

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

September 8, 1994

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING *R PSC (msd)*

FROM: DIVISION OF LEGAL SERVICES (CAPELESS, PIERSON) *SCM JKW*  
DIVISION OF WATER AND WASTEWATER (COKER, MESSER) *WTC*

RE: UTILITY: JACKSONVILLE SUBURBAN UTILITIES CORPORATION  
DOCKET NO. 940743-WS  
COUNTY: DUVAL, ST. JOHNS, NASSAU

CASE: JOINT APPLICATION FOR TRANSFER OF MAJORITY ORGANIZATIONAL CONTROL OF JACKSONVILLE SUBURBAN UTILITIES CORPORATION IN DUVAL COUNTY FROM GENERAL WATERWORKS CORPORATION TO UNITED WATER RESOURCES INC.

AGENDA: SEPTEMBER 20, 1994 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\940743.RCM

CASE BACKGROUND

Jacksonville Suburban Utilities Corporation (Jacksonville Suburban or utility) provides water and wastewater service to approximately 27,000 customers pursuant to Commission Certificates Nos. 236-W and 197-S in Duval, St. Johns, and Nassau Counties. Jacksonville Suburban is a wholly-owned subsidiary of General Waterworks Corporation (General Waterworks), which, until April 22, 1994, was a wholly-owned subsidiary of GWC Corporation (GWC), a Delaware corporation. On April 22, 1994, GWC merged into United Water Resources Inc. (UWR), a New Jersey corporation. As a result of the merger, GWC ceased to exist and UWR became the corporate grandparent of Jacksonville Suburban.

Also as a result of the merger, according to UWR's 1993 Annual

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Report, UWR became the second largest investor-owned water utility in the nation. UWR expects its operating revenues to double and its consolidated assets to exceed \$1 billion. Prior to the merger, Lyonnaise American Holding, Inc. (LAH) owned approximately 82% of GWC's issued and outstanding stock. LAH is a subsidiary of Lyonnaise des Eaux-Dumez (Lyonnaise), a French multi-national corporation and one of Europe's largest water purveyors. As a result of the merger, LAH now owns only approximately 26% of UWR's issued and outstanding stock. UWR's current Board of Directors includes the eleven-member UWR Board which existed prior to the merger, two persons who were previously members of the GWC Board of Directors, and two officers of Lyonnaise.

According to UWR's 1993 Annual Report, UWR entered into a definitive agreement to merge with GWC on September 15, 1993. On November 30, 1993, the Boards of Directors of both corporations voted to proceed with the proposed merger subject to various closing conditions, including approvals from certain state regulatory agencies. On that same date, Mr. Walton F. Hill, Assistant Vice President and Senior Attorney at General Waterworks Management and Service Company, sent a letter to Staff advising of GWC's intent to merge into UWR. In the letter, Mr. Hill stated that the utility did not believe the merger would require Commission approval under Section 367.071, Florida Statutes, because the direct control of Jacksonville Suburban would not change and because no changes were proposed to the operation, management, customer service, rates or any other element of Jacksonville Suburban's business. On June 2, 1994, Staff responded to Mr. Hill's letter, advising that Staff believed the utility should seek Commission approval because the merger would involve a change of the utility's majority organizational control. On July 13, 1994, Jacksonville Suburban and UWR filed a joint application for transfer of majority organizational control.

Along with the application, the utility and UWR (applicants) filed a motion for waiver of the noticing requirements of Rule 25-30.030, Florida Administrative Code. In the alternative, the utility requests waiver of:

- (1) Rule 25-30.030(2);
- (2) Rule 25-30.030(5)(c), (d), (g) and (h);
- (3) Rule 25-30.030(4)(c);
- (4) Rule 25-30.030(6); and
- (5) Rule 25-30.030(7),

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Florida Administrative Code. The applicants' motion for waiver of these noticing requirements is the subject of this recommendation. The application for transfer of majority organizational control will be addressed in a later recommendation.

DISCUSSION OF ISSUES

ISSUE 1: Should the utility be exempted from compliance with Rule 25-30.030, Florida Administrative Code, which requires the utility to provide notice of its application in the manner and to the entities described in the Rule?

RECOMMENDATION: No, except that the utility should be exempted from full compliance with Rule 25-30.030(4)(c), Florida Administrative Code, as discussed in subsequent issues, to permit the utility to reduce the length of its territory description in its notice to individual customers and by publication.

