

State of Florida



Public Service Commission

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COMMISSION
CLERK

DATE: June 7, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Jaeger) JSC
Division of Economic Regulation (Brady) PB

RE: Docket No. 120084-WS – Application of Utilities, Inc. for authority to transfer majority organizational control of Hydro Star, LLC to Corix Utilities (Illinois), LLC.

AGENDA: 06/19/12 – Regular Agenda – Rule Waiver – Proposed Agency Action for Issue 1 -
- Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: Pursuant to Section 120.542(8), F.S., the Commission must grant or deny a waiver by July 12, 2012.

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\120084.RCM.DOC

Case Background

On April 13, 2012, Utilities, Inc. (Utilities, Inc. or Utility) filed an Application for authority to transfer majority organizational control of Hydro Star, LLC (Hydro Star) to Corix Utilities (Illinois), LLC (Corix). The application proposes the transfer of 100 percent of the issued and outstanding membership interests in Hydro Star to Corix. Hydro Star owns Hydro Star Holdings Corporation, which, in turn, owns 100 percent of the issued and outstanding shares of Utilities, Inc. (the regulated entity). A list of Utilities, Inc.'s Commission regulated utilities in Florida (Regulated Entities) that will be affected by the stock transfer is appended to this recommendation as Exhibit A. Utilities, Inc. asserts that the acquisition of Hydro Star's stock by

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Corix does not entail any change in direct ownership or control of the Regulated Entities and will not cause any change in management or loss of operational expertise.

With its application, Utilities, Inc. also filed a Petition for variance or waiver of Rules 25-30.030(4)(c), (5), (6) and (7), Florida Administrative Code (F.A.C.), governing noticing requirements, and Rules 25-30.037(3)(i), (j), and (k), F.A.C., governing transfers. Notice of the rule waiver request was published in the May 11, 2012, Florida Administrative Weekly. No comments on the rule waiver petition have been filed, and the time for filing such has expired.

Also, although the Utility requested a waiver of the time for noticing its customers and the other appropriate entities, it did timely notice its customers and the appropriate entities of the proposed transfer of majority organizational control. In response to these notices, several customers filed letters with the Commission expressing their concern over the proposed transfer. These letters will be addressed when staff files its recommendation on the transfer recommendation.

Staff is currently reviewing Utilities, Inc.'s transfer of majority organizational control application and expects to file a recommendation on that matter as soon as practicable. In this recommendation, staff addresses only the Utility's request for rule waivers. The Commission has jurisdiction over this matter through Sections 367.045, 367.071, and 120.542, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission grant Utilities, Inc.'s Petition for Variance or Waiver of Rules 25-30.030(4)(c), (5), (6), and (7), and 25-30.037(3)(i), (j), and (k), Florida Administrative Code (F.A.C.)?

Recommendation: The Commission should grant Utilities, Inc.'s Petition for Waiver of Rules 25-30.030(4)(c) and 25-30.037(3)(i) and (k), F.A.C. If the Commission approves waiver of Rule 25-30.030(4)(c), F.A.C., which requires a full legal description, a waiver of Rules 25-30.030(5), (6), and (7), F.A.C., is moot and is not required. The Utility's request for waiver of Rule 25-30.037(3)(j), F.A.C., should be granted as to all tariff sheets, except for Tariff Sheet 3.0. (Jaeger, Brady)

Staff Analysis: The rule provisions in question govern the notice and information that an applicant must provide to receive Commission approval of a transfer of majority organizational control. The Commission has previously determined that mergers or transfer of majority organizational control at the corporate parent or grandparent level require the approval of this Commission, pursuant to Section 367.071, F.S.¹

Staff notes that this rule waiver request is almost identical to the rule waiver request filed when Hydro Star acquired majority organizational control of Utilities, Inc. from Nuon Global Solutions USA, B.V. in 2005.² In that case, the Commission granted Utilities, Inc.'s request for waiver of Rules 30.030(4)(c), (5), (6) and (7) and 25-30.037(3)(i), (j), and (k), F.A.C.

