REQUEST FOR CHANGE TO AGENDA CONFERENCE
HAND DELIVER

Date of Request: 8/13/2009 Date of Agenda Conference: 8/18/2009 Item No. 24

Docket No.: 080517-WS Brief Title: _____

Requested by: ☐ Staff ☒ Other Aqua Utility Florida (Name)

Please attach a copy of the written documentation filed (IF OTHER)

STAFF's Recommendation to Executive Suite (IF OTHER) ☒ Approve Request ☐ Deny Request

ACTION REQUESTED [see APM 2.11]

☐ Defer Item to Agenda Scheduled Date: _____

☐ Change Order of Item or Take Up at Time Certain

☒ Withdraw Item (not expected to return to Agenda)

☐ Late Filed Recommendation (must be filed no later than 3:00 p.m. on the date approved for late filing) **A copy of the front page of the recommendation must be provided to the Commission Clerk by 12 noon on the regular filing date for use as a place-holder during agenda preparation.**

☐ Add Item to Published Agenda [see Section 120.525(2), F.S.] – Issue an ADDENDUM and give Legal NOTICE

☐ Add Emergency Item to Published Agenda [see Section 120.525 (3), F.S.] – Issue an ADDENDUM and Give Fair NOTICE

Concise explanation, justification or comments (attach additional sheet if necessary):

On August 12, 2009 Aqua Utility Florida filed a letter withdrawing the Application for Approval of Transfer of Horizon Homes of Central Florida, Inc. and Five Land Group LLC's Water and WAstewater Systems and Amendment of Certificates in Sumter County Florida.

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Signature (Technical Staff): Marshall Willis CG Initials (Division Director or Designee): TD

Signature (Legal Staff): Mo EG Initials (General Counsel or Designee): BL

EXECUTIVE DIRECTOR:

Recommendation to the Chairman's Office ☒ Approve Request ☐ Deny Request

Initials: MAB Date: 8/13/09

Comments:

CHAIRMAN's OFFICE:

☑ Approve Request ☐ Deny Request

Initials: WCB Date: 8/14/09

Executive Suite will send the original to the Office of Commission Clerk and return copy to the requesting staff after the Chairman's Office takes action on this request. Requesting staff should distribute copies to the Division Directors (OPR & OCR) and Attorney assigned to the docket.

CLK AGENDA STAFF COPIED

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PSC/EXD-001 (Rev. 05/09)

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D. Bruce May, Jr.
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August 12, 2009

VIA HAND DELIVERY

Matthew M. Carter, II
Chairman
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0810

Re: Docket No. 080517-WS - In re: Aqua Utilities Florida, Inc.'s Application for Approval of Transfer of Horizon Homes of Central Florida, Inc. and Five Land Group LLC's Water and Wastewater Systems and Amendment of Certificates in Sumter County Florida ("Application").

Dear Chairman Carter:

After much deliberation, Aqua Utilities Florida, Inc. ("AUF"), by undersigned counsel, hereby withdraws its referenced Application, which AUF filed with the Commission on July 29, 2008, pursuant to Section 367.071, Florida Statutes, and Florida Administrative Code Rule 25-30.037. In light of staff's memorandum dated August 4, 2009 in this docket, AUF will proceed to unwind its conditional acquisition of the utility systems in Sumter County identified in the Application (the "Utility Systems") and sell them back to the prior owner. I apologize in advance for the length of this letter; however, I want to be as precise as possible in explaining the reasons for the withdrawal.

THE LONG-STANDING PUBLIC INTEREST TEST FOR APPROVAL OF UTILITY TRANSFERS

The Florida Legislature has authorized the Commission to approve the transfer of water and wastewater utilities under the Commission's jurisdiction. Section 367.071(1), Florida Statutes, provides that no jurisdictional utility shall transfer its facilities without the Commission's determination and approval that the transfer "is in the *public interest* and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and the representations of the utility." (Emphasis added.) Based on the authority granted to it by Section 367.071(1), the Commission adopted Rule 25-30.037 to delineate the components of the public interest test for

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utility transfers. To that end, Rule 25-30.037 requires the buyer to include in its application for transfer approval: (1) "a summary of the buyer's experience in water or wastewater utility operations;" (2) "a showing of the buyer's financial ability to provide service;" and, (3) "a statement that the buyer will fulfill the commitments, obligations and representations of the seller with regard to utility matters."

