



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: AUGUST 5, 1999

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

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

RE: DOCKET NO. 990248-WU - APPLICATION FOR TRANSFER OF
MAJORITY ORGANIZATIONAL CONTROL OF MORNINGSIDE UTILITIES,
INC., HOLDER OF CERTIFICATE NO. 595-W FROM GEORGE
DEVILLERS TO GARY K. TURNER.
COUNTY: OSCEOLA

AGENDA: AUGUST 17, 1999 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\990248WU.RCM

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 DIVISION OF RECORDS AND REPORTING
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CASE BACKGROUND

Morningside Utilities, Inc. (Morningside or utility) is a Class C water utility providing service to approximately 175 residential customers in Morningside Village in Osceola County. Wastewater service is provided by septic tanks. The utility reported 1998 total revenues of \$62,802 with a net operating income of \$9,145. For informational purposes, the utility's rate base was set at \$49,957 as of year-end 1997 pursuant to Order No. PSC-98-1585-FOF-WU, issued November 25, 1998, in Docket No. 980445-WU. The value placed on utility stock in the transfer was \$180,000.

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Morningside was granted Water Certificate No. 595-W by Order No. PSC-97-1211-FOF-WU issued October 7, 1997, in Docket No. 970636-WU. On February 27, 1999, the current owner, Mr. George DeVillers, transferred majority organizational control of the utility to Mr. Gary K. Turner, the current plant operator. Prior to the transfer, staff was contacted for information and application forms. However, according to the utility, the parties had to close on the stock transfer due to a developer's need for service outside the utility's service territory. Although Morningside was the only provider in the area, the existing owner was trying to divest the utility business, not expand it. And, absent the stock transfer, the buyer did not have the authority to enter into a developer agreement. The seller and buyer made the stock purchase agreement contingent upon regulatory approval. On March 3, 1999, an application for transfer of majority organizational control was filed, opening this docket, along with a separate application for territory extension which is being processed in Docket No. 990247-WU.

Both applications contained a number of deficiencies including documents filed under the name of Morningside Utilities, Inc., instead of the name Morningside Utility, Inc., in which the utility was then certificated. The discrepancy was apparently due to the seller's mistaken belief he had incorporated the utility under the former name. On May 7, 1999, the utility filed the documentation necessary to complete this application as well as to request a change in name to Morningside Utilities, Inc.

By Order No. PSC-99-1196-FOF-WU, issued June 11, 1999, in this docket, the utility's request to change its name to Morningside Utilities, Inc., was approved. This recommendation addresses the utility's request for a transfer of majority control from George DeVillers to Gary K. Turner as well as the apparent violation of Section 367.071(1), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Morningside Utilities, Inc., be ordered to show cause, in writing within 21 days, why it should not be fined for violation of Section 367.071, Florida Statutes?

RECOMMENDATION: No. A show cause proceeding should not be initiated. (CROSSMAN, CROSBY)

STAFF ANALYSIS: As stated in the Case Background, the transfer of stock from Mr. George DeVillers to Mr. Gary Turner occurred on February 27, 1999, prior to Commission approval. Therefore, Morningside Utilities, Inc. is in apparent violation of Section 367.071, Florida Statutes, which states, in part, "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."

Mr. DeVillers and Mr. Turner contacted the Commission staff for information and an application form prior to executing the stock transfer. However, because there was an immediate need to extend the utility's service territory and to provide service to customers in that area, Mr. DeVillers and Mr. Turner entered into an agreement to transfer the stock prior to Commission approval. 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.

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Failure of Morningside to obtain this Commission's approval prior to the transfer appears to be due to the belief that the need for service was immediate. Customers requested service in the additional territory, and Mr. DeVillers, the previous owner, had no inclination to extend the utility's territory to serve those customers requesting service. Mr. DeVillers and Mr. Turner modified the contract to include a provision that states:

This contract is contingent upon the ability of the Purchaser and Seller working jointly to obtain all necessary documents, licenses, permits and any other form of authorization or certification required for the operation of the water plant located on the real property, which is owned by the Corporation, from any regulatory agencies regulating any aspects of the operation of that water plant known as Morningside Utilities and Water Treatment Plant on said property.

The contract further defines "regulatory agencies" to include the Florida Public Service Commission. Morningside also filed the application for approval of the transfer on March 3, 1999, and completed the filing requirements as expeditiously as was feasible. Mr. Turner has been very cooperative in meeting the filing requirements for both the transfer of majority organizational control and the amendment docket.

