

RECEIVED-FPSC

11 OCT -6 AM 11:45

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

COMMISSION
CLERK

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

DATE: October 6, 2011

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Golden, Jones-Alexis, Mouring, Walden)
Office of the General Counsel (Bennett, Jaeger)

Handwritten notes and signatures:
MJB NS, MJS, JWB, CJB, JCB, JSC, JAD

RE: Docket No. 090424-WS – Application for certificates to provide water and wastewater service in Polk County by Bimini Bay Utilities Corporation.
County: Polk

AGENDA: 10/18/11 – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Please place on agenda after Docket No. 110254-WS

FILE NAME AND LOCATION: S:\PSC\ECR\WP\090424.RCM.DOC

Case Background

On August 31, 2009, Bimini Bay Utilities Corporation (Bimini Bay or Utility) filed an application for original water and wastewater certificates for a utility in existence in Polk County. Bimini Bay is a Class C utility currently providing service to 212 customers in the Bimini Bay Resort and Spa townhome development in Davenport, Florida. At buildout, the Utility anticipates serving a total of 360 residential customers and 2 general service customers (a clubhouse and water park). The Utility is located in the Southwest Florida Water Management District. Although the Utility is not located in a water use caution area, district water restrictions are in effect due to drought conditions. As determined by a Florida Public Service Commission (Commission) financial audit of the historic year ended June 30, 2010, the Utility had operating revenues of \$25,448 for water and \$68,617 for wastewater, with net operating losses of \$35,502

DOCUMENT NUMBER DATE

07288 OCT-6 =

FPSC-COMMISSION CLERK

and \$39,793, for water and wastewater, respectively.¹ Bimini Bay's owner also owns Four Points Utility Corporation (Four Points), which was granted water and wastewater certificates by the Commission on April 2, 2007, by Order No. PSC-07-0280-PAA-WS, to serve the Island Club West Spa and Resort townhome development in Davenport, Florida.²

Bimini Bay is a consecutive system that purchases bulk water and wastewater service from Polk County for resale to its customers. The Utility does not own or operate any treatment facilities, but does own and operate the water distribution and wastewater collection systems. The Utility is regulated by the Florida Department of Health (DOH) through the Polk County Health Department (PCHD).

Bimini Bay began providing water and wastewater service to the development in August 2005. The Utility provided water and wastewater service at no charge until February 2008, at which time it began charging customers based upon the cost of service purchased from Polk County. Pursuant to Section 367.022(8), Florida Statutes (F.S.), any person who resells water or wastewater service at a rate or charge which does not exceed the actual purchase price is exempt from regulation by the Commission. However, because Bimini Bay wants to begin charging higher rates that will allow it to recover additional expenses, it filed an application to request water and wastewater certificates and approval of initial rates and charges. Approval of the Utility's application would make it subject to Commission regulation pursuant to Sections 367.011 and 367.021(12), F.S.

In June 2009, prior to the Utility filing its certificate application, the Commission received a complaint from a Bimini Bay customer regarding the Utility's monthly rates and apparent billing errors. In response to that complaint, Commission staff initiated a review of Bimini Bay's status as a reseller of water and wastewater services. Staff sent letters to the Utility to request billing information on June 18 and August 12, 2009, with deadlines of July 17 and August 27, 2009, respectively. The August 12 letter advised the Utility that staff could initiate show cause proceedings if the Utility did not provide the billing information, or request an extension, by the due date. The Utility did not respond to either letter, but subsequently filed its application for certificates on August 31, 2009.

On September 11, 2009, staff sent a third letter to advise the Utility that the reseller billing information requested in staff's June 18 and August 12 letters was separate and distinct from the Utility's certificate application and must still be provided. The Utility's deadline was extended to October 12, 2009. In addition, a letter was sent to both Bimini Bay and Four Points on September 25, 2009, regarding apparent violations of Commission statutes and rules, and possible implementation of show cause proceedings against Bimini Bay, Four Points, and Narcossee Utility, LLC.³ Bimini Bay's apparent violations pertained to operating without a certificate and charging unauthorized rates. The Utilities were advised that Commission staff

¹ *Audit Report on Bimini Bay Utilities Corporation's Application to Receive Water and Wastewater Certificates*, issued on October 18, 2010.

