

RECEIVED

JUN - 4 1998

11:30

FPSC - Records/Reporting

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: JUNE 4, 1998

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

FROM: DIVISION OF WATER AND WASTEWATER (WALKER, REDEMANN) *32m Nde*
DIVISION OF LEGAL SERVICES (CROSEY) *RR*

RE: DOCKET NO. 971269-WS - APPLICATION FOR TRANSFER OF MAJORITY ORGANIZATIONAL CONTROL OF EAST MARION SANITARY SYSTEMS, INC. AND EAST MARION WATER DISTRIBUTION, INC. IN MARION COUNTY FROM DEL-AMERICAN/FIRST FEDERAL OF OSCEOLA TO HERBERT HEIN.

AGENDA: 6/16/98 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\971269.RCM

CASE BACKGROUND

This application concerns a proposed transfer of majority organizational control for two utility systems, East Marion Water Distribution, Inc., and East Marion Sanitary Systems, Inc. The application shows that these utility systems were acquired by Mr. Herbert Hein on February 14, 1995, from the First Federal Savings & Loan Association of Osceola County (Association).

On October 2, 1997, Mr. Hein filed this request to transfer organizational control of the utilities following his purchase of undeveloped property within the utility's service area. The purchase price for 171 lots and the common stock of the utility systems was \$650,000.

By Order No. 24553, issued on May 20, 1991, in Docket No. 900603-WS, the Commission approved a requested transfer of these systems from the original owner, Mr. Eric Wagner, to Forest Lake Village - Del American Ltd. Our review of the utility's annual

DOCUMENT NUMBER 06002 JUN -4 98
FPSC-RECORDS/REPORTING

reports indicates that these systems were largely inactive from 1991 through 1995, with only a few customers being served. The application discloses that these systems were acquired through foreclosure measures in 1992, without prior knowledge and approval by this Commission. The previous owner's inability to develop the service area reportedly led to foreclosure by the Association. However, as discussed in Issue 1, staff does not recommend initiation of show cause proceedings although a violation of Section 367.071(1) may have occurred.

This recommendation addresses the petition to transfer majority organizational control of the subject systems to Mr. Hein and a request to change the name of the water system. Our review indicates that these systems are current with regard to submission of annual reports and payment of regulatory assessment fees.

DISCUSSION OF ISSUES

ISSUE 1: Should East Marion Sanitary Systems, Inc. and East Marion Water Distribution, Inc. be ordered to show cause, in writing within twenty days, why it should not be fined for violation of Section 367.071, Florida Statutes?

RECOMMENDATION: No. Show cause proceedings should not be initiated. (CROSBY)

STAFF ANALYSIS: As stated in the case background, East Marion Sanitary Systems, Inc. and East Marion Water Distribution, Inc. are in apparent violation of Section 367.071(1), Florida Statutes, 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 . . ." At the time of certification, the system was owned by Eric Wagner (developer). When Mr. Wagner died shortly after completion of the development, his estate sold the development and utilities to Del American, Ltd. First Federal of Osceola Bank foreclosed on the development and utilities in 1992. The utilities were in foreclosure until majority organizational control was transferred to Herbert Hein on May 16, 1995. At that time ownership of the land upon which the facilities are located was transferred to East Marion Sanitary System Trust and East Marion Water Distribution Trust. The transfer of control of the utilities and ownership of the land

DATE: JUNE 4, 1998

occurred prior to Commission approval, which is a violation of Section 367.071, Florida Statutes. 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.

Because of the circumstances, show cause proceedings should not be initiated against East Marion Sanitary Systems, Inc. and East Marion Water Distribution, Inc. for failure to obtain Commission approval prior to the transfer. Transfer of ownership/control occurred due to the death of Mr. Wagner and subsequent foreclosure by First Federal of Osceola Bank.

