



Public Service Commission

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RECORDS AND REPORTING

DATE: JANUARY 7, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF WATER AND WASTEWATER (BRADY) *IBM*
DIVISION OF LEGAL SERVICES (GERVASI) *JP*

RE: DOCKET NO. 961321-WS - APPLICATION OF POINT WATER & SEWER, INC. FOR TRANSFER OF WATER AND WASTEWATER FACILITIES TO CLAY COUNTY UTILITY AUTHORITY.
COUNTY: CLAY

AGENDA: JANUARY 19, 1999 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\961321.RCM

CASE BACKGROUND

Point Water & Sewer, Inc. (PWS or utility) is a Class C utility providing water and wastewater service in Clay County to two general service customers: a marina known as Whitney's Sailcenter, Inc., and a homeowners association known as The Point Property Owners Association, Inc. (the PPOA). The PPOA consists of 19 existing townhouse units. According to its 1997 annual report, the utility had combined water and wastewater operating revenues of \$23,450 and a combined net operating loss of \$58,993.

Although the utility has been in existence since 1980, it has never been certificated. Staff was made aware of the utility's existence in December of 1995 by the Florida Department of Environmental Protection. On November 4, 1996, PWS submitted an application for original water and wastewater certificates in this docket after being informed by staff that a small system exemption did not apply due to the capacity of the utility's systems.

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On November 22, 1996, the PPOA filed a timely objection to PWS's application for original certificates. Accordingly, the matter was scheduled for a customer service hearing on July 31, 1997, and a formal hearing on August 1, 1997. A prehearing was held on July 8, 1997, and a prehearing order, Order No. PSC-97-0868-PHO-WS, was issued on July 21, 1997. Just prior to the hearing, PWS and the PPOA filed a Joint Emergency Motion for Continuance to allow time to pursue a negotiated settlement. By Order No. PSC-97-0888-PCO-WS, issued July 28, 1997, the Commission granted the joint motion. Up through April 10, 1998, five additional orders were issued granting continuance.

Pursuant to the negotiated settlement, Clay County Utility Authority (CCUA) acquired the utility effective November 3, 1998. However, the PWS will continue to operate its systems under license by CCUA until the connection, which is expected to occur within nine months from the November 3, 1998 closing date. On November 17, 1998, PWS filed a supplemental application in this docket to transfer its facilities to CCUA. On December 14, 1998, a notice was filed by the PPOA withdrawing its protest to PWS's application for certificates.

This recommendation addresses whether the Commission should acknowledge the PPOA's withdrawal of its protest to PWS's application for water and wastewater certificates and approve the transfer of facilities from PWS to CCUA. The recommendation also addresses PWS's apparent violation of Sections 367.031 and 367.071, Florida Statutes, for operating a utility without a certificate and for transferring the utility prior to the Commission taking action on the utility's application for transfer.

DISCUSSION OF ISSUES

ISSUE 1: Should PWS be ordered to show cause within twenty-one days why it should not be fined for apparent violation of Sections 367.031 and 367.071, Florida Statutes?

RECOMMENDATION: No, show cause proceedings should not be initiated. (GERVASI)

STAFF ANALYSIS: PWS has been providing water and wastewater service to the PPOA (and later to Whitney's Sailcenter) from 1980 to the present time without certificates of operation. Therefore, PWS is in apparent violation of Section 367.031, Florida Statutes, which states, in relevant part, that "[e]ach utility subject to the jurisdiction of the commission must obtain from the commission a certificate of authorization to provide water or wastewater service."

Moreover, as noted in the case background, the application for transfer of PWS's facilities was filed on November 17, 1998. However, the sale of PWS to CCUA closed on November 3, 1998, prior to the Commission taking action on the utility's application for transfer, in apparent violation of Section 367.071(1), Florida Statutes. Section 367.071(1), Florida Statutes, requires that:

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 and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility.

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.

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, the utility's failure to obtain antecedent Commission approval to transfer majority organizational control 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.

The failure of PWS to obtain certificates of authorization appears to be due to its belief that it qualified for a small system exemption pursuant to Section 367.022(6), Florida Statutes. By letter dated July 22, 1996, PWS was informed that it did not qualify for a small system exemption due to the capacity of its water system which had a design capacity of 28,000 gallons per day (gpd). Pursuant to Rule 25-30.055(1), Florida Administrative Code, "a water and wastewater system is exempt under section 367.022(6), Florida Statutes, if its current or proposed water or wastewater treatment facilities and distribution or collection systems have and will have a capacity, excluding fire capacity, of no greater than 10,000 gpd."