² Issued April 2, 2007, in Docket No. 050595-WS, In re: Application for certificates to provide water and wastewater service in Polk County by Four Points Utility Corporation.

³ The Utility later reported that the Narcossee project was an undeveloped piece of land and it would file an application for a certificate before providing service.

would open dockets to initiate show cause proceedings if the Utilities did not correct the violations by October 19, 2009.

The Utilities' operations manager submitted a written response on October 7, 2009. The letter indicated that Bimini Bay was operating as a reseller and only charging the customers the cost of the water and wastewater service from Polk County. Following a reminder e-mail from staff on October 13, 2009, the operations manager provided the requested reseller billing information on October 14, 2009. Staff has reviewed the billing information provided by the Utility, as well as information gathered by Commission audit staff in this docket. The billing records covered January 2008, a month before Bimini Bay began charging customers for service, through June 2010. Staff's review of the billing information indicated that Bimini Bay charged its customers less than its cost for the purchased water and wastewater service during that time, and, therefore, was exempt from Commission regulation.

On March 15 and 31, 2010, the Commission received letters from two customers objecting to the Utility's application for certificates. By letters dated June 24, 2010, Commission legal staff responded to both customers and requested that they notify legal staff by July 9, 2010, if they intended to pursue a full evidentiary hearing before the Commission pursuant to Sections 120.569 and 120.567, F.S. Neither customer requested a hearing. No further objections to the notice of application have been received and the time for filing such has expired.

On November 18 and 19, 2010, the Commission conducted joint noticed customer meetings in Davenport, Florida, for this docket and a separate undocketed review of Four Points. The purpose of the meetings was to provide customers with an opportunity to ask questions or offer comments regarding either Bimini Bay's application for certificates or the quality of service provided by either Bimini Bay or Four Points.

At the customer meetings, the Commission heard from 7 Bimini Bay customers and 21 Four Points customers, who voiced their dissatisfaction with the services provided by both Bimini Bay and Four Points.⁴ Customer complaints alleged erroneous billing, inadequate customer service, untimely processing of customer payments, improper service disconnections, incorrect meter readings, poorly constructed water and wastewater facilities, and inept management. The customers also complained about several issues outside of the Commission's jurisdiction, such as building code violations and improper homeowners association charges. Commission staff subsequently initiated a compliance and management audit of both Utilities on November 22, 2010, and ultimately opened Docket No. 110254-WS to initiate show cause proceedings against Four Points for apparent violations of Commission rules and regulations.

This recommendation addresses Bimini Bay's application for original water and wastewater certificates and initial rates and charges. The Commission has jurisdiction pursuant to Sections 367.031, 367.045, and 367.081, F.S.

⁴ See Docket No. 090424-WS, Document Nos. 09852-10 and 09853-10, Transcripts of the 11/18/10 and 11/19/10 customer meetings in Davenport, Florida.

Discussion of Issues

Issue 1: Should the Utility's application for water and wastewater certificates and initial rates and charges be approved?

Recommendation: No. The Utility's application for water and wastewater certificates and initial rates and charges should be denied. (Golden, Jones-Alexis, Mouring, Walden)

Staff Analysis: As discussed in the case background, Bimini Bay filed its application for water and wastewater certificates on August 31, 2009. The application was found to be deficient and a deficiency letter was sent to the Utility on September 24, 2009, setting forth the items that were needed to satisfy the minimum filing requirements in this docket. Bimini Bay paid the required \$1,500 application filing fee on October 9, 2009, and provided additional deficiency corrections on December 31, 2009. In response to phone conversations with Commission staff, the Utility provided more information on February 12, 2010, but still did not complete all of the outstanding deficiencies and information requests needed to process this application.

