

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for sale, assignment, or transfer of Certificates Nos. 523-W and 457-S in Sumter County from EGR Enterprises, Inc. d/b/a Wildwood Estates to LHTW Properties, Inc. d/b/a Wildwood Estates.

DOCKET NO. 961444-WS
ORDER NO. PSC-98-1571-FOF-WS
ISSUED: November 23, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER APPROVING TRANSFER AND DECLINING
TO INITIATE A SHOW CAUSE PROCEEDING

BY THE COMMISSION:

BACKGROUND

Wildwood Estates (utility) is a Class C water and wastewater utility providing service to approximately 79 mobile home customers in Sumter County. The utility reported 1997 combined gross revenues of \$12,940 and a combined net operating loss of \$27,860.

Certificates Nos. 523-W and 457-S were originally granted to Heritage Wood 'N Lakes Estates (Heritage) by Order No. 22152, issued November 6, 1989, in Docket No. 890730-WS. Heritage owned the mobile home development as well. Sometime in 1990, Freedom Federal Savings and Loan of Tampa (S&L) acquired the utility assets through foreclosure on Heritage's development. Soon thereafter, the S&L itself was taken over by the Resolution Trust Corporation (RTC). The RTC temporarily operated the utility through Sunshine State Service Company.

On April 4, 1991, the mobile home development and utility assets were acquired by EGR Enterprises, Inc. d/b/a Wildwood

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FPSC-RECORDS/REPORTING

Estates (EGR). This Commission first became aware that the original certificate holder, Heritage, no longer owned and operated the utility when it failed to file its 1990 annual report. The current owner at the time, EGR, was located and required to file a request for transfer which was approved by Order No. PSC-92-0335-FOF-WS, issued May 11, 1992, in Docket No. 911054-WS. On November 30, 1993, a little over a year after the transfer to EGR was approved, EGR sold the mobile home development and the utility assets to LHTW Properties, Inc. d/b/a Wildwood Estates (LHTW) without prior Commission notification and approval.

Since LHTW continued to file annual reports and regulatory assessment fees (RAFs) for the utility under the same d/b/a and from the same address as EGR, the Commission did not become aware that a transfer had occurred until March of 1996 when the Division of Administration forwarded to the Division of Water and Wastewater name change information received from one of its periodic requests for updated information. Upon review, it was determined that a transfer of certificates had occurred, and the current owner, LHTW, was required to file a request for transfer. After several filing extensions, an application for transfer of Certificates Nos. 523-W and 457-S from EGR to LHTW was filed on December 3, 1996.

While preparing discovery at the conclusion of the transfer audit, our staff learned there had been at least one protest to the application for transfer. The letter of protest apparently had not been recorded in the docket file because the utility gave notice to its customers too far in advance of the filing. In January of 1998, the utility was required to renotice the transfer, and the renoticing occurred on March 16, 1998. Three timely protests were filed, and the matter was set for hearing in October of 1998.

Believing that most of the issues raised in the letters of protest were beyond the scope of our authority, an informal customer meeting was held at Wildwood Estates on May 14, 1998. Subsequent to the meeting, all protests to the transfer were voluntarily withdrawn, and the hearing dates were canceled. On August 24, 1998, the utility completed its remaining filing requirements.

SHOW CAUSE

As stated earlier, on November 30, 1993, EGR sold the mobile home development and utility assets to LHTW without prior Commission notification and approval. Pursuant to Section

367.071(1), Florida Statutes, "No utility shall sell, assign, or transfer its certificate of authorization, facilities, or any portion thereof, . . . without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest." Section 367.071(2), Florida Statutes, provides that the Commission "may impose a penalty pursuant to s. 367.161 when a transfer occurs prior to approval by the commission."

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 rule or order of the Commission. Each day that such refusal or violation continues constitutes a separate offense.

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). Thus, any intentional act, such as the utility's failure to obtain Commission approval prior to the transfer of the utility, would meet the standard for a "willful violation." In 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.