Although PWS failed to obtain certificates prior to providing service, within a reasonable amount of time after being notified that it was not exempt from regulation, PWS complied by filing an application for original certificates and was responsive to staff's subsequent requests for information.

Moreover, with respect to PWS's apparent violation of Section 367.071(1), Florida Statutes, by failing to obtain the approval of the Commission before transferring its facilities to CCUA, there are circumstances which appear to mitigate this apparent violation, as well. From July 1997 up through the filing of the application for transfer, PWS and the PPOA were granted several continuances in order to negotiate a settlement agreement. In addition, between December 1997 and June 1998, staff noticed and conducted nine informal conference calls with the parties and Clay County representatives to receive progress reports on the negotiations for interconnection of PWS to CCUA. PWS kept staff fully advised of the ongoing negotiations and the conclusion of the settlement over the past year. In addition, according to PWS, because of the complexity of the transaction and the parties involved, the PPOA would not have withdrawn its protest to the application for certificates until the transfer transaction was consummated by CCUA.

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For the foregoing reasons, staff does not believe that the apparent violations of Sections 367.031, and 367.071, Florida Statutes, rise to the level warranting initiation of show cause proceedings. Therefore, staff recommends that the Commission not order PWS to show cause for failing to obtain certificates of authorization prior to providing water and wastewater service or for transferring its facilities to CCUA prior to obtaining Commission approval.

ISSUE 2: Should the withdrawal of the protest by the PPOA to PWS's application for water and wastewater certificates be acknowledged and the transfer of facilities from PWS to CCUA be approved?

RECOMMENDATION: Yes, the Commission should acknowledge the withdrawal of the protest by the PPOA to PWS's application for water and wastewater certificates and approve the transfer of facilities from PWS to CCUA as a matter of right. The Commission need not take action on PWS's original application for certificates of authorization as the transfer renders the application for certificates moot. The jurisdictional period for PWS should be January 1, 1996 through November 3, 1998. (BRADY, GERVASI)

STAFF ANALYSIS: As previously stated, on November 17, 1998, an application was filed on behalf of PWS to transfer water and wastewater facilities to CCUA. Pursuant to Section 367.071(4)(a), Florida Statutes, the sale of facilities to a governmental authority shall be approved as a matter of right. The application is in compliance with Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. As such, no notice of the transfer is required and no filing fees apply.

As also previously stated, PWS's original petition in this docket for water and wastewater certificates, filed November 4, 1996, was timely protested by the PPOA and the matter was set for formal hearing on August 1, 1997. Just prior to the hearing, PWS and the PPOA filed a Joint Emergency Motion for Continuance to negotiate a settlement to connect the utility's facilities to CCUA. After over a year of negotiations, on November 17, 1998, PWS filed an application to transfer facilities to CCUA and the PPOA withdrew its protest to PWS's application for water and wastewater certificates on December 14, 1998. Staff recommends that the Commission acknowledge the withdrawal of the PPOA's protest to PWS's application for water and wastewater certificates. As a point of information, no revised dates for hearing have been set since the Joint Emergency Motion for Continuance was granted by Order No. PSC-97-0888-PCO-WS.

As soon as its original application for water and wastewater certificates was filed in this docket, PWS requested and received a staff-assisted rate case in Docket No. 961434-WS. By the resulting Order No. PSC-97-0588-FOF-WS, issued May 23, 1997, the docket was held in monitor status to either verify the installation of a master meter or the execution of an interconnection agreement with CCUA. By memo dated November 22, 1998, staff administratively

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closed Docket No. 961434-WS after PWS entered into the November 3, 1998 Agreement with CCUA.

Although PWS has been operating as a utility and charging rates since 1980, staff believes it is appropriate to consider the utility jurisdictional in terms of annual reports and regulatory assessment fees (RAFs) from January 1, 1996 through the November 3, 1998 transfer to CCUA. As noted in the Case Background, staff first became aware of the existence of PWS in December of 1995 at which time the utility believed it was exempt as a small system pursuant to Section 367.022(6), Florida Statutes. By letter dated July 22, 1996, the utility was informed that it needed to file for certificates of authorization.

Since the utility was first made aware that it needed certificates of authorization in 1996, staff believes that PWS should be considered jurisdictional from January 1, 1996 through the November 3, 1998 transfer to CCUA. Staff has confirmed that the utility is current on its 1996 and 1997 annual reports and RAFs and that there are no outstanding penalties and interest due. PWS should, therefore, only be responsible for remitting 1998 RAFs up through November 3, 1998 pursuant to the requirements of Rules 25-30.110 and 25-30.120, Florida Administration Code.

