

M E M O R A N D U M

February 15, 1995

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FPSC-RECORDS/REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CAPELESS) *WJC JAS*

RE: DOCKET NO. 940743-WS - Joint application for transfer of majority organizational control of JACKSONVILLE SUBURBAN UTILITIES CORPORATION in Duval County from GWC Corporation to United Water Resources Inc.

0215-FOF

Attached is an ORDER APPROVING TRANSFER AND CLOSING DOCKET, to be issued in the above-referenced docket. (Number of pages in Order - 7)

RGC/dp

Attachment

cc: Division of Water and Wastewater (Coker, Redemann, Messer)

I: 0743-O.RGC

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint application for) DOCKET NO. 940743-WS
transfer of majority) ORDER NO. PSC-95-0215-FOF-WS
organizational control of) ISSUED: February 16, 1995
JACKSONVILLE SUBURBAN UTILITIES)
CORPORATION in Duval County from)
GWC Corporation to United Water)
Resources Inc.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER APPROVING TRANSFER OF MAJORITY ORGANIZATIONAL CONTROL
AND CLOSING DOCKET

BY THE COMMISSION:

Background

Jacksonville Suburban Utilities Corporation (Jacksonville Suburban or utility) provides water and wastewater service to approximately 27,000 customers pursuant to Commission Certificates Nos. 236-W and 179-S in Duval, St. Johns, and Nassau Counties. Jacksonville Suburban's most recent submission to this Commission, the 1992 Annual Report, details utility operating revenues of \$16,591,617 and utility operating expenses of \$11,619,544. Jacksonville Suburban is a wholly owned subsidiary of General Waterworks Corporation (General Waterworks), which, until April 22, 1994, was a wholly-owned subsidiary of GWC Corporation (GWC), a Delaware corporation. On April 22, 1994, GWC merged into United Water Resources Inc. (UWR), a New Jersey corporation. As a result of the merger, GWC ceased to exist and UWR became the corporate grandparent of Jacksonville Suburban.

Also as a result of the merger, according to UWR's 1993 Annual Report, UWR became the second largest investor owned water utility in the nation. UWR expects its operating revenues to double and its consolidated assets to exceed \$1 billion. Prior to the merger, Lyonnaise American, Inc., (LAH) owned approximately 82% of GWC's issued and outstanding stock. LAH is a subsidiary of Lyonnaise des

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Eaux-Dumez (Lyonnaise), a French multi-national corporation and one of Europe's largest water purveyors. As a result of the merger, LAH now owns only approximately 26% of UWR's issued and outstanding stock. UWR's current Board of Directors includes the eleven member UWR Board which existed prior to the merger, two persons who were previously members of the GWC Board of Directors, and two officers of Lyonnaise.

According to UWR's 1993 Annual Report, UWR entered into a definitive agreement to merge with GWC on September 15, 1993. On November 30, 1993, the Boards of Directors of both corporations voted to proceed with the proposed merger subject to various closing conditions, including approvals from certain state regulatory agencies. On that same date, Mr. Walton F. Hill, Assistant Vice President and Senior Attorney at General Waterworks Management and Service Company, sent a letter to the Commission advising of GWC's intent to merge into UWR. In the letter, Mr. Hill stated that the utility did not believe the merger would require Commission approval under Section 367.071, Florida Statutes, because the direct control of Jacksonville Suburban would not change and because no changes were proposed to the operation, management, customer service, rates or any other element of Jacksonville Suburban's business. On June 2, 1994, our Staff responded to Mr. Hill's letter, advising that Staff believed the utility should seek Commission approval because the merger would involve a change of the utility's majority organizational control.

No Show Cause Required

In a timely response to Staff's request that the utility seek Commission approval of the transfer, on July 13, 1994, Jacksonville Suburban and UWR filed a joint application for transfer of majority organizational control. However, the transfer itself was completed as of April 22, 1994.

Section 367.071(1), Florida Statutes, requires that no utility may transfer its majority organizational control 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.

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 antecedent Commission approval to transfer the majority organizational control of its corporate grandparent, 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 the approval of the Commission prior to completing a transfer of majority organizational control is an apparent violation of Section 367.071(1), Florida Statutes. However, we bear in mind that the utility notified our Staff of the impending transfer of its grandparent corporation on the same date that the Boards of Directors of the merging corporations voted to proceed with the transfer. Because of the delay in our Staff's response to the utility, and because the utility subsequently cooperated in filing its application, we do not believe that this utility's apparent violation of Section 367.171(1), Florida Statutes, rises to the level of warranting that a show cause order be issued. For these reasons, we do not find it appropriate to order Jacksonville Suburban to show cause for failing to obtain Commission approval of the transfer of majority organizational control of GWC prior to the date of the transfer.

Application

Although the application was filed after the transfer itself took place, it is otherwise in compliance with the governing statute, Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for transfer of majority organizational control. The application contains a check in the amount of \$6,000.00, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. The applicants have provided evidence that the utility owns the land upon which its facilities are located, as required by Rule 25-30.037(1)(o), Florida Administrative Code.

Along with the application, the utility and UWR filed a Motion for Waiver of the noticing requirements of Rule 25-30.030, Florida Administrative Code. In the alternative, the utility requested waiver of Rules 25-30.030(2), (4)(c), (5)(c), (5)(d), (5)(g), (5)(h), (6), and (7), Florida Administrative Code. By Order No.

