



Public Service Commission

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RECORDS AND REPORTING

DATE: JUNE 29, 2000

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

FROM: DIVISION OF REGULATORY OVERSIGHT (REHWINKEL, REDEMANN) *OR*
DIVISION OF LEGAL SERVICES (VAN LEUVEN) *BLV*

RE: DOCKET NO. 991001-WU - APPLICATION FOR TRANSFER OF FACILITIES AND CERTIFICATE NO. 424-W IN HIGHLANDS COUNTY FROM LAKE JOSEPHINE WATER TO AQUASOURCE UTILITY, INC.

COUNTY: HIGHLANDS

AGENDA: 07/11/00 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUES 5 AND 6 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\991001WU.RCM

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CASE BACKGROUND

Lake Josephine Water (Lake Josephine or utility) is a Class C utility serving approximately 474 water customers in Highlands County. On September 9, 1982, the Board of County Commissioners of Highlands County adopted a resolution which bestowed jurisdiction over privately owned water and/or wastewater utilities in the County upon the Florida Public Service Commission. By Order No. 12989, issued February 13, 1984, the utility was granted Certificate No. 424-W and initial rates were established.

The utility's 1998 annual report lists annual revenues of \$103,889. The annual report also includes annual operating expenses of \$97,731 resulting in a net operating income of \$6,158.

On August 4, 1999, Lake Josephine filed an application for the transfer of its water facilities and Certificate No. 424-W to AquaSource Utility, Inc. (AquaSource). Lake Josephine closed on the transfer of its facilities to AquaSource on June 10, 1999, prior to obtaining Commission approval. Staff addresses this matter in Issue 1.

DISCUSSION OF ISSUES

ISSUE 1: Should Lake Josephine Water be ordered to show cause, in writing within 21 days, why it should not be fined for its apparent violation of Section 367.071, Florida Statutes?

RECOMMENDATION: No. A show cause proceeding should not be initiated. (VAN LEUVEN)

STAFF ANALYSIS: As stated in the case background, Lake Josephine closed on the transfer of its facilities to AquaSource on June 10, 1999, prior to obtaining Commission approval. Section 367.071(1), Florida Statutes (1998), states:

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

This statute was subsequently revised, effective June 11, 1999, to allow closing prior to Commission approval provided that it is made contingent upon Commission approval.

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 to have willfully violated any provision of Chapter 367, Florida Statutes. In closing on the transfer of its facilities prior to Commission approval, the utility's 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, Florida Administrative Code, 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."

Although Lake Josephine's failure to obtain Commission approval prior to transferring its facilities to AquaSource is an apparent violation of Section 367.071(1), Florida Statutes, there are circumstances that appear to mitigate the utility's apparent

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violation. The parties were concerned that after having done extensive research regarding the system's status, and negotiating an agreement for transfer, any additional passage of time might have a detrimental effect on the agreement. Moreover, the owner of Lake Josephine was anxious to get out of the utility business. Furthermore, there is a provision in the Asset Purchase Agreement between Lake Josephine and AquaSource which states that if the Regulatory Authority (FPSC) does not approve the transfer, the parties will "unwind" the transaction.

In this instance, staff does not believe that the apparent violation of Section 367.071, Florida Statutes, rises to the level which warrants the initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order Lake Josephine to show cause for failing to obtain Commission approval prior to transferring its facilities to AquaSource.

ISSUE 2: Should Lake Josephine be ordered to show cause, in writing within 21 days, why it should not be fined up to \$5,000 per day for failure to maintain its accounts and records in conformance with the National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts (USOA), in apparent violation of Rule 25-30.115(1), Florida Administrative Code and Order No. PSC-95-1044-FOF-WS?

