

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-

RECORDS AND REPORTING
JAN 25 AM 9:33
1:30

DATE: JANUARY 25, 2001

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

FROM: DIVISION OF REGULATORY OVERSIGHT (BRADY) *SSM pb PR*
DIVISION OF LEGAL SERVICES (CROSBY, GERVAZI) *RES*

RE: DOCKET NO. 001145-WU - APPLICATION FOR TRANSFER OF MAJORITY ORGANIZATIONAL CONTROL OF SAN SEBASTIAN UTILITIES, INC., HOLDER OF CERTIFICATE NO. 439-W IN BREVARD COUNTY, AND NAME CHANGE ON CERTIFICATE, TO SAN SEBASTIAN WATER, LLC.
COUNTY: BREVARD

AGENDA: 02/06/01 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\RGO\WP\001145.RCM

CASE BACKGROUND

San Sebastian Utilities, Inc., (San Sebastian or utility) is a Class C water utility located in Brevard County to provide water service to the subdivision known as San Sebastian Woods. Wastewater service is provided by septic systems. The utility's 1999 Annual Report indicates no revenues or operating income.

On May 16, 1984, San Sebastian filed an application for an original water certificate intended to serve approximately 225 small, single family residences. There was common ownership between the developer of the subdivision, Charles E. Buchanan, and the utility. The Commission granted Certificate No. 439-W and established projected rates by Order No. 13816, issued October 29, 1984, in Docket No. 840189-WU.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

By letter dated July 6, 1999, Mr. Buchanan notified the Commission that the subdivision development, along with the future water system, was sold to Howbert, L.C. (Howbert or intermediate owner). It was later learned that the transfer of majority organizational control (TMOC) had occurred on June 26, 1999, without prior Commission approval or any provision to be contingent upon such approval, in apparent violation of Section 367.071, Florida Statutes. The transfer had occurred at "the final hour" prior to foreclosure by Huntington Bank on both the development and the utility. Because of incorrect and insufficient utility information, Mr. Buchanan's notification was forwarded to the Division of Consumer Affairs (CAF). By the time the letter was referred to the Division of Water and Wastewater (WAW), San Sebastian was in the process of closing on a second TMOC to San Sebastian Water, LLC (SSW or buyer), which is the pending transfer in this docket.

Since the transfer of majority control of San Sebastian from the original owner to the intermediate owner was rendered moot by the pending transfer, staff has not evaluated the intermediate owner's technical and financial ability. The apparent violation of Section 367.071, Florida Statutes, for transferring majority organizational control of the utility without Commission approval will be addressed in Issue 1.

On August 15, 2000, the pending application for transfer of majority organizational control of San Sebastian was filed with the Commission along with a request to change the utility name to San Sebastian Water, LLC. The Contract for Sale and Purchase (Sales Contract) was executed November 9, 1999, with an anticipated closing in January 2000. However, since staff was in contact with the utility prior to the closing, the transfer of stock is being held subject to Commission approval. Staff's recommendation on the pending transfer will be addressed in Issue 2. The request to change the name of the utility will be addressed in Issue 3.

It should be noted that staff has been concerned for some time with the failure of the utility to construct to serve. In a transfer proceeding where there has been a long-term failure to construct, staff believes that the commitment of the buyer to construct, rather than the failure of the seller to have previously done so, is what needs to be evaluated to determine continued need for the certificate. Therefore, in addition to an evaluation of the financial and technical ability of the buyer, Issue 2 will also address the buyer's apparent commitment to construct.

With regard to rate base, it has been Commission practice not to establish rate base in a TMOC proceeding. The reason behind this approach is the philosophy that publicly traded stock has no regulatory relationship to rate base. In other words, since the utility's assets and liability accounts are not altered by stock transfers, such transfers have no affect on the utility's rate base balance. Since rate base is not affected by stock transfers, it is not part of the consideration of public interest for a TMOC. This same approach is followed even if the stock is privately held, rather than publicly traded. Similarly, it has also been Commission practice that acquisition adjustments for stock transfers are not part of the consideration of public interest for a TMOC. Therefore, staff's recommendation does not include issues regarding the establishment of rate base or an acquisition adjustment. For informational purposes, the projected, pro forma rate base used in Order No. 13816, issued October 29, 1984, in Docket No. 840189-WU, to set initial rates at 80% operating capacity was \$122,639.

The Commission has jurisdiction pursuant to Section 367.071, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should San Sebastian Utilities, Inc. be ordered to show cause, in writing, within 21 days, why he should not be fined for apparent violation of Section 367.071(1), Florida Statutes?

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

STAFF ANALYSIS: As indicated in the case background, San Sebastian is 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....However, a sale, assignment, or transfer of its certificate of authorization, facilities or any portion thereof, or majority organizational control may occur prior to commission approval if the contract for sale, assignment, or transfer is made contingent upon commission approval.

