

Ruth Nettles

From: James L. O'Leary, II [jloesq@gmail.com]
Sent: Friday, April 24, 2009 2:20 PM
To: Filings@psc.state.fl.us
Cc: Michael B. Twomey, Esq.; Anna Williams
Subject: Docket No. 090056-SU, Petition for Formal Hearing - Electronic Filing
Attachments: 090056-SU Petition for Formal Hearing.pdf

Date April 24, 2009

Dear Office of Commission Clerk,

Please accept for electronic filing the attached Petition for Formal Hearing in Adobe Acrobat version 9.1.

1) The full name, address, telephone number, and e-mail address of the person responsible for the electronic filing,

James L. O'Leary, II
Attorney At Law
Offices at Vanderbilt
28089 Vanderbilt Drive, Suite 202
Bonita Springs, FL 34134
jloesq@gmail.com
(239) 947-8900

2) The docket number and title if filed in an existing docket,

Docket No. 090056-SU

In re: Application for approval of transfer
of wastewater system of Fountain Lakes
Sewer Corporation, holder of Certificate
442-S, to Aqua Utilities Florida, Inc.,
holder of Certificate 268-S, in Lee County,
by Aqua Utilities Florida, Inc.

3) The name of the party on whose behalf the document is filed,

James L. O'Leary, II

4) The total number of pages in each attached document: 11 pages.

5) A brief but complete description of each attached document: Petition for Formal Hearing

Respectfully Submitted,

James L. O'Leary, II
Attorney At Law
Offices at Vanderbilt
28089 Vanderbilt Drive, Suite 202
Bonita Springs, FL 34134
www.jloesq.com
jloesq@gmail.com
(239) 236-4700 Fax
(239) 947-8900
(239) 287-8191 Cell

DOCUMENT NUMBER-DATE

03836 APR 24 2

FPSC-COMMISSION CLERK

4/24/2009

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for approval of transfer
of wastewater system of Fountain Lakes
Sewer Corporation, holder of Certificate
442-S, to Aqua Utilities Florida, Inc.,
holder of Certificate 268-S, in Lee County,
by Aqua Utilities Florida, Inc.

Docket No. 090056-SU

Date April 24, 2009

PETITION FOR FORMAL HEARING

I, James L. O'Leary, who reside in the Fountain Lakes Community at 22601 Island Lakes Drive, Estero, FL 33928, hereby formally object to the application for approval of transfer of the Fountain Lakes Sewer Corporation's ("Fountain Lakes", "Utility" or "Seller") wastewater system to Aqua Utilities Florida, Inc. ("Aqua" or "Buyer") and for amendment of Certificate 268-S in Lee County, Florida, and I request a formal evidentiary hearing on this matter, and allege the following:

1. The name and address of the agency affected and the agency's file number:

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Docket No. 090056-SU

2. The name, address and telephone number of the Petitioner:

James L. O'Leary
28089 Vanderbilt Drive, Suite 202
Bonita Springs, FL 34134
(239) 947-8900

DOCUMENT NUMBER-DATE

03836 APR 24 8

FPSC-COMMISSION CLERK

3. An explanation of how the Petitioner's substantial interests will be affected by the application:

The Petitioner is a customer of Fountain Lakes wastewater system and resides in the community of Fountain Lakes, located in southern Lee County, Florida. The substantial interests of the Petitioner will be affected by the Commission's decision in this docket because the proposed transfer of the Fountain Lakes wastewater system is not in the public interest and if approved would adversely affect both the quality and cost of wastewater service to the Petitioner and the residents of Fountain Lakes and Marsh Landing that comprise approximately 1,370 residential units.

4. A statement of when and how the Petitioner received notice of the application:

Petitioner received a copy of Aqua's notice of application of the proposed transfer by U.S. mail in February, 2009. Petitioner and numerous other affected residents filed timely objections to the proposed transfer. Subsequent to the timely objections, Petitioner was contacted by the Commission's Staff ("Staff") inquiring if the Petitioner wished to request the Commission to conduct a formal hearing to take evidence so that it could determine if the proposed transfer is in the public interest. Staff advised that this request should be filed with the Commission on or before April 28, 2009.