RECOMMENDATION: No. Lake Josephine should not be ordered to show cause, in writing within 21 days, why it should not be fined up to \$5,000 per day for failure to maintain its accounts and records in conformance with the NARUC USOA, in apparent violation of Rule 25-30.115(1), Florida Administrative Code and Order No. PSC-95-1044-FOF-WS. (VAN LEUVEN)

STAFF ANALYSIS: Rule 25-30.115(1), Florida Administrative Code, states "Water and wastewater utilities shall, effective January 1, 1998, maintain their accounts and records in conformity with the 1996 NARUC Uniform Systems of Accounts adopted by the National Association of Regulatory Utility Commissioners."

During a staff audit of Lake Josephine's books and records, staff learned that the utility had not reconciled its books and records with Order No. PSC-95-1044-FOF-WS, issued August 22, 1995 in Docket No. 950020-WU, a staff assisted rate case. That order required Lake Josephine to keep its books and records in accordance with the 1984 NARUC USOA. Staff made adjustments to the utility's rate base as discussed in Issue 5 in order to reconcile its books with Order No. PSC-95-1044-FOF-WS. Therefore, staff does not believe that it is appropriate to address the adjustments to rate base in this issue.

Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes. 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). Thus, any intentional act, such as the utility's failure to maintain its accounts and records in conformance with the NARUC USOA, would meet the standard for a "willful violation." 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 "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Lake Josephine's failure to maintain its books and records in accordance with NARUC USOA is in apparent violation of Rule 25-30.115, Florida Administrative Code, and Order No. PSC-95-1044-FOF-WS. In this instance, Lake Josephine doesn't operate the utility because AquaSource has acquired its facilities and is currently operating the utility. In light of these circumstances, staff believes that a show cause proceeding should not be initiated because the primary purpose of a show cause proceeding is to bring a utility into compliance with the Commission's orders, rules, and statutes, and to do so in this instance would serve no purpose since the utility is being transferred to another party.

As to the current state of Lake Josephine's books and records, it is staff's understanding that the books and records have been transferred to AquaSource. Further, it is our understanding that AquaSource is in the process of bringing the utility's books and records into compliance with the 1996 NARUC USOA. Staff is relying on conversations with AquaSource and a letter received on June 28, 2000 from AquaSource which states that the books and records will be in compliance by December 2000.

Therefore, staff recommends that Lake Josephine should not be ordered to show cause, in writing within 21 days, why it should not be fined up to \$5,000 per day for failure to maintain its accounts and records in conformance with the National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts (USOA), in apparent violation of Rule 25-30.115(1), Florida Administrative Code and Order No. PSC-95-1044-FOF-WS.

ISSUE 3: Should Lake Josephine, be ordered to show cause, in writing within 21 days, why it should not be fined for serving outside its certificated territory in apparent violation of Section 367.045(2), Florida Statutes and Order No. PSC-95-1044-FOF-WS?

RECOMMENDATION: No. Lake Josephine should not be ordered to show cause, in writing within 21 days, why it should not be fined for serving outside its certificated territory in apparent violation of Section 367.045(2), Florida Statutes and Order No. PSC-95-1044-FOF-WS, and that AquaSource should be ordered to file an amendment application within 60 days of the effective date of the order to include this territory. (VAN LEUVEN)

STAFF ANALYSIS: Section 367.045(2), Florida Statutes, states that "A utility may not . . . extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the commission." However, Lake Josephine has been serving customers outside of its certificated territory since at least August 22, 1995, the issuance date of Order No. PSC-95-1044-FOF-WU. Order No. PSC-95-1044-FOF-WU states that

The utility is currently providing service to customers outside the approved service territory. Therefore, the utility is in violation of Section 367.045(2), Florida Statutes. . . . LJW [Lake Josephine] shall file an application for an amendment of its certificate of authorization to extend its service territory, within 90 days of the issuance of this Order.

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 to have willfully violated any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission. Utilities are charged with the knowledge of the Commission's rules and statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, entitled 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 "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. 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). Thus, in serving outside of its certificated territory without obtaining an amended certificate of authorization, the utility's act appears "willful" in the sense intended by Section 367.161, Florida Statutes.

