

FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

MEMORANDUM

DECEMBER 4, 1997

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FPSC - Records/Reporting

TO: DIRECTOR OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF WATER AND SEWER (WALKER REDEMANN) *sem*
DIVISION OF LEGAL SERVICES (CROSBY) *YAS*

RE: DOCKET NO. 970762-WU - APPLICATION FOR TRANSFER OF
CERTIFICATE NO. 573-W FROM HARBOR LAKES WATER SYSTEMS,
INC. TO NHC UTILITIES, INC. IN CHARLOTTE COUNTY *mm*

AGENDA: DECEMBER 16, 1997 - REGULAR AGENDA - PROPOSED AGENCY
ACTION FOR ISSUES NOS. 3 and 4 - INTERESTED PERSONS MAY
PARTICIPATE *bl*

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\WAW\WP\970762.RCM

CASE BACKGROUND

Harbor Lakes Water Systems, Inc. (Harbor Lakes or utility) is a Class C utility that provides water service for about 458 residential customers in Charlotte County. In 1995, Harbor Lakes recorded operating revenues of \$161,680, operating expenses of \$166,808, and a consequent \$5,128 net operating loss.

On June 24, 1997, NHC Utilities, Inc. (NHC) filed an application to transfer Water Certificate No. 573-W from Harbor Lakes to NHC. This recommendation addresses the application for transfer. NHC is a wholly owned subsidiary of LEMB, L.P., (LEMB) a Delaware limited partnership that acquired this utility system and the mobile home community it serves from previous owners. The utility also serves an adjacent 59 lot single-family subdivision known as Riverwood.

Review of the application discloses that this utility system was purchased pursuant to an agreement dated August 14, 1996 between the previous owners and Sunlife RV Resorts, L.L.C. (Sunlife). On December 2, 1996, Sunlife assigned its rights under the purchase agreement to LEMB, L.P., NHC's parent company. In June of 1997, LEMB assigned its rights under the contract to NHC.

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In all cases, transfer of the utility system was made contingent upon Commission approval. The purchase agreement also disclosed that the "Buyer" would manage, operate, and maintain the utility system until the proposed transfer was approved by the Commission. If not approved, the agreement indicated that the utility would revert to the "Seller." Nonetheless, our review indicates that the interim transfer, although subject to Commission approval, may have violated certain rules concerning prior approval for transfers. This apparent violation is discussed in Issue No. 1.

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DISCUSSION OF ISSUES

ISSUE 1: Should Harbor Lakes Water Systems, Inc. be ordered to show cause, in writing within twenty days, why it should not be fined for violation of Section 367.071, Florida Statutes?

RECOMMENDATION: No. Show cause proceedings should not be initiated. (CROSBY)

STAFF ANALYSIS: As stated in the case background, Harbor Lakes Water Systems, Inc. is in apparent violation of Section 367.071, Florida Statutes, which states, in part, "No utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organizational control without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest." Harbor Lakes Water Systems, Inc. entered into a contract on August 14, 1996, to sell the water system to NHC Utilities, Inc. NHC Utilities, Inc. has been operating, managing and maintaining the system since August, 1996, without the approval of the Commission. Such action is "willful" in the sense intended by Section 367.161, Florida Statutes. Section 367.161, 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. 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 "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Harbor Lakes Water Systems, Inc. failed to obtain the approval of the Commission prior to entering into a contract and turning the facilities over to NHC Utilities, Inc. to operate. The Third Amendment to the Purchase and Sale Agreement states that the transfer is contingent upon Commission approval. A copy of the Escrow Agreement was also provided which states that approval of the Commission to transfer the assets of Harbor Lakes to the Buyer is needed. In addition, the Agreement states that the Buyer and Seller have agreed that the Buyer will operate and manage Harbor Lakes during the interval between the date of this Escrow Agreement and final approval by the Commission. The Escrow Agreement further states, in part, that the Escrow Agent shall hold the entire escrow deposit pending, among other provisions, final approval of the

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Commission. If approval is not obtained by the Buyer, the funds held in escrow are to be returned to the Buyer. Failure of Harbor Lakes to obtain prior approval of the Commission appears to be due to its belief that the sale is not final because it is contingent upon Commission approval, and therefore, not a violation of Section 367.071, Florida Statutes.

Staff has reviewed the application, the sales agreement and its amendments, and the Escrow Agreement, and, although NHC has been operating the utility since the agreement was signed in August of 1996, the sale becoming final is conditioned upon Commission approval. Therefore, staff does not believe that the apparent violation of Section 367.071, Florida Statutes, rises in these circumstances to the level of warranting initiation of show cause proceedings. Staff recommends that the Commission not order Harbor Lakes to show cause for failing to obtain Commission approval prior to the transfer of the utility to NHS.

