

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: October 21, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Fleming, Brown)
Division of Economic Regulation (Clapp, Redemann)

RE: Docket No. 030102-WS – Application for authority to transfer Certificate Nos. 620-W and 533-S in Highlands County from The Woodlands of Lake Placid, L.P. to L. P. Utilities Corporation.
County: Highlands

AGENDA: 11/02/04 – Regular Agenda – Posthearing Decision – Participation is Limited to Commissioners and Staff

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030102\030102.RCM.DOC

Case Background

The Woodlands of Lake Placid, L.P. (Woodlands or utility) is a Class C water and wastewater utility providing service in Highlands County. The utility serves about 338 water and wastewater residential customers and two general service customers located in Camp Florida Resort RV Park (resort or RV park), 38 water-only residential customers (Hickory Hills and Lake Ridge Estates), and four water-only general service customers outside of the Resort. The customer base is primarily residential, comprised of single family homes, park homes, and RV sites. The utility is in both the Highlands Ridge and Southern Water Use Caution Areas of the Southwest Florida Water Management District (SWFWMD).

On January 29, 2003, L.P. Utilities Corporation (LPUC or utility) filed an application for authority to transfer Water Certificate No. 620-W and Wastewater Certificate No. 533-S from Woodlands to LPUC. According to the application, Highvest Corporation (Highvest), lender of funds to Woodlands, foreclosed on a lien on the utility assets and purchased the assets at the

foreclosure sale. The Woodlands did not defend against the foreclosure. Highvest then immediately sold the assets to LPUC, lent LPUC the funds to purchase the utility, and executed a new lien on the assets Highvest had just sold to LPUC.

In Order No. PSC-03-1053-PAA-WS, issued September 22, 2003, the Commission denied the transfer to LPUC because in the application LPUC stated that it would not assume any obligations of the Woodlands prior to the foreclosure by Highvest. This is contrary to the requirements of section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code.¹ The Commission ordered LPUC to file another application for transfer of the Certificates within 30 days from the date the decision was final, in which LPUC agreed to accept all regulatory obligations of the Woodlands. The Commission further ordered that “Highvest, the current owner of the utility’s assets, was responsible to provide service to the utility’s customers, submitting the utility’s present and past due regulatory assessment fees . . . and honoring any refunds to the utility customers ordered by the Commission, until an appropriate transfer to LPUC is approved by the Commission.”

On October 20, 2003, LPUC filed an application for the transfer of wastewater utility facilities of Woodlands to Camp Florida Property Owners Association, Inc. (Camp Florida or Association), and for the transfer majority organizational control of LPUC to Camp Florida. Mr. Anthony Cozier is a limited partner of Woodlands, Director of LPUC, and President of Highvest. Camp Florida’s primary property owner is Highvest Corporation, which owned 246 of the 397 lots within the resort at the time of the Association’s vote to purchase the utility assets from LPUC. On October 31, 2003, the Office of Public Counsel filed an objection to the application.

A Prehearing Conference was held on August 2, 2004, in Tallahassee, Florida. The technical and customer service hearings were held on August 11, 2004, at the Sebring Civic Center, Sebring, Florida. Fifteen customers testified at the morning session of the customer service hearing, and one customer testified at the evening session. Most customers were opposed to the transfer because they did not want to enter into a financial relationship with Anthony Cozier, they were distrustful of Mr. Cozier, and they were concerned about a lien being placed on their homes for the purchase of the water and wastewater system. No comments were made concerning the quality of service from the utility.

This recommendation addresses all issues related to LPUC’s application to transfer the utility facilities of Woodlands to LPUC, to transfer the wastewater utility facilities of Woodlands to Camp Florida Property Owners Association, Inc., and to transfer majority organizational control of LPUC to Camp Florida Property Owners Association, Inc. The Commission has jurisdiction pursuant to section 367.071, Florida Statutes.

¹ The Commission also found that the transfer was not in the public interest because all of the entities involved in the transfer functioned as alter egos of Anthony Cozier in the decision by Highvest to foreclose on the Woodlands’ mortgage and purchase the Woodlands’ utility assets at the foreclosure sale; in the decision by the Woodlands not to defend against the foreclosure; and in the decision by Highvest to sell, and LPUC to purchase, the Woodlands utility. Supra, at p. 8

Stipulations

The Commission found that the following stipulation reached by the parties was reasonable and accepted the stipulated matter set forth below.

The purchase price resulting from the loan from Highvest Corporation to L.P. Utilities Corporation in the amount of \$409,959 is greater than the combined amount of water and wastewater rate base in the amount of \$380,609. Therefore, pursuant to Rule 25-30.0371, Florida Administrative Code, no acquisition adjustment should be made. (Issue 3)

Discussion of Issues

Issue 1: Is Camp Florida Property Owners Association, Inc. an exempt entity pursuant to Section 367.022(7), Florida Statutes?

Recommendation: No. Based on the evidence in the record, Camp Florida's provision of water and wastewater service would not be exempt from Commission jurisdiction pursuant to Section 367.022(7), Florida Statutes. (Fleming, Brown)

Position of the Parties

LPUC: Yes, Camp Florida Property Owners Association, Inc., is a Florida not-for-profit corporation formed on July 10, 1990, and is in good standing with the Florida Department of State.

OPC: No. Based on the evidence produced at the hearing, Camp Florida is not an exempt entity.

