



Public Service Commission

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RECORDS AND REPORTING

DATE: NOVEMBER 5, 1998

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

FROM: DIVISION OF WATER AND WASTEWATER (BRADY) *BSM pb*
DIVISION OF LEGAL SERVICES (BRUBAKER, CROSBY) *gcb*

RE: DOCKET NO. 980767-WS - JOINT APPLICATION FOR TRANSFER OF FACILITIES OF GULF UTILITY COMPANY TO GULF ENVIRONMENTAL SERVICES, INC. AND CANCELLATION OF CERTIFICATE NOS. 072-W AND 064-S.
COUNTY: LEE

AGENDA: NOVEMBER 17, 1998 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\980767.RCM

CASE BACKGROUND

Gulf Utility Company (Gulf or utility) is a Class A water and wastewater utility which currently serves approximately 7,562 water and 2,805 wastewater customers in South Lee County. According to its 1997 Annual Report, the utility had combined water and wastewater operating revenues of \$3,625,027 and a combined net operating income of \$387,636.

Gulf began operation in 1972 as San Carlos Utilities, Inc. (SCU), which was a wholly owned subsidiary of Coastland Corporation of Florida, a real estate development company. SCU was granted Certificates Nos. 072-W and 064-S by Order No. 5366, issued March 24, 1972 in Dockets Nos. C-71643-W and C-71635-S. There were several amendments to the utility's original territory prior to the creation in 1982 of a separate corporation to hold the utility's assets. Transfer of the assets to that corporation was approved by

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Order No. 11266, issued October 25, 1982, in Docket No. 820280-WS. When originally formed the corporation was briefly known as RBN Utilities Company. The name was subsequently changed to Gulf Utility Company. Gulf subsequently retained ownership of the utility's assets until June 30, 1988, when the facilities were sold to Gulf Environmental Services, Inc. (GES).

On June 18, 1998, just prior to the effective date of that transfer, Gulf and GES filed a joint application for transfer of utilities facilities from Gulf to GES and for cancellation of Certificates Nos. 523-W and 457-S. The joint application was filed pursuant to Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code, which concern a transfer to a governmental authority. This recommendation addresses whether the joint application for transfer was filed pursuant to the appropriate statutes and rules and, if so, whether the transfer should be acknowledged by the Commission. The recommendation also addresses Gulf's apparent violation of Section 367.071, Florida Statutes, for transferring the utility prior to the Commission taking action on the utility's application.

DISCUSSION OF ISSUES

ISSUE 1: Should the transfer of Gulf Utility Company to Gulf Environmental Services, Inc., be treated as a transfer to a governmental authority, pursuant to Section 367.071(4), Florida Statutes?

RECOMMENDATION: Yes, the transfer of Gulf Utility Company to Gulf Environmental Services, Inc., should be treated as a transfer to a governmental authority, pursuant to Section 367.071(4), Florida Statutes. If the Commission rejects this recommendation, Gulf should be ordered to file an application for transfer pursuant to Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code, and notice in accordance with Rule 25-30.030, Florida Administrative Code, by or within thirty (30) days of the issuance of the Order. (BRUBAKER)

STAFF ANALYSIS: As previously stated in the case background, Gulf's transfer application was filed pursuant to Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code, which address transfers to a governmental authority. Applications filed pursuant to Section 367.071(4)(a), Florida Statutes, are approved as a matter of right. However, based upon the information filed with the transfer application, staff made a preliminary evaluation that GES was not a "governmental authority" as defined by Section 367.021(7), Florida Statutes, and the transfer could not be approved as a matter of right, but rather the Commission could approve the transfer after a finding that the transfer is in the public interest in accordance with Section 367.071(1), Florida Statutes.¹ Therefore, by letters dated July 24, 1998 and September 18, 1998, staff requested that the utility refile its application in accordance with Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code.

The utility declined to refile its application at that time, instead requesting to first meet with staff. Staff, counsel for Gulf and GES, and an Office of Public Counsel representative met on October 9, 1998, at which time additional information was provided to staff with respect to the creation, structure and purpose of GES and its acquisition of Gulf Utility Company. This additional

¹Staff notes that if the Commission believes that GES is not a "governmental authority" and a transfer application filed in accordance with Section 367.071(1) is more appropriate, GES is exempt pursuant to Section 367.022(2), Florida Statutes.

information was memorialized by counsel for GES in a letter dated October 9, 1998, and is discussed in greater detail below. Staff is bringing this matter before the Commission for its determination because this appears to be a matter of first impression which involves the construction of Section 367.021, Florida Statutes.

