

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer
of Certificate No. 573-W from
Harbor Lakes Water System, Inc.
to NHC Utilities, Inc. from
Charlotte County.

DOCKET NO. 970762-WU
ORDER NO. PSC-98-0024-FOF-WU
ISSUED: January 5, 1998

The following Commissioners participated in the disposition of
this matter:

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

ORDER APPROVING TRANSFER

AND

NOTICE OF PROPOSED AGENCY ACTION
ORDER ESTABLISHING RATE BASE, FOR PURPOSES OF THE TRANSFER

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action establishing rate base for purposes of the transfer, as discussed herein, is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Background

On June 24, 1997, NHC Utilities, Inc. (NHC) filed an application to transfer Certificate No. 573-W from Harbor Lakes Water Systems, Inc. (Harbor Lakes or utility) to NHC. Harbor Lakes is a Class C utility that provides water service to about 458 residential customers in Charlotte County. NHC is a wholly-owned subsidiary of LEMB, L.P. (LEMB), a Delaware limited partnership that acquired the utility system and the mobile home community it

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serves. The utility also serves an adjacent 59 lot single-family subdivision known as Riverwood.

According to the application, Sunlife RV Resorts, L.L.C. (Sunlife) and the former owners entered into an agreement on August 14, 1996, to purchase various assets, including the utility. By agreement dated December 2, 1996, Sunlife agreed to assign its rights under the purchase agreement to LEMB, L.P., NHC's parent company. In June of 1997, LEMB agreed to assign its rights under the contract to NHC. In all cases, transfer of the utility system was made contingent upon Commission approval. The purchase agreement also indicated that the acquiring company would manage, operate, and maintain the utility system until the proposed transfer was approved by the Commission. However, because the contract was signed and the utility was turned over to NHC prior to Commission approval, Harbor Lakes is in apparent violation of Section 367.071, Florida Statutes. The violation is discussed later in this Order.

Show Cause

As stated previously, Harbor Lakes is in apparent violation of Section 367.071, Florida Statutes, which states, in part, "No utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organizational control without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest." Harbor Lakes Water Systems, Inc. entered into a contract on August 14, 1996, to sell the water system to NHC Utilities, Inc. NHC Utilities, Inc. has been operating, managing and maintaining the system since August, 1996, without the approval of the Commission. Such action is "willful" in the sense intended by Section 367.161, Florida Statutes. Section 367.161, 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. 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 "[i]n 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.

Harbor Lakes Water Systems, Inc. failed to obtain the approval of the Commission prior to entering into a contract and turning the facilities over to NHC to operate. The Third Amendment to the Purchase and Sale Agreement states that the transfer is contingent upon Commission approval. A copy of the Escrow Agreement was also provided which states that approval of the Commission to transfer the assets of Harbor Lakes to the Buyer is needed. The Agreement also states that the Buyer and Seller have agreed that the Buyer will operate and manage Harbor Lakes during the interval between the date of this Escrow Agreement and final approval by the Commission. The Escrow Agreement further states, in part, that the entire escrow deposit shall be held pending, among other provisions, final approval of the Commission. If approval is not obtained by the Buyer, the funds held in escrow are to be returned to the Buyer. Failure of Harbor Lakes to obtain prior approval of the Commission appears to be due to its belief that because the sale is contingent upon Commission approval, it is not final, and therefore, not a violation of Section 367.071, Florida Statutes.

We have reviewed the application, the sales agreement and its amendments, and the Escrow Agreement. Although NHC has been operating the utility since the agreement was signed in August of 1996, closing of the sale is conditioned upon Commission approval. We do not believe that the apparent violation of Section 367.071, Florida Statutes, rises in these circumstances to the level of warranting initiation of show cause proceedings. Therefore, we do not find it appropriate to initiate show cause proceedings against Harbor Lakes for failing to obtain Commission approval prior to turning the system over to NHC to operate.

Application

The application is in compliance with Section 367.071, Florida Statutes, and other pertinent statutes and provisions of the Florida Administrative Code. In particular, the application contains a filing fee in the amount of \$750, pursuant to Rule 25-30.020, Florida Administrative Code.

