

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for  
certificate to operate water and  
wastewater utility in Marion  
County by Ocala Springs  
Utilities Inc.

DOCKET NO. 980876-WS  
ORDER NO. PSC-98-1374-PCO-WS  
ISSUED: October 12, 1998

The following Commissioners participated in the disposition of  
this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION  
ORDER GRANTING AMENDED PETITION FOR TEMPORARY VARIANCE FROM OR  
TEMPORARY WAIVER OF RULES 25-30.033(1)(h), (j), (k), (m), (o),  
(r), (t), (u), (v), (w), (2), (3), and (4),  
and 25-30.433(10), FLORIDA ADMINISTRATIVE CODE

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

On July 13, 1998, Ocala Springs Utilities, Inc., (OSUI)  
submitted an application for original certificates to operate a  
water and wastewater utility in Marion County, Florida, along with  
a petition requesting a temporary variance from or a temporary  
waiver of Rules 25-30.033(1)(h), (j), (m), (o), (r), (t), (u), (v),  
(w), (2) and (3) and 25-30.433(10), Florida Administrative Code.  
On July 31, 1998, the utility filed an amended petition requesting  
a temporary variance from or temporary waiver of Rules 25-  
30.033(1)(k) and (4), Florida Administrative Code, in addition to  
the above-mentioned rules.

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FLORIDA PUBLIC SERVICE COMMISSION

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OSUI is a wholly-owned subsidiary of Avatar Utilities, Inc., (Avatar), which is a wholly-owned subsidiary of Avatar Holdings, Inc., (Avatar Holdings). Avatar's other operating subsidiaries include Florida Cities Water Company, which serves customers in six Florida communities, and Poinciana Utilities, Inc., which provides service to customers in Osceola and Polk Counties.

OSUI has been created for the specific purpose of providing water and wastewater service to Ocala Springs which is planned to be an active adult community. Avatar Holdings owns all the land, consisting of 4,666 acres, included within the boundary of Ocala Springs.

This action pertains to the amended petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code. The issue of whether a certificate of authorization to provide water and wastewater service should be granted to OSUI will be determined at a later date.

AMENDED PETITION FOR TEMPORARY RULE WAIVERS OR VARIANCES

Rules 25-30.033(1)(h), (k), (o), (r), (t), (u), (v), and (w), Florida Administrative Code, pertain to the establishment of rates and charges and require the utility to submit: information regarding the number of equivalent residential connections proposed to be served; one original and two copies of a sample tariff containing all rates, classifications, charges, rules, and regulations; a statement regarding the capacities of the proposed lines and treatment facilities; a statement of the financial condition of the applicant; a cost study supporting the proposed rates, charges, and service availability charges; schedules showing the projected cost of the proposed system; the proposed operating expenses of the proposed system; and the projected capital structure including methods of financing the construction. Rules 25-30.033(1)(j) and (m), Florida Administrative Code, apply to certification and require the applicant to provide evidence of ownership or continued use of the land upon which the facilities are or will be located and to submit a detailed system map showing the location of the proposed lines, treatment facilities, and territory proposed to be served.

Rules 25-30.033(2), (3), and (4), Florida Administrative Code, require the utility to implement the base facility and usage rate structure, to establish a return on common equity using the Commission's approved leverage formula, and authorizes the accrued allowance for funds used during construction. Rule 25-30.433(10), Florida Administrative Code, also requires the utility to provide proof that it owns the land upon which the facilities are or will be located.

#### Statutory Requirements

On August 14, 1998, notice of the petition and the amended petition to temporarily waive or vary the above-mentioned rules was published in the Florida Administrative Weekly pursuant to Section 120.542(6), Florida Statutes. No written comments were received, and the time for filing such has expired.

Pursuant to Section 120.542(8), Florida Statutes, we are required to grant or deny a petition for variance or waiver within 90 days after receipt of the completed petition. Therefore, we must rule on OSUI's petition by October 28, 1998.

Section 120.542(1), Florida Statutes, states that agencies are authorized to grant variances and waivers of their rules. Section 120.542(2), Florida Statutes, requires the entity requesting a rule waiver or variance to demonstrate that the "purpose of the underlying statute will be or has been achieved by other means" and that the "application of the rule would create a substantial hardship or would violate the principles of fairness." Section 120.542(2), Florida Statutes, defines "substantial hardship" as demonstrated economic, technical, legal, or other type of hardship.

