BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Approval of Transfer of Facilities of Harbor Utilities Company, Inc. to Bonita Springs Utilities and Cancellation of Certificates Nos. 272-W and 215-S in Lee County	DOCKET NO. 950758-WS ORDER NO. PSC-97-0283-FOF-WS ISSUED: March 12, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
JOE GARCIA

APPEARANCES:

Jennifer Brubaker, Esquire, John R. Jenkins, Esquire, Rose, Sundstrom & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301.
On behalf of Bonita Springs Utilities, Inc.

Barbara J. Fagan, 26266 Queen Mary Lane, Bonita Springs, Florida 33923
On behalf of herself.

Charles J. Pellegrini, Esquire, Florida Public Service Commission, Gerald L. Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

ORDER APPROVING TRANSFER, CANCELLING CERTIFICATES, AND CLOSING DOCKET

BY THE COMMISSION:

BACKGROUND

Harbor Utilities Company, Inc. (Harbor) is a Class C utility company in Lee County, which we certificated in 1975. At the time of its last rate case, the utility was serving 644 water customers and 439 wastewater customers.

Harbor has had a history of quality of service problems, which we addressed in the utility's rate case proceeding in Docket No. 921261-WS. On August 7, 1991, the Lee County Board of County Commissioners adopted Resolutions Nos. 91-08-12 and 91-08-13, creating the Imperial Harbor Water and Sewer Municipal Services Benefit Unit (MSBU) for the purpose of upgrading the Harbor facilities for connection to the systems of Bonita Springs Utilities, Inc. (BSU). The property owners of Imperial Harbor voted to reject the MSBU, electing to continue receiving services from Harbor.

By Proposed Agency Action Order No. PSC-94-0075-WS, issued January 21, 1994, we denied Harbor's request for an increase in final water and wastewater rates and required a refund of interim rates. Harbor initially protested this order, then voluntarily withdrew its protest on September 12, 1994.

On October 21, 1994, Mr. James J. Ryan, president of Harbor, filed a notice of abandonment with us and the Florida Department of Environmental Protection (DEP). Mr. Ryan stated that the utility did not have the required financial resources to bring the facility into compliance with DEP standards. He stated that the utility's efforts to obtain meaningful rate relief through this Commission had been unsuccessful.

On December 22, 1994, we issued Order No. PSC-94-1588-FOF-WS, acknowledging the abandonment of Harbor. BSU was appointed receiver by the Lee County Circuit Court on January 23, 1995. We acknowledged this appointment in Order No. PSC-95-0346-FOF-WS, issued March 13, 1995.

On June 21, 1995, the circuit court issued a Final Order Granting Receiver's Recommendation for Disposition of Assets. On July 19, 1995, the Lee County Board of Commissioners granted approval of the transfer to BSU in Resolution No. 95-07-27.

On July 3, 1995, BSU filed a Petition for Recognition of the Transfer of the Facilities of Harbor to BSU. BSU filed a revised application for Expedited Transfer of Harbor to BSU, pursuant to Section 367.071, Florida Statutes, and Rule 25-30.037, Florida Administrative Code, on August 9, 1995. On August 21, 1995, Harbor customers Barbara Fagan, Dennis V. Carlson, Pauline E. LaPointe, Howard Milne, Robert F. Meichner, Louise Hamlin, Janet Taylor, and Donald and Dorothy Lawrence individually filed timely objections to the transfer, taking issue with the special service charges approved by Lee County and our resolution of the interim refund in Docket No. 921261-WS. An administrative hearing was set for September 30, 1996.

On October 17, 1995, BSU interconnected the former Harbor customers to its water system. Wastewater customers were connected on November 28, 1995.

On May 17, 1996, with BSU's transfer application still pending before us, the circuit court issued an Order Discharging Receivership. Finding the receivership objectives fulfilled, the court ordered that Harbor's assets shall be the "sole, absolute and unencumbered property" of BSU and that Harbor customers shall be the "sole and absolute customers" of BSU. Further, the court ordered that Harbor customers shall be charged the "approved final Special Service Charges," in addition to charges for utility services applicable to all BSU customers. The court retained jurisdiction in the event we fail to "acknowledge" the transfer of Harbor's assets to BSU "in a form and manner acceptable to BSU and Lee County."

