



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: OCTOBER 24, 2002

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

FROM: OFFICE OF THE GENERAL COUNSEL (HARRIS) *Tom*
DIVISION OF ECONOMIC REGULATION (BRADY) *pb*

RE: DOCKET NO. 021023-WS - JOINT APPLICATION FOR APPROVAL OF ACQUISITION BY PHILADELPHIA SUBURBAN CORPORATION OF STOCK OF AQUASOURCE UTILITY, INC., AND RESULTING TRANSFER OF CONTROLLING INTEREST OF ARRENDONDO UTILITY COMPANY, INC., CRYSTAL RIVER UTILITIES, INC., JASMINE LAKES UTILITIES CORPORATION, LAKE SUZY UTILITIES, INC., AND OCALA OAKS UTILITIES, INC.

AGENDA: 11/05/02 - REGULAR AGENDA - RULE WAIVER - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NOVEMBER 5, 2002 - 30 DAY STATUTORY DEADLINE FOR RULING ON EMERGENCY PETITION FOR WAIVER OR VARIANCE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\021023.RCM

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CASE BACKGROUND

On October 7, 2002, Philadelphia Suburban Corporation (Philadelphia Suburban) and AquaSource Utility, Inc. (AquaSource), along with AquaSource's five subsidiary utilities, filed a Joint Application for Approval of Acquisition of the six AquaSource utilities by Philadelphia Suburban and an Emergency Petition for Variance or Waiver of Rules 25-30.030(4)(c), (5), (6), (7) and 25-30.037(3)(i), (j), and (k), Florida Administrative Code. The five subsidiaries of AquaSource are Arredondo Utility Company, Inc., Crystal River Utilities, Inc., Jasmine Lakes Utilities Corporation, Lake Suzy Utilities, Inc., and Ocala Oaks Utilities, Inc.

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According to the application, on July 29, 2002, Aqua Acquisition Corporation (Acquisition Corp.), DQE, Inc., and Aquasource, Inc. entered into a Purchase Agreement which will result in Philadelphia Suburban acquiring the stock and controlling interest in AquaSource and its five subsidiaries. The application states that the stock of AquaSource is currently owned by DQE, Inc. Philadelphia Suburban intends to purchase this stock, with the result that it will become the corporate parent of AquaSource Utility, Inc. and the corporate grandparent of the five AquaSource subsidiaries.

Acquisition Corp. is a wholly owned subsidiary of Philadelphia Suburban formed to help effectuate the proposed transaction. The closing on the proposed stock transfer is scheduled to occur five business days after satisfaction of all conditions precedent, including receipt of all required regulatory approvals. According to the application, there will be no immediate change in rates or services provided by the subsidiaries, and little or no change in local management or staffing levels. Further, the corporate names of AquaSource and the five subsidiary utilities will remain the same following the change in ownership.

This recommendation addresses AquaSource's Emergency Petition for Variance or Waiver of Rules 25-30.030(4)(c), (5), (6), (7) and 25-30.037(3)(i), (j), and (k), Florida Administrative Code. A subsequent recommendation addressing the merits of the Joint Application for Approval of Acquisition will be filed for a later agenda conference. The Commission has jurisdiction pursuant to Sections 367.071 and 120.542, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should AquaSource Utility, Inc.'s request for an emergency variance or waiver from Rules 25-30.030(4)(c), (5), (6), (7) and 25-30.037(3)(i), (j), and (k), Florida Administrative Code, be granted?

RECOMMENDATION: Yes. AquaSource Utility, Inc.'s request for an emergency variance or waiver from Rules 25-30.030(4)(c), (5), (6), (7) and 25-30.037(3)(i), (j), and (k), Florida Administrative Code, should be granted. (HARRIS, BRADY)

STAFF ANALYSIS:

THE LAW GOVERNING EMERGENCY RULE VARIANCES OR WAIVERS

Rule 28-104.004(2)(a) and (b), Florida Administrative Code, provides that a petition for an emergency waiver shall specify, in addition to the other requirements of Section 120.542(5), Florida Statutes, the following:

(a) The specific facts that make the situation an emergency; and

(b) The specific facts to show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, Florida Statutes.