Although regulated utilities are charged with the knowledge of Chapter 367, Florida Statutes, staff does not believe that, under the foregoing circumstances, the apparent violation of Section 367.071, Florida Statutes, rises to the level of warranting the initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order Morningside to show cause for its failure to obtain Commission approval prior to the transfer of majority organizational control of the utility from Mr. DeVillers to Mr. Turner.

ISSUE 2: Should the transfer of majority organizational control of Morningside Utilities, Inc., from George DeVillers to Gary K. Turner be approved?

RECOMMENDATION: Yes, the transfer of majority organizational control should be approved. The territory being transferred is described in Attachment A. (BRADY)

STAFF ANALYSIS: On March 3, 1999, this application was filed for approval of the transfer of majority organizational control of Morningside from Mr. George DeVillers, 100% stock owner, to Mr. Gary K. Turner, operator of the utility. The application contained a number of deficiencies including a discrepancy in the name used on certain documents attesting to the transfer. The information necessary to complete the application and a request for a name change were filed on May 7, 1999. By Order No. PSC-99-1196-FOF-WU, issued June 11, 1999, in this docket, the Commission approved the utility's request to change the name on its certificate to Morningside Utilities, Inc.

Except as noted in Issue 1, the application as filed and supplemented 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. The application also contained evidence of compliance with the noticing requirements pursuant to Rule 25-30.030, Florida Administrative Code. No objections to the notice have been received by the Commission and the time for filing such has expired.

Rules 25-30.037(3)(e) and (g), Florida Administrative Code, require a statement of the financing and a disclosure of all entities that have provided, or will provide, funding to the buyer. According to the Stock Purchase Agreement furnished with the application, the buyer purchased 100% of the utility shares for a total of \$180,000 of which \$30,000 was paid by cashiers check as a down payment at the time of the closing. The buyer intends to finance the remaining \$150,000 through a 15 year mortgage held by the seller at a 10% per annum interest rate and secured by the real

property. The Mortgage Deed attached to the Stock Purchase Agreement was executed on February 27, 1999 making that the effective date of the transfer.

As proof the utility continues to own the land upon which its facilities are located, pursuant to Rule 25.30-037(3)(i), Florida Administrative Code, the application also contained a Warranty Deed dated January 22, 1999, by which Mr. DeVillers transferred title from himself to Morningside Utilities, Inc. However, since the Warranty Deed was superseded by the Mortgage Deed which places a lien on the property in favor of Mr. DeVillers, Mr. DeVillers provided an affidavit attesting that legal title to the land continues to remain with the utility by evidence of the Warranty Deed.

Pursuant to Rule 25-30.037(3)(h), Florida Administrative Code, the buyer provided a statement that, upon reasonable investigation, the systems being acquired appear to be in satisfactory condition and in compliance with all applicable standards set by the Florida Department of Environmental Protection (FDEP). Staff has confirmed with the FDEP that the utility has been inspected recently and was found to be in satisfactory working condition and in compliance with environmental rules.

According to Section 5 of the Stock Purchase Agreement, the seller is solely and exclusively responsible for all outstanding utility debt due until closing. However, the buyer agreed to be responsible for utility operations from January 1, 1999, forward and will, therefore, file the utility's 1999 Annual Report and resulting Regulatory Assessment Fees (RAFs). Staff has confirmed that the utility is current through 1998 on its RAFs. However, the utility paid the 1998 RAFs late and penalties and interest will apply. Staff is contacting the former owner, Mr. DeVillers, who will be responsible for payment of penalties and interest.

Pursuant to Rules 25-30.037(3)(d) and (f), Florida Administrative Code, staff has reviewed the financial statements of the buyer and such statements appear to indicate resources sufficient to finance the acquisition along with sufficient reserves for utility emergencies. As for technical ability, while the buyer indicates he does not own any other utility facilities,

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he currently holds a Florida "B" Drinking Water License as well as a Florida "C" Wastewater License. He has been the operator for Morningside for one year, with a total of nine years experience working with water treatment plants.

The buyer believes that the transfer of majority organizational control is in the best interest of the public because of his knowledge of the operations of water treatment plants and his previous experience operating the utility. The buyer also furnished a statement that he intends to fulfill the commitments, obligations and representations of the utility with regard to utility matters.

Based on all the above, staff believes the transfer of majority control of Morningside Utilities, Inc., from George DeVillers to Gary K. Turner is in the public interest and should be approved. The territory being transferred is described in Attachment A.

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ISSUE 3: Should rate base be established for Morningside Utilities, Inc., 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 generally establishes 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 generally does not establish 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 Morningside has been accomplished by the transfer of stock, staff recommends that rate base not be established at the time of transfer.

