

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of majority organizational control of Tymber Creek Utilities, Incorporated, holder of Certificate Nos. 303-W and 252-S in Volusia County, from Joseph Stanley and Steve P. Shirah to Joseph Stanley Shirah.

DOCKET NO. 110317-WS

In re: Application for amendment of Certificate Nos. 303-W and 252-S to add territory in Volusia County by Tymber Creek Utilities, Incorporated.

DOCKET NO. 120191-WS  
ORDER NO. PSC-12-0571-FOF-WS  
ISSUED: October 24, 2012

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman  
LISA POLAK EDGAR  
ART GRAHAM  
EDUARDO E. BALBIS  
JULIE I. BROWN

ORDER APPROVING TRANSFER OF MAJORITY ORGANIZATIONAL CONTROL OF  
TYMBER CREEK UTILITIES, INC., AMENDING CERTIFICATE NOS. 303-W AND 252-S  
AND DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS

BY THE COMMISSION:

**Background**

Tymber Creek Utilities, Incorporated (Tymber Creek or Utility) is a Class B utility serving approximately 423 water and wastewater customers in Volusia County. The Utility is located in the St. Johns River Water Management District, which has permanent water restriction rules in place. Tymber Creek purchases bulk water from the City of Ormond Beach. According to the Utility's 2011 Annual Report, combined operating revenues were \$335,350 with a total net operating loss of \$47,826.

Tymber Creek was granted Certificate Nos. 303-W and 252-S in 1978.<sup>1</sup> The Utility's only other certification action was a name change in 2005.<sup>2</sup> On December 12, 2011, an

<sup>1</sup> See Order No. 8242, issued April 6, 1978, in Docket Nos. 770324-W and 770325-S, In re: Application of Tymber Creek Utilities for certificates to operate a water and sewer utility in Volusia County, Florida. Section 367.041, Florida Statutes.

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application for transfer of majority organizational control was filed. During the application process, we reviewed the Utility's legal description and territory maps and found that the Utility was serving outside its approved territory. Upon notification of a possible violation of Section 367.045, Florida Statutes, (F.S.), Tymber Creek filed an application for amendment of Certificate Nos. 303-W and 252-S in Docket No. 120191-WS.

This Order addresses the amendment of certificates and transfer of majority organizational control. We have jurisdiction pursuant to Sections 367.045 and 367.071, F.S.

### Decision

#### Show Cause

As stated previously, Tymber Creek is serving customers outside of its certificated water and wastewater territories in apparent violation of Section 367.045(2), F.S., which states in pertinent part: "A utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the [C]ommission. . ." If a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, F.S., Section 367.161(2), F.S., authorizes this Commission to assess a penalty of not more than \$5,000 for each offense. By serving customers outside of its certificated territory without obtaining an amended certificate of authorization, the utility's act was "willful" within the meaning of Section 367.161, F.S. Utilities are charged with the knowledge of the Commission's statutes and rules. Thus, any intentional act, such as Tymber Creek providing water service to the public for compensation since 1990, without first obtaining a certificate of authorization from this Commission, would meet the standard for a "willful violation" of Section 357.161(1), F.S. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, In re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., this 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"; see also Order No. PSC-99-2390-FOF-WU, Issued on December 7, 1999, in Docket No. 980543-WU, In re: Application for amendment of Certificate No. 363-W to add territory in Marion County by Sunshine Utilities of Central Florida, Inc., (finding that the utility's apparent violation of Section 367.045, F.S., did not warrant the initiation of a show cause proceeding). Additionally, "it 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).

Although Tymber Creek's failure to obtain an amended certificate of authorization from this Commission prior to serving outside of its certificated area is an apparent violation of Section 367.045(2), F.S., according to its application, the Utility erroneously believed that the

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<sup>2</sup> See Order No. PSC-05-0188-FOF-WS, issued February 18, 2005, in Docket No. 041339-WS, In re: Application for name change on Certificates Nos. 303-W and 252-S in Volusia County from Tymber Creek Utilities to Tymber Creek Utilities, Incorporated.

territory in question was included in its service area. As a result, the Utility has been providing service to approximately 12 water and wastewater connections located outside its certificated territory since 1990, in an area of approximately 23.7 acres adjacent to the utility's certificated territory. Additionally, the Utility has paid regulatory assessment fees (RAFs) on the revenues received from these customers and complied with all other rules and regulations as if the 12 connections were part of its territory. When the error was discovered, Tymber Creek immediately filed the instant application to correct the mistake by requesting this territory be added to its service area.