Waivers of the Noticing Rule

Rule 25-30.030(4)(c), F.A.C., requires the applicant to provide notice of the proposed transfer that includes "a description using township, range and section reference" of the territory being transferred. Utilities, Inc. requests that it be permitted to send an identical, one-page notice (abbreviated notice) to all of the customers of each of its 11 Regulated Entities, without reference to a detailed territory description for each one. The notice would list the names of the individual Regulated Entities and their county of operation. Utilities, Inc. states that this abbreviated notice is appropriate in this case, because the application requests approval only for the transfer of the shares of stock of the parent companies, and no specific territory will be affected. Utilities, Inc. asserts that the underlying statutory purpose, to provide adequate notice to customers who wish to participate in the administrative process, is accomplished by the proposed abbreviated notice. Staff agrees.

Rules 25-30.030(5) and (7), F.A.C., require that notice be sent to local governing bodies, utilities, as well as published once in a newspaper of general circulation in the affected area within seven days of the filing of the application. Also, Rule 25-33.030(6), F.A.C., requires that

¹ See Order No. PSC-01-1647-PAA-WS, issued August 13, 2001, in Docket No. 010887-WS, In re: Application for approval of merger of Utilities, Inc. and Nuon Acquisition Sub, Inc., an Illinois corporation, and for determination of Commission's jurisdiction of such merger.

² See Order No. PSC-05-1155-PAA-WS, issued November 18, 2005, in Docket No. 050499-WS, In re: Application for transfer of majority organizational control of Utilities, Inc. from Nuon Global Solutions USA, B.V. to Hydro Star, LLC.

the utility notify its customers no sooner than 21 days before filing the application and no later than 7 days after filing the application. Utilities, Inc. originally requested that it be allowed to provide these notices and publish within ten (10) days of the Commission's approval of the abbreviated notice.

The application included a copy of Utilities, Inc.'s proposed abbreviated notice, which reflected a transfer of majority organization control of Utilities, Inc., to Corix. However, instead of waiting for Commission approval of variance or waiver of the part of the noticing rule governing timing of the required notices, Utilities, Inc., using the abbreviated notice, noticed all required entities of the application within the timeframes prescribed by the rule. If the Commission agrees that the abbreviated notice is appropriate, i.e., it grants waiver of Rule 25-30.030(4)(c), F.A.C., then staff believes that the request for waiver of Rule 25-30.030(5), (6), and (7), F.A.C., is moot, as those provisions have effectively been complied with by the Utility, and there will be no need to do any further noticing.

Waivers of the Transfer Rule

Rule 25-30.037(3)(i), F.A.C., requires an applicant for approval of the transfer of majority organizational control to file evidence of ownership of the land upon which utility facilities are located. Utilities, Inc. requests a waiver of this provision because the proposed stock transfer of parent companies does not affect the title to any real estate held by the operational utility subsidiaries. Therefore, evidence of title would serve no purpose in this proceeding, and the operational utilities have provided evidence of ownership of land in other Commission certification proceedings. Staff agrees.

Rule 25-30.037(3)(j), F.A.C., requires an applicant for approval of the transfer of majority organizational control to file an original and two copies of tariff sheets reflecting the change in ownership. Utilities, Inc. requests a waiver of this rule, because the transfer of ownership involves only the transfer of the stock of the parent company. Utilities, Inc. states that it will retain ownership of its operational subsidiaries, and no tariff changes will be necessary.

Staff agrees that there will be no change in the issuing officer at the Regulated Entity level. Therefore, the requirement for filing new tariffs reflecting the change in ownership should be waived. However, if an order is issued granting the transfer of majority organizational control, the tariff sheet which lists certificate orders, Tariff Sheet 3.0, will need to be updated in each of the Regulated Entities' water and wastewater tariffs. This tariff sheet cannot be revised until after an order is issued. Based on the above, staff recommends that a waiver be granted in regards to all tariff sheets except Tariff Sheet 3.0. The revision of this tariff sheet will be addressed in a subsequent recommendation addressing the transfer of majority organizational control in this docket.

Rule 25-30.037(3)(k), F.A.C., requires an applicant for approval of a transfer of majority organizational control to file the applicable certificates with the Commission. Utilities, Inc. explains that it is not the holder of any water or wastewater certificates. Its regulated operational subsidiaries hold the certificates, and since there will not be any change in ownership of the operational subsidiaries, the Utility argues that filing certificates will not serve any useful purpose.

While the Regulated Entities' certificates will be affected by this application, staff agrees there is no need for the certificates to be returned as a result of a change in Commission practice. Instead of issuing paper certificates which need to be returned for updating, revised certificates are now attached to Commission orders.³ Therefore, there is no need for paper certificates to be returned for updating. For this reason, staff recommends the rule waiver be granted.

