



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-

RECEIVED-FPSC
OCT - 2 PM 2:45
COMMISSION CLERK

DATE: OCTOBER 3, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (BRADY, BRINKLEY) ^{pb pd} ^{MB}
OFFICE OF THE GENERAL COUNSEL (HOLLEY) ^{JAH} ^{WAT} ^{JOJ}

RE: DOCKET NO. 020403-SU - APPLICATION FOR TRANSFER OF WASTEWATER FACILITIES OF COUNTRY RUN WASTEWATER UTILITY COMPANY IN ORANGE COUNTY TO ORANGE COUNTY UTILITIES, AND REQUEST FOR CANCELLATION OF CERTIFICATE NO. 490-S.
COUNTY: ORANGE

AGENDA: 10/15/02 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020403.RCM

CASE BACKGROUND

Country Run Wastewater Utility Company (Country Run or utility) is a Class C wastewater facility serving approximately 143 active connections in Orange County. The utility is located in a priority water resource caution area of the St. Johns River Water Management District with water service provided by Orange County. The utility's 2001 annual report lists gross revenues of \$31,840 with a net operating loss of \$14,765.

Country Run's wastewater facilities were initially constructed in 1990 as part of a multi-phase subdivision development. Shortly thereafter the developer defaulted on, among other things, a \$2.8 million loan to Numerica Savings Bank FSB, Manchester, NH (Numerica). Numerica subsequently failed and in 1992 the utility

DOCUMENT NUMBER-DATE

10639 OCT-2002

FPSC-COMMISSION CLERK

DOCKET NO. 020403-SU
DATE: OCTOBER 3, 2002

facilities were acquired by the Federal Deposit Insurance Corporation (FDIC) as Receiver for Numerica.

Upon staff's becoming aware of the utility's existence, the FDIC was advised it must apply for a certificate of authorization, which it did on July 13, 1993. The resulting Certificate No. 490-S was issued March 2, 1994, by Order No. PSC-94-0225-FOF-SU, in Docket No. 930683-SU. The FDIC continued to operate the utility indirectly through a sequence of management companies up to the 1998 Florida Auction. This was a large auction of all Florida properties being liquidated by the FDIC at the time. In that auction, the 15 acres which comprised Phase 3 of the Country Run development, along with the wastewater treatment facilities, were sold to James E. Guldi on or about August 10, 1998. This sale was without Commission approval in apparent violation of Section 367.071(1), Florida Statutes.

In the process of attempting to locate the utility's 1998 annual report, staff learned of the sale of the utility to Mr. Guldi. When contacted in June of 1999, Mr. Guldi indicated he was in the process of transferring the wastewater collection system to Orange County. While Mr. Guldi owned real estate, he indicated he had no prior utility ownership or operational experience upon which to rely. When he acquired the utility facilities from the FDIC, he understood these were temporary, private facilities for which control was to transfer to Orange County.

Indeed, in January of 1984, the Board of County Commissioners had signed an agreement with the developer of Phase 1 of the Country Run Subdivision which allowed the use of a "package" wastewater treatment plant until Orange County Utilities' (OCU) facilities were available. While OCU's facilities have been available for some time, the interconnection had been put on hold pending resolution of the prior owners' bankruptcy and the resumption of construction.

While Mr. Guldi was eventually able to file the missing 1998 annual report, he asked for relief from late-filed penalties. He also asked for extensions to file a transfer application due to the pending transfer to Orange County. On January 8, 2002, the Board of County Commissioners passed a resolution to establish a Municipal Service Benefit Unit to assist existing property owners with the Wastewater Capital Charge of \$2,487.00 to connect to OCU's

DOCKET NO. 020403-SU
DATE: OCTOBER 3, 2002

wastewater system. Earlier, the OCU had made provisions with an adjacent developer to construct the connection.

On May 8, 2002, an application was filed for the transfer of the utility's wastewater facilities to Orange County and for the cancellation of Certificate No. 490-S. The connection occurred on July 26, 2002. Section 2.07(c)(12), Administrative Procedures Manual, grants staff the authority to approve transfers of utility facilities to governmental agencies. This recommendation is being brought to the Commission's attention because of the apparent violation of Section 367.071(1), Florida Statutes, for the prior transfer from the FDIC to Mr. Guldi and the apparent violation by Mr. Guldi for his failure to file the required 1998 annual report in a timely manner. The Commission has jurisdiction pursuant to Section 367.021, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Federal Deposit Insurance Company be ordered to show cause, in writing, within 21 days, why it should not be fined for apparent violation of Section 367.071(1), Florida Statutes?

