State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: JUNE 6, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (BRADY, REDEMANN, IWENJIORA)
OFFICE OF THE GENERAL COUNSEL (HARRIS)

RE: DOCKET NO. 011402-WU - NOTICE OF ABANDONMENT OF WATER SERVICES BY SILVER CITY UTILITIES, AND APPLICATION FOR TRANSFER OF WATER FACILITIES FROM SILVER CITY UTILITIES TO SILVER CITY OAKS INC., A NON-PROFIT CORPORATION, AND FOR CANCELLATION OF CERTIFICATE NO. 413-W.

COUNTY: MARION

AGENDA: 06/18/02 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\011402.RCM

CASE BACKGROUND

Silver City Utilities (Silver City or utility) is a Class C utility providing water service to approximately 47 unmetered mobile homes in the Silver City Subdivision of Marion County. This location is in the St. Johns River Water Management District (SJRWMD) all of which is considered a water use caution area. Wastewater is provided by septic system. On its 2001 annual report, the utility indicated $2,777 in revenues with a net operating loss of $2,386.

Order No. 13160, issued April 2, 1984, in Docket No. 830254-W, granted the utility Certificate No. 413-W and established initial

rates and charges using a base facility/gallonage charge rate structure. However, meters have never been installed and customers have never been billed in an apparent violation of Section 367.081(1), Florida Statutes. This matter will be addressed in Issue 1. In addition, the utility has never filed a petition for an index, rate proceeding, or for any other type of rate relief.

On October 30, 2001, Mr. David L. Small, the operating owner, noticed the Commission of the owners' intent to abandon the utility as of December 31, 2001, and this docket was opened. By Order No. PSC-01-2510-PCO-WU, issued December 21, 2001, the Commission acknowledged the abandonment, noticed the utility of its responsibility to file a 2001 annual report and remit 2001 regulatory assessment fees (RAFs), and held open the docket pending final disposition of the utility facilities.

While the owners' legal obligation to the utility ended December 31, 2001, they chose to continue to operate the utility facilities until the customers had an opportunity to decide whether to form a non-profit corporation to own and control the facilities. Meanwhile, on January 3, 2002, Marion County filed a petition in the Circuit Court of the Fifth Judicial Circuit for the Appointment of Receiver should the utility become abandoned.

On March 29, 2002, an application was filed for approval of the transfer of facilities from Silver City to Silver City Oaks, Inc., the resident's homeowners association,(HOA), a non-profit corporation formed on behalf of the utility customers, and for cancellation of Certificate No. 413-W. The transfer occurred on March 27, 2002, with provisions that it be contingent upon Commission approval. Marion County was informed of the transfer.

The Commission has jurisdiction pursuant to Sections 367.165 and 367.071, Florida Statutes. This recommendation addresses the utility's failure to charge its approved rates, the transfer to an exempt entity, and closure of the docket.

DISCUSSION OF ISSUES

ISSUE 1: Should Silver City Utilities, Inc., be ordered to show cause, in writing, within 21 days, why it should not be fined for apparent violation of Section 367.081(1), Florida Statutes?

RECOMMENDATION: No. Show cause proceedings should not be initiated. (HARRIS, BRADY, IWENJIORA)

STAFF ANALYSIS: Section 367.081(1), Florida Statutes, provides that a utility may only charge rates and charges that have been approved by the Commission. Silver City is in apparent violation of this statute.

As noted in the Case Background, when the Commission granted Certificate No. 413-W in 1984, it established a base facility/ gallonage charge rate structure for Silver City which required the installation of meters. However, meters were never installed, the utility's approved rates were never implemented, and up to 1998, no revenues were ever collected. As a consequence, the utility reported zero revenue in its annual reports and paid the minimum regulatory assessment fees (RAFs) required by Rule 25-30.120(1), Florida Administrative Code.

Since it is not unusual for a start-up utility to have no revenues until lots are sold and service is provided, the annual reports were not questioned by staff until after the 1997 annual report was filed. Upon being told by the owners that service was being provided without compensation, staff advised the owners that the utility might be non-jurisdictional because it did not meet the definition of a utility pursuant to Section 367.021(12), Florida Statutes.[1] In response, the owners indicated that they were in the process of turning the facilities over to the homeowners.