PSC-94-1236-FOF-WS, issued October 11, 1994, in this docket, we denied the applicants' Motion for Waiver from all requirements of Rule 25-30.030, Florida Administrative Code. However, by that same Order, we exempted the utility from full compliance with the requirements of Rule 25-30.030(4)(c), Florida Administrative Code, as it applied to the individual noticing of customers, required by Rule 25-30.030(6), Florida Administrative Code, and to noticing by publication, required by Rule 25-30.030(7), Florida Administrative Code, for the purposes of this application only. The utility has provided proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code, as modified by Order No. PSC-94-1236-FOF-WS.

Ten customers of the utility objected to the application. Of the ten objection letters received, one, dated November 7, 1994, was timely filed by Mr. Earl Williams. On December 5, 1994, the utility filed a Motion to Dismiss Objection of Earl Williams, arguing, inter alia, that Mr. Williams did not state with particularity the grounds for his objection, as required by Rule 25-30.031(2), Florida Administrative Code, nor did he request a hearing pursuant to Section 120.57, Florida Statutes, as required by Section 367.045(4), Florida Statutes.

The other nine objections were untimely received on December 6, 1994. The utility filed a Motion to Strike, or in the alternative, Motion to Dismiss, those objections on December 15, 1994. In its Motion, the utility points out, inter alia, that November 4, 1994, was the last day that the Notice of Application was mailed or published by the utility, and that Rule 25-30.031, Florida Administrative Code, provides that a written objection is timely if it is filed within thirty days of the last day that the notice was mailed or published, which is consistent with the statutory thirty-day requirement set forth in Section 367.045(3) and (4), Florida Statutes.

On December 16, 1994, Mr. Williams filed a second objection letter, stating that he continued to object to the application because he, and others, feared the transfer would result in a rate increase. However, by letter dated December 19, 1994, Mr. Williams advised that he, and others, were withdrawing their protests because their intention was to protest rate increases, and not the transfer application. At the bottom of this letter of withdrawal, Mr. Williams carbon copied eight of the other nine customer objectors. Our Staff made telephone contact with the ninth objector, Ms. Suzanne Campbell, who advised that her name was inadvertently left off of Mr. Williams' list of customer objectors to be carbon copied, but that she did receive a copy of his letter of withdrawal of the customer protests, and that she and the other

eight customer objectors authorized Mr. Williams to speak on their behalf. Staff also made telephone contact with Ms. Eileen Rogers, another of the nine customer objectors, who also advised that Mr. Williams' letter of withdrawal of the customer protests speaks for all ten customers. Based on the foregoing, we deem all ten customer objections, whether timely or untimely filed, to have been withdrawn. The utility's Motion to Dismiss Mr. Williams' objection, and Motion to Strike, or, in the Alternative, to Dismiss, the other nine objections, are therefore denied, as moot.

The utility has provided a copy of the purchase agreement and a statement that it will fulfill the commitments, obligations and representations of the transferor. The immediate operations of the utility, as well as the books and records, have continued to be managed by Jacksonville Suburban. The transfer contemplates no change in the provision of service for customer rates and charges.

Based on the foregoing, we find that the transfer of majority organizational control of Jacksonville Suburban Utilities Corporation from GWC Corporation to United Water Resources Inc., is in the public interest. The application for transfer of majority organizational control is hereby approved.

Rate Base

Traditionally, the Commission establishes rate base at the time of a transfer because the utility purchase price as compared to the rate base are an integral part of determining whether the transfer is in the public interest. In particular, purchase prices far over the rate base may flag financial viability concerns. Establishing rate base also provides a snapshot of the utility's assets and liabilities at that point in time. However, the establishment of rate base is not conducted when the transfer involves the sale of stock. The stock is publicly traded and its price has no regulatory relationship to the established rate base. Furthermore, the stock sale will not change the utility's immediate assets and liabilities. Therefore, we do not establish rate base in this docket.

Rates and Charges

The utility's approved rates and charges were effective September 19, 1989, pursuant to Order No. 21871, issued September 11, 1989, in Docket No. 890968-WS. Jacksonville Suburban has exercised the statutory provision of increasing rates through price indexing and pass through rate adjustments in 1986, 1987, 1988 and 1989.

Rule 25-9.044(1), Florida Administrative Code, provides that:

In case of change of ownership or control of a utility which places the operation under a different or new utility, . . . the company which will thereafter operate the utility business must adopt and use the rates, classification and regulations of the former operating company (unless authorized to change by the Commission).

UWR has not requested a change in the rates and charges of the utility and we see no reason to change them at this time. Accordingly, the utility shall continue operations under its existing tariff by applying its approved rates and charges until authorized to change by this Commission in a subsequent proceeding. The utility has filed a revised tariff reflecting the change in issuing officer due to the transfer of majority organizational control. The tariff shall be effective for services provided or connections made on or after the stamped approval date on the tariff sheets. Because no further action is required, this docket shall be closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the transfer of majority organizational control of Jacksonville Suburban Utilities Corporation, 1400 Millcoe Road, Jacksonville, Florida 32225, from GWC Corporation to United Water Resources Inc., 200 Old Hook Road, Harrington Park, New Jersey 07640, is hereby approved. It is further

ORDERED that the customer objections filed in this docket are hereby deemed withdrawn. It is further

ORDERED that Jacksonville Suburban Utilities Corporation's Motion to Dismiss Objection of Earl Williams, and Motion to Strike, or in the Alternative, Motion to Dismiss, the other customer objections filed in this docket are hereby denied, as moot. It is further

ORDERED that Jacksonville Suburban Utilities Corporation shall continue to charge the rates and charges approved in its tariff until authorized to change by this Commission. It is further

ORDERED that this docket is hereby closed.

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By ORDER of the Florida Public Service Commission, this 16th
day of February, 1995.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

RGC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 Records and Reporting 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 Records and Reporting 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.