As discussed previously, EGR originally acquired the utility assets in April of 1991 from the RTC which had acquired the assets from a failed S&L which, in turn, had foreclosed on the original certificate holder, Heritage. The transfer of the utility assets to EGR was approved by Order No. PSC-92-0335-FOF-WS, issued May 11, 1992, in Docket No. 911054-WS. In that order, we decided not to initiate show cause proceedings since EGR had filed the application for transfer shortly after being advised of the statutory requirement.

However, on November 30, 1993, a little over a year after the transfer of the utility to EGR was approved, another transfer occurred without prior Commission approval when EGR sold the mobile home development and utility assets to LHTW. Such an unapproved transfer is an apparent violation of Section 367.071, Florida Statutes. We are unaware of any mitigating circumstances which would explain EGR's failure to obtain prior Commission approval and believe this apparent violation of Section 367.071, Florida Statutes, is egregious.

However, we subsequently have learned that EGR Enterprises, Inc., was administratively dissolved in 1994 by the Florida Department of State, Division of Corporations. Therefore, if we were to initiate a show cause proceeding which culminated in the imposition of a fine, only the directors or shareholders could be held responsible for payment of the fine. However, because the statutes of limitations have run, we do not believe that even EGR's directors or shareholders could be held responsible now.

A director may be held liable for an unlawful distribution if made in violation of his duties set forth in Section 607.0830, Florida Statutes. Section 607.0834, Florida Statutes. The action to hold the director liable must be commenced within 2 years after the date on which the effect of the distribution was measured. Section 607.0834(3), Florida Statutes. Pursuant to Section 607.1406(13), Florida Statutes, a shareholder of a corporation is not liable for any claim against the corporation which is brought after three years of the effective date of dissolution. Accordingly, we do not believe any entity or person exists which could respond to the show cause order or be held responsible for any fines which might subsequently be imposed if we initiated show cause proceedings. Because EGR has been dissolved and because the statutes of limitations have run, we find that a show cause proceeding would not be cost effective. Accordingly, we decline to initiate a show cause proceeding.

APPLICATION FOR TRANSFER

The application as filed and amended is in compliance with Section 367.071, Florida Statutes, regarding the sale, assignment, or transfer of a certificate of authorization, with the exception that the transferred has already occurred as discussed previously. It contains the appropriate filing fee pursuant to Rule 25-30.020, Florida Administrative Code. Pursuant to Rule 25-30.037(2)(t), Florida Administrative Code, LHTW contacted the seller in an

attempt to locate the utility's original certificates but determined they were no longer available. As for the other requirements of the rules for authority to transfer, the application contained the following information:

As previously discussed, the original notice to the utility's customers was not in compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code, in that the notice was given too far in advance of the application. As a consequence, a timely protest was filed by Ms. Dorothy S. Williams in November of 1996 but was not recorded in the docket file as a protest. After confirming the utility had given notice to customers inappropriately, the utility was required to renotice the transfer in January of 1998 which the utility did in March of 1998. Three timely customer protests were filed, and the matter was set for hearing in October of 1998.

Believing most of the issues raised in the letters of protest to be beyond the scope of our authority, an informal customer meeting was held at Wildwood Estates on May 14, 1998. As a result of that meeting, the customers who had protested the transfer agreed to withdraw their protest as long as the utility filed monthly progress reports on the status of the negotiations for connection to the City of Wildwood. Accordingly, we find it appropriate to acknowledge the withdrawal of protests by these utility customers.

As required by Rules 25-30.037(2)(g) through (i) and (k), Florida Administrative Code, the application was accompanied by the Purchase and Sale Agreement which contained the provisions required by the rules. The purchase and sale was for the entire mobile home community of which the utility facilities were a relatively small part. The purchase price for all of Wildwood Estates' properties was \$2,541,527. Financing was provided by the assumption of a \$1,572,000 mortgage and the issuance of 950,000 shares of common stock by Leisureways Marketing Ltd., (Leisureways), the parent company of LHTW. Because the seller of the utility was acquiring the purchaser's stock, rather than the other way around, the transaction is not a transfer of majority control of utility stock. LHTW is 100% owned by Leisureways and is reliant on the parent for the assumption of the mortgage as well as for the issuance of common stock. Since the utility does not have a service availability policy and does not collect deposits or miscellaneous fees, these matters were not addressed in the Purchase and Sale Agreement.