Staff sent a second deficiency letter to the Utility on March 12, 2010, but the Utility did not respond by the April 12, 2010 deadline. In response to additional follow-up phone calls and e-mails from Commission staff, a Utility representative informed staff that the deficiency responses would be provided first by May 25, 2010, and then later by June 25, 2010. The Utility did not provide any additional information on either date, and the application remains deficient as discussed below.

Outstanding Deficiency Corrections and Financial Information Requests

On March 1, 2010, the Commission Clerk received Bimini Bay's legal notice of its certificate application. The notice was dated February 17, 2010, and delivered by regular mail as required by Rule 25-30.030(5), F.A.C. The Commission also received copies of the notice from the two customers who objected to the Utility's application. However, the Utility has failed to provide proof of noticing as required by Section 367.045(1)(e), F.S., and Rule 25-30.030, Florida Administrative Code (F.A.C.).

Section 367.045(1)(e), F.S., requires that when a utility applies for an initial certificate of authorization from the Commission, it shall "submit an affidavit that the applicant has provided notice of its actual application pursuant to this section." Rule 25-30.030, F.A.C., requires the Utility to provide a notice of its application for water and wastewater certificates to each customer of the system; to a list of governing bodies and water and wastewater utilities provided by the Commission; and in a newspaper of general circulation in the territory proposed to be served. The Utility is then required to provide a copy of the notice that was sent or published, along with an affidavit to confirm that the noticing was completed. A separate affidavit must be provided for each of the three types of notices (customers, governing bodies/utilities, and newspaper).

In addition, the Utility has not provided sufficient information to meet the requirements of Rules 25-30.033(1)(t), 25-30.460, 25-30.570, and 25-30.580, F.A.C., which include a cost study to support the proposed rates and charges; cost justification for the proposed miscellaneous

charges; evidence of the cost and accounting treatment of the water distribution and wastewater collection systems to determine contributions in aid of construction (CIAC); and support for the proposed service availability policy and charges. Also, the Utility has not provided adequate financial information as required by Rule 25-30.033(1)(s), F.A.C., which requires a list of all entities, including affiliates, upon which the Utility is relying to provide funding, including a description of the proposed funding, personal financial statements of the Utility's officers, and personal guarantees. Further, the Utility has not responded to staff's request for detailed information on an outstanding Utility liability or loan in the amount of \$1,566,233 documented on the Utility's 2008 tax return.

Consequently, the Utility's application is not in compliance with the governing statute, Section 367.045, F.S, and other pertinent statutes and administrative rules concerning an application for an original certificate. In an effort to obtain sufficient information to calculate initial rates and charges, staff initiated a financial audit of Bimini Bay on July 15, 2010. The audit covered the historical year ended June 30, 2010. The Commission's Office of Auditing and Performance Analysis (APA) issued its *Audit Report on Bimini Bay Utilities Corporation's Application to Receive Water and Wastewater Certificates* (Financial Audit) on October 18, 2010.

The audit staff verified Operation and Maintenance (O & M) Expenses for the historic year ended June 30, 2010, including purchased water, purchased wastewater, salaries and wages, materials and supplies, rent, regulatory commission expense, bad debt expense, and miscellaneous expense. The Utility's O & M Expenses were \$59,533 for water, of which \$27,537 (46 percent) was the Utility's expense for water purchased from Polk County, and \$103,449 for wastewater, of which \$77,005 (74 percent) was the Utility's expense for purchased wastewater service. In addition, the Utility had operating revenues of \$25,448 for water and \$68,617 for wastewater, with net operating losses of \$35,502 and \$39,793, for water and wastewater, respectively.

