

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by BONITA BAY) DOCKET NO. 940659-WS
LIMITED PARTNERSHIP to be) ORDER NO. PSC-94-1453-FOF-WS
deleted from territory in Lee) ISSUED: November 28, 1994
County served by HARBOR)
UTILITIES COMPANY, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION
ORDER DELETING TERRITORY

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

Harbor Utilities Company, Inc. (Harbor or utility) is a Class C water and wastewater utility in Lee County which provides service to 644 water and 439 wastewater customers. According to its 1993 annual report, Harbor reported a combined net operating loss of \$58,915. Bonita Bay Limited Partnership (Bonita Bay) is the owner of the Ryder Club, a proposed residential development located entirely within Harbor's certificated service territory. On June 21, 1994, Bonita Bay filed a petition requesting that its area be deleted from Harbor's territory.

The Ryder Club will contain 800 units at buildout in 1999. Construction for the first phase is planned for January, 1995. Bonita Bay anticipates that the initial units of Ryder Club will be in place and customers will need water and wastewater service by the third quarter of 1995. Bonita Bay has petitioned for the deletion of territory so that the Ryder Club can receive service from Bonita Springs Utilities (BSU). BSU is a utility exempt from

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FPSC-RECORDS/REPORTING

the Public Service Commission's regulation pursuant to Section 367.022(7), Florida Statutes, as a nonprofit corporation. According to the petition, the Ryder Club abuts BSU's lines and BSU has ample capacity to provide service to the Ryder Club. Bonita Bay has written BSU requesting service and BSU has stated that it has the capacity to provide service to the Ryder Club.

Bonita Bay has not specifically requested service from Harbor. However, prior to filing the petition for deletion, by letter dated May 11, 1994, Bonita Bay requested that Harbor voluntarily delete the Ryder Club from Harbor's certificated territory. Bonita Bay alleges that Harbor lacks the capacity to provide service to the customers of the Ryder Club and, even if Harbor was given rate relief or additional funding to expand its facilities to provide service to the Ryder Club, new facilities could not be in place in sufficient time.

In its May 16, 1994, response to Bonita Bay's letter requesting voluntary deletion, Harbor declined Bonita Bay's request because it was not willing to delete the territory, nor did Harbor believe it was able to delete the territory at that time because the territory was part of a contract for sale to BSU. The sale contract failed because some of the terms of the contract could not be met. Harbor also responded to the petition by denying the allegations of the petitioner concerning the poor quality of service. With regard to the quality of service allegation, Harbor stated that it is currently providing water and wastewater service in compliance with all environmental agency standards. The utility believes that it will be able to meet the immediate needs of the Ryder Club with expansion of the plant. We have since learned that Harbor has filed a notice of abandonment pursuant to Section 367.165, Florida Statutes, on October 19, 1994.

PETITION

According to Bonita Bay's petition, Harbor does not have adequate capacity to provide service to the Ryder Club in the time frame required. In addition, Bonita Bay states that Harbor has not demonstrated the ability to provide satisfactory quality of service to the proposed development based on the utility's history of noncompliance with the environmental regulatory agencies. Further, according to the petition, water and wastewater service can be provided to the development by BSU, which is an exempt utility whose lines abut the Ryder Club. Through correspondence dated October 7, 1994, Bonita Bay also argued that Harbor does not have the ability to meet the minimum fire flow requirements of the development.

Capacity

With regard to lack of capacity, Harbor claims that Bonita Bay's assertion that the utility cannot provide adequate water and wastewater service when the Ryder Club's initial units come on line in 1995 is incorrect. The utility's responses to the petition did not indicate the capacity of the water treatment plant, or whether there were any planned upgrades to the water system. Harbor further stated that it had no knowledge of the information provided concerning the size and development of the Ryder Club since Bonita Bay had not requested service for the Ryder Club. Harbor also claims that it had no knowledge of BSU's willingness or capacity to provide service to the Ryder Club.