The effective date of the transfer was November 30, 1993. Since that date, the utility's annual reports and RAFs have been paid by LHTW under the utility's former d/b/a of Wildwood Estates. LHTW is current on annual reports and RAFS and has no outstanding fees, penalties or interest.

Pursuant to Rule 25-30.037(2)(q), Florida Administrative Code, the Purchase and Sale Agreement contains a recorded warranty deed as evidence that LHTW now owns the land upon which the utility facilities are located.

Pursuant to Rules 25-30.037(2)(p) and (j), Florida Administrative Code, the utility provided information regarding the its environmental condition and experience. Wildwood Estates is the only utility owned and operated by LHTW and its parent company. At the time of the filing, the utility was under a Florida Department of Environmental Protection (FDEP) Warning Letter, dated August 1, 1996, concerning issues related to the utility's wastewater treatment system. The utility has responded with an action plan developed by Barnes, Ferland and Associates, Inc., in which it is considering either connecting to the City of Wildwood for wastewater treatment or building additional effluent disposal facilities.

During the pendency of the application, the utility first chose the latter option and constructed two new percolation ponds. Both ponds failed several months after construction in late 1997. Since that time the utility has been actively negotiating with the City of Wildwood for bulk water and wastewater service. The utility is also undergoing all tests and making all repairs required by the City of Wildwood as part of additional negotiations for the City to acquire the utility's internal lines as well. Meanwhile, the utility facilities are being managed by an operator licensed by the FDEP. The FDEP is satisfied with the work being performed by the utility and with the pace of the utility's negotiations with the City of Wildwood for eventual wastewater treatment.

Pursuant to Rule 25-30.037(2)(j), Florida Administrative Code, LHTW provided information regarding its financial ability. As noted earlier, LHTW's 1997 annual report shows a net operating loss of \$27,860. LHTW's balance sheet for year-end 1997 also shows a cumulative \$3,000,000 deficit for its Wildwood Estates properties which has been covered by a transfer from Leisureways. Leisureways is a marketing company based in Vancouver, Canada. According to

Leisureways' annual reports, it is committed to its investment in Wildwood Estates which is its only manufactured housing venture to date. Leisureways' annual reports also show continued year-end deficits. LHTW explains that its parent's deficits are due to the fact that Leisureways is currently in the process of developing alternative business opportunities. LHTW further states that Leisureways has been able to finance itself through the issuance of securities and will continue to do so, as necessary.

We believe that LHTW has been demonstrating since November of 1993 that it can meet its financial responsibilities with regard to utility operations even though the costs have been considerable. If, for some reason the transfer of all of the utility's facilities to the City of Wildwood does not occur, a staff-assisted rate case would be able to bring the utility's revenues in line with its costs.

As required by Rule 25-30.037(2)(j), Florida Administrative Code, the buyer provided a statement that it intends to fulfill the commitments, obligations and representations of the seller with regard to utility matters. LHTW further stated that it has continually supported, maintained and improved the utility since the acquisition late in 1993 and intends to continue to do so as long as the utility facilities are owned by LHTW.

Based on all the above, we find that the transfer of Certificates Nos. 523-W and 457-S from EGR d/b/a Wildwood Estates to LHTW d/b/a Wildwood Estates is in the public interest and is approved to serve the territory described in Attachment A. The name on the certificates shall remain unchanged. LHTW also is put on notice that the transfer of any utility facilities to the City of Wildwood or any other entity will require prior Commission approval.

RATE BASE

Primarily in an attempt to capture utility books and records, an audit was conducted to establish rate base as of November 30, 1993. As was the case in the previous audit for the transfer of the utility from Heritage to EGR, rate base could not be established for transfer purposes.