RECOMMENDATION: No. A show cause proceeding should not be initiated. (HOLLEY, BRADY)

STAFF ANALYSIS: As indicated in the case background, the FDIC is in apparent violation of Section 367.071(1), Florida Statutes, which states, in part 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.

Upon being advised by staff that it was in apparent violation of Section 367.071(1), Florida Statutes, the FDIC undertook a rather extensive examination of its records in an effort to understand how the violation occurred. The FDIC filed the results of the examination by letter dated September 18, 2002. The FDIC retrieved and examined the general files from the 1998 Florida Auction and the historic asset-specific files in its Division of Receiverships and Resolutions. When this review revealed nothing helpful, a written request for asset-specific information and any corporate recollection was sent to the Florida law firm engaged by the FDIC to provide local counsel for the 1998 Florida Auction. Again, no useful information resulted. Finally, the FDIC retrieved and reviewed twelve banker's boxes of files related to the 1998 Florida Auction with the same unsuccessful result.

The FDIC's letter indicates its regret over the oversight. While not offered as an excuse, the FDIC did want the Commission to know that the assets of Country Run were sold for \$35,000, all of which the Receiver remitted to the judgment lien holder of the failed bank to clear title to the real property and to facilitate the sale.

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 25-14.033, F.A.C., Relating To Tax Savings Refund For 1988 and 1989 For Gte Florida, Inc., the Commission, having found 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 the FDIC's failure to obtain Commission approval prior to transferring utility facilities is an apparent violation of Section 367.071(1), Florida Statutes, the circumstances described by the FDIC appear to mitigate the apparent violation. As stated, the assets of Country Run were just one asset in a large 1998 Florida Auction. Apparently, FDIC's Florida Counsel for the auction was not aware that Country Run's assets included regulated utility facilities. As a consequence, the FDIC officials involved in the sale were not so advised.

Also, as indicated in the Case Background, it was apparent that Orange County was waiting for resolution of the bankruptcy to affect interconnection to its wastewater facilities. Therefore, but for the bankruptcy and subsequent failure of the lending institution, the utility facilities would probably have transferred to Orange County prior to certification by the Commission.

While regulated entities 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 the FDIC to show cause for failing to obtain approval prior to selling the utility facilities to Mr. Guldi.

ISSUE 2: Should Mr. Guldi be ordered to show cause, in writing, within 21 days, why he should not be fined for apparent violation of Rule 25-30.110(3), Florida Administrative Code?

RECOMMENDATION: No. A show cause proceeding should not be initiated. (HOLLEY, BRINKLEY)

STAFF ANALYSIS: Pursuant to Rule 25-30.110(3), Florida Administrative Code, utilities subject to Commission jurisdiction as of December 31 of each year are required to file an annual report on or before March 31 of the following year. Moreover, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to file a timely, complete annual report is subject to penalties, absent demonstration of good cause for noncompliance. The penalty set out in Rule 25-30.110(7), Florida Administrative Code, for Class C utilities, is \$3 per day, based on the number of calendar days elapsed from March 31, or from an approved extended filing date.

As stated previously in the case background, the utility was sold to Mr. Guldi on or about August 10, 1998. Thus, the annual report for 1998 was due to be filed by Mr. Guldi on March 31, 1999. However, the annual report for 1998 was not received by the Commission until July 1, 1999, making the annual report 92 days late. Thus, Mr. Guldi is in apparent violation of Rule 25-30.110(3), Florida Administrative Code.

In addition to the 1998 annual report, Mr. Guldi also submitted a letter which contained an explanation as to why the annual report had not been filed in a timely manner. In his letter, Mr. Guldi stated that the facility had been acquired through auction from the FDIC, and that no disclosures had been made to him regarding the reporting requirements to the Commission. He also assured the Commission that all required reports and correspondence in the future would be delivered promptly. Finally, he requested that the Commission review the circumstances surrounding his acquisition of the property, as well as his good faith intention to comply with all guidelines and regulations in considering whether to impose the fine associated with the late-filed annual report.

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 25-14.033, F.A.C., Relating To Tax Savings Refund For 1988 and 1989 For Gte Florida, Inc., the Commission, having found 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.

