

State of Florida

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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: 07/09/98

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

FROM: DIVISION OF WATER AND WASTEWATER (BRADY) *BRADY*
 DIVISION OF LEGAL SERVICES (FLEMING) *FLEMING*

RE: DOCKET NO. 980341-SU - APPLICATION FOR TRANSFER OF
 MAJORITY ORGANIZATIONAL CONTROL OF CERTIFICATE NO. 168-S
 HELD BY K W RESORT UTILITIES CORP. FROM K W RESORT
 HOLDINGS CORP. TO WS UTILITY, INC., WITH NO CHANGE IN NAME
 ON CERTIFICATE.
 COUNTY: MONROE

AGENDA: 07/21/98 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\980341.RCM

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FPSC-RECORDS/REPORTING

CASE BACKGROUND

K W Resort Utilities Corp. (K W Resort) is a Class B wastewater utility providing service to approximately 817 residential connections, 3 general service connections, 9 private lift station operators and 1 reuse customer on Stock Island in Monroe County. Water service is provided by the Florida Keys Aqueduct Authority. The utility reported 1997 gross operating revenues of \$379,988 and a net operating income of \$13,315.

Certificate No. 168-S was originally granted to Nu-Age Utilities Division of Riviera Enterprises, Inc., by Order No. 6803, issued July 28, 1975, in Docket No. 750149-S. The assets of the utility were subsequently transferred to Stock Island Utility Company (Stock Island) by Order No. 11319, issued November 16, 1982, in Docket No. 820363-S. Additional territory was granted to Stock Island's certificate by Order No. 12618, issued October 18, 1983, in Docket 830390-S.

On January 1, 1985, Citicorp Real Estate, Inc. (Citicorp), filed a petition requesting that the Commission acknowledge that K W Resort, a subsidiary of Citicorp, had acquired Stock Island's assets, including Certificate No. 168-S, through foreclosure on Stock Island's mortgage. In Order No. 14010, issued January 18, 1985, in Docket No. 850009-SU, the Commission declined to recognize that property interest in Certificate No. 168-S could be transferred without Commission approval of the public interest. Instead, the order treated Citicorp's petition as a request for transfer pursuant to Section 367.071, Florida Statutes, and, as such, it was approved.

A few months later the transfer of utility's assets from K W Resort to South Key Utility Company was approved by Order No. 14532, issued July 2, 1985, in Docket No. 850196-SU. In November of 1985, the Commission was officially notified that the proposed sale would not be consummated. By Order No. 15658, issued February 12, 1986, in Docket No. 850196-SU, Certificate 168-S was reissued to K W Resort where it currently resides.

On March 5, 1998, an application was received to transfer Certificate No. 168-S, held by K W Resort, through a sale of the utility's stock by K W Resort Holdings Corp. to WS Utility, Inc., with no change in name on certificate. Upon review, staff determined that the application was more appropriately a transfer of majority organizational control.

DISCUSSION OF ISSUES

ISSUE 1: Should the transfer of majority organizational control of K W Resort Utilities Corp. from K W Resort Holdings Corp. to WS Utility, Inc., be approved?

RECOMMENDATION: Yes, the transfer of majority organizational control of K W Resort Utilities Corp. from K W Resort Holdings Corp. to WS Utility, Inc., should be approved. The name on Certificate No. 168-S should remain as currently certificated. The territory being transferred is described in Attachment A. (BRADY, FLEMING)

STAFF ANALYSIS: On March 5, 1998, an application was received to transfer Certificate No. 168-S, currently held by K W Resort, through a sale of the utility's stock by K W Resort Holdings Corp. to WS Utility, Inc., with no change in name on certificate. As noted in the Case Background, staff determined the application was more appropriately a transfer of majority organizational control since the transfer of ownership was accomplished primarily by stock exchange.

According to its 1997 Annual Report, 100% of K W Resort's stock is held by K W Resort Holdings Corp., a subsidiary of Aspiration, Inc., which is a subsidiary of Citicorp, N.A. After the exchange, 100% of K W Resort's stock will be held by WS Utility, Inc. (WS Utility). According to the January 22, 1998, Stock Purchase Agreement which accompanied the application, WS Utility is, and at all times will be, 100% owned and/or controlled by William L. Smith, Jr., or an affiliate of William L. Smith, Jr. The consummation of the acquisition is intended to be the earlier of (a) 15 days after the satisfaction of the PSC Condition or (b) July 15, 1998, provided the PSC Condition has been satisfied. The "PSC Condition" is defined in the purchase agreement as the approval or consent of the PSC to the acquisition.