Rule 25-30.037(2)(q), Florida Administrative Code, requires a utility to provide proof of ownership of the land upon which its facilities are located. However, Harbor Lakes purchases bulk potable water from Charlotte County Utilities for resale to its customers. The utility's distribution facilities are located within authorized easements.

NHC provided proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code, including notice to the customers of the system being transferred. No objections to the application have been received and the time for filing such has expired.

Because NHC's parent company will own and operate the mobile home community that is served by the utility, NHC has pledged that it will provide satisfactory service for its customers. NHC will retain the same personnel who presently operate and maintain the utility's facilities.

We have contacted the Department of Environmental Protection (DEP) concerning Harbor Lakes' status relative to any Notices of Violation or DEP consent orders. According to DEP, there are no outstanding notices of violation or consent orders against the utility.

NHC provided a copy of the contract for sale which reflects the purchase price, terms of payment and a list of the assets purchased and the liabilities assumed. In addition, NHC provided a statement in its application that it will fulfill the commitments, obligations, and representations of Harbor Lakes.

Based on the foregoing, we find that the transfer of Certificate No. 537-W from Harbor Lakes to NHC is in the public interest and it is approved. The territory the utility is authorized to serve is shown on Attachment A of this Order, which by reference is incorporated herein. Accordingly, Certificate 537-W to will be reissued reflecting the change in ownership.

Rate Base

According to the application, rate base for the Harbor Lakes system was \$302,163 as of November 30, 1996. This amount reflects the adjusted net book value of the acquired system as proposed by the utility's outside consultant. Those adjustments include removal of misclassified and undocumented charges, corresponding revisions to accumulated depreciation, and crediting the contributions-in-aid-of-construction (CIAC) balance.

The Commission staff conducted an audit of the utility's books and records to affirm that the adjusted balance was correct in all material respects. Two additional corrections were necessary, a \$1,842 addition to general plant to reclassify computer equipment

that was incorrectly expensed and accumulated depreciation was updated to December 31, 1996 to provide year-end details.

An acquisition adjustment results when the purchase price of a utility differs from the original cost calculation. In this proceeding, the purchase price of the utility cannot be readily determined because the utility was purchased in combination with other assets. Nowhere in the agreement does it specifically define what portion of the purchase price should be assigned to the utility. NHC's consultant assigned about \$301,163 to the utility system since that amount matched the adjusted net book value.

In the absence of extraordinary circumstances, it has been Commission policy that the purchase of a utility at a premium or discount shall not affect the rate base calculation. The circumstances in this exchange do not appear to be extraordinary. Further, an acquisition adjustment has not been requested by NHC, and none has been included in the rate base calculation.

Therefore, rate base for Harbor Lakes is found to be \$302,627 as of December 31, 1996, which for transfer purposes reflects the net book value of the system being transferred. Our calculation of rate base, with adjustments, is shown on Schedule No. 1, which by reference is incorporated herein.

The rate base calculation is used solely to establish the net book value of the system being transferred. The calculation does not include the normal ratemaking adjustments for working capital or used an useful factors.

Rates and Charges

Harbor Lakes' current rates and charges became effective on January 13, 1995, pursuant to a price index rate adjustment (WS-94-0261). Rule 25-9.044, Florida Administrative Code, requires the new owner of a utility to adopt and use the rates, classification and regulations of the former owner unless authorized to change by this Commission. NHC has not requested to change the rates and charges of the utility and we see no reason to change them at this time. NHC shall continue to charge the rates and charges approved in Harbor Lakes' tariff until authorized to change by this Commission in a subsequent proceeding. NHC has filed a tariff reflecting the change in ownership. The tariff shall be effective for service rendered or connections made on or before the stamped approval date on the tariff sheets.