On June 12, 1996, BSU filed a Notice of Withdrawal of Application for Transfer and Voluntary Dismissal. We declined to acknowledge the utility's notice of withdrawal in Order No. PSC-96-0992-FOF-WS, issued on August 5, 1996.

At the hearing on September 30, 1996, Janet Taylor, Donald and Dorothy Lawrence and Pauline E. LaPointe withdrew their objections. Only Barbara Fagan of the group of objectors participated in the hearing. The parties filed post-hearing briefs on November 1, 1996.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND POLICY

Having heard the evidence presented at the hearing and having reviewed the recommendations of our staff, as well as the briefs of the parties, we now enter our findings and conclusions.

SUPPLEMENTAL AUTHORITY

As a preliminary matter, we consider whether to receive supplemental authority in this proceeding. On January 7, 1997, BSU submitted the December 13, 1996, opinion of the Second District Court of Appeal in State of Florida Department of Environmental Protection v. Harbor Utilities Co., Inc., 21 Fla.L.Weekly D2664, requesting that it be received and considered in this proceeding as supplemental authority. The opinion reverses the trial court's order dismissing Mr. Ryan as an individual in a DEP administrative enforcement action taken against Harbor and Mr. Ryan individually. BSU provided copies to Ms. Fagan and to the Office of Public Counsel. No one opposed BSU's request.

We have no rule allowing for the filing of a notice of supplemental authority in the post-hearing stage. However, we have stated that it might be appropriate to recognize as applicable in proceedings before us the conditions for receiving supplemental authority after the last brief that are set forth in Rule 9.210(g), Fla.R.App.P., Notice of Supplemental Authority. For example, in Order No. PSC-94-0987-FOF-WS, issued in Docket No. 930256-WS, In Re: Petition for Limited Proceeding to Implement Conservation Plan in Seminole County by Sanlando Utilities Corporation, we noted that a notice of supplemental authority drawing our attention to authority newly discovered and devoid of argument would be properly received. In that proceeding, the utility called to our attention in a notice of supplemental authority newly-enacted Section 367.0817, Florida Statutes, and argued that because the statute addressed the objections raised to our order approving the utility's conservation plan, they should be dismissed. Because it contained argument, we rejected the notice.

In Harbor Utilities, supra, the court held that under Florida's Air and Water Pollution Control Act, corporate officers, directors and managers may be subject to personal liability. The court held further that DEP's complaint stated a sufficient cause of action against Mr. Ryan. The objecting parties in this proceeding have grounded their objection to BSU's application for transfer of Harbor to BSU in part upon an allegation that it is inappropriate for BSU to impose impact fees upon the Imperial Harbor residents for system improvements made by BSU. They have contended that these improvements ought to have been made by Harbor through rates paid by the Imperial Harbor residents for the utility services provided by Harbor. On the other hand, BSU has contended that the imposition of impact fees is entirely proper and that the Imperial Harbor residents must pursue Harbor and Mr. Ryan for redress of their claim.

In submitting the court's opinion to us for our "review, information, and as supplemental authority," BSU argued that the opinion is appropriate supplemental authority because the ultimate issue before us is whether or not the transfer is in the public interest and the opinion specifically addresses the actions of Harbor and Mr. Ryan. We conclude that BSU submitted the court's opinion in a manner that constitutes argument. BSU argued that the opinion is additional support for its contention that the transfer of Harbor to BSU is in the public interest and that the Imperial Harbor residents' recourse, if any, is not against BSU, but against Harbor and Mr. Ryan. We find, therefore, that BSU's submittal does not meet our test for receiving supplemental authority. Accordingly, we have not considered the opinion in Harbor Utilities, supra, in this proceeding.

