

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

DECEMBER 4, 1997

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FPSC - Records/Reporting

TO: DIRECTOR OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF WATER AND SEWER (WALKER, REDEMANN) *SM*
DIVISION OF LEGAL SERVICES (CROSBY) *BL*

RE: DOCKET NO. 970758-WU - APPLICATION FOR TRANSFER OF MEADOW
WOOD IN CITRUS COUNTY FROM RICHARD INSTINE TO WANDA
MCKEEVER

AGENDA: DECEMBER 16, 1997 - REGULAR AGENDA - INTERESTED PERSONS
MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\WAW\WP\970758.RCM

CASE BACKGROUND

Meadow Wood is a Class C utility that provides water service for about 37 unmetered, residential customers in Citrus County. In 1995, Meadow Wood recorded operating revenues of \$9,591, operating expenses of \$7,140, and operating income of \$2,451.

On June 9, 1997, Ms. Wanda McKeever filed an application for authority to transfer Water Certificate No. 545-W from Mr. Richard Instine, the previous owner, to Meadow Wood, a company that Ms. McKeever will own and operate. In an earlier letter dated December 16, 1996, Ms. McKeever notified the Commission that Mr. Instine passed away in 1996, but before his death he transferred the utility system to her care as his intended beneficiary on his death so that his personal and business affairs would be in order. The deed conveying ownership to Ms. McKeever is dated August 31, 1995. An application to so transfer the utility's assets to Ms. McKeever was not filed at that time. However, staff is not recommending show cause proceedings in view of the circumstances that surround this case. On June 23, 1997, this application was docketed for further Commission action.

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DISCUSSION OF ISSUES

ISSUE 1: Should the transfer of Water Certificate No. 545-W from Mr. Instine to Meadow Wood be approved?

RECOMMENDATION: Yes, the transfer should be approved. (WALKER, CROSBY)

STAFF ANALYSIS: 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 a certificate. The application contains a check in the amount of \$750, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. In the application, Ms. McKeever requested that the filing fee be waived due to the circumstances of the transfer. Waiver of the filing fee is discussed in Issue 2.

The application includes proof of ownership of the utility's treatment plant sites as prescribed by Rule 25-30.037(2)(q), Florida Administrative Code. Further, 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.

A description of the territory served by the utility is appended to this memorandum as Attachment A.

The staff contacted the Department of Environmental Protection (DEP) concerning Meadow Wood's compliance status relative to any Notices of Violation or any DEP consent order. We were informed that this system is not subject to any outstanding violation or consent orders.

By her letter dated December 16, 1996, Ms. McKeever advised the Commission of Mr. Instine's death. She simultaneously filed a copy of a warranty deed, dated August 30, 1995, that conveyed ownership of the utility system to her care. Ms. McKeever later reported that she has retained the services of a licensed operator who visits this system twice weekly. She explained that she has been involved in the daily operation of the Meadow Wood system for many years. Ms. McKeever reported that system has no liabilities, is in satisfactory condition, and complies with DEP standards. The utility is a small system which that should require modest technical and financial support. According to Meadow Wood's tariff, customer deposits are not collected.

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Based on the above, staff believes the transfer of Water Certificate No. 545-W from Mr. Richard Instine to Meadow Wood, which will be owned and operated by Ms. McKeever, is in the public interest and should be approved.

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ATTACHMENT A

MEADOW WOOD

TERRITORY DESCRIPTION

The following described lands located in portions of Section 26, Township 18 South, Range 17 East, Citrus County, Florida:

A division of the South 1/2 of the Northeast 1/4 of the Northeast 1/4 of Section 26.

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ISSUE 2: Should the Commission grant Wanda McKeever's request for waiver of the application fee?

RECOMMENDATION: No. Because the filing fee is required by Statute, Section 367.071(3), Florida Statutes, the request for waiver should be denied. (CROSBY)

STAFF ANALYSIS: Ms. McKeever has asked the Commission to waive payment of the \$750 filing fee in this proceeding because of the circumstances involved in the transfer. Meadow Wood was transferred to Ms. McKeever just prior to the death of the previous owner. Section 367.071(3), Florida Statutes, states, in part, "An application for proposed sale, assignment, or transfer shall be accompanied by a fee." (emphasis added) Although the circumstances in this transfer are unusual, the Commission does not have the statutory authority to waive Section 367.071(3), Florida Statutes.

Section 120.542, Florida Statutes, states, in part, "Agencies are authorized to grant variances and waivers to requirements of their rules . . . This section does not authorize agencies to grant variances or waivers to statutes." Therefore, because the filing fee is required by statute, it cannot be waived.

