

State of Florida



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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COMMISSIONER  
CLERK

**DATE:** September 20, 2012

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Engineering (Brady, Ellis, Matthews, Rieger) *pb PBE TW SDR JS*  
Division of Accounting and Finance (Kaproth) *TS ALI*  
Office of the General Counsel (Lawson) *JSC*

**RE:** Docket No. 110317-WS – Application for transfer of majority organizational control of Tymber Creek Utilities, Incorporated, holder of Certificate Nos. 303-W and 252-S in Volusia County, from Joseph Stanley and Steve P. Shirah to Joseph Stanley Shirah.

Docket No. 120191-WS – Application for amendment of Certificate Nos. 303-W and 252-S to add territory in Volusia County by Tymber Creek Utilities, Incorporated.

**AGENDA:** 10/02/12 – Regular Agenda – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Edgar (110317-WS)  
Administrative (120191-WS)

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ENG\WP\110317.RCM.DOC

### Case Background

Tymber Creek Utilities, Incorporated (Tymber Creek or Utility) is a Class B utility serving approximately 423 water and wastewater customers in Volusia County. The Utility is located in the St. Johns River Water Management District, which has permanent water restriction

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rules in place. Tymber Creek purchases bulk water from the City of Ormond Beach. According to the Utility's 2011 Annual Report, combined operating revenues were \$335,350 with a total net operating loss of \$47,826.

Tymber Creek was granted Certificate Nos. 303-W and 252-S in 1978.<sup>1</sup> The Utility's only other certification action was a name change in 2005.<sup>2</sup> On December 12, 2011, an application for transfer of majority organizational control was filed. During the application process, staff reviewed the Utility's legal description and territory maps and found that the Utility is serving outside its approved territory. Upon notification of the possible violation of Section 367.045, Florida Statutes, (F.S.), Tymber Creek filed an application for amendment of Certificate Nos. 303-W and 252-S in Docket No. 120191-WS.

This recommendation addresses the amendment of certificates and transfer of majority organizational control. The Commission has jurisdiction pursuant to Sections 367.045 and 367.071, F.S.

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<sup>1</sup> See Order No. 8242, issued April 6, 1978, in Docket Nos. 770324-W and 770325-S, In re: Application of Tymber Creek Utilities for certificates to operate a water and sewer utility in Volusia County, Florida. Section 367.041, Florida Statutes.

<sup>2</sup> See Order No. PSC-05-0188-FOF-WS, issued February 18, 2005, in Docket No. 041339-WS, In re: Application for name change on Certificates Nos. 303-W and 252-S in Volusia County from Tymber Creek Utilities to Tymber Creek Utilities, Incorporated.

### **Discussion of Issues**

**Issue 1:** Should Tymber Creek Utilities, Incorporated be required to show cause, in writing, within 21 days why it should not be fined for its apparent violation of Section 367.045, Florida Statutes?

**Recommendation:** No. A show cause proceeding should not be initiated. (Lawson)

**Staff Analysis:** As stated in the case background, Tymber Creek is serving customers outside of its certificated water and wastewater territories in apparent violation of Section 367.045(2), F.S. Section 367.045(2), F.S., states in pertinent part: "A utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the [C]ommission . . . ." If a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, F.S., Section 367.161(2), F.S., authorizes the Commission to assess a penalty of not more than \$5,000 for each offense. By serving customers outside of its certificated territory without obtaining an amended certificate of authorization, the utility's act was "willful" within the meaning of Section 367.161, F.S. Utilities are charged with the knowledge of the Commission's statutes and rules. Thus, any intentional act, such as Tymber Creek providing water service to the public for compensation since 1990, without first obtaining a certificate of authorization from the Commission, would meet the standard for a "willful violation" of Section 357.161(1), F.S. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., the Commission having found that 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"; see also Order No. PSC-99-2390-FOF-WU, Issued on December 7, 1999, in Docket No. 980543-WU, In re: Application for amendment of Certificate No. 363-W to add territory in Marion County by Sunshine Utilities of Central Florida, Inc., (finding that the utility's apparent violation of Section 367.045, F.S., did not warrant the initiation of a show cause proceeding). Additionally, "it is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404,411 (1833).