STAFF ANALYSIS: The applicants request a waiver of the requirements of Rule 25-30.030, Florida Administrative Code, for the purpose of their application for transfer of majority organizational control only. This Rule requires the utility to, among other things, provide notice of the application to certain entities in a specified manner. As a basis for their request, the applicants point to Rule 25-30.011(2), Florida Administrative Code, which states that "[i]n any case where compliance with any of these rules introduces unusual hardship, or if unreasonable difficulty is involved in immediate compliance with any particular rule, application may be made to the Commission for modification of the rule or for temporary exemption from its requirements. . . ."

The applicants argue that because the Rule requires the notice to contain a copy of the legal description of the territory proposed to be transferred, and because the legal descriptions of the utility's water and wastewater service areas are very lengthy, the costs of preparing, photocopying, and mailing such notice will be excessive. They further argue that the information set forth in the notice may be very confusing to its recipients because the transfer of majority organizational control in this matter is not a simple transfer at the utility company level. The merger does not contemplate any changes in the direct ownership, direct control or operation of the utility. Nor does it seek any changes in the rates charged to customers, or in any policies regarding service, employees, operations, financing, accounting, capitalization, depreciation, or other matters affecting the public interest or utility operations.

Among the entities required to be noticed pursuant to Rule 25-30.030, Florida Administrative Code, are the governing body of the county or city affected, the Public Counsel, and this Commission. These same entities are also required to be noticed by mail or personal delivery pursuant to Section 367.045(1)(a), Florida Statutes. The applicants argue that Section 367.045, Florida



Statutes, is inapplicable to them because they are applying for a transfer of majority organizational control, and not for an initial certificate of authorization. However, Section 367.071(4), Florida Statutes, expressly requires applications for transfer of majority organizational control to be disposed of as provided in Section 367.045, Florida Statutes, with one exception involving the sale of a utility to a governmental authority, which is not applicable here. See Section 367.071(4)(a), Florida Statutes. Therefore, the applicants' argument lacks merit.

Staff recommends that the Commission deny the applicants' request for a full waiver of Rule 25-30.030, Florida Administrative Code. Compliance with portions of this Rule are required by Section 367.045, Florida Statutes, and this Commission lacks the authority to waive or to temporarily exempt utilities from compliance with statutory law. Moreover, Staff does not believe that the applicants have shown unreasonable difficulty or unusual hardship in complying with the Rule. The utility should be ordered to initiate the noticing of the governing body of the county or city affected, the Public Counsel, and this Commission, within twenty days of the effective date of the order. The applicants' alternative request for waiver of specific sections of the Rule are discussed in subsequent issues.

**ISSUE 2:** Should the utility be exempted from compliance with Rule 25-30.030(2), Florida Administrative Code, which requires the utility to provide this Commission with a complete legal description of the territory proposed to be transferred along with its request for a list of names and addresses?

**RECOMMENDATION:** No.

**STAFF ANALYSIS:** In the event that this Commission agrees with Staff's recommendation regarding Issue 1, the applicants alternatively request waiver of the requirements of certain provisions of Rule 25-30.030, Florida Administrative Code. Rule 25-30.011(2), Florida Administrative Code, provides this Commission with the discretion to modify or to temporarily exempt applicants from the requirements of any of the rules contained in Chapter 25-30, Florida Administrative Code, when compliance either introduces unusual hardship or involves unreasonable difficulty.

Rule 25-30.030(2), Florida Administrative Code, requires the applicants to request that the Commission provide the utility with a list of the names and addresses of certain entities to which the utility must provide notice pursuant to other portions of Rule 25-30.030, Florida Statutes. This Rule also requires the utility to include in its request for the list a complete legal description of the territory to be transferred. The applicants request that the Commission waive this requirement. They state that the legal descriptions of Jacksonville Suburban's water and wastewater service areas are very lengthy, comprising over 130 pages of its tariffs. They argue that the costs of preparing, photocopying, and mailing the complete legal description to this Commission will be excessive.

Staff does not believe that full compliance with Rule 25-30.030(2), Florida Administrative Code, will pose unusual hardship or involve unreasonable difficulty for the utility. Under this Rule provision, the utility need only provide one entity, namely this Commission, with a complete legal description of its territory. Therefore, Staff recommends that the Commission deny the applicants' request for waiver of this Rule provision. The utility should be ordered to initiate compliance with Rule 25-30.030(2), Florida Administrative Code, within twenty days of the effective date of the order.

**ISSUE 3:** Should the utility be exempted from compliance with all provisions of Rule 25-30.030(5), Florida Administrative Code, which requires the utility to provide notice to certain entities?