Section 120.542(5), Florida Statutes, states in pertinent part that:

In addition to any requirements mandated by the uniform rules, each petition shall specify:

(a) The rule from which a variance or waiver is sought.

(b) The type of action requested.

(c) The specific facts that would justify a waiver or variance for the petitioner.

(d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

Therefore, in order to qualify for an emergency rule variance or waiver, AquaSource must show specific facts which would justify a waiver or variance, the reason(s) the variance or waiver would serve the purpose of the underlying statute, the specific facts which make AquaSource's request an emergency, and the specific facts which demonstrate the immediate adverse effect failure to grant the emergency variance would cause AquaSource.

RULES FROM WHICH VARIANCE IS SOUGHT

AquaSource has requested a variance from the requirements of Rules 25-30.030(4)(c), (5), (6), (7) and 25-30.037(3)(i), (j), and (k), Florida Administrative Code, for the purpose of its Joint Application for Approval of Acquisition, filed October 7, 2002.

Rule 25-30.030(4)(c), Florida Administrative Code, states that notice of the application shall include a description, using township, range and section references, of the territory proposed to be either served, added, deleted, or transferred. AquaSource seeks permission to use an abbreviated one page notice which would list the names of the six individual utilities and their counties of operation without including legal descriptions of the territories served.

Rule 25-30.030(5), (6), and (7), Florida Administrative Code, provides for time frames within which the applicant must provide copies of the notice required by Rule 25-30.030(4)(c), Florida Administrative Code, to certain enumerated persons and bodies, including mailings to customers and publication in newspapers of general circulation in the utility's counties of operation. Aquasource requests a waiver or variance from the time requirements such that it be allowed to mail the notices within 10 days of the Commission's approval of the notice.

Rule 25-30.037(3)(i), Florida Administrative Code, requires that the applicant for approval of transfer of majority organizational control file evidence that the utility owns or has continued use of the land upon which the treatment facility is located. As AquaSource and the five subsidiaries will continue to hold title to the land in their own names, as it is currently held, AquaSource requests that the Commission consider the evidence of land ownership which has previously been filed by the individual utilities with the Commission in lieu of re-filing this same information.

Rule 25-30.037(3)(j), Florida Administrative Code, requires an applicant for approval of transfer of majority organizational control to file the original and two (2) copies of tariff sheets reflecting the change in ownership. AquaSource requests that it not be required to re-file the existing tariff sheets as there are no tariff changes necessary since the names of the utilities will remain the same following the acquisition.

Rule 25-30.037(3)(k), Florida Administrative Code, requires the applicant for approval of transfer of majority organizational control to file its Certificates of Authorization. AquaSource requests that it not be required to re-file the Certificates as there are no changes in ownership of AquaSource or any of the subsidiary companies.

STAFF ANALYSIS:

Staff in general agrees with the arguments of AquaSource regarding the specific facts of its Petition and is therefore recommending that the Commission grant the variances or waivers requested. Staff believes AquaSource has demonstrated specific facts which justify a waiver or variance, that variance or waiver would serve the purposes of the underlying statutes, that the situation is an emergency, and that AquaSource will suffer an immediate adverse effect if the variances or waivers are not granted.

Section 120.542(8), Florida Statutes, allows the Commission 90 days to grant or deny a non-emergency petition for variance or waiver after it is deemed complete. In addition, Section 120.542(5) allows for an additional 30 days for the Commission to determine if the application is complete. AquaSource states that this merger is extremely large, involving a number of utilities in 12 states. With time for AquaSource to add any additional information required by the Commission to complete the petition, it could take in excess of 120 days for the Commission to approve the Petition for Variance or Waiver. As AquaSource is pursuing a multi-state merger, with coordinated timetables and schedules, which must be completed before further progress on the merger can be taken, AquaSource has justified the use of the emergency rule waiver procedure. Staff believes these facts constitute sufficient grounds for the Commission to find that this is an emergency situation which would support the granting of an emergency rule variance or waiver.