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ISSUE 2: Should the transfer of Water Certificate No. 573-W from Harbor Lakes Water Systems, Inc. to NHC Utilities, Inc. be approved?

RECOMMENDATION: Yes, the transfer should be approved. (WALKER)

STAFF ANALYSIS: The application is in compliance with the governing statute, Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for transfer of a certificate. The application contains a check in the amount of \$750, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code.

The Harbor Lakes water system purchases bulk potable water from Charlotte County Utilities for resale to its customers. According to the application, the utility's distribution lines, hydrants, and services all reside in properly authorized easements. Thus, this utility is not subject to any filing requirements relative to proving ownership of the treatment plant sites (Rule 25-30.037(2)(q), Florida Administrative Code).

The application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code, including notice to the customers of the system to be transferred. No objections to the notice of application have been received and the time for filing such has expired.

A description of the territory served by the utility is appended to this memorandum as Attachment A.

We believe the public interest is served by approving the proposed transfer to NHC. Since its parent company will own and operate the mobile home community that is the utility's principal customer, NHC has pledged that it will provide satisfactory service for its customers. NHC has also stated that it will retain the same personnel who presently operate and maintain the utility's facilities.

We have contacted the Department of Environmental Protection (DEP) concerning Harbor Lakes' compliance status relative to any Notices of Violation or DEP consent orders. We were informed that this system is not subject to any outstanding violation or consent orders.

The application contains a copy of the contract for sale which discusses the purchase price, terms of payment and a list of the assets purchased and the liabilities assumed. NHC provided a

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statement in its application that it will fulfill the commitments, obligations, and representations of Harbor Lakes.

Based on the above, staff believes the transfer of Water Certificate No. 53-W from Harbor Lakes to NHC is in the public interest and should be approved.

ATTACHMENT A

NHC UTILITIES, INC.

TERRITORY DESCRIPTION

A portion of Plan No. 1 of a part of Ward Seven El Jobean, as recorded in Plat Book 2, Page 37, of the Public Records of Charlotte County, Florida, and a portion of Plan No. 2 of a part of Ward Seven El Jobean, as recorded in Plat Book 2, Page 48, of the Public Records of Charlotte County, Florida, all being more particularly described as follows:

Beginning at the intersection of the Northerly right of way line of Russell Avenue and the centerline of the C.H. & N. Railroad; thence South $72^{\circ} 11' 23''$ West along the Northerly right of way line of said Russell Avenue, a distance of 1257.07 feet to a point on the arc of a curve whose radius point bears South $67^{\circ} 00' 19''$ West from said point, and being the right of way line of Seminole Circle; thence, Northerly and Westerly, along the arc of said curve, having a radius of 332 feet and a central angle of $49^{\circ} 37' 52''$, an arc distance of 287.59 feet, to the Easterly right of way line of Southland Avenue; thence North $12^{\circ} 11' 23''$ East, along said Easterly right of way line, a distance of 2024.95 feet; thence North $77^{\circ} 48' 37''$ West, a distance of 1390.0 feet, to the center of Lincoln Park; thence North $17^{\circ} 22' 27''$ East radially a distance of 331.97 feet to the intersection of Lincoln Circle with the Easterly right of way line of Hamner Avenue; thence North $12^{\circ} 11' 23''$ East along the Easterly right of way line of Hamner Avenue, a distance of 1222.32 feet to the intersection with the Southeasterly right of way line of Colonial Avenue; thence North $72^{\circ} 11' 23''$ East along the Southeasterly right of way line of Colonial Avenue, a distance of 605.01 feet to the Southwesterly extension of the Southeasterly right of way line of Ward Road; thence North $12^{\circ} 11' 23''$ East along the Southeasterly right of way line of Ward Road, a distance of 417.62 feet to a point on the North line of Section 21, Township 41 South, Range 21 East, Charlotte County, Florida; thence South $89^{\circ} 32' 10''$ East along the North line of said Section 21, a distance of 2212.21 feet to the intersection with the centerline of the C.H. & N. Railroad; thence South $12^{\circ} 11' 23''$ West along said centerline, a distance of 4258.40 feet to the Point of Beginning, containing 202.5285 acres, more or less.

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ISSUE 3: What is the rate base of Harbor Lakes at the time of transfer?

RECOMMENDATION: The rate base amount, which for transfer purposes reflects the net book value, is \$302,627. (WALKER)

STAFF ANALYSIS: NHC reported in its application that the rate base value for the acquired system as of November 30, 1996 was \$302,163. That amount reflects the net book value of the acquired system with certain adjustments proposed by the utility's outside consultant. Those corrections included removal of misclassified or undocumented charges, corresponding revisions to accumulated depreciation, and crediting Contributions in Aid of Construction (CIAC) for cash reimbursements. This utility was formerly regulated by Charlotte County. Its rate base has not been formerly established by this Commission.

