

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for transfer) DOCKET NO. 940939-WS
of facilities of Destin Utility) ORDER NO. PSC-95-0269-FOF-WS
Company, Inc., and Eastdestin) ISSUED: February 28, 1995
Wastewater Services, Inc., in)
Okaloosa County and cancellation)
of Certificates Nos. 561-W and)
489-S by DESTIN WATER USERS,)
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 AND CANCELLING OF CERTIFICATES

BY THE COMMISSION:

BACKGROUND

On September 1, 1994, Destin Water Users, Inc. (Destin Water Users), filed an application for transfer of Destin Utility Company, Inc. (Destin Utility), and Eastdestin Wastewater Services, Inc. (Eastdestin), and for cancellation of the respective certificates. Destin Utility is a Class C utility providing water service in Okaloosa County under Certificate No. 561-W. The utility provides service to 56 connections in the Destin area. The utility's 1993 annual report shows an annual operating revenue of \$9,264 and a net loss of \$183,564.

Eastdestin is also a Class C utility providing wastewater service in Okaloosa County under Certificate No. 489-S. The utility provides service to 391 connections in the Destin area. The utility's 1993 annual report shows an annual operating revenue of \$73,407 and a net loss of \$217,775.

Destin Water Users is a non-profit corporation providing water and wastewater service in Okaloosa County. The Commission granted an exemption pursuant to Section 367.022(7), Florida Statutes, to

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FFSC RECORDS/REPORTING

Destin Water Users in Order No. PSC-93-0873-FOF-WS, issued June 9, 1993.

Destin Utility and Eastdestin filed applications for a staff assisted rate case on December 10, 1993. While the rate cases were being processed, Destin Water Users completed negotiations with the two utilities for a transfer of assets. The utilities subsequently withdrew the rate case assistance applications. In this order we address the transfer of the assets of Destin Utility and Eastdestin to Destin Water Users.

TRANSFER

On September 1, 1994, Destin Water Users filed an application for transfer of the lines, assets and customers of Destin Utility and Eastdestin to Destin Water Users. Except that the application was filed subsequent to the completion of the purchase and sale transaction (a matter that we address below), it was 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 contained checks for \$2,250 for water service and \$750 for wastewater service, which, although individually not the correct amounts, satisfied the filing fees of \$1,500 for each utility, pursuant to Rule 25-30.020(c)(2), Florida Administrative Code.

Destin Water Users requested our approval of the transfer of the water treatment plant, water distribution lines and the wastewater collection lines. Destin Water Users will operate the Destin Utility water system. The Eastdestin wastewater customers have been interconnected to Destin Water Users wastewater lines since the middle of September, 1994. The wastewater treatment plant was not included in the sale and has been decommissioned. Eastdestin notified the Department of Environmental Protection (DEP) on October 18, 1994, that the wastewater treatment plant had been properly pumped out and sealed.

We note that this transfer will result in a change in rates to customers. The base facility charges will include different gallonage amounts and have varying breakpoints for the actual gallonage charge, which makes a rate schedule to rate schedule comparison very difficult. However, we have determined monthly bills for customers under the old and new rates based on consumption of 10,000 gallons of water. The new and old rates and the bill comparisons are shown in Schedule 1. The water and wastewater bills for a residential customer using 10,000 gallons of water are \$.55 higher in total under Destin Water Users.

According to the contract for sale, the purchase price for both systems was \$1,200,000. Destin Water Users stated it would borrow \$1,000,000 from Regions Bank in Fort Walton Beach, Florida, with the balance to be drawn from operating capital. Destin Water Users represents that this transaction will not jeopardize its financial standing. In 1993, Destin Water Users reported total revenues of \$3,309,379 and total expenses of \$2,908,413. The selling parties represent that there are no outstanding fees or fines due any regulatory authorities. Both Destin Utility and Eastdestin were current in the filing of annual reports and regulatory assessment fees. No liabilities for taxes of any kind assessable to Destin Utility or Eastdestin were assumed by Destin Water Users.

Destin Water Users has been in operation since 1964. The company historically operates within DEP standards. The utility has consistently met DEP standards and provided customers with quality service. Destin Water Users has no outstanding violations.

Rate base for transfer purposes is not generally set in a case where the transfer is to an exempt entity. However, Destin Utility and Eastdestin had filed for staff assisted rate cases and an audit was completed on those utilities. We note rate bases for Destin Utility and Eastdestin of \$7,198 and \$375,334, respectively.

Destin Water Users has demonstrated the financial and technical capability to provide quality service to the additional customers transferred to the utility. We expect that the customers will experience consistent service provided within DEP standards. The rate impact to most customers is minimal. We find, pursuant to Section 367.071(1), Florida Statutes, that this transfer is in the public interest and that Destin Water Users is capable of fulfilling the commitments, obligations and representations of the utilities. Therefore, we grant our approval of the transfer of Destin Utility Company, Inc., and Eastdestin Wastewater Services, Inc., to Destin Water Users, Inc. It shall follow that Certificates Nos. 561-W and 489-S are cancelled.

SHOW CAUSE

Destin Utility and Eastdestin completed the closing on the purchase and sale of assets agreement on August 31, 1994. Section 367.071 (1), Florida Statutes, requires that:

No utility shall sell, assign, or transfer its certificate of authorization, facilities, or any portion thereof ..., without determination and approval of the

commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility.

Section 367.161 (1), Florida Statutes, authorizes this 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 have willfully violated, any provision of Chapter 367, Florida Statutes.

