



Public Service Commission

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DATE: MAY 9, 2002
TO: DIRECTOR, DIVISION OF THE COMMISSION ADMINISTRATIVE SERVICES (BAYÓ)
FROM: DIVISION OF ECONOMIC REGULATION (BRADY, REDEMANN, KAPROTH) OFFICE OF THE GENERAL COUNSEL (FUDGE, GERVASI)
RE: DOCKET NO. 970409-SU - INITIATION OF LIMITED PROCEEDING TO RESTRUCTURE WASTEWATER RATES FOR FLORIDA WATER SERVICES CORPORATION'S TROPICAL ISLES SERVICE AREA IN ST. LUCIE COUNTY.

DOCKET NO. 011634-SU - APPLICATION BY FLORIDA WATER SERVICES CORPORATION FOR TRANSFER OF FACILITIES AND ATTENDANT ASSETS OF TROPICAL ISLES WASTEWATER PLANT TO TROPICAL ISLES UTILITIES CORPORATION, A FLORIDA NOT-FOR-PROFIT CORPORATION, AND FOR CANCELLATION OF CERTIFICATE NO. 482-S IN ST. LUCIE COUNTY.
COUNTY: ST. LUCIE

AGENDA: 05/21/02 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\011634.RCM

CASE BACKGROUND

Florida Water Services Corporation (FWSC or seller) is a Class A utility providing water and wastewater service throughout Florida. Most of its systems are under Commission jurisdiction including the Tropical Isles Wastewater Plant (Tropical Isles or utility) which is a stand-alone wastewater system in St. Lucie County. While Tropical Isles does not provide water service, it is located in the Critical Water Supply Area of the South Florida

DOCUMENT NUMBER-DATE

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DATE: MAY 9, 2002

Water Management District. Water service is provided by the Ft. Pierce Utility Authority (FPUA). As of June 30, 2001, Tropical Isles had 251 active connections. According to FWSC's 2000 annual report, the system had operating revenues of \$107,845 and net operating income of \$42,610.

FWSC purchased the Tropical Isles system from Messrs. Spizizen and Shacket in 1989 with Messrs. Spizizen and Shacket retaining ownership of the modular housing park known as the Tropical Isles Mobile Home Park (TIMHP or park). Effective October 1, 1992, the St. Lucie County Board of County Commissioners transferred jurisdiction over privately-owned water and wastewater utilities in St. Lucie County to this Commission. By Order No. PSC-93-0621-FOF-SU, issued April 21, 1993, in Docket No. 930075-SU, the Commission granted FWSC, then known as Southern States Utilities, Inc., Certificate No. 482-S for the territory served by Tropical Isles. The order also approved the continuation of the monthly flat rate being charged for wastewater service as established by the St. Lucie County Water and Sewer Authority.

At a service hearing in FWSC's most recent rate case (Docket No. 950495-WS), the Tropical Isles' customers questioned the validity of a flat rate for wastewater service since they received metered water service from the FPUA. Order No. PSC-96-1320-FOF-WS, issued in the rate case on October 30, 1996, required FWSC to investigate whether it could establish metered wastewater rates based on FPUA's water meter information.

As a result of FWSC's investigation, Docket No. 970409-SU was opened on April 1, 1997 to investigate the possibility of restructuring Tropical Isles' wastewater flat rate. A customer meeting on the matter was held on November 19, 1997. Based on customer comments, and other information obtained after the customer meeting, the scope of Docket No. 970409-SU was expanded to also investigate the revenue requirement for the Tropical Isles system.

By Proposed Agency Action Order No. PSC-00-0526-PAA-SU (PAA Order), issued March 13, 2000, the Commission proposed a base facility/gallonage charge rate structure for Tropical Isles but declined to change the revenue requirement. However, the PAA Order was protested by Mr. Clarke Schaaf on behalf of the Tropical Isles Homeowners Association and the matter was set for hearing by Order No. PSC-00-2034-PCO-SU, issued June 12, 2000.

DOCKET NO. 970409-SU, 011634-SU

DATE: MAY 9, 2002

Subsequently, FWSC and the utility customers began negotiations for the sale of the utility to the customers. All controlling dates in Docket No. 970409-SU, including the hearing dates, were held in abeyance and continued pending the outcome of the negotiations. See Orders Nos. PSC-00-1197-PCO-SU, issued July 3, 2000; PSC-00-2135-PCO-SU, issued November 8, 2000; and PSC-01-1770-PCO-SU, issued August 30, 2001.

