State of Florida

Public Service Commission

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DATE: FEBRUARY 21, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (CLAPP, WALDEN, KAPROTH)
OFFICE OF THE GENERAL COUNSEL (CROSBY, HELTON)

RE: DOCKET NO. 010506-WU - APPLICATION FOR TRANSFER OF A PORTION OF THE WATER FACILITIES OPERATED BY A. P. UTILITIES, INC., HOLDER OF CERTIFICATE NO. 380-W IN MARION COUNTY, TO MARION COUNTY UTILITIES.
COUNTY: MARION

AGENDA: 03/05/02 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUE NO. 3 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\010506WU.RCM

CASE BACKGROUND

A. P. Utilities, Inc. (APU or utility) is a Class B utility serving approximately 1,017 residential water customers in Marion County (in the St. Johns River Water Management District (SJRWMD)). All of the APU customers are on septic tanks. Pursuant to Order No. 11475, issued December 29, 1982, in Docket No. 810364-W, Water Certificate No. 380-W was granted in the name of Maco Developments, Inc. The certificate was transferred twice (Dockets No. 881603-WU and 910117-WU) and amended several times to include additional territory. (Dockets No. 870169-WU, 910116-WU, 910118-WU, and 910119-WU) In Docket No. 981030-WU, two of the systems were transferred to another Commission regulated utility. The utility consists of five service areas, Raven Hill, South Oak, Evergreen-Peppertree, South Ocala Industrial Park (SOIP), and Quail Run. The

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utility's 2000 annual report shows total operating revenue of $227,555 and a net operating loss of $554.

On April 17, 2001, the utility filed an application for transfer of the Raven Hill, South Oak, Evergreen-Peppertree, and South Ocala Industrial Park water systems to Marion County (County). As a result of the filing, staff became aware of the existence of the SOIP system, which the utility thought was exempt from Commission regulation because it was such a small system. However, the utility found it easier to pay regulatory assessment fees based on all of the customer payments than to try to segregate the revenue of SOIP. SOIP will be discussed further in Issue 1. The transfer includes all 296 customers of Raven Hill, all 394 customers of South Oak, all 271 customers of Evergreen-Peppertree and all 14 customers of SOIP. This leaves the utility with the Quail Run service area, which includes 66 customers. The utility is in the process of negotiating the transfer of that system.

The purpose of this recommendation is to address whether the transfer of four of APU's five systems to the County should be approved as a matter of right, to amend Certificate No. 380-W, and to address whether the utility should be required to show cause for operating a system outside of its certificated territory. The Commission has jurisdiction pursuant to Section 367.071, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should APU be ordered to show cause, in writing within 21 days, why it should not be fined for serving outside its certificated territory in apparent violation of Section 367.045(2), Florida Statutes?

RECOMMENDATION: No. A show cause proceeding should not be initiated. (CROSBY, CLAPP)

STAFF ANALYSIS: APU acquired the Evergreen, Indian Trails, and Peppertree systems pursuant to Order No. 25075, issued September 17, 1991, in Docket No. 910118-WU, from Aqua Pure Water Company and

continued serving the territory served by the previous owner. Included in the purchase was SOIP, which the previous owner believed to be exempt because it was a small system. The SOIP system is located outside of APU's certificated territory and is not exempt from Commission jurisdiction because it is a part of APU's whole system. APU has provided service outside of its territory since acquiring the SOIP system, which is an apparent violation of Section 367.045(2), Florida Statutes. Section 367.045(2) states, in part,

> A utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the commission. . .

Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than $5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission.

Utilities are charged with the knowledge of the Commission's rules and statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, entitled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Although the utility's failure to comply with Section 367.045(2), Florida Statutes, could be said to be willful in the sense intended by Section 367.161, Florida Statutes, staff believes that the utility's actions do not rise in these circumstances to the level that warrants the initiation of a show cause proceeding. APU simply continued service to the area served by the previous owner. Further, the territory was transferred to Marion County on June 26, 2001, and is, therefore, no longer subject to Commission jurisdiction. In addition, APU included the revenues from the SOIP

system in its annual reports and paid RAFs on the additional territory during its time of ownership. Therefore, staff recommends that the Commission not order APU to show cause for its apparent violation of Section 367.045(2), Florida Statutes.

ISSUE 2: Should the transfer of a portion of APU's water systems to the County be approved as a matter of right and should Water Certificate No. 380-W be amended to reflect the deletion of territory?

RECOMMENDATION: Yes. The transfer of a portion of APU's water systems to the County should be approved as a matter of right pursuant to Section 367.071(4)(a), Florida Statutes, and Water Certificate No. 380-W should be amended to reflect the territory deletion effective June 26, 2001, which is the closing date of the sale. A description of the territory remaining after the partial transfer is appended as Attachment A. (CLAPP, WALDEN, KAPROTH)

STAFF ANALYSIS: The original utility provided water service to the Raven Hill and South Oak water systems prior to the Marion County Commission transferring jurisdiction of its water and wastewater utilities to the Florida Public Service Commission on May 5, 1981. The utility was issued Certificate No. 380-W pursuant to Order No. 11475, issued December 29, 1982, in Docket No. 810364-W.

