

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of majority organizational control of San Sebastian Utilities, Inc., holder of Certificate No. 439-W in Brevard County, and name change on certificate, to San Sebastian Water, LLC.

DOCKET NO. 001145-WU
ORDER NO. PSC-01-0426-FOF-WU
ISSUED: February 22, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER APPROVING TRANSFER OF MAJORITY ORGANIZATIONAL CONTROL AND NAME CHANGE, AND HOLDING DOCKET OPEN PENDING FILING OF PROOF OF OWNERSHIP OR CONTINUED USE OF THE LAND UPON WHICH THE UTILITY'S FACILITIES ARE LOCATED

BY THE COMMISSION:

On August 15, 2000, an application for approval of the transfer of majority organizational control of San Sebastian Utilities, Inc. (San Sebastian or utility) from Charles E. Buchanan through Howbert, L.C. (Howbert or seller) to San Sebastian Water, LLC (SSW or buyer) was filed with this Commission, pursuant to Section 367.071, Florida Statutes. San Sebastian is a Class C water utility, in Brevard County. The utility's 1999 Annual Report indicates that San Sebastian had no revenues or operating income.

San Sebastian was granted Certificate No. 439-W by Order No. 13816, issued October 29, 1984, in Docket No. 840189-WU. That Order also established projected rates for the utility. According to the information provided at that time, the utility intended to serve approximately 225 small, single family residences in the

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subdivision known as San Sebastian Woods. The area also includes approximately 6.2 acres, improved with a pool, fishing lake, clubhouse, and a storage area for recreational vehicles and boats. Although the subdivision and utility were both owned by Mr. Buchanan, the area was never developed. The only water facilities in existence are wells and lines utilized for irrigation purposes.

By letter dated July 6, 1999, Mr. Buchanan notified the Commission that the subdivision and future water system were sold to Howbert. The transfer of majority organizational control occurred on June 26, 1999, without prior Commission approval.

Because of incorrect and insufficient information, Mr. Buchanan's letter was misdirected. According to information obtained later, the transfer occurred just prior to foreclosure by Huntington Bank on the Subdivision and the utility. By the time we became aware that the transfer had taken place, San Sebastian was in the process of transferring majority organizational control of the utility to SSW. The Sales Contract was executed on November 9, 1999, with an anticipated closing in January 2000. After being informed of the requirement to obtain Commission approval prior to transfer, the parties have not closed on the transfer.

Transfer Prior to Commission Approval

As discussed previously, the transfer of majority organizational control of the utility from Mr. Buchanan to Howbert, L.C. occurred prior to Commission approval, which is an apparent violation of Section 367.071(1), Florida Statutes. Section 367.071 (1), 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 . . . However, a sale, assignment, or transfer of its certificate of authorization, facilities or any portion thereof, or majority organizational control may occur prior to commission approval if the contract for sale, assignment, or transfer is made contingent upon commission approval.

By letter dated July 6, 1999, Mr. Buchanan attempted to notify the Commission of the transfer of the utility to Howbert. The transfer occurred on June 26, 1999, just prior to foreclosure on the utility and subdivision by Huntington Bank. Although Mr. Buchanan's letter was misdirected, as will be discussed later, it does not change the fact that the transfer occurred without prior Commission approval. Further, the closing was not contingent upon such approval. 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.

Although San Sebastian's failure to obtain Commission approval prior to transferring facilities is an apparent violation of Section 367.071(1), Florida Statutes, there are circumstances that appear to mitigate the utility's apparent violation. As stated previously, the transfer occurred just prior to foreclosure by the Huntington Bank on the development and utility. Typically, during negotiations for the transfer of a utility, there is time for a utility to contact our staff regarding the appropriate procedures. This case was complicated by the impending foreclosure proceedings.

Mr. Buchanan attempted to notify this Commission by letter of the sale of the subdivision and the future water system to Howbert. Because the company code used by Mr. Buchanan to identify the system was incorrect and the letter did not correctly identify the utility, it was not recognized as a regulated utility. As a consequence, the letter was forwarded to our Division of Consumer Affairs. After Mr. Buchanan's January 22, 2000, response to the

Division of Consumer Affairs' inquiries, the matter was forwarded to the Division of Water and Wastewater for handling.

Although regulated utilities are charged with knowledge of Chapter 367, Florida Statutes, 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 a show cause proceeding. Therefore, we do not find it appropriate to initiate a show cause proceeding against San Sebastian for failure to obtain approval prior to transferring majority organizational control of the utility to Howbert.

Application

In order to process the application for approval of the transfer of majority organizational control, additional information and clarification was needed. The application is now in compliance with Section 367.071, Florida Statutes, and provisions of the Florida Administrative Code. The application contains the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. Also, Rule 25-30.037(3)(k), Florida Administrative Code, requires an applicant to return its certificate with the application or provide a statement of the efforts taken to obtain the certificate. Because San Sebastian was unable to locate its certificate, an explanation of the steps taken to obtain it was provided.