When the utility owners failed to file a transfer application and timely file a 1998 annual report, a written explanation was

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[1] "Utility" means a water or wastewater utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public *for compensation*. (Emphasis added.)

requested. By letter dated July 27, 1999, the owners indicated they originally chose to offer free water as an incentive for buying lots. As a consequence, while expenses continued to accrue, no revenues were generated. In 1997, when the owners believed they could no longer afford to offer free water, they approached the homeowners with an offer for the homeowners to take over ownership of the utility facilities. Believing they lacked the resources needed to legally incorporate, the homeowners did not agree to assume ownership at that time. But, in May of 1998, they agreed to assume the utility's operating costs and began paying the utility's bills. However, because the utility never received any direct compensation, the owners did not recognize the payment of bills by the homeowners as revenues and continued to report zero revenue in the utility's annual reports for 1998 through 2000.

Meanwhile, the utility owners have been considering abandonment since 1999. While reluctant to take this extreme measure, on October 30, 2001, the owners finally filed a notice of intent to abandon the utility. Both before and after the notice of abandonment, the utility owners and staff worked with representatives of the homeowners to help them understand the ramifications of abandonment and the alternative options for service. After receiving the actual notice of abandonment, the homeowners decided that their least-cost option was to incorporate the homeowners association. On January 22, 2002, the homeowners incorporated Silver City Oaks Inc., as a Florida not-for-profit corporation for the purpose of owning and operating the utility facilities. The resulting transfer of utility facilities occurred on March 27, 2002.

With staff's assistance, the utility owners corrected the revenues reported on their annual reports from the time the homeowners began paying the utility's bills in May of 1998 through 2001. The owners were then advised of the amount of underpayment of RAFs along with the associated penalties and interest. The total amount due was received on March 18, 2002. Further, on April 17, 2002, the owners prepaid 2002 RAFs, through the date of transfer on March 27, 2002. As a result, the utility is now current with respect to annual reports and RAFs. However, there is no remedy for the original failure to install meters and implement Commission approved rates. Arguably, had the utility done so, the problems that subsequently occurred might have been avoided.

Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than $5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes. Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "it 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 charge Commission approved rates and charges, would meet the standard for a "willful violation." In In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, 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.

Although regulated utilities are charged with knowledge of the Commission's rules and statutes, staff does not believe the apparent violation of Section 367.081(1), Florida Statutes, for failure to charge approved rates and charges warrants the initiation of a show cause proceeding. Most notably, this is an abandonment in which the owners continued to operate the utility beyond the 60 days' notice in order to ensure an orderly transfer of operations to the homeowners. Once the owners realized that they were in violation of the Commission's statutes and rules, they made reasonable efforts to fulfill their obligations regarding annual reports and RAFs. And, since the efforts by both parties have resulted in the transfer of facilities to an entity exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes, the matter of tariffed rates and charges is no longer jurisdictional. Therefore, any show cause proceeding would serve no future purpose.

For all the above reasons, staff recommends that the Commission not require the utility to show cause in writing why it should not be fined for apparent violation of Section 367.081(1), Florida Statutes.

ISSUE 2: Should the transfer of facilities from Silver City Utilities to Silver City Oaks Inc., be approved?

RECOMMENDATION: Yes. The transfer to Silver City Oaks Inc., an exempt entity pursuant to Section 367.022(7), Florida Statutes, should be approved and Certificate No. 413-W should be cancelled effective March 27, 2002. (BRADY, REDEMANN, IWENJIORA, HARRIS)

STAFF ANALYSIS: As described in Issue 1, the transfer of the utility system from Silver City to the HOA is the customers' resolution to the owners' October 30, 2001, notice of intent to abandon the water system. The Commission issued Order No. PSC-01-2510-PCO-WU on December 21, 2001, to acknowledge the potential abandonment. On January 3, 2002, Marion County filed a petition in the Circuit Court of the Fifth Judicial Circuit for the Appointment of Receiver should the utility become abandoned. While the owners could have legally abandoned the system as of December 31, 2001, they continued to operate the system until the customers had an opportunity to decide whether they wished to assume ownership.

On January 22, 2002, the homeowners incorporated as Silver City Oaks Inc., a Florida not-for-profit corporation and, on January 29, 2002, voted to assume ownership and operation of the Silver City water facilities. On March 5, 2002, Silver City provided a Warranty Deed for the transfer of the utility facilities and land to the HOA and, on March 27, 2002, a Contract for Sale (Contract) was executed and closed by both parties with provisions to be contingent upon Commission approval.

On March 29, 2002, an application was filed with the Commission for approval of the transfer of Silver City to the HOA and for cancellation of Certificate No. 413-W. The application is in compliance with Section 367.071, Florida Statutes, and other pertinent statutes and provisions of the Florida Administrative Code with regard to authority to transfer. The applicants have also returned the utility's original certificate for cancellation.