AGREEMENT FOR TRANSFER OF CUSTOMER SERVICE RIGHTS

Ms. Fagan raised a number of concerns related to a putative agreement between BSU and Harbor having to do with customer service rights. As we have noted, the Lee County Commission in 1991 pursued creation of an MSBU to provide a funding mechanism for the necessary upgrades to the Harbor system. Approval of the taxing unit would have allowed the County to issue bonds to finance improvements to the water distribution and wastewater collection lines, at no cost to Harbor. The county would accept title and provide maintenance to these lines until other arrangements were made. Bond money would also have been used to reimburse BSU for wastewater connection fees that would not be required of present or future residents of Imperial Harbor.

The details were specified in what was called the Agreement for Transfer of Customer Service Rights (Agreement), which was apparently drafted on July 16, 1991. The Agreement was to be a contract between Harbor and BSU. The purpose of the Agreement was to:

> provide the mechanism for the transfer of bulk customer service rights from Harbor to BSU in an orderly fashion, to assure that safe, efficient and sufficient potable water and sanitary sewer service will continue to be provided to Harbor's current customers and to the remainder of Harbor's certificated service area, upon its future development and to set forth the compensation to be provided to Harbor in exchange for the transfer of its customer service rights.

The compensation was to include payment to Harbor of an amount equal to the sum of 325 Aid-to-New-Construction (ANC) fees by BSU, salvage rights to discontinued plant, and additional connections to BSU wastewater lines for six lots to be developed in the Imperial Harbor subdivision. The Agreement also provided for the recovery of connection charges from the Imperial Harbor residents under a specified methodology. The Agreement was to be void if the MSBU created by the Lee County Commission was not approved by the Imperial Harbor residents through a referendum.

The Lee County Board of County Commissioners voted to create an MSBU on August 17, 1991. However, in early 1994 the Imperial Harbor residents defeated the matter in a referendum. Harbor then noticed its intent to abandon the utilities, and BSU was appointed receiver in January 1995.

Ms. Fagan asserted that the Agreement was in fact implemented and continues in effect. She said that she understood the Agreement was contingent upon the approval of the MSBU and she said that she was aware the MSBU was rejected. However, she said she believes the "effect" of the Agreement was not altered. Her concern with the Agreement was that it would unjustly provide substantial compensation to the former owner of Harbor.

BSU witness Partin steadfastly maintained the Agreement was not implemented. He said that the Agreement became void when the creation of the MSBU failed, and as a result, Mr. Ryan never received any value or benefits from the Agreement. He added that BSU has had since then no contact or any type of business relationship with Mr. Ryan.

We find that there is no record evidence to sustain the contention that the Agreement was at any time in force or effect. The version of the Agreement offered into evidence by Ms. Fagan is not signed by Mr. Ryan. The language of the Agreement clearly requires the formation of a special taxing district as a condition precedent. The record is clear that the Lee County Commissioners created an MSBU subject to ratification by the Imperial Harbor residents and that the Imperial Harbor residents voted the MSBU down by referendum. The record contains no evidence that the Agreement, or any modification of it, came nonetheless to be in force or effect. Thus, we conclude that the Agreement was never implemented.

UNJUST ENRICHMENT

Ms. Fagan contended that the former Harbor owner has received and will continue to receive compensation pursuant to the Agreement unjustly. According to Section 4 of the Agreement, a number of ANC fees payable to BSU were to be transferred to Harbor. Further, according to Section 6 of the Agreement, the wastewater connection charges for six lots owned by Mr. Ryan were to be waived.

Ms. Fagan maintained that through the Agreement BSU agreed to furnish considerable value to Mr. Ryan in exchange for his abandonment of the Harbor systems. She said she believed Mr. Ryan has indeed received compensation in this manner. Witness Partin stated that since the Agreement was never executed, Mr. Ryan never realized anything of value from these provisions or any special consideration as a member of the Bonita Springs cooperative. He stated that the assets of the utilities were abandoned by Harbor and transferred to BSU by the circuit court according to BSU's proposal to the court, which did not provide for payment to Harbor.

