

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: October 20, 2005

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

FROM: Office of the General Counsel (Brown)
Division of Economic Regulation (Johnson, Rieger)

RE: Docket No. 050499-WS – Application for authority to transfer majority organizational control of Utilities, Inc. from Nuon Global Solutions USA, B.V. to Hydro Star, LLC.

AGENDA: 11/01/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050499.RCM.DOC

Case Background

On July 25, 2005, Utilities, Inc. (Utilities, Inc. or company) filed an Application for authority to transfer majority organizational control of the company from Nuon Global Solutions USA, B.V. (Nuon) to Hydro Star, LLC. (Hydro Star) The application proposes the transfer of the issued stock of Utilities, Inc., which controls the stock of 16 utilities certificated by the Commission to provide water and wastewater service in Florida, from Nuon to Hydro Star by early 2006, after all regulatory approvals have been obtained. A list of the Utilities, Inc. regulated utilities in Florida that will be affected by the stock transfer is appended to this recommendation as Attachment A. Utilities, Inc. asserts that the acquisition of Nuon's stock by

Hydro Star does not entail any change in direct ownership or control of the Florida utilities and will not cause any change in management or loss of operational expertise.

With its application, Utilities, Inc. also filed a Petition for variance or waiver of Rules 25-30.037(3)(i), (j) and (k), and 25-30.030(4)(c), (5), (6) and (7), Florida Administrative Code, the Commission's rules governing transfers. Initially Utilities, Inc. asked for expedited treatment of the petition, but withdrew that request by letter dated August 18, 2005. Notice of the rule waiver request was published in the August 26, 2005, Florida Administrative Weekly. No comments on the rule waiver petition have been filed.

Staff is currently reviewing Utilities, Inc.'s substantive application and expects to bring a recommendation at the end of the month. This recommendation will only address the company's request for rule waivers. The Commission granted Utilities, Inc. a similar waiver of Rules 25-30.037(3)(i), (j) and (k), and 25-30.030(4)(c), (5), (6) and (7), Florida Administrative Code, when Nuon acquired majority organizational control of Utilities, Inc. in 2001.¹ The Commission has jurisdiction over this matter through Sections 367.071, and 120.542, Florida Statutes.

¹ See, Order No. PSC-01-1647-PAA-WS, issued August 13, 2001, in Docket No. 010887-WS, In re: Application for approval of merger of Utilities, Inc. and Nuon Acquisition Sub, Inc., an Illinois Corporation, and for determination of the Commission's jurisdiction of such merger.

Discussion of Issues

Issue 1: Should the Commission grant Utilities, Inc.'s Petition for waiver of Rules 25-30.037(3)(i), (j) and (k), and 25-30.030(4)(c), (5), (6) and (7), Florida Administrative Code?

Recommendation: Yes, the Commission should grant Utilities, Inc.'s Petition for waiver of Rules 25-30.037(3)(i), (j) and (k), and 25-30.030(4)(c), (5), (6) and (7), Florida Administrative Code.

Staff Analysis: The rule provisions in question govern the information and notice that an applicant must provide to receive the Commission's approval of a transfer of majority organizational control.

Rule 25-30.030(4)(c), Florida Administrative Code, requires the applicant to provide notice of the proposed transfer that includes "a description using township, range and section reference" of the territory being transferred. Utilities, Inc. requests that it be permitted to send an identical, one-page notice to all of the customers of each of its 16 subsidiary utilities, without reference to a detailed territory description for each one. The notice would list the names of the individual utilities and their county of operation. Utilities, Inc. states that this abbreviated notice is appropriate in this case, because the application requests approval only for the transfer of the shares of stock of the parent companies, and no specific territory will be affected. Utilities, Inc. asserts that the underlying statutory purpose, to provide adequate notice to customers who wish to participate in the administrative process, is accomplished by the proposed abbreviated notice.

Rule 25-30.030(5), (6) and (7), Florida Administrative Code, requires that notice be sent to customers and published in newspapers of general circulation in the affected area within certain timeframes. Utilities, Inc. requests that it be permitted to mail and publish its abbreviated notice within 10 days of the date the Commission approves the notice.

Rule 25-30.037(3)(i), Florida Administrative Code, requires an applicant for approval of the transfer of majority organizational control to file evidence of ownership of the land upon which utility facilities are located. Utilities, Inc. requests a waiver of this provision because the proposed stock transfer of parent companies does not affect the title to any real estate held by the operational utility subsidiaries. Evidence of title would serve no purpose in this proceeding, and the operational utilities have provided evidence of ownership of land in other Commission certification proceedings.

Rule 25-30.037(3)(j), Florida Administrative Code, requires an applicant for approval of the transfer of majority organizational control to file an original and two copies of tariff sheets reflecting the change in ownership. Utilities, Inc. requests a waiver of this rule, because the transfer of ownership involves only the transfer of the stock of the parent company. Utilities, Inc. will retain ownership of its operational subsidiaries, and no tariff changes will be necessary.

Rule 25-30.037(3)(k), Florida Administrative Code, requires an applicant for approval of the transfer of majority organizational control to file the applicable certificates with the Commission. Utilities, Inc. explains that it is not the holder of any water or wastewater certificates. Its regulated operational subsidiaries hold the certificates, and since there will not be

any change in ownership of the operational subsidiaries, filing certificates will not serve any useful purpose.

Section 120.542, Florida Statutes, authorizes the Commission to grant variances or waivers to the requirements of its rules where the person subject to the rules has demonstrated that the underlying purpose of the statute has been or will be achieved by other means, and that strict application of the rules would cause the person substantial hardship or would violate principles of fairness. "Substantial hardship" as defined in this section means demonstrated economic, technological, legal, or other hardship.

The underlying statutes that govern the Commission's approval of the transfer of majority organizational control are sections 367.071 and 367.045, Florida Statutes. Section 367.071(1) requires Commission approval of such a transfer. Section 367.071(4) requires that the transfer application comport with the requirements of section 367.045. Section 367.045(1)(a) requires a utility to "[p]rovide notice of the actual application filed by mail or personal delivery to the governing body of the county or city affected, the Public Counsel, to the commission, and to such other persons and in such other manner as may be prescribed by commission rule." The purpose of these statutes is to ensure that the utility's actions are in the public interest and that the utility has provided timely and adequate notice of those actions to those entities that may have an interest in them. Staff believes that Utilities, Inc. will fulfill the underlying purpose of these statutes by providing notice and otherwise complying with the Commission's applicable rules as it has proposed. Strict compliance with the rules would serve no useful purpose and would cause unnecessary expense in this proceeding to approve the transfer of a parent company's stock. Staff recommends that the Commission approve the petition for waiver or variance of Rules 25-30.037(3)(i), (j) and (k), and 25-30.030(4)(c), (5), (6) and (7), Florida Administrative Code.

Issue 2: Should this docket be closed?

Recommendation: No. The docket should remain open pending the Commission's decision on the substantive aspects of the application. (Brown)

Staff Analysis: The docket should remain open pending the Commission's decision on the substantive aspects of the application.