BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Bayside Mobile Home Park against Bayside Utility Services, Inc. regarding denial of request for water and wastewater service in Bay County.	DOCKET NO. 010726-WS ORDER NO. PSC-01-2095-PAA-WS ISSUED: October 22, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

NOTICE OF PROPOSED AGENCY ACTION
ORDER DISPOSING OF COMPLAINT OF BAYSIDE MOBILE HOME PARK AND REQUIRING BAYSIDE UTILITY SERVICES, INC. TO TIMELY INSPECT AND RESPOND TO PLANS AND SPECIFICATIONS FOR ON-SITE DEVELOPMENT
AND
FINAL ORDER DECLINING TO INITIATE INVESTIGATION INTO DELETION OF SERVICE TERRITORY

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein, except for the decision not to initiate an investigation into whether territory of Bayside Utility Services, Inc. should be deleted, 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

Our staff filed its initial recommendation in this complaint docket on August 23, 2001 for consideration at the September 4, 2001 Agenda Conference. However, the request of Bayside Mobile Home Park (complainant, developer, or BMHP), for a deferral was granted.

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Moreover, on September 4, the complainant filed its Second Response to Staff's First Data Request (Second Response), in which it took exception to several statements made in staff's initial recommendation dated August 23, 2001. By letter dated September 12, 2001, Bayside Utility Services, Inc. (BUSI or utility) responded to BMHP's Second Response to Staff's First Data Request. In this letter, BUSI stated that it agreed with staff's initial analysis. Moreover, BUSI states that "even if everything in the 'Second Response' were accepted as correct and accurate (much of which the utility disputes), it is evident that there is nothing therein which would change the result of the staff recommendation dated August 23, 2001."

Also, on September 12, 2001, BMHP submitted what it entitled its Third Response to Staff's First Data Request (Third Response). Based on the above-noted filings, staff filed a revised recommendation on September 20, 2001, which we considered at the October 2, 2001 Agenda Conference.

BUSI is a Class C water and wastewater utility serving Bayside Mobile Home Park in Bay County. The utility purchases water and wastewater services from the City of Panama City Beach (City). According to the utility's 2000 annual report, it has approximately 287 water and 287 wastewater active connections.

Order No. PSC-99-1818-PAA-WS issued September 20, 1999, approved the transfer of Certificates Nos. 469-W and 358-S from Bayside Utilities, Inc., to BUSI. BUSI was incorporated on November 6, 1998, as a Florida corporation and is a wholly-owned subsidiary of Utilities, Inc., a corporation based in Illinois. Prior to the transfer of the utility to BUSI, BMHP had been established in 1972, and had been purchased by Bayside Partnership in 1984. Bayside Utilities, Inc., the former utility, was formed in 1987, and was a wholly owned subsidiary of Bayside Partnership.

As required by Rules 25-30.037(2) (g), (h), (i), and (k), Florida Administrative Code, the transfer application was accompanied by the Asset Purchase Agreement (sales contract) executed on October 7, 1998. However, the closing did not occur until June 17, 1999. The agreed upon purchase price was $190,000 and it was a cash transaction. At that time, BUSI took over the utility and the remaining portion of the business became known as Bayside Mobile Home Park.

Apparently, BMHP began plans for expansion as early as 1997, and BMHP hired Mr. George Walrond, P.E., on July 13, 1998, to begin the engineering process to develop the vacant property. Mr. Walrond was replaced by Mr. Sam McNeil, P.E., on July 7, 1999. The new expansion area is to include 65 new lots for mobile homes and 10 lots for single-family, waterfront residences on the bay. This expansion was to take place in an unoccupied area in the northwest section of the service area. The area is currently being used for garbage receptacles and parking for various sports recreation equipment.

An ordinance of the City imposes an impact fee on additional connections to the water and wastewater systems. The developer forwarded a schedule of these proposed fees to the utility which included a fee of $2,420.78 for each mobile home added to the system and $2,796.02 for each single family residence added to the system. The total impact fees required by the City totaled $185,310.90 and were expected, by the developer, to be paid by the utility.