However, the audit staff was unable to substantiate the Utility's rate base due to the lack of detailed records. According to the Utility, its books and records were lost when a fire destroyed its administration building in June 2009. Consequently, the audit staff was unable to substantiate the amounts for plant in service, accumulated depreciation, depreciation expense, deferred income taxes, CIAC amortization, accumulated amortization of CIAC, or any components of the Utility's capital structure, other than customer deposits. Although the Utility has limited records that show plant in service balances of \$298,174 for water and \$1,115,864 for wastewater, the Utility's records do not provide sufficient detail for Commission ratemaking purposes. If the Commission grants Bimini Bay's request for certificates, the Utility will be required to establish its books and records in accordance with the National Association of Regulatory Utility Commissioners (NARUC) Uniform Systems of Accounts, as required by Rule 25-30.115, F.A.C.⁵

⁵ Rule 25-30.115, F.A.C., states in pertinent part, "[w]ater and wastewater utilities shall, effective January 1, 1998, maintain their accounts and records in conformity with the 1996 NARUC Uniform Systems of Accounts adopted by the National Association of Regulatory Utility Commissioners."

Environmental Compliance

As discussed in the case background, Bimini Bay is regulated for environmental compliance by the Florida Department of Health (DOH) through the Polk County Health Department (PCHD). As part of staff's review of the applicant's technical ability to operate the water and wastewater systems, staff contacted the PCHD to inquire about the condition of the systems and any outstanding environmental concerns.

Staff was advised that on April 6, 2011, PCHD conducted an annual inspection of the Bimini Bay water system. By letter dated April 11, 2011, PCHD notified the Utility about 14 monitoring and sampling requirements that would be required. The letter instructed the Utility to take the necessary steps to correct the deficiencies within 30 days. Further, the letter stated that if the deficiencies could not be corrected within 30 days, a written schedule stating when the deficiencies would be corrected must be submitted within the 30-day time frame. Lastly, the letter advised the Utility that failure to comply will result in referral to the enforcement section for further action and the possible imposition of a fine. The Utility did not respond to PCHD's April 11, 2011 letter.

PCHD sent a second letter to remind the Utility of the outstanding monitoring and sampling requirements on July 27, 2011. The letter stated, "We have not received a response letter from your office within the stipulated 30 days and to the best of our knowledge none of the bacteriological and chemical sampling was conducted." The letter advised the Utility to contact the PCHD regarding all these issues by August 10 or be referred for enforcement. Bimini Bay also failed to respond to PCHD's July 27, 2011 letter.

Subsequently, on August 17, 2011, PCHD issued a Warning Letter (Warning Notice No. 11-653PW5727A) to Bimini Bay listing 17 violations that may exist within its water system. The Warning Letter instructed the Utility's owner to contact the PCHD within ten days of receiving the Warning Letter to arrange a meeting to discuss this matter. The Utility was advised that the Warning Letter is part of an agency investigation. The apparent violations include failure to: monitor for bacteriological contaminants, asbestos, lead and copper, and residual disinfectant concentration; provide Monthly Operation Reports; provide Consumer Confidence Reports; implement a routine cross connection plan; flush dead-end mains; provide written plans for sampling, flushing, and valve exercise programs; and maintain records, maps, and operation and maintenance logs.

Although the first Warning Letter cited violations related to Consumer Confidence Reports, PCHD issued a second Warning Letter (Warning Notice No. 11-653PW5727B) on August 24, 2011, to specifically address that issue. The letter advised Bimini Bay that it was in violation for failing to provide a Consumer Confidence Report to its customers and for failing to submit Form 62-555.900(19), Certification of Delivery of Consumer Confidence Report, to the PCHD. The Warning Letter instructed the Utility's owner to contact the PCHD within ten days of receiving the letter to arrange a meeting to discuss this matter. Following subsequent e-mail reminders, the Utility contacted the PCHD on September 2, 2011, to arrange a meeting. The meeting was held on September 13, 2011. The PCHD advised staff on September 30, 2011, that

it is allowing the Utility an additional six weeks to complete its lead and copper testing, and submit a sampling plan.