We find that there is no record evidence that would sustain the further contention that Harbor or Mr. Ryan benefited, justly or unjustly, as a result of the Agreement or in any other way related to the transfer of the utility's assets to BSU. In the first place, we have concluded that the evidence does not support that the Agreement, which purports to define benefits that would accrue to either Harbor or Mr. Ryan, was ever consummated or in any way effective. The assertions that nonetheless such benefits materialized, or, indeed, could materialize, are speculative and not at all supported by the record. The order of the circuit court establishing the disposition of the utility's assets assigns those assets to BSU without mention of compensation to Harbor. Thus, we conclude that the owner of Harbor received no enrichment of any kind as a result of the Agreement.

LAND TRANSFER

Ms. Fagan contended that the land on which Harbor's water and wastewater plants were located was not transferred from Mr. Ryan (as Imperial Harbor Associates) to Harbor as we required in Order No. PSC-94-0075-FOF-WS, issued January 21, 1994. She urged that we require Imperial Harbor Associates to take whatever steps are now necessary to dispose of the land, with any proceeds from the disposition going to the exclusive benefit of the Imperial Harbor residents. In the alternative, Ms. Fagan urged that if it is determined that the land was transferred to BSU, any proceeds from its disposition, whenever that should occur, should go to the exclusive benefit of the Imperial Harbor customers.

Ms. Fagan testified that when she telephoned the Bonita Springs property appraiser's office on September 17, 1996, she was told that the property upon which Harbor's water and wastewater treatment plants were located was owned by Imperial Harbor Associates. She further testified that on the next day when she went to the property appraiser's office to secure documentation of Imperial Harbor Associates' ownership, the records then revealed the land was owned by Harbor.

BSU argued that this land was transferred by the June 21, 1995, order of the circuit court conveying the assets of Harbor. Witness Partin stated that according to the circuit court's Final Order Granting Receiver's Recommendation for Disposition of Assets, BSU was to assume full operational responsibility for the systems and become lawful owner of all the real property of Harbor. BSU placed in evidence a fee simple deed to the land under both the water and wastewater treatment plants dated October 13, 1994, as proof of ownership.

We find that the record evidence sustains the transfer of the land on which both Harbor's water and wastewater treatment plants were located by operation of the circuit court order. Furthermore, the record shows that Harbor responded appropriately to our requirement in Order No. PSC-94-0075-FOF-WS that the land be transferred from Imperial Harbor Associates to Harbor. Thus, we conclude that the land on which the Harbor water and wastewater plants were located was transferred from Imperial Harbor Associates to Harbor and then to BSU by operation of the circuit court's June 21, 1995, order disposing of the utility's assets.

Given our conclusion that the land in question is owned by BSU, Ms. Fagan asked that we require that any value received from the disposition of this land in the future be credited to the benefit of the Imperial Harbor residents. She stated that based upon the sales price ($725,000) of a parcel of property located directly behind the Harbor parcel, she believes the land has substantial potential value, which should be used to offset the surcharges levied by BSU on residents of Imperial Harbor.

Witness Partin stated that BSU shut down Harbor's small reverse osmosis plant. BSU also decommissioned Harbor's small wastewater plant. Both plants still remain on the property. Percolation ponds utilized by Harbor, and BSU as receiver, have been filled in. Witness Partin stated that BSU hopes the land will eventually be utilized to serve Imperial Harbor residents, but there are no pending plans to use or dispose of the land.

We find it inappropriate to require BSU to dispose of the former Harbor property. In its Order Appointing Receiver, the circuit court stated that:

> As consideration for Receiver assuming responsibility for the continued operation and maintenance of the System, the Receiver and its agents and employees are hereby declared to be held harmless and not legally responsible for any and all claims, liability, demands, expenses, fees, fines, penalties, suits, proceedings, actions and fees, including attorneys' fees, that have arisen or may arise out of (or be the result of) the past design, construction, operation, and maintenance of the Harbor Utilities Company, Inc. System. This immunity shall include but not be limited to: immunity from injury to persons, damage to property or property regulation or requirement that may arise from

> the design, construction, operation or maintenance of the System prior to the date of the appointment of the Receiver, or during the period of receivership, if such injury, damage or violation is the direct result of prior design, construction, operation or maintenance of the System.