Statutory Compliance

Section 120.542, F.S., authorizes the Commission to grant variances or waivers to the requirements of its rules where the person subject to the rules has demonstrated that the underlying purpose of the statute has been or will be achieved by other means, and that strict application of the rules would cause the person substantial hardship or would violate principles of fairness. "Substantial hardship" as defined in this section means demonstrated economic, technological, legal, or other hardship.

The underlying statutes that govern the Commission's approval of the transfer of majority organizational control are sections 367.071 and 367.045, F.S. Section 367.071(1), F.S., requires Commission approval of such a transfer. Section 367.071(4), F.S., requires that the transfer application comport with the requirements of Section 367.045, F.S. Section 367.045(1)(a), F.S., requires a utility to "[p]rovide notice of the actual application filed by mail or personal delivery to the governing body of the county or city affected, the Public Counsel, to the commission, and to such other persons and in such other manner as may be prescribed by commission rule."

The purpose of these statutes is to ensure that the utility's actions are in the public interest and that the utility has provided timely and adequate notice of those actions to those entities that may have an interest in them. Except in one instance, staff believes that Utilities, Inc. will fulfill the underlying purpose of these statutes by providing notice as it has done and otherwise complying with the Commission's applicable transfer rules as it has proposed. The one exception is the Utility's request for waiver of Rule 25-30.037(3)(j), F.A.C. Staff believes that this rule requires the original and two copies of sample tariff sheets reflecting the transfer of majority organizational control. Tariff Sheet 3.0 lists the orders affecting ownership of a utility. If the Commission does approve transfer of majority organizational control, then this tariff sheet would have to be revised so as to keep a record of this transfer of majority organizational control. Therefore, because all other tariffs remain the same, the Utility's request for waiver of Rule 25-30.037(3)(j), F.A.C., should be granted as to all tariff sheets, except for Tariff Sheet 3.0. Other than the above, staff believes that strict compliance with the rules would serve no useful purpose and would cause unnecessary expense in this proceeding to approve the transfer of a parent company's stock. Further, staff believes that the Utility has shown that it will suffer a hardship and that strict adherence to the rule would violate principles of fairness if the Utility were to have to incur significant additional expenses to provide needless legal descriptions in the notices, proofs of ownership, multiple certificates, and tariffs, if the waiver is not granted.

³ Staff is in the process of initiating rulemaking on certificate rules, including the deletion of this requirement.

Staff Conclusion

Staff recommends that the Commission grant Utilities, Inc.'s Petition for Waiver of Rules 25-30.030(4)(c), and 25-30.037(3)(i) and (k), F.A.C. If the Commission approves waiver of Rule 25-30.030(4)(c), F.A.C., which requires a full legal description, a waiver of Rules 25-30.030(5), (6) and (7), F.A.C., becomes moot and is not required. The Utility's request for waiver of Rule 25-30.037(3)(j), F.A.C., except for Tariff Sheet 3.0, should also be granted.

Docket No. 120084-WS

Date: June 7, 2012

Issue 2: Should this docket be closed?

Recommendation: No. The docket should remain open pending the Commission's decision on the substantive aspects of the application. (Jaeger, Brady)

Staff Analysis: The docket should remain open pending the Commission's decision on the substantive aspects of the application.

Utilities, Inc.
List of Subsidiaries – 100% wholly-owned

<u>Subsidiary Name</u>	<u>County of Operations</u>	<u>Certificate No.</u>
Cypress Lakes Utilities	Polk	509-S; 592-W
Labrador Utilities, Inc.	Pasco	530-S; 616-W
Lake Placid Utilities, Inc.	Highlands	414-W; 347-S
Lake Utility Services, Inc.	Lake	465-S; 496-W
Mid-County Services, Inc.	Pinellas	081-S
Sanlando Utilities Corp.	Seminole	189-S; 247-W
Tierra Verde Utilities, Inc.	Pinellas	058-S
Utilities, Inc. of Eagle Ridge	Lee	369-S
Utilities, Inc. of Florida	Seminole Pasco Marion Pinellas Orange	278-W; 225-S 229-S; 107-W 305-S; 410-W 204-W 040-W
Utilities, Inc. of Longwood	Seminole	232-S
Utilities, Inc. of Pennbrooke	Lake	400-S; 466-W