5. A concise statement of the ultimate facts alleged including specific facts that the Petitioner contends warrant denial of the application:

a. The Fountain Lakes wastewater system was established in conjunction with the development of Fountain Lakes by Kraus Anderson because at the time there was no available central county sewer nor other privately held central sewer system available to service the community. The existing sewer plant is over twenty (20) years old and is experiencing serious operational problems.

b. The applicant's statement that the transfer is in the public interest is seriously deficient. The statement was filed with the Commission on January 29, 2009 and only provided general background information related to the fact that Aqua is a publicly traded company, maintains a status as a large, multi-state, fiscally sound entity that provides economies of scale to its customers, and a general statement of its commitment to customer service by its history of working with state and local officials to help address the problems inherent with small systems like the Fountain Lakes sewer system. The statement does not acknowledge nor address the extensive history of this facility wherein raw sewage has backed out onto the residential streets and properties of the owners. Furthermore, the statement does not acknowledge the fact that since the system was installed, an entire second development, Marsh Landing, has been added into the system putting greater strain on the aging, improperly maintained and outdated equipment.

c. The Purchaser's financial strength, experience and know how are not the only factors that affect the public interest when this Commission decides whether the continued operation of this facility is in the public interest. In fact, as recently as March 20, 2009, the Florida Department of Environmental Protection ("DEP") issued a warning letter to Jack Lihvarcik, the Chief Operating Officer of Aqua (which is attached to the application as Exhibit A), documenting that the facility was discharging raw influent out of the headworks and onto the ground below in violation of Rule 62-600.740 (2)(a), F.A.C., which states that the release of disposal of excreta, sewage, or other wastewaters or domestic wastewater residuals without providing proper treatment is prohibited. The DEP also stated Aqua improperly reported spills and abnormal events in violation of Rule 62-

620.650 (3), F.A.C. Last, the DEP alleges in its March 20, 2009 letter that DEP personnel who conducted an in person inspection of the system made the following observations which violate Rule 62-600.410 (6), F.A.C.: (1) multiple leaks on the tanks, (2) excessive foam in the aerators, (3) floating solids in the clarifier, (4) floating solids in the chlorine contact chamber, (5) the scum baffle in the clarifier is warped.

d. The problems with discharge of raw sewage into the community have occurred on numerous occasions over the history of the plant. These continued episodes directly and substantially affect the public health, safety and welfare of the people living in the affected areas.

e. The sewer plant sits on the edge of a wetland that flows into the Estero River and then Estero Bay. Estero Bay is recognized by the South Florida Water Management District as an impaired water body that receives excess nutrients; the ultimate removal of the wastewater plant will result in a significant reduction of nutrient loading. The Estero Bay Aquatic Preserve contains one of the State of Florida's most delicate and treasured estuaries with a plethora of fish and wildlife. It is sound public policy of Lee County and the State of Florida to not further endanger this natural treasure.

f. It appears from the application that Aqua performed only a cursory examination of the wastewater system to make its determination that the facilities are in satisfactory condition. Because of Aqua's failure to perform adequate due diligence concerning the condition of Fountain Lakes' facilities, the application fails to address the list of repairs needed and the approximate cost of those repairs in order to assure safe and adequate water and wastewater service at a reasonable cost to its customers. The application for transfer does not provide a realistic inventory of the extensive modifications, upgrades, and repairs in order to assure safe and adequate wastewater service at a reasonable cost to its customers. These necessary costs include, but are not limited to, costs to conduct a comprehensive inspection, overhaul and modernization of all existing hardware and software, addressing the inadequate digester space, completely

replacing all of the outdated vitrified clay pipes that result in leakages and other structural hazards, and overhauling all of the lift stations.

g. Although it is not the direct question before this Commission it should be noted that an extremely well managed and member owned utility now operates in the Fountain Lakes/Marsh Landing sewer zone and has recently built a state of the art sewer processing facility and has capacity to service Fountain Lakes and Marsh Landing and currently has existing utility lines adjacent to the communities.

h. The application fails to disclose the dollar amount of the purchase price attributable to the regulated verses nonregulated operations and entities.