By letter dated August 24, 1994, our staff requested that Bonita Bay provide the development plan and the capacity required by the Ryder Club initially and at buildout. Pursuant to that request, Bonita Bay provided a projected construction phase plan with the estimated flow requirements and the site plans for the project. This plan shows that in 1995, the estimated usage will be 21,250 gallons per day (gpd) for water and 21,250 gpd for wastewater and that at buildout in 1999, the estimated usage will be 208,500 gpd for water and 208,500 gpd for wastewater.

The development plan of the Ryder Club was sent to Harbor by letter dated September 21, 1994. When asked if the utility could meet the capacity requirements according to the plan, Harbor's response was vague. Harbor stated that there are water upgrades planned; however, it did not give details on these upgrades.

In addition to the information provided by Harbor and Bonita Bay, we analyzed the flows and plant capacity represented by Harbor's Minimum Filing Requirements (MFRs) filed in Docket No. 921261-WS, Application for a Rate Increase in Lee County by Harbor Utilities Company, Inc. Harbor's reverse osmosis water plant is currently permitted at 80,000 gpd. Based on Harbor's monthly water report for the months of January through August 1994, the maximum daily usage (max day) for this period was 88,100 gpd. We compared these flows with data from the test year of 1992, where we found that the max day was 82,600 gpd. Since current flows occasionally exceed the permitted plant capacities, we conclude that the current water plant does not have the capacity to serve the additional water customers proposed for the Ryder Club. As noted above, Harbor has not provided any details on future upgrades to the water treatment plant.

With regard to wastewater capacity, Harbor presently operates a 54,000 gpd wastewater plant which utilizes the contact

stabilization treatment method. Harbor has indicated that it is in the process of expanding its existing capacity by 40,000 gpd, which Harbor anticipates should be completed by the last quarter of 1995. Based on Harbor's MFRs, the average daily flow max month for the 1992 test year was 51,000 gpd. With the 40,000 gpd addition, Harbor would increase its capacity to 91,000 gpd. With the addition of the first phase flows of the Ryder Club of 21,250 gpd, the average daily flow max month should increase to approximately 72,250 gpd. We concur with Harbor that it would be able to serve the Ryder Club's first phase scheduled for late 1995. However, by 1996, the Ryder Club expects its flows to increase by approximately 50,000 gpd which would exceed the capacity of Harbor's plant. Furthermore, for 1997, 1998, and 1999, Ryder Club expects flow increases of 50,000 gpd; 50,000 gpd, and 37,250 gpd respectively. Since Harbor has not mentioned any additional expansion plans scheduled for its wastewater plant and since it will take an estimated 18 months for the design and construction of any plant addition, we hereby conclude that Harbor will not have the capacity to serve the additional wastewater customers proposed for the Ryder Club.

Florida Statutes

The utility argues that despite Bonita Bay's desire for service from BSU, the issue of who the developer wishes to receive service from is irrelevant. Harbor argues that there is established case law which holds that customers cannot choose their water and wastewater utility provider. In its petition for deletion, Bonita Bay asserts that jurisdiction for the requested action is vested in the Commission pursuant to Sections 367.021, 367.045 and 367.121, Florida Statutes. We acknowledge that customers should not be allowed to pick and choose the utility that provides service. In Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), the Supreme Court held, "An individual has no organic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-8. However, Section 367.111, Florida Statutes, gives the Commission the discretion to delete territory from a service area. Section 367.111, Florida Statutes, states:

Each utility shall provide service to the area described in its certificate of authorization within a reasonable time. If the commission finds that any utility has failed to provide service to any person reasonably entitled thereto, or finds that extension of service to any such person could be accomplished only at an unreasonable cost and that addition of the deleted area to that of another utility company is economical and

feasible, it may amend the certificate of authorization to delete the area not served or not properly served by the utility, or it may rescind the certificate of authorization.

