BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for authority to transfer majority organizational control of Utilities, Inc. from Nuon Global Solutions USA, B.V. to Hydro Star, LLC.	DOCKET NO. 050499-WS ORDER NO. PSC-06-0093-FOF-WS ISSUED: February 9, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
ISILIO ARRIAGA
MATTHEW M. CARTER II
KATRINA J. TEW

ORDER GRANTING MOTION TO DISMISS
AND
APPROVING APPLICATION FOR TRANSFER OF MAJORITY ORGANIZATIONAL CONTROL

BY THE COMMISSION:

BACKGROUND

On July 25, 2005, Utilities, Inc. (Utilities, Inc. or company) filed an Application for authority to transfer majority organizational control of the company from Nuon Global Solutions USA, B.V. (Nuon) to Hydro Star, LLC (Hydro Star). The application proposes the transfer of the issued stock of Utilities, Inc., which in turn controls the stock of 16 utilities that provide water and wastewater service in Florida, from Nuon to Hydro Star by early 2006, after all regulatory approvals have been obtained. In all, the transaction involves over 80 subsidiary operating companies of Utilities, Inc. in 17 states. A list of the Commission-regulated utilities that Utilities, Inc. owns is included in Attachment A. Utilities, Inc. asserts that the acquisition of Nuon's stock by Hydro Star does not entail any change in direct ownership or control of the Florida utilities and will not cause any change in management or loss of operational expertise. Because of the size and scope of the stock transfer, Utilities, Inc. filed a Petition for variance or waiver of Rules 25-30.037(3)(i), (j) and (k), and 25-30.030(4)(c), (5), (6) and (7), Florida

Administrative Code, the Commission's rules governing transfers. The requested waivers were granted by Order No. PSC-05-1155-PAA-WS, issued November 18, 2005.[1]

Utilities, Inc. provided notice of its stock transfer petition to the customers of its operational utilities on August 1 and 2, 2005. We received a letter from one customer of Pennbrooke Utilities regarding that utility's water conservation programs. We also received an "Objection to Application of Utilities, Inc. for Authority for Transfer of Majority Organizational Control to Hydro Star, LLC and Request for Public Hearing" from Michael J. Duggar, Esq., a customer of Wedgefield Utilities. The Pennbrooke customer indicated that he did not wish to formally contest the transfer of majority organizational control of the utility holding companies, but would pursue his conservation concerns informally. Mr. Duggar, however, confirmed that he was requesting an administrative hearing to contest the stock transfer based on his concerns with Wedgefield's water quality.

Utilities, Inc. filed a response to Mr. Duggar's objection on October 24, 2005, and on November 7, 2005, Utilities, Inc. filed a copy of its November 4, 2005, letter to Mr. Duggar. In both filings, Utilities, Inc. provided a detailed description of the water quality issues at Wedgefield Utilities, Wedgefield's proposal to the Department of Environmental Protection (DEP) to improve its water quality, and the approximate time and cost to implement the proposal. On November 9, 2005, Utilities, Inc. filed a Motion to Dismiss or, in the Alternative, for Summary Disposition of Objection, a Motion to Bifurcate Proceeding, and a Request for Oral Argument. Mr. Duggar did not respond to any of those motions.

We have jurisdiction over this matter pursuant to section 367.071, Florida Statutes. We grant Utilities, Inc.'s motion to dismiss the objection, and we dispose of Utilities, Inc.'s other motions as moot.[2] In light of our decision to grant the motion to dismiss, we have also carefully reviewed the application for transfer of majority organizational control and we approve it. Our reasons for these decisions are explained in detail below.

DECISION

The Motion to Dismiss

The subject matter of this proceeding involves the proposed transfer of the issued stock of Utilities, Inc. from its parent company, Nuon, to a new parent company, Hydro Star. The proceeding does not affect the direct ownership, operational control or regulatory status of any of the 16 Florida water and wastewater companies that Utilities, Inc. itself owns, including Mr. Duggar's utility, Wedgefield. The transfer of control between the grandparent companies is two steps removed from the operating utility, and Utilities, Inc. asserts that the transfer will not cause any change in management or operational expertise. On the basis of these facts, Utilities, Inc.'s

[1] Consummating Order No. PSC-05-1216-CO-WS finalized Order No. PSC-05-1155-PAA-WS on December 13, 2005.

