



Public Service Commission

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RECORDS AND REPORTING
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DATE: MARCH 4, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAY)

FROM: DIVISION OF LEGAL SERVICES (GERVASI, CROSBY)
DIVISION OF WATER AND WASTEWATER (BRADY, REDEMANN)

RE: DOCKET NO. 981403-W5 - APPLICATION FOR TRANSFER OF
CERTIFICATE NOS. 469-W AND 358-S IN BAY COUNTY FROM
BAYSIDE UTILITIES, INC. TO BAYSIDE UTILITY SERVICES, INC.
COUNTY: BAY

AGENDA: MARCH 16, 1999 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981403.RCM

CASE BACKGROUND

On October 26, 1998, Utilities Inc. filed an application for transfer of Certificates Nos. 469-W and 358-S in Bay County from Bayside Partnership a/k/a Bayside Utilities, Inc. (Bayside or utility) to Bayside Utility Services, Inc., pursuant to Section 367.001, Florida Statutes. Bayside Utility Services, Inc. is in the process of incorporating as a Florida corporation. It will be a wholly-owned subsidiary of Utilities, Inc. On November 12, 1998, three customers filed a letter objecting to the application. The customers have subsequently indicated that they request a hearing on the matter. Accordingly, this matter is currently set for an administrative hearing on February 2-3, 2000.

On January 26, 1999, Utilities, Inc. and Bayside filed a Motion to Dismiss the Objection and Protest of the application. On February 8, 1999, the customers filed a Response to the motion to dismiss and a letter clarifying their intentions for protesting the

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application. This recommendation addresses the motion to dismiss and the response thereto.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the Motion to Dismiss the Objection and Protest filed by Utilities, Inc. and Bayside Utility Services, Inc.?

RECOMMENDATION: No. Because the customers have substantially complied with Rule 28-106.201, Florida Administrative Code, and have alleged facts sufficient to state a cause of action, the Commission should deny the motion to dismiss. (GERVASI)

STAFF ANALYSIS: As stated in the case background, on November 12, 1998, three customers timely-filed a letter objecting to the transfer application filed by Utilities, Inc., on October 26, 1999, in this docket. By the letter, the customers stated their reasons why they believed it would be improper for the utility to transfer ownership. The letter was signed by one of three customers, with Bayside Homeowners Association and the names and addresses of the three customers typed at the bottom of the letter.

Because the customers did not indicate in the letter whether they were seeking a hearing on the matter, by letter dated November 24, 1998, staff requested the customer who signed the letter to advise us, in writing, by January 7, 1999, whether the customer(s) intended to pursue the objection through a hearing. By facsimile received on January 7, 1999, signed by all three customers, as well as by a fourth additional customer, the customers indicated that they object to the transfer application and that they do request that a hearing be scheduled.

On January 26, 1999, Utilities, Inc. and Bayside filed a Motion to Dismiss the Objection and Protest. The utilities argue that the letter of objection to the transfer is insufficient as a protest. The utilities point out that the original letter of objection was signed by only one person, but had the names and addresses of three individuals at the bottom of the letter. The utilities also point out that the letter of objection was purported to be made on behalf of Bayside Homeowners Association, although there is no indication that the Association or its Board of Directors represents all or even a majority of the residents in the area, whether the homeowners were notified of the decision of the individual(s) to file an objection or protest, whether the

purported action was approved by a majority vote of the members of the Association, whether there was a vote of the Board of Directors, or whether the Association was lawfully created, if it even exists.

The utilities further argue that the letter of objection does not allege that the acquiring utility lacks the technical expertise and the financial ability to provide the required utility services. According to the utility, the only thing the letter does is to pose several questions regarding the acquiring utility's plans for the service area, which are not grounds to protest the transfer. The utility responded to these questions by letter to the Commission and to the customers on November 25, 1998.

Moreover, the letter of objection recites that the customers believe it would be improper to transfer ownership at this time because the recently approved staff-assisted rate case was currently under litigation in Docket No. 971401-WS. However, the customers subsequently filed a voluntary notice of dismissal of their protest of the PAA order filed in that case.

The utilities argue that the letter of objection fails to allege appropriate or sufficient grounds to protest the transfer and is frivolous. The utilities state that they reserve their right to seek the inclusion of any attorneys fees or costs incurred in relation to the objection as a recovery from its utility customers in this service area, as well as such other rights and remedies for damages, attorneys fees or other costs as may be available to them under the statutes and rules governing the Commission and the Circuit Courts or other tribunals of this State, including but not limited to claims under Section 57.105, Florida Statutes.