Destin Utility and Eastdestin appear to have violated Section 367.071 (1), Florida Statutes, by failing to obtain our approval before selling their facilities to Destin Water Users. While we have no reason to believe that the utilities intended to violate this statute, their act was "willful" in the sense intended by Section 367.161, Florida Statutes. 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, "in our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

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 utilities' failure to obtain antecedent Commission approval to sell their facilities, would meet the standard for a "willful violation."

The Eastdestin wastewater system was operating with several persistent deficiencies and under DEP notices of violation. The operational circumstances had reached emergency proportions. The financial posture of the utilities had become perilous. The wastewater customers, as well as DEP, had strongly urged interconnection. The wastewater system was incapable of managing the wastewater flows. DEP had issued several notices of violation against the Eastdestin system for numerous operating and maintenance deficiencies. DEP inspected the wastewater facility on nine occasions between July 1993 and June 1994, finding, amongst other problems, problems with poor effluent quality, disinfection, odor, sludge spills, and inoperable flow meters. Although the utilities are charged with knowledge of Chapter 367, Florida statutes, we do not believe that these utilities' apparent

violations of Section 367.171 (1), Florida Statutes, rise to the level of warranting that show cause orders be issued. Thus, we find it inappropriate to order Destin Utility and Eastdestin to show cause for failing to obtain the Commission's prior approval for the sale of their assets to Destin Water Users.

COWBOYS RESTAURANT REFUND

On October 20, 1992, the Board of County Commissioners of Okaloosa County declared that Okaloosa County shall become subject to Chapter 367, Florida Statutes. We acknowledged the County's enabling resolution in Order No. PSC-92-1409-FOF-WS, issued December 3, 1992. In each of the subsequent certification orders, Order No. PSC-92-1409-FOF-WS and Order No. PSC-94-0259-FOF-WU, both issued March 8, 1994, we ordered that Destin Utility and Eastdestin hold monies collected from Cowboys Restaurant subject to refund, and secured by an escrow agreement or other security, pending the final determination of rates in then-open staff-assisted rate case dockets, Dockets Nos. 931188-WU and 931187-SU.

Our practice, upon an application for a grandfather certificate, is to approve the rates and charges employed by the utility at the time of the Commission's assertion of jurisdiction. We found, in the certification dockets, that both Destin Utility and Eastdestin were charging general service rates not in effect at the time of certification, and unapproved, to Cowboys Restaurant, which connected to the utilities' services subsequent to the transfer of jurisdiction. In Orders Nos. PSC-94-0259-FOF-WU, concerning Destin Utility, and PSC-94-0260-FOF-SU, concerning Eastdestin, we stated that the utility:

requested a general service rate for Cowboys Restaurant, a restaurant which connected to [the utility] subsequent to the jurisdictional date. Although a general service rate was previously not approved by this Commission for this utility, we find that it is appropriate that [the utility] continue to charge Cowboys Restaurant the general service rate approved herein. [The utility] has applied for a staff assisted rate case, and these rates will be analyzed further in that rate proceeding.

The rates charged to Cowboys Restaurant were implemented prior to Commission approval. Therefore, the monies collected from Cowboys Restaurant shall be held subject to refund pending the final determination of rates in the staff assisted rate case

Following their acquisition by Destin Water Users, the utilities withdrew their staff-assisted rate case applications on September 13, 1994, pursuant to Section 367.0814 (6), Florida Statutes, which states that "[i]f a utility becomes exempt from commission regulation or jurisdiction during the pendency of a staff-assisted rate case, the request for rate relief is deemed to have been withdrawn." We never completed an analysis that might have disproved the reasonableness of the rates charged to Cowboys Restaurant and approved in the prior grandfather certification case. Therefore, we do not find it appropriate to require a refund. The rate approved in the certification case continues to be the only official rate approved by the Commission, up to the time of the completion of the transfer to Destin Water Users. Since no further action is required, this docket shall be closed.

Based on the foregoing, it is therefore,

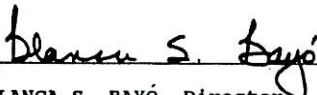
ORDERED by the Florida Public Service Commission that the transfer of the assets of Destin Utility Company, Inc., and Eastdestin Wastewater Services, Inc., to Destin Water Users, Inc., is approved. It is further

ORDERED that show cause proceedings against Destin Utility Company, Inc., and Eastdestin Wastewater Services, Inc., shall not be initiated. It is further

ORDERED that Destin Utility Company, Inc., and Eastdestin Wastewater Services, Inc., shall not be required to make refunds to Cowboys Restaurant. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission, this 28th day of February, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CJP

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.

SCHEDULE 1

Comparison of
 Rates and Sample Bill

Water

	<u>Destin Utility</u>	<u>Destin Water Users</u>
Base Facility Charge	\$7.50 (includes 4,000) gallons	\$6.00 (includes 3,000) gallons
Gallage Charge		
3,000-15,000	N/A	\$1.40
15,000-50,000	N/A	\$1.65
4,001-10,000	\$1.25	N/A
10,000+	\$1.50	N/A

Wastewater

	<u>Eastdestin Wastewater</u>	<u>Destin Water Users</u>
Base Facility Charge	\$18.25	\$18.00
Gallage Charge	N/A	N/A

Comparative Bills
 at 10,000 Gallons

	<u>Destin Utility Company</u>	<u>Eastdestin Wastewater</u>	<u>Destin Water Users</u>
Water	\$15.00	N/A	\$15.80
Wastewater	N/A	\$18.25	\$18.00
TOTAL	\$15.00	\$18.25	\$33.80