

SMF ENERGY CORP
Form S-8 POS
June 06, 2007

As filed with the Securities and Exchange Commission on June 6, 2007

Registration No. 333-61764
Registration No. 333-113622

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

**Post-Effective Amendment No. 1 to
FORM S-8**

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

SMF ENERGY CORPORATION
(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

65-0707824
(I.R.S. Employer
Identification Number)

**200 West Cypress Creek Road, Suite 400
Fort Lauderdale, Florida
Telephone: (954) 308-4200**
(Address of principal executive offices)

SMF ENERGY CORPORATION 2000 STOCK OPTION PLAN
(Full title of plan)

Richard E. Gathright
Chief Executive Officer and President
SMF Energy Corporation
200 West Cypress Creek Road, Suite 400
Fort Lauderdale, Florida
Telephone: (954) 308-4200
(Name, address, including zip code, and telephone number,
including area code, of agent for service)

With copies to:

S. Lee Terry, Jr.
Davis Graham & Stubbs LLP
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
(303) 892-9400

EXPLANATORY NOTE

This Post-Effective Amendment No. 1 relates to Registration Statement Nos. 333-61764 and 333-113622 on Form S-8, filed with the Securities and Exchange Commission (the “SEC”) on May 25, 2001 and March 15, 2004, respectively (collectively, the “Original Registration Statements”). This Post-Effective Amendment is being filed pursuant to Rule 414 under the Securities Act of 1933, as amended (the “Securities Act”), to notify the SEC that SMF Energy Corporation, a Delaware corporation (“SMF”), is the successor to Streicher Mobile Fueling, Inc., a Florida corporation (“Streicher”), and to amend the Original Registration Statement accordingly.

SMF is the successor to Streicher as a result of the reincorporation merger of Streicher with and into SMF, a wholly-owned subsidiary of Streicher, consummated pursuant to an Agreement of Merger and Plan of Merger and Reorganization (the “Merger Agreement”). The Merger Agreement was approved by the shareholders of Streicher at the annual meeting of shareholders held on December 8, 2006 and at the reconvened meeting held on December 22, 2006. The merger was effective on February 14, 2007. Immediately prior to the merger, SMF had no assets or liabilities other than nominal assets and liabilities.

Pursuant to Rule 414(d) under the Securities Act, SMF, as successor to Streicher, hereby adopts the Original Registration Statements on Form S-8 with respect to the SMF Energy Corporation 2000 Stock Option Plan (Registration Statement Nos. 333-61764 and 333-113622), as its own registration statements for all purposes of the Securities Act and the Securities Exchange Act of 1934, as amended (the “Exchange Act”).

The SMF Energy Corporation 2000 Stock Option Plan was initially registered on May 25, 2001 (Registration Statement No. 333-61764). On March 15, 2004, an additional 1,357,948 shares of common stock was registered under this plan (Registration Statement No. 333-113622). This is the reason that a single Post-Effective Amendment No. 1 is being filed with respect to the Original Registration Statements for this plan.

As used in this Post-Effective Amendment No. 1, the term “Registrant” refers to each of Streicher Mobile Fueling, Inc. and its successor by merger, SMF Energy Corporation, as the context may require.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents, previously filed by the Registrant with the SEC, are hereby incorporated in this registration statement by reference as of their date of filing with the SEC:

- (a) the Registrant's Annual Report on Form 10-K for the year ended June 30, 2006;
- (b) the Registrant's Quarterly Reports on Form 10-Q for the quarters ended September 30, 2006, December 31, 2006 and March 31, 2007;
- (c) the Registrant's Current Reports on Form 8-K filed with the SEC on July 7, 2006 (other than information in the Current Report that is furnished, but not filed); October 2, 2006; October 3, 2006; October 16, 2006 (other than information in the Current Report that is furnished, but not filed); October 18, 2006; December 4, 2006; December 22, 2006; January 19, 2007; February 14, 2007; February 21, 2007; February 22, 2007 and April 3, 2007; and
- (d) the Registrant's description of its common stock contained in Amendment No. 2 to its Registration Statement on Form 8-A/A (SEC File No. 000-21825) filed with the SEC on June 5, 2007.

All documents filed by the Registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act subsequent to the date of this registration statement and prior to the filing of a post-effective amendment which indicates that all securities offered have been sold or that deregisters all such securities then remaining unsold, shall be deemed to be incorporated by reference herein and shall be a part hereof from the date of filing of such documents.

