

State of Florida



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: February 18, 2010

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Clapp, Kaproth, Rieger)
Office of the General Counsel (Fleming)

Handwritten initials and signatures: PJO, KR, JA, OJS, CRB

RE: Docket No. 030458-WU – Application for transfer of majority organizational control of Holiday Utility Company, Inc. in Pasco and Pinellas Counties to Holiday Waterworks Corporation, and amendment of Certificate No. 224-W.

Docket No. 070084-WU – Application for amendment of Certificate No. 224-W to extend territory in Pasco and Pinellas Counties by Holiday Utility Company, Inc.

Docket No. 100033-WU – Application for transfer of water facilities to Florida Governmental Utility Authority, and cancellation of Certificate No. 224-W, by Holiday Utility Company, Inc. in Pasco and Pinellas Counties.
Counties: Pasco and Pinellas

AGENDA: 03/02/10 – Regular Agenda – Notice of Withdrawal (Issue 2) – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative (030458-WU)
Skop (070084-WU)
Administrative (100033-WU)

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Related Docket Nos. 100034-WU, 100035-WU, 100036-WU, and 100037-WU should be considered sequentially.

FILE NAME AND LOCATION: S:\PSC\ECR\WP\100033.RCM.DOC

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Case Background

Holiday Utility Company, Inc., (Holiday or utility) is a Class C utility providing water service to approximately 337 customers in Pasco and Pinellas Counties. The utility is in the Tampa Bay Water Use Caution Area of the Southwest Florida Water Management District (SWFWMD). Holiday was granted Certificate No. 224-W in 1975.¹ The certificate was amended to delete territory in 1977, and the utility was transferred and a portion of its service territory was deleted in 2006.² The utility's 2008 annual report shows gross revenue of \$150,202 and a net operating loss of \$19,534.

On May 23, 2003, an application for transfer of majority organizational control of the water system (Docket No. 030458-WU) was filed by Holiday Waterworks Corporation (HWC or the buyer). According to the application, on April 25, 2003, Elaine Mickler individually and as personal representative of the estate of Bartley L. Mickler (the Micklers or seller) and the buyer entered into a stock purchase agreement for the utility. The closing on the transfer took place on April 30, 2003, subject to the Commission's approval.

When the transfer application was noticed, Commission staff advised the buyer that the 1975 order granting the grandfather certificate was for a lesser service territory than that included in the notice of transfer. No objections were received to the transfer notice; however, HWC filed an amended and restated application for transfer of majority organizational control and amendment of certificate on March 16, 2004. The amendment was to add the territory the buyer thought was part of the utility's original approved service territory. After receiving the notice of transfer of majority organizational control and amendment, Pasco County (the County) filed an objection to the amendment with the Commission. Subsequently, HWC asked for time to negotiate a settlement with the County.

On September 15, 2005, HWC filed a letter advising the Commission that HWC and the County were unable to reach an agreement concerning the service areas. The letter also included a modified legal description of the service area sought by HWC, including an area to be deleted from the utility's approved service territory. No objections were received to the notice of deletion.

Staff held a conference call with HWC and the County on December 15, 2005. At that time the County stated that it did not object to the transfer of majority organizational control or the proposed deletion of territory. However, the County still objected to the amendment to include additional territory to the utility's authorized service territory. Neither would object to

¹ Order No. 6780, issued July 17, 1975, in Docket No. 73489-W, In re: Application of Holiday Utility Company for a Certificate to operate a water system in Pasco County, Florida.

² Order No. 8080, issued December 5, 1977, in Docket Nos. 750227-WS (CP), 73489-W (PR), and 770521-W (GI), In re: Complaint of First Memphis Realty Trust and Forest Oaks, Inc. against Aloha Utilities, Inc. and Holiday Utility Company, Inc.; Extraordinary Petition of First Memphis Realty Trust and Forest Oaks, Inc. for Reconsideration of Order No. 6780 which granted Certificate No. 224-W to Holiday Utility Company, Inc.; Investigation of the quantity and quality of water service by Holiday Utility Company Inc. in Pasco County, Florida and Order No. PSC-06-0380-FOF-WU, issued May 8, 2006, in Docket No. 030458-WU, In re: Application for transfer of majority organizational control of Holiday Utility Company, Inc in Pasco County to Holiday Waterworks Corporation, and amendment of Certificate No. 224-W.