Upon receipt of this information, the utility took the position that the developer was responsible for the impact fees imposed by the City. In a letter to the utility and to the Commission dated March 6, 2000, the developer argued that BUSI's tariff indicates that the main extension charge is $300 per connection. The developer also argued that the utility is responsible for supplying water and wastewater service to the proposed lots since they were in the prescribed service area. The developer also suggested to BUSI that the tariff should be changed to accommodate the impact fee imposed by the City.

In a letter dated March 21, 2000, the developer sent another letter to the utility. The developer, Mr. Leonard Jeter, met with the City Manager of the City, Mr. Richard Jackson, on the matter of the impact fees. Our staff states that Mr. Jackson informed the developer that it is typical for the end user (purchaser of a lot) to pay the impact fees for the water and wastewater connections at the time that they purchase the lot and begin building.

In its initial recommendation, our staff believed that the conflict had been resolved. However, in its Second Response, BMHP stated that this was not the case. BMHP maintains that it has always been and still is the position of BMHP that the impact fees

of the City are owed by and should be paid by BUSI. However, by letter dated March 21, 2000, Mr. Jeter, representing BMHP, admitted that the problem of the impact fees was solved when the City agreed that the burden of paying the impact fees was on the lot purchaser, where it should be. Despite the fact that that problem appears to be resolved, BMHP believes that the utility should still consider revising its tariff to include the impact fees to the City.

In addition to the question of who should pay the impact fees, the question arose as to who was responsible for the installation of the water service lines and the wastewater collection lines in the proposed development. In a letter to the utility dated April 25, 2000, the developer made its position clear that it believed it was the responsibility of the utility to provide the water and wastewater extensions into the proposed development. The developer stated that it would not make sense for the developer to install the needed system and then hand it over to the utility free of charge for the purpose of profit. The developer further stated that his understanding of Commission rules indicated that a donated system would not add to utility rate base and would not allow a return since it would be considered contributions-in-aid-of-construction (CIAC). The developer also made it clear that it wished to be reimbursed for the engineering expenses which were associated with the planning of the water and wastewater systems of the proposed development.

On March 2, 2001, the utility submitted a developer's agreement to the developer in an effort to clarify any misunderstanding about responsibility for the proposed utility extension. The agreement indicated that the developer would be liable for the installation of the proposed water and wastewater distribution and collection lines and also required the developer to essentially warranty the lines against malfunctions or breaks for a period of one year. The developer refused to sign the agreement on the grounds that in its tariff, the utility has main extension charges of $300 per connection. The developer believes that it should only be charged $300 for each of the additional 75 connections within the proposed development area. These charges would only account for $22,500 of the estimated $100,000 - $150,000 necessary to complete the extension of the water and wastewater systems.

On May 11, 2001, the developer filed a complaint with this Commission pursuant to Rule 25-30.540(4), Florida Administrative Code, which states, "If an applicant (for service) believes the charges required by a utility pursuant to subsections (2) and (3) are unreasonable, the applicant may file a complaint with the Commission in accordance with Chapter 25-22, F.A.C."

The complaint states that BUSI is in violation of Rule 25-30.520, Florida Administrative Code, which states, "It is the responsibility of the utility to provide service within its certificated territory in accordance with terms and conditions on file with the Commission."

The developer is asking us to determine who is financially responsible for the installation of the proposed utility extension. We have jurisdiction pursuant to Sections 367.101 and 367.121, Florida Statutes.

COMPLAINT

Upon receiving this complaint, our staff sent data requests to both the developer and the utility in an effort to obtain additional information that would help resolve the complaint by the developer. In the data request to the developer, our staff asked whether it was possible or feasible to include the cost of providing utility service in the price of the lots that are to be sold within the expansion area. In its responses, the developer stated that it believes that including the costs of the utility expansion in the lot prices places an unfair burden on the developer and could jeopardize both the potential for sales and potential for a reasonable profit from the venture.