Staff Analysis: According to LPUC witness Lovelette, LPUC was formed in 2001 and currently serves about 338 water and wastewater residential customers and two general service customers located in the Resort, as well as 38 water-only residential customers and four water-only general service customers outside of the Resort. The customer base is primarily residential, comprised of single family homes, park homes, and RV sites. Some customers reside there all year, but the majority of residents own and maintain their lots for recreational purposes for use during the winter. (TH TR 20-21)² LPUC claims that Camp Florida is exempt from Commission jurisdiction under section 367.022(7), Florida Statutes, which provides an exemption for:

(7) Nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such nonprofit corporations, associations, or cooperatives.

LPUC states that Camp Florida is a not-for-profit corporation in good standing with the Florida Department of State and is exempt from Commission regulation because section 367.022(7), Florida Statutes, specifically exempts nonprofit corporations, associations, and cooperatives providing service solely to members who own and control such. (LPUC BR 2-3)

OPC argues that Camp Florida would not be exempt under section 367.022, Florida Statutes. According to OPC, to qualify for an exemption, a nonprofit association cannot provide service to any person who is not a member of the association. OPC argues that Camp Florida does not meet this requirement for either its water or wastewater operations. OPC contends, and the utility agrees, that Camp Florida's water operations would not be exempt because it provides service to customers who are not members of the Association. OPC also contends that Camp Florida wastewater operations would not be exempt because Camp Florida provides wastewater service to the front office of the resort, which is owned by Highvest. According to OPC,

² For purposes of this recommendation, TH TR refers to the technical hearing transcript and SH TR refers to the service hearing transcript.

Highvest's membership in the Association stems from its ownership of the Camp Florida rental lots, not from its ownership of the front office. Therefore, OPC claims that the wastewater service provided to the front office prevents Camp Florida from attaining exempt status. (OPC BR 2-3)

Witness Lovelette testified that Camp Florida Property Owners Association, Inc. is a not for profit Florida corporation organized in 1990 for the purpose of owning and managing the resort. (TH TR 22) In addition, the Articles of Incorporation, Bylaws and Amendments indicate that Camp Florida is a not for profit Florida corporation and is registered with the Florida Division of Corporations. (EXH 2) The Association's membership consists of all the owners of lots in the resort. Each lot has one vote in the Association's affairs. There are 397 platted lots in the RV Park. Currently, Highvest Corporation owns 240 lots, and thus votes the shares attributable to the lots. Witness Lovelette also testified that the Association has assured him that it will provide service solely to its members who own and control it. (TH TR 22, 24)

The utility is currently providing water service to 38 residential customers and four general service customers outside of the resort; thus, the water operations are subject to Commission regulation because it serves more than just members of the Association. With regard to the wastewater operations, at the customer service hearing Anthony Cozier testified that the front office (sales office building) was originally part of the common area until he was asked to purchase it by the property owners, making the front office no longer part of the common area.³ (SH TR 114-115) Camp Florida's membership consists of the 397 platted lots in the Park, which does not include the front office owned by Anthony Cozier. (TH TR 22) Since the utility is providing wastewater service to the front office, which is not part of Camp Florida, the Association's provision of wastewater service would not be exempt from Commission jurisdiction pursuant to Section 367.022(7), Florida Statutes.

Based on the evidence in the record, staff believes that Camp Florida's provision of water and wastewater service would not be exempt from Commission jurisdiction pursuant to Section 367.022(7), Florida Statutes, because it serves customers who are not members of the Association. Staff notes, however, that the determination of whether Camp Florida is an exempt entity is not ultimately material to the Commission's decision on whether the transfer is in the public interest.

³ See also, Order No. PSC-03-1051-FOF-WS, issued September 22, 2003, in Docket No. 020010-WS, In re: Application for staff-assisted rate case in Highlands County by The Woodlands of Lake Placid, L.P., in which the Commission allocated rent to the front office because it was no longer owned by the property owners association, at pgs. 6-7

Issue 2: Should the Commission approve the transfer of Certificate Nos. 620-W and 533-S from The Woodlands of Lake Placid, L.P. to L.P. Utilities Corporation?

Recommendation: Yes. The transfer of Certificate Nos. 620-W and 533-S from The Woodlands of Lake Placid, L.P. to L.P. Utilities Corporation is in the public interest and should be approved, effective on the day of the Commission vote. A description of the territory granted to Certificate Nos. 620-W and 533-S is appended as Attachment A. LPUC should continue charging the rates and charges approved for Woodlands, until authorized to change by the Commission in a subsequent proceeding. LPUC should be required to file revised tariff sheets reflecting the transfer to LPUC, including the currently approved rates and charges, within 30 days of the Order. The tariff pages reflecting the transfer should be effective for services provided or connections made on or after the stamped approval date on the tariff sheets. (Clapp, Redemann)

Position of the Parties

LPUC: Yes.

OPC: No. The transfer, as proposed, with the subsequent sale of the wastewater assets to Camp Florida Property Owners Association, Inc. (Camp Florida) and transfer of L.P. Utilities Corporation to Camp Florida does not meet the standard for transfer specified in Section 367.071 of the Florida Statutes.

Staff Analysis: LPUC applied for a transfer of Certificate Nos. 620-W and 533-S from Woodlands to LPUC on January 29, 2003. A description of the territory granted to Certificate Nos. 620-W and 533-S is appended as Attachment A. (EXH 3) Section 367.071(1), Florida Statutes, requires that no utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organization control without determination and approval that the transfer is in the public interest and that the transferee will fulfill the commitments, obligations, and representations of the utility. Rule 25-30.037, Florida Administrative Code, details the application requirements. LPUC believes the transfer should be approved. Public Counsel did not express specific concerns regarding the transfer from Woodlands to LPUC except that this would be the first in a chain of transfers to ultimately lead to the transfer to the Association.