Noticing The application contains evidence of compliance with the noticing provisions of Rule 25-30.03, Florida Administrative Code. Notice could not be provided to each customer of the system being transferred since the utility does not currently serve any customers. No objections to the application have been received and the time for filing such has expired.

Sales Contract, Financing and Environmental Compliance A copy of the Sales Contract executed on November 9, 1999, between Howbert and Charles H. Wahlen and/or assigns (SSW), was provided with the application. With regard to financing of the transfer, the application indicates that the purchase was a cash transaction and that the purchase price was \$1,400,000. Therefore, SSW is not relying on any other entity to provide funding for the acquisition. The purchase price includes the development rights to 145 platted lots in the San Sebastian Woods subdivision, with the potential of

approximately 225 small single-family residences at build out. The purchase price also includes approximately 6.2 acres improved with a pool, fishing lake, clubhouse and a storage area for recreational vehicles and boats.

Also conveyed to the buyer is 100 percent of the stock in the utility, which is described in the addendum to the Contract as a "bare-bones corporation with virtually no assets established to operate a private water plant." The only water facilities in existence are wells and lines utilized for irrigation purposes. It is estimated that 100,000 gallons of water are pumped annually for developer-related services. Because no customers are being served, the systems are not monitored by the Florida Department of Environmental Protection (FDEP), which does not monitor systems with fewer than 25 customers. We confirmed that San Sebastian is not monitored by FDEP.

Financial Ability With regard to financial ability, the financial statements of the joint owners of SSW (CRL, Inc., Thomas G. Martino, and Charles H. Wahlen) were provided with the application. According to the information in the statements, it appears that SSW has sufficient financial resources to develop properties in San Sebastian Woods while building and maintaining the utility facilities. Order No. 13816, which established initial rates, projected that utility plant-in-service at 80 percent operating capacity would cost \$415,675, with annual operating expenses of \$47,959.

Technical Ability According to the application, the buyer does not own any other water or wastewater utilities certificated by this Commission. However, SSW has retained the services of W.F. McCain & Associates, Inc. (McCain), to design, permit, and observe the construction of the infrastructure. Prior to the formation of McCain, the owner, Mr. William McCain, ran the Utilities Engineering Department for Indian River County for twelve years. McCain has a contract with Altech Water for operations of the water plant after construction. Altech Water is an FDEP licensed operator.

Public Interest The application indicates that the joint owners of SSW develop properties nationally and are financially capable of completing the construction of the utility. As a

demonstration of its commitment to follow the utility to fruition, SSW points to its long-standing, national record of project completion and follow-up. Further, McCain, the engineering firm, provided a report on the current status of permitting and construction. From this report, it appears that the permitting process should be completed by March 2001, with construction to be completed late in 2001.

The application indicates that there are approximately 25 pre-existing homes with privately-owned wells and septic systems. Having the option to tie into a central water system will provide these homes with additional service options. Finally, SSW provided a statement of its intent to fulfill the commitment, obligations and representations of the seller with regard to utility matters, in accordance with Rule 25-30.037(3)(f), Florida Administrative Code.

Regulatory Assessment Fees San Sebastian is current on its annual reports and regulatory assessment fees (RAFs) through 1999. Pursuant to Rule 25-30.120(1), Florida Administrative Code, the utility is only required to pay a minimum of \$25 since it has no revenues. San Sebastian shall be responsible for filing an annual report and paying RAFs for the year 2000. SSW shall be responsible for filing annual reports and paying RAFs for subsequent years.

Rate Base It has been Commission practice not to establish rate base in a transfer of majority organizational control. The reason for this is that publicly traded stock has no regulatory relationship to rate base. Because a utility's assets and liability accounts are not altered by stock transfers, such transfers have no affect on the utility's rate base balance. Since rate base is not affected by stock transfers, it is not considered when determining whether the transfer is in the public interest. This same approach is followed even if the stock is privately held, rather than publicly traded. Similarly, it has been Commission practice that acquisition adjustments for stock transfers are not part of the consideration of public interest in a transfer of majority organizational control. Therefore, we do not find it appropriate to establish rate base in this docket.

Based on the foregoing, we find that the transfer of majority organizational control of San Sebastian from Mr. Buchanan through

Howbert to SSW 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. San Sebastian shall be responsible for filing an annual report and remitting RAFs for the year 2000, within the time-frame and manner prescribed by Commission rules. SSW shall be responsible for filing annual reports and paying RAFs for all subsequent years. Further, SSW shall file a recorded warranty deed, long-term lease, or other evidence that the utility has continued use of the land upon which its facilities are located, in the name of San Sebastian Water, LLC, within 45 days of the date the stock is transferred.

Name Change

At the time San Sebastian filed its application for approval of majority organizational control in the instant docket, it also requested that the name on Certificate No. 439-W be changed from San Sebastian Utilities, Inc. to San Sebastian Water, LLC. We find it appropriate to approve this request. Because San Sebastian was unable to locate the original certificate, a new certificate shall be issued for the utility in the name of San Sebastian Water, LLC.