The application, as filed and amended, is in compliance with the governing statute, Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules pertaining to an application for transfer of majority organizational control. The application contained the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code (F.A.C.). As proof of ownership pursuant to Rule 25.30-037(3)(i), F.A.C., a title commitment by Lawyers Title Insurance Corporation was furnished as Exhibit C to the Stock Purchase Agreement.

Proof of compliance with the noticing requirements set forth in Rule 25-30.030, F.A.C., was furnished as an amendment to the application. One protest to the notice was timely filed by Mr. Harry M. Goode. The concerns expressed by Mr. Goode were not within the jurisdiction of this Commission. A follow-up letter of inquiry was sent by Legal Counsel in which Mr. Goode was requested to respond by a certain date if he wished to pursue an objection to the transfer through a hearing. Otherwise, staff would move forward in processing the application. No response was received within the specified time period. However, since the application was originally filed as a transfer of certificate rather than transfer of majority control, the applicant was required to renotice the filing. No objections to the renotice have been received and the time for filing such protest has now expired.

Another reason staff requested renoticing was that the territory description provided with the application and in the original notice did not include the additional territory added to Certificate 168-S by the Commission in Order No. 12618, issued October 18, 1983, in Docket No. 830390-S. Since the utility's existing wastewater tariff did not contain a description of the additional territory either, for clarification, the territory approved by the Commission for Certificate 168-S has been appended to this recommendation as Attachment A.

At the time the application was filed, the buyer had additional time remaining under the purchase agreement in which to accomplish environmental due diligence pursuant to Rule 25-30.037(3)(h), F.A.C. By supplemental statement filed June 22, 1998, the Commission was informed that the buyer's consultants had completed Phase I of their environmental site assessment and, as such, the buyer stated the system being acquired appeared to be in satisfactory condition and in compliance with all applicable standards set by the Florida Department of Environmental Protection (FDEP). Staff has also confirmed with the FDEP that the utility is currently in environmental compliance.

Rules 25-30.037(3)(e) and (g), F.A.C., require a statement of the financing and a disclosure of all entities that have or will provide funding to the buyer. According to the Stock Purchase Agreement furnished with the application, the purchase price for all shares in the utility is \$810,000 of which \$50,000 was prepaid as a down payment. The application indicates that the buyer will finance approximately \$600,000 of the total purchase price through Barnett Bank (or its successor in interest) with the remaining \$210,000 paid out of cash assets.

Pursuant to Rules 25-30.037(3)(d) and (f), F.A.C., staff has reviewed the financial statements of the buyer and such statements indicate sufficient resources to finance the acquisition as well as retain adequate liquid reserves for utility emergencies. The application states that the buyer does not currently own any other water or wastewater utilities. However, the buyer intends to continue to have Davis Water Analysis perform the day to day operation of the utility system. The lead operator is Mark Burkemper who has a valid FDEP license to operate a wastewater facility the size of K W Resort's plant. In addition to Davis Water Analysis, the buyer states his brother is a Florida-licensed engineer who consults frequently on water and wastewater related matters.

The application indicates that the transfer of control is in the public interest because the buyer is interested in continuing the operation of the utility as well as in expanding the service territory to serve adjacent properties not presently served by central wastewater service. The buyer also furnished a statement that it intends to fulfill the commitments, obligations and representations of the utility with regard to utility matters. Because the transfer transaction is being accomplished by means of a stock purchase, the buyer intends that the name of the utility remain as certificated, i.e., K W Resort Utilities Corp. Proof has been provided that the utility name is active and current with the Florida Department of State, Division of Corporations.

According to Section 2.7 of the Stock Purchase Agreement, K W Resort Holdings Corp. will be responsible for the payment of all outstanding regulatory assessment fees (RAFs) for 1997 and RAFs for 1998 will be prorated between the buyer and seller as of the date of the closing and treated as an adjustment to the purchase price. Staff has confirmed that the utility is current through 1997 on its regulatory assessment fees and there are no outstanding penalties or interest owed.

Based on all the above, staff believes the transfer of majority control of K W Resort Utilities Corp. from K W Resort Holdings Corp. to WS Utility, Inc., is in the public interest and should be approved. The utility name should remain as currently certificated. The territory being transferred is described in Attachment A.