This recommendation is consistent with previous Commission decisions. See Order No. PSC-97-0522-FOF-TI, issued May 7, 1997, in Docket No. 961143-TI (In Re: Request for Waiver of Penalty Related to Late Payment of Regulatory Assessment Fees, by Excel Telecommunications, Inc.), wherein the Commission found that neither the Florida Statutes nor the Commission Rules provide the Commission with the discretion to waive statutorily required fees, penalties and interest. See also Order No. PSC-94-1235-FOF-WS, issued October 11, 1994, in Docket No. 940743-WS (In Re: Joint Application for Transfer of Majority Organizational Control of Jacksonville Suburban Utilities Corporation in Duval County from MWC Corporation to United Water Resources, Inc.) wherein the Commission found that it lacks the authority to waive or temporarily exempt utilities from compliance with statutory law.

In In re: Petition for waiver of penalty for late payment of regulatory assessment fees pursuant to Rule 25-7.0131, Florida Administrative Code, by City Gas Company of Florida, Order No. PSC-97-0767-FOF-FU, Docket No. 970360-GU, June 30, 1997, the Commission discussed its lack of authority to waive the statutory penalty and interest assessments on late regulatory assessment fee payments.

Constitutional law requires that only the legislature can repeal, amend or modify an unambiguous statute. The

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principle of separation of powers of government in the Florida Constitution, which divides powers among the legislative, executive and judicial branches, confines each branch to its own proper function and prohibits encroachment by one branch of government upon another. The right to pass statutes includes the power to repeal or modify them, provided no right secured by constitutional provisions is thereby violated. Ponder v. Graham, 4 Fla. 23 (Fla. 1951). It is the function of the legislature and not the courts or administrative agencies to change the law. 1 Fla. Jur. 2d, Administrative Law, Section 32. The grant of a waiver of the regulatory assessment fee penalty statute, in the absence of any waiver provisions, express or implied, contained in the statute, would be a modification of the statute. This is a function reserved solely for the legislature. In addition, there is no basis for interpretation of Section 350.113(4), Florida Statutes. The statute is clear and unambiguous on its face. If the terms and provisions of a statute are plain, there is no room for administrative interpretation. Southeastern Utilities service Co. v. Redding, 131 So.2d 1 (Fla. 1950).

It should also be noted that even in uncomplicated proceedings, costs are incurred by the Commission in processing the applications which will be offset by the filing fee. Therefore, based on the foregoing, staff recommends that the request for waiver be denied.

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ISSUE 3: Should rate base be established at this time?

RECOMMENDATION: Rate base should not be established in this proceeding. (WALKER)

STAFF ANALYSIS: In accordance with Chapter 367.071, Florida Administrative Code, the Commission, by order, may establish the rate base for a utility system that is being transferred. In this proceeding, the staff recommends that rate base should not be established. The transfer was identified as a bequest to Ms. McKeever by Mr. Instine. Rate base was not established when Mr. Instine was granted an original certificate in 1992, for a system then about 20 years old and operated by Mr. Instine for 10 years. Mr. Instine's annual reports do not reveal the utility's investment amount since balance sheet information was omitted. Because of incomplete information, an engineer's assessment of original cost will probably be needed when a rate base determination is essential. Accordingly, we recommend that rate base should not be established in this docket.

Our review indicates that this system was conveyed to Ms. McKeever in accordance with Mr. Instine's instructions. Thus, her basis in the property should match that of the prior owner, Mr. Instine. Since the purchased price and rate base are not being established, an acquisition adjustment issue is not present in this case.

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ISSUE 4: Should Meadow Wood's existing rates and charges be retained?

RECOMMENDATION: Yes, the utility should continue charging the rates previously approved for this system. Staff will approve the tariff filing effective for services provided or connections made after the stamped approval date. (WALKER)

STAFF ANALYSIS: The utility's presently approved rates and charges were approved on October 5, 1992, pursuant to Order No. PSC-92-1114-POF-WU, issued in Docket No. 920674-WU. The utility has proposed retaining those charges in this proceeding.

Rule 25-9.044(1), Florida Administrative Code, provides that:

In cases of change of ownership or control of a utility which places the operation under a different or new utility...the company which will thereafter operate the utility business must adopt and use the rates, classification and regulations of the former operating company (unless authorized to change by the Commission)...

Ms. McKeever has not requested a change in the utility's rates and charges. Likewise, staff does not aware of reason for revision. Accordingly, staff recommends that the utility should continue operations under the existing tariff and apply the approved rates and charges. The utility has filed a tariff reflecting the transfer of ownership. Staff will approve the tariff filing effective for services provided or connections made after the stamped approval date.

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ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes. No further actions are required and this docket should be closed. (CROSBY)

STAFF ANALYSIS: Since no further action are required, this docket should be closed.