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bifurcating the docket to proceed with the transfer and deletion prior to the hearing on the amendment portion. According to Order No. PSC-06-0380-FOF-WU, Docket No. 030458-WU was to remain open pending the disposition of the bifurcated application's amendment for the additional territory. On September 29, 2006, the utility filed a request to withdraw the application for an amended service territory and stated it intended to file an amendment application regarding the disputed service territory in a new docket.

Docket No. 070084-WU was opened on January 26, 2007. The application in this docket was for an amendment to add territory outside of the utility's service territory but currently served by the utility. Again the County objected.

Docket Nos. 030458-WU and 070084-WU have been held in abeyance while the utility and the County negotiated a settlement. Status reports on the negotiations were filed approximately every 120 days. On January 20, 2010, the utility filed an application for the acknowledgement of the transfer of the utility to the Florida Governmental Utility Authority (FGUA) in Docket No. 100033-WU. On February 15, 2010, Holiday filed a letter to withdraw its application in Docket Nos. 030458-WU and 070084-WU. On February 16, 2010, the County filed a withdrawal of its objection to Docket No. 070084-WU. These three related dockets are being addressed in this recommendation. It should be noted that the agreement for purchase and sale of water assets submitted in Docket No. 100033-WU includes four utilities in addition to Holiday. The other dockets regarding sale of assets to FGUA, which should be considered sequentially with Docket No. 100033-WU, are Docket Nos. 100034-WU, 100035-WU, 100036-WU, and 100037-WU.

This recommendation addresses the acknowledgement of transfer of the utility to a governmental entity and Holiday's withdrawal of Docket No. 030458-WU. The Commission has jurisdiction pursuant to Section 367.071, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the transfer of the water facilities of Holiday Utility Company, Inc. to the Florida Governmental Utility Authority be acknowledged, as a matter of right, and Certificate No. 224-W be cancelled?

Recommendation: Yes. The transfer of the Holiday water territory and facilities to FGUA should be acknowledged, as a matter of right, pursuant to Section 367.071(4)(a), F.S., and Certificate No. 224-W should be cancelled effective December 23, 2009, which was the closing date of the sale. (Clapp, Kaproth, Rieger, Fleming)

Staff Analysis: Holiday filed an application on January 20, 2010, to transfer the utility's service territory and facilities to FGUA pursuant to Section 367.071(4)(a), F.S., and Rule 25-30.037(4), Florida Administrative Code (F.A.C.), and to cancel Certificate No. 224-W. The FGUA has been determined to be a governmental authority in previous dockets.³ The actual closing of the transfer took place on December 23, 2009. Therefore, December 23, 2009, is the effective date of the transfer. Pursuant to Section 367.071(4), F.S., the transfer of facilities to a governmental authority shall be approved as a matter of right. As such, no notice of the transfer is required and no filing fees apply.

The application contains a statement that FGUA obtained Holiday's most recent income and expense statement, balance sheet, statement of rate base for regulatory purposes, and contributions-in-aid-of-construction. A statement was provided indicating that the utility transferred customer deposit balances to FGUA. Prior to the transfer, interest accumulated on the customer deposits was distributed to applicable customers.

The utility has filed all annual reports through 2008 and paid all regulatory assessment fees through December 23, 2009. Because the utility is not jurisdictional as of December 31, 2009, no annual report is required to be filed for 2009.

Staff recommends that the transfer of the Holiday water territory and facilities to FGUA should be acknowledged, as a matter of right, pursuant to Section 367.071(4)(a), F.S., and Certificate No. 224-W should be cancelled effective December 23, 2009, which was the closing date of the sale.

³ See Order No. PSC-00-2351-FOF-WS, issued December 7, 2000, in Docket No. 990489-WS, In re: Application by Florida Cities Water Company, holder of Certificate Nos. 027-W and 024-S in Lee County and 0007-W and 0003-S in Brevard County, and Poinciana Utilities, Inc., holder of Certificate Nos. 146-W and 103-S in Polk and Osceola Counties, for transfer of facilities to Florida Governmental Utility Authority and Cancellation of Certificate Nos. 027-W, 024-S, 007-W, 003-S, 146-W, and 103-S; Order No. PSC-03-1284-FOF-WS, issued November 10, 2003, in Docket No. 030932-WS, In re: Joint application for acknowledgement of sale of land and facilities of Florida Water Services Corporation in Lee County to Florida Governmental Utility Authority, and for cancellation of Certificate Nos. 306-W and 255-S; and Order No. PSC-09-0334-PAA-WS, issued May 14, 2009, in Docket No. 090120-WS, In re: Joint notice by Aloha Utilities, Inc. and the Florida Governmental Utility Authority of transfer of water and wastewater assets to the Florida Governmental Utility Authority, in Pasco County, and cancellation of Certificate Nos. 136-W and 97-S.

