

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Application for) DOCKET NO. 940743-WS
Transfer of Majority) ORDER NO. PSC-94-1236-FOF-WS
Organizational Control of) ISSUED: October 11, 1994
JACKSONVILLE SUBURBAN UTILITIES)
CORPORATION in Duval County from)
GWC Corporation to United Water)
Resources Inc.)
_____)

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING UNITED WATER RESOURCES INC.'S AND JACKSONVILLE SUBURBAN UTILITIES CORPORATION'S JOINT MOTION FOR WAIVER OF RULE 25-30.030, FLORIDA ADMINISTRATIVE CODE, AND TEMPORARILY EXEMPTING UNITED WATER RESOURCES INC. AND JACKSONVILLE SUBURBAN UTILITIES CORPORATION FROM FULL COMPLIANCE WITH RULE 25-30.030(4)(c), FLORIDA ADMINISTRATIVE CODE, AS APPLIED TO NOTICING INDIVIDUAL CUSTOMERS AND TO NOTICING BY PUBLICATION

BY THE COMMISSION:

BACKGROUND

Jacksonville Suburban Utilities Corporation (Jacksonville Suburban or utility) provides water and wastewater service to approximately 27,000 customers pursuant to Commission Certificates Nos. 236-W and 197-S in Duval, St. Johns, and Nassau Counties. Jacksonville Suburban is a wholly-owned subsidiary of General Waterworks Corporation (General Waterworks), which, until April 22, 1994, was a wholly-owned subsidiary of GWC Corporation (GWC), a Delaware corporation. On April 22, 1994, GWC merged into United Water Resources Inc. (UWR), a New Jersey corporation. As a result of the merger, GWC ceased to exist and UWR became the corporate grandparent of Jacksonville Suburban.

Also as a result of the merger, according to UWR's 1993 Annual Report, UWR became the second largest investor-owned water utility in the nation. UWR expects its operating revenues to double and

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its consolidated assets to exceed \$1 billion. Prior to the merger, Lyonnaise American Holding, Inc. (LAH) owned approximately 82% of GWC's issued and outstanding stock. LAH is a subsidiary of Lyonnaise des Eaux-Dumez (Lyonnaise), a French multi-national corporation and one of Europe's largest water purveyors. As a result of the merger, LAH now owns only approximately 26% of UWR's issued and outstanding stock. UWR's current Board of Directors includes the eleven-member UWR Board which existed prior to the merger, two persons who were previously members of the GWC Board of Directors, and two officers of Lyonnaise.

According to UWR's 1993 Annual Report, UWR entered into a definitive agreement to merge with GWC on September 15, 1993. On November 30, 1993, the Boards of Directors of both corporations voted to proceed with the proposed merger subject to various closing conditions, including approvals from certain state regulatory agencies. On that same date, Mr. Walton F. Hill, Assistant Vice President and Senior Attorney at General Waterworks Management and Service Company, sent a letter to Staff advising of GWC's intent to merge into UWR. In the letter, Mr. Hill stated that the utility did not believe the merger would require Commission approval under Section 367.071, Florida Statutes, because the direct control of Jacksonville Suburban would not change and because no changes were proposed to the operation, management, customer service, rates or any other element of Jacksonville Suburban's business. On June 2, 1994, Staff responded to Mr. Hill's letter, advising that Staff believed the utility should seek Commission approval because the merger would involve a change of the utility's majority organizational control. On July 13, 1994, Jacksonville Suburban and UWR filed a joint application for transfer of majority organizational control.

Along with the application, the utility and UWR (applicants) filed a Motion for Waiver of the noticing requirements of Rule 25-30.030, Florida Administrative Code. In the alternative, the utility requests waiver of Rules 25-30.030(2), (4)(c), (5)(c), (5)(d), (5)(g), (5)(h), (6), and (7), Florida Administrative Code. The applicants' Motion for Waiver of these noticing requirements is the subject of this order. The application for transfer of majority organizational control will be addressed in a later order.