The Imperial Harbor residents seek redress for what would appear to be a misappropriation by Harbor of that portion of the utility rates that ought to have been applied in maintaining and upgrading the Harbor systems. They would have us order BSU to dispose of the Harbor land and offset the impact fee by the amount of the proceeds from the disposition. The circuit court has ordered that BSU is the lawful owner of all the real estate of Harbor. The evidence produced in this proceeding substantiates that the Harbor land on which its treatment facilities were located was included in the real estate within the reach of the court's order. It would contravene the circuit court's order to require BSU to do what the Imperial Harbor residents urge. That would impose upon BSU a requirement to liquidate its assets in order to answer to a potential liability incurred by Harbor.

We note that the Imperial Harbor residents could consider bringing an action in circuit court if they wish to be heard concerning their right to an interest in the former assets of Harbor, and whether such right, if it exists, is one accruing to the benefit of only the Imperial Harbor residents or to BSU's customers generally. We conclude, however, that it is inappropriate for us to require BSU to make any disposition of the real estate on which the former Harbor treatment facilities are located.

TRANSFER APPLICATION

Ms. Fagan challenged the sufficiency of BSU's transfer application, asserting that the requirements of Rule 25-30.037,(2)(h) 3, Florida Administrative Code, appear to have not been satisfied. This rule provides that a contract for sale shall provide for the disposition, where applicable, of any developer agreements. Initially, Ms. Fagan raised this issue over her concern that the application failed to meet the requirements of Rule 25-30.037(g), Florida Administrative Code. This rule provides that a contract for sale shall include, if applicable, the purchase price and terms of payment, the amount of assets purchased and liabilities assumed and not assumed, and a description of the consideration exchanged. BSU asserted that all the requirements of

Rule 25-30.037, Florida Administrative Code, have been substantially satisfied, even though it claimed the issue was outside the scope of this proceeding.

The record shows that on July 3, 1995, BSU filed an application for transfer of the lines, assets and customers of Harbor to BSU, which it revised on August 9, 1995. Because this utility was abandoned, several requirements of Rule 25-30.037, Florida Administrative Code, are not applicable. An abandoned utility is generally transferred under terms granted by the court and not through a traditional contract for sale, as are the transfers of utilities not in abandonment. Therefore, the rule provisions concerning contracts for sale are not applicable in this docket, including Rules 25-30.037 (g) and (h), Florida Administrative Code.

We find that the application is in compliance with the governing statute, Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning the application for transfer of utility assets. Therefore, we conclude that BSU's transfer application meets the requirements of Rule 25-30.037, Florida Administrative Code.

PAST PAYMENTS OFFSET

Ms. Fagan contended that Imperial Harbor residents had already supplied the funds through rates paid to Harbor to enable the necessary improvements to the Harbor systems and should not be made to now pay special service charges to BSU for that purpose. She testified that for several years the residents of Imperial Harbor paid monthly bills to Harbor, a portion of which was targeted for plant maintenance and repairs. She added that during this period, Harbor was under the regulatory authority of this Commission and accountable to us for its failure to provide the necessary maintenance of the Harbor systems. She said she believes that because of the failure of Harbor management and a lack of Commission oversight, the Harbor system deteriorated and the eventual result was that Mr. Ryan abandoned the plant facilities. She suggested that we calculate the amount of customers' bills over the years which should have been spent on maintenance, and condition this transfer on BSU's offsetting this amount against the sums now sought by BSU for upgrading the Harbor system.

BSU asserted that Lee County has jurisdiction over rate setting for BSU and that the County has determined the appropriate charges for residents of Imperial Harbor.