GES was created for the sole purpose of acquiring Gulf's assets and facilities. GES' Articles of Incorporation provide that (1) its Board of Directors must be appointed or confirmed by Lee County's Board of County Commissioners, (2) the assets of GES may not be sold except to Lee County, and (3) upon retirement of GES' bond indebtedness, Lee County would automatically acquire title to GES' assets.

A specific condition to the closing of GES' purchase of Gulf's assets was that Lee County must approve of the transaction as contemplated by the Purchase and Sale Agreement. In its Resolution No. 98-03-249, adopted March 31, 1998, Lee County gave preliminary approval to the bonds to be issued by GES, the activities and purposes of GES itself, and accepting unencumbered title to all real and personal property of GES upon defeasance or assumption of the bonds. On June 9, 1998, at a noticed public meeting, Lee County adopted Resolution No. 98-06-18, in which Lee County found that the purchase of Gulf's assets served a public purpose, and was in the public interest.

Section 9 of Resolution No. 98-06-18 notes that the purchase and sale was being undertaken in lieu of condemnation proceedings by Lee County for Gulf's assets. To this end, the Lee County Tax Collector found the transaction to be exempt from documentary stamps because the acquisition was by a governmental authority in lieu of condemnation. In addition, the income payable on the bonds issued by GES for the purchase of Gulf is exempt from federal income taxation pursuant to Revenue Ruling No. 63-20, which permits a not-for-profit corporation to issue tax-exempt bonds provided a governmental agency, among other things, has a beneficial interest in the assets of the not-for-profit corporation. The summary statement of the bonds' Official Statement recognizes that the issuer of the bonds, i.e., GES, "may also mean the County or any district created by or on behalf of the County, to whom the system is transferred as a whole, as provided in the Resolution." Given the structure of the transaction, "municipal" bond insurance was issued.

GES has adopted a written policy by which it subjected itself to the Florida Sunshine and Public Records Laws. Its Board of Directors' meetings are open to the public and its records are open

for inspection by the public. Furthermore, the Utility Director for Lee County also sits on GES' Board of Directors, and both Lee County's utility system and GES use the same contract operator.

Section 367.021(7), Florida Statutes provides that a "governmental authority" means a political subdivision, as defined by Section 1.01(8), Florida Statutes, or a regional water supply authority created pursuant to Section 373.1962, Florida Statutes. Section 1.01(8) provides that the term "political subdivision" includes counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state. Counsel for GES asserts that, in terms of statutory construction, the word "include" is usually a term of enlargement and not of limitation. It therefore conveys the conclusion that there are other terms includable, though not specifically enumerated by the statute. See Argosy Limited v. Hennigan, 404 F.2d 14 (5th Cir. 1968). As stated by counsel for GES, Lee County considers itself to be the effective purchaser of Gulf's assets and facilities. Resolution No. 98-06-18, by which Lee County gave its final approval of the Gulf purchase, was structured to comply with Section 125.3401, Florida Statutes, which sets forth the conditions and requirements a county must consider prior to acquiring a water or wastewater utility.

Counsel for GES states that by creating GES and structuring the purchase of Gulf in this manner, the purchase has no immediate and direct impact on Lee County's financial picture, particularly with respect to bonds already issued by Lee County and which remain outstanding. Furthermore, it allows the system to operate in a privatized-format for several years, in order to work out any operational flaws prior to interconnecting the system with that of Lee County.

Under these circumstances, staff believes it is reasonable to conclude that GES constitutes a "governmental authority" as contemplated by Sections 367.021(7) and 1.01(8), Florida Statutes. Lee County has plenary control over the appointment of GES' Board of Directors and sole beneficial interest in GES' assets and facilities. GES conducts itself essentially as a branch of Lee County, and is subject to Government-in-the-Sunshine and public records law disclosures. Lee County gave its requisite approval of the transaction at a noticed public meeting, and upon a finding that the transaction served a public purpose and interest. Staff therefore recommends that the transfer of Gulf Utility Company to Gulf Environmental Services, Inc., should be treated as a transfer to a governmental authority pursuant to Section 367.071(4)(a), Florida Statutes.

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If the Commission rejects this recommendation, Gulf should be ordered to file an application for transfer pursuant to Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code, and notice in accordance with Rule 25-30.030, Florida Administrative Code, within thirty (30) days of the issuance of the Order.

ISSUE 2: Should the Commission order Gulf Utility Company to show cause, in writing within 21 days, why it should not be fined for violation of Section 367.071, Florida Statutes?