MOTION FOR WAIVER OF RULE 25-30.030.
FLORIDA ADMINISTRATIVE CODE

The applicants request a waiver of the requirements of Rule 25-30.030, Florida Administrative Code, for the purpose of their application for transfer of majority organizational control only. This Rule requires the utility to, among other things, provide

notice of the application to certain entities in a specified manner.

As a basis for their request, the applicants point to Rule 25-30.011(2), Florida Administrative Code, which states that "[i]n any case where compliance with any of these rules introduces unusual hardship, or if unreasonable difficulty is involved in immediate compliance with any particular rule, application may be made to the Commission for modification of the rule or for temporary exemption from its requirements. . . ."

The applicants argue that because the Rule requires the notice to contain a copy of the legal description of the territory proposed to be transferred, and because the legal descriptions of the utility's water and wastewater service areas are very lengthy, the costs of preparing, photocopying, and mailing such notice will be excessive. They further argue that the information set forth in the notice may be very confusing to its recipients because the transfer of majority organizational control in this matter is not a simple transfer at the utility company level. The merger does not contemplate any changes in the direct ownership, direct control or operation of the utility. Nor does it seek any changes in the rates charged to customers, or in any policies regarding service, employees, operations, financing, accounting, capitalization, depreciation, or other matters affecting the public interest or utility operations.

Among the entities required to be noticed pursuant to Rule 25-30.030, Florida Administrative Code, are the governing body of the county or city affected, the Public Counsel, and this Commission. These same entities are also required to be noticed by mail or personal delivery pursuant to Section 367.045(1)(a), Florida Statutes. The applicants argue that Section 367.045, Florida Statutes, is inapplicable to them because they are applying for a transfer of majority organizational control, and not for an initial certificate of authorization. However, Section 367.071(4), Florida Statutes, expressly requires applications for transfer of majority organizational control to be disposed of as provided in Section 367.045, Florida Statutes, with one exception involving the sale of a utility to a governmental authority, which is not applicable here. See Section 367.071(4)(a), Florida Statutes.

We find it appropriate to deny the applicants' request for a full waiver of Rule 25-30.030, Florida Administrative Code. We believe that compliance with portions of this Rule are required by Section 367.045, Florida Statutes. This Commission lacks the authority to waive or to temporarily exempt utilities from compliance with statutory law. Moreover, we do not believe that

the applicants have shown unreasonable difficulty or unusual hardship in complying with the Rule. The utility shall initiate the noticing of the governing body of the county or city affected, the Public Counsel, and this Commission, within twenty days of the effective date of this order.

REQUEST FOR WAIVER OF RULE 25-30.030(2), FLORIDA
ADMINISTRATIVE CODE

The applicants alternatively request waiver of the requirements of certain provisions of Rule 25-30.030, Florida Administrative Code. Rule 25-30.011(2), Florida Administrative Code, provides this Commission with the discretion to modify or to temporarily exempt applicants from the requirements of any of the rules contained in Chapter 25-30, Florida Administrative Code, when compliance either introduces unusual hardship or involves unreasonable difficulty.

The applicants request waiver of the requirements of Rule 25-30.030(2), Florida Administrative Code. This Rule requires the applicants to request this Commission to provide the utility with a list of the names and addresses of certain entities to which the utility must provide notice pursuant to other portions of Rule 25-30.030, Florida Statutes. This Rule also requires the utility to include in its request for the list a complete legal description of the territory to be transferred. The applicants request that the Commission waive this requirement. They state that the legal descriptions of Jacksonville Suburban's water and wastewater service areas are very lengthy, comprising over 130 pages of its tariffs. They argue that the costs of preparing, photocopying, and mailing the complete legal description to this Commission will be excessive.

We do not believe that full compliance with Rule 25-30.030(2), Florida Administrative Code, will pose unusual hardship or involve unreasonable difficulty for the utility. Under this Rule provision, the utility need only provide one entity, namely this Commission, with a complete legal description of its territory. Therefore, the applicants' request for waiver of this Rule provision is hereby denied. The utility shall initiate compliance with Rule 25-30.030(2), Florida Administrative Code, within twenty days of the effective date of this order.