Staff believes that the 90 day statutorily authorized time to process the non-emergency rule waiver or variance procedure would in fact cause AquaSource to suffer adverse and immediate effects by not being able to coordinate the regulatory approval with other state public service commissions because of the merger's timetable. This lack of coordination could result in significant additional costs due to loss of efficiencies and shared expenses. Therefore,

staff recommends that proceeding under the Emergency Variance and Waiver provisions of the Uniform Rule (Rule 28-104.004) is appropriate.

As to Rule 25-30.030(4)(c), Florida Administrative Code, AquaSource requests that it be allowed to use a one page notice of application (with a list of names of the six utilities in question as well as the counties in which they operate), to be provided as required by rule to customers, agencies, and other utilities. The proposed sample notice is appended to this recommendation.

AquaSource argues that the customers know the name of the individual utility providing service to them, and will be able to identify that utility on the notice form. Further, AquaSource argues that, as the purpose of the notice is to allow interested persons an entry into the administrative process, this purpose is accomplished by the one page notice with the name of the utility without an accompanying full legal description.

The underlying statute pertaining to the rules requested to be waived in this instance are Sections 367.071 and 367.045, Florida Statutes. Section 367.071(1), Florida Statutes, requires Commission approval for a transfer of majority organizational control. Section 367.071(4), Florida Statutes, requires that this type of application be disposed of as provided in Section 367.045, Florida Statutes. Section 367.045(1)(a), Florida Statutes, states that a utility shall "[p]rovide notice of the actual application filed by mail or personal delivery to the governing body of the county or city affected, to the Public Counsel, to the commission, and to such other persons and in such other manner as may be prescribed by commission rule." The purpose of Sections 367.071 and 367.045, Florida Statutes, is to ensure that the utility's actions are in the public interest and that the utility has provided notice as prescribed by statute and the Commission's rules. AquaSource will satisfy the underlying purposes of the statutes by using a one-page notice of its Joint Application for Approval of Acquisition. In order to satisfy the purpose of the statutes, the abbreviated notice will be provided by U.S. Mail to each consumer, published in the newspaper of general circulation in each county served by a utility owned by AquaSource, and sent to all other required persons or bodies.

As to Rule 25-30.030(5), (6), and (7), Florida Administrative Code, AquaSource requests waiver or variance to allow it to provide

the notice required by these rules within ten days of the Commission's approval of waiver or variance of Rule 25-30.030(4)(c), Florida Administrative Code, as to the form of the notice, as sought above. In support, AquaSource argues that it filed the actual Joint Application along with this Emergency Petition for Waiver or Variance, and pending decision on that Emergency Petition, it should not be required to issue notices within the time frames specified by Rules 25-30.030(5), (6), and (7), Florida Administrative Code.

The purpose of Rule 25-30.030(5), (6), and (7), Florida Administrative Code, is to ensure timely notice of the filing of the Application to affected persons, as required by Section 367.045, Florida Statutes, discussed above. In this case, AquaSource is requesting waiver or variance as to the form of the notice. To require AquaSource to provide notice as required by the Rules, prior to a decision by the Commission on the form of the notice, would make no sense, and would effectively moot the argument for the proposed alternative notice form. Until the Commission votes whether to grant AquaSource's petition for waiver or variance as to the form the notice should take, it would make little sense to require AquaSource to begin noticing within the time periods required by Rules 25-30.030(5), (6), and (7), Florida Administrative Code. As compliance with these rules would pose a substantial hardship, AquaSource should be allowed to notice those persons and entities enumerated by these rules within ten days of the Commission's decision regarding the form of the required notice.

As to Rule 25-30.037(i), (j), and (k), Florida Administrative Code, AquaSource argues that since it does not hold Certificates or tariff sheets, but they are held by the actual subsidiary utilities, it should not be required to file such in this Joint Application for Approval of Acquisition. Similarly, since the proposed merger will not affect the actual titleholder of the real property on which the six utilities are located, AquaSource asserts it should not be required to file proof of ownership. AquaSource states that all of these documents have already been filed with the Commission in various previous actions with the Commission and are accessible through the Commission's records. AquaSource argues that it would serve no useful purpose to be required to file the above documents in this docket, and would constitute an unnecessary burden and expense.