Rate base for the utility has never been established. Residents of the mobile home park own their lots and pay a monthly maintenance fee which includes water and wastewater services, as

well as garbage collection and common area maintenance services. Increases in the maintenance fee are governed by the lot owners' covenants and restrictions. The utility's water and wastewater rates are flat rates that were set based on the maintenance fees at the time the utility's certificates were granted by Order No. 22152, issued November 6, 1989, in Docket No. 890730-WS.

The audit revealed that LHTW was not maintaining an accounting system which would allow determination of the water and wastewater rate bases. According to the audit, the pre-1994 accounting records maintained at Wildwood Estates contained only operations information and correspondence with no rate base documentation. Also, the system of accounts maintained by LHTW did not have utility plant accounts. The only plant documents that could be located were operating diagrams for the Marloff Sewer Treatment plant and a set of as-built plans for the two new percolation ponds that were constructed after the transfer date. According to LHTW's response to our staff's discovery:

The [Commission's auditing] requirements have been provided to our finance department and steps have been taken to separate costs more finitely in order to track specific expenses with respect to the facilities.

The final audit opinion is that an original cost study will be required in order to establish rate base for Wildwood Estates. However, the utility is not requesting nor do we find it necessary to require that such a study be undertaken at this time for purposes of recognizing this transfer.

Based on the foregoing, we do not find it appropriate to establish rate base at the time of the transfer. In addition, LHTW is placed on notice that it will be required to conduct an original cost study upon the filing of any rate petition. Finally, the utility shall maintain its books in compliance with the NARUC Uniform System of Accounts.

Acquisition Adjustment

An acquisition adjustment results when the purchase price differs from the original cost calculation adjusted to the time of the acquisition. Since rate base for the utility at the time of the transfer cannot be established, a comparison is not possible. For informational purposes, LHTW valued the utility assets at

\$168,165 in the overall purchase price of \$2,541,527 for the Wildwood Estate properties.

RATES AND CHARGES

The utility's rates were established at the time its original certificates were granted by Order No. 22152. At that time, the monthly maintenance fee was \$65.00. According to information in the original certificate application, \$13.65 was attributable to water and wastewater service. As a result, we approved a monthly flat rate of \$5.85 for water and \$7.80 for wastewater. The utility's original tariffs did not include any service availability charges, miscellaneous service charges or customer deposits. No changes to the utility's original rates and charges have been approved.

However, pursuant to Commission rules, Order No. 22152 required the original utility owner, Heritage, to bill utility services separately from the remaining maintenance fee. Apparently this has never been done because the utility does not send out regular bills. The amount of the monthly maintenance fee is fixed and known. The only time customers receive any billing correspondence is when the monthly maintenance fee increases. The monthly maintenance fees, which are controlled by the lot owners' covenants and restrictions, have increased from \$65.00 in 1989 to \$120 in 1997.

In order to verify that increases in monthly maintenance fees are not being driven by increases in water and wastewater costs, we requested income and expense statements back through 1995 to compare maintenance cost components. During this period, total maintenance costs increased from \$127,482 to \$177,401. However, the relative percentage of utility costs, including electricity, decreased from 34.3% to 18%. In Order No. 22152 the percentage of water and wastewater costs was estimated to be 21%.

Aware that the utility was incurring extraordinary costs in environmental compliance, we placed the utility on notice by letter dated June 5, 1997 that recovery of any expenses relating to water and wastewater services must be approved by the Commission and incorporated into the utility's tariffs. It was further explained that if and when the utility intends to recover its expenses, it should apply for a staff assisted rate increase. While the utility estimates it has spent in excess of \$78,000 for the new containment ponds, LHTW has chosen not to pass these costs onto its customers.

Rule 25-9.044(1), Florida Administrative Code, provides that:

In case of change of ownership or control of a utility which places the operation under a different or new utility . . . the company which will thereafter operate the utility business must adopt and use the rates, classification and regulations of the former operating company [unless authorized to change by the Commission]
. . . .