Although Tymber Creek's failure to obtain an amended certificate of authorization from the Commission prior to serving outside of its certificated area is an apparent violation of Section 367.045(2), F.S., according to its application, the utility erroneously believed that the territory in question was included in its service area. As a result, the Utility has been providing service to approximately 12 water and wastewater connections located outside its certificated territory since 1990, in an area of approximately 23.7 acres adjacent to the utility's certificated territory. Additionally, the Utility has paid regulatory assessment fees (RAFs) on the revenues received from these customers and complied with all other rules and regulations as if the 12 connections were part of its territory. When the error was discovered, Tymber Creek immediately filed the instant application to correct the mistake by requesting the territory to be added to its service area.

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Staff does not believe that the apparent violation of Section 367.045, F.S., rises in these circumstances to the level which warrants the initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order Tymber Creek to show cause for failure to obtain an amended certificate of authorization prior to serving outside of its certificated territory.

**Issue 2:** Should the Commission approve the application by Tymber Creek Utilities, Incorporated to amend Certificate Nos. 303-W and 252-S?

**Recommendation:** Yes. The Commission should approve Tymber Creek's application for amendment of Certificate Nos. 303-W and 252-S to include territory as reflected in Attachment A, effective the date of the Commission vote. The resultant order should serve as Tymber Creek's amended certificates and should be retained by the utility. The Utility should charge the customers in the territory added herein the rates and charges contained in its current tariff until a change is authorized by the Commission in a subsequent proceeding. (Rieger, Ellis, Matthews)

**Staff Analysis:** The Utilities application to amend its authorized service territory is in compliance with the governing statute, Section 367.045, F. S., and Rule 25-30.036, Florida Administrative Code (F.A.C.). The application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, F.A.C. No objections to the application have been received and the time for filing such has expired.

Since the Utility has been serving the proposed territory since 1990, staff believes that the Utility has demonstrated that it has the necessary financial and technical expertise to do so. In addition, the Utility has indicated that its current water and wastewater systems have sufficient capacity to serve the proposed areas. Staff has contacted the Volusia County Health Department and the Department of Environmental Protection (DEP) and learned that there are no outstanding notices of violation issued for Tymber Creek's water and wastewater treatment facilities, respectively.

The application also contains evidence that the utility owns or has long-term use of the land upon which the utility facilities are located. Adequate service territory maps and territory descriptions have also been provided. The Utility is currently providing service to approximately 12 water and wastewater residential customers located in the proposed territory, an area of approximately 23.7 acres adjacent to the Utility's certificated territory. As noted, the Utility has indicated that service to these residential customers started in 1990. Until recently, the Utility had assumed that the proposed areas had always been within the certificated areas authorized by the Commission. The Utility has indicated that throughout this time period, the calculation of the RAFs for Tymber Creek was inclusive of all of these customers. The Utility has filed revised tariff sheets incorporating the additional territories into its tariff.

Based on the foregoing, staff believes it is in the public interest to approve the application filed by Tymber Creek to amend its territory to reflect the area described in Attachment A, effective the date of the Commission vote. The resultant order should serve as Tymber Creek's amended certificates and should be retained by the Utility. The Utility should charge the customers in the territory added herein the rates and charges contained in the current tariff until a change is authorized by the Commission in a subsequent proceeding.

**Issue 3:** Should the transfer of majority organizational control be approved?

**Recommendation:** Yes, the transfer of majority organizational control of Tymber Creek Utilities, Incorporated from Joseph Stanley Shirah and Steve P. Shirah to Joseph Stanley Shirah is in the public interest and should be approved effective the date of the Commission vote. The resultant order should serve as the Utility's Certificate Nos. 303-W and 252-S and should be retained by the Utility. The Utility's existing rates and charges should remain in effect until a change is authorized by the Commission in a subsequent proceeding and the Utility should continue to be responsible for filing annual reports and remitting RAFs. (Brady, Kaproth, Lawson)

**Staff Analysis:** On December 12, 2011, an application for transfer of majority organizational control of Tymber Creek from Joseph Stanley Shirah and Steve P. Shirah to Joseph Stanley Shirah was filed pursuant to Section 367.071, F.S. When certificated in 1978, Joseph Stanley, Steve P., and Ronald E. Shirah each owned 1/3 interest in the Utility. Subsequently, Ronald E. Shirah relinquished his 1/3 interest, resulting in Joseph Stanley Shirah and Steve P. Shirah each owing 50 percent interest, but neither in control. In a stock purchase agreement which closed on December 31, 2011, control passed 100 percent to Joseph Stanley Shirah (Buyer). Pursuant to Section 367.071, F.S., the transfer was made contingent upon Commission approval.