By letter dated July 6, 1999, Mr. Buchanan attempted to notify the Commission of the transfer of the utility on June 26, 1999, to Howbert. The transfer occurred just prior to foreclosure on the utility and the development by Huntington Bank. Although Mr. Buchanan's letter was misdirected, as will be discussed later, it does not change the fact that the transfer occurred without prior Commission approval. Further, the closing was not contingent upon such 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.

Although San Sebastian's failure to obtain Commission approval prior to transferring facilities is an apparent violation of Section 367.071(1), Florida Statutes, there are circumstances that appear to mitigate the utility's apparent violation. As stated previously, the transfer occurred just prior to foreclosure by the Huntington Bank on the development and utility. Typically, during negotiations for the transfer of a utility, there is time for a utility to contact Commission staff regarding the appropriate procedures. This case was complicated by the impending foreclosure proceedings.

Mr. Buchanan attempted to notify the Commission by letter of the sale of the subdivision and the future water system to Howbert. Because the company code used by Mr. Buchanan to identify the system was incorrect and the letter did not correctly identify the utility, it was not recognized as a regulated utility. As a consequence, the letter was forwarded to CAF. After Mr. Buchanan's January 22, 2000, response to CAF's follow-up inquiries, the matter was forwarded to WAW for handling.

Although regulated utilities are charged with knowledge of Chapter 367, Florida Statutes, staff does not believe that the apparent violation of Section 367.071, Florida Statutes, rises in these circumstances to the level of warranting initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order San Sebastian to show cause for failing to obtain approval prior to transferring majority organizational control of the utility to Howbert.

ISSUE 2: Should the transfer of majority organizational control of San Sebastian Utilities, Inc., from C.E. Buchanan through Howbert, L.C., to San Sebastian Water, LLC, be approved?

RECOMMENDATION: Yes. The transfer of majority organizational control should be approved. San Sebastian Utilities, Inc. should be responsible for filing an annual report for the utility and remitting the resulting regulatory assessment fees to the Commission for the year 2000 within the time-frame and manner prescribed by Commission rules. San Sebastian Water, LLC, should be responsible for subsequent annual reports and regulatory assessment fees. A recorded warranty deed, long-term lease, or other evidence of the utility's continued use of the land upon which the utility facilities reside, in the name of San Sebastian Water, LLC, should be filed with the Commission within 45 days from the date the stock is transferred. (BRADY, CROSBY)

STAFF ANALYSIS: On August 15, 2000, an application was filed for approval of the transfer of majority organizational control of San Sebastian from Mr. Buchanan, through Howbert, to SSW. As stated in the case background, the Sales Contract was executed on November 9, 1999, with an anticipated closing in January 2000. However, after learning of the requirement, pursuant to Section 367.071, Florida Statutes, for such transfers to be subject to Commission approval, the seller decided not to transfer the stock until after Commission approval.

While the application was essentially complete, there were a number of issues involved with the application that needed additional information or clarification prior to staff making its recommendation. As filed and clarified, the application is in compliance with the governing statute, Section 367.071, Florida Statutes, pertaining to an application for a TMOC. The application contains the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. The applicant was not able to locate the utility's original certificate. Instead, an explanation of the steps taken to obtain the certificate was furnished pursuant to Rule 25-30.037(3)(k), Florida Administrative Code. A description of the territory granted by Certificate No. 439-W is appended to this memorandum as Attachment A.

Noticing. The application contained evidence of compliance with the noticing requirements of Rule 25-30.030, Florida Administrative Code. Evidence was provided that notice was given to the local utilities and governmental entities identified by staff. Evidence was also provided that notice was published once in a newspaper of general circulation in the vicinity of the

utility's service territory. However, notice could not be provided to each customer of the system since the utility does not currently serve any customers. No objections to any of the notices were received by the Commission and the time for filing such has expired.

Ownership. SSW is a Florida limited liability company jointly owned by Charles H. Wahlen, Thomas G. Martino, and CRL, Inc., in common with the development company known as Micco Properties, LLC (Micco Properties). Pursuant to Rule 25-30.037(3)(i), Florida Administrative Code, a recorded warranty deed was provided with the application deeding the land from Howbert to Micco Properties. Once the Commission approves the TMOC to SSW, Howbert will transfer 100% of the utility stock to SSW. Within 45 days of the stock transfer, a recorded warranty deed, long-term lease, or other evidence of the utility's continued use of the land upon which the utility facilities reside, in the name of San Sebastian Water, LLC, should be filed with the Commission.