REQUEST FOR WAIVER OF RULE 25-30.030(5), FLORIDA
ADMINISTRATIVE CODE

In their alternative request, the applicants request waiver of those portions of Rule 25-30.030(5), Florida Administrative Code,

which require the utility to provide notice to those entities which are not statutorily required to be noticed. Specifically, the applicants request waiver of Rule 25-30.030(5)(c), (d), (g) and (h), Florida Administrative Code. These provisions require the utility to provide a copy of the notice by regular mail within seven days of filing the application to the regional planning council, to all water or wastewater utilities contained on the list, to the Department of Environmental Protection (DEP), and to the appropriate Water Management District, respectively.

Additionally, Rule 25-30.030(4)(c), Florida Administrative Code, requires the utility to include a description, using township, range, and section references of the territory being transferred, to each entity which is to receive a copy of the notice pursuant to Rule 20-30.030(5), Florida Administrative Code.

The applicants state that the legal descriptions of Jacksonville Suburban's water and wastewater service areas are very lengthy, comprising over 130 pages of its tariffs. They argue that the information set forth in the notice may be very confusing to its recipients and not overly useful. They further argue that the costs of preparing, photocopying, and mailing the notice will be excessive.

We disagree that the notice, including a complete legal description in accordance with Rule 25-30.030(4)(c), Florida Administrative Code, would be confusing and not overly useful to those entities which are required to be noticed pursuant to Rule 25-30.030(5), Florida Administrative Code. On the contrary, those entities tend to rely on such technical, legal service area descriptions as a matter of practice. For this reason, we believe the costs associated with noticing these entities in accordance with Rule 25-30.030(4)(c), Florida Administrative Code, are justifiable. Indeed, in a previous docket, wherein this same utility requested waiver of the Rule 25-30.030 noticing requirements, this Commission found that "because those entities referenced in Rule 25-30.030(5) . . . rely on the technical legal description, . . . we believe notice to [those] entities . . . is necessary." Order No. PSC-93-0017-FOF-WS, issued January 5, 1993, In re: Application for Modification of Certificates Nos. 236-W and 179-S and Amendment of Certificate No. 236-W in Duval County by Jacksonville Suburban Utilities Corporation.

We do not believe that full compliance with Rule 25-30.030(5), Florida Administrative Code, will pose unusual hardship nor involve unreasonable difficulty for the utility. Therefore, the applicants' request for waiver of this portion of the Rule is hereby denied. The utility shall initiate noticing of these

entities pursuant to Rule 25-30.030(4)(c), Florida Administrative Code, within twenty days of the effective date of this order.

REQUEST FOR WAIVER OF RULE 25-30.030(6), FLORIDA
ADMINISTRATIVE CODE

The applicants request waiver of Rule 25-30.030(6), Florida Administrative Code, which requires the utility to provide a copy of the notice by regular mail or personal delivery to each customer of the system being transferred no later than seven days after filing the application. The applicants argue that the change in majority organizational control involved here is more similar to a request for a name change or a grandfather certificate than a transfer in that there will be no change in the operation and immediate ownership of the utility company. They argue that Rule 25-30.030, Florida Administrative Code, does not apply to applications for grandfather certificates or to name changes. We disagree with this argument. There has been a change of ownership and majority organizational control of this utility, albeit at the "grandparent" corporation level. UWR's fifteen-member Board of Directors includes its original eleven members, none of whom sat on GWC's Board prior to the merger.

We find that the customers have a right to notice, not only under the Rule, but under due process principles of both the U.S. and the Florida Constitutions. Any one of the utility's customers who has been substantially affected by the transfer is to be afforded a hearing upon request pursuant to Chapter 120.57, Florida Statutes. The seminal case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), held that a cause of action is a species of property protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). And "[n]otice to legally interested parties so that they can assert their claims is the essence of the procedural due process protections provided by the Florida Constitution. Art. I, § 9, Fla. Const." In re Adoption of a Minor Child, 593 So. 2d 185, 189 (Fla. 1991). Although these cases do not involve utility law, we believe that the constitutional principles which they stand for are applicable here.