LHTW has specifically not requested any change in the utility's existing rates. Accordingly, LHTW shall continue charging the existing monthly flat rate of \$5.85 for water and \$7.80 for wastewater until authorized to change by this Commission. In the absence of monthly bills, the utility shall indicate, in any correspondence with its customers relating to maintenance fee increases, the fixed amount of the fees relating to water and wastewater service. LHTW has filed a tariff reflecting the transfer of ownership. The tariff shall be effective for services provided or connections made on or after the stamped approval date.

CLOSING OF DOCKET

No further action is required, and this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the withdrawal of the customers' protests is hereby acknowledged. It is further

ORDERED that the transfer of Certificates Nos. 523-W and 457-S in Sumter County from EGR Enterprises, Inc. d/b/a Wildwood Estates to LHTW Properties, Inc. d/b/a Wildwood Estates is hereby approved. It is further

ORDERED that the name on the certificates shall remain unchanged. It is further

ORDERED that a show cause proceeding shall not be initiated against EGR Enterprises, Inc. d/b/a Wildwood Estates for violation of Section 367.071, Florida Statutes. It is further

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ORDERED that each of the findings in the body of this Order is hereby approved in every respect. It is further

ORDERED that all matters contained in the schedules and attachment attached hereto are by reference incorporated herein. It is further

ORDERED that rate base shall not be established at this time. It is further

ORDERED that no acquisition adjustment shall be made at this time. It is further

ORDERED that LHTW Properties, Inc. d/b/a Wildwood Estates shall maintain its books in compliance with the NARUC Uniform System of Accounts. It is further

ORDERED that LHTW Properties, Inc. d/b/a Wildwood Estates shall continue charging the rates and charges contained in the tariff of EGR Enterprises, Inc. d/b/a Wildwood Estates until authorized to change by this Commission in a subsequent proceeding. It is further

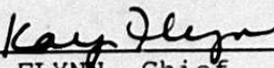
ORDERED that all rates and charges shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets. It is further

ORDERED that in the absence of monthly bills, the utility shall indicate, in any correspondence with its customers relating to maintenance fee increases, the fixed amount of the fees relating to water and wastewater service. It is further

ORDERED that this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 23rd
day of November, 1998.



KAY FLYNN, Chief
Bureau of Records

(S E A L)

BLR

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

TERRITORY DESCRIPTION

WILDWOOD ESTATES

SUMTER COUNTY

Township 19 South, Range 23 East
Section 16

Beginning at the NW corner of the SW 1/4 of Section 16, Township 19 South, Range 23 East, Sumter County, Florida; thence

North 00° 02'49" East along the West boundary of the NW 1/4 of said Section, a distance of 1,592.76 feet to an intersection with the South right-of-way line of State Road 44 (100 feet wide); thence

South 69° 41'51" East along said right-of-way line, a distance of 1,414.39 feet to an intersection with the East boundary of the West 1/2 of the SW 1/4 of said Section; thence

South 00° 04'47" East along said East boundary, a distance of 1,097.86 feet; thence

South 00° 02'36" East along said East boundary, a distance of 1,324.54 feet; thence

South 00° 38'18" West along said East boundary, a distance of 10.28 feet to the SE corner of Heritage Wood 'N Lakes Estates, according to the plat thereof as recorded in Plat Book 4, Pages 61 and 61A, Public Records of Sumter County, Florida; thence

South 89° 34'21" West along the South boundary of said Heritage Wood 'N Lakes Estates and a Westerly projection thereof, a distance of 946.35 feet more or less to an intersection with the East boundary of Tract D, Hearty Host Lake Resort, according to the plat thereof as recorded in Plat Book 3, Pages 57 and 57A, Public Records of Sumter County, Florida; thence

South 00° 03'20" East along said East boundary of Tract D, a distance of 27.06 feet more or less to the SE corner of said Tract D; thence

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South 89° 38'21" West along the South boundary of said Tract D, a distance of 388.84 feet to the SW corner of said Tract D; thence

North 00° 12'25" East along the West boundary of said Tract D and the West boundary of aforesaid SW 1/4, a distance of 1,353.14 feet to the POINT OF BEGINNING.