The developer went on to cite Commission Order No. 18624 issued January 4, 1988, in Docket No. 870093-WS, a staff-assisted rate case for Bayside Partnership which was then both the developer and the utility, but is now the developer. In that Order, this Commission ordered the utility to borrow approximately $250,000 to supply a needed expansion and upgrades to the utility. It is the developer's opinion that the utility should similarly be forced to expand in this situation. However, we find that the situation in 1988 was far different from the situation now.

Pursuant to Order No. 18624, this Commission found that the wastewater treatment facility was in violation of Department of Environmental Regulation (now Department of Environmental Protection - hereinafter DEP) requirements, and that, in addition to the noted problems with the percolation ponds, there were "additional requirements needing the utility's attention." Although a consent order was drafted, it was not signed by the utility. Instead, the utility pursued interconnection with the City and retired its wastewater treatment plant.

In any event, at the time of the interconnection with the City, the utility had to take some action to bring it in compliance with the rules and regulations of DEP. In Order No. 18624, this Commission determined that the utility, and not the customers, should bear the cost of the interconnection. However, this Commission did allow the utility to recover the costs of the interconnection through its rates.

In the current situation, the utility is neither in violation of any DEP or Commission rules, nor is it in a situation where forced abandonment is on the horizon for failure to comply. Service is being requested by the developer for an area of future development. The utility is being asked to spend in excess of $100,000 by the developer for a proposed development that essentially has an uncertain future.

In its data request to each entity, our staff requested an estimate of time as to when the proposed expansion area would be built out. The developer estimated that it would be from two to three years before the entire area was built out. The utility was unsure how long full occupancy would take and whether full occupancy would be achieved at all. The utility further argued that it would be unfair for it to install a system that may lay dormant for years as nonused and useful. It further argued that if the system were considered used and useful, it would be included in rate base and would place an unfair burden on the current residents who are receiving no benefit from the lines being added for the expansion.

As with most real estate ventures, the proposed expansion is speculative at best. We have no reason to believe that all of the proposed lots and building sites will be sold as downturns in the economy and a number of other factors may leave the area unoccupied

for some time. Moreover, if the system were put in place, the utility might see no immediate return on investment and at least a portion of the system would be considered nonused and useful until the expansion area was built out. If the system is considered nonused and useful, the utility will receive no return on investment until the system is determined to be used and useful in a future rate case. Moreover, because the utility is a reseller, a large increase in rate base would place an unfair burden on current customers of the utility. The current customers could see a large increase in rates due only to the expansion of the water and wastewater lines. Based on the above concerns, the costs associated with a proposed real estate development shall not become a burden to either the utility or to the utility's current customers.

Also in the data requests, our staff inquired as to whether the terms of the expansion were discussed during the negotiation phase of the sale of the utility. The developer indicated that it was discussed with all parties involved with the sale. However, the utility asserted that the expansion was mentioned only after the closing of the sale. Moreover, the utility states that during the negotiations, there was no discussion of expansion, there was no developer agreement drafted, nor were there any terms included as part of the sale of the utility that would indicate that the utility would install the lines for the proposed expansion. The utility states that in Article I, Section 5, of the asset purchase agreement for the utility, the seller (developer) was selling ". . . a complete water distribution system, and a complete central sewer collection system."

In its Second Response to the data request, the developer cited Rule 25-30.520, Florida Administrative Code, which states: "It is the responsibility of the utility to provide service within its certificated territory in accordance with terms and conditions on file with the Commission." BMHP goes on to state that BUSI was fully aware of the expansion plans and purchased the system knowing that it would eventually have to provide service to the proposed development. BMHP contends that the utility should be obligated to install the water and wastewater extensions for the $300 per unit main extension charge set forth within the tariff of the utility.

While this may be true for an individual requesting an extension of services to an individual lot, Rule 25-30.585, Florida

Administrative Code, sets forth service availability charges for a developer. The rule states:

> . . . service availability charges for real estate developments shall not be less than the cost of installing the water transmission and distribution facilities and sewer collection system and not more than the developer's hydraulic share of the total cost of the utility's facilities and the cost of installing the water transmission and distribution facilities and sewage collection systems.

