

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for approval of) DOCKET NO. 950758-WS
transfer of facilities of Harbor) ORDER NO. PSC-96-1175-PHO-WS
Utilities Company, Inc. to) ISSUED: September 20, 1996
Bonita Springs Utilities and)
cancellation of Certificates)
Nos. 272-W and 215-S in Lee)
County.)
_____)

Pursuant to Notice, a Prehearing Conference was held on September 11, 1996, in Tallahassee, Florida, before Commissioner Julia L. Johnson, as Prehearing Officer.

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.

PREHEARING ORDER

I. CASE BACKGROUND

On January 23, 1995, Lee County Circuit Court, Judge Lynn Gerald, in Case No. 94-0820 CA-LGL, appointed Bonita Springs Utilities (BSU or receiver) receiver for Harbor Utilities Company, Inc. (Harbor or utility). Harbor had noticed its intent to abandon on October 19, 1994. The appointment order recognized BSU's "responsibility" to the Commission for its activities as receiver for the utility. In Order No. 5223, issued September 21, 1971, the Commission exempted BSU's water system from its regulation, and in Order No. 24921, issued August 16, 1991, it exempted BSU's wastewater system from its regulation pursuant to Section 367.022(7), Florida Statutes, while reaffirming the water system's exemption.

DOCUMENT NUMBER-DATE

10019 SEP 20 96

FPSC-RECORDS/REPORTING

On April 4, 1995, BSU filed its Receiver's Recommendation for Disposition of Assets with the court, and on June 21, 1995, the court issued a Final Order Granting Receiver's Recommendation for Disposition of Assets. The order provided for the conveyance of the utility to BSU, including all real and personal property, and was issued subject to the approval of the transfer of the utility to BSU by the Commission and the approval of the Lee County Board of Commissioners of all charges associated with the transfer. The order required BSU to wind up the business activities and affairs of the utility and to provide the county with a final accounting. By Resolution No. 95-07-27, the county commissioners, on July 19, 1995, granted their approval.

On July 3, 1995, BSU filed a Petition for Recognition of the Transfer of the Facilities of Harbor Utilities, Inc., to BSU with the Commission, and on August 9, 1995, 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, the instant docket. On August 21, 1995, several Harbor customers filed objections to the transfer, taking issue with the county-approved "impact fees" (special service charges) to be charged Harbor customers upon transfer, as well as with the Commission's refunds order in Docket No. 921261-WS, alleging mismanagement on the part of Harbor's owner, and alluding to "other concerns." The objections were filed consistent with the provisions of Sections 367.045(4), and 367.071(4), Florida Statutes. Accordingly, an administrative hearing was set for September 30, 1996.

Then, on May 17, 1996, with BSU's transfer application still pending before the Commission, the court issued an Order Discharging Receivership. Finding the receivership objectives fulfilled, the court ordered that Harbor's assets are 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, reserving for later ruling the issue of reabandonment by BSU in the event the Commission fails "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 with the Commission a Notice of Withdrawal of Application for Transfer and Voluntary Dismissal (notice of withdrawal). On August 5, 1996, in Order No. PSC-96-0992-FOF-WS, the Commission declined to acknowledge the utility's notice of withdrawal.

In Docket No. 921261-WS, a rate case filed by Harbor on December 15, 1992, the Imperial Harbor Civil Rights Unit (IHCRU), on July 19, 1995, protested the Commission's imputation to CIAC of approximately \$15,000 in unsecured refunds of interim rates in Order No. PSC-95-0884-FOF-WS, issued on the same date. An administrative hearing was set for August 9, 1996, with a prehearing conference, July 19, 1996. These were continued on July 18, 1996.

On October 17, 1995, BSU interconnected Harbor customers to its water system, and on November 28, 1995, to its wastewater system.

II. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 367.156, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 367.156, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 367.156, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The

notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

III. POST-HEARING PROCEDURES

Rule 25-22.056(3), Florida Administrative Code, requires each party to file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. The rule also

provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 60 pages, and shall be filed at the same time. The prehearing officer may modify the page limit for good cause shown. Please see Rule 25-22.056, Florida Administrative Code, for other requirements pertaining to post-hearing filings.

IV. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

V. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Fred B. Partin	BSU	All issues
Barbara J. Fagan	Herself	All issues
<u>Rebuttal</u>		
Fred B. Partin	BSU	1, 2A, 4

VI. BASIC POSITIONS

BSU: BSU has been providing water and wastewater service to the customers of Harbor Utilities since October and November 1995, respectively. The transfer of Harbor Utilities to Bonita Springs Utilities has already been acknowledged by the Lee County Circuit Court, and deemed by the Court to be in the best interest of Harbor's customers. The transfer is supported by the vast majority of Harbor customers and the issues being raised by the party-objectors present no legal or factual bases which would merit a finding by the PSC that the transfer should not take place. The transfer of Harbor's assets to BSU is in the public interest, and should be recognized as such by the PSC.

