

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

AUGUST 28, 1997

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF WATER & WASTEWATER (COKER) *etc bsm gdw*
DIVISION OF LEGAL SERVICES (BRUBAKER) *etc JAS bl*

RE: DOCKET NO. ~~970381~~-SU - APPLICATION FOR TRANSFER OF
FACILITIES AND ASSETS OF SANDALHAVEN UTILITY, INC. TO CHP
UTILITIES, INC. AND EXEMPTION FROM FLORIDA PUBLIC SERVICE
COMMISSION REGULATION FOR PROVISION OF WASTEWATER SERVICE
IN CHARLOTTE COUNTY BY CHP UTILITIES, INC. AND
CANCELLATION OF CERTIFICATE NO. 495-S.
COUNTY: CHARLOTTE

AGENDA: SEPTEMBER 9, 1997 - REGULAR AGENDA - INTERESTED PERSONS
MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

LOCATION OF FILE: S:\PSC\WAW\WP\970381SU.RCM

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

CASE BACKGROUND

On September 27, 1994, the Board of County Commissioners of Charlotte County adopted a resolution pursuant to Section 367.171, Florida Statutes, whereby jurisdiction over the privately owned water and wastewater utilities in Charlotte County was transferred to the Florida Public Service Commission. The Commission acknowledged the County's resolution in Order No. PSC-94-1451-FOF-WS, issued November 28, 1994. On December 29, 1994, Sandalhaven Utility, Inc. filed its application for a grandfather certificate pursuant to Section 367.171, Florida Statutes. By Order No. PSC-95-0478-FOF-SU, issued April 13, 1995, the Commission granted Sandalhaven Water Certificate No. 495-S to operate a wastewater utility. The residents which receive wastewater service from Sandalhaven, receive potable water from Fiveland Investments. The facilities of the utility include one wastewater treatment plant and one wastewater collection system.

Sandalhaven Utility, Inc. (Sandalhaven or Utility) is a Class C utility which provides wastewater service to 623 residential, general service, and multi-family customers in Charlotte County. According to the 1996 Annual Report, the utility had annual operating revenues of \$161,918 and experienced an operating loss of \$41,249.

On March 26, 1997, the Commission received an application from CHP Utility, Inc. (CHP), a non-profit corporation, requesting transfer of Sandalhaven's assets and customer service area, and seeking exempt status from the Commission for provision of wastewater service as an exempt non-profit association. Although the actual closing took place December 30, 1996, the contract contained a condition which demanded complete approval by the Florida Public Service Commission for final closure.

CHP is a non-profit corporation formed on April 10, 1996. The company has filed with the Office of the Secretary of State as a non-profit entity and has fulfilled all of the criteria to be considered an exempt entity pursuant to Section 367.022(7), Florida Statutes. The CHP membership is comprised of utility customers receiving service from the utility and all members hold one vote as stated in the Articles of Incorporation. As required by the Florida Administrative Code, only members of the non-profit corporation receive wastewater service. This case is being brought to the attention to the Commission because staff is recommending transfer of assets and cancellation of the certificates currently held by Sandalhaven.

DISCUSSION OF ISSUES

ISSUE 1: Should Sandalhaven be ordered to show cause, in writing within twenty days, why it should not be fined for violation of Chapter 367.071, Florida Statutes?

RECOMMENDATION: No, staff recommends that show cause proceedings should not be initiated against Sandalhaven. (BRUBAKER)

STAFF ANALYSIS: Section 367.071(1), Florida Statutes, requires that no utility may transfer its facilities without determination and approval of the Commission that the buyer will fulfill the commitments, obligations, and representations of the utility. 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. As stated in the case background, the utility was transferred to CHP on December 30, 1996, and CHP thereafter began running Sandalhaven's facilities, without prior approval of the Commission. The application for approval of the transfer was subsequently filed on March 26, 1996.