[2] At our January 24, 2006, Agenda Conference, when we considered this application and the motion to dismiss, we determined that oral argument on the motions was not necessary to our understanding of the issues, and we denied Utilities, Inc.'s request for oral argument.

motion to dismiss challenges the sufficiency of the facts Mr. Duggar alleges to demonstrate that he has standing to object to this stock transfer.

In his objection, Mr. Duggar states that the proposed transfer is important to him and other customers of Wedgefield Utilities, because the Department of Environmental Protection (DEP) has indicated that the utility's water quality exceeds DEP's present standards for levels of trithalomethane (TTHM), and Wedgefield has not acted promptly and effectively to resolve this water quality matter. Therefore, the objection argues, since Utilities, Inc.'s stock transfer application asserts that no change will occur in the operational and managerial expertise of the utilities it owns, the application should be denied. The objection also states that the application should be denied because Hydro Star and its affiliated investment entities do not have experience in operating water and wastewater utilities. ". . . [c]onsistent with previous management, bottom line will dominate over the best interests of the health safety and welfare of the citizen's served." (Objection p. 3.)

The objection also states that the Utilities, Inc. application does not adequately comply with the requirements of Commission Rule 25-30.037(3)(p), Florida Administrative Code, which provides that an application for authority to transfer shall include the following information:

> (p) A statement from the buyer that after reasonable investigation, the system being acquired appears to be in satisfactory condition and in compliance with all applicable standards set by the Department of Environmental Protection (DEP) or, if the system is in need of repair or improvement, has any outstanding Notice of Violation of any standard set by the DEP or any outstanding consent orders with the DEP, the buyer shall provide a list of the improvements and repairs needed and the approximate cost to make them, a list of the action taken by the utility with regard to the violation, a copy of the Notice of Violation(s), a copy of the consent order and a list of the improvements and repairs consented to and the approximate cost to make them.

Mr. Duggar contends that the statement that "the relevant Regulated Entities are working with the DEP to formulate compliance plans" contained in Utilities, Inc.'s application does not meet the requirements of the Commission rule. Mr. Duggar requests that the application be rejected due to the lack of operational utility experience of the buyer and its failure to provide concrete safeguards to protect the health safety and well-being of the citizens it proposes to serve. The objection states that the Petitioner, Mr. Duggar, would consider acceptance of the application for the stock transfer if the applicant supplemented its application with sufficient information required by subsection (p) of Rule 25-30.037, Florida Administrative Code, and if the applicant was ". . . in full compliance with all standards for one full year prior to the transfer." (Objection p. 5.) We find that with its response to Mr. Duggar's objection on October 24, 2005, and its November 4, 2005, letter to Mr. Duggar, Utilities, Inc. has provided more than sufficient detail about Wedgefield's water quality, actions taken and estimated costs to meet DEP's requirements to comply with our rule.

Utilities, Inc.'s Motion to dismiss or in the alternative for summary disposition requests that we either dismiss Mr. Duggar's objection or summarily dispose of it as moot, without

further necessity for hearing. As grounds for its motion to dismiss, Utilities, Inc. asserts that the facts alleged in the objection fail to demonstrate standing to participate in this administrative proceeding under the two-part test established in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). In Agrico, the Court held that to demonstrate a substantial interest entitled to a formal hearing in an administrative proceeding, the petitioner must show both an injury in fact of sufficient immediacy to warrant a hearing, and that the alleged injury is of the type or nature which the proceeding is designed to protect.

