

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EAST MARION SANITARY SYSTEMS,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 12-0909
)
PUBLIC SERVICE COMMISSION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before W. David Watkins, Administrative Law Judge of the Division of Administrative Hearings, on June 12, 2012, in Ocala, Florida.

APPEARANCES

For Petitioner: No appearance

For Respondent: Martha F. Barrera, Esquire
Lisa Bennett, Esquire
Florida Public Service Commission
2540 Shumard Oak Blvd.
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For Intervenor: Millicent Mallon, pro se
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For Intervenor: Terry Will, pro se
1385 Northeast 130th Terrace
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STATEMENT OF THE ISSUE

Are Intervenors Mallon and Will each entitled to the installation of an irrigation meter with a "dedicated line configuration" at the prior tariffed rate of \$70.00?

PRELIMINARY STATEMENT

On August 19, 2008, East Marion Sanitary Systems, Inc. (East Marion or Utility) filed an application with the Florida Public Service Commission (Commission) for approval to amend its tariff sheets. Among the changes requested was an increase in meter installation charges, and the imposition of a new tap-in fee. The application was processed and on April 27, 2009, the Commission issued Order No. PSC-09-0263-TRF-WU (2009 Order) approving a new meter installation fee of \$195 and tap-in fees of \$1,400, \$1,800, and \$2,600 for the short, long, and extra-long irrigation service line installations, respectively.

In the 2009 Order, the Commission ordered that any customer who requested an irrigation meter from the Utility prior to April 7, 2009, would only be charged the \$70 rate in effect at the time of their request. On May 15 and 18, 2009, the Utility timely protested the portion of the Commission's order requiring the Utility to install irrigation meters at the prior tariff rate for customers requesting the meters prior to April 7, 2009. On September 15, 2010, the Commission granted Terry Will and Millicent Mallon's motions to intervene wherein they alleged

they were entitled to the installation of irrigation meters at the \$70 rate. Several other Utility customers who had requested meters also intervened in the action.

On September 29, 2011, East Marion, a majority of the intervenors, and the Office of Public Counsel (on behalf of all ratepayers), filed a joint motion for Commission approval of a settlement agreement wherein East Marion would install irrigation meters for the customers signing the agreement at the prior tariff rate of \$70 using an agreed-upon meter configuration. Intervenors Will and Mallon did not sign the agreement. On December 12, 2011, the Commission entered an order (2011 Order) approving the settlement agreement only as to the customers/intervenors who signed the agreement.

On December 29, 2011, East Marion protested the December 12, 2011, Order stating Will and Mallon were not entitled to a meter at the prior tariff rate. On January 11, 2012, Will filed a protest of the 2011 Order. On March 14, 2012, the Commission referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing.

Pursuant to notice, the hearing was convened on June 12, 2012, in Ocala, Florida. East Marion did not appear at the hearing and did not present any evidence. Mr. Mike Smallridge appeared at the hearing and represented that the Utility's

owner, Herbert Hein, asked him to state that the Utility had now agreed to install irrigation meters for Will and Mallon.

Mr. Smallridge stated, however, that Mr. Hein did not indicate that he would install the meters at the \$70 fee.

Mr. Smallridge, who is not an attorney, also stated that he was not appearing on behalf of the Utility and was not an agent, employee or representative of East Marion.

The Commission presented the testimony of Bart Fletcher and James McRoy, and introduced one exhibit into evidence.

Intervenors Will and Mallon each testified on their own behalf.

Mallon submitted five exhibits into evidence and the parties offered 9 joint exhibits, all of which were admitted. The Commission's motion to deem the request for admissions propounded by the Commission on East Marion was granted.

At the conclusion of the hearing the parties requested, and were granted, leave to submit their proposed recommended orders 30 days after the transcript was filed. The Transcript was filed at the Division on June 19, 2012, and on July 18, 2012, the Commission filed its Proposed Recommended Order. On August 16, 2012, Petitioner filed a Proposed Recommended Order, which Respondent moved to strike as untimely. On August 31, 2012, the undersigned entered an order denying the motion to strike. However, the order also noted that the documents attached to Petitioner's Proposed Recommended Order, which were

not offered into evidence at the hearing and were not part of the record in this case could not form the basis for any findings of fact. The Proposed Recommended Orders of both parties have been carefully considered in the preparation of this recommended order.

All citations are to Florida Statutes (2012) unless otherwise indicated.

FINDINGS OF FACTS

1. Petitioner, East Marion Sanitary Systems Inc., is a Class C investor-owned utility providing water and wastewater service to approximately 96 customers in Marion County, Florida.

2. Respondent, Public Service Commission, is an arm of the legislative branch of the State of Florida responsible for regulating investor-owned water and/or wastewater utilities pursuant to chapters 350 and 367, Florida Statutes.

3. Intervenors Terry Will and Millicent Mallon are two water/wastewater customers of the Utility.

4. A utility's rates and charges must be contained in a tariff approved by the Commission. A utility may only charge rates and charges that are approved by the Commission.