We do not find that this apparent violation of Section 367.045, F.S., rises, in these circumstances, to the level which warrants the initiation of a show cause proceeding. Therefore, we find that an order for Tymber Creek to show cause for failure to obtain an amended certificate of authorization prior to serving outside of its certificated territory is not necessary.

Amendment of Certificate Nos. 303-W and 252-S

The Utility's application to amend its authorized service territory is in compliance with the governing statute, Section 367.045, F.S., and Rule 25-30.036, Florida Administrative Code (F.A.C.). The application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, F.A.C. No objections to the application were received and the time for filing such has expired.

Since the Utility has been serving the proposed territory since 1990, we find that the Utility has demonstrated it has the necessary financial and technical expertise to do so. In addition, the Utility has shown that its current water and wastewater systems have sufficient capacity to serve the proposed areas. According to the Volusia County Health Department and the Florida Department of Environmental Protection (DEP), there are no outstanding notices of violation issued for Tymber Creek's water and wastewater treatment facilities at this time.

The application also contains evidence that the utility owns or has long-term use of the land upon which the utility facilities are located. Adequate service territory maps and territory descriptions have been provided. The Utility is currently providing service to approximately 12 water and wastewater residential customers located in the proposed territory, an area of approximately 23.7 acres adjacent to the Utility's certificated territory. As noted, the Utility has indicated that service to these residential customers started in 1990. Until recently, the Utility had assumed that the proposed areas had always been within the certificated areas authorized by this Commission. The Utility has indicated that throughout this time period, the calculation of the RAFs for Tymber Creek was inclusive of all of these customers. The Utility has filed revised tariff sheets incorporating the additional territory into its tariff.

Based on the foregoing, we find it is in the public interest to approve the application filed by Tymber Creek to amend its territory to reflect the area described in Attachment A, effective the date of this Commission's vote on this matter, October 2, 2012. This Order shall serve as Tymber Creek's amended certificates and shall be retained by the Utility. The Utility shall charge the customers in the territory added herein the rates and charges contained in the current tariff until a change is authorized by this Commission in a subsequent proceeding.

Transfer of Majority Organizational Control

On December 12, 2011, an application for transfer of majority organizational control of Tymber Creek from Joseph Stanley Shirah and Steve P. Shirah to Joseph Stanley Shirah was filed pursuant to Section 367.071, F.S. When certificated in 1978, Joseph Stanley, Steve P., and Ronald E. Shirah each owned 1/3 interest in the Utility. Subsequently, Ronald E. Shirah relinquished his 1/3 interest to the remaining shareholders, so that Joseph Stanley Shirah and Steve P. Shirah each owned a 50 percent interest, but neither in absolute control of the Utility. In a stock purchase agreement which closed on December 31, 2011, Steve P. Shirah relinquished his shares so that 100 percent ownership and exclusive control of the Utility passed to Joseph Stanley Shirah. Pursuant to Section 367.071, F.S., the transfer was made contingent upon approval by this Commission.

The application is in compliance with the governing statutes and other pertinent statutes and administrative rules concerning an application for transfer of majority organizational control. The application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, F.A.C. No objections to this application were received and the time for filing objections has expired. Pursuant to Rule 25-30.037(3)(g), F.A.C., the application contains a copy of a promissory note by which funding of the transaction will occur. Pursuant to Rule 25-30.037(3)(i), F.A.C., the application also contains evidence that the Utility owns or has long-term use of the land upon which the utility facilities are located.

Pursuant to Rule 25-30.037(3)(f), F.A.C., the application contains a statement of how the transfer is in the public interest. According to the application, the Buyer has been managing the system for many years and is familiar with the system. The Buyer has pledged to keep the systems in compliance with DEP standards and to fulfill the commitments, obligations, and representations of the Utility, pursuant to Rule 25-30.037(3)(h), F.A.C. We have verified that the Utility's systems are currently in compliance with all applicable standards set by the DEP and the Volusia County Health Department.