Rates and Charges

San Sebastian's current rates and charges, which were established by Order No. 13816, issued October 29, 1984, in Docket No. 840189-WU, became effective on November 1, 1984. The utility's rates and charges are set forth below.

Residential Service
Monthly Rates

<u>Base Facility Charge</u>	<u>Charge</u>
<u>Meter Size</u>	
5/8" x 3/4"	\$ 11.27
3/4"	\$ 16.91
1"	\$ 28.18
1 1/2"	\$ 56.35
2"	\$ 90.16
3"	\$ 180.32
4"	\$ 281.75
6"	\$ 563.50

Gallonage Charge
(Per 1,000 Gallons) \$ 2.98

Customer Deposits

Residential
Meter Size
5/8" x 3/4" \$ 50.00

Service Availability Charges

Meter Installation Fees
5/8" x 3/4" \$ 112.00
All Others At Cost

System Capacity Charge
Per Equivalent Residential Connection
(250 gallons) \$1,000.00

Rule 25-9.044(1), Florida Administrative Code, requires the new owner of a utility to adopt and use the rates, classifications and regulations of the former operating company unless authorized to change by this Commission. SSW has not requested to change the rates and charges and we see no reason to change them at this time. SSW shall continue to charge the rates and charges approved in San Sebastian's tariff until authorized to change by this Commission in a subsequent proceeding. SSW has filed a revised tariff reflecting change in the issuing office and the change in the utility name. The tariff shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets.

It is, therefore,

ORDERED by the Florida Public Service Commission that the transfer of majority organizational control of San Sebastian Utilities, Inc., 8730 U.S. 1, Micco, Florida 32976, from Charles E. Buchanan, Post Office Box 40, West Melbourne, Florida 32912-0040, to San Sebastian Water, LLC, 2537 Sherman Street, Hollywood, Florida 33020, is hereby approved. The territory San Sebastian Utilities, Inc. is authorized to serve is shown on Attachment A of this Order, which by reference is incorporated herein. It is further

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ORDERED that the request to change the name of the utility on Certificate No. 439-W to from San Sebastian Utilities, Inc. to San Sebastian Water, LLC is hereby approved. It is further

ORDERED that San Sebastian Water, LLC shall file a recorded warranty deed, long-term lease, or other evidence that the utility owns or has continued use of the land upon which its facilities are located, in the name of San Sebastian Water, LLC, within 45 days of the date the stock is transferred. It is further

ORDERED that San Sebastian Utilities, Inc. shall be responsible for filing an annual report and paying regulatory assessment fees for the year 2000, within the time-frame and manner prescribed by Commission rules. San Sebastian Water, LLC shall be responsible for filing annual reports and paying regulatory assessment fees for all subsequent years. It is further

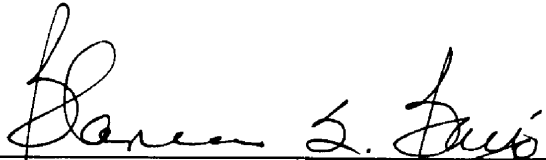
ORDERED that San Sebastian Water, LLC shall continue to charge the rates and charges approved in San Sebastian Utilities, Inc.'s tariff until authorized to change by this Commission in a subsequent proceeding. It is further

ORDERED that the tariff filed by San Sebastian Water, LLC, which reflects the change in issuing officer and the change in name, shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets. It is further

ORDERED that this docket shall remain open pending receipt of ownership or continued use of the land upon which the utility's facilities are located, as set forth in the body of this Order. Upon receipt of the evidence and upon verification by the Commission staff that such evidence meets the requirements as set forth in Rule 25-30.037(3)(i), Florida Administrative Code, this docket shall be administratively closed.

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By ORDER of the Florida Public Service Commission this 22nd
day of February, 2001.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.

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

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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.

ATTACHMENT A

SAN SEBASTIAN UTILITIES, INC.
BREVARD COUNTY
(Water Service Only)

TOWNSHIP 30 SOUTH, RANGE 38 EAST
SECTION 14

That portion of the South 1/2 of said Section 14 lying East of the Florida East Coast Railroad and West of U.S. Highway No. 1.

LESS

The North 250 feet thereof.

SECTION 23

That part of the East 1/2 of the Northwest 1/4 of said Section 23 lying East of the East Right-of-Way of the Florida East Coast Railroad.

AND

The North 400 feet of said Section 23 lying East of the Florida East Coast Railroad and West U.S. Highway No. 1.

LESS

That portion thereof described as beginning at the intersection of the Western Right-of-Way of U.S. Highway No. 1 and the Northern Right-of-Way of Tenth Street; thence North 89°38' East, a distance of 605 feet, more or less, to the East Right-of-Way of Third Street; thence North, following said Right-of-Way of Third Street, a distance of 265 feet, more or less, to the South Right-of-Way of Eleventh Street; thence North, following said Right-of-Way of Eleventh Street, a distance of 605 feet, more or less, to the Western Right-of-Way of U.S. Highway No. 1; thence South, following said Right-of-Way of U.S. Highway No. 1, a distance of 265 feet, more or less, to the Point of Beginning.