DOCKET NO. 980341-SU

DATE: 07/09/98

ISSUE 2: Should rate base be established for K W Resort Utilities Corporation at the time of the transfer?

RECOMMENDATION: No, rate base should not be established at the time of transfer. (BRADY)

STAFF ANALYSIS: Section 367.071(5), Florida Statutes, states in part:

The commission by order may establish the rate base for a utility or its facilities or property when the commission approves a sale, assignment, or transfer thereof[.]

The Commission has traditionally established rate base at the time of a sale, assignment or transfer of certificate because the purchase price of the utility, as compared to the rate base, is part of determining whether the transfer is in the public interest. However, the Commission has traditionally not established rate base for transfers of majority control since the purchase is usually accomplished by the transfer of stock. Stock is publicly traded and, as such, its price has no regulatory relationship to a utility's established rate base.

Since the transfer of majority control of K W Resort Utilities Corp. has been accomplished by the acquisition of stock, staff recommends that rate base not be established at the time of transfer.

ISSUE 3: Should the rates and charges approved for K W Resort Utilities Corp. be continued?

RECOMMENDATION: Yes, the rates and charges approved for K W Resort Utilities Corp. should be continued. The tariff filing reflecting the transfer of majority control should be effective for services provided or connections made on or after the stamped approval date pursuant to Section 25-30.475, F.A.C. (BRADY)

STAFF ANALYSIS: The utility's rates were last reviewed in Docket No. 830388-S and approved by stipulation in Order No. 14620, issued July 23, 1985. Spin-off Docket No. 850370-SU approved the utility's service availability charges by Order No. 14756, issued August 22, 1985. The utility's current general service, residential, and private lift station rates were last indexed in 1997. A new class of reuse rates was established in December of 1994 pursuant to Order No. PSC-95-0035-FOF-SU in Docket No. 941323-SU. A protested limited proceeding for an increase in the reuse rates in Docket No. 970229-SU has been put on hold pending a final decision in this docket at which time it is expected there will be a negotiated settlement.

Rule 25-9.044(1), F.A.C., provides that:

In case of change of ownership or control of a utility which places the operation under a different or new utility, or when its name is changed, 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)[.]

Staff recommends that the new majority owner be required to adopt the rates, charges and classifications of the existing majority owner until authorized to change by the Commission. The application contained a wastewater tariff reflecting the transfer of majority control. Staff will approve the tariff filing effective for services rendered or connections made on or after the stamped approval date pursuant to Section 25-30.475, F.A.C.

DOCKET NO. 980341-SU
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ISSUE 4: Should this docket be closed?

RECOMMENDATION: No, the docket should remain open until receipt of written confirmation of the date of closing. (FLEMING)

STAFF ANALYSIS: The docket should remain open until receipt of written confirmation of closing of the transfer. Once this information is received, this docket may be administratively closed.

ATTACHMENT A
TERRITORY
K W RESORT UTILITIES CORP.
MONROE COUNTY

Docket No. 750149-S (AP), Order No. 6803, issued July 28, 1975
and
Docket No. 820363-S (TC), Order No. 11319, issued November 16, 1982

Township 67 South, Range 25 East
Section 35

A parcel of land as delineated on Maloney's plat of Stock Island as recorded in plat book 1, page 55 of official records of Monroe County, Florida and more particularly described as follows.

BEGINNING at the intersection of the Easterly abutment of the North-bound lane of the Stock Island-Key West Bridge and the Southerly right-of-way line of Highway U.S. No. 1 (State Road No. 5), run in Northeasterly direction along the Southerly right-of-way line of Highway U.S. No. 1 to a point which is the intersection of said Southerly right-of-way line of U.S. No. 1 and the Southerly right-of-way line of McDonald Avenue; thence in an Easterly direction along the Southerly right-of-way line of McDonald Avenue to a point which is the intersection of the Southerly right-of-way line of McDonald Avenue and the Southeasterly right-of-way line of Maloney Avenue; thence in a Southeasterly direction along the Southerly right-of-way line of Maloney Avenue to the shores of the Atlantic Ocean; thence meander the shoreline of Stock Island in Westerly, Southerly and Northerly direction back to the POINT OF BEGINNING.

Docket No. 830390-S (EX), Order No. 12618, issued October 18, 1983

Township 67 South, Range 25 East
Sections 26 and 35

All that area of said sections bounded on the North, East and West by the centerline of Jr. College road as now constructed and on the South by the centerline of U.S. Highway No. 1 (State Road No. 5) as now constructed.