

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: January 20, 2005

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

FROM: Division of Economic Regulation (Brady, Kaproth)
Office of the General Counsel (Jaeger)

RE: Docket No. 041339-WS – Application for name change on Certificate Nos. 303-W and 252-S in Volusia County from Tymber Creek Utilities to Tymber Creek Utilities, Incorporated.

AGENDA: 02/01/05 – Regular Agenda – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\041339.RCM.DOC

Case Background

On November 24, 2004, Tymber Creek Utilities (Tymber Creek or utility) filed a request to change the name on Certificate Nos. 303-W and 252-S to Tymber Creek Utilities, Incorporated. Tymber Creek is a Class C water and wastewater utility serving 447 water and 415 wastewater customers in Volusia County. It is located in a water resource caution area of the St. Johns River Water Management District. In its 2003 annual report, the utility reported combined gross revenues of \$245,174 and a combined net operating loss of \$15,786.

Tymber Creek was granted its water and wastewater certificates in 1978.¹ There have been no other certification actions on behalf of the utility. When the utility was certificated, it was a partnership. In 1994 the utility reorganized as a Subchapter S corporation called Tymber Creek Utilities, Incorporated. The name change was discovered in the staff assisted rate case in

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

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Docket No. 040300-SU. Upon being informed that a change in name required Commission approval, the utility filed the application in this docket.

The purpose of this memorandum is to address the utility's failure to notify the Commission before changing its name as well as the utility's application for a name change. The Commission has jurisdiction pursuant to Section 367.1214, Florida Statutes.

Discussion of Issues

Issue 1: Should Tymber Creek Utilities be ordered to show cause in writing, within 21 days, why it should not be fined for its failure to comply with the requirements of Section 367.1214, Florida Statutes?

Recommendation: No. Tymber Creek Utilities should not be ordered to show cause. (Jaeger)

Staff Analysis: Section 367.1214, Florida Statutes, requires that a water and wastewater utility notify the Commission and its customers before changing its name. Effective February 21, 1994, the utility recorded with the Florida Department of State, Division of Corporations, a change in organization from a partnership to a corporation and a resulting change in name from Tymber Creek Utilities to Tymber Creek Utilities, Incorporated.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t 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). Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, Florida Statutes, or any lawful order of the Commission. By failing to comply with the provisions of Section 367.1214, Florida Statutes, the utility's acts were "willful" in the sense intended by Section 367.161, Florida Statutes. In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., 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 "willful" implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Staff believes that Tymber Creek has admitted to violating Section 367.1214, Florida Statutes, but that there are mitigating circumstances. Since neither the partners nor the partners' share changed as a result of the reorganization, the utility stated it was unaware of the requirement to notify the Commission and its customers prior to changing its name. In addition, the Commission did not receive any customer inquiries or complaints. Finally, once aware of the violation, the utility immediately took steps to file the necessary documents to request the Commission's approval of the name change. Due to the length of time the utility has operated under the changed name, the fact that it apparently caused no customer confusion, and the utility's willingness to immediately correct its error, staff recommends that no show cause proceeding be initiated against Tymber Creek for its apparent violation of Section 367.1214, Florida Statutes.

Issue 2: Should Tymber Creek Utilities' notice of change of name on Certificate Nos. 303-W and 252-S to Tymber Creek Utilities, Incorporated be approved?

Recommendation: Yes. The name on Certificate Nos. 303-W and 252-S be should be changed to Tymber Creek Utilities, Incorporated effective the date of the Commission's vote. A recorded warranty deed, or long-term lease, reflecting the name change should be provided within 30 days from the date of the Commission's order for the land upon which the utility's wastewater treatment plant resides. The utility's revised tariffs should be effective for services rendered on or after the stamped approval date. (Brady, Kaproth, Jaeger)

Staff Analysis: On November 24, 2004, an application was filed on behalf of the utility to change the name on its certificates to Tymber Creek Utilities, Incorporated. The application was filed pursuant to Rule 25-30.039, Florida Administrative Code, which provides for changes in name only, with no change in the ownership or control of the utility or its assets.

The reason given for the name change was to recognize that the utility had reorganized from a partnership to a Subchapter S corporation. A statement was provided by the utility's Corporate Secretary attesting that neither the ownership nor the ownership percentage of the utility assets changed as a result of the name change. Staff would clarify that, while the utility was reorganized from a partnership to a corporation, the prior owners of the partnership, Messrs. J. Stanley, Steve P., and Ronald E. Shirah, each retained their 1/3 interest in the utility. The application included a copy of the utility's proposed water and wastewater tariffs showing the name change and returned the applicant's current water and wastewater certificates.

The application also included documentation from the Florida Department of State, Division of Corporations, showing recognition of the name change. The effective date of the name change was February 21, 1994. Issue 1 addresses the utility's failure to timely notify the Commission of the change in name. As required by Rule 25-30.039(2)(f), Florida Administrative Code, the utility provided a proposed notice to be given to customers. Staff believes the utility should also be required to provide a recorded warranty deed, or long-term lease, under the new name of the utility for the land upon which the utility's wastewater treatment plant resides. Water service is provided by the City of Ormond Beach.

The utility is current with annual reports and regulatory assessment fees. There are no outstanding fees, penalties, or interest, and no refunds are due. Staff has also verified that the utility's wastewater systems are in environmental compliance with the Florida Department of Environmental Protection and there are no water use issues with regard to the St. Johns River Water Management District.

Staff, therefore, recommends that the name on Certificate Nos. 303-W and 252-S be changed to Tymber Creek Utilities, Incorporated effective the date of the Commission's vote. A recorded warranty deed, or long term lease, reflecting the name change should be provided within 30 days from the date of the Commission's order for the land upon which the utility's wastewater treatment plant resides. The revised tariffs should be effective for services rendered on or after the stamped approval date.

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Issue 3: Should the docket be closed?

Recommendation: No. The docket should remain open pending receipt of a recorded warranty deed, or long-term lease, for the land upon which the utility's wastewater treatment plant resides. Upon receipt of such document, the docket should be administratively closed. (Jaeger)

Staff Analysis: The docket should remain open pending receipt of a recorded warranty deed, or long-term lease, for the land upon which the utility's wastewater treatment plant resides. Upon receipt of such document, the docket should be administratively closed.