STAFF ANALYSIS: No, a show cause proceeding should not be initiated. (BRUBAKER)

RECOMMENDATION: As discussed previously in the case background, the application for transfer of Gulf's assets and facilities was filed on June 18, 1998. However, the sale of Gulf to GES was completed on June 30, 1998, prior to the Commission taking action on the utility's application. Section 367.071 (1), Florida Statutes, requires that:

No utility shall sell, assign, or transfer its certificate of authorization, facilities, or any portion thereof ..., without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee 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 have willfully violated, any provision of Chapter 367, Florida Statutes.

Gulf appears to have violated Section 367.071(1), Florida Statutes, by failing to obtain the approval of the Commission before transferring its facilities to GES. While staff has no reason to believe that the utility intended to violate this statute, its act was "willful" in the sense intended by Section 367.161, 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, "in 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. 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).

Gulf's failure to obtain the 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 apparent violation. As discussed previously, Gulf and GES were unable to file the transfer application until they had first received approval from Lee County. Lee County gave its consent to the transfer pursuant to Resolution No. 98-06-18, which was issued on June 9, 1998. The transfer application was filed approximately one week later, on June 18, 1998. Although the sale was completed prior to obtaining the Commission's acknowledgment of the transfer, staff counsel has confirmed that Gulf and GES scheduled the sale closing date for June 30, 1998, in order to take advantage of low interest rates on bonds used to finance the purchase of Gulf.

Under these circumstances, staff does not believe that the utility's apparent violation of Section 367.071(1), Florida Statutes, rises to the level of warranting that a show cause order be issued. Therefore, staff recommends that the Commission not order Gulf to show cause why it should not be fined for failing to obtain the Commission's approval of the transfer of the utility's facilities prior to the date of the transfer.

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ISSUE 3: If Issue 1 is approved, should the Commission acknowledge the transfer of the facilities of Gulf Utility Company to Gulf Environmental Services, Inc., and the cancellation of Certificates Nos. 072-W and 064-S?

RECOMMENDATION: Yes. The Commission should acknowledge the transfer of utility facilities from Gulf Utility Company to Gulf Environmental Services, Inc. Certificates Nos. 072-W and 064-S should remain in effect until all issues relating to Docket Nos. 980057-WU and 980943-WS are resolved and the dockets are closed. (BRADY)

STAFF ANALYSIS: If the Commission decides in Issue 1 that the appropriate application for this transfer is to a governmental authority, then the application is in compliance with Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. As such, no notice of the transfer is required and no filing fees apply.

The application was accompanied by a copy of the Agreement for Purchase and Sale of Water and Wastewater Assets (Agreement), portions of which were described in some detail in Issue 1. The total purchase price for the transfer was \$43,000,000. Gulf has retained no assets that would constitute a system providing, or proposing to provide, water or wastewater service to the public for compensation. The Agreement required the seller to furnish the buyer, within five (5) days of the closing, all correspondence with the Commission for the last two years, copies of any developer agreements, a list of customer deposits or advance facility charges and accounts receivable, and an audited Balance Sheets and Income Statements as of December 31, 1997.

Staff has confirmed that the utility is current on its annual reports and regulatory assessment fees and that there are no outstanding fines or interest due. As already noted, the date of closing was September 30, 1998. Gulf is, therefore, responsible for remitting regulatory assessment fees up through September 30, 1998. The appropriate fees should be remitted to the Commission pursuant to the requirements of Rules 25-30.110 and 25-30.120, Florida Administrative Code.

Gulf has two open dockets pending Commission disposition: Docket No. 980057-WU and Docket No. 980943-WS. Docket No. 980057-WU is a petition for interim and permanent increase in water rates. In PSC Order No. 98-0382-FOF-WU, issued March 10, 1998, the Commission denied Gulf's request for interim rates. The docket has

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essentially been on hold since the filing of this petition but, to date, the utility has not withdrawn its petition. Staff will prepare a separate recommendation for disposition of that docket by the Commission. Docket No. 980943-WS was opened by staff for disposition of Gulf's contributions-in-aid-of-construction (CIAC) and gross-up funds. Until Docket No 980057-WU is voluntarily withdrawn by Gulf or otherwise closed by the Commission, and until a final determination is made of all issues in Docket No. 980943-WS, the utility's certificates should remain in effect.

Based on all the above, staff recommends that the Commission acknowledge the transfer of utility facilities from Gulf Utility Company to Gulf Environmental Services, Inc. Certificates Nos. 072-W and 064-S should remain in effect until all issues relating to Dockets Nos. 980057-WU and 980943-WS are resolved and the dockets are closed.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. (BRUBAKER, CROSBY)

STAFF ANALYSIS: This docket should remain open pending final disposition of all issues in Docket Nos. 980057-WU and 980943-WS. Once those dockets have been closed, Certificate Nos. 072-W and 064-S should be canceled and this docket should be administratively closed.