Utilities, Inc. asserts that Mr. Duggar's objection fails to meet either prong of the Agrico test. Utilities, Inc. states that the objection does not demonstrate an injury in fact due to elevated levels of TTHMs, because DEP has assured customers of Wedgefield Utilities that their health is not jeopardized, and therefore "the presence of TTHMs in the quantities that exist in Wedgefield's water do not result in any injury of sufficient immediacy to warrant a public hearing." Utilities, Inc. also asserts that the injury alleged -- noncompliant water quality in the Wedgefield system -- is beyond the scope of this stock transfer proceeding, regulated by the DEP, and therefore not an injury which the proceeding is designed to protect. Citing Order No. PSC-98-1640-FOF-WS, issued December 7, 1998, in Docket No. 980957-WS, In re: Application for transfer of majority organizational control of Sanlando Utilities Corporation, Utilities, Inc. states that the primary focus of this proceeding is whether the stock transfer is in the public interest, and whether the buyer is willing and able to fulfill the commitments, obligations and representations of the utility. The approval or disapproval of this transfer will not affect the actions Wedgefield takes to comply with DEP regulations. While the Commission requires information on the status of compliance with DEP standards, and assurance from the buyers that they will fulfill the commitments of the utility, DEP is the agency with primary jurisdiction of the TTHM issue.

While Utilities, Inc. argues that Mr. Duggar's concerns do not provide standing to protest this stock transfer, Utilities, Inc. does suggest that there are other forums before the Commission to address those concerns.

ANALYSIS AND CONCLUSION

The standard to be applied in disposing of a motion to dismiss a petition for an administrative hearing is similar to the standard of review for a motion to dismiss in a judicial forum, which is whether, with all factual allegations in the objection taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).[3] Rule 28-106.201(2), Florida Administrative Code, specifies three key requirements for a petition for hearing:

> (1) . . . an explanation of how the petitioner's substantial interests will be affected by the agency determination;

[3] Rule 28-106.204(2), Florida Administrative Code, specifically authorizes motions to dismiss in the administrative context.

(2) a statement of the specific rules or statutes the petitioner contends require a reversal or modification of the agency's proposed action;

(3) a statement of the relief sought be the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

The threshold question for any request to participate in a formal administrative proceeding is whether the petitioner has a substantial interest that will be affected by the proceeding and thus has standing to participate. If that threshold is not met, then the petitioner has failed to state a cause of action on which we can grant relief.

We find that Mr. Duggar has not alleged facts sufficient to show that he has a substantial interest in the outcome of this stock transfer proceeding. Certainly Mr. Duggar and all customers of Wedgefield Utilities have an interest in the quality of Wedgefield's water, but that interest is not one that will be substantially affected by the outcome of this proceeding either way, whether we approve or disapprove the transfer of Utilities Inc.'s stock from one holding company to another. Wedgefield will remain the regulated operating utility with primary responsibility to resolve any water quality issues in its system. For that reason, the objection has not alleged an injury of sufficient immediacy that can be resolved by a hearing in this case, and therefore has not met the first prong of the Agrico test.

The case of Ameristeel v. Clark, 691, So. 2d 473 (Fla. 1997), makes this point well. In that case, Ameristeel, an industrial customer of Florida Power & Light Company (FPL) in Duval County petitioned to intervene in a proceeding before the Commission to approve a territorial agreement between FPL and the Jacksonville Electric Authority (JEA). Ameristeel wished to have its plant served by JEA, which at the time had lower rates than FPL. The Commission denied Ameristeel's petition to intervene for lack of standing. Among other reasons, the Commission found that Ameristeel's plant was located in a part of FPL's territory that would not be affected by the proposed territorial agreement. Under the Agrico standard Ameristeel could not demonstrate an injury in fact of sufficient immediacy to warrant participation in the territorial agreement proceeding, because whether or not the agreement was approved, Ameristeel's plant would remain in FPL's service territory. The Florida Supreme Court upheld that analysis, saying, at page 478:

> Ameristeel has been an FPL customer since it located its plant in FPL's service territory in 1974 and its position as a customer of FPL remains the same under the new territorial agreement approved by the Commission. Thus, Ameristeel has failed to meet the first prong of the Agrico test for standing because its corporate interests remain completely unaffected and in no way injured by the JEA-FPL territorial agreement.

See also our recent decision in Order No. PSC-06-0033-FOF-TP, issued January 10, 2006,[4] where we dismissed for lack of standing the Communications Workers of America's request for a hearing on Sprint's request for approval of a transfer of control.