Sales Contract, Financing, and Environmental Compliance. The application contains a copy of the Sales Contract executed on November 9, 1999, between Howbert and Charles H. Wahlen, and/or assigns (SSW). The application indicates that the purchase price of \$1,400,000 was a full cash transaction. As such, SSW is not relying on any other entity to provide funding for the acquisition. The purchase price includes the development rights to 145 platted lots in the subdivision known as San Sebastian Woods with the build out potential of approximately 225 small, single family residences. In addition, the purchase price includes approximately 6.2 acres improved with a pool, fishing lake, clubhouse, and a storage area for recreational vehicles and boats. Also to be conveyed to the buyer is 100% of the stock in the utility corporation which is described in the addendum to the Sales Contract as a "bare-bones corporation with virtually no assets established to operate a private water plant."

The application indicates that the only water facilities in existence are wells and lines utilized for irrigation purposes. The applicant estimates that 100,000 gallons of water are pumped annually for these developer-related services. Since no customers are being served, the application states that the systems are not monitored by the Florida Department of Environmental Protection (FDEP). Staff has confirmed that San Sebastian is not on FDEP's monitoring list. In general, the FDEP does not monitor systems with fewer than 25 customers.

Pursuant to Rule 25-30.037(3)(f), Florida Administrative Code, the application contains statements regarding the buyer's technical and financial ability along with a statement describing how the transfer is in the public interest.

Financial Ability. With regard to financial ability, the application contains the financial statements of the joint owners of SSW: CRL, Inc., Thomas G. Martino, and Charles H. Wahlen. With a total combined net worth in excess of \$17,058,000 as of mid-year 2000, SSW appears to demonstrate sufficient financial ability to develop properties in San Sebastian Woods while building and maintaining the utility facilities. The order which established initial rates (Order No. 13816, issued October 29, 1984, in Docket No. 840189-WU) projected that utility plant-in-service at 80% operating capacity would cost \$415,675 with annual operating expenses of \$47,959.

Technical Ability. With regard to technical ability, the application indicates that the buyer does not own any other water or wastewater utilities certificated by the Commission. However, the buyer has retained the services of W.F. McCain & Associates, Inc., to design, permit, and observe the construction of the treatment facility and completion of all remaining subdivision infrastructure. Prior to the formation of W.F. McCain & Associates, Inc., the owner, Mr. William McCain, ran the Utilities Engineering Department for Indian River County for twelve years. W. F. McCain & Associates, Inc., has a contract with Altech Water for operations of the water plant after construction. Altech Water is an FDEP licensed operator.

Public Interest. As a statement of the public interest, the application indicates that the joint owners of SSW develop properties nationally and are financially capable of completing the construction of the utility. As a demonstration of its "sound commitment to follow this utility to fruition," SSW points to its long-standing, national record of project completion and follow-up. As indicated above, SSW has retained the engineering services of W.F. McCain & Associates, Inc. The engineering firm provided staff with a report on the current status of permitting and construction. From this report, it appears that the permitting process should be completed by March 2001 with construction intended to be completed late in 2001. The application indicates there are also approximately 25 pre-existing homes with privately-owned wells and septic systems. Having the option to tie into a central water system will provide these homes with additional service options. Finally, SSW has provided a statement of its intent to fulfill the commitments, obligations and representations of the seller with

regard to utility matters, in accordance with Rule 25-30.037(3)(f), Florida Administrative Code.

Regulatory Assessment Fees. Staff has confirmed that the utility is current through 1999 on its annual reports and regulatory assessment fees (RAFs). Pursuant to Rule 25-30.120(1), Florida Administrative Code, the utility is only required to pay a minimum annual fee of \$25 since it reported no revenues. San Sebastian should be responsible for filing an annual report with the Commission for the utility and remitting the resulting RAFs for the year 2000. SSW should be responsible for subsequent annual reports and RAFs.

Rate Base. With regard to rate base, it has been Commission practice not to establish rate base in a TMOC proceeding. The reason behind this approach is the philosophy that publicly traded stock has no regulatory relationship to rate base. In other words, since the utility's assets and liability accounts are not altered by stock transfers, such transfers have no affect on the utility's rate base balance. Since rate base is not affected by stock transfers, it is not part of the consideration of public interest for a TMOC. This same approach is followed even if the stock is privately held, rather than publicly traded. Similarly, it has also been Commission practice that acquisition adjustments for stock transfers are not part of the consideration of public interest for a TMOC. Therefore, staff's recommendation does not include issues regarding the establishment of rate base or an acquisition adjustment. For informational purposes, the projected, pro forma rate base used in Order No. 13816, issued October 29, 1984, in Docket No. 840189-WU, to set initial rates at 80% operating capacity was \$122,639.