5. The purpose of an irrigation meter is to avoid being charged a sewage rate for any water used to water lawns. Without a separate irrigation meter, a consumer is charged the

sewage rate based on the amount of potable water that the consumer uses.

6. In East Marion's tariff, approved by the Commission in 2002, the charge for installation of a meter was \$70. The tariff contained no provision for tap-in fees.

7. On February 14, 2007, Ms. Mabelle Gregorio, a customer of East Marion, filed a complaint with the Commission regarding the cost of an irrigation meter. East Marion charged, and Ms. Gregorio paid, a total of \$897 for the installation of the irrigation meter.

8. On October 2, 2007, Angela and Dennis Fountain, also customers of East Marion, filed a complaint with the Commission regarding the \$597 they were required to pay the Utility for the installation of an irrigation meter.

9. In response to the complaints, Mr. Hein, the Utility owner, stated in a letter to the Commission that there was no way to install an irrigation meter to the existing piping.

10. By Commission Order No. PSC-08-0182-PAA-WU, issued March 25, 2008, East Marion was required to refund the sum of \$824 to Ms. Gregorio, and the sum of \$527, with interest, to the Fountains.

11. In the March 25, 2008, Order, the Commission stated: "[w]hile we agree that the actual cost of the meter installation

may have exceeded \$70, the utility may only charge the fees contained in its approved tariff."

12. East Marion did not request that the Commission approve a change to its tariff charges for installation of irrigation meters until August 2008. On August 19, 2008, East Marion filed an application for Commission approval to amend its tariff sheets to reflect, among other items, an increase in meter installation charges, and the imposition of new tap-in fees.

13. Prior to April 27, 2009, a notice was placed on the locked bulletin board located at the Utility's office stating that no irrigation meters would be put in place until the requested new rates went into effect.

14. On September 26, 2008, Mr. Herbert Hein, owner and operator of East Marion, left a voicemail message to Commission staff member, Shannon Hudson, regarding a customer of the Utility and the installation of irrigation meters. In the voicemail message, Mr. Hein stated that he was "in the middle of asking for an irrigation meter tariff and until that is approved, I am not installing irrigation meters."

15. In order to offer customers a separate irrigation service, East Marion's application requested approval to implement new tap-in fees with charges dependent upon whether the tap-in required a "short," "long," or "extra-long"

installation. The short installation tap-in involved installing a dedicated service line 20 feet or less where the water main is on the same side of the road as the meter. The long installation tap-in involved installing a dedicated service line 40 feet or less where the water main is on the opposite side of the road. Finally, the extra-long installation tap-in involved installing the irrigation service line 40 feet or more on the opposite side of the meter.

16. By Order No. PSC-09-0263-TRF-WU, issued April 27, 2009, the Commission approved a new meter installation fee of \$195 and tap-in fees of \$1,400, \$1,800, and \$2,600 for the short, long, and extra-long irrigation service line installation, respectively. In that same order, the Commission directed that any customer who requested an irrigation meter from East Marion prior to April 7, 2009, would only be charged the \$70 rate, which was in effect at the time of the Utility's application.

17. Intervenor Will requested the Utility to install an irrigation meter by letter to the Utility dated March 16, 2008. Will also verbally requested the installation of the irrigation meter.

18. Mallon requested East Marion to install an irrigation meter at the \$70 tariff rate in a letter written by her late husband dated January 11, 2008.

19. On May 18, 2009, the Utility protested the portion of the Commission's order addressing previous applications for irrigation meters. Specifically, East Marion protested the Commission's requirement that the Utility install irrigation meters at its prior tariff rate for some customers who requested the meters prior to April 7, 2009.

20. On April 19, 2010, Terry Will and Millicent Mallon filed testimony in Docket 080562-WU, alleging they were entitled to the installation of irrigation meters at the \$70 rate. Several other Utility customers who had requested meters also intervened in the action.

21. On September 29, 2011, East Marion, a majority of the intervenors, and Florida's Office of Public Counsel, on behalf of all ratepayers, entered into a settlement agreement, and filed a joint motion with the Commission for approval of the settlement.

22. The Commission approved the settlement agreement by Commission Order No. PSC-11-0566-AS-WU, issued December 12, 2011.

23. At paragraph 1 of the settlement agreement, East Marion agreed to provide each settling Intervenor with an irrigation meter, installed as prescribed by the June 16, 2010, memorandum titled "Settlement of Docket No. 080562-WU

("grandfather installation")". The memorandum, dated June 16, 2010, was attached as attachment "A" to the agreement and order.

24. The June 16, 2010, Memorandum stated that the meter installation would use "the less costly configuration which uses the existing 1" line that serves two houses, rather than the more expensive dedicated line that goes directly to the main." The configuration for the agreed-upon meter installation, pictured in attachment "A," did not include a separate dedicated line leading from the Utility's main line to the irrigation meter.

25. Will and Mallon declined to enter into the settlement agreement. The Commission order issued December 12, 2011, expressly held that the settlement agreement was binding only as to the customer/intervenors who signed the agreement.