Woodlands, LPUC, Highvest, Camper Corral, Inc., Anbeth, and Camp Florida are all related entities. Mr. Anthony Cozier is a limited partner in Woodlands, President of Camper Corral, Inc., director and primary decision maker for LPUC, and President of Highvest. Mr. Cozier and his wife also formed a trust, Anbeth Corporation, which is the sole shareholder of LPUC. Mr. John Lovelette is a director of LPUC, Vice President of Highvest, and President of Camp Florida Property Owners Association, Inc. The Association's primary property owner is Highvest Corporation, which owned 246 of the 397 lots within the resort at the time of the Association's vote to purchase the utility assets from LPUC. Charts detailing the entities and their relationships are found in Order No. PSC-03-1051-FOF-WS, issued September 22, 2003, in Docket No. 020010-WS, In Re: Application for staff-assisted rate case in Highlands County by the Woodlands of Lake Placid, L.P., at pgs. 16-19 and in Order No. PSC-03-1053-PAA-WS, at

pgs. 7-8. OPC witness DeRonne also included a copy of the chart as an exhibit to her testimony, appended hereto as Attachment B. (TH TR 74; EXH 10)

Application. Rule 25-30.037(2)(g), Florida Administrative Code, requires that a copy of the contract for sale and purchase of the utility is to be provided with the application. According to the application filed on January 29, 2003, because the utility system was purchased in a foreclosure proceeding by Highvest Corporation and almost immediately “flipped” to LPUC, there is no written contract for purchase or sale of the utility. In addition, the application contained a statement that LPUC would fulfill the commitments and obligations of the utility that accrued subsequent to the foreclosure. (EXH 3) By Order No. PSC-03-1053-PAA-WS, issued on September 22, 2003, the Commission denied the proposed transfer to LPUC and ordered the utility to file another application within 30 days in which the utility would agree to accept all of the regulatory obligations of Woodlands, which included the obligations to make refunds from overcharges and to install meters. See, Order No. PSC-03-1051-FOF-WS in Docket No. 020010-WS.

On October 21, 2003, LPUC filed an amended application for the transfer of wastewater utility facilities of Woodlands to Camp Florida Property Owners Association, Inc., and for the transfer of majority organizational control of LPUC to the Association. On November 12, 2003, LPUC filed a statement agreeing to fulfill the commitments, obligations, and representations of the prior owner with regard to utility matters. (EXH 7)

Financial and Technical Viability. LPUC has been running the utility since October 1, 2002. (EXH 3) Since that time, according to Mr. Lovelette, the meter installation required by the Commission in Order No. PSC-02-1739-PAA-WS has been completed. The utility has been crediting customer bills \$43.88 per month for the refund required by Order No. PSC-03-1051-FOF-WS. The refund is due to be completed by September, 2004. (TH TR 16, 25-26, 39)

LPUC witness Lovelette testified that the mortgage on the Woodlands property was assigned to Highvest Corporation, whose President is Anthony Cozier. Woodlands defaulted on the note and in September, 2002, Highvest foreclosed on the mortgage. Woodlands did not contest the foreclosure. On October 1, 2002, Highvest sold the utility assets to LPUC for \$409,959, financed over 10 years at 10% interest. (TH TR 22; EXH 2; EXH 3) According to Witness Lovelette, the LPUC mortgage with Highvest for the utility assets is not current. He testified that the reason the principal amount on the mortgage reported on the 2002 and 2003 annual reports had not changed was because no payments had been made. (TH TR 46-47; EXH 5)

The overwhelming customer testimony at the service hearing was that the customers oppose the proposed transfers and do not trust Mr. Cozier, the utility owner, or Mr. Lovelette, the utility manager. Several customers specifically referred to the fact that Mr. Cozier, through his corporation, Highvest, has foreclosed on other entities he controls as a reason to question his trustworthiness. There were no complaints regarding quality of service. (SH TR 12-130)

Conclusion. Although the utility has filed the information required by Rule 25-30.037, Florida Administrative Code, the Commission must find that the transfer is in the public interest

based on the buyer's financial and technical ability to manage, maintain and operate the utility, and in consideration of any other public interest factors that may have a bearing on the proposed transfer. Although there do not appear to be any significant problems with the operating condition of the utility, there are concerns regarding the utility's ongoing financial viability and the owner's lack of responsiveness to the requirements of chapter 367, Florida Statutes, and Commission orders.

The default on the Woodlands' mortgage, the subsequent foreclosure by Highvest on the Woodlands' property, and the sale of the utility assets to LPUC were all decisions made by Mr. Cozier without regard to the utility transfer requirements of chapter 367, Florida Statutes. While the Commission has tolerated less than perfect adherence to its statutes and rules in foreclosures by banks or other investors not familiar with the Commission's regulations, Mr. Cozier has been familiar with those regulations since 1999 when Woodlands applied for an original certificate. For example, when Highvest sold the utility to LPUC, Highvest and LPUC, through Mr. Cozier, had every opportunity to prepare a contract that would comply with the requirements that the transfer be contingent on Commission approval and that LPUC would assume the commitments, obligations, and representations of the utility. Instead, in its January 29, 2003, application, it appears that LPUC attempted to avoid its responsibilities stating that it was responsible for only those utility obligations incurred after LPUC took over the utility. (EXH 3)

With respect to the utility's financial viability, LPUC is now in arrears on the current mortgage to Highvest. (TH TR 46-47) The utility's witness offered no explanation as to why the mortgage payments had not been made or why the mortgage was financed over 10 years. In addition, the utility was given 12 months, pursuant to Rule 25-30.360, Florida Administrative Code, to make a refund in excess of \$78,000 plus interest. Since the utility has been crediting the monthly customer bills to complete the refund, the utility's monthly cash flow for the past 12 months has been reduced by the amount of those monthly credits. In addition, Highvest's failure to pay for utility service to its rental lots until November 2003, has put an additional strain on the utility's financial viability. (TH TR 36)

