

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

APRIL 24, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (RAYO)

FROM: DIVISION OF WATER & WASTEWATER ^{mail} (GOLDEN, REDEMAN) ^{BCR} ⁱⁿ ^{CDW}
DIVISION OF LEGAL SERVICES (CYRUS-WILLIAMS) ^{OW} ^{at} ^{bl}

RE: DOCKET NO. 961015-W8 - ASTOR WEST, INC. - APPLICATION FOR
TRANSFER OF CERTIFICATES NOS. 378-W AND 325-S IN MARION
COUNTY TO CIVIC ASSOCIATION OF RIO VISTA UTILITIES, INC.
BY ASTOR WEST, INC.
COUNTY: MARION

AGENDA: MAY 6, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\WAW\WP\961015WS.BCM

DOCUMENT NUMBER-DATE

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FPSO-RECORDS/REPORTING

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CASE BACKGROUND

Astor West, Inc. (Astor West, Seller, or utility) is a Class C utility which provides water and wastewater service in Marion County. The utility provides service to the Rio Vista, Rio Vista First Edition, Rio Vista Estates, and Glenwood Subdivisions. According to the utility's 1995 Annual Report, it serves 201 water customers and 40 wastewater customers. In 1995, the utility had annual operating revenues of \$33,311 for water and \$12,082 for wastewater. The net operating income was \$1,219 and \$696 for water and wastewater, respectively.

On September 3, 1996, Astor West filed an application to transfer Certificates Nos. 378-W and 325-S from Astor West to Civic Association of Rio Vista Utilities, Inc. (Rio Vista or Buyer.) The utility's application was found to be deficient. The deficiencies were corrected on February 28, 1997.

Rio Vista is a non-profit corporation which was formed by the homeowners for the purpose of owning and operating the Astor West water and wastewater systems. Rio Vista plans to operate the utility as a non-profit association, exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes. The application states that the transfer is in the public interest because the sole officer and shareholder of the utility no longer has the desire nor resources to operate the facility. The Buyer is eager and willing to assume all responsibility and operation of the utility. Further, the Buyer is committed to, and has the resources available, to make all necessary repairs to the system as may from time to time be required.

Section 367.031, Florida Statutes, requires each utility subject to the Commission's jurisdiction to obtain a certificate of authorization. Section 367.071, Florida Statutes, states in part that no utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organizational control without approval of the Commission. Upon review of the transfer application, staff discovered that the transfer occurred on July 31, 1996, which is an apparent violation of Section 367.071, Florida Statutes. This matter will be discussed further in Issue 1. The following is staff's recommendation regarding the requested transfer.

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DISCUSSION OF ISSUES

ISSUE 1: Should Astor West be ordered to show cause, in writing within twenty days, why it should not be fined for violation of Chapter 367.071, Florida Statutes?

RECOMMENDATION: No, staff recommends that show cause proceedings should not be initiated against Astor West. (CYRUS-WILLIAMS)

STAFF ANALYSIS: 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. As stated in the case background, Astor West is in apparent violation of Section 367.071, Florida Statutes. The utility was transferred to Rio Vista on July 31, 1996 without prior approval of the Commission. The application for approval of the transfer was subsequently filed on September 3, 1996.

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 antecedent Commission approval to transfer the majority organizational control of its corporate grandparent, 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 approval of the Commission 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. Based on information contained in the application, effective September 30, 1994, the Seller obtained ownership of the utility through a court mediated settlement agreement on the estate

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of the prior owner, the Seller's husband. On July 3, 1996, the Seller and Buyer entered into the Contract for Sale and Purchase of the utility. A utility representative informed staff that the utility was being operated out of the estate of the prior owner and they were not aware that they were required to obtain prior approval of the transfer from the Commission. After being informed that they must obtain Commission approval, the parties amended the Contract for Sale and Purchase to include a statement that the Contract is subject to approval by the Commission pursuant to Section 367.071, Florida Statutes. The utility subsequently filed the appropriate application on September 3, 1996.

Failure of Astor West to obtain approval prior to the transfer appears to be due to a lack of understanding and knowledge by the parties of the Commission's rules and regulations. Although regulated utilities are charged with knowledge of Chapter 367, Florida Statutes, staff does not believe that the violation of Section 367.071, Florida Statutes, rises in these circumstances to the level of warranting initiation of show cause proceedings. First, the utility tried to comply with the Statute by filing the appropriate application as soon as it was made aware of the need to do so. Second, since the transfer resulted in the utility being placed under the control of the customers, staff believes there was no harm to the customers as a result of the unauthorized transfer. Therefore, staff recommends that the Commission not order Astor West to show cause for failing to obtain approval from the Commission prior to the transfer of the utility to Rio Vista.