As stated previously, the annual report for 1998 was filed on July 1, 1999, making it 92 days late. If imposed, the penalty for the late-filed 1998 annual report would be \$276 (\$3 per day X 92 days). Since that time, Mr. Guldi has been very cooperative with staff, and all subsequent annual reports, as well as RAFs, have been submitted in a timely manner. Moreover, in an attempt to further cooperate with staff and facilitate the ease of the transfer that is the subject of this recommendation, Mr. Guldi submitted a pre-payment of the RAFs due for the year 2002, for January 1 through the date of the transfer to the County.

Rule 25-30.110(6)(c), Florida Administrative Code, states that any utility that fails to comply with the rule for filing annual reports shall be subject to the penalties imposed unless the utility demonstrates good cause for the noncompliance. Moreover, the Commission may, in its discretion, impose greater or lesser penalties for such noncompliance. Although Mr. Guldi's failure to submit the 1998 annual report is an apparent violation of Rule 25-30.110(3), Florida Administrative Code, staff believes that the circumstances in this instance mitigate the apparent violation. Further, staff believes that Mr. Guldi has sufficiently demonstrated good cause for his failure to timely file the annual report for 1998.

For the foregoing reasons, staff does not believe that the apparent violation of Rule 25-30.110(3), Florida Administrative Code, rises in these circumstances to the level of warranting the initiation of show cause proceedings. Therefore, staff recommends that the Commission not order Mr. Guldi to show cause, in writing within 21 days why he should not be fined for his failure to timely file the annual report for 1998. Further, staff recommends that the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should not be assessed.

DOCKET NO. 020403-SU
DATE: OCTOBER 3, 2002

ISSUE 3: Should the transfer of Country Run Wastewater Utility Company to Orange County be acknowledged?

RECOMMENDATION: Yes. The transfer should be acknowledged and Certificate No. 490-S should be cancelled effective July 26, 2002. (BRADY, BRINKLEY, HOLLEY)

STAFF ANALYSIS: As indicated in the case background, an application for the transfer of Country Run's wastewater facilities to Orange County and for the cancellation of Certificate No. 490-S, was filed on May 8, 2002. The physical interconnection with Orange County occurred on July 26, 2002, making that the effective date of the transfer and the effective date for the cancellation of Certificate No. 490-S.

The application as filed is in accordance with Section 367.071(4), Florida Statutes, and Rule 25-30.037, Florida Administrative Code. A copy of the Bill of Sale was provided with the application. The purchase price of One Dollar (\$1.00) was for the wastewater collection system, only, with Mr. Guldi retaining ownership of and responsibility for the package wastewater treatment plant.

According to the application, there are no customer deposits. In addition, staff has verified that Orange County was provided the utility's most recent available income and expense statement and statement of rate base for regulatory purposes. Staff has also verified there are no open dockets with pending matters for this utility.

Pursuant to Section 367.071(2), Florida Statutes, the transferor remains liable for any outstanding regulatory assessment fees (RAFs), penalties, or fines. Staff has verified the utility filed a 2001 annual report and remitted 2001 RAFs. Staff has also verified there are no outstanding penalties and interest owed or refunds due.

Pursuant to Rule 25-30.110(3), Florida Administrative Code, the obligation to file an annual report applies to any utility which is subject to Commission jurisdictional as of December 31 of that year. Since the transfer to Orange County took place on July 26, 2002, the utility will not be jurisdictional as of December 31, 2002. Therefore, there is no requirement for the utility to file a 2002 annual report. On September 23, 2002, the transferor

DOCKET NO. 020403-SU
DATE: OCTOBER 3, 2002

prepaid the utility's 2002 RAFs from January 1, 2002, through the interconnection on July 26, 2002. Therefore, the transferor has no remaining regulatory responsibilities.

Since Orange County did not acquire the wastewater treatment plant, staff contacted the Florida Department of Environmental Protection (FDEP) to ensure that the transferor was taking the necessary steps to properly dismantle the plant. According to the FDEP, the transferor was in the process of complying with the required abandonment procedures on the date of FDEP's last inspection on September 19, 2002. Based on that inspection, the FDEP is satisfied the dismantlement will occur as prescribed by its rules and regulations.

Based upon all the above, staff recommends that the Commission acknowledge the transfer of Country Run's wastewater collection system and interconnection of Country Run's customers to Orange County. Certificate No. 490-S should be cancelled effective July 26, 2002.

DOCKET NO. 020403-SU
DATE: OCTOBER 3, 2002

ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes. Since no further action is necessary, this docket should be closed. (HOLLEY)

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