i. The application fails to disclose the existence or nonexistence of any other consideration between the Seller and Buyer, for example, promised salaries, retainer fees, stock, stock options or assumptions of obligations.

j. The Asset Purchase Agreement fails to provide for the disposition of the following:

1. Customer deposits and interest there on;
2. Any guaranteed revenue contracts;
3. Developer agreements;
4. Customer deposits; and
5. Leases

k. The Asset Purchase Agreement states that except for Aqua's expressed assumption of the obligation to perform additional repairs to correct the occasional exceeded flows at the wastewater treatment plant, all liabilities and obligations of the Seller arising from ownership and operation of the assets prior to the closing shall remain the sole responsibility of the Seller. The application not only fails to provide a statement that the Buyer will fulfill the commitments, obligations and representations of the Seller with regard to utility matters, it affirmatively asserts that the Buyer makes no commitment to fulfill the

"obligations of the Seller of any nature whatsoever, whether express or implied, fixed or contingent, known or unknown."

l. As stated above, Aqua acknowledges the wastewater treatment plant flow readings have occasionally exceeded permitted flow levels, and that it is believed to be due to inflow/infiltration problems with the wastewater system. During Aqua's management and operation of the Fountain Lakes wastewater system, spills have continued to occur without a commitment on the part of Aqua to effectively remedy the situation. Therefore, Aqua has demonstrated a disregard for the health, safety and welfare of the residents of our communities.

m. The application fails to identify all adjustments made to update the rate base of regulated assets last established by the Commission to the date of transfer. It also fails to specify the proposed net book value of regulated verses nonregulated operations and entities.

n. The application fails to provide a statement from the Buyer that it has obtained or will obtain copies of all of the federal income tax returns of the Seller from August, 1993, to the date of transfer.

o. Chapter 367.071 (1), Florida Statutes, requires that no utility shall sell its facilities without the determination and approval of the Commission that the proposed sale is in the public interest. According to this subsection of the statute a sale may occur prior to Commission approval if the contract for sale is made contingent upon Commission approval. However, to qualify for this exception to the requirement of receiving prior approval of the Commission, the after the fact approval must be sought **within a reasonable time**. Surely, the statute does not contemplate an entity purchasing a regulated utility and operating it for two years before it even begins the process of seeking the after the fact approval of the Commission. In the instant case, the Asset Sale Agreement is dated September 7, 2007. The closing date is identified as October 16, without identifying the year. If the closing, in fact, took place on October 16, 2007, I suggest that Aqua and Fountain Lakes effectively violated

Chapter 367.071 (1), Florida Statutes, by failing to even file the application to approve the transfer with the Commission more than 15 months after the closing took place.

p. On March 25, 2009, a specially set Joint Meeting of the Fountain Lakes and Marsh Landing communities was held in the Fountain Lakes clubhouse. The unanimous sentiment amongst the crowd was to oppose the proposed transfer, and to explore the possibility of other options that do not include the continued operation of the Fountain Lakes wastewater treatment plant.

q. The proposed transfer is substantially inferior to other alternatives available for the future operation of the Fountain Lakes Wastewater System, and for this reason and the other reasons outlined above the proposed transfer is not in the public interest.

r. Each of the forgoing allegations involve disputed issues of material facts.

6. A statement of the specific rules or statutes the Petitioner contends require denial or modification of the application:

The application should be denied because of Commission Rule 25-30.037(2) (g)2.,3.,(h), (j), (l), (o) and (p), Florida Administrative Code, and Section 367.071, Florida Statutes.

WHEREFORE, for the reasons stated above, the Petitioner requests the Commission to conduct a formal evidentiary hearing, pursuant to the provisions of Section 120.57 (1), Florida Statutes, and further petitions that such hearing be

scheduled at a convenient time within or as close as practical to Fountain Lakes' certified service area.