The Utility's current rates were effective September 26, 2011, pursuant to a staff-assisted rate case.<sup>3</sup> Rule 25-9.044(1), F.A.C., provides that in the case of a change in ownership or control of a utility, the rates, classifications, and regulations of the former owner must continue unless authorized to change by this Commission. Since Buyer has not requested a change, the Utility's existing rates and charges shall remain in effect until a change is authorized by this Commission in a subsequent proceeding. Because transfers of majority organizational control are by stock transfer, there is no acquisition adjustment consideration. The Utility is current on annual reports and RAFs through December 31, 2011. In accordance with Rules 25-30.120, F.A.C., the Utility shall continue to be responsible for all future annual reports and RAFs.

Based on the above, we find the transfer of majority organizational control of Tymber Creek Utilities, Incorporated from Joseph Stanley and Steve P. Shirah to Joseph Stanley Shirah is in the public interest and shall be approved effective the date of our vote on this matter. This

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<sup>3</sup> See Order No. PSC-11-0345-PAA-WS, issued August 16, 2011, in Docket No. 100359-WS, In re: Application for staff-assisted rate case in Volusia County by Tymber Creek Utilities, Incorporated.

Order shall serve as the Utility's Certificate Nos. 303-W and 252-S and shall be retained by the Utility. The Utility's existing rates and charges shall remain in effect until a change is authorized by this Commission in a subsequent proceeding and the Utility shall continue to be responsible for filing annual reports and remitting RAFs.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Utility shall not be required to show cause for violation of Section 367.045(2) F.S. It is further

ORDERED that Tymber Creek Utilities, Incorporated's application for amendment of Certificate Nos. 303-W and 252-S is granted and shall include the territory as reflected in Attachment A, effective October 2, 2012. This Order shall serve as the Utility's amended certificates and shall be retained by the Utility. It is further

ORDERED that the transfer of majority organizational control of Tymber Creek Utilities, Incorporated from Joseph Stanley Shirah (Buyer) and Steve P. Shirah (Seller) to Joseph Stanley Shirah is in the public interest and is granted effective October 2, 2012. It is further

ORDERED that the Utility shall charge the customers in the territory added herein the rates and charges contained in its current tariff until a change is authorized by this Commission in a subsequent proceeding. It is further

ORDERED that the Utility's existing rates and charges shall remain in effect until a change is authorized by this Commission in a subsequent proceeding. It is further

ORDERED that the Utility shall continue to be responsible for filing annual reports and remitting RAFs. It is further

ORDERED that no further action is necessary and these dockets shall be closed.

By ORDER of the Florida Public Service Commission this 24th day of October,  
2012.



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ANN COLE  
Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399  
(850) 413-6770  
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

MTL

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 Office of Commission Clerk, 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 Office of Commission Clerk, 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

ORDER NO. PSC-12-0571-FOF-WS  
DOCKET NOS. 120191-WS and 110317-WS  
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Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

TYMBER CREEK UTILITIES, INCORPORATED

DESCRIPTION OF WATER AND WASTEWATER TERRITORY

LOST CREEK SUBDIVISION

IN VOLUSIA COUNTY

Township 14 South, Range 31 East  
Section 31

That portion of the Southwest one-quarter of the Northeast one-quarter of Section 25, Township 14 South, Range 31 East, lying North of the Northerly top of bank of the Tomoka River and Easterly of Groover Branch Creek, in Volusia County, Florida, being more particularly described as follows:

