FOF-WU, issued June 9, 1992, the Commission proposed to allow the utility to recover $23,486 on an annual basis for the cost of refurbishing 50 percent of the dual check valve devices. On June 30, 1992, the utility filed a timely protest to that Order. The utility subsequently filed an offer of settlement on November 16, 1992, which we accepted and memorialized in Order No. PSC-92-1467-AS-WU. Betmar Acres Club, Inc., (BAC) timely filed a protest to Order No. PSC-92-1467-AS-WU, issued December 17, 1992.

A Section 120.57, Florida Statutes, administrative hearing was held on August 4, 1993, in Zephyrhills, Florida. By Order No. PSC-93-1719-FOF-WU, issued November 30, 1993, we denied Betmar's

request to recover the cost of testing the devices. In doing so, we found that Betmar did not prove that the dual check valve devices or any backflow prevention devices should be installed on all connections. We further found that the Department of Environmental Protection's (DEP) rules do not require a device on all connections. (Order at 8 and 10.) Prior to our decision in that docket, DEP issued a final order on a petition for declaratory statement filed by Betmar. We took official recognition of DEP's order which contained the following conclusions of law:

1. Rule 17-555.360(2), Florida Administrative Code, does apply to Betmar as a community water system, even though there are no reclaimed water systems operating within Betmar's service territory;

2. Implementation of a cross-connection control program is mandatory;

3. Betmar's installation of residential dual check valves is not an acceptable component of a routine cross-connection control program designed to detect and prevent cross-connections that create or may create an imminent and substantial danger to public health;

4. The cross-connections in Betmar's service territory do constitute prohibited cross-connections as defined in Rule 17-555.360(3), Florida Administrative Code;

5. DEP is convening meetings and workshops to address the entire issue of cross-connection control. Whether DEP would begin enforcement of Rule 17-555.360, Florida Administrative Code, is a decision to be evaluated later; and

6. Maintenance of the devices is required and annual testing is consistent.

Finally, during the course of the August, 1993, hearing, we directed our Staff to open a separate investigation docket for the purpose of addressing the Office of Public Counsel's belief that Betmar sent notices to its customers regarding backflow prevention devices which contained certain misrepresentations. By Order No. PSC-94-0437-FOF-WU, issued April 12, 1994, Betmar was ordered to show cause why it should not be fined $7,460 for misrepresenting to its customers that the installation and testing of the devices was required. In these notices, Betmar also threatened to disconnect service for customers refusing to install a device. By Order No. PSC-94-0991-FOF-WU, issued August 16, 1994, we found that the

notices sent by Betmar were misleading. However, after reviewing the pleadings and the documents, we stated that the utility did not deliberately mislead its customers. The notices were sent before our decision was rendered on this matter. As for the threat to disconnect service for failure to install a device, we specifically stated that:

> 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.

In January, 1996, it first came to our attention that Betmar was threatening to disconnect service to any customer who refused to install a backflow prevention device. Mr. Turco, Betmar's manager, allegedly told these customers that after running tests, he discovered "prohibited cross-connections" which warranted the installation of a backflow prevention device. On January 3, 1996, the Betmar customers were granted a temporary injunction against Betmar by Circuit Court Judge Swanson. By letter dated January 11, 1996, after consulting with the Department of Health and Rehabilitative Services (HRS), DEP informed Mr. Turco that the situation he described "did not constitute a change in the classification of its low hazard status." By letter dated January 22, 1996, after consulting with DEP, our Staff informed Mr. Turco that disconnection of service for the alleged cross-connection was not appropriate pursuant to the Commission's rules. By letter dated February 13, 1996, Betmar requested an official interpretation by this Commission and an evidentiary hearing on the entire matter.

Request for Hearing

As stated earlier, it was brought to our attention that Mr. Turco, on behalf of Betmar, threatened to disconnect service to Betmar customers upon their refusal to install a backflow prevention device after he allegedly "discovered" a cross-connection. The customers asserted that Mr. Turco was creating the cross-connection at the customers' meters by his own actions.

By letter dated January 22, 1996, our Staff informed Mr. Turco that such action was not supported by Rule 25-30.320(2)(a), Florida Administrative Code, which provides that a utility may refuse

service or discontinue service for "noncompliance with or violation of any state or municipal law or regulation governing such utility service." It was Betmar's assertion that DEP's rules require a cross-connection program and disconnection of service if a prohibited cross-connection is discovered and not eliminated. Therefore, it was Betmar's assertion that the Commission's rules would also support disconnection for violation of DEP's regulations.