26. Will and Mallon did not agree that the installation of an irrigation meter in the configuration agreed to by the parties and intervenors, depicted in the June 16, 2010, memorandum, was an appropriate installation. This is because an irrigation meter installation that serves two houses, without a separate dedicated line, may impact one neighbor's water pressure if the other neighbor is running the irrigation system.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

28. Petitioner, East Marion, has the burden of proving, by a preponderance of the evidence, that Mallon and Will were not entitled to an irrigation meter installed at the prior tariff rate of \$70. In this case, East Marion failed to meet its burden, as it did not appear at the final hearing and did not present any evidence that Mallon and Will were not entitled to irrigation meters installed at the prior tariff rate of \$70. Fla. Dep't of Transp. v. J.W.C. Co., Inc. 396 So. 2d 778 (Fla. 1st DCA 1981).

29. Section 367.081(2)(a)1., Florida Statutes, provides that the Commission shall, either upon request or upon its own motion, fix rates for water and wastewater utilities which are just, reasonable, compensatory, and not unfairly discriminatory. Section 367.081(1) provides that a utility may only charge rates and charges that have been approved by the Commission.

30. In Aloha Utilities, Inc. v. Florida Public Service Commission, 281 So. 2d 357 (Fla. 1973), the Supreme Court found that where a utility company's rate increase was not authorized by the Commission, all rates and charges were to be refunded or reduced to pre-rate hike status.

31. In 2007 and 2008, East Marion charged two customers amounts in excess of the \$70 fee for the installation of

irrigation meters. East Marion objected on the basis that the installation of the irrigation meters had required the installation of additional separate lines connected from the main line to the meter. East Marion argued that the installation of the additional lines would cost more than the existing \$70 rate. The Commission, noting that the Utility's existing tariff only provided a \$70 fee for meter installation, ordered refunds of all amounts collected in excess of the \$70 stating: "[w]hile we agree that the actual cost of the meter installation may have exceeded \$70, the utility may only charge the fees contained in its approved tariff."

32. Section 367.111 requires each utility to provide service to customers in its service territory within a reasonable time. Pursuant to Florida Administrative Code Rule 25-30.520, East Marion could not refuse to provide service within its certificated areas in accordance with the terms and conditions on file with the Commission. The terms and conditions on file with the Commission were those in East Marion's tariff, which included the installation of a meter at the rate of \$70. It is clear from the evidence presented in this case that Will and Mallon requested the irrigation meter installation prior to the April 7, 2009, date provided in the Commission's 2009 Order. It is also clear that East Marion improperly delayed providing the service to its customers when

it refused customers' requests to install meters until its application to increase the Utility's tariff was approved by the Commission.

33. Section 367.081(3), provides that in fixing rates for a water/wastewater utility, the Commission may determine the prudent cost of providing service during the period of time the rates will be in effect following the entry of a final order relating to the rate request of the utility, and may use such costs to determine the revenue requirements that will allow the utility to earn a fair rate of return on its rate base.

34. In this case, the costs of providing the meters to Will and Mallon will exceed the \$70 tariff rate. In its December 12, 2011, Order, the Commission cautioned East Marion that if it failed to prove that Mallon and Will did not request a meter, "the Utility will be required to connect the two customers at the \$70 fee and any additional costs it incurs will likely not be considered a prudent expenditure."

35. East Marion has failed to prove, by a preponderance of the evidence, that Will and Mallon did not request the meter installation prior to the April 7, 2009, deadline established in the Commission's 2009 Order. Rather, the unrebutted evidence of record established that Will and Mallon timely requested the meter installation while the approved rate was \$70 and that East Marion refused to install the meters.

36. Moreover, Will and Mallon are not bound by the stipulated meter installation configuration set forth in the settlement agreement approved by the Commission since they refused to join in the agreement.

37. The unrebutted evidence also established that an irrigation meter installation with a separate dedicated line is a superior configuration. Indeed, this was the approach used by the Utility to install the Gregorio's and Fountain's irrigation meters, believing it could recoup the full cost of the installation.

38. Section 367.091(1), (3), and (4), provide that each utility's rates, charges, and customer service policies must be contained in a tariff approved by and on file with the Commission. Further, a utility may only impose and collect those rates and charges approved by the Commission for the particular class of service involved. A change in a utility's rate schedule may not be made without Commission approval.

39. Since the Utility did not have an additional fee in its approved tariff for the installation of an irrigation meter with a dedicated line at the time Will and Mallon requested installation, East Marion can only charge \$70 for the installation with the dedicated line.

40. As Will and Mallon requested the meter installation prior to the April 7, 2009, deadline, they are entitled to the installation of an irrigation meter with a separate dedicated line at the prior tariff rate of \$70.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Public Service Commission enter a Final Order dismissing Petitioner's protest and ordering the Utility to install irrigation meters with a dedicated line for Intervenors Will and Mallon at the prior tariff rate of \$70.

DONE AND ENTERED this 17th day of September, 2012, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
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this 17th day of September, 2012.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.