In Order No. PSC-95-0884-FOF-WS, issued July 19, 1995, in Docket No. 921261-WS, we ordered that BSU (then operating as receiver for Harbor) credit Harbor's contribution-in-aid-of construction (CIAC) account with the amount of refunds of interim rates that Harbor had failed to secure pursuant to Order No. PSC-93-1450-FOF-WS, issued October 5, 1993. In the order, we stated that, "since BSU became Harbor's receiver on December 22, 1994 ... the unsecured refund is a prior liability. Therefore, BSU shall not be held responsible for the past operation of Harbor's system." As we have already noted, in its order appointing BSU receiver for Harbor, the circuit court removed BSU from responsibility for the liabilities incurred by Harbor prior to the receivership appointment. We acknowledged this provision of the court's order in Order No. PSC-95-0884-FOF-WS.

The improvements to the Harbor systems were required to conform with DEP and other agency standards as a result of the former owner's lax manner of operation. BSU has implemented substantial improvements to the Harbor systems and has been providing acceptable utility services now for more than a year to the Imperial Harbor residents.

Witness Partin stated that BSU has no way of knowing what the management of Harbor did with the money it collected from its customers or how the system was operated prior to its abandonment. The proceeds from the utility's letter of credit, securing a potential interim rates refund, that were provided to BSU in the receivership estate were fully applied to partially refund the customers' interim rates, as we ordered. He said that if Imperial Harbor residents are looking to recover the benefit of past payments to Harbor, which they believe are due them, their complaint is with the past management of Harbor, not BSU.

In deciding this issue, we consider the jurisdictional question whether we have the authority to require BSU to effect any type of change that would affect the rates and charges billed by BSU to its customers. Witness Partin stated that, "all of BSU's rates and charges must be approved by the Lee County Board of Commissioner, pursuant to BSU's Franchise Agreement with Lee County." BSU is a member-owned non-profit cooperative, exempt from our regulation. Pursuant to Section 367.165(3), Florida Statutes, however, any receiver operating a regulated utility that has been abandoned is considered to hold a temporary authorization from this Commission. Accordingly, BSU has been and remains in receiver status, subject to our jurisdiction, pending our transfer approval. In its Order Discharging Receivership, the court retained jurisdiction in recognition of the requirement that it remained for us to approve the transfer of Harbor to BSU.

Thus, we have exclusive jurisdiction over BSU's operation of Harbor's utility facilities, BSU's exempt status notwithstanding. Section 367.165(3), Florida Statutes. Both we and the circuit court, however, have declared that BSU shall not be held responsible for the liabilities of Harbor incurred before the receivership. If we were to order BSU, as we are authorized to do,to apply an offset against BSU's impact fees in an amount equivalent to that contributed by the Imperial Harbor residents through past rates, it would be calling upon BSU to bear some responsibility for an alleged pre-receivership liability. We find that this would be inappropriate. There is no evidence that would implicate BSU in any derelictions or shortcomings of the utility's prior ownership. In addition, to impose burdens of this type on receivers of abandoned utilities would surely be counterproductive in a time when small system abandonments are rising and willing receivers are few to be found. Moreover, even if we were to decide that the transfer should be conditioned in the manner urged by Ms. Fagan, this record contains no evidence to support the required "adjustment."

We shall not impose any requirement involving refunds by BSU from its own resources to Harbor customers. Therefore, we conclude that past payments by Imperial Harbor utility customers to Harbor shall not be applied as an offset to any charges now sought by BSU for recovery of expenditures necessary to upgrading the Harbor water and wastewater systems.

FINANCIAL ABILITY

Ms. Fagan called BSU's financial ability to provide services to the Imperial Harbor residents into question because it requires an impact fee for water and a surcharge on the customer's water and wastewater bills to recover expenses related to system improvements it has made. On the other hand, Ms. Fagan argued, since BSU has the financial wherewithal to have funded the costs of the improvements made to the Harbor facilities, the Imperial Harbor residents should not be required to "reimburse" BSU for these costs through the imposition of impact fees. She also stated that she did not know why BSU was requiring a surcharge because BSU shows 1995 net income of $5 million. She acknowledged that BSU financed the changes to the Harbor system through its own funds, since the rates charged by BSU in the course of the receivership were the same rates charged by Harbor prior to the abandonment.