**RECOMMENDATION:** No.

**STAFF ANALYSIS:** In their alternative request, the applicants request waiver of those portions of Rule 25-30.030(5), Florida Administrative Code, which require the utility to provide notice to those entities which are not statutorily required to be noticed. Specifically, the applicants request waiver of Rule 25-30.030(5)(c), (d), (g) and (h), Florida Administrative Code. These provisions require the utility to provide a copy of the notice by regular mail within seven days of filing the application to the regional planning council, to all water or wastewater utilities contained on the list, to the Department of Environmental Protection (DEP), and to the appropriate Water Management District, respectively.

Additionally, Rule 25-30.030(4)(c), Florida Administrative Code, requires the utility to include a description, using township, range, and section references of the territory being transferred, to each entity which is to receive a copy of the notice pursuant to Rule 20-30.030(5), Florida Administrative Code.

The applicants state that the legal descriptions of Jacksonville Suburban's water and wastewater service areas are very lengthy, comprising over 130 pages of its tariffs. They argue that the information set forth in the notice may be very confusing to its recipients and not overly useful. They further argue that the costs of preparing, photocopying, and mailing the notice will be excessive.

Staff disagrees that the notice, including a complete legal description in accordance with Rule 25-30.030(4)(c), Florida Administrative Code, would be confusing and not overly useful to those entities which are required to be noticed pursuant to Rule 25-30.030(5), Florida Administrative Code. On the contrary, those entities tend to rely on such technical, legal service area descriptions as a matter of practice. For this reason, Staff believes the costs associated with noticing these entities in accordance with Rule 25-30.030(4)(c), Florida Administrative Code, are justifiable. Indeed, in a previous docket, wherein this same utility requested waiver of the Rule 25-30.030 noticing requirements, this Commission found that "because those entities referenced in Rule 25-30.030(5) . . . rely on the technical legal description, . . . we believe notice to [those] entities . . . is necessary." Order No. PSC-93-0017-FOF-WS, issued January 5, 1993, in re: Application for Modification of Certificates Nos. 236-W and

179-S and Amendment of Certificate No. 236-W in Duval County by Jacksonville Suburban Utilities Corporation.

Staff does not believe that full compliance with Rule 25-30.030(5), Florida Administrative Code, will pose unusual hardship nor involve unreasonable difficulty for the utility. Therefore, Staff recommends that the Commission deny the applicants' request for waiver of this portion of the Rule. The utility should be ordered to initiate noticing of these entities pursuant to Rule 25-30.030(4)(c), Florida Administrative Code, within twenty days of the effective date of the order.



**ISSUE 4:** Should the utility be exempted from compliance with Rule 25-30.030(6), Florida Administrative Code, which requires the utility to notice each customer of the system being transferred by regular mail or personal delivery?

**RECOMMENDATION:** No.

**STAFF ANALYSIS:** The applicants request waiver of Rule 25-30.030(6), Florida Administrative Code, which requires the utility to provide a copy of the notice by regular mail or personal delivery to each customer of the system being transferred no later than seven days after filing the application. The applicants argue that the change in majority organizational control involved here is more similar to a request for a name change or a grandfather certificate than a transfer in that there will be no change in the operation and immediate ownership of the utility company. They argue that Rule 25-30.030, Florida Administrative Code, does not apply to applications for grandfather certificates or to name changes. Staff disagrees with this argument. There has been a change of ownership and majority organizational control of this utility, albeit at the "grandparent" corporation level. UWR's fifteen-member Board of Directors includes its original eleven members, none of whom sat on GWC's Board prior to the merger.

Staff believes that the customers have a right to notice, not only under the Rule, but under due process principles of both the U.S. and the Florida Constitutions. Any one of the utility's customers who has been substantially affected by the transfer is to be afforded a hearing upon request pursuant to Chapter 120.57, Florida Statutes. The seminal case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), held that a cause of action is a species of property protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). And "[n]otice to legally interested parties so that they can assert their claims is the essence of the procedural due process protections provided by the Florida Constitution. Art. I, § 9, Fla. Const." In re Adoption of a Minor Child, 593 So. 2d 185, 189 (Fla. 1991). Although these cases do not involve utility law, Staff believes that the constitutional principles which they stand for are applicable here.

Moreover, to date, this Commission has not exempted a water or wastewater utility from the customer noticing requirements of Rule 25-30.030(6), Florida Administrative Code. See e.g., Order No. 20652, issued January 24, 1989, in re: Application of Topeka Group, Inc., to acquire control of Deltona Corporation's utility subsidiaries in Citrus, Marion, St. Johns, Washington, Collier, Volusia and Hernando Counties (finding that "[t]he circumstances in

this case, specifically the large number of customers and utilities involved, do not warrant a waiver of this Rule that is regularly applied to companies with significantly lesser resources and sophistication").