On February 8, 1999, three of the four customers who signed the faxed document indicating their intent to seek a hearing on the matter signed and filed a response to the utilities' motion to dismiss. The customers argue that they are consumers of Bayside and, as ratepayers, are substantially affected by the outcome of this proposed transfer. They argue that they filed an objection to the transfer, in writing, within thirty days of the notice of the proposed transfer, and that as laypeople, they have followed the procedure necessary to obtain their rights under Florida Statutes.

Further, in response to the utilities' complaint that the initial written objection was signed by only one person but had the names of three individuals at the bottom, as well as the name of the Homeowners Association, the customers argue that this does not

invalidate the objection. The signatory of the original letter of objection and each of the other referenced objectors are customers of Bayside and thus have statutory standing to object to the transfer.

In response to the utilities' argument that the objection does not specify how the proposed purchaser lacks the expertise necessary to run the system, the customers argue that the Florida Statutes do not require the objection to provide any such allegations, and that this is therefore not a valid ground for dismissal.

Moreover, the customers state that the response by the utility to the questions raised by the protestors referenced by the utilities in their motion does not eliminate the concerns of the customers. Neither does the customers' voluntary dismissal of their protest to the PAA rate case eliminate their objection to the transfer application. The customers argue that a hearing on the transfer is all the more important in order for the Commission to examine some of the issues that the customers previously hoped would have been raised in the PAA protest hearing.

Additionally, also on February 3, 1999, the three customers who signed the response to the motion to dismiss filed a letter with the Commission to further clarify their objection. The customers state that the one customer who signed the original objection did so on behalf of all four of the customers who signed the faxed document clarifying their intent to seek a hearing. They again state that they do object to the proposed transfer and that they request a 120.569 and 120.57 hearing on the matter. Moreover, they state that the city of Panama City Beach (City) has expressed an interest in purchasing the utility and that a transfer to the City is superior to a private transfer for several reasons. Bayside currently purchases all of its services from the City and thus acts merely as a middleman for the provision of utility services. A direct provision by the City would be more efficient and less costly. The customers state that an integrated countywide municipal system would be of general benefit to all Bay County citizens. For these reasons, as well as others that require an expanded forum for full illumination, the customers believe that the proposed transfer is not in the public interest.

Staff notes that the utilities do not allege that the customers' protest does not conform to Rule 28-106.201, Florida Administrative Code, which provides in subsection (2), that any document that requests an evidentiary proceeding and asserts the existence of a disputed issue of material fact shall contain a

statement of all disputed issues of material fact and a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief.

Significantly, the rule further provides in subsection (4) that a petition may be dismissed if it is not in substantial compliance with subsection (2) or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. Upon review of the letter of objection, and the subsequent documentation provided by the customers to clarify their intent for seeking a hearing in this matter, staff believes that taken together, these filings sufficiently explain how their substantial interests will be affected by the Commission's determination in this docket and sufficiently identify certain disputed issues and the ultimate facts alleged in accordance with Rule 28-106.201, Florida Administrative Code, including whether the proposed transfer is in the public interest. Therefore, the filings substantially comply with the rule, and staff sees no need for the customers to be required to file an amended petition to further clarify their request for a hearing on the matter.

Moreover, "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action." Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). "In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint . . . nor consider any evidence likely to be produced by either side. . . . Significantly, all material factual allegations . . . must be taken as true." Id.

Section 367.071(1), Florida Statutes, requires the Commission to, among other things, make a determination that the proposed transfer is in the public interest. Because the customers have alleged reasons why it would not be in the public interest for the Commission to grant the proposed transfer, staff believes that the customers have alleged sufficient facts to state a cause of action.

Additionally, staff agrees with the customers that since each customer has standing to object to the transfer, the fact that the initial letter of objection was signed by only one customer does not invalidate the objection. Nor is there a legal requirement that the customers allege that the proposed purchaser lacks the expertise necessary to run the system. The customers have alleged

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that the proposed transfer is not in the public interest and they have requested a hearing on the matter.

For the foregoing reasons, staff recommends that the utilities' motion to dismiss the objection and protest should be denied.

DOCKET NO. 981403-WS
DATE: MARCH 4, 1993

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. If staff's recommendation is approved in Issue 1, this docket should remain open pending final disposition of this case. (GERVASI)

STAFF ANALYSIS: No. If staff's recommendation is approved in Issue 1, this docket should remain open pending final disposition of this case.