In these unique circumstances, the Commission's options are limited. If the Commission denies the transfer, the utility certificate would remain with Woodlands, even though title to the assets has been transferred to LPUC. Woodlands is no longer an active corporate entity with the Secretary of State, Division of Corporations. (EXH 4) The assets would have to be transferred back to Woodlands and that entity would have to be reinstated with the Florida Department of State, which may present additional problems. As the Commission found in Order No. PSC-03-1053-PAA-WS, the transactions that transferred the utility from the Woodlands to Highvest and from Highvest to LPUC were not arms length transactions and no real transfer of facilities or operational control has taken place. Because the utility assets are now owned by LPUC, staff believes that the public would be better served by transferring the utility certificates to LPUC. Although it is clear that LPUC has significant cash flow problems, the Commission has set rates for the utility, based on all customers paying for their water and wastewater service, which will allow the utility an opportunity to recover its prudent operating costs and earn a fair return on its investment. It is up to the utility to adhere to the provisions of chapter 367, Florida Statutes, its tariffs, and to operate the utility in a financially responsible manner.

Based on the record, staff recommends that the transfer of Certificate No. 620-W and 533-S from Woodlands to LPUC is in the public interest and should be approved effective on the day of the Commission vote. A description of the territory granted to Certificate Nos. 620-W and 533-S is appended as Attachment A. LPUC should continue charging the rates and charges approved for Woodlands, until authorized to change by the Commission in a subsequent proceeding. LPUC should be required to file revised tariff sheets reflecting the transfer to LPUC, including the currently approved rates and charges, within 30 days of the Order. The tariff pages reflecting the transfer should be effective for services provided or connections made on or after the stamped approval date on the tariff sheets.

Issue 3: Should the Commission approve an acquisition adjustment for the transfer of The Woodlands of Lake Placid, L.P. to L.P. Utilities Corporation?

Recommendation: No. The purchase price resulting from the loan from Highvest Corporation to L.P. Utilities Corporation in the amount of \$409,959 is greater than the combined amount of water and wastewater rate base in the amount of \$380,609. Therefore, pursuant to Rule 25-30.0371, Florida Administrative Code, no acquisition adjustment should be made. (Clapp, Redemann)

Staff Analysis: The parties have stipulated that no acquisition adjustment should be made pursuant to Rule 25-30.0371, Florida Administrative Code, because the purchase price resulting from the loan from Highvest Corporation to L.P. Utilities Corporation in the amount of \$409,959 is greater than the combined amount of water and wastewater rate base in the amount of \$380,609.

Issue 4: Is the transfer of L.P. Utilities to Camp Florida in the public interest?

Recommendation: No. It is not in the public interest to approve the transfers of the wastewater system or the LPUC stock to the Association. (Clapp, Redemann)

Position of the Parties

LPUC: Yes.

OPC: No. Before the transfer of majority organizational control can take place, the Commission must approve the transfer as being in the public interest. Based on all the reasons presented in the evidence, it is clear that the transfer to Camp Florida is not in the public interest.

Staff Analysis: Section 367.071, Florida Statutes, provides that no utility shall sell, assign, or transfer its certificate of authorization, facilities, or any portion thereof, or majority organizational control without determination and approval of the Commission that the proposed sale, assignment, or transfer is in the public interest. The Commission has exclusive authority to decide whether to approve the transfer of the utility facilities and certificates. The Commission considers many factors in determining whether a transfer is in the public interest, including the buyer's financial and technical ability to continue operating the utility, as well as any other factors that are relevant to the public interest of the transfer. Issues 6 and 7 also address whether the transfers of LPUC's wastewater assets and LPUC's stock with respect to the water facilities are in the public interest.

The utility argues that the majority of the lot owners voted in favor of the transfers, customers cannot choose their utility, and the Commission has no authority to vindicate breaches, if any, in land sales practices or private contracts. (LPUC BR 5-6) OPC argues that the Commission has broad discretion in determining what is in the public interest, and should rely on the majority of the individual customers' votes against the transfer to determine whether that transfer is in the public interest. OPC argues that the public interest question in this case is whether customers should be forced into an ownership relationship with Mr. Cozier. (OPC BR 4, 7) The customers' testimony at the hearing regarding their concerns with the transfers did not represent their desire to choose which utility will provide their utility service, but rather their reluctance to be in the utility business themselves. For example, several customers expressed concern with being forced to invest their money in a utility business about which they had no understanding or knowledge. (SH TR 12-24, 32, 35-44, 55, 67)

As stated above, Section 367.071, Florida Statutes, gives the Commission specific authority to determine whether a transfer of a privately-owned water or wastewater utility is in the public interest and Commission precedent supports the Commission's broad discretion in determining what is in the public interest.⁴ As the Commission stated in Order No. PSC-94-0114-FOF-TI, issued January 31, 1994, in Docket No. 930396-TI, In Re: Application for

⁴ See, Order No. PSC-03-0193-FOF-WS, issued February 7, 2003, in Docket No. 021066-WS, In Re: Investigation into proposed sale of Florida Water Services Corporation, at p. 2.

certificate to provide interexchange telecommunications service by Atlas Communication Consultants, Inc., at p. 3:

The public interest standard gives latitude and discretion to the Commission to legislate regulatory rules of behavior and fashion appropriate remedies to fix regulatory problems.