Staff does not believe that providing notice to the customers by way of publication in a newspaper would, standing alone, satisfy the customers' due process rights to notice. The U.S. Supreme Court stated, in Mullane, that "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper[.]" 339 U.S. at 315. Further, "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." Id. at 318. In a later case, the Court stated that "[t]he general rule that emerges from the Mullane [c]ase is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." Schroeder v. New York, 371 U.S. 208, 212-13 (1962). Staff recommends that this Commission adhere to this general rule enunciated by the U.S. Supreme Court, by denying the applicants' request for waiver or temporary exemption from Rule 25-30.030(6), Florida Administrative Code. The utility should be ordered to initiate noticing pursuant to this Rule within twenty days of the effective date of the order, either by mailing the notice with its customer billings or by a separate mailing.

**ISSUE 5:** Should the utility be exempted from full compliance with Rule 25-30.030(4)(c), Florida Administrative Code, which requires the utility to include a description, using township, range, and section references of the territory being transferred to each customer who is required to receive notice under Rule 25-30.030(6), Florida Administrative Code?

**RECOMMENDATION:** Yes. The utility should be permitted to omit from its notice to each customer a full territory description as required by Rule 25-30.030(4)(c), Florida Administrative Code. The utility should be required to provide notice to each customer which simply identifies each county that has been affected by the transfer.

**STAFF ANALYSIS:** The applicants request waiver of Rule 25-30.030(4)(c), Florida Administrative Code, as it applies to the individual noticing of each customer. This Rule provision requires the utility to include a description, using township, range, and section references of the territory being transferred to the individual customers of the utility. The applicants argue that the full territory description may be confusing and not overly useful to the customers. They further argue that the costs of preparing, photocopying, and mailing a notice of 130 or more pages to 27,000 customers will be excessive. Staff agrees. Therefore, Staff recommends that this Commission exercise its authority under Rule 25-30.011(2), Florida Administrative Code, to temporarily exempt the utility from full compliance with Rule 25-30.030(4)(c), Florida Administrative Code, with respect to its customer notice mailings for purposes of this application only. Instead of requiring a full territory description, Staff recommends that the Commission exempt the utility from full compliance with this Rule provision by ordering the utility to mail a notice to each customer which simply identifies each county that has been affected by the transfer. This should reduce the length of the notice from 130 pages to only one page per customer address, which will greatly reduce the burden on the utility to comply with Rule 25-30.030(6), Florida Administrative Code.

**ISSUE 6:** Should the utility be exempted from compliance with Rule 25-30.030(7), Florida Administrative Code, which requires the utility to publish the notice once in a newspaper of general circulation in the territory affected by the transfer?

**RECOMMENDATION:** No, however the utility should be permitted to omit from the publication a full territory description as required by Rule 25-30.030(4)(c), Florida Administrative Code, and instead publish once in a newspaper of general circulation in the territory affected a notice which resembles the customer notice and simply identifies each county that has been affected by the transfer.

**STAFF ANALYSIS:** The applicants request waiver of Rule 25-30.030(7), Florida Administrative Code, which requires the utility to publish the notice once in a newspaper of general circulation in the affected territory. The applicants argue that it will be very expensive to publish the notice in a newspaper, especially when the notice includes over 100 pages of legal descriptions. Staff agrees that it would be unreasonable for the Commission to require the utility to publish 100 or more pages.

According to the Mullane Court, "publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning." 339 U.S. at 316. If this Commission orders the utility to mail a one-page notice to each customer address, the Commission will be, in effect, saying that it reasonably expects such notice to adequately convey the "warning." It would follow that the newspaper publication, being merely a supplemental notice, need not convey more information than that which the principal notice conveys. Therefore, Staff recommends that this Commission exercise its authority under Rule 25-30.011(2), Florida Administrative Code, to temporarily exempt the utility from full compliance with Rule 25-30.030(4)(c), Florida Administrative Code, with respect to its newspaper publication of the notice for purposes of this application only. Instead of publishing a full territory description, Staff recommends that the Commission exempt the utility from full compliance with this Rule provision by ordering the utility to publish once in a newspaper of general circulation in the territory affected a notice which resembles the customer notice and simply identifies each county that has been affected by the transfer.



ISSUE 7: Should this docket be closed?

RECOMMENDATION: No, the docket should remain open to process the transfer application.

STAFF ANALYSIS: The Commission vote on the applicants' motion for waiver of noticing requirements will alert the utility as to what it must do to complete its application. Once filing requirements are met, Staff will file an additional recommendation concerning the transfer.