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ISSUE 4: Should the rates and charges approved for Morningside Utilities, Inc., be continued?

RECOMMENDATION: Yes, the rates and charges approved for Morningside Utilities, Inc., should be continued. (BRADY)

STAFF ANALYSIS: The utility's current rates and service availability charges became effective February 1, 1999, pursuant to the staff-assisted rate case in Docket No. 980445-WU, as approved by Order No. PSC-98-1585-FOF-WU.

Rule 25-9.044(1), Florida Administrative Code, 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).

The Buyer has not requested a change in rates and charges of the utility. 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. The tariff filing should be approved, to be effective for services rendered or connections made on or after the stamped approval date.

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ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes. Because no further action is necessary, this docket should be closed. (CROSSMAN, CROSBY)

STAFF ANALYSIS: Because no further action is necessary, this docket should be closed.

MORNINGSIDE UTILITIES, INC.
TERRITORY DESCRIPTION
OSCEOLA COUNTY

Township 25 South, Range 30 East
Section 3

Beginning at the NE corner of Section 3, Township 25 South, Range 30 East, Osceola County, Florida, also being the NE corner of Lot 124, Morningside Village, Unit Four, as filed and recorded in Plat Book 5, Page 185 of the Public Records of Osceola County, Florida, run

North 88° 57' 45" West, along the North line of said Section 3, 1,991.94 feet to the NW corner of Lot 163, Morningside Village, Unit Five, as filed and recorded in Plat Book 6, Page 1 of the Public Records of Osceola County, Florida; run thence

South 00° 58' 04" West, along the West line of aforesaid Morningside Village, Unit Five, 655.51 feet to the SW corner of Lot 159 of aforesaid Morningside Village, Unit Five; run thence

South 88° 46' 09" East, along the South line of said Morningside Village, Unit Five, 662.73 feet to the NW corner of Lot 10, Morningside Village, Unit One, as filed and recorded in Plat Book 4, Page 84 of the Public Records of Osceola County, Florida; run thence

South 00° 58' 29" West, along the West line of aforesaid Morningside Village, Unit One, 1,337.02 feet to the SW corner of Lot 1 of aforesaid Morningside Village, Unit One; run thence along the South line of said Morningside Village, Unit One, the following:

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ATTACHMENT A, continued:

South 89° 01' 31" East, 175.00 feet;

North 25° 05' 45" East, 73.41 feet to a point on a 50.00 feet radius curve, concave Northwesterly; run thence

Northeasterly along said 50.00 feet radius curve, through a central angle of 98° 02' 52", an arc distance of 85.56 feet (Chord bearing North 41° 57' 03" East, Chord = 75.50 feet) to the SW corner of Lot 19 of said Morningside Village, Unit One; run thence

South 89° 01' 31" East, along the South line of said Lot 19, 155.49 feet to the SE corner of said Morningside Village, Unit One, said point being a point on the West line of Morningside Village, Unit Two, as filed and recorded in Plat Book 4, Page 85 of the Public Records of Osceola County, Florida; run thence

South 00° 58' 29" West, along said West line of Morningside Village, Unit Two, 37.00 feet to the SW corner of said Morningside Village, Unit Two; run thence

South 89° 01' 31" East, along the South line of said Morningside Village, Unit Two, 126.01 feet to a point on a 50.00 feet radius, concave Northwesterly; run thence

Southeasterly along said 50.00 feet radius, through a central angle of 101° 32' 13", an arc distance of 88.61 feet (Chord bearing South 38° 15' 24" East) to a point on the West line of Lot 44 of said Morningside Village, Unit Two; run thence

South 00° 58' 29" West, 35.00 feet; continue thence along aforesaid South line of Morningside Village, Unit Two, the following:

South 89° 01' 31" East, 145.00 feet;

South 00° 58' 29" West, 100.00 feet;

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ATTACHMENT A, continued:

South 89° 01' 13" East, 290.00 feet to the SW corner of Lot 73, Morningside Village, Unit Three, as filed and recorded in Plat Book 5, Page 84 of the Public Records of Osceola County, Florida; run thence along the South line of said Morningside Village, Unit Three, the following:

South 89° 01' 31" West, 63.00 feet;

South 00° 58' 29" West, 133.00 feet;

South 89° 01' 31" East, 237.83 feet to the SE corner of said Morningside Village, Unit Three, said corner being on the East line of aforesaid Section 3; run thence

North 01° 11' 59" East, along said East line, 2,234.32 feet to the Point of Beginning.