The utility's territory has been amended several times resulting in its current water service to five systems. In Docket No. 910118-WU, the Commission approved the transfer of the Evergreen, Indian Trails, and Peppertree systems to APU.

On April 17, 2001, this Commission received an application to transfer Raven Hill, South Oak, Evergreen-Peppertree, and SOIP from APU to the County pursuant to Section 367.071, Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. As previously discussed, APU does not currently have the SOIP system in its certificated territory.

Included with the application is a copy of the transfer agreement between the two parties. The application states a proposed closing on or before May 19, 1999. Staff has confirmed that the actual closing took place on June 26, 2001. Therefore, June 26, 2001, is the effective date of the sale.

Pursuant to Section 367.071(4)(a), Florida Statutes, the sale of facilities to a governmental authority shall be approved as a matter of right. As such, no notice of the transfer is required and no filing fees apply. The application is in compliance with Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code.

The application contains a statement that the County obtained APU's most recent income and expense statement, balance sheet, statement of rate base for regulatory purposes, and contributions-in-aid-of-construction pursuant to Rule 25-30.037(4)(e), Florida Administrative Code. A statement that the customer deposits and interest thereon will be paid to the County for the benefit of the customers as required by Rule 25-30.037(4)(g), Florida Administrative Code, was also included in the application. Additionally, pursuant to the requirements of Rule 25-30.037(4)(h), Florida Administrative Code, a statement was included that APU would pay outstanding regulatory assessment fees (RAFs) as part of its regular annual filing. The utility has filed all RAFs and annual reports through 2000. It should be noted that APU pays its RAFs on a monthly basis into an escrow account, which the Commission controls pursuant to Order No. PSC-98-0044-PCO-WS, issued January 6, 1998, in Docket No. 971504-WS. The RAF owed by APU from January 1, 2001 to June 26, 2001, on these systems was $4,372.77 and was paid on October 19, 2001. APU will still be responsible for the RAFs on the Quail Run system.

Staff recommends that the application is in compliance with all provisions of Rule 25-30.037, Florida Administrative Code. Pursuant to Section 367.071(4)(a), Florida Statutes, the transfer of facilities to a governmental authority shall be approved as a matter of right. Therefore, staff recommends that the Commission approve, as a matter of right, the transfer of the Raven Hill, South Oak, Evergreen-Peppertree, and South Ocala Industrial Park water systems to the County. Because APU is transferring only four of its five water systems, Certificate No. 380-W should be amended to reflect the territory deletion effective June 26, 2001. A description of the territory remaining after the partial transfer is appended as Attachment A.

ISSUE 3: Should the Commission open a docket to examine whether APU's sale of its facilities involves a gain that should be shared with APU's remaining customers?

RECOMMENDATION: No. The Commission should not open a docket to examine whether APU's sale of its facilities involves a gain that should be shared with APU's remaining customers. (CLAPP, CROSBY)

STAFF ANALYSIS: The proposition that a gain on sale should be shared with customers has been considered in other dockets. In each case, the Commission evaluated whether or not ratepayers in the remaining utility service area were entitled to share the gain when another portion of the utility's operating facility was sold. See Order No. PSC-93-0301-FOF-WS, issued February 25, 1993, in Docket No. 911188-WS; Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, in Docket No. 920199-WS; Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS; and Order No. PSC-01-1986-PAA-WU, issued October 8, 2001, in Docket No. 001826-WU.

The Commission last established rate base for the South Oaks and Raven Hill systems in a staff assisted rate case for APU's water systems by Order No. 16145, issued May 23, 1986, in Docket No. 850366-WU. At that time, the utility consisted only of the Raven Hill and South Oaks systems. Since that time the certificate has been amended several times to reflect the addition and deletion of territory. Rate base was last established for the Evergreen, Indian Trails, and Peppertree systems in the transfer docket by Order No. 25075, issued September 17, 1991. Rate base was established for Quail Run in the transfer docket Order No. 25063, issued September 13, 1991, in Docket No. 910119-WU. In each of the transfer dockets the systems' existing rates were approved to continue for the customers. As a result, APU's tariff has different rates for residential customers for each service area. A flat rate of $9.00 per month was approved for the Quail Run system, the only system that was not metered.

Since the utility has unique rates for each of its systems that were established specifically for the systems on a stand alone basis, and the rate for the Quail Run system is a flat rate of $9, it appears unlikely that the Quail Run customers have subsidized the rates of the other systems' customers.

Therefore, there appears to be no basis for determining that a gain on sale resulted from this transfer. Therefore, staff recommends that the Commission should not open a docket to examine whether APU's sale of its facilities involves a gain that should be shared with APU's remaining customers.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes, if no protest is received to the proposed agency action issue, the docket should be closed upon the issuance of a Consummating Order. (CROSBY)

STAFF ANALYSIS: If no protest is received to the proposed agency action issue, the docket should be closed upon the issuance of a Consummating Order.

Attachment A

A.P. UTILITIES, INC

MARION COUNTY

QUAIL RUN SUBDIVISION

(formerly owned by Marico Properties, Inc.)

The following described lands located in portions of Section 25, Township 16 South, Range 21 East, Marion County, Florida:

Section 25:

The Southeast 1/4 of the Southeast 1/4 of said Section 25

LESS AND EXCEPT

The South 209 feet thereof and that portion lying North and East of State Road 475-A