Research shows that, in interpreting Section 367.071(1) and Rule 25-30.037, the Commission has consistently found a transfer to be in the public interest so long as the buyer satisfies the three criteria set forth in Rule 25-30.037 by showing that it has the experience and financial ability to provide the utility service, and agrees to fulfill the seller's utility obligations.[1] Research also shows that the Commission has never determined that a proposed transfer was not in the public interest where the buyer satisfied this three-pronged public interest test.

AUF relied on the Commission's long-standing interpretations of the public interest test referenced in Section 367.071(1) and Rule 25-30.037 when it conditionally acquired the Utility Systems and filed its Application. The Application made it clear that AUF had (i) extensive experience in utility operations, (ii) strong financial ability to provide water and wastewater services, and (iii) expressly agreed to fulfill all of the seller's commitments, obligations and representations with regard to utility matters. Staff expressly recognized that AUF satisfied the traditional three-pronged public interest test when it initially recommended that the Commission approve the transfer on March 26, 2009:

> According to the application, AUF has the technical and financial ability to provide efficient service to the amended territory. AUF is the wholly-owned subsidiary of Aqua America, Inc., a publicly traded water and wastewater utility, providing service to more than 800,000 customers in thirteen states. The application states that, given its size, access to capital, and recognized strength in utility planning, capital budgeting, and construction management, Aqua America, Inc. and its subsidiary, AUF, are well-positioned to provide high quality water and wastewater service to its customers. The application includes a statement that AUF will fulfill the commitments, obligations, and representations of Jumper Creek with regard to utility matters.
>
> Based on the above information, staff recommends that it is in the public interest to approve the transfer . . . .

See Staff Recommendation dated March 26, 2009.

[1] Indeed, within the past 12 months, the Commission has used the traditional three-pronged test to find two other utility transfers involving AUF to be in the public interest. See Orders Nos. PSC-09-0038-PAA-WS and PSC-08-0533-FOF-WS.

However, last Thursday, staff rescinded its earlier recommendation and now states that the transfer is not in the public interest. *See* Staff Memorandum dated August 4, 2009 ("Revised Recommendation"). Staff concedes in its Revised Recommendation that AUF has met the Commission's long-standing three-pronged public interest test (*i.e.*, technical experience, financial ability, and a commitment to honor the seller's utility obligations). However, staff now asserts that the transfer is not in the public interest because AUF failed to show that there would be no "additional subsidies" flowing from AUF's existing body of customers to the customers of the acquired utility. Revised Recommendation at 6. Staff's attempt to add a new and unprecedented "fourth prong" to the public interest test for utility transfers is based on a flawed analysis, has unintended consequences, and represents a marked departure from the Commission's long-standing interpretation of "public interest" in Section 367.071(1) and Rule 25-30.037.

STAFF'S NEW PUBLIC INTEREST TEST IS FLAWED

Under staff's new public interest test, the acquiring utility must be able to demonstrate that there are no additional subsidies flowing to or from the acquiring utility's existing body of ratepayers as a result of its acquisition of the other utility. Revised Recommendation at 6. Upon close review, staff's new "no subsidies" test is virtually impossible to satisfy. For example, under staff's new analysis, if AUF sought to acquire Utility A and Utility A's average cost was above that of AUF, AUF's existing customers would be perceived as subsidizing Utility A's customers. On the other hand, if Utility A's average cost was below that of AUF, then Utility A's customers would be perceived as subsidizing AUF's existing customers. Under either scenario there would be "subsidies" resulting from the acquisition which, according to staff, would be contrary to the public interest. The only instance where staff's "no subsidy" test could be met would be where the average cost of Utility A is identical to that of AUF. Different utilities rarely, if ever, have the same average cost. Consequently, staff's new "no subsidies" test is virtually impossible to satisfy, thus making it arbitrary, capricious and contrary to fundamental precepts of law.

Staff cites two cases – one dealing with Jacksonville Suburban Utility's Corporation ("JSUC") and another dealing with North Fort Myers Utility, Inc. ("North Fort Myers")[2] – as apparent support for its new public interest test. However, a careful review of both of those decisions shows that the Commission employed the traditional three-pronged public interest test (experience, financial ability and commitment to honor existing utility's obligations) to determine that the transfers in those dockets were in the public interest. In both of the cases cited by staff, the Commission never considered subsidies (or rates) as part of its public interest analysis in approving the transfer.[3] Interestingly, the Commission's decision to approve the acquisition by North Fort Myers resulted in customers of the acquired utility paying higher rates than they otherwise would have. Order No. 97-0419-PAA-SU at 6. ("Customers using an average of 3,000 gallons of water per month will see an increase in $1.72 per month, while

[2] Order No. PSC-93-1480-FOF-WS and Order No. PSC-07-0419-PAA-SU.
[3] Although the Commission did set rates in both of these dockets, those rates were set as part of a limited proceeding requested by the utility that was separate and apart from the utility transfer issue.

customers using an average of 10,000 gallons per month will see an increase of $30.77 per month.") By comparison, AUF proposed in this case not to increase rates as a result of the transfer. Instead, under AUF's proposal, the rates of the acquired systems would have continued as they exist today.