To date, this Commission has not exempted a water or wastewater utility from the customer noticing requirements of Rule 25-30.030(6), Florida Administrative Code. See e.g., Order No. 20652, issued January 24, 1989, In re: Application of Topeka Group, Inc., to acquire control of Deltona Corporation's utility subsidiaries in Citrus, Marion, St. Johns, Washington, Collier, Volusia and Hernando Counties (finding that "[t]he circumstances in

this case, specifically the large number of customers and utilities involved, do not warrant a waiver of this Rule that is regularly applied to companies with significantly lesser resources and sophistication").

Moreover, we do not believe that providing notice to the customers by way of publication in a newspaper would, standing alone, satisfy the customers' due process rights to notice. The U.S. Supreme Court stated, in Mullane, that "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper[.]" 339 U.S. at 315. Further, "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." Id. at 318. In a later case, the Court stated that "[t]he general rule that emerges from the Mullane [c]ase is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." Schroeder v. New York, 371 U.S. 208, 212-13 (1962). We adhere to this general rule enunciated by the U.S. Supreme Court. Therefore, the applicants' request for waiver or temporary exemption from Rule 25-30.030(6), Florida Administrative Code, is hereby denied. The utility shall initiate noticing pursuant to this Rule within twenty days of the effective date of this order, either by mailing the notice with its customer billings or by a separate mailing.

REQUEST FOR WAIVER OF RULE 25-30.030(4)(c), FLORIDA
ADMINISTRATIVE CODE, AS APPLIED TO INDIVIDUAL
NOTICING OF CUSTOMERS

The applicants request waiver of Rule 25-30.030(4)(c), Florida Administrative Code, as it applies to the individual noticing of each customer. This Rule provision requires the utility to include a description, using township, range, and section references of the territory being transferred to the individual customers of the utility. The applicants argue that the full territory description may be confusing and not overly useful to the customers. They further argue that the costs of preparing, photocopying, and mailing a notice of 130 or more pages to 27,000 customers will be excessive. We agree. Therefore, we hereby exercise our authority under Rule 25-30.011(2), Florida Administrative Code, to temporarily exempt the utility from full compliance with Rule 25-30.030(4)(c), Florida Administrative Code, with respect to its customer notice mailings for purposes of this application only. Instead of providing a full territory description to each customer, the utility shall mail a notice to each customer which simply

identifies each county that has been affected by the transfer. This should reduce the length of the notice from 130 pages to only one page per customer address, which will greatly reduce the burden on the utility to comply with Rule 25-30.030(6), Florida Administrative Code.

REQUEST FOR WAIVER OF RULE 25-30.030(7), FLORIDA
ADMINISTRATIVE CODE, AND REQUEST FOR WAIVER OF
RULE 25-30.030(4)(C), FLORIDA ADMINISTRATIVE CODE,
AS APPLIED TO NOTICING BY PUBLICATION

The applicants request waiver of Rule 25-30.030(7), Florida Administrative Code, which requires the utility to publish the notice once in a newspaper of general circulation in the affected territory. As support for this request, the applicants argue that it will be very expensive to publish the notice in a newspaper, especially when the notice includes over 100 pages of legal descriptions.

We agree that it would be unreasonable to require the utility to publish 100 or more pages. However, we do not believe it unreasonable to require the utility to publish a one-page newspaper notice. According to the Mullane Court, "publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning." 339 U.S. at 316. By ordering the utility to mail a one-page notice to each customer address, we are, in effect, saying that we reasonably expect such notice to adequately convey the "warning." It would follow that the newspaper publication, being merely a supplemental notice, need not convey more information than that which the principal notice conveys.

We hereby deny the applicants' request for waiver of Rule 25-30.030(7), Florida Administrative Code. The utility shall provide notice by publication according to this Rule. However, in so ruling, we hereby exercise our authority under Rule 25-30.011(2), Florida Administrative Code, to temporarily exempt the utility from full compliance with Rule 25-30.030(4)(c), Florida Administrative Code, with respect to its newspaper publication of the notice for purposes of this application only. Instead of publishing a full territory description, the utility shall publish once in a newspaper of general circulation in the territory affected, a notice which resembles the customer notice and simply identifies each county that has been affected by the transfer.