Management Audit

During our review of Bimini Bay's application for certificates, staff also considered the information obtained during the Commission's compliance and management audit of Four Points and Bimini Bay. The main focus of the management audit was to review operational, managerial, and compliance issues at Four Points. However, due to Bimini Bay's pending certificate application, the management audit staff also reviewed these issues for Bimini Bay to determine what actions may be needed, if any, if the Commission grants Bimini Bay's request for certificates.

In June 2011, APA issued the *Management Audit of Four Points Utility Corporation and Bimini Bay Utilities Corporation* (Management Audit). In response to the Management Audit, staff opened Docket No. 110254-WS to initiate show cause proceedings against Four Points for apparent violations of Commission rules and regulations. The audit findings and apparent violations are discussed in detail in the staff recommendation filed in Docket No. 110254-WS for the October 18, 2011 Agenda Conference. Staff believes the audit findings are relevant to Bimini Bay's certificate application and warrant a brief discussion in this docket as well.

The Management Audit states that overall, audit staff believes that Four Points and Bimini Bay do not currently have the management capability to operate successfully as providers of water and wastewater services. As discussed in the recommendation in Docket No. 110254-WS, staff believes that Four Points is not in compliance with Rules 25-30.145, 25-30.110, 25-30.120, 25-30.130 25-30.355, 25-22.032, 25-30.311, 25-30.320, 25-30.335, 25-30.345, and 25-30.350, F.A.C. These apparent rule violations pertain to audit access to records, filing of annual reports, payment of regulatory assessment fees (RAFs), customer complaints, customer deposits, meter reading, customer billing, and discontinuance of service. Because Four Points and Bimini Bay are operated from the same office, many of the compliance issues found within Four Points were also evident in Bimini Bay's records.

The Management Audit also indicates that management audit staff found sufficient cause to believe that Four Points and Bimini Bay lack effective managerial controls. Management has not established sufficient financial and operational safeguards to ensure that customers receive accurate bills and appropriate customer service. Both Four Points and Bimini Bay have issued customer bills that contain billing errors, despite customer efforts to report these problems and seek resolution. Management audit staff noted that a lack of written procedures and proper training, as well as high turnover of employees, have contributed to poor customer service.

With respect to Bimini Bay's records, the Management Audit discovered that every single bill issued between March and July 2010 contained incorrect mathematical calculations. Staff has received copies of customer bills as recently as June 2011 that still include mathematical errors. This particular billing problem was first brought to the Commission's attention by a customer in June 2009. At that time, Bimini Bay's operations manager indicated the problem occurred because the Utility adjusted its rates each month to prorate the bill from

Polk County, but had been lax in changing the rates shown on the printed invoice. Although staff's review of the Utility's billing records for reseller purposes indicates the Utility has not charged its customers more than the cost of the water and wastewater services purchased from Polk County, the excessive mathematical errors lead customers to believe they have been overbilled in many cases. If the Utility continues to be unable to produce correct bills with its current billing system, staff suggests the Utility consider investing in a more reliable, integrated billing software package, or perhaps outsourcing the meter reading, billing, and collecting functions to an existing, experienced billing company that specializes in utility billing.

If the Commission grants certificates to Bimini Bay, the Utility would be required to comply with the above referenced rules as well. Because Bimini Bay is operating as an exempt reseller of water and wastewater services, it is not yet required to adhere to Chapter 25-30, F.A.C. As a reseller, Bimini Bay's only regulatory requirement is that it comply with Section 367.022(8), F.S., by not charging its customers more than its cost of service from Polk County. However, if the Commission grants Bimini Bay's request for certificates, the Utility would be required to comply with the other requirements of Section 367, F.S., and Chapter 25-30, F.A.C., at that time.