The Commission has also found that it has discretion in determining what is in the public interest and it is not precluded from considering a variety of factors, where appropriate, in the interpretation of what is in the public interest. See, Order No. PSC-93-1376-FOF-EI, issued September 20, 2003, in Docket No. 921155-EI, In Re: Petition for approval of plan to bring generating units into compliance with the Clean Air Act by Gulf Power Company, at p. 15. See also, Order No. 21834, issued September 5, 1989, in Docket No. 881361-WU, In Re: Application for transfer of Certificate No. 364-W from Linadale Water Company to Troy Alan Eagan in Marion County, where the Commission denied a transfer for failure to demonstrate financial viability. In this case, the financial and technical viability of the buyer is critical to the public interest determination. Issues 6 and 7 contain staff's analysis of the financial and technical ability with respect to the proposed transfers. In those issues, staff recommends that Camp Florida has not shown that it has the financial and technical ability to operate the utility.

The Commission's public interest determination should not be based on the organization and membership of the Association. The public interest determination should be based on other factors such as technical and financial viability. Staff recommends that it is not in the public interest to approve the transfers of the wastewater system or the LPUC stock to the Association based on Camp Florida's failure to show that it will have the financial and technical ability to operate the utility successfully. It should be noted that the transfer contract states that the transfer of the water and wastewater systems are contingent upon the closing of each other. (EXH 7)

Issue 5: Does the evidence demonstrate that Camp Florida will fulfill the obligations and commitments of Woodlands?

Recommendation: Yes. It appears that Camp Florida will fulfill the commitments, obligations, and representations of the utility if the transfers are approved. (Clapp, Redemann)

Position of the Parties

LPUC: Yes.

OPC: No. Florida Statutes require that before a transfer can be approved, the Commission must make an affirmative determination that the transferee will fulfill the obligations and commitments of the transferor. There is no reason to conclude the transferee would be able to fulfill the transferor's regulatory obligations and commitments.

Staff Analysis: Section 367.071, Florida Statutes, provides that in considering a transfer application, the Commission must determine whether the buyer will fulfill the commitments, obligations and representations of the seller with regard to utility matters. LPUC indicated that Camp Florida will fulfill the commitments, obligations, and representations with regard to utility matters. Public Counsel believes that Camp Florida will not be able to fulfill the utility's commitments, obligations, and representations.

OPC argues that the refunds ordered by the Commission in the staff assisted rate case docket will not be paid off prior to the transfer. (OPC BR 14-16) In its brief, OPC pointed out that as of July, 2004, the amount of outstanding refunds due to customers was \$53,148.87 and the total amount of the credit balance on customers' bills was \$10,399, with only a few months remaining to complete the refund. (TH TR 99-100) This would make the individual customers, as members of the Association, responsible for the net credit balance on customers' bills at the time of transfer. Effectively, the customers would be paying their own refunds. Further, according to OPC, the utility would have significant cash flow problems for an extended period of time as a result of the large credit balances on the customers' utility bills. OPC states that absent the proposed transfer, the obligation for the large credit balance would be the responsibility of LPUC and Highvest, not the customers. (OPC BR 15-16)

The utility included a statement in its application that Camp Florida would fulfill the commitments, obligations and representations with regard to utility matters. (EXH 7) Mr. Lovelette's testimony supported that statement. Specifically, Mr. Lovelette testified that the meters had been installed as required by Order No. PSC-02-1739-PAA-WS. He also testified that the refunds would be completed by September, 2004 as required by Order No. PSC-03-1051-FOF-WS. (TH TR 16, 39)

The evidence in the record supports the conclusion that Camp Florida has acknowledged its responsibility to fulfill the commitments, obligations, and responsibilities of the utility if the transfers are approved. (EXH 7) At the hearing, the utility has asserted that all the refunds, required in Docket No. 020010-WS, would be made by September, 2004. OPC's arguments to the contrary are speculative. Commission rules and statutes do not prohibit utilities from making

refunds by credits to customer bills. Therefore, staff recommends that based on the record it appears that Camp Florida will fulfill the commitments, obligations, and representations of the utility if the transfers are approved. Other concerns regarding the ongoing financial viability of the utility if the transfers are approved are discussed in Issues 6 and 7.

Issue 6: Should the Commission approve the transfer of the wastewater facilities to Camp Florida Property Owners Association, Inc. and cancel Certificate No. 533-S?

Recommendation: No. The transfer of the wastewater facilities to Camp Florida Property Owners Association, Inc. is not in the public interest and should not be approved. (Clapp, Redemann)

Position of the Parties

LPUC: Yes.

OPC: No. The facts of this case are such that the Commission should not approve this transfer as in the public interest or determine that the transferee will fulfill all of the obligations of the utility.

Staff Analysis: On October 21, 2003, LPUC applied for a transfer of the wastewater utility facilities of Woodlands to Camp Florida Property Owners Association, Inc. and cancellation of Certificate No. 533-S. (EXH 7) The application has met the minimum filing requirements of section 367.071, Florida Statutes, and Rule 25-30.037, Florida Administrative Code, which details the application requirements. LPUC believes the application should be approved. Public Counsel does not believe that the transfer is in the public interest or that the transferee will fulfill the obligations of the utility.