Respectfully submitted,

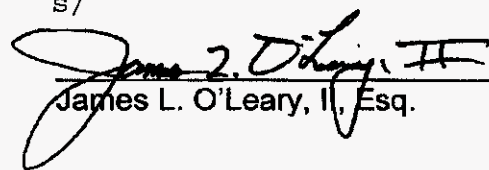
s/


JAMES L. O'LEARY, II, ESQ.
Florida Bar No. 0058040
28089 Vanderbilt Drive, # 202
Bonita Springs, FL 34134
(239) 947-8900
(239) 236-4700 Fax
Email: jloesq@gmail.com

CERTIFICATE OF SERVICE

Docket No. 090056-SU

I HEREBY CERTIFY that this petition was electronically filed with the Florida Public Service Commission, Director, Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850 this 24th day of April, 2009 and true and correct copies of the above and foregoing have been furnished by U.S. mail and electronic mail this 24th day of April, 2009 to Michael B. Twomey, Attorney for Aqua Utilities Florida, Inc., P.O. Box 5256, Tallahassee, FL 32314-5256 and Anna Williams, Attorney, Office of General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850.

s/

James L. O'Leary, II, Esq.



Florida Department of Environmental Protection

South District Office
P.O. Box 2549
Ft. Myers, Florida 33902-2549

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

CERTIFIED MAIL NO.: 7008 0500 0000 7775 6653
RETURN RECEIPT REQUESTED

March 20, 2009

Mr. Jack Lihvarcik
Chief Operating Officer
Aqua Utilities Florida, Inc.
1100 Thomas Avenue
Leesburg, FL 34748
Email: jmlihvarcik@aguaamerica.com

RE: Lee County-DW
Fountain Lakes WWTP
FLA014669

Dear Mr. Lihvarcik:

The purpose of this letter is to advise you of possible violations of law for which you may be responsible, and to seek your cooperation in resolving the matter. A site inspection and a file review of the above referenced facility indicate that violations of Florida Statutes (F.S.) and Rules may exist at the above-described facility.

1. The facility was discharging raw influent out of the headworks and onto the ground below. F.A.C. Rule 62-600.740 (2)(a) states that the release of disposal of excreta, sewage, or other wastewaters or domestic wastewater residuals without providing proper treatment is prohibited.
2. There has been improper reporting of spills and abnormal events. FAC 62-620.650(3) states that the operator shall report to the permittee or supplier of water and the Department, and if applicable, the local regulatory agency, as soon as possible, but within 24 hours following the discovery of any serious plant breakdown or condition causing or likely to cause: unsafe treatment plant operation, any discharge of water or wastewater not in accordance with Chapters 62-550, 62-555, 62-302, F.A.C., or the facility's permit, or any major interruption in service.
3. The following observations were made by Department personnel which violate Florida Administrative Code F.A.C. Rule 62-600.410(6) which requires that all facilities and equipment necessary for the treatment, reuse, and disposal of domestic wastewater or domestic wastewater residuals shall be maintained at a minimum, so as to function as intended.

Page 1 of 2

EXHIBIT A

- a. Multiple leaks on the tanks.
- b. Excessive foam in the aerators.
- c. Floating solids in the clarifier.
- d. Floating solids in the chlorine contact chamber.
- e. The scum baffle in the clarifier is warped.

The activities observed during the Department's field inspection and any activity at the facility that may be contributing to violations of the above described statutes and rules should be ceased.

Please contact **Keith Kleinmann** at (239) 332-6975, ext. 182 or at the letterhead address **within 15 days** of receipt of this Warning Letter to **arrange a meeting** to discuss this matter. The Department is interested in reviewing any facts you may have that will assist in determining whether any violations have occurred. You may bring anyone with you to the meeting that you feel could help resolve this matter.

PLEASE BE ADVISED that this Warning Letter is a part of an agency investigation, preliminary to agency action in accordance with Section 120.57(5), F.S. We look forward to your cooperation in completing the investigation and resolution of this matter

Pursuant to the Americans With Disabilities Act, any person requiring special accommodations to participate in this meeting/workshop/hearing is asked to advise the agency at least 48 hours before the meeting by calling the Bureau of Personnel Services at (850) 245-2511, or by calling (800) 955-8771 (TDD) or (800) 955-8770 (Voice) via the Florida Relay Service.

Sincerely,



Jon M. Iglehart
Director of
District Management

JMI/DWF/jl

cc: Enforcement File
Allen Slater- FRWA allen.slater@frwa.net