In this instance, Lake Josephine has ceased to operate the utility because AquaSource has acquired its facilities and is currently operating the utility. In light of these circumstances, staff believes that a show cause proceeding should not be initiated because the purpose of a show cause proceeding is to bring a utility into compliance with the Commission's orders, rules, and statutes, and to do so in this instance would serve no purpose since the utility is being transferred to another party. In addition, on June 28, 2000, staff received a letter from AquaSource stating that it will file an amendment application within 60 days of the effective date of the order to include this territory. Therefore, staff recommends that the Commission not order Lake Josephine to show cause for its apparent violation of Section 367.045(2), Florida Statutes and Order No. PSC-95-1044-FOF-WS and that AquaSource should be ordered to file an amendment application within 60 days of the effective date of the order to include this territory.

ISSUE 4: Should the transfer of facilities and Water Certificate 424-W from Lake Josephine Water to AquaSource Utility, Inc. be approved?

RECOMMENDATION: Yes, the transfer of facilities and Water Certificate 424-W from Lake Josephine to AquaSource Utility, Inc., should be approved. Further, AquaSource should be required to file an amendment of territory application within 60 days of the effective date of the order. Also, AquaSource should be responsible for the filing of the 1999 annual report and the payment of the 1999 regulatory assessment fees. (REHWINKEL, REDEMANN)

STAFF ANALYSIS: As stated in the case background, Lake Josephine applied for a transfer of its water facilities and Water Certificate No. 424-W in Highlands County to AquaSource Utility, Inc., on August 4, 1999. 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. 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. The applicant has provided evidence, in the form of a warranty deed, that the utility owns the land upon which its facilities are located, as required by Rule 25-30.037(2)(q), Florida Administrative Code.

In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code. No objections to the application were received, and the time for the filing of such objections has expired. A description of the territory served by the utility is appended to this memorandum as Attachment A, which is the service area granted to Lake Josephine by Order No. 12989, issued February 13, 1984, in Docket No. 830083-W. However, according to the former owner, the utility is currently serving outside its certificated service area. (See Issue 3 of this recommendation) AquaSource has agreed to file an amendment application within 60 days of the effective date of the order to correct this problem.

With regard to the purchaser's technical ability, AquaSource has indicated that it will maintain and operate the system in compliance with the appropriate laws and rules. Even though AquaSource is a relatively new corporation in Florida, it has experienced staff who have been providing operation, maintenance and management services for municipal and private water utilities for more than 25 years. While AquaSource currently operates and maintains three systems in Florida under the Commission's

jurisdiction, the company owns and operates other water and wastewater systems serving approximately 135,000 customers.

AquaSource is expanding its technical capabilities and implementing improved quality control, maintenance management, training and safety programs. These improvements provide direct tangible benefits to utilities owned and operated by AquaSource and municipal utilities served by AquaSource. Further, the Buyer has agreed to continue to employ the operations and clerical personnel currently employed by the Seller after the purchase. The continued employment of the personnel who operate the utility on a day to day basis will ensure that water and wastewater services will continue with the same high quality of service that has existed under previous ownership.

In addition to 25 years of experience in operating water and wastewater utilities, AquaSource has the financial resources to ensure consistent compliance with environmental regulations. Regarding the financial ability of AquaSource, the buyer supplied financial statements to staff, along with additional information regarding the sources of annual income. AquaSource is a wholly-owned subsidiary of DQE, Inc. DQE is listed on the New York Stock Exchange and has a market value in excess of \$2 billion. All acquisitions are funded through direct capital contributions from DQE, Inc., the funded parent of Duquesne Light Company, which has assets of more than \$4.6 billion and annual revenues in excess of \$1.2 billion. According to the Buyer, DQE currently intends to continue to make substantial investments in AquaSource with a goal of providing the company with the financial stability required to maintain its utility systems in accordance with Commission standards.

This application contains a copy of the Asset Purchase Agreement which includes the purchase price, terms of payment, a list of the assets purchased and liabilities assumed and not assumed and disposition of customer deposits and interest. Based on the application, there are no guaranteed revenue contracts, developer agreements, customer advances, debt of the utility, or leases that must be disposed of in association with the transfer of the utility.