Purchase Price and Financing. A written contract for the purchase of the wastewater facilities is included with the application. According to the contract, the wastewater system purchase price is \$191,523, which is to be financed by a loan, from Anbeth or its assigns, for 100% of the purchase price amortized by quarterly payments over 10 years at 6.99% interest. Principal and interest payments are to be paid quarterly to coincide with the receipt of maintenance fees from Association members. (EXH 7) LPUC witness Lovelette testified that the purchase price is equal to the rate base established in Order No. PSC-03-1051-FOF-WS. (TH TR 27)

Mr. Lovelette testified that a ten-year period was chosen as the payback period for the loan because he did not want to drag it out over a longer period of time and the interest rate of 6.99% was what was currently offered. (TH TR 50) Based on his understanding that the Association is exempt from Commission regulation, he testified that the wastewater system would be able to operate more efficiently without regulation in that the rates would no longer be subject to regulatory assessment fees or to other expenses of regulation. (TH TR 27-28) In its brief, the utility identified several other factors that could impact the utility's future cash flow for wastewater, including additional revenues resulting from additional meters being installed, changes in utility management, and that the debt is expected to be paid off in ten years. (LPUC BR 9-10; TH TR 17-18, 58, 119)

Several of the customers testified at the service hearing that they were fearful of incurring debt for a business of which they did not want to be a part. They were concerned that if the Association were to purchase the wastewater utility with a loan from Anbeth and were unable to

make the quarterly mortgage payments, that increased assessments for the Association members or foreclosure on the Association would be likely. (SH TR 12-103, 124-130)

OPC witness DeRonne testified that the Association would not be able to make the full mortgage payment and pay on-going wastewater system operating costs under the current rates. She provided an analysis of the ability of the Association to make the annualized mortgage payments (\$26,780) in addition to the costs of operating the wastewater system with the wastewater revenues approved in the staff assisted rate case. The analysis indicates an annual cash shortfall of \$1,939 assuming the utility collects its approved rates from all customers. An additional cash shortfall of \$21,591 was estimated based on Highvest not paying for wastewater service for its rental lots. Her analysis noted that depreciation, a non-cash expense, was excluded in estimating the cash shortfall. She also noted that the analysis does not consider possible additions that may be needed for capital improvements. (TH TR 79-83; EXH 9) Ms. DeRonne expressed concern that Highvest may not pay for utility service on its lots, because of its history of not paying for service until November 2003. Since the Highvest lots represent approximately 62% of the platted lots in Camp Florida, neither the Association nor any other company could forego such a high portion of its revenue and continue to remain financially viable. (TH TR 72-74)

Mr. Lovelette testified that the board of the Association would have a fiduciary duty to the members that would prevent the members of the board from deciding not to charge Highvest for its water and wastewater service, even if a majority of the members voted not to charge Highvest. He further testified that if Highvest did not pay, its service would be terminated. However, he conceded that when he was responsible for running the water and wastewater utilities, as Woodlands or LPUC, he never cut off service to Highvest during the months Highvest was not making its payments. (TH TR 122-124) Mr. Lovelette also testified that Highvest has been paying for utility service since November, 2003. (TH TR 36) Mr. Lovelette also testified that LPUC provides water service to Anthony Cozier for his personal residence. However, Mr. Cozier does not pay for water service. (TH TR 45)

Technical and Financial Ability. According to the application, the Association will retain the experienced and knowledgeable staff of LPUC to operate the wastewater system assets in accordance with industry standards. LPUC has the technical ability to render reasonably sufficient, adequate and efficient service. (EXH 7) Mr. Lovelette testified that the Association wants to hire someone else to run the day-to-day operations of the utility and he would assist with the transition to the replacement. (TH TR 17, 52)

A review of the Association's financial statement for 2003 shows negative earnings for that year. (EXH 3) In its brief LPUC states that if there is any shortfall of the wastewater earnings, there is operating income from the water system to offset any shortfall. (LPUC BR 10)

Fifteen customers spoke at the customer service hearing and most expressed concerns about Mr. Cozier's management and control of the utility and the Association. In particular, they testified that they had filed a Circuit Court case in which they sued Mr. Cozier for unethical business practices and breach of fiduciary duty with respect to the Association property. The customers were adamant that they did not want to be in the utility business or in any other

business with which Mr. Cozier was associated. One customer, Mr. Cozier, spoke in favor of the transfer. (SH TR 12-130)

Modifications. During the technical hearing, Ms. DeRonne was asked what could be modified about the transfers to the Association to cause the Association members to want the transfers to take place. The suggestions discussed included the bylaws being modified to allow for one vote per owner within Camp Florida, an independent manager of the utility being hired, and \$100,000 of foregone revenue being infused into cash reserves. (TH TR 108-113) In response, LPUC's brief included a statement that LPUC was willing to restructure the transaction to leave the wastewater assets in LPUC when its stock is sold to the Association. (LPUC BR 11) While this might not be a solution, staff believes this might be a good starting point for future discussions.

Conclusion. Although the utility has filed the information required by Rule 25-30.037, Florida Administrative Code, the Commission must consider whether the transfer is in the public interest based on the buyer's financial and technical ability to maintain and operate the utility and in consideration of any other public interest factors that may have a bearing on the proposed transfer, as discussed in Issue 4. Although there do not appear to be any significant problems with the operational condition of the utility, there are serious concerns regarding the Association's financial and managerial abilities, particularly with respect to the repayment of the loan to Highvest and the customers' concerns with respect to Mr. Cozier's business practices.

The contract for the transfer of the wastewater system offered a mortgage to the Association for 100% financing of the \$191,523 purchase price for 10 years at 6.99% interest. This appears to be an extremely short pay back period regardless of whether the utility is regulated or exempt. Even if all customers pay the utility's authorized rates, it is unclear whether those rates are sufficient to provide the cash flow needed to make the mortgage payments and fund the wastewater operating expenses.