FAGAN: A transfer of Harbor Utilities Company, Inc. to Bonita Springs Utilities is not in the public interest.

STAFF: On the basis of prefiled testimony, and absent record evidence to the contrary, the Commission should approve the transfer of Harbor Utilities Company, Inc., to Bonita Springs Utilities and cancel Certificates Nos. 272-W and 215-S.

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VII. ISSUES AND POSITIONS

ISSUE 1: **Has the Agreement for Transfer of Customer Service Rights, entered on July 16, 1991, between Harbor Utilities Company, Inc. and Bonita Springs Utilities, Inc., been implemented, and/or is it of any current force or effect?**

POSITIONS

BSU: No.

FAGAN: No position pending further development of the record

STAFF: No position pending further development of the record.

ISSUE 2A: Whether the former owner of Harbor Utilities Company, Inc., has become unjustly enriched as a result of the Agreement for Transfer of Customer Service Rights, entered on July 16, 1991, between Harbor Utilities Company, Inc., and Bonita Springs Utilities.

POSITIONS

BSU: No, the assets of Harbor Utilities Company were abandoned by Harbor Utilities Company and were transferred to Bonita Springs Utilities by the Lee County Circuit Court without payment to Harbor Utilities Company.

FAGAN: Yes. Bonita Springs has agreed to furnish value to Mr. Jim Ryan (former owner of Harbor) in exchange for his abandoning the Harbor system.

STAFF: Whether there has been unjust enrichment as alleged may be irrelevant to the Commission's consideration of the transfer application.

ISSUE 2B: Whether the land upon which the Harbor Utilities Company, Inc.'s water and wastewater treatment plants are located was transferred to Bonita Springs Utilities by the order of the circuit court conveying the assets of Harbor Utilities Company, Inc., and, if yes, whether the proceeds of any disposition of such land should go to the exclusive benefit of the Imperial Harbor customers.

POSITIONS

BSU: The land upon which the Harbor Utilities Company Inc.'s water and wastewater treatment plants are located was transferred by the order of the Lee County Circuit Court conveying assets of Harbor Utilities Company, Inc. During the receivership, the Harbor customers received the benefit of all Harbor assets. Following the transfer by the Court to BSU, and termination of the receivership, all assets transferred became the property of BSU and all of its members, as required by the Company's Articles of Incorporation, Bylaws and applicable tax code provisions. The land is currently being utilized to serve the Imperial Harbor customers, and there are no pending plans to dispose of those lands.

FAGAN: If the land was transferred to Bonita Springs Utilities, any proceeds from its disposition, whenever that should occur, should go to the exclusive benefit of the Imperial Harbor customers. If the land was not transferred, Harbor Utilities Company, Inc., should be ordered to take whatever steps are necessary to dispose of the land with any proceeds from the disposition going to the exclusive benefit of the Imperial Harbor customers.

STAFF: No position pending further development of the record.

ISSUE 3: Whether Harbor Utilities' transfer application filed by BSU meets the requirements of Rule 25-30.037, Florida Administrative Code.

POSITIONS

BSU: Yes.

FAGAN: No. The requirements of Rule 25-30.037, (2) (g) 1, 2 and 3, Florida Administrative Code, appear to have not been satisfied.

STAFF: Yes.

ISSUE 4: Should the past payments by utility customers to Harbor Utilities Company, Inc. be used as an offset to any sums sought by Bonita Springs for upgrade of the Harbor System?

POSITIONS

BSU: No, the County, not the PSC, has jurisdiction over rate setting for Bonita Springs Utilities and has determined the appropriate charge for residents of Imperial Harbor.

FAGAN: Yes. For years the customers of Harbor paid recurring monthly bills to Harbor, a material portion of which was targeted for plant maintenance, depreciation, and replacement. During this same period, Harbor was under the jurisdiction of the Florida Public Service Commission, and accountable to the Commission for its failure to provide the necessary maintenance and upkeep of the Harbor system. Because of the failure of Harbor and because of the failure of the Commission oversight,

the Harbor system was permitted to deteriorate, and the former utility owner, Mr. Jim Ryan, to abandon the plant facilities.