NOTICING

The application contained proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code. Notice was given to the appropriate utilities and governmental entities. A notice was also published once in a newspaper of general circulation in the area of the utility. For

proof of notice to customers, the utility provided an affidavit of the notices given to the customers of the meetings held to discuss the acquisition of the utility facilities.

BUYER

Pursuant to Rule 25-30.037(2)(c), (d), (e) and (f), Florida Administrative Code, the application contains information on the corporate nature of the buyer. The HOA was incorporated on January 22, 2002, as a Florida not-for-profit corporation. The application indicates that everyone receiving service from the utility is a member of the HOA and that the HOA does not own any other utility facilities.

ENVIRONMENTAL COMPLIANCE

Rule 25-30.037(2)(p), Florida Administrative Code, requires a statement from the buyer of the condition of the utility and its compliance with the standards set by the Florida Department of Environmental Protection (FDEP). Since the HOA did not believe it was competent to make an environmental determination, they contacted the FDEP which provided a statement that the system is in satisfactory condition and is in compliance with all applicable FDEP environmental regulations. Staff has also verified that the utility has received and is in compliance with its water use permit. Finally, staff would note that the HOA has retained the services of the current operating company which has FDEP certified operators on staff.

CONTRACT AND LAND OWNERSHIP

Pursuant to Rule 25-30.037(2)(g), (h), (i), and (k), Florida Administrative Code, the application contains a copy of the Contract between Silver City and the HOA. The Contract was made contingent upon Commission approval as required by Section 367.071(1), Florida Statutes. The utility was conveyed to the HOA for the amount of $10.00 and other good and valuable considerations.

Rule 25-30.037(2)(q), Florida Administrative Code, requires evidence that the utility owns the land upon which the utility treatment facilities are located, or a copy of an agreement which provides for the continued use of the land. As proof of ownership, the application contains a copy of a recorded Warranty Deed in the

name of the HOA. In addition to the land under the utility facilities, the Warranty Deed includes the community's common area.

PUBLIC INTEREST

Rule 25-30.037(2)(j), Florida Administrative Code, requires a statement indicating how the transfer is in the public interest. The customers of the utility are assuming ownership of the utility facilities through their homeowners association. Pursuant to Section 367.022(7), Florida Statutes, nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such entities are exempt from Commission regulation.

As evidence of its exemption, the application contains a copy of the HOA's registration with the Florida Department of State as a not-for-profit corporation pursuant to Section 617.0821, Florida Statutes, effective January 22, 2002. The application also contains copies of the HOA's Articles of Incorporation and proposed By-Laws. A review of these documents verifies that service is intended to be provided solely to members and that each member has one vote in HOA matters.

Staff recommends that the transfer is in the public interest because the customers are voting members of the HOA and, as such, have control over the utility's provision of service. In addition, staff recommends that the HOA has demonstrated its exemption from regulation as defined in Section 367.022(7), Florida Statutes. Therefore, staff recommends that the transfer be approved and Certificate No. 413-W be cancelled effective March 27, 2002.

RATE BASE AND RATES AND CHARGES

If the Commission approves the transfer to an exempt entity, then it is not necessary to establish rate base, consider the appropriateness of an acquisition adjustment, or approve the continuation of rates and charges. For informational purposes, rate base has never been established for Silver City.

ANNUAL REPORTS AND RAFs

Rule 25-30.110(3), Florida Administrative Code, requires an annual report be filed for any year a utility is jurisdictional as of December 31st. As described in Issue 1, Silver City is current

on its annual reports through 2001. Since the transfer to an exempt entity occurred in March of 2002, the system will not be jurisdictional as of December 31, 2002. Therefore, there is no requirement for Silver City to file a 2002 Annual Report for the portion of 2002 during which it was jurisdictional.

Also, Silver City has paid RAFs up through the transfer date on March 27, 2002, and there are no penalties, interest or refunds due. Therefore, staff recommends that there are no further requirements for the Silver City system with respect to annual reports or RAFs.

CONCLUSION

Based upon all the above, staff recommends that the Commission approve the transfer of Silver City Utilities to Silver City Oaks Inc., an exempt entity pursuant to Section 367.022(7), Florida Statutes, and that Certificate No. 413-W be cancelled effective March 27, 2002.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. No further action is required and the docket should be closed. (HARRIS)

STAFF ANALYSIS: Providing the Commission accepts staff's recommendations on Items 1 and 2, there are no further actions remaining and the docket should be closed.