Our audit examination disclosed that the \$302,163 reported balance was correct in all material respects. The audit staff proposed two additional corrections: a \$1,842 addition to general plant to reclassify computer equipment that was incorrectly expensed and updating accumulated depreciation to December 31, 1996 to provide year-end details. With these corrections, the recommended rate base balance was \$302,627 as of December 31, 1996.

Staff's recommended rate base balance for Harbor Lakes is attached as Schedule No. 1. Based on the adjustments set forth herein, staff recommends that the rate base value for Harbor Lakes should be \$302,627. This rate base calculation is used solely to establish the net book value of the property being transferred. This amount does not include the normal ratemaking adjustments for working capital or used and useful factors.

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SCHEDULE NO. 1

HARBOR LAKES WATER SYSTEMS, INC.
SCHEDULE OF WATER RATE BASE
AS OF DECEMBER 31, 1996

<u>Description</u>	<u>Balance per Utility</u>	<u>Adjust</u>		<u>Balance per Staff</u>
Utility Plant in Service	\$559,829	\$1,842	a)	\$561,671
Accumulated Depreciation	(\$171,602)	(\$1,681)	b)	(\$173,283)
CIAC	(\$102,221)	\$0		(\$102,221)
Accumulated Amortization	\$16,157	\$303	c)	\$16,460
Working Capital	<u>\$0</u>	<u>\$0</u>		<u>\$0</u>
Totals	<u>\$302,163</u>	<u>\$464</u>		<u>\$302,627</u>

- a) Adjustment to reclassify computer equipment to plant in service
b) Adjustment to include additional plant and update to 12/31/96
c) Adjustment to update balance to 12/31/96

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ISSUE 4: Should an acquisition adjustment be approved?

RECOMMENDATION: No. The reported cost of the utility system is an allocated share of a total purchase price for a mobile home park and various other assets. Since the exact purchase price for the utility system cannot be determined, an acquisition adjustment should not be recorded. (WALKER)

STAFF ANALYSIS: An acquisition adjustment results when the purchase price of a utility system differs from its original cost calculation. In this proceeding, the purchase price for the Harbor Lakes utility system cannot be readily ascertained because the utility was purchased in combination with other assets associated with operation of a mobile home park (Harbor Lakes Mobile Home and RV Park). Accordingly, since the precise purchase price is uncertain, an acquisition adjustment should not be recorded.

Review of the purchase agreement reveals that SunLife RV Resorts, L.L.C (SunLife), a Delaware limited liability company, agreed to pay \$5,100,000 to purchase various assets associated with operation of a mobile home park known as Harbor Lakes Mobile Home and RV Park. The acquired assets included land, easements, various improvements (including the utility system), rental agreements, and other tangible and intangible properties. An explicit price for the utility assets was not defined. Subsequently, SunLife assigned its interests in the purchase agreement to LEMB, L.P. (LEMB), a Delaware limited partnership, which is also the utility's parent company. Later, on December 2, 1996, LEMB and the seller agreed that \$250,000 of the purchase price would be escrowed while purchase of the utility system remains pending. None of these sums specifically define what portion of the purchase price should be assigned to buying the utility system. The utility's outside consultant elected to assign \$302,163 to the utility system since that amount matched utility's adjusted net book value. As such, the purchase price and the rate base value would be identical and an acquisition adjustment would not be recorded. We believe this proposal is reasonable since rate base inclusion of an acquisition adjustment is not allowed unless extraordinary conditions are shown, and none are apparent in this case. Therefore, we recommend that an acquisition adjustment should not be recognized in this proceeding.

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ISSUE 5: Should NHC adopt and use the rates and charges approved by this Commission for Harbor Lakes?

RECOMMENDATION: Yes, NHC should continue charging the rates and charges approved for this utility system. (WALKER)

STAFF ANALYSIS: The utility's approved rates and charges were effective January 13, 1995 pursuant to administrative order WS-94-0261. These tariff changes were implemented pursuant to a rate index application.

Rule 25-9.044(1), Florida Administrative Code, provides that:

In cases of change of ownership or control of a utility which places the operation under a different or new utility...the company which will thereafter operate the utility business must adopt and use the rates, classification and regulations of the former operating company (unless authorized to change by the Commission)...

NHC has not requested a change in the rates and charges of the utility, nor is staff aware of any reason to change them at this time. Accordingly, staff recommends that the utility continue operations under the existing tariff and apply the approved rates and charges. The utility has filed a tariff reflecting the transfer of ownership. Staff will approve the tariff filing effective for services provided or connections made after the stamped approval date.

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ISSUE 6: Should this docket be closed?

RECOMMENDATION: Yes, this docket should be closed if no timely protests are filed to the proposed agency action issues. (CROSBY)

STAFF ANALYSIS: If there are no timely protests to the proposed agency action issues (Issues Nos. 3 and 4), no further action will be required and the docket should be closed.