In its Third Response, BMHP vehemently disagrees that Rule 25-30.585, Florida Administrative Code, is applicable. BMHP argues that Rule 25-30.585, Florida Administrative Code, is subject to the limitation in Rule 25-30.580, Florida Administrative Code.

Rule 25-30.580, Guidelines for Designing Service Availability Policy, merely states:

> A utility's service availability policy shall be designed in accordance with the following guidelines:
>
> (1) The maximum amount of contributions-in-aid-of-construction, net of amortization, should not exceed 75% of the total original cost, net of accumulated depreciation, of the utility's facilities and plant when the facilities and plant are at their designed capacity; and
>
> (2) The minimum amount of contributions-in-aid-of-construction should not be less than the percentage of such facilities and plant that is represented by the water transmission and distribution and sewage collection systems.

Moreover, BMHP argues that because BMHP is not a new development, Rule 25-30.585, Florida Administrative Code, does not apply. We disagree.

According to this rule, if the utility chose to install the necessary lines for the systems, the developer would still be responsible for the costs associated with the extension. Therefore, we find that the utility is not liable for the costs of installing the additional distribution and collection lines for the

proposed expansion. However, if BMHP believes that BUSI specifically contracted to pay for the expansion, other than the $300 main extension charge, then BMHP's remedy is to file an action in circuit court for enforcement of such contract and reimbursement for the costs of installing the distribution and collection mains.

Based on all of the above, we find that the current situation is entirely different from the time when Bayside Utilities, Inc., made the decision to interconnect with the City. That was a part of a DEP enforcement action. In the current situation, a developer (BMHP) merely wants service. BMHP shall pay for this expansion and the current ratepayers shall not have to endure the risks associated with this new development. Therefore, the utility shall not be required to install wastewater collection lines, manholes, and water distribution lines in the proposed expansion area. Moreover, through review of the data requests sent to the parties involved with the complaint, we find that the developer should be responsible for all costs of development.

The developer also indicated that failure of the utility to expand services would require the developer to begin negotiations with the City in an effort to gain services to the proposed site. However, Mr. Albert Shortt, the Utilities Director for the City, states that the duty of supplying lines to a proposed development would be at the expense of the developer. In instances where the City installs the lines, the developer is usually required to reimburse the City for the cost of the lines and collection systems. Therefore, if the proposed development were to interconnect with the City, the developer would be responsible not only for the lines and collection systems in the proposed development, but also for several thousand feet of additional water and wastewater lines needed to reach possible connection points with the City's main lines, plus the City's impact fees, totaling $185,310.90.

The developer indicated that the cost of installing the needed utility lines will ". . . put an unfair burden on this developer as the land acquisition costs and other development costs would jeopardize both the potential for sales and a reasonable profit on the venture." Speculative real estate development does not go without risks. We believe that, if the costs of the lines and distribution systems are evenly spread over the total number of proposed lots, the necessary price increases needed to cover

utility system costs are not significant. In fact, it would be considerably less than the City-mandated impact fees that will be included with each lot.

The utility has requested that, if the developer chooses to contract for the installation of the lines, the developer should be responsible for the proper working of the lines for a period of nine months following the installation. This is a standard practice throughout the State of Florida and we find this to be fair in that the developer will then be responsible if less than acceptable work is performed in the installation of the lines.

Based on all of the above, the developer shall be responsible for the costs associated with the installation of the wastewater collection lines, main sewer lines, and the water distribution lines throughout the development. The developer has the option of installing the necessary lines itself or paying the utility to install the lines.

Moreover, as stated in BMHP's Second Response, the City has now agreed that the total amount of $185,310.90 for impact fees need not be paid up front and may be collected from each customer as each lot is purchased and construction begins.

In its complaint, BMHP also requests that BUSI be ordered to reimburse BMHP for its engineering costs incurred to date. However, the utility has indicated that at no time did it instruct the developer to contract the services of an engineer to perform an analysis or develop plans for the proposed system in the proposed expansion area. The developer believed that he would expedite the process of development by acquiring the services of an engineer to perform analyses and plan the proposed utility expansion.