Issue 2: Should the Commission acknowledge Holiday Utility Company, Inc.'s voluntary withdrawal of Docket No. 030458-WU, its petition for transfer of majority organization control, and if so, what effect does the withdrawal have on Docket 030458-WU?

Recommendation: Yes, the Commission should acknowledge Holiday's voluntary withdrawal of its petition for transfer of majority organization control as a matter of right. The effect of the voluntary withdrawal is to divest the Commission of further jurisdiction over this matter. (Fleming)

Staff Analysis: It is a well established legal principle that the plaintiff's right to take a voluntary dismissal is absolute.⁴ Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.⁵ Both of these legal principles have been recognized in administrative proceedings.⁶ In Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123, 1128 (Fla. 2d DCA 1993), the court concluded that "the jurisdiction of any agency is activated when the permit application is filed . . . [and] is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the fact-finding process." In this case, the hearing has not yet occurred, so the fact-finding process is not complete. Staff therefore recommends that the Commission acknowledge Holiday's withdrawal of its petition as a matter of right, which is in accord with past Commission decisions.⁷ The Commission should further find that the effect of Holiday's voluntary withdrawal of its petition for transfer of majority organizational control is to divest the Commission of further jurisdiction over this matter.

⁴ Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975)

⁵ Randle-Eastern Ambulance Service, Inc. v. Vasta, Elena, etc., 360 So. 2d 68, 69 (Fla. 1978)

⁶ Orange County v. Debra, Inc., 451 So. 2d 868 (Fla. 1st DCA 1983); City of Bradenton v. Amerifirst Development Corporation, 582 So. 2d 166 (Fla. 2d DCA 1991); Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123 (Fla. 2d DCA 1993) aff'd, 645 So. 2d 374 (Fla. 1994).

⁷ See Order No. PSC-07-0725-FOF-EU, issued September 5, 2007, in Docket No. 060635-EU, In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee; Order No. PSC-07-0485-FOF-EI, issued June 8, 2007, in Docket Nos. 050890-EI, In re: Complaint of Sears, Roebuck and Company against Florida Power & Light Company and motion to compel FPL to continue electric service and to cease and desist demands for deposit pending final decision regarding complaint and 050891-EI, In re: Complaint of Kmart Corporation against Florida Power & Light Company and motion to compel FPL to continue electric service and to cease and desist demands for deposit pending final decision regarding complaint; Order No. PSC-94-0310-FOF-EQ, issued March 17, 1994, in Docket No. 920977-EQ, In re: Petition for approval of contract for the purchase of firm capacity and energy from General Peat Resources, L.P. and Florida Power and Light Company; Order No. PSC-97-0319-FOF-EQ, issued March 24, 1997, in Docket No. 920978-EQ, In re: Complaint of Skyway Power Corporation to require Florida Power Corporation to furnish avoided cost data pursuant to Commission Rule 25-17.0832(7), F.A.C.; Order No. PSC-04-0376-FOF-EU, issued April 7, 2004, in Docket No. 011333-EU, In re: Petition of City of Bartow to modify territorial agreement or, in the alternative, to resolve territorial dispute with Tampa Electric Company in Polk County. But see Order No. PSC-07-0297-FOF-SU, issued April 9, 2007, in Docket No. 020640-SU, In re: Application for certificate to provide wastewater service in Lee County by Gistro, Inc. and Order No. PSC-96-0992-FOF-WS, issued August 5, 1996, in Docket No. 950758-WS, In Re: Petition for approval of transfer of facilities of Harbor Utilities Company, Inc., to Bonita Springs Utilities and cancellation of Certificates Nos. 272-W and 215-S in Lee County (voluntary dismissal cannot be utilized to divest the Commission as an adjudicatory agency of its jurisdiction granted to it by the legislature).

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On February 15, 2010, Holiday filed a letter to withdraw its application in Docket No. 070084-WU. On February 16, 2010, the County filed a withdrawal of its objection in Docket No. 070084-WU. With respect to this docket, staff notes that no Commission action has been taken, no request for refund of filing fees has been made, and no agency action has been taken; therefore, this docket may be administratively closed.

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Issue 3: Should Docket Nos. 030458-WU, 070084-WU, and 100033-WU be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issues 1 and 2, these dockets should be closed because no further action is necessary. (Fleming, Clapp)

Staff Analysis: If the Commission approves staff's recommendation in Issues 1 and 2, these dockets should be closed because no further action is necessary.