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The underlying purposes of Rule 25-30.037(i), (j), and (k), Florida Administrative Code, is to ensure that the Applicant possesses Certificates of Authorization; has tariffs in effect, and holds title to the real property on which the utility facilities are located, as required by Section 367.071, Florida Statutes. Section 367.071, Florida Statutes requires this information so that the Commission can make a determination that the proposed sale or transfer is in the public interest, and that the buyer will fulfill the commitments, obligations, and representations of the seller.

In this case, the proof necessary for the Commission to make that determination has been provided in prior proceedings and dockets, and the purposes of the Rules and underlying Statute has been met. Requiring AquaSource to file these documents for each of the six corporations in this docket would be unduly burdensome to AquaSource and would not further the underlying purposes of Section 367.071, Florida Statutes. As no change in the name of the parent corporation or the subsidiaries is taking place, nor are the names of the six actual utility corporations themselves changing, there will be no changes to any of these documents. Staff sees no reason to require AquaSource to file documents in this docket which reflect no changes, and recommends the Commission grant a variance from the requirement that these documents be filed with the joint application for approval of merger.

In support of its petition for an emergency variance or waiver, AquaSource cites to Order No. PSC-01-1647-PAA-WS, issued August 13, 2002, in Docket No. 010887-WS and Order No. PSC-99-2422-PAA-WS, issued December 9, 1999, in Docket No. 991660-WS, as examples of the Commission granting a variance or waiver of the same rules that AquaSource is requesting variance or waiver from in this instance. Staff has reviewed these Orders and Dockets, and finds them to be factually similar to the Petition in this Docket. Therefore, in conclusion, staff recommends that AquaSource's request for an emergency variance from Rules 25-30.030(4)(c), (5), (6), (7) and 25-30.037(i), (j), and (k), Florida Administrative Code, be granted.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open for the processing of AquaSource's Joint Application for Approval of Acquisition. If the Commission accepts staff's recommendations on Issue 1, the docket should remain open to allow interested persons an opportunity to protest the Commission's Proposed Agency Action on that Issue. (HARRIS)

STAFF ANALYSIS: AquaSource has filed a Joint Application for Approval of Acquisition. This docket should remain open for the processing of this application. In addition, if the Commission adopts staff's recommendations, the result will be a Proposed Agency Action Order. Interested persons whose substantial interests are affected by that Order would have 21 days from the date of issuance of the Order to protest said Order. This docket should remain open to allow interested persons time to file protests within that 21 day period and have a point of entry into the administrative process regarding the rule variances or waivers. If there are no protests, this Order will be final and effective upon the issuance of the Consummating Order.

ATTACHMENT "A"

NOTICE OF APPLICATION FOR A TRANSFER
OF MAJORITY ORGANIZATIONAL CONTROL
LEGAL NOTICE

Notice is hereby given on the ____ day of _____, 2002, pursuant to Section 367.071, Florida Statutes, of the application for transfer of majority organizational control of AquaSource Utility, Inc., to Philadelphia Suburban Corporation. THIS APPLICATION IS NOT A REQUEST TO CHANGE THE RATES OF AQUASOURCE UTILITY, INC., OR ANY OF THE BELOW LISTED SUBSIDIARIES. The following are the Utilities which are certificated by the Florida Public Service Commission, which are affected by this proceeding, and their counties of operation:

- AquaSource Utility, Inc. Highlands, Lake, Lee, Polk
- Arredondo Utility Company, Inc. Alachua
- Crystal River Utilities, Inc. Lake, Palm Beach, Polk, Sumter
- Jasmine Lakes Utilities Corporation Pasco
- Lake Suzy Utilities, Inc. DeSoto, Charlotte
- Ocala Oaks Utilities, Inc. Marion

Any objection to the said application must be made in writing and filed within thirty (30) days from this date to the Director, Division of Commission Clerk and Administrative Services, Florida Public Service Commission, 2540 Shumard Oaks Boulevard, Tallahassee, FL 32399-0850. A copy of said objection should be mailed to the attorney for the applicant who is: Martin S. Friedman, Esquire, Rose, Sundstrom & Bentley, LLP, 650 S. North Lake Boulevard, Suite 420, Altamonte Springs, FL 32701.