According to our records, the utility requested and was granted an extension for filing its 1999 annual report. The 1999 annual report is due to be filed with the Commission on June 30, 2000. The utility's extension request cited complications arising from preparing a consolidated 1999 annual report for AquaSource's various systems, many of which have been acquired in the last year as its basis for requesting an extension. The utility paid its 1999 regulatory assessment fees in the amount of \$2,828 on March

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31, 1999 and is current with its regulatory assessment fees through December 1999.

Based on the above, staff recommends that the transfer of facilities and certificates from Lake Josephine to AquaSource is in the public interest and should be approved. AquaSource should be required to file an amendment of territory application within 60 days of the effective date of the order. Also, AquaSource should be responsible for the filing of the 1999 annual report and the payment of the 1999 regulatory assessment fees.

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Attachment A

AQUASOURCE UTILITY, INC.
HIGHLANDS COUNTY
WATER SERVICE AREA
SERVING THE LAKE JOSEPHINE SUBDIVISION

(Docket No. 830083-W, Order No. 12989)

Township 35 South, Range 29 East

Section 34

The North 1/2 of the SE 1/4 and that portion of the SW 1/4 lying South of the shoreline of Lake Josephine.

Section 34

The NW 1/4 of the SW 1/4.

ISSUE 5: What is the rate base of Lake Josephine at the time of transfer?

RECOMMENDATION: The rate base of Lake Josephine, which for transfer purposes reflects the net book value, is \$178,226. (REHWINKEL)

STAFF ANALYSIS: According to the application, and based on our records, rate base was previously established by this Commission in Docket No. 950020-WU, which was a staff-assisted rate case. According to Order No. PSC-95-1044-FOF-WS, issued on August 22, 1995 in that docket, rate base was \$34,432.

Staff conducted an audit of the utility's books and records to determine rate base at the time of transfer. The audit reveals that the utility did not reconcile its books and records with Order No. PSC-95-1044-FOF-WS. Therefore, adjustments were necessary to reconcile the utility's balance with the above-referenced order and to bring the utility's books and records up to date.

The plant-in-service account was understated by \$247,514. Staff adjusted this account by that amount to reflect the reconciliation to the above-referenced order and to reflect the proper amount of plant retirements. The total adjustment to plant-in-service is \$247,514 resulting in a plant balance of \$520,859. Similarly, to reconcile the land value with the last rate case order, staff has decreased land by \$4,900. The resulting land value is \$20,100.

In addition, the utility did not book imputed contributions-in-aid-of-construction (CIAC) in the amount of \$97,167 pursuant to Order No. PSC-95-1044-FOF-WU for the period ending December 31, 1994. Also, an adjustment in the amount of \$12,962 was necessary to reflect additions to CIAC since the last rate case. Therefore, CIAC was adjusted by \$110,129 to reflect the appropriate amount of CIAC at the time of transfer. The related amortization of CIAC is \$62,567. An adjustment to this account in the amount of \$5,912 was necessary to reflect the appropriate balance.

The auditor calculated accumulated depreciation after adjusting the plant balances for the above discrepancies. Accumulated depreciation was understated by \$943. Staff increased the accumulated depreciation balance by that amount to reflect the depreciation associated with the above adjustments to plant-in-service and to reflect the appropriate accumulated depreciation balance at the time of transfer.

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Staff's calculation of rate base is shown on Schedule No. 1. Staff recommends that rate base for Lake Josephine be established as \$178,226. This rate base calculation is used solely to establish the net book value of the property being purchased and does not include the normal ratemaking adjustments of working capital calculations and used and useful adjustments.