STAFF'S NEW PUBLIC INTEREST TEST HAS UNINTENDED CONSEQUENCES

There are also serious unintended consequences that arise out of staff's new public interest test and its finding in this case that the transfer is not in the public interest. By setting forth a new "no subsidies" public interest test that is virtually impossible to meet, there is a real risk that future utility acquisitions could be brought to a standstill. Furthermore, as a consequence of staff's finding that AUF's acquisition in this case does not meet its new public interest test, AUF's conditional acquisition of the Utility Systems will be unwound and AUF will take steps to sell the Utility Systems back to the original owner. Staff fails to apprise the Commission of the original owner's willingness to operate the Utility Systems going forward. For the record, the original owner has indicated that it does not want to own and operate the Utility Systems.

IMPROPER PROCEDURE TO CHANGE LONG-STANDING INTERPRETATION

As demonstrated above, staff's attempt to add a new and unprecedented "fourth prong" to the public interest test for utility transfers represents a marked departure from the Commission's long-standing interpretation of "public interest" in Section 367.071(1) and Rule 25-30.037. Such an abrupt change from the Commission's past interpretations cannot lawfully be effected in the course of this adjudicatory proceeding. Indeed, the Florida First District Court of Appeal has admonished the Agency for Healthcare Administration ("AHCA") for attempting to change its long-standing interpretation of a statute and rule in an adjudicatory proceeding:

> Without question, an agency must follow its own rules, but if the rule, as it plainly reads, should prove impractical in operation, the rule can be amended pursuant to established rulemaking procedures. However, 'absent such amendment, expedience cannot be permitted to dictate its terms. That is, while an administrative agency 'is not necessarily bound by its initial construction of a statute evidenced by the adoption of a rule, the agency may implement its changed interpretation only by validly adopting subsequent rule changes.' The statutory framework under which administrative agencies must operate in this state provides adequate mechanisms for the adoption or the amendment of rules. To the extent that the results sought by an agency cannot be accomplished by changes in the administrative rules, interested parties must seek a remedy in the legislature.

Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996) (citations omitted.) *See also, Miller v. Agrico Chemical Co.,* 383 So.

2d 1137, 1139 (Fla. 1st DCA 1980) (court admonished agency for changing its administrative interpretation of a statute without any subsequent legislative direction to do so).

In light of the foregoing authority, we respectfully submit that it would be inappropriate for the Commission to follow staff's recommendation and to attempt to change its long-standing interpretation of the public interest test in Section 367.071(1) and Rule 25-30.037 through this adjudicatory proceeding. Indeed, the adoption of staff's recommendation – to essentially add a fourth prong to the three criteria in Rule 25-30.037 – in this adjudicatory proceeding and outside of a properly noticed rulemaking proceeding would require the Commission to rely on an unadopted rule, something which the Legislature has expressly prohibited effective January 1, 2009. See § 120.57(1)(e), Fla. Stat.

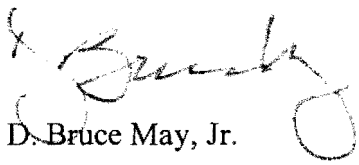
AUF strongly believes that the Commission's long-standing interpretation of the public interest test in utility transfers is sound public policy and there is no valid reason for changing its interpretation. However, if the Commission desires to reevaluate its long-standing policy and interpretation, then it should only do so in a rulemaking proceeding where it may give the public and affected persons a full and fair opportunity to comment and then carefully evaluate the consequences of the change.

* * *

All of the foregoing reasons have caused AUF to withdraw the Application at this time. In the meantime, be assured that AUF will continue to provide customers of the affected Utility Systems with quality water and wastewater services while steps are taken to sell the systems back to the original owner.

Sincerely,

HOLLAND & KNIGHT LLP



D. Bruce May, Jr.

DBM:kjg

cc: Commissioner Nancy Argenziano
Commissioner Lisa Polak Edgar
Commissioner Katrina J. McMurrian
Commissioner Nathan A. Skop
Ann Cole, Commission Clerk
Greg Wasserman, President, Horizon Homes

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