Utilities are charged with the knowledge of the Commission's rules and statutes. 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). Thus, any intentional act, such as the utility's failure to obtain Commission approval prior to transferring its assets and facilities to another entity, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled 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.

Failure to obtain approval of the Commission prior to completing a transfer of a utility's facilities is an apparent violation of Section 367.071(1), Florida Statutes. There are, however, circumstances which appear to mitigate the utility's violation. Through conversations with staff, the utility stated that the need for the sales transaction to occur in December 1996 was driven by tax considerations. By executing the agreement prior to January 1997, the utility avoided substantial ad valorem

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taxation assessments for the current year. The utility required additional time in order to prepare the information and documentation needed to file the transfer application. Regardless of when the sale of the assets actually occurred or when CHP commenced running the utility, the Purchase and Sale Agreement provided that the closing was contingent upon PSC approval of the transfer. So, even though the sale was closed prior to PSC approval, it is still dependent upon receiving such approval. Furthermore, the transfer resulted in the utility being placed under the control of the customers.

Although regulated utilities are charged with knowledge of Chapter 367, Florida Statutes, staff does not believe that the violation of Section 367.071, Florida Statutes, rises in these circumstances to the level of warranting initiation of show cause proceedings. Therefore, staff recommends that the Commission not order Sandalhaven to show cause for failing to obtain approval from the Commission prior to the transfer of the utility to CHP.

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ISSUE 2: Should the transfer of facilities and utility assets of Sandalhaven Utility, Inc. to CHP Utility, Inc. and cancellation of Wastewater Certificate No. 495-S be approved?

RECOMMENDATION: Yes. The transfer of facilities and utility assets of Sandalhaven Utility, Inc. to CHP Utility, Inc. should be approved and Wastewater Certificate No. 495-S should be canceled. (COKER)

STAFF ANALYSIS: On March 26, 1997, the Commission received an application from CHP Utility, Inc. (CHP), a non-profit association, requesting transfer of Sandalhaven's assets and customer service area, and seeking exempt status from the Commission for provision of wastewater service as an exempt non-profit corporation. The application is in compliance with the governing statute, Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for transfer of utility assets. The application contains a check for wastewater service totaling \$1,500.00, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code.

The filing by CHP requests that the transfer include the wastewater collection lines and wastewater treatment system. According to the contract for sale, the purchase price for both systems is \$733,000. CHP will fund the purchase through from operating capital. The non-profit association has also indicated this transaction will not jeopardize its financial standing. The non-profit corporation was created as an entity to operate the utility and is registered with the Office of the Secretary of State. CHP will not be held liable for any prior taxes assessed to Sandalhaven.

Sandalhaven has been in operation since 1983. The utility has consistently met DEP standards and provided customers with quality service. Sandalhaven has no outstanding violations. Sandalhaven is current with Commission requirements of Annual Reports and Regulatory Assessment Fees through 1996. Sandalhaven will be responsible for submitting a 1997 Annual Report and 1997 Regulatory Assessment Fees through the date of transfer as recognized by Commission Order.

According to the application, CHP will continue to utilize the professional services of licensed operators, who have managed the day to day operations of the system since 1983. The buyer is committed and willing to make any necessary repairs to the system. Because the operations of the system will be relatively unchanged, the customers should experience consistent service provided within DEP standards. Staff believes these considerations demonstrate a

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financial and technical ability to provide quality utility service and that CHP is capable of fulfilling the commitments, obligations and representations of the utilities. Therefore, Staff recommends that the transfer of Sandalhaven Utility, Inc. to CHP Utility, Inc. is in the public interest and be approved.

As a non-profit corporation, CHP Utility, Inc. meets the definition of an exempt utility, pursuant to 367.022, Florida Statutes. Accordingly, staff recommends that Wastewater Certificate No. 495-S be canceled.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, this docket should be closed. (BRUBAKER)

STAFF ANALYSIS: This docket should be closed. CHP Utility, Inc. has successfully completed all requirements for transfer of the assets of Sandalhaven Utility, Inc.