Mr. Duggar's objection does not meet the second prong of the Agrico test, either, because, as Utilities, Inc. states in its motion, his stated interest in the proceeding, resolution of Wedgefield's water quality problems, is not the type of interest this stock transfer proceeding is designed to protect, and the substance of that issue will not be addressed in the proceeding. The purpose of this proceeding is to ensure that the new corporate owners of Utilities, Inc. have the resources and commitment to the financial and operational viability of Utilities, Inc. and that therefore the transfer serves the public interest. That investigation only involves Utilities, Inc.'s operating utilities indirectly. Concerns about Wedgefield's water quality can and should be addressed by means of a customer complaint against Wedgefield, a utility rate case or other Commission investigatory proceeding, or before DEP.

Our decision to grant Utilities, Inc.'s motion to dismiss renders moot Utilities, Inc.'s alternative motions for summary disposition or to bifurcate the proceeding to approve the transfer of majority organizational control for all Utilities, Inc.'s operational utilities except Wedgefield.

The Transfer of Majority Organizational Control

We find, as explained below, that the transfer of majority organizational control of Utilities, Inc. from Nuon Global Solutions USA, B.V. to Hydro Star, LLC. is in the public interest, and we approve it effective January 24, 2006. On May 14, 2005, the parties entered into the agreement for Hydro Star to purchase 100% of the stock in Utilities, Inc. from Nuon. The closing, which is contingent upon securing multiple regulatory approvals, is anticipated to occur in the first quarter of 2006. The application for transfer complies with the governing statute, Section 367.071, Florida Statutes, and the requirements of Rule 25-30.037, Florida Administrative Code. Pursuant to Rule 25-9.044(1), Florida Administrative Code, the rates and charges approved for Utilities, Inc.'s Florida utility subsidiaries shall continue unchanged until we authorize a change in a subsequent proceeding.

The application contained a statement that, after reasonable investigation, the utility systems appear to be in satisfactory condition and in compliance with all applicable standards set by the Florida Department of Environmental Protection (DEP), with the exception of five systems. Utilities, Inc. has indicated that it is working with the DEP to formulate compliance plans for those systems. These compliance issues are the result of new rules imposed by DEP. Attachment B is a DEP letter to a customer of Wedgefield stating that the water is safe to drink. Furthermore, Utilities, Inc has indicated that Wedgefield Utilities installed new water treatment processes for its system in mid December to control TTHMs, with DEP approval.

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[4] Docket No. 050551-TP, In Re Joint application for approval of transfer of control of Sprint-Florida, Incorporated, holder of ILEC Certificate No. 22, and Sprint Payphone Services, Inc., holder of PATS Certificate No. 3822, from Sprint Nextel Corporation to LTD Holding Company, and for acknowledgment of transfer of control of Sprint Long Distance, Inc., holder of IXC Registration No. TK001, from Sprint Nextel Corporation to LTD Holding Company.

The application contains a statement describing how the transfer is in the public interest, including a summary of the buyer's experience in water and wastewater operations and a showing of the buyer's financial ability. According to the application, the seller no longer wants to be in the utility business and is divesting all of it U.S. assets due to the declining value of the dollar against the Euro. AIG Highstar Capital II, L.P. (Highstar II), the sole member of Hydro Star, and its affiliates are seeking to make substantial investments in water and wastewater assets as a complement to their existing U.S. energy asset portfolio. The acquisition of majority control of Utilities, Inc. by Hydro Star will not result in any change in management of Utilities, Inc. The current Utilities, Inc. management has been providing quality water and wastewater service to all of the Florida systems for approximately 30 years. By combining Utilities, Inc.'s management approach and regulatory expertise with the financial resources and support of Hydro Star, Utilities, Inc. will continue to have the ability to provide consistent and uninterrupted service to its customers. With regard to Hydro Star's financial ability, Highstar II and Hydro Star have access to extensive resources to fund the operations of the regulated entities. Highstar II and its affiliates will provide funding in the form of inter-company loans to Hydro Star on an as needed basis. As of March 31, 2005, Highstar II total assets were approximately $102,861,000.