Although the transfer to Mr. Hein occurred prior to Commission approval, 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. Therefore, staff recommends that the Commission not order East Marion Sanitary Systems, Inc. and East Marion Water Distribution, Inc. to show cause for failing to obtain Commission approval prior to the transfer.

ISSUE 2: Should the transfer of Majority Organization Control of East Marion Water Distribution, Inc. and East Marion Sanitary Systems, Inc. from Forest Lake Village - Del American Ltd./First Federal of Osceola County to Mr. Herbert Hein be approved and should his request to operate both systems under the name - East Marion Sanitary Systems, Inc. - be approved?

RECOMMENDATION: Yes, the transfer of majority organizational control for these systems should be approved. Also, the request to operate these systems under one name should be approved. However, the utility should be ordered to submit a warranty deed or a long-term lease for its treatment plant sites within 60 days of the order issue date in the name of East Marion Sanitary Systems, Inc. (WALKER, REDEMANN)

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 majority organizational control. 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.

In response to the data request for proof of its ownership of its plant sites, Mr. Hein filed Warranty Deeds that assigned the treatment plant sites to a company named Universal Sonlight, Inc., as trustee for East Marion Water Distribution Trust and East Marion Sanitary Systems Trust. Although the utility's consent is reportedly needed to dispose of the sites, that restraint is not evident from the warranty deeds. Instead, the agreements suggest that the trustee is authorized to lease, even sell these sites. As prescribed by Rule 25-30.037(3)(i), Florida Administrative Code, the applicant must present evidence of ownership or long-term lease provisions for its plant sites. The warranty deeds that were filed by Mr. Hein do not provide assurance that the utility's plant sites are secure. Therefore, we recommend that the applicant be ordered to submit appropriate warranty deeds, lease agreements, or other acceptable usage agreements in the name of the utility within 60 days of the order issue date.

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.

DATE: JUNE 4, 1998

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

Mr. Hein purchased the utilities' common stock and some development property from the First Federal Savings and Loan Association of Osceola County in 1995 pursuant to a \$650,000 lump-sum purchase agreement, which was reportedly paid in cash. This system and the community it serves had been in foreclosure since at least 1992. The transfer will allow new houses to be connected to the utility, producing additional revenues for better maintenance of the utility.

The utility will be operated by the same on-site individuals who have managed the system since 1992. Mr. Len Tabor, the certified operator for this system, provides technical services for this utility and various private and public entities. Ms. Tabor manages this system and provides billing services. Their services were retained following acquisition of the systems by Mr. Hein. Mr. Hein stated that he examined the utility systems with Mr. Tabor, and that no operating problems, outstanding violations, or major repairs or needed improvements were found. The staff contacted the Department of Environmental Regulation about this system and were informed that there are no outstanding notices of violation.

The original notice in this application informed customers and local utilities that a transfer of organizational control of the water company was planned. However, the notice did not advise the customers and local utilities that the wastewater system was also being transferred. Upon discovery of this matter, staff informed the utility that the wastewater system would also require a separate notice. In the intervening period, Mr. Hein elected to discontinue use of the name - East Marion Water Distribution, Inc. - and operate both systems under the name - East Marion Sanitary Systems, Inc. The last notice informed the utility's customers and local utilities that both systems would subsequently operate under one name. The utility also provided a revised tariff showing that the water and wastewater systems would thereafter operate under the name - East Marion Sanitary Systems, Inc.

Based on the above, staff believes the transfer of majority organizational control of East Marion Water Management, Inc., and East Marion Sanitary Services, Inc., from Forest Lake Village - Del American Ltd./First Federal of Osceola County to Mr. Herbert Hein is in the public interest and should be approved. In addition, we recommend that the request to operate both systems under the name - East Marion Sanitary Systems, Inc. - should be approved.

ATTACHMENT A

EAST MARION SANITARY SYSTEMS, INC.