LAKE JOSEPHINE WATER

SCHEDULE OF WATER RATE BASE

As of June 30, 1999

<u>DESCRIPTION</u>	<u>BALANCE PER UTILITY</u>	<u>STAFF ADJUSTMENTS</u>	<u>BALANCE PER STAFF</u>
Utility Plant in Service	\$ 273,345	\$ 247,514	\$ 520,859
Land	\$ 25,000	\$ (4,900)	\$ 20,100
Accumulated Depreciation	\$ (133,723)	\$ (943)	\$ (134,666)
Contributions-in-aid-of-Construction	\$ (180,505)	\$ (110,129)	\$ (290,634)
CIAC Amortization	<u>\$ 56,655</u>	<u>\$ 5,912</u>	<u>\$ 62,567</u>
TOTAL	\$ 40,772	\$ 137,454	\$ 178,226

ISSUE 6: Should an acquisition adjustment be approved?

RECOMMENDATION: No. An acquisition adjustment should not be included in the calculation of rate base for transfer purposes. (REHWINKEL)

STAFF ANALYSIS: An acquisition adjustment results when the purchase price differs from the original cost calculation adjusted to the time of the acquisition. The acquisition adjustment resulting from the transfer of Lake Josephine would be calculated as follows:

Purchase Price:	\$ 200,000.00
Staff Calculated Rate Base:	\$ 178,226.00
Positive Acquisition Adjustment:	\$ 21,774.00

In the absence of extraordinary circumstances, it has been Commission policy that a subsequent purchase of a utility system at a premium or discount should not affect the rate base calculation. See In re: Application for transfer of Certificate No. 456-S from Del Vera Limited Partnership to Coolidge-Ft. Myers Realty Limited Partnership d/b/a Heron's Glen Utilities in Lee County, Order No. PSC-00-0758-PAA-WU, issued April 17, 2000, in Docket No. 991056-SU; In re: Application for transfer of Certificates Nos. 469-W and 358-S in Bay County from Bayside Utility Services, Inc., Order No. PSC-99-1818-PAA-WS, issued September 20, 1999, in Docket No. 981403-WS. The circumstances in this exchange do not appear to be extraordinary; therefore, staff recommends that a positive acquisition adjustment should not be included in the calculation of rate base. Also, a positive acquisition adjustment was not requested by the applicant.

ISSUE 7: Should the rates and charges approved for Lake Josephine be continued?

RECOMMENDATION: Yes. AquaSource should continue charging the rates and charges approved for Lake Josephine. The tariff should be effective for services rendered or connections made on or after the stamped approval date, in accordance with Rule 25-30.475, Florida Administrative Code. (REHWINKEL)

STAFF ANALYSIS: Rates and charges were approved in the utility's last rate proceeding by Order No. PSC-95-1044-FOF-WU, issued August 22, 1995, in Docket No. 950020-WU. The utility's rates and charges have been increased each year since the staff-assisted rate case through price index/pass-through filings with the most recent increase effective August 12, 1999.

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)
. . . .

The rates are reflected below:

WATER MONTHLY RATES

Residential Service, Multi-Residential, and General Service

<u>Meter Size</u>	<u>Base Facility Charge</u>
5/8 x 3/4"	\$ 8.60
3/4"	\$ 12.90
1"	\$ 21.48
1 1/2"	\$ 42.98
2"	\$ 68.76
3"	\$ 137.53
4"	\$ 214.89
6"	\$ 429.77
Gallonage Charge per 1,000 gallons	\$ 1.64

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Based on the above, staff recommends that AquaSource continue charging the rates and charges approved for Lake Josephine. The tariff should be effective for services rendered or connections made on or after the stamped approval date, in accordance with Rule 25-30.475, Florida Administrative Code.

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ISSUE 8: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open to allow AquaSource to file an application for an amendment within 60 days of the effective date of the order. If no timely protest is received to the proposed agency action issues upon the expiration of the protest period, the order should become final and effective upon the issuance of a Consummating Order. (VAN LEUVEN)

STAFF ANALYSIS: This docket should remain open to allow AquaSource to file an application for an amendment within 60 days of the effective date of the order. If no timely protest is received to the proposed agency action issues upon the expiration of the protest period, the order should become final and effective upon the issuance of a Consummating Order.