As discussed in Issue 2, Woodlands, LPUC, Highvest, Camper Corral, Inc., Anbeth, and the Association are all related entities. Mr. Lovelette's testimony that the board of the Association has a fiduciary duty to require Highvest to pay for its water and wastewater service is not compelling because those same individuals, as officers and directors of Woodlands and LPUC, have historically not required Highvest to pay for water and wastewater service. Mr. Cozier's and Mr. Lovelette's past business practices have shown that they do not always put the utility and its customers first in making business decisions. Further, based on Mr. Lovelette's testimony, the Association plans to replace him at some point, but no testimony was offered as to who the replacement might be.

Based on the record, assuming the Commission approves staff's recommendation in Issue 2 to transfer the utility from Woodlands to LPUC, staff recommends that the Association has not shown that it has the financial and managerial ability to operate the utility. The transfer of facilities from LPUC to the Association is not in the public interest and should not be approved. If the Commission approves staff's recommendation in Issue 1 and finds that the Association is not exempt, then even if the transfer is approved, the certificate should not be cancelled.

Issue 7: Should the Commission approve the transfer of majority organizational control of L.P. Utilities Corporation from AnBeth Corporation to Camp Florida Property Owners Association, Inc.?

Recommendation: No. The transfer of the majority organizational control of LPUC from Anbeth to the Association is not in the public interest and should not be approved. (Clapp, Redemann)

Position of the Parties

LPUC: Yes.

OPC: No. The facts of this case are such that the Commission should not approve this transfer as in the public interest or determine that the transferee will fulfill all of the obligations of the utility.

Staff Analysis: The issues with respect to the proposed transfer of majority organizational control of LPUC from Anbeth Corporation to the Association are the same as those associated with the proposed transfer of wastewater facilities from LPUC to the Association as discussed in Issue 6. The utility maintains that the transfer is in the public interest because the customers will have direct control over the utility. The customers remain concerned about the ability of Highvest to control the utility through control of the Association, Highvest's failure to pay for utility service, and incurring debt for a business of which the customers will have limited control. (SH TR 12-130; TH TR 73-74)

LPUC applied for a transfer of majority organizational control of LPUC from Anbeth to the Association on October 20, 2003. The contract is contingent on the closing of the water and wastewater systems. (EXH 7) The application has met the minimum filing requirements of section 367.071, Florida Statutes, and Rule 25-30.037, Florida Administrative Code.

Purchase Price and Financing. A written contract for the transfer of the stock in LPUC is included with the application. LPUC witness Lovelette testified that the purchase price for the LPUC stock is equal to the value of the water rate base of \$189,086, less a deduction of \$89,086, which is in consideration of the utility assuming the obligation to pay refunds.⁵ Because LPUC has been making the refunds, the purchase price of the stock will be increased by the amount of the refunds paid as of the effective date of the sale of the stock. The purchase price will not exceed the value of the rate base set by the Commission in the SARC order. According to the application, at closing, LPUC will be debt free except for the refund obligation. Mr. Lovelette testified that the purchase is to be funded by the Association through a special assessment of \$261.78 per lot for each of 382 lots. Because LPUC has been making the refunds, the purchase price of the stock will increase and the special assessment to the property owners will also increase if the transfer is approved. (TH TR 28-29, 43, 54-55; EXH 7)

⁵ The water rate base of \$189,086 was established in Docket No. 020010-WS. See, Order No. PSC-02-1739-PAA-WS, and Order No. PSC-03-1051-FOF-WS.

Technical and Financial Ability. As discussed in Issue 6, the utility's application indicated that the Association intends to retain the current staff of LPUC which has demonstrated the technical ability to run the utility. However, Mr. Lovelette testified that the Association intends to replace him at some point, but offered no testimony as to who that replacement might be. (TH TR 52) With respect to financial ability, pursuant to Order No. PSC-03-1051-FOF-WS, LPUC was ordered to refund \$78,268 plus interest to the 150 residential customers who own lots in the park and the 33 residential customers outside the park. Mr. Lovelette testified that the \$43.88 monthly refunds, most of which are credits to the customer bills, will be completed in September, 2004. (TH TR 25, 39) Ms. DeRonne testified that if the transfer were allowed to go through as proposed, because of significant credit balances on most of the customers' accounts, a significant period of time would pass prior to these customers actually paying a utility bill, creating a cash flow problem for the utility. (TH TR 100) Further, as also discussed in Issue 6, the financial condition of the utility has been affected by Highvest's historical failure to pay for water and wastewater service, although Mr. Lovelette testified that Highvest began paying for service in November, 2003. (TH TR 36)

Conclusion. As discussed in Issue 6, although the utility has filed the information required by Rule 25-30.037, Florida Administrative Code, the Commission must consider whether the transfer is in the public interest based on the buyer's financial and technical ability to maintain and operate the utility and in consideration of any other public interest factors that may have a bearing on the proposed transfer. There do not appear to be any significant problems associated with the operational condition of the utility. However, there are concerns with respect to the financial and managerial viability of the utility.

The contract for the transfer of majority organizational control of LPUC is offered as a cash transaction funded by a special assessment on the Association property owners. While the assessment was initially established as \$261.78 for each of 382 lots, as LPUC makes the refunds, the purchase price will increase from \$100,000 to \$189,086. (TH TR 28, 54-55; EXH 7) The proposed transfer of stock from Anbeth to the Association would put the homeowners in the position of potentially having to help fund utility cash flow shortfalls resulting from the water refund and Highvest's failure to pay for utility service.

While the application indicates that the stock of LPUC is being transferred without any existing debt, it is unclear as to how that will be accomplished. As discussed in Issue 2, LPUC's current mortgage for the utility is \$409,959 and no payments were made on the loan during 2003. (TH TR 47) The proposed purchase price for the wastewater assets is \$191,523 and the most the Association might pay for the stock in LPUC (for the remaining water assets) is \$189,086. These amounts fall short of the balance of the LPUC mortgage by approximately \$29,000. No testimony was offered as to how that shortfall would be addressed.