Although Chapter 367 does not expressly provide a mechanism by which a customer may request that his property be deleted from a utility's service area, Section 367.111, Florida Statutes, as interpreted, means that the Commission, on its own motion, could delete a portion of a utility's service territory, if it finds that certain conditions with respect to service have not occurred. Even further, pursuant to Section 367.011, Florida Statutes, the Commission could delete this territory in the interest of the public and for the protection of the public health, safety, or welfare.

Abandonment

We have received a copy of a notice of abandonment, pursuant to Section 367.165, Florida Statutes, filed by the owner of Harbor on October 19, 1994. Since the utility is in the process of being abandoned, it is even more likely that the needed improvements to the water and wastewater systems will not be made in time to meet the demands of the Ryder Club development.

Based upon all of the facts stated above, we hereby grant Bonita Bay's petition for deletion. The territory described in Attachment A, incorporated by reference, shall be deleted from Harbor Utilities Company Inc.'s territory. The utility shall file revised tariff sheets within thirty days of the effective date of this Order reflecting the new territory. The utility shall also return Certificates Nos. 272-W and 215-S for incorporation of the deletion. If no timely protest is filed upon expiration of the protest period, this docket shall be closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Bonita Bay Limited Partnership's petition is hereby granted, and the territory described in Attachment A shall be deleted from Harbor Utilities Company, Inc.'s territory. It is further

ORDERED that Harbor Utilities Company, Inc., shall file revised tariff sheets reflecting the new territory within thirty days of the effective date of this Order. It is further

ORDERED that Harbor Utilities Company, Inc., shall return Certificates Nos. 272-W and 215-S for incorporation of the deletion

within thirty days of the effective date of this Order. 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, 101 East Gaines Street, Tallahassee, Florida 32399-0870, 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 28th day of November, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Helgen
Chief, Bureau of Records

(S E A L)

MSN

Note: Commissioner Kiesling dissents with opinion as follows:

The majority's decision deprives Harbor of the full value of its certificated territory even though there has been no showing that the utility is currently unable to provide immediate or near-future service to the territory being deleted. By deleting this territory, the utility loses a valuable asset which could otherwise provide the incentive necessary for the receiver or another utility to acquire Harbor. Assuring system viability is an integral part of this Commission's responsibility to utilities. To deny Harbor the potential for growth in the new development may deny viability to this utility. This is particularly true where there is no immediate need for service. Therefore, I respectfully dissent.

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, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on December 19, 1994.

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.

ATTACHMENT A

RYDER CLUB

LEGAL DESCRIPTION: In Section 27, Township 47 South, Range 25 East, Lee County, Florida.

That portion of Section 27, Township 47 South, Range 25 East, Lee County, Florida lying West of Florida Power and Light easement being more particularly described as follows:

Beginning at the Northwest corner of Section 27, Township 47 South, Range 25 East, Lee County, Florida:

THENCE South 83°32'38" East along the North line of said Section 27 a distance of 1,468.89 feet to the Westerly line of the Florida Power and Light easement, per Deed Book 229 at Page 46 (set concrete Monday, 20.00 feet West of corner, due to water in ditch):

THENCE South 21°14'36" along said Florida Power and Light easement a distance of 2,991.35 feet at an angle point in said easement;

THENCE South 00°59'55" East along said easement a distance of 2,623.17 feet to a point in the Northerly right-of-way of West Terry Street;

THENCE North 83°02'59" West along the said right-of-way of West Terry Street, a distance of 2,529.87 feet to the West line of Section 27;

THENCE North 00°57'59" West along the said West section line a distance of 2,618.31 feet to the West Quarter (W1/2) corner of said Section 27;

THENCE North 00°43'42" West along the said West section line a distance of 2,652.17 feet to the POINT OF BEGINNING.

Being a part of Section 27, Township 47 South, Range 25 East, Lee County, Florida.

Subject to easement or restriction of records.
Containing 271.64 acres of land, more or less.