BSU argued that it has the financial ability to provide service to the former customers of Harbor. Witness Partin observed that BSU has provided water and wastewater service in the area since 1971 as a member-owned non-profit cooperative. He stated

that the utility has consistently met DEP standards and provided customers with quality service and that it has no outstanding violations. He also pointed to BSU's record of providing service to over 17,000 water customers and over 10,000 wastewater customers.

The record reflects numerous examples of BSU's financial ability to provide service to the former Harbor customers. BSU expended about $2.25 million making considerable additions and improvements to the wastewater system in order to serve the Harbor customers. BSU dismantled portions of the Harbor plant and cleaned up the site. BSU upgraded the lift stations, constructed wastewater mains to interconnect the Harbor customers with the wastewater transmission system and waived the normal wastewater service interconnection fee. These changes were financed by BSU to bring the Harbor systems up to a level such that interconnecting them would not compromise services to existing BSU utility customers.

BSU's statements show net income of $5,439,000 in 1995, with net assets of $64,090,332. Approximately $30 million dollars in secured, tax exempt industrial development bonds have been issued by Lee County to finance renovation and expansion of BSU's regional water and wastewater utility facilities. Also, BSU stated that it has a "AAA" credit rating from the National Investor Services and that its long term debt is insured through the bond insurance markets.

We find it appropriate to discuss the policy considerations involved in the recovery of system improvement investment by BSU from the Imperial Harbor residents. Throughout Ms. Fagan's testimony, she made it clear that she believed investment recovery from Imperial Harbor residents was improper and that it called into question BSU's fiscal soundness. When questioned concerning the potential subsidization of former Harbor customers by the rest of BSU's customers, if charges specific to the Harbor customers were not applied to them, she responded that either all customers should pay or none should, and that the Commission should so condition the transfer.

Our policy requires the collection of impact or service connection fees from new customers of regulated systems. Our term for these fees is "service availability charges." See Section 367.091, Florida Statutes. The purpose of these charges is to allow the utility to recover investment made in plant and lines to provide service. In the long term, this investment recovery benefits ratepayers, because it becomes CIAC, which is used as an offset to total plant investment. This has the effect of lowering

the overall dollar level of plant-in-service, which results in a lower rate base and, therefore, lower rates. Because BSU operates as a non-profit utility, it does not exactly follow these accounting procedures; however, it separately identifies contributions (ANC) as members' equity.

The recovery of system improvements is also a normal part of utility business. With a Commission-regulated system, we consider the necessity and level of investment made by the utility. Those investments determined to be appropriate are allowed as part of the utility's overall investment in plant. As a result, appropriate investment is included in rate base, and recovered in monthly rates.

It appears to us that the recovery of investment through service charges and monthly rates is being appropriately implemented by BSU. Wastewater service availability charges to the Imperial Harbor residents were forgiven by BSU, consistent with the treatment of other customers connecting to the new treatment facility. Connection to water service, however, has required the payment of a $2,494.05 charge. In order to make the charge less burdensome, BSU offered connecting customers the opportunity to pay it over a period of 25 years at 7% interest. These payments will be booked to members' equity. Thus, the dollars received as a surcharge on the monthly bills of the Imperial Harbor residents relating to improvements made to the Harbor system will offset the investment required to properly service those residents.

BSU's allocation of the cost recovery to Harbor residents is consistent with our policy. We endorse the policy of costs being recovered by cost-causers in the general case. See, e.g., Order No. PSC-92-1357-FOF-SU, issued November 23, 1992. In this case, recovery of investment made to the old Harbor system is to be from the Imperial Harbor residents, for whom the investment was necessary and who receive the benefit. To spread this recovery over BSU's entire customer base would be to unfairly force other customers of BSU to subsidize the service provided to those in Imperial Harbor. To require BSU to forego all recovery would be to be in conflict with the circuit court's order, our prior position, and our policy.