The application is in compliance with the governing statutes and other pertinent statutes and administrative rules concerning an application for transfer of majority organizational control. The application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, F.A.C. No objections to this application were received and the time for filing objections has expired. Pursuant to Rule 25-30.037(3)(g), F.A.C., the application contains a copy of a Promissory Note by which funding of the transaction will occur. Pursuant to Rule 25-30.037(3)(i), F.A.C., the application also contains evidence that the Utility owns or has long-term use of the land upon which the utility facilities are located.

Pursuant to Rule 25-30.037(3)(f), F.A.C., the application contains a statement of how the transfer is in the public interest. According to the application, the Buyer has been managing the system for many years and is familiar with the system. The Buyer has pledged to keep the systems in compliance with DEP standards and to fulfill the commitments, obligations, and representations of the Utility, pursuant to Rule 25-30.037(3)(h), F.A.C. Staff has verified that the Utility's systems are currently in compliance with all applicable standards set by the DEP and the Volusia County Health Department.

The Utility's current rates were effective September 26, 2011, pursuant to a staff-assisted rate case.<sup>3</sup> Rule 25-9.044(1), F.A.C., provides that in the case of a change in ownership or control of a utility, the rates, classifications, and regulations of the former owner must continue unless authorized to change by the Commission. The Buyer has not requested a change; therefore, the Utility's existing rates and charges should remain in effect until a change is authorized by the Commission in a subsequent proceeding. Because transfers of majority organizational control are by stock transfer, there is no acquisition adjustment consideration.

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<sup>3</sup> See Order No. PSC-11-0345-PAA-WS, issued August 16, 2011, in Docket No. 100359-WS, In re: Application for staff-assisted rate case in Volusia County by Tymber Creek Utilities, Incorporated.

The Utility is current on annual reports and RAFs through December 31, 2011. In accordance with Rules 25-30.120, F.A.C., the Utility should continue to be responsible for all future annual reports and RAFs.

Based on the above, staff recommends the transfer of majority organizational control of Tymber Creek Utilities, Incorporated from Joseph Stanley and Steve P. Shirah to Joseph Stanley Shirah is in the public interest and should be approved effective the date of the Commission vote. The resultant order should serve as the Utility's Certificate Nos. 303-W and 252-S and should be retained by the Utility. The Utility's existing rates and charges should remain in effect until a change is authorized by the Commission in a subsequent proceeding and the Utility should continue to be responsible for filing annual reports and remitting RAFs.

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**Issue 4:** Should this docket be closed?

**Recommendation:** Yes. If the Commission approves staff's recommendations in Issues 1, 2, and 3, no further action will be necessary and this docket should be closed. (Lawson)

**Staff Analysis:** If the Commission approves staff's recommendations in Issues 1, 2, and 3, no further action will be necessary and this docket should be closed.



TYMBER CREEK - LOST CREEK SUBDIVISION

DESCRIPTION OF TERRITORY

That portion of the southwest one-quarter of the northeast one-quarter of section 25, Township 14 south, range 31 east, lying north of the northerly top of bank of the Tomoka River and easterly of Groover Branch Creek. In Volusia County, Florida, being more particularly described as follows:

Commence at the southwest corner of lot 326, after lot 326 as measured along the W line of the NE one-quarter of section 25, 1319.05 feet south from the NW corner of the NE one-quarter of section 25, Township 14, Range 31. Tymber Creek Phase II subdivision. As recorded in map book 35, pages 116 thru 136 of the public records of Volusia County, Florida. Said point being the point of beginning; thence N. 87° 26' 54" E. Along the southerly line of said Tymber Creek Phase II Subdivision. 1330.09 feet to the east line of the said southwest one-quarter of the northeast one-quarter of section 25; Thence S. 01° 25' 04" E along the said east line a distance of 516.82 feet to a meander line along the northerly top of bank of the Tomoka River; Thence along the said top of bank of the Tomoka River the following courses and distances: S. 56° 53' 33" W 163.94 feet; S. 58° 00' 47" W 100.98 feet; S. 41° 45' 18" W. 109.66 feet; S. 63° 07' 13" W. 100.12 feet; S. 82° 40' 55" W. 104.40 feet; S. 46° 41' 34" W. 105.94 feet; S. 76° 08' 56" W 32.10 feet; S 44° 55' 10" W. 107.70 feet; S. 32° 45' 58" W. 101.43 feet; S. 20° 15' 20" W. 100.12 feet; S. 28° 52' 54" W. 81.18 feet; S. 71° 09' 07" W. 40.26 feet to a meander line along the easterly top of bank of said Groover Branch Creek; Thence along said top of Bank of Groover Branch Creek the following courses and distances: N. 81° 16' 40" W. 57.20 feet; N. 18° 23' 19" W. 34.56 feet; N. 17° 18' 38" W. 38.01 Feet; N. 04° 51' 59" W. 56.40 feet; N. 23° 33' 35" W. 23.18 feet; N. 03° 39' 21" W. 52.53 feet; N. 13° 17' 07" E 45.99 feet; S. 83° 41' 27" E. 38.88 feet; N. 39° 20' 57" E. 56.10 feet; N. 29° 00' 26" W. 36.31 feet; N. 55° 22' 42" W. 47.25 feet; N. 56° 00' 28" W. 51.45 feet; N. 15° 18' 09" W. 72.15 feet; N. 29° 53' 10" W. 69.49 feet; S. 66° 30' 02" W. 33.57 feet; S. 08° 08' 31" W. 36.56 feet; S. 43° 31' 28" W. 41.66 feet; S. 84° 11' 30" W. 65.49 feet; N. 80° 37' 26" W. 40.34 feet; N. 48° 25' 21" W. 61.62 feet; N. 12° 00' 14" W. 26.80 feet; N. 28° 07' 04" E. 80.59 feet; N. 15° 29' 07" E. 85.50 feet; N. 27° 46' 29" W. 19.83 feet; S. 72° 57' 24" W. 70.77 feet; S. 46° 51' 09" W. 64.30 feet; S. 29° 10' 55" W. 42.53 feet; S. 51° 45' 35" W. 22.87 feet to the west line of the said southwest one-quarter of the northeast one-quarter of section 25; Thence N 01° 20' 57" W. 610.00 feet to the point of beginning.

Said parcel containing 23.7 acres, more or less. MB 44 pgs 12 & 13 PRVC

**FLORIDA PUBLIC SERVICE COMMISSION**

**authorizes  
Tymber Creek Utilities, Incorporated  
pursuant to  
Certificate Number 303-W**

to provide water service in Volusia County in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

<u>Order Number</u>	<u>Date Issued</u>	<u>Docket Number</u>	<u>Filing Type</u>
8242	04/06/1978	770324-W	Original Certificate
PSC-05-0188-FOF-WS	02/18/2005	041339-WS	Name Change
*	*	110317-WS	Transfer of Majority Control
*	*	120191-WS	Amendment

**\*Order Numbers and dates to be provided at time of issuance.**

**FLORIDA PUBLIC SERVICE COMMISSION**

**authorizes  
Tymer Creek Utilities, Incorporated  
pursuant to  
Certificate Number 252-S**

to provide wastewater service in Volusia County in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

<u>Order Number</u>	<u>Date Issued</u>	<u>Docket Number</u>	<u>Filing Type</u>
8242	04/06/1978	770325-S	Original Certificate
PSC-05-0188-FOF-WS	02/18/2005	041339-WS	Name Change
*	*	110317-WS	Transfer of Majority Control
*	*	120191-WS	Amendment

**\*Order Numbers and dates to be provided at time of issuance**