#### The Underlying Statutes

The underlying statutes pertaining to the rules in this instance are Sections 367.031 and 367.045, Florida Statutes. Section 367.031, Florida Statutes, requires a utility to obtain from the Commission a certificate of authorization to provide water and wastewater service. Moreover, Section 367.045(5)(a), Florida Statutes, states that the Commission may grant a certificate of authorization in the public interest. The purpose of Sections 367.031 and 367.045, Florida Statutes, is to ensure that a utility has the financial and technical ability to provide service and that there is a need for service in the proposed service area.

Although OSUI requested a temporary waiver of the rule requiring a utility to submit its financial statements, OSUI provided an agreement made with its parent company, Avatar, in which Avatar promises to finance the initial operation of the proposed facility and included the consolidated financial statements of Avatar, Avatar Holdings, and Avatar's subsidiaries which show OSUI has the financial backing to operate a water and wastewater system. To demonstrate its technical ability, OSUI points to the fact that Avatar is a utility holding company which has provided water and wastewater service through its subsidiaries since 1956. Also, OSUI included in its application an agreement made with Avatar whereby Avatar promises to convey title to the land upon which the facilities will be located.

The future Ocala Springs community will need water and wastewater service. OSUI stated that Ocala Springs is not within the service area of the City of Ocala nor the Marion County Water and Wastewater Utility Planning and Service areas. No protests to the application have been received, and the time for filing such has expired.

#### Substantial Hardship

OSUI contends that the development plans for Ocala Springs are "predicated on the assurances and economic feasibility of water and wastewater service which can only be achieved through the creation of a utility entity and the construction of the required water and wastewater infrastructure to serve the development." Thus, OSUI faces the technical hardship of needing the water and wastewater certificates in order to proceed with the development plans for Ocala Springs, and initial rates and charges for the utility cannot be established until the development plans are complete.

In the past, we have bifurcated the application for certificate process, allowing utilities to defer the establishment of initial rates and charges. See In re: Application of Malabar Woods Utilities, Inc. for water and sewer certificates in Brevard County, Florida, Docket No. 890694-WS, Order No. 21641, July 31, 1989; see also In re: Application of Island Landing Utilities Company for original water and sewer certificates in St. Johns County, Docket No. 871108-WS, Order No. 18729, January 25, 1988; see also In re: Application by Clyatt R. Powell, et. al. d/b/a Ravenswood Forest Utilities, for original water and sewer certificates in St. Johns County, Docket No. 871170-WS, Order No. 19436, June 6, 1988. In most cases, the utility requested

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certification without establishing initial rates and charges because the certificate was needed to obtain permits from the Department of Environmental Protection.

OSUI has not requested a permanent waiver of or variance from the foregoing rule requirements. OSUI asked that the submittal of detailed system maps and evidence of ownership of the plant sites be deferred until it submits its application for a consumptive use permit with the water management district (for water) and its application for construction permits to the Florida Department of Environmental Protection (for wastewater). According to OSUI's revised application, this is scheduled to occur by July 1, 1999. The utility stated that construction will commence by January 1, 2000. OSUI requested that the submittal of a separate application for initial rates and charges be deferred until 24 months following the issuance of any Commission order granting the utility's original certificates.

#### CONCLUSION AND FINDINGS

OSUI has demonstrated that it has achieved the underlying purpose of Sections 367.031 and 367.045, Florida Statutes, pertaining to the certification of utilities. Furthermore, OSUI has shown that it will face a substantial hardship if all the provisions of Rule 25-30.033, Florida Administrative Code, are strictly applied. Therefore, based on Section 120.542, Florida Statutes, we grant OSUI's amended petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code.

Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, this docket shall remain open pending our further action on OSUI's application for original water and wastewater certificates.

Based on the foregoing, it is

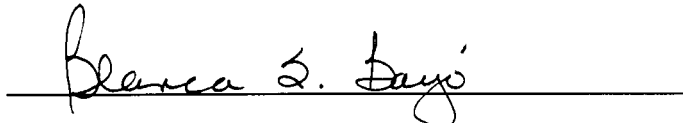
ORDERED by the Florida Public Service Commission that Ocala Springs Utilities, Inc.'s amended petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code, is hereby granted. It is further

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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 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 upon expiration of the protest period, this docket shall remain open pending this Commission's action on Ocala Springs Utilities, Inc.'s application for original water and wastewater certificates.

By ORDER of the Florida Public Service Commission this 12th day of October, 1998.

A handwritten signature in cursive script, reading "Blanca S. Bayó", is written over a solid horizontal line.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

SAM

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 2, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

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.