We understand Ms. Fagan's concern about BSU's receiving reimbursement for improvements made to the Harbor system. However, this is consistent with the policy we require regulated utilities to follow. We cannot accept, and the record does not support, Ms. Fagan's view that BSU's imposition of the wastewater impact fee and the water and wastewater surcharges reflects at all negatively upon BSU's financial capability to provide utility services to Imperial

Harbor residents. We find that BSU has met its burden in proving its financial ability through financing the interconnection program and the statements of its financial condition. Therefore, we conclude that BSU possesses the financial ability to provide water and wastewater service to the former customers of Harbor.

PUBLIC INTEREST

In determining whether to approve a transfer of utility assets we are required to find whether the proposed transfer is in the public interest. Section 367.071, Florida Statutes. We received some testimony to that effect at the hearing held in Bonita Springs on September 30, 1996, from two former Harbor customers, besides Ms. Fagan. One testified in support of the transfer to BSU. The other expressed concern that the water quality had not improved since interconnection to the BSU system.

Ms. Fagan stated that she believes the transfer of Harbor to BSU would be in the public interest only on condition that special service charges are eliminated. She stated that the senior citizens that largely comprised the customer base of Harbor simply do not have the money to pay the charges that have been imposed. She contended that their last recourse lies with us, that we can require, as a condition of the transfer, that BSU eliminate these charges.

Witness Partin discussed the tenuous operating status of the Harbor systems at the time Harbor abandoned them. He stated that the utility was operating without a DEP permit and under a DEP consent order. The utility was also having a problem with the discharge of brine from its water plant. Ms. Fagan testified that there was a sporadic problem at that time with a strong odor from heavily chlorinated water, and that she regularly bought bottled water to drink as a result.

In order to properly serve the Harbor customers, BSU, as we have noted, has made substantial additions and improvements to the wastewater system. BSU has upgraded the lift stations, constructed wastewater mains to interconnect the Harbor customers with the wastewater transmission system and waived the normal interconnection fee. The Harbor customers have been fitted with individual meters and their wastewater rates have changed to the standard rate for BSU service. As we also noted above, BSU closed Harbor's treatment plant facilities and effluent disposal percolation pond system.

The transfer application includes adequate service territory and system maps and a territory description as prescribed by Rules 25-30.035 (9), (10), and (11), Florida Administrative Code. The territory requested by the applicant is consistent with the service area authorized in Order No. PSC-94-1453-FOF-WS, issued June 16, 1994, approving a certificate amendment deleting territory from the Harbor service area. BSU credited Harbor customer deposits to appropriate accounts in the final billing cycle prior to interconnection.

BSU is an established not-for-profit cooperative with a record of providing adequate utility service. The utility has consistently met DEP standards and provided customers with quality service. BSU has no outstanding violations. The Imperial Harbor customers should receive, and apparently are receiving, service provided consistently within DEP standards. The record does not contain substantial evidence that the quality of service provided by BSU is anything short of acceptable. Witness Partin testified that the former Harbor customers are now full members of the BSU cooperative, and have the same voting privileges and service rights which are due any other BSU customer.

We find that the record demonstrates that BSU is capable of fulfilling the commitments, obligations and representations of Harbor. Therefore, we conclude that the transfer of Harbor to BSU is in the public interest. We approve the transfer and order that Harbor Certificates Nos. 272-W and 215-S shall be canceled.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the transfer of the assets of Harbor Utilities Company, Inc., to Bonita Springs Utilities, Inc. is hereby approved. It is further

ORDERED that Harbor Utilities Company, Inc.'s Certificates Nos. 272-W and 215-S shall be canceled. It is further

ORDERED that each of the findings and conclusions made in the body of this Order are hereby approved in every respect. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 12th day of March, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

CJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/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 after the issuance 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.