TERRITORY DESCRIPTION

WATER AND WASTEWATER SERVICE AREA

The following described lands located in portions of Sections 7, 8, 17, Township 15 South, Range 24 East, Marion County, Florida:

Beginning at the S.W. corner of the S.W. 1/4 of the N.W. 1/4 of Section 8, Township 15 South, Range 24 East, Marion County, Florida, thence N 00°29'46" W along the west boundary of said Section 8 a distance of 839.97 feet to the southwesterly right-of-way line of State Road No. 40, thence S 56°59'12" E along said southwesterly right-of-way line 531.25 feet, thence S 33°01'47" W 89.79 feet, thence S 00°11'26" E 1385.87 feet, thence S 36°25'52" E 285.41 feet to the approximate shoreline of Lake Walenda, thence run into said Lake S 29°57'59" E 201.43 feet to a point in said lake, said point being the south-east corner of the West 1/2 of the N.W. 1/4 the S.W. of 1/4 of said Section 8, thence S 89°30'58" W along said south boundary 329.84 feet to a point on the aforesaid approximate shoreline of Lake Walenda, thence continue S 89°30'58" W along said south boundary 330.29 feet to the southwest corner of said West 1/2 of N.W. 1/4 of S.W. 1/4, thence N. 00°10'04" along the west boundary of said Section 8 a distance 1319.86 feet to the point of beginning.

Also: Lots 107, 108, and 109, in the Town of Walenda, situated in the S.W. 1/4 of Section 8, Township 15 South, Range 24 East, as per plat thereof recorded in Plat Book "E", page 23, Public Records of Marion County, Florida. Less and excepting therefrom that part of the East 200 feet of West 1181.38 feet of the S.W. 1/4 of said Section 8, Township 15 South, Range 24 East, lying south of Lake Walenda, all of which lies in Lot 109.

Also: South 1/2 of S.E. 1/4 of Section 7, Township 15 South, Range 24 East, except the West 70 acres, thereof.

Also: That part of the West 3/4 of the N.W. 1/4 of Section 17, Township 15 South, Range 24 East, lying north of Fort Gates Road,

DOCKET NOS. 971269-WS
DATE: JUNE 4, 1998

except additional road right-of-way conveyed in Official Records
Book 991, page 173.

DOCKET NOS. 971269-WS
DATE: JUNE 4, 1998

ISSUE 3: Should rate base be established?

RECOMMENDATION: No, different ownership of stock does not affect the rate base balance. (WALKER)

STAFF ANALYSIS: The sale of the stock of East Marion Water Distribution, Inc., and East Marion Sanitary Services, Inc., from Del- American/ First Federal Of Osceola Bank to Mr. Herbert Hein will not alter the utility's asset and liability accounts. Accordingly, this transfer of stock ownership will not change the rate base balance. Therefore, staff recommends that rate base not be established in this docket.

DOCKET NOS. 971269-WS
DATE: JUNE 4, 1998

ISSUE 4: Should the rates and charges approved for this utility be continued?

RECOMMENDATION: Yes, the rates and charges approved for this utility system should be continued. (WALKER)

STAFF ANALYSIS: The utility's approved rates and charges were effective June 13, 1991, pursuant to Order No. 24553 issued in Docket No. 900603-WS. These rates were approved in the previous application to transfer majority organizational control of these utility systems to Del American, Ltd.

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)...

Mr. Herbert Hein has not requested a change in the rates and charges of the utility and staff sees no reason to change them at this time. Accordingly, staff recommends that the utility continue operations under the existing tariff and apply the approved rates and charges. The utility has filed a revised tariff reflecting the change in issuing officer due to the transfer of majority organizational control. Staff will approve the tariff filing effective for services provided or connections made after the stamped approval date.

DOCKET NOS. 971269-WS
DATE: JUNE 4, 1998

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending receipt of warranty deeds transferring the plant sites to this utility. (CROSBY)

STAFF ANALYSIS: Since additional action is required in this docket, Staff recommends this docket remain open. However, this docket may be closed upon receipt of proof that East Marion has obtained and filed warranty deeds in utility's name.