Current charges from Bonita Springs include sums for the upgrade of the Harbor system, which, but for the failure of Harbor former owner, and of the Commission, would not now be required. The Commission should perform a calculation of the aggregate of the portion of customers' bills over the years which should have been spent on maintenance, and condition this transfer on Bonita Springs' offsetting this aggregate against the sums now sought by Bonita Springs for upgrade of the Harbor system.

STAFF: No position pending further development of the record.

ISSUE 5: Whether Bonita Springs Utilities possesses the financial ability to provide water and wastewater services to the customers of Harbor Utilities Company, Inc.

POSITIONS

BSU: Yes.

FAGAN: The financial ability of BSU is questionable since it has imposed a special services charge of \$3500 on the Imperial Harbor customers.

STAFF: Yes.

ISSUE 6: Whether it is in the public interest to approve the transfer of Harbor Utilities, Inc., to Bonita Springs Utilities.

POSITIONS

BSU: Yes.

FAGAN: No. Without an accounting for the unjust enrichment of Mr. Jim Ryan, and without an accounting of the funds paid by Harbor customers for the maintenance and upkeep of the Harbor system, this transfer is not in the public interest.

STAFF: No position pending further development of the record.

VIII. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Fred B. Partin	BSU	_____ (FP-1)	Harbor Utilities Company, Inc.'s Transfer Application, filed on August 9, 1995, with the PSC, and attached Exhibits
Fred B. Partin	BSU	_____ (FP-2)	Order Discharging Receiver-ship, Case No. 94-8020 CA-LGL (May 17, 1996), Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, by Circuit Judge Lynn Gerald, Jr.
Barbara J. Fagan	Herself	_____ (BJF-1)	Memorandum, William E. Sundstrom, May 3, 1991, Re: B.S.W.S. / Imperial Harbor/Central Sanitary Sewer & Potable Water
Barbara J. Fagan	Herself	_____ (BJF-2)	Agreement for Transfer of Customer Service Rights

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

IX. PROPOSED STIPULATIONS

At the Prehearing Conference, the parties proposed the following stipulations, which they and staff agree are reasonable and should be accepted by the Commission:

- 1) The customers of Harbor Utilities Company, Inc., have become members of the Bonita Springs Utilities not-for-profit cooperative.
- 2) Bonita Springs Utilities possesses the technical ability to provide water and wastewater services to the customers of Harbor Utilities Company, Inc.

X. PENDING MOTIONS

There are no pending motions at this time.

XI. OTHER MATTERS

- 1) An issue asking whether the party-objectors present a legal or factual basis which would merit a finding by the PSC that the transfer should not take place was dropped at the Prehearing Conference on the motion of the utility as duplicative.
- 2) Former Harbor customers will be permitted an opportunity to address the Commission at the start of the hearing.

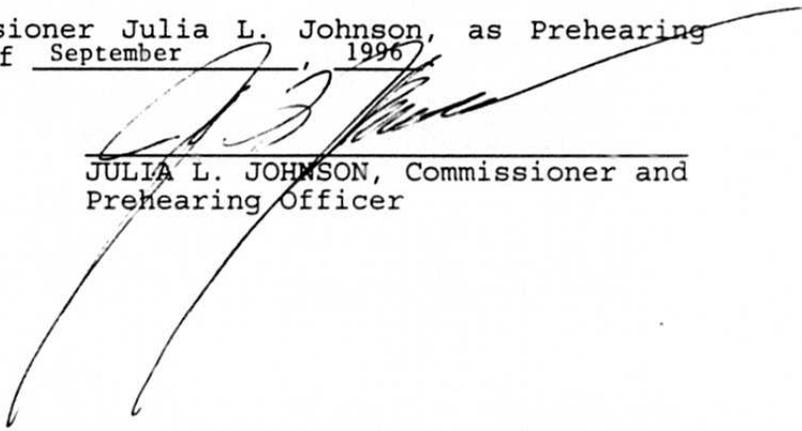
XII. RULINGS

- 1) In the present posture of this docket, and subject to the Commission's determination, the Office of Public Counsel shall be permitted to provide continuing counsel to Barbara F. Fagan, but shall not be permitted to participate in the hearing.
- 2) Discovery must be completed by September 25, 1996.
- 3) The parties shall respond to interrogatories and requests for production of documents within 10 days after service.
- 4) The parties may take depositions upon 3 days notice.

It is therefore,

ORDERED by Commissioner Julia L. Johnson, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Julia L. Johnson, as Prehearing Officer, this 20th day of September, 1996



JULIA L. JOHNSON, Commissioner and
Prehearing Officer

(S E A L)

CJP

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.