By letter dated January 11, 1996, DEP does state and we recognize that DEP requires all drinking water facilities to have cross-connection control programs. In its letter, DEP also states that Chapter 62-555, Florida Administrative Code, "dictates prudent application of the industry standards and recognizes that protective public health measures are needed on residential premises that have developed auxiliary water supplies (e.g., private wells or pumps withdrawing surface waters), employ wastewater reuse, or have underground sprinkler systems." DEP goes on to state that "Typical residential single family premises do not pose public health implications sufficient to warrant the application of the rule to require all such connections to install a device to meet the requirements of the State rule." Perhaps most importantly, DEP's letter also states that: "Simulation by a utility representative of a backflow event from the resident side of the meter does not constitute a change in the classification of its low hazard status."

By letter dated February 13, 1996, Betmar requested that the Commission hold a hearing on this matter "to establish a coherent policy on cross-connection control which addresses not only the minimum requirements of the [DEP's] rule, but the risk of catastrophic injury due to residential backflow." In its letter, Betmar asserts that it acted within all rules and within the direct approval of Order No. PSC-95-0737-FOF-WS; and that Staff has misconstrued DEP's position on cross-connection control as set forth in DEP's declaratory statement.

By memorandum dated March 20, 1996, from HRS to DEP, HRS officially informed DEP that after reviewing the Betmar situation, it was HRS's opinion that:

> a normal single family residential connection does not present a substantial threat to the integrity of the suppliers' water system, and therefore it would not mandate the requirement of a backflow prevention device at the water meter. In the case of Betmar Utilities, it is apparent that the utility is creating a

> backflow at the meter through their own actions. This of course, is a natural hydraulic response to the severing of the service line to replace the water meter. Additionally, the presence of warm water in a service line is not viewed by this department as a source of contamination and a threat to public health. This is not viewed as a cross connection, and hence, does not pose a threat to the quality of the water supply and mandate corrective action.

In the last three years, our Staff has had numerous meetings with DEP on the Betmar situations in the past and on DEP's policies concerning cross-connection control programs. We are well aware that DEP mandates a cross-connection control program for drinking water utilities. That is certainly within DEP's purview. We have the responsibility of determining the economic impact, if any, for utilities and customers when such programs are implemented. Our Staff has also worked with DEP over the last three years in attempting to determine whether Mr. Turco's actions in implementing his cross-connection control program are appropriate.

The situation described by Mr. Turco and the Betmar customers has lead DEP to the opinion that the situation, although a cross-connection, deserves a "low hazard" classification not requiring a backflow prevention device. As stated earlier, HRS does not view this particular situation as a cross-connection, and hence, does not believe that there is a threat to the quality of the water supply nor a need for corrective action.

Betmar has cited to Order No. PSC-95-0737-FOF-WS, issued June 20, 1995, in Docket No. 950533-WS in support of its backflow prevention program and disconnection of service. By that Order, the Commission dismissed customer complaints after finding that DEP, not the Commission, must determine the necessity to install a backflow prevention device and the acceptability of a particular type of device in each single circumstance. In the complaint, the customers requested that the Commission order Betmar to "cease and desist" the threats to disconnect service. Our dismissal of the complaint in no way condoned Betmar's threats to discontinue service, but instead, we stated that DEP had to make the determination. In this case, we find that DEP has made the determination that disconnection of service based on the circumstances described herein is not necessary.

We further believe that Betmar's assertion that DEP's formal policy is set forth in the declaratory statement is not accurate. DEP responded to a hypothetical situation set forth by Betmar in a petition for a declaratory statement. We believe that DEP answered the hypothetical situation as described to them. This is a different situation in that Mr. Turco has himself created the cross-connection which DEP believes constitutes a "low hazard" situation. DEP has stated that "normal" residences do not pose high hazards.

As for the utility's request for a hearing, Section 120.57, Florida Statutes, provides in part that the provisions of that section apply in all proceedings in which the substantial interests of a party are determined by an agency. We recognize that we could hold an evidentiary hearing to determine whether the factual allegations are true and whether such facts warrant disconnection of service. With DEP's guidance, we could probably even determine when disconnection of service is appropriate. However, the Commission cannot determine "the risk of catastrophic injury due to backflow." At this time, however, we find that an evidentiary hearing on all of these matters is not necessary. The two agencies with the primary responsibility of determining public health concerns have called Betmar's current situation a low hazard situation. The DEP, whose rules should control in this matter, has stated that backflow prevention devices are not required in this situation. Moreover, the HRS does not even believe the current situation can be called a cross-connection. Accordingly, Betmar's request for an evidentiary hearing is denied.

Finally, we note that some of Betmar's customers have paid for the installation of the backflow prevention devices in response to Betmar's threat to disconnect service. Our Staff is herein directed to investigate the number of those customers and whether a refund of those monies is appropriate.

Closing Docket

Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Betmar Utilities, Inc.'s request for an evidentiary hearing is denied. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission, this 10th day of May, 1996.

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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.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 31, 1996.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.