

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Ortega
Utility Company for transfer of
facilities in Duval County to
Jacksonville Electric Authority,
and cancellation of Certificate
Nos. 223-W and 167-S.

DOCKET NO. 981241-WS
ORDER NO. PSC-99-0252-FOF-WS
ISSUED: February 9, 1999

The following Commissioners participated in the disposition of
this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

ORDER APPROVING TRANSFER, CANCELLING CERTIFICATE, AND
DECLINING TO INITIATE A SHOW CAUSE PROCEEDING

BY THE COMMISSION:

BACKGROUND

Ortega Utility Company (Ortega or utility) is a Class B water and wastewater utility located in Duval County, Florida. Ortega owns and operates utility systems in three separate communities: Blanding, Herlong and Airport. According to its 1997 annual report, Ortega serves approximately 1,428 water and 1,298 wastewater customers with combined water and wastewater revenues of \$1,404,551 and a combined net operating income of \$237,690.

Ortega was organized in July of 1965 for the purpose of providing water and wastewater service to an area in the southern most end of Duval County. The utility was granted Certificate Nos. 223-W and 167-S by Order No. 6775, issued July 16, 1975, in Docket Nos. 74466-S and 74467-W. Since that time, the utility's service territory has been amended several times. The most recent amendment was approved pursuant to Order No. PSC-98-1150-FOF-WS, issued August 25, 1998, in Docket No. 980298-WS.

DOCUMENT NUMBER-DATE

01702 FEB-99

FPSC-RECORDS/REPORTING

This amendment was filed pursuant to Rule 25-30.036(2), Florida Administrative Code, to provide service to the U.S. Department of Navy's DRMO Facility which represented fewer than 25 equivalent residential connections. On August 11, 1998, just prior to the issuance of Order No. PSC-98-1150-FOF-WS, Ortega closed on an agreement for the acquisition of its facilities by the City of Jacksonville through the City's utility department, Jacksonville Electric Authority (JEA). On September 30, 1998, an application to transfer Ortega's facilities to JEA was filed with the Commission.

NO SHOW CAUSE REQUIRED

As stated in the case background, the utility was transferred to JEA on August 11, 1998, and JEA thereafter began running Ortega's facilities, without prior approval of the Commission. The application for approval of the transfer was subsequently filed on September 30, 1998. 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.

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 our 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 our approval 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 our staff and by letter dated November 27, 1998, Alan W. Potter, Sr., president of the utility, stated that the need for the sales transaction to occur in August was driven by "trying to meet the obligations of the various parties." The utility understood that transfer of a utility, its service territory, and assets to a governmental authority, was a matter of right and did not require the approval of the Commission, pursuant to Section 367.071(4)(a), Florida Statutes. However, we are charged with approving a utility's application prior to the sale or transfer of facilities.

Although regulated utilities are charged with knowledge of Chapter 367, Florida Statutes, we find that the apparent violation of Section 367.071, Florida Statutes, does not rise in these circumstances to the level which warrants the initiation of a show cause proceeding. Therefore, we decline to initiate a show cause proceeding against Ortega for its failing to obtain our approval prior to the transfer of the utility to JEA.

APPLICATION

As noted previously, an application for the transfer of Ortega's facilities to JEA was received by the Commission on September 30, 1998. Pursuant to Section 367.071(4)(a), Florida Statutes, the sale of facilities to a governmental authority shall be approved as a matter of right. The application is in compliance with Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. As such, no notice of the transfer is required and no filing fees apply.

The application was accompanied by a copy of the Asset Purchase Agreement (Agreement). The closing occurred on August 11, 1998. The total purchase price for the transfer of assets was \$7,180,000.

The application states that Ortega has neither collected nor retains any deposits from either customers or developers. A letter from JEA was provided with the application indicating that JEA believes it has received Ortega's most recent available income and expense statement, balance sheet, statement of rate base for regulatory purposes and contributions-in-aid-of-construction.

According to our records, the utility owes \$1,790.42 in penalties and interest for late-filed 1991 water and wastewater regulatory assessment fees. By letter dated December 22, 1998, the utility was sent an explanation of the charges and asked to respond in thirty days. The utility is otherwise current on its annual reports and regulatory assessment fees. As already noted, the date of closing was August 11, 1998. Therefore, in addition to any amount owed in penalties and interest, Ortega will be responsible for 1998 regulatory assessment fees up through August 11, 1998. The appropriate fees shall be remitted to the Commission pursuant to the requirements of Rules 25-30.110 and 25-30.120, Florida Administrative Code.

Ortega has one open docket pending our disposition in Docket No. 981022-WS regarding disposition of any CIAC gross-up funds collected by Ortega during the years 1987 through 1996. Until a final determination is made of all issues in this docket, the utility's certificates shall remain in effect.

Based on the above, we find it appropriate to approve the transfer of facilities from Ortega Utility Company to Jacksonville Electric Authority as a matter of right. Certificate Nos. 223-W and 167-S shall remain in effect until all issues relating to Docket No. 981022-WS are resolved and the docket is closed.

This docket shall remain open pending final disposition of all issues in Docket No. 981022-WS. Once that docket has been closed, Certificate Nos. 223-W and 167-S shall be canceled and this docket shall be administratively closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the transfer from Ortega Utility Company, 905 North Street, Jacksonville, Florida 32211-5793, to Jacksonville Electric Authority, 21 West Church Street, Tower 16, Jacksonville, Florida 32202-3139 is hereby approved. It is further

ORDERED that a show cause proceeding shall not be initiated as set forth herein. It is further

ORDERED that Ortega Utility Company shall be responsible for 1998 regulatory assessment fees up through August 11, 1998. It is further

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ORDERED that this docket shall remain open pending final disposition of all issues in Docket No. 981022-WS. Once that docket has been closed, Certificate Nos. 223-W and 167-S shall be canceled and this docket shall be administratively closed.

By ORDER of the Florida Public Service Commission this 9th day of February, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: *Kay Flynn*
Kay Flynn, Chief
Bureau of Records

(S E A L)

SRF

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 Records and Reporting, 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 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.