Based on all the above, staff recommends that the transfer of majority organizational control of San Sebastian from Mr. Buchanan through Howbert to SSW is in the public interest and should be approved. San Sebastian should be responsible for filing an annual report for the utility and remitting the resulting RAFs to the Commission for the year 2000 within the time-frame and manner prescribed by Commission rules. SSW should be responsible for subsequent annual reports and RAFs. A recorded warranty deed, long-term lease, or other evidence of the utility's continued use of the land upon which the utility facilities reside, in the name of San Sebastian Water, LLC, should be filed with the Commission within 45 days from the date the stock is transferred.

ISSUE 3: Should the request for name change on Certificate No. 439-W from San Sebastian Utilities, Inc., to San Sebastian Water, LLC, be approved?

RECOMMENDATION: Yes. If the Commission votes in Issue 2 to approve the transfer of majority organizational control, then the request for name change on Certificate No. 439-W from San Sebastian Utilities, Inc., to San Sebastian Water, LLC, should be approved. (BRADY, CROSBY)

STAFF ANALYSIS: At the time the utility filed its application for approval of the current TMOC, the utility also requested that the name on Certificate No. 439-W be changed from San Sebastian Utilities, Inc., to San Sebastian Water, LLC. If the Commission votes in Issue 2 to approve the change in majority organizational control, staff recommends that the request for name change on Certificate No. 439-W from San Sebastian Utilities, Inc., to San Sebastian Water, LLC, be approved.

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

RECOMMENDATION: Yes. The rates and charges approved for the utility should be continued. The tariff reflecting the transfer of majority organizational control and the change in name should be approved and effective for services rendered or connections made on or after the stamped approval date. (BRADY)

STAFF ANALYSIS: The utility's current rates and charges were approved effective November 1, 1984, as established by Order No. 13816, in Docket No. 840189-WU, which granted the utility its original certificate.

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 any changes to the rates and charges of the utility. Accordingly, staff recommends that the buyer continue to operate the utility under the utility's approved rates, classification and regulations. The buyer has filed a revised water tariff reflecting both the change in issuing officer pursuant to the TMOC and the request for change in utility name. The tariff filing should be approved and effective for services rendered or connections made on or after the stamped approval date.

For informational purposes, the initial rates and charges established by Order No. 13816, other than meter test and miscellaneous service charges, are as follows:

RESIDENTIAL WATER SERVICE
MONTHLY RATES

<u>Meter Size</u>	<u>Base Facility Charge</u>
5/8" x 3/4"	\$ 11.27
3/4"	16.91
1"	28.18
1 1/2"	56.35
2"	90.16

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3"	180.32
4"	281.75
6"	563.50

Gallonge Charge
(Per 1,000 Gallons) \$ 2.98

CUSTOMER DEPOSITS

Residential 5/8" x 3/4" \$ 50.00

SERVICE AVAILABILITY CHARGES

Meter Installation Fees
 5/8" x 3/4" \$112.00
 All Others At Cost

System Capacity Charge
 Per ERC (250 gallons) \$1,000

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No. The docket should remain open pending the filing of a recorded warranty deed, long-term lease, or other evidence of the utility's continued use of the land upon which the utility facilities reside, in the name of San Sebastian Water, LLC.
(CROSBY)

STAFF ANALYSIS: The docket should remain open pending the filing of a recorded warranty deed, long-term lease, or other evidence of the utility's continued use of the land upon which the utility facilities reside, in the name of San Sebastian Water, LLC. Once such documentation is filed with the Commission and verified by staff, the docket should be administratively closed.

DESCRIPTION
SAN SEBASTIAN UTILITIES, INC.
BREVARD COUNTY

WATER SERVICE ONLY

TOWNSHIP 30 SOUTH, RANGE 38 EAST
SECTION 14

That portion of the South 1/2 of said Section 14 lying East of the Florida East Coast Railroad and West of U.S. Highway No. 1.

LESS

The North 250 feet thereof.

SECTION 23

That part of the East 1/2 of the Northwest 1/4 of said Section 23 lying East of the East Right-of-Way of the Florida East Coast Railroad.

AND

The North 400 feet of said Section 23 lying East of the Florida East Coast Railroad and West U.S. Highway No. 1.

LESS

That portion thereof described as beginning at the intersection of the Western Right-of-Way of U.S. Highway No. 1 and the Northern Right-of-Way of Tenth Street; thence North 89°38' East, a distance of 605 feet, more or less, to the East Right-of-Way of Third Street; thence North, following said Right-of-Way of Third Street, a distance of 265 feet, more or less, to the South Right-of-Way of Eleventh Street; thence North, following said Right-of-Way of Eleventh Street, a distance of 605 feet, more or less, to the Western Right-of-Way of U.S. Highway No. 1; thence South, following said Right-of-Way of U.S. Highway No. 1, a distance of 265 feet, more or less, to the Point of Beginning.