The application for transfer states that PWS has never held customer deposits. Therefore, disposition of such deposits is not an issue. The application also states that CCUA has obtained from PWS its most recent available income and expense statement of rate base for regulatory purposes and contributions-in-aid-of-construction. The application was accompanied by a copy of the "Agreement Between Point Water & Sewer, Inc., Clay County Utility Authority, IGR, Inc., James E. Yonge, Whitney's Sailcenter, Inc., and The Point Property Owners Association, Inc." (the Agreement). As noted in the Case Background, while the Agreement was executed on November 3, 1998, PWS will continue to provide utility service on behalf of the CCUA until the connection to CCUA occurs. The contract specifies that the connection date is not to exceed nine months from the date the Agreement was executed.

The purchase price is a complex transaction resulting from months of substantial and complicated negotiations between the parties and CCUA. Connection of PWS's systems to CCUA will require \$173,564.00 for off-site improvements, environmental site assessment, closing costs, and bond issuance costs. The value placed on PWS's utility franchise is an additional \$100,000.00. The way the Agreement is to be financed is that Mr. James E. Yonge, PWS's nominee, will advance CCUA the \$173,564.00 in

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connection costs at the time of closing. In return, CCUA will issue Mr. Yonge a private, tax-exempt bond for \$273,564.00 which represents the advance of \$173,564.00 plus the \$100,000.00 for the value of the utility's franchise. The bond will have a maturity of 10 years with a fixed interest rate of 7.00% resulting in an additional \$115,734.25 in interest. The total cost of the transaction, with interest through bond retirement, is \$389,298.25.

While the bond will be issued to Mr. Yonge, it will be paid for by a special assessment levied on the PPOA and Whitney's Sailcenter in quarterly installments for ten years beginning in February 1999. Of the \$389,298.25 total assessment, the PPOA will be assessed 66.50% and Whitney's Sailcenter will be assessed 33.50%. As a result, each of the PPOA's 19 constructed units will pay a quarterly amortized installment of \$334.85 for a total assessment of \$13,394.00. At the end of ten years the special assessment will be eliminated and PWS, through its designee, will have netted \$100,000.00 as reimbursement for the utility franchise. To assure payment to CCUA of the special assessment, the Agreement provides for liens against the PPOA and Whitney's Sailcenter.

The following utility assets have been excluded from the Agreement: the existing wastewater treatment package plant, the effluent discharge line and outfall easement to the St. Johns River, and the existing water well and water treatment package plant. However, according to the Agreement, after the connection to CCUA, PWS has 120 days to remove the existing water and wastewater treatment plants from the property. The PPOA and Whitney's Sailcenter are responsible for enforcing this contract obligation. Included in the interconnection costs is \$700.00 for CCUA to remove the utility slabs and restore the sites. PWS provided a supplemental statement that, after the connection to CCUA, it does not intend the use the effluent discharge line and outfall easement to discharge into the St. John's River. Eventually the easement permit will expire.

Finally, staff suggested that PWS officially withdraw its original application for certificates of authorization. PWS declined to do so because, pursuant to the Agreement, it will continue to operate the utility systems until the connection to CCUA. However, pursuant to Section 367.022(2), Florida Statutes, the utility system became exempt from Commission regulation on November 3, 1998 when title to all non-excluded utility assets was conveyed to the CCUA. As confirmation that PWS will be operating in the interim from the closing to the interconnection under the jurisdiction of CCUA, the Agreement specifically provides at page 25:

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From the Closing Date through and including the Connection Date, Purchaser hereby irrevocably grants to Seller a license to use the Purchased Assets in connection with providing continuous water and wastewater service to the Project at the current rates in effect for the Seller. This license shall survive Closing and shall terminate immediately upon the connection of the Project to the Purchaser's Systems as of the Connection Date.

Pursuant to Section 367.071(4)(a), Florida Statutes, staff recommends that the Commission approve the November 3, 1998 transfer of PWS's facilities to CCUA as a matter of right. The Commission need not take action on PWS's original application for certificates of authorization as the transfer renders the application for certificates moot.

In summary, staff recommends that the Commission acknowledge the withdrawal of the protest by the PPOA to PWS's application for water and wastewater certificates and approve the transfer of facilities from PWS to CCUA as a matter of right. The Commission need not take action on PWS's original application for certificates of authorization as the transfer renders the application for certificates moot. Further, staff recommends the jurisdictional period for PWS be considered January 1, 1996 through November 3, 1998.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. (GERVASI)

STAFF ANALYSIS: No further action is required and this docket should be closed.