The concerns regarding managerial ability with respect to the transfer of control of the stock in LPUC to the Association are the same as those discussed in Issue 6. Woodlands, LPUC, Highvest, Camper Corral, Inc., Anbeth, and the Association are all related entities (EXH 10) and Mr. Cozier's and Mr. Lovelette's past business practices have shown that they do not always put the utility and its customers first in making business decisions. Although the utility's application indicated that the Association intends to retain the current staff of LPUC, as discussed in Issue 6,

Mr. Lovelette testified that the Association intends to replace him at some point, but offered no testimony as to who that replacement might be.

Based on the record, assuming the Commission approves staff's recommendation in Issue 2 to transfer the utility from Woodlands to LPUC, staff recommends that the Association has not shown that it has the financial and managerial ability to operate the utility. The transfer of the majority organizational control of LPUC from Anbeth to the Association is not in the public interest and should not be approved. Again, staff notes that the proposed contract is contingent upon the closing of the water and wastewater systems.

Docket No. 030102-WS

Date: October 21, 2004

Issue 8: Should this docket be closed?

Recommendation: Upon the expiration of the appeal period, if no party timely appeals the order, and upon the filing and staff's approval of the revised tariff sheets, this docket should be closed. (Fleming, Brown)

Staff Analysis: Upon the expiration of the appeal period, if no party timely appeals the order, and upon the filing and staff's approval of the revised tariff sheets, this docket should be closed.

ATTACHMENT A

L. P. UTILITES CORPORATION

HIGHLANDS COUNTY

WATER SERVICE AREA

Commence at the Northwest corner of Section 17, Township 37 South, Range 30 East, Highlands County, Florida; thence East along the North line of said Section 17, 824 feet, more or less, to the intersection of the North line of said Section 17 and the East right-of-way line of U.S. Highway 27 extended, being the Point of Beginning; thence continue East along the said North line of Section 17, 3700 feet, more or less, to the shoreline of Lake Grassy; thence South and Southwesterly along the shoreline of said Lake Grassy, 5600 feet, more or less, to the South line of said Section 17 and the said East right-of-way line of U.S. Highway 27; thence Northwest along said East right-of-way line, 5950 feet, more or less, to the Point of Beginning.

ATTACHMENT A

L. P. UTILITES CORPORATION

HIGHLANDS COUNTY

WASTEWATER SERVICE AREA

Begin at a point on the North line of Section 17, Township 37 South, Range 30 East, Highlands County, Florida, 660 feet Easterly of the East right-of-way line of US Highway 27, as measured at right angles; thence run Easterly along the North line of Section 17 a distance of 2,975 feet more or less to the Shore line of Lake Grassy, thence run Southerly and Southwesterly along the shore line of Lake Grassy (a straight line to this point is a distance of 2,250 feet more or less) to a point that is 413.15 feet North of the South line of the Northeast 1/4 and the Northwest 1/4 of Section 17; thence run Westerly along a line 413.15 feet North of the South line of said Northeast 1/4 and 413.15 feet North of the South line of said Northwest 1/4 to a point that is 600 feet Easterly of the East right-of-way line of US Highway 27, as measured at right angles; thence run Northwesterly, 660 feet East of and parallel to the Easterly right-of-way line of US Highway 27 to the Point of Beginning. And, The North 300 feet of the South 750 feet of the West 410 feet of the East 1/2 of the East 1/2 of the Southwest 1/4 of Section 8, Township 37 South, Range 30 East, Highlands County, Florida. And, The West 210 feet of the South 450 feet of the East 1/2 of the East 1/2 of the SW 1/4 of Section 8, Township 37 South, Range 30 East, Highlands County, Florida.

Township 37 South, Range 30 East, Section 17- That portion of Lake Placid Camp Florida Resort, as recorded in Plat Book 15, Page 93, Highlands County, Florida, previously being part of the territory described in Highlands Utilities Corporation service area, being more particularly described as follows: Commence on the North line of Section 17, Township 37 South, Range 30 East, 660 feet Easterly of, as measured at right angles to the East right of way line of U.S. 27; thence Southeasterly along a line that is 660 feet East of and parallel with the said East right of way line, 300 feet more or less to the North line of said Lake Placid Camp Florida Resort and the **Point of Beginning**; thence continuing South easterly along the line 660 feet East of and parallel with said right of way line, 778.39 feet more or less to the South line of said Lake Placid Camp Florida Resort; the following 15 calls are along the boundary of said Lake Placid Camp Florida Resort, (1) thence N81°58'06"W, 29.61 feet; (2) thence N35°18'13"W, 256.10 feet; (3) thence S88°19'15" W, 135.89 feet; (4) N69°05'48"W, 8.86 feet; (5) thence S65°07'11"W, 291.84 feet; (6) thence N24°52'49"W, 174.00 feet; (7) thence S65°07'11"W, 165.76 feet to said right of way line; (8) thence N24°49'46"W, 157.95 feet; (9) thence N65°08'22"E, 25.57 feet; (10) thence N24°51'38"W, 219.42 feet; (11) thence N80°20'00"E, 107.91 feet; (12) thence N87°00'00"E, 218.15 feet; (13) thence N 50°00'00"E, 166.49 feet; (14) thence N75°29'10"E, 115.12 feet; (15) thence along the arc of a curve to the right with a central angle of 08°24'16", whose radius is 377.51 feet, with a chord bearing of N79°41'18"E, and a chord distance of 55.33 feet, an arc distance of 55.38 feet to the **Point of Beginning**.