

State of Florida



# Public Service Commission

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RECORDS AND REPORTING

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**DATE:** JANUARY 7, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF WATER AND WASTEWATER (BRADY) *BBM pb*  
DIVISION OF LEGAL SERVICES (FERGUSON) *[Signature]*

**RE:** DOCKET NO. 981241-WS - APPLICATION OF ORTEGA UTILITY COMPANY FOR TRANSFER OF FACILITIES TO JACKSONVILLE ELECTRIC AUTHORITY, AND CANCELLATION OF CERTIFICATES NOS. 223-W AND 167-S.  
COUNTY: DUVAL

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

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\WAW\WP\981241.RCM

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DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

CASE BACKGROUND

Ortega Utility Company (Ortega or utility) is a Class B water and wastewater utility located in Duval County, Florida. Ortega owns and operates utility systems in three separate communities: Blanding, Herlong and Airport. According to its 1997 annual report, Ortega serves approximately 1,428 water and 1,298 wastewater customers with combined water and wastewater revenues of \$1,404,551 and a combined net operating income of \$237,690.

Ortega was organized in July of 1965 for the purpose of providing water and wastewater service to an area in the southern most end of Duval County. The utility was granted Certificates Nos. 223-W and 167-S by Order No. 6775 issued July 16, 1975 in Dockets Nos. 74466-S and 74467-W. Since that time, the utility's service territory has been amended several times. The most recent amendment was pursuant to Order No. PSC-98-1150-FOF-WS issued August 25, 1998 in Docket No. 980298-WS.

This amendment was filed pursuant to Rule 25-30.036(2), Florida Administrative Code, to provide service to the U.S. Department of Navy's DRMO Facility which represented fewer than 25 equivalent residential connections. On August 11, 1998, just prior to the issuance of Order No. PSC-98-1150-FOF-WS, Ortega closed on an agreement for the acquisition of its facilities by the City of Jacksonville through the City's utility department, Jacksonville Electric Authority (JEA). On September 30, 1998, an application to transfer Ortega's facilities to JEA was filed with the Commission.

This recommendation addresses approval of the transfer and Ortega's apparent violation of Section 367.071, Florida Statutes.

DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission order Ortega Utility Company to show cause in writing within 21 days why it should not be fined for apparent violation of Section 367.071, Florida Statutes?

**RECOMMENDATION:** No, a show cause proceeding should not be initiated. (FERGUSON)

**STAFF ANALYSIS:** Section 367.071(1), Florida Statutes, requires that no utility may transfer its facilities without determination and approval of the Commission that the buyer 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. As stated in the case background, the utility was transferred to JEA on August 11, 1998, and JEA thereafter began running Ortega's facilities, without prior approval of the Commission. The application for approval of the transfer was subsequently filed on September 30, 1998.

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 transferring its assets and facilities to another entity, 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.

Failure to obtain approval of the Commission prior to completing a transfer of a utility's facilities is an apparent violation of Section 367.071(1), Florida Statutes. There are, however, circumstances which appear to mitigate the utility's violation. Through conversations with staff and by letter dated November 27, 1998, Alan W. Potter, Sr., president of the utility,

stated that the need for the sales transaction to occur in August was driven by "trying to meet the obligations of the various parties." The utility understood that "transfer of a utility, its service territory, and assets to a governmental authority, was a matter of right and did not require the approval of the Commission", pursuant to section 367.071(4)(a), Florida Statutes. However, the Commission is charged with approving a utility's application prior to the sale or transfer of facilities.

Although regulated utilities are charged with knowledge of Chapter 367, Florida Statutes, staff does not believe that the apparent violation of Section 367.071, Florida Statutes, rises in these circumstances to the level which warrants the initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order Ortega to show cause for failing to obtain Commission approval prior to the transfer of the utility to JEA.

**ISSUE 2:** Should the Commission approve the transfer of the facilities of Ortega Utility Company to Jacksonville Electric Authority and cancellation of Certificates Nos. 223-W and 167-S?

**RECOMMENDATION:** Yes. The Commission should approve the transfer of utility facilities from Ortega Utility Company to Jacksonville Electric Authority as a matter of right. Certificates Nos. 223-W and 167-S should remain in effect until all issues relating to Docket No. 981022-WS are resolved and the docket closed. (BRADY)

**STAFF ANALYSIS:** As noted in the Case Background, an application for the transfer of Ortega's facilities to JEA was received by the Commission on September 30, 1998. 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.

The application was accompanied by a copy of the Asset Purchase Agreement (Agreement). As noted in the Case Background, and for the reasons given in Issue 1, the closing occurred on August 11, 1998. The total purchase price for the transfer of assets was \$7,180,000. As part of the Agreement, Ortega is required to individually covenant not to compete with JEA for five years within the incorporated area of the City of Jacksonville in terms of establishing, reestablishing or reopening any business, trade or occupation similar to the utility business being sold to JEA.

The application states that Ortega has neither collected nor retains any deposits from either customers or developers. A letter from JEA was provided with the application indicating that JEA believes it has received Ortega's most recent available income and expense statement, balance sheet, statement of rate base for regulatory purposes and contributions-in-aid-of-construction.

According to Commission records, the utility owes \$1,790.42 in penalties and interest for late-filed 1991 water and wastewater regulatory assessment fees (RAFs). By letter dated December 22, 1998, the utility was sent an explanation of the charges and asked to respond in thirty days. The utility is otherwise current on its annual reports and RAFs. As already noted, the date of closing was August 11, 1998. Therefore, in addition to any amount owed in penalties and interest, Ortega will be responsible for 1998 RAFs

DOCKET NO. 981241 S  
DATE: JANUARY 7, 1999

fees up through August 11, 1998. The appropriate fees should be remitted to the Commission pursuant to the requirements of Rules 25-30.110 and 25-30.120, Florida Administrative Code.

Ortega has one open docket pending Commission disposition-- Docket No. 981022-WS regarding disposition of any CIAC gross-up funds collected by Ortega during the years 1987 through 1996. Until a final determination is made of all issues in this docket, the utility's certificates should remain in effect.

Based on the above, staff recommends that the Commission approve the transfer of facilities from Ortega Utility Company to Jacksonville Electric Authority as a matter of right. Certificates Nos. 223-W and 167-S should remain in effect until all issues relating to Docket No. 981022-WS are resolved and the docket is closed.

DOCKET NO. 981241 3  
DATE: JANUARY 7, 1999

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No. (FERGUSON)

**STAFF ANALYSIS:** This docket should remain open pending final disposition of all issues in Docket No. 981022-WS. Once that docket has been closed, Certificates Nos. 223-W and 167-S should be canceled and this docket should be administratively closed.