Commence at the Southwest corner of lot 326, after lot 326 as measured along the West line of the Northeast one-quarter of Section 25, a distance of 1,319.05 feet South from the Northwest corner of the Northeast one-quarter of Section 25, Township 14, Range 31. Tymber Creek Phase II Subdivision. As recorded in map book 35, pages 116 thru 136 of the public records of Volusia County, Florida. Said point being the Point of Beginning; thence N. 87° 26' 54" E. along the Southerly line of said Tymber Creek Phase II Subdivision a distance of 1,330.09 feet to the East line of the said Southwest one-quarter of the Northeast one-quarter of Section 25; Thence S. 01° 25' 04" E. along the said East line a distance of 516.82 feet to a meander line along the Northerly top of bank of the Tomoka River; Thence along the said top of bank of the Tomoka River the following courses and distances: S. 56° 53' 33" W. a distance of 163.94 feet; S. 58° 00' 47" W. a distance of 100.98 feet; S. 41° 45' 18" W. a distance of 109.66 feet; S. 63° 07' 13" W. a distance of 100.12 feet; S. 82° 40' 55" W. a distance of 104.40 feet; S. 46° 41' 34" W. a distance of 105.94 feet; S. 76° 08' 56" W. a distance of 32.10 feet; S. 44° 55' 10" W. a distance of 107.70 feet; S. 32° 45' 58" W. a distance of 101.43 feet; S. 20° 15' 20" W. a distance of 100.12 feet; S. 28° 52' 54" W. a distance of 81.18 feet; S. 71° 09' 07" W. a distance of 40.26 feet to a meander line along the Easterly top of bank of said Groover Branch Creek; Thence along said top of Bank of Groover Branch Creek the following courses and distances: N. 81° 16' 40" W. a distance of 57.20 feet; N. 18° 23' 19" W. a distance of 34.56 feet; N. 17° 18' 38" W. a distance of 38.01 feet; N. 04° 51' 59" W. a distance of 56.40 feet; N. 23° 33' 35" W. a distance of 23.18 feet; N. 03° 39' 21" W. a distance of 52.53 feet; N. 13° 17' 07" E. a distance of 45.99 feet; S. 83° 41' 27" E. a distance of 38.88 feet; N. 39° 20' 57" E. a distance of 56.10 feet; N. 29° 00' 26" W. a distance of 36.31 feet; N. 55° 22' 42" W. a distance of 47.25 feet; N. 56° 00' 28" W. a distance of 51.45 feet; N. 15° 18' 09" W. a distance of 72.15 feet; N. 29° 53' 10" W. a distance of 69.49 feet; S. 66° 30' 02" W. a distance of 33.57 feet; S. 08° 08' 31" W. a distance of 36.56 feet; S. 43° 31' 28" W. a distance of 41.66 feet; S. 84° 11' 30" W. 65.49 feet; N. 80° 37' 26" W. a distance of 40.34 feet; N. 48° 25' 21" W. a distance of 61.62 feet; N. 12° 00' 14" W. a distance of 26.80 feet; N. 28° 07' 04" E. a distance of 80.59 feet; N. 15° 29' 07" E. a distance of 85.50 feet; N. 27° 46' 29" W. a distance of 19.83 feet; S. 72° 57' 24" W. a distance of 70.77 feet; S. 46° 51' 09" W. a distance of 64.30 feet; S. 29° 10' 55" W. a distance of 42.53 feet; S. 51° 45' 35" W. a distance of 22.87 feet to the West line of the said Southwest one-quarter of the Northeast one-quarter of Section 25; Thence N 01° 20' 57" W. a distance of 610.00 feet to the Point of Beginning.

Said parcel containing 23.7 acres, more or less. MB 44 pgs 12 & 13 PRVC



**FLORIDA PUBLIC SERVICE COMMISSION**

**Authorizes  
Tymber Creek Utilities, Incorporated  
Pursuant to  
Certificate Number 303-W**

to provide water service in Volusia County in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

<u>Order Number</u>	<u>Date Issued</u>	<u>Docket Number</u>	<u>Filing Type</u>
8242	04/06/1978	770324-W	Original Certificate
PSC-05-0188-FOF-WS	02/18/2005	041339-WS	Name Change
PSC-12-0571-FOF-WS	10/24/2012	110317-WS	Transfer of Majority Control
PSC-12-0571-FOF-WS	10/24/2012	120191-WS	Amendment

**FLORIDA PUBLIC SERVICE COMMISSION**

**Authorizes  
Tymber Creek Utilities, Incorporated  
Pursuant to  
Certificate Number 252-S**

to provide wastewater service in Volusia County in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

<u>Order Number</u>	<u>Date Issued</u>	<u>Docket Number</u>	<u>Filing Type</u>
8242	04/06/1978	770325-S	Original Certificate
PSC-05-0188-FOF-WS	02/18/2005	041339-WS	Name Change
PSC-12-0571-FOF-WS	10/24/2012	110317-WS	Transfer of Majority Control
PSC-12-0571-FOF-WS	10/24/2012	120191-WS	Amendment