Rule 25-30.540 (2), Florida Administrative Code, states that "An advance deposit may be required by the utility at the time of execution to cover the additional utility costs of engineering plans and cost estimates of construction required to serve the property. . . ." By this rule, it appears that the developer would be responsible for the costs of engineering and obtaining estimates if the utility were required to install the lines.

We have already concluded that the utility should not be obligated to install the lines and collection systems at its own

expense in the proposed service area. Moreover, the utility shall not be responsible for any unsolicited engineering expenses that may have been incurred by the developer. The developer contracted with the engineering firm to expedite the completion of the expansion. Therefore, we find that the developer is responsible for any expenses incurred by hiring the engineer.

Although the utility is not liable for the developer's engineering expenses, the utility will be responsible for approval of plans for the expansion area. Rule 25-30.540, Florida Administrative Code, states:

> An applicant may use its engineer to prepare plans and specifications for its on-site development. However, such plans and specifications and the on-site water or wastewater facilities will be subject to the utility's inspection and approval. An appropriate inspection and plan review fee may be charged by the utility.

In order to not further delay the development or cause any undue hardship for the developer, the utility shall properly review any engineering plans submitted and respond in a timely manner as to the adequacy of the plans.

INITIATION OF AN INVESTIGATION TO DELETE TERRITORY

As discussed above, the developer contends that failure of the utility to provide service will require discussions with the City in an effort to obtain utility services for the proposed expansion area. The developer has requested that the proposed expansion area be deleted from the service area of BUSI so that the developer may obtain services from an outside source; in this case, the City.

It appears that interconnection with the City will likely prove to be much more expensive for the developer than interconnection with BUSI. To interconnect with the City, the developer would be responsible for the same distribution and collection lines plus several thousand feet of additional lines to reach the City's main distribution and collection lines. Also, due to the location of the proposed expansion area, the lines would have to travel through almost the entire length of the utility's service area in order to reach the City's main lines. The utility has indicated that it would not allow this to occur.

Connection with BUSI appears to be the best alternative for the developer. Moreover, the utility has not indicated an unwillingness or an inability to provide the service. Therefore, we decline to initiate an investigation as to whether the portion of the utility's service area that will contain the proposed development should be deleted from the utility's certificates.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Bayside Mobile Home Park shall be responsible for all costs associated with the installation of the wastewater collection lines, manholes, and water distribution lines throughout the proposed development if it wishes to receive water and wastewater services from Bayside Utility Services, Inc. It is further

ORDERED that Bayside Utility Services, Inc. shall not be required to reimburse Bayside Mobile Home Park for the engineering costs associated with this development. It is further

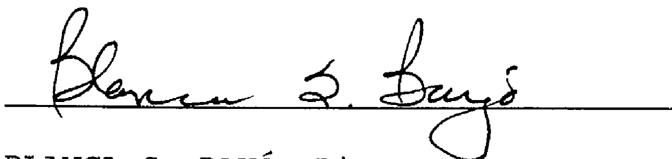
ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that pursuant to Rule 25-30.540, Florida Administrative Code, the engineering plans for the development are subject to the approval of Bayside Utility Services, Inc. However, Bayside Utility Services, Inc. shall properly review any engineering plans submitted and respond in a timely manner as to the adequacy of the plans, in order to not further delay the development or cause any undue hardship for the developer. It is further

ORDERED that no investigation into deletion of the utility's service territory shall be initiated at this time. It is further

ORDERED that upon expiration of the protest period, this docket shall be closed upon the issuance of a Consummating Order, if no person, whose interests are substantially affected by the proposed actions, files a protest within the 21 day protest period.

By ORDER of the Florida Public Service Commission this 22nd day of October, 2001.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

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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, except for the decision not to initiate an investigation into whether territory of Bayside Utility Services, Inc. should be deleted, 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 the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 12, 2001.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

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.

Any party adversely affected by the Commission's final decision not to initiate an investigation into whether territory of Bayside Utility Services, Inc. should be deleted may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 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 the Commission Clerk and Administrative Services 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.