The utility is current on annual reports and regulatory assessment fees (RAFs) through 2004. Since no changes are taking place at the utility subsidiary level the responsibility for filing all RAFs and annual reports for 2005 and the future will remain the responsibility of Utilities, Inc.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Utilities, Inc.'s Motion to Dismiss is granted. It is further

ORDERED that the Application for authority to transfer majority organizational control of Utilities, Inc. from Nuon Global Solutions USA, B.V. to Hydro Star, LLC. is approved. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 9th day of February, 2006.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

MCB

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.

Any party adversely affected by the Commission's final action in this matter 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.

ATTACHMENT A

Utilities, Inc.
List of Subsidiaries – 100% wholly-owned

Subsidiary Name	County Operations	Certificate No.
Alafaya Utilities, Inc.	Seminole	379-S
Cypress Lakes Utilities, Inc.	Polk	509-S; 592-W
Labrador Utilities, Inc.	Pasco	530-S; 616-W
Lake Placid Utilities, Inc.	Highlands	414-W; 347-S
Lake Utility Services, Inc.	Lake	465-S; 496-W
Mid-County Services, Inc.	Pinellas	081-S
Miles Grant Water and Sewer Company	Martin	352-W; 308-S
Sanlando Utilities, Inc.	Seminole	189-S; 247-W
Tierra Verde Utilities, Inc.	Pinellas	058-S
Utilities, Inc. of Eagle Ridge	Lee	369-S
Utilities, Inc. of Florida	Seminole	278-W; 225-S
	Pasco	229-S; 107-W
	Marion	305-S; 410-W
	Pinellas	204-W
	Orange	040-W
Utilities, Inc. of Hutchinson Island	Martin	291-S; 336-W
Utilities, Inc. of Longwood	Seminole	232-S
Utilities, Inc. of Pennbrooke	Lake	400-S; 466-W
Utilities, Inc. of Sandalhaven	Charlotte	495-S
Wedgefield Utilities, Inc.	Orange	341-S; 404-W

ATTACHMENT B

Department of
Environmental Protection

Jeb Bush
Governor

Central District
3319 Maguire Boulevard, Suite 232
Orlando, Florida 32803-3767

Colleen Castille
Secretary

August 5, 2005

Ms. Wanda J. Harding
23030 Ardon Avenue
Orlando, FL 32833

OCD-PW-05-0662

Re: Wedgfield Utilities, Inc.

Dear Mr. Harding:

We received your letter on August 1 (dated July 29, 2005) and I am responding to it. Despite the statements you made in your letter regarding the quality of drinking water at Wedgefield Utilities, the water is adequate and safe to drink. If it were not, the Department would have directed the utility to discontinue providing the water when the analyses of Trihalomethanes (THMs) became known.

THMs are low risk, suspect carcinogens with a long latency period. This means that they are believed to cause cancer if they are consumed in large quantities of high concentrations for long periods of time. Maximum Contaminant Level or MCL, whose exceedance triggered the Public Notification, assume a consumption of 2 liters per day over a lifetime. The MCL is the level below which THMs are not believed to cause ANY adverse health effects. This means that a short-term exceedance will not result any adverse health effects.

Pursuant to Chapters 62-555 and 62-550, *Florida Administrative Code*, the utility will make the proper adjustments to the drinking water processes at the plant to ensure that the level of the THMs do not exceed the 80 mg/l MCL. We expect a study identifying these changes to be forthcoming followed by their implementation. Be assured, the Department will monitor these changes to make sure that they are done in a timely fashion. A meeting has been scheduled for August 17 to discuss health concerns about the THMs.

I appreciate your concern but must emphasize that your water is safe to drink. If bottled water or an additional treatment system is purchased, then that is an individual decision that the consumer has made but one not mandated by either the Utility or the Department.

Sincerely,

Richard S. Lott, P.G., P.E.
Program Manager - Drinking Water

Cc: Paul Morrison, FDEP
Patrick Flynn, Utilties Inc. [p.c.flynn@utilitiesinc-usa.com]