As stated earlier, the utility's application for transfer will be processed at a later date. Therefore, this docket shall remain open pending final disposition of the transfer application.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that United Water Resources Inc.'s and Jacksonville Suburban Utilities Corporation's joint Motion for Waiver from all requirements of Rule 25-30.030, Florida Administrative Code, is hereby denied. It is further

ORDERED that United Water Resources Inc.'s and Jacksonville Suburban Utilities Corporation's joint Motion for Waiver from the requirements of Rule 25-30.030(2), Florida Administrative Code, is hereby denied. It is further

ORDERED that United Water Resources Inc.'s and Jacksonville Suburban Utilities Corporation's joint Motion for Waiver from the requirements of Rule 25-30.030(5), Florida Administrative Code, is hereby denied. It is further

ORDERED that United Water Resources Inc.'s and Jacksonville Suburban Utilities Corporation's joint Motion for Waiver from the requirements of Rule 25-30.030(6), Florida Administrative Code, is hereby denied. It is further

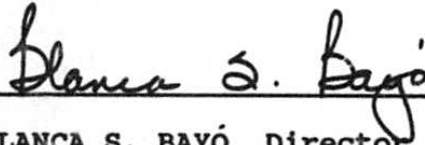
ORDERED that United Water Resources Inc. and Jacksonville Suburban Utilities Corporation are hereby exempt from full compliance with the requirements of Rule 25-30.030(4)(c), Florida Administrative Code, as it applies to the individual noticing of customers required by Rule 25-30.030(6), Florida Administrative Code, as set forth in the body of this order. It is further

ORDERED that United Water Resources Inc.'s and Jacksonville Suburban Utilities Corporation's joint Motion for Waiver from the requirements of Rule 25-30.030(7), Florida Administrative Code, is hereby denied. It is further

ORDERED that United Water Resources Inc. and Jacksonville Suburban Utilities Corporation are hereby exempt from full compliance with the requirements of Rule 25-30.030(4)(c), Florida Administrative Code, as it applies to noticing by publication required by Rule 25-30.030(7), Florida Administrative Code, as set forth in the body of this order. It is further

ORDERED that this docket shall remain open in order to process United Water Resources Inc.'s and Jacksonville Suburban Utilities Corporation's joint application for transfer of majority organizational control of Jacksonville Suburban Utilities Corporation from GWC Corporation to United Water Resources Inc.

By ORDER of the Florida Public Service Commission, this 11th
day of October, 1994.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

RGC

Commissioner Kiesling dissents with opinion. Approval by the Commission of this transfer is not contemplated by the plain meaning of Section 367.071 (1), Florida Statutes (F.S.), which provides that no utility shall sell, assign, or transfer its certificate of authorization, facilities or majority organizational control without Commission approval. In the instant case, the regulated utility has not transferred its majority organizational control, rather, the control of the utility's grandparent corporation was transferred. Section 367.071 (1), F.S., also requires that the Commission determine that a transferee will fulfill the commitments, obligations, and representations of the utility. The transfer of organizational control of the grandparent corporation in this case in no way affects the commitments, obligations, or representations of the regulated utility. Further, there is no evidence, nor was there any allegation, that this transfer will affect the management or day-to-day operations of the utility. Also, the language controlling transfers in the telephone industry, Section 364.335 (4), F.S., and Rule 25-4.05, Florida Administrative Code, is less specific than the language of Chapter 367, F.S.

In reaching their decision in this case, the majority also relied on the Commission's practice in the telephone industry to require approval of transfers of majority organizational control at the grandparent level. In the telephone industry there may be a compelling rationale for requiring approval of a sale or transfer of majority organizational control; the vertical organizational structures in that industry are such that a transfer at the grandparent level is more likely to have a direct impact on the regulated utility. For these reasons, I dissent from the Commission's decision that approval of the subject transfer of majority organizational control is required by either Chapter 367 or previous Commission practice.

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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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.