Conclusion

Section 367.045(5)(a), F.S., states in pertinent part, "[t]he commission may grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest . . . or it may deny a certificate of authorization or an amendment to a certificate of authorization, if in the public interest" Further, Rule 25-30.033(1)(e), F.A.C., requires in part that each application for an original certificate of authorization and initial rates and charges shall provide "[a] statement showing the financial and technical ability of the applicant to provide service"

Staff believes the applicant has not demonstrated the required financial and technical ability to provide service, and therefore, recommends that Bimini Bay's request for water and wastewater certificates and initial rates and charges be denied. Specific reasons for the denial include:

- (1) The application is not in compliance with the governing statute, Section 367.045, F.S, and other pertinent statutes and administrative rules concerning an application for an original certificate, because the Utility has not provided the required proof of noticing and additional information required to process its application.
- (2) The Utility has not demonstrated financial ability to provide service because it has not provided the financial information required by Rule 25-30.033(1)(s), F.A.C, and requested by staff, regarding the Utility's funding and financial liabilities.
- (3) The Utility has not demonstrated technical ability to provide service because it has not provided sufficient information to meet the requirements of Rules 25-30.033(1)(t), 25-30.460, 25-30.570, and 25-30.580, F.A.C., which include a cost study to support the proposed rates and charges; cost justification for the proposed

miscellaneous charges; evidence of the cost and accounting treatment of the water distribution and wastewater collection systems to determine CIAC; and support for the proposed service availability policy and charges.

- (4) The Utility has not demonstrated technical ability to provide service because it has failed to comply with the testing, monitoring, reporting, and other operational requirements of the DOH and PCHD, as demonstrated by the PCHD Warning Letters discussed above.
- (5) The Utility has not demonstrated technical ability because it has failed to establish sufficient financial and operational safeguards to ensure that customers receive accurate bills and appropriate customer service, as reported in the Management Audit.

The Commission could simply dismiss Bimini Bay's application for failure to provide the required information.⁶ However, for the reasons cited above, staff believes there is sufficient cause to conclude that it is not in the public interest to grant water and wastewater certificates to Bimini Bay at this time. Staff does not believe denial of the Utility's request for certificates should preclude the Utility from seeking certificates in the future when it is better prepared to meet the Commission's certificate application and regulatory requirements. In the event the Utility can demonstrate that it has corrected the existing compliance, operational, and managerial issues discussed in this recommendation, the Management Audit, and Docket No. 110254-WS, Bimini Bay could reapply to become a certificated utility at a future date.

Based on the above information, staff believes it is not in the public interest to grant Bimini Bay's application for water and wastewater certificates. Therefore, staff recommends that the Utility's application for water and wastewater certificates and initial rates and charges be denied. If the Commission approves staff's recommendation, Bimini Bay will continue to operate as an exempt reseller pursuant to Section 367.022(8), F.S. Pursuant to that statute, Bimini Bay may not charge its customers more than the cost of the water and wastewater services purchased from Polk County. Alternatively, if the Commission determines that Bimini Bay's request for water and wastewater certificates and initial rates and charges should be granted, staff will return to the Commission at a later date with a separate recommendation to recommend approval of specific certificate numbers, service territory, rates and charges, and future annual report and RAF requirements.

⁶ See Order No. PSC-94-1245-FOF-WS, issued October 11, 1994, in Docket No. 930206-WS, In re: Application for water and wastewater certificates in Sumter County by Sumter Utilities, Inc.

Docket No. 090424-WS
Date: October 6, 2011

Issue 2: Should this docket be closed?

Recommendation: Yes, if no timely protest to the proposed agency action in Issue 1 is filed with the Commission by a substantially affected person, a Consummating Order should be issued and the docket closed. (Bennett, Jaeger)

Staff Analysis: If no timely protest to the proposed agency action in Issue 1 is filed with the Commission by a substantially affected person, a Consummating Order should be issued and the docket closed.