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Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the transfer of Certificate No. 573-W from Harbor Lakes Water Systems, Inc., 3737 El Jobean Road (State Road 776), Port Charlotte, Florida 33953, to NHC Utilities, Inc., 3737 El Jobean Road (State Road 776), Port Charlotte, Florida 33953, is hereby approved. It is further


ORDERED that rate base, for purposes of the transfer which reflects the net book value of the system, is \$302,627 as of December 31, 1996. It is further

ORDERED that NHC Utilities, Inc. shall continue to charge the rates and charges approved in Harbor Lakes Water Systems, Inc.'s tariff until authorized to change by this Commission in a subsequent proceeding. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 5th day of January, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

ALC

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.

As identified in the body of this order, our action establishing rate base for purposes of the transfer is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on January 26, 1998. If such a petition is filed, mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water 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

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the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date 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.

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 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.

ATTACHMENT A

NHC UTILITIES, INC.

Territory Description

A portion of Plan No. 1 of a part of Ward Seven El Jobean, as recorded in Plat Book 2, Page 37, of the Public Records of Charlotte County, Florida, and a portion of Plan No. 2 of a part of Ward Seven El Jobean, as recorded in Plat Book 2, Page 48, of the Public Records of Charlotte County, Florida, all being more particularly described as follows:

Beginning at the intersection of the Northerly right-of-way line of Russell Avenue and the centerline of the C.H. & N. Railroad; thence South $72^{\circ} 11' 23''$ West along the Northerly right-of-way line of said Russell Avenue, a distance of 1257.07 feet to a point on the arc of a curve whose radius point bears South $67^{\circ} 00' 19''$ West from said point, and being the right-of-way line of Seminole Circle; thence, Northerly and Westerly, along the arc of said curve, having a radius of 332 feet and a central angle of $49^{\circ} 37' 52''$, an arc distance of 287.59 feet, to the Easterly right-of-way line of Southland Avenue; thence North $12^{\circ} 11' 23''$ East, along said Easterly right-of-way line, a distance of 2024.95 feet; thence North $77^{\circ} 48' 37''$ West, a distance of 1390.0 feet, to the center of Lincoln Park; thence North $17^{\circ} 22' 27''$ East radially a distance of 331.97 feet to the intersection of Lincoln Circle with the Easterly right-of-way line of Hamner Avenue; thence North $12^{\circ} 11' 23''$ East along the Easterly right-of-way line of Hamner Avenue, a distance of 1222.32 feet to the intersection with the Southeasterly right-of-way line of Colonial Avenue; thence North $72^{\circ} 11' 23''$ East along the Southeasterly right-of-way line of Colonial Avenue, a distance of 605.01 feet to the Southwesterly extension of the Southeasterly right-of-way line of Ward Road; thence North $12^{\circ} 11' 23''$ East along the Southeasterly right-of-way line of Ward Road, a distance of 417.62 feet to a point on the North line of Section 21, Township 41 South, Range 21 East, Charlotte County, Florida; thence South $89^{\circ} 32' 10''$ East along the North line of said Section 21, a distance of 2212.21 feet to the intersection with the centerline of the C.H. & N. Railroad; thence South $12^{\circ} 11' 23''$ West along said centerline, a distance of 4258.40 feet to the Point of Beginning, containing 202.5285 acres, more or less.

SCHEDULE NO. 1

HARBOR LAKES WATER SYSTEMS, INC.

SCHEDULE OF WATER RATE BASE

AS OF DECEMBER 31, 1996

<u>Description</u>	Balance per <u>Utility</u>	<u>Adjust</u>		Balance per <u>Commission</u>
Utility Plant in Service	\$559,829	\$1,842	a)	\$561,671
Accumulated Depreciation	(\$171,602)	(\$1,681)	b)	(\$173,283)
CIAC	(\$102,221)	\$ 0		(\$102,221)
Accumulated Amortization	\$ 16,157	\$ 303	c)	\$ 16,460
Working Capital	<u>\$ 0</u>	<u>\$ 0</u>		<u>\$ 0</u>
Totals	<u>\$302,163</u>	<u>\$ 464</u>		<u>\$302,627</u>

a) Adjustment to reclassify computer equipment to plant in service

b) Adjustment to include additional plant and update to 12/31/96

c) Adjustment to update balance to 12/31/96