On December 10, 2001, FWSC filed an application in Docket No. 011634-SU for the transfer of the facilities and assets of Tropical Isles to Tropical Isles Utilities Corporation (TIUC or buyer) a not-for-profit corporation formed on behalf of the utility customers, and for the cancellation of Certificate No. 482-S. The transfer occurred on July 16, 2001, with provisions to be contingent upon Commission approval. Although the Tropical Isles Homeowners Association has declined to withdraw its protest to Order No. PSC-00-0526-PAA-SU, it has agreed that Docket No. 970409-SU can be closed once the Commission approves the transfer to TIUC.

This recommendation addresses the transfer application filed in Docket No. 011634-SU and the resulting resolution of Docket No. 970409-SU. The Commission has jurisdiction pursuant to Sections 367.045 and 367.071, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the transfer of facilities and attendant assets of Florida Water Services Corporation's Tropical Isles Wastewater Plant to Tropical Isles Utilities Corporation be approved?

RECOMMENDATION: Yes. The transfer to Tropical Isles Utilities Corporation, an exempt entity pursuant to Section 367.022(7), Florida Statutes, should be approved and Certificate No. 482-S should be cancelled effective July 16, 2001. Tropical Isles Utilities Corporation, or any successors in interest, should be put on notice that if there is a change in circumstance or method of operation which causes it to no longer qualify for exemption pursuant to Section 367.022, Florida Statutes, it should inform the Commission. (BRADY, REDEMANN, KAPROTH, FUDGE)

STAFF ANALYSIS: As noted in the Case Background, the transfer of Tropical Isles' facilities and assets from FWSC to TIUC is the result of a settlement in Docket No. 970409-SU. The hearing in that docket to evaluate a proposed change in rate structure was held in abeyance pending negotiations for the acquisition of the utility facilities by its customers. See Orders Nos. PSC-00-1197-PCO-SU, issued July 3, 2000; PSC-00-2135-PCO-SU, issued November 8, 2000; and PSC-01-1770-PCO-SU, issued August 30, 2001.

On July 16, 2001, FWSC closed on an Agreement for Purchase and Sale (Agreement) for the transfer of utility facilities and assets to TIUC. The Agreement contained provisions for the transfer to be contingent upon Commission approval as required by Section 367.071, Florida Statutes. On December 10, 2001, FWSC filed an application in Docket No. 011634-SU for approval of the transfer of Tropical Isles' facilities and assets from FWSC to TIUC and for cancellation of Certificate No. 482-S.

The application, as filed, is in compliance with Section 367.071, Florida Statutes, and other pertinent statutes and provisions of the Florida Administrative Code with regard to authority for transfer. The application contains the correct filing fee, pursuant to Rule 25-30.020, Florida Administrative Code. The application also contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code. No objections to the application have been received and the time for filing such has expired. The applicants have also returned the utility's original certificate for cancellation.

BUYER

Pursuant to Rules 25-30.037(2)(c), (d), (e) and (f), Florida Administrative Code, the application contains information on the corporate nature of the buyer. TIUC was incorporated on July 3, 2000, as a Florida not-for-profit corporation. Its officers are Roger Shacket, Louis McGough, and Donna Nickel. All members of TIUC are persons and entities, including TIMHP, who receive service from the Tropical Isles system within and adjacent to the park.

As an exempt entity formed solely for the purpose of owning and operating the Tropical Isles system, TIUC does not own any other utility facilities. For informational purposes, staff would note that the system is currently in compliance with all applicable standards set by the Florida Department of Environmental Protection and that TIUC has retained the professional services of Hutchinson Utilities to operate the facilities on a going-forward basis.

AGREEMENT

Pursuant to Rules 25-30.037(2)(g), (h), (i), and (k), Florida Administrative Code, the application contains a copy of the Agreement between FWSC, the seller, and TIUC and TIMHP, collectively the buyers. The total purchase price for the Tropical Isles system is \$43,000, which includes all utility assets and property with the exception of a parcel of land that was erroneously conveyed to FWSC by TIMHP in 1989. The application and Agreement indicate that TIUC relied on TIMHP for the guarantees necessary to secure the funds to purchase the system.