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ISSUE 2: Should the transfer of Water Certificate No. 378-W and Wastewater Certificate No. 325-S from Astor West, Inc. to Civic Association of Rio Vista Utilities, Inc. be approved?

RECOMMENDATION: Yes, the transfer should be approved. Also, Water Certificate No. 378-W and Wastewater Certificate No. 325-S should be cancelled. (GOLDEN, REDEMANN)

STAFF ANALYSIS: As stated in the case background, Rio Vista is a non-profit corporation that was formed by the homeowners for the purpose of owning and operating the Astor West utility facilities. Section 367.022(7), Florida Statutes, requires that a non-profit entity, to meet the requirements for exemption, provide service solely to its members who own and control it. The Commission, however, no longer makes determinations of exemption because Section 367.022(7), Florida Statutes, is now self-executing. Staff has reviewed Rio Vista's Articles of Incorporation and By-Laws, and we believe that Rio Vista satisfies the requirements of Section 367.022(7), Florida Statutes. Consequently, if the Commission approves the utility's application to transfer the certificates to Rio Vista, staff recommends that the certificates be cancelled.

Except as noted in Issue 1, the application is in compliance with the governing statute, Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for transfer of certificates. The application contains a check in the amount of \$1,500, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. Also, the applicant has provided evidence that the utility owns the land upon which the utility's facilities are located as required by Rule 25-30.037(2)(q), Florida Administrative Code.

The application contains 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 to be transferred. No objections to the notice of application have been received and the time for filing such has expired.

Regarding the Buyer's technical ability to operate the system, the application states that although the Buyer has minimal experience in water and/or wastewater utility operations, the Buyer intends to continue using the services of Enviro-Masters Water and Wastewater Services, Inc. to manage the overall operation of the utility. Enviro-Masters owns several utilities, and has been responsible for the operation of Astor West's facilities since 1994. The application states that the facilities appear to be in satisfactory condition and in compliance with all applicable

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standards set by the Florida Department of Environmental Protection (DEP), with the exception of three items listed in a DEP letter dated June 21, 1996. Staff was informed by a utility representative that all of these repairs were subsequently made by the Buyer.

Regarding the Buyer's financial ability, the application states that the Buyer is committed to, and has the resources available, to make all necessary repairs to the system as may from time to time be required. Staff has reviewed the financial statements of the Buyer, and we believe the Buyer has the overall financial ability to continue operating the utility.

The application contains a copy of the Contract for Sale and Purchase which includes the purchase price and a list of the assets purchased. According to the Contract, the purchase price for the utility land and facilities is \$60,000. According to a utility representative, there were no customer deposits at the time of transfer. Also, the Seller will be responsible for any regulatory assessment fees owed through July 31, 1996, and the Buyer will be responsible from August 1, 1996 through the date the certificates are cancelled by the Commission.

Rate base for transfer purposes is not generally set in a case where the transfer is to an entity which will not be regulated by the Commission. However, for informational purposes, the Commission last established the utility's rate base in Docket No. 931056-WS, which was a staff-assisted rate case. By Order No. PSC-94-0744-POF-WS, issued June 16, 1994, rate base was established as \$34,530 for water and \$30,662 for wastewater, as of December 31, 1993.

Similarly, the Commission does not generally make a determination regarding the rates and charges of the utility in cases where the transfer is to a non-regulated entity. However, for informational purposes, staff was informed that Rio Vista plans to continue charging the approved rates and charges of Astor West at this time.

Based on the above, staff believes the transfer of Water Certificate No. 378-W and Wastewater Certificate No. 325-S from Astor West, Inc. to Civic Association of Rio Vista, Inc. is in the public interest and should be approved. Further, it appears that Rio Vista satisfies the requirements for exemption of Section 367.022(7), Florida Statutes. Therefore, staff recommends that Water Certificate No. 378-W and Wastewater Certificate No. 325-S be cancelled.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. (CYRUS-WILLIAMS)

STAFF ANALYSIS: No further action is required in this docket and it can be closed.