While TIMHP, a for-profit entity, is considered one of the buyers, the Agreement is clear that the utility assets and property were sold exclusively to TIUC. However, the Agreement also includes several special provisions collectively referred to as the 2001 Transactions. It is necessary to understand the 2001 Transactions in order to determine if a non-profit exemption pursuant to Section 367.022(7), Florida Statutes, applies. The 2001 Transactions include two Prior Service Agreements (PSAs), a Standby Operating Agreement (SOA), and terms for a financial hold by TIMHP.

Prior Service Agreements. The two PSAs are for wastewater service to be provided without charge. One is for service without charge to six mobile home units within the Park until the residents of these units sell the lots. This PSA is the result of an

DATE: MAY 9, 2002

agreement with these customers that predated FWSC's 1989 ownership of the utility. Currently, two residents have relocated, leaving four units still receiving service without charge. The other PSA is for service without charge to the clubhouse located in the park.

The non-profit exemption pursuant to Section 367.022(7), Florida Statutes, requires that service be provided solely to members. According to the application, the clubhouse and lots receiving service without compensation are members of TIUC. Even if these customers were not members, the Commission has previously determined in Orders Nos. PSC-95-1436-FOF-WU, issued November 27, 1995, in Docket No. 951154-WU, and 23897, issued December 18, 1990, in Docket No. 900516-WU, that service by a non-profit corporation to a nonmember without compensation is non-jurisdictional. According to Section 367.021(12), Florida Statutes, only those entities which provide, or propose to provide, service to the public for compensation are a utility subject to Chapter 367, Florida Statutes. Therefore, any services which TIUC provides without compensation would not be considered utility services.

Standby Operating Agreement. The SOA is an agreement between the buyers, TIUC and TIMHP, which augments and transcends the transfer Agreement. The SOA spells out the mechanism for the transfer of a parcel of land known as the 1989 Parcel to TIMHP (see Land Ownership below), the assignment of responsibility for the PSAs (above), and the terms for a financial hold over TIUC by TIMHP.

Financial Hold. As already noted, the Agreement is clear that TIUC now owns and operates the utility. However, TIMHP provided the financial guarantees which enabled TIUC to secure a loan to purchase the utility. The loan included additional money to fund TIUC's corporate reserves. In consideration, the SOA requires that TIMHP be satisfied that TIUC will, (a) provide wastewater service without interruption and in a nondiscriminatory manner, (b) operate and maintain the systems in environmental compliance, (c) assume and abide by the obligations of the PSAs, and (d) not allow ownership to pass to a third party.

As a consequence, the SOA required TIUC's By-Laws to provide that one member of TIUC's board be a TIMHP representative and that all withdrawals require two signatures, one of which must be that of the TIMHP representative. As long as TIMHP receives service from Tropical Isles through the clubhouse, its membership in TIUC is

DATE: MAY 9, 2002

consistent with a non-profit exemption under Section 367.022(7), Florida Statutes.

In event of default by TIUC of the mutually-agreed upon operating and financial system requirements set forth in the SOA, TIMHP has the right under the SOA to assume operating control until the default is remedied or until the system is peacefully surrendered to TIMHP. The SOA also provides for automatic transfer of ownership to TIMHP in the event of an abandonment. In the event of a bona fide offer to purchase the utility system, TIMHP retains the first right of refusal. Staff believes that TIMHP's financial hold is not substantially different from contract provisions for mortgages held by regular lending institutions. As such, staff believes the hold is not inappropriate.

However, staff would emphasize that, because TIMHP is a for-profit entity, it would not be exempt from Commission regulation if it were to own or control utility service. Therefore, staff recommends that TIUC, or any successors in interest, should be put on notice that if there is a change in circumstance or method of operation which causes it to no longer qualify for exemption pursuant to Section 367.022, Florida Statutes, it should inform the Commission for appropriate action.

LAND OWNERSHIP

Rule 25-30.037(2)(q), Florida Administrative Code, requires evidence that the utility owns the land upon which the utility treatment facilities are located, or a copy of an agreement which provides for the continued use of the land, such as a 99-year lease. The rule also provides for the Commission to consider a written easement or other cost-effective alternative. For the reason noted below, a written easement has been provided.

As noted in the Case Background, FWSC originally purchased the utility facilities and land in 1989 from Messrs. Spizizen and Shacket who, as TIMHP, retained ownership of the park. During that purchase, TIMHP conveyed a parcel of real property (1989 Parcel) to FWSC which erroneously included real property not related to the utility facilities. To correct the error, the Agreement in this transfer provided for TIUC to buy the utility facilities and property, exclusive of the 1989 Parcel. FWSC then conveyed the 1989 Parcel back to TIMHP which, in turn, granted an easement to TIUC for the portion of the 1989 Parcel which constitutes the land under the

DATE: MAY 9, 2002

utility plant site. It was for this limited purpose that TIMHP is considered one of the buyers in the Agreement.

PUBLIC INTEREST

Rule 25-30.037(2)(j), Florida Administrative Code, requires a statement indicating how the transfer is in the public interest. In response, TIUC has indicated it is exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes, which exempts nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such entities. The application contains a copy of TIUC'S registration with the Florida Department of State as a not-for-profit corporation pursuant to Section 617.0821, Florida Statutes. The registration was effective July 3, 2000. The application also contains copies of TIUC's Articles of Incorporation and By-Laws as well as a copy of its Operating Policy and Procedures, which is a tariff.

A review of these documents verifies that service is intended to be provided solely to members (variously referred to as subscribers or accounts) and that each member has one vote in TIUC matters. Further, these documents confirm that TIUC intends to operate at all times on a cooperative, not-for-profit basis whereby the income of the corporation is used solely to cover losses and expenses. No interest or dividends are to be paid by TIUC on capital furnished by its members.

By means of these documents, staff believes that TIUC has demonstrated its exemption from regulation as defined in Section 367.022(7), Florida Administrative Code. Therefore, should the transfer be approved by the Commission, staff recommends that Certificate No. 482-S be cancelled effective July 16, 2001.

RATE BASE, ACQUISITION ADJUSTMENT, RATES AND CHARGES

If the Commission approves the transfer to an exempt entity, then it is not necessary to establish rate base, consider the appropriateness of an acquisition adjustment, or approve the continuation of rates and charges. For informational purposes, rate base for the Tropical Isles system was last established by Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS. As of the time of FWSC's 2000 annual report, rate base had been adjusted to \$282,257. As indicated earlier, FWSC sold the system to its customers for \$43,000.

ANNUAL REPORTS AND REGULATORY ASSESSMENT FEES (RAFs)

Rule 25-30.110(3), Florida Administrative Code, requires an annual report be filed for any year a utility is jurisdictional as of December 31st. Staff has verified that FWSC is current on its annual reports for the Tropical Isles system through 2000 and has until May 31, 2002, in which to file its 2001 consolidated annual report. However, since the transfer to an exempt entity occurred in July of 2001, the Tropical Isles system was not jurisdictional as of December 31st. Therefore, there is no requirement for FWSC to include the Tropical Isles system in its 2001 annual report.

Staff has also verified that FWSC has paid RAFs for the Tropical Isles system up through the transfer in 2001 and that there are no penalties, interest or refunds due. Therefore, FWSC has no further requirements with respect to annual reports or RAFs for the Tropical Isles system.

CONCLUSION

Based upon all the above, staff recommends that the Commission approve the transfer of Tropical Isles Wastewater Plant to Tropical Isles Utilities Corporation, an exempt entity pursuant to Section 367.022(7), Florida Statutes, and that Certificate No. 482-S be cancelled effective July 16, 2001. Tropical Isles Utilities Corporation, or any successors in interest, should be put on notice that if there is a change in circumstance or method of operation which causes it to no longer qualify for exemption pursuant to Section 367.022, Florida Statutes, it should inform the Commission.

DOCKET NO. 970409-SU, 011634-SU

DATE: MAY 9, 2002

ISSUE 2: Should Dockets Nos. 970409-SU and Docket No. 011634-SU be closed?

RECOMMENDATION: Yes. No further action is required in Dockets Nos. 970409-SU and 011634-SU. Therefore, Dockets Nos. 970409-SU and 011634-SU should be closed. (FUDGE)

STAFF ANALYSIS: Since there is no further action required in Dockets Nos. 970409-SU and 011634-SU, the dockets should be closed.