Any statement contained in a document incorporated by, or deemed incorporated by reference herein, shall be deemed to be modified or superseded for purposes of this registration statement to the extent that a statement contained herein or in any other subsequently filed document which also is or is deemed to be incorporated by reference herein modifies or supersedes such statement. Any statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this registration statement.

Item 4. Description of Securities

Not applicable.

Item 5. Interests of Named Experts and Counsel.

The Registrant has agreed to indemnify and hold KPMG LLP ("KPMG") harmless against and from any and all legal costs and expenses incurred by KPMG in successful defense of any legal action or proceeding that arises as a result of KPMG's consent to the incorporation by reference of its audit report on the Registrant's past financial statements incorporated by reference in this registration statement.

Item 6. Indemnification of Directors and Officers.

SMF Energy Corporation is incorporated in the State of Delaware. Section 145(a) of the General Corporation Law of the State of Delaware (the "DGCL") provides that a Delaware corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation or enterprise, against expenses, judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, he had no cause to believe his conduct was unlawful.

Section 145(b) of the DGCL provides that a Delaware corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that such person acted in any of the capacities set forth above, against expenses actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted under similar standards, except that no indemnification may be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine that despite the adjudication of liability, such person is fairly and reasonably entitled to be indemnified for such expenses which the court shall deem proper.

Section 145 of the DGCL further provides that to the extent a director or officer of a corporation has been successful in the defense of any action, suit or proceeding referred to in subsections (a) and (b) or in the defense of any claim, issue, or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith; that indemnification provided for by Section 145 shall not be deemed exclusive of any other rights to which the indemnified party may be entitled; and that the corporation may purchase and maintain insurance on behalf of a director, officer, employee or agent of the corporation against any liability asserted against him or incurred by him in any such capacity or arising out of his status as such whether or not the corporation would have the power to indemnify him against such liabilities under such Section 145.

Section 102(b)(7) of the DGCL provides that a corporation in its original certificate of incorporation or an amendment thereto validly approved by stockholders may eliminate or limit personal liability of members of its board of directors or governing body for breach of a director's fiduciary duty. However, no such provision may eliminate or limit the liability of a director for breaching his duty of loyalty, failing to act in good faith, engaging in intentional misconduct or knowingly violating a law, paying a dividend or approving a stock repurchase which was illegal, or obtaining an improper personal benefit. A provision of this type has no effect on the availability of equitable remedies, such as injunction or rescission, for breach of fiduciary duty. SMF's Certificate of Incorporation contains such a provision.

The Certificate of Incorporation of SMF generally allows indemnification of officers and directors to the fullest extent allowed by law. SMF currently intends to indemnify its officers and directors to the fullest extent permitted by its Certificate of Incorporation and Delaware Law.

SMF maintains insurance policies under which its directors and officers are insured, within the limits and subject to the limitations of the policies, against expenses in connection with the defense of actions, suits or proceedings, and certain liabilities that might be imposed as a result of such actions, suits or proceedings, to which they are parties by reason of being or having been a director or officer SMF.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits

Exhibit

| No. | Description of Exhibit |
|-------|--|
| 2.1 | Agreement of Merger and Plan of Merger and Reorganization between Streicher Mobile Fueling, Inc. and SMF Energy Corporation, dated February 13, 2007 (incorporated by reference to Exhibit 2.1 to the Registrant's Current Report on Form 8-K filed on February 14, 2007) |
| 3(i) | Incorporating Documents of SMF Energy Corporation, including: Certificate of Incorporation dated October 6, 2006 (incorporated by reference to Appendix B to the Registrant's Definitive Proxy Statement on Schedule 14A, filed on October 30, 2006); Certificate of Amendment dated February 12, 2007 (incorporated by reference to Exhibit 3(i) to the Registrant's Current Report on Form 8-K filed on February 14, 2007) |
| 3(ii) | Bylaws of SMF Energy Corporation (incorporated by reference to Appendix D to the Registrant's Definitive Proxy Statement on Schedule 14A, filed on October 30, 2006) |
| 4.1 | Specimen Common Stock Certificate (incorporated by reference to Exhibit 4.1 to the Registrant's Amendment No. 2 to Registration Statement on Form 8-A/A (SEC File No. 000-21825) filed on June 5, 2007) |
| 4.2 | SMF Energy Corporation 2000 Stock Option Plan |
| 5.1 | Opinion of Davis Graham & Stubbs LLP |
| 23.1 | Consent of Davis Graham & Stubbs LLP (included in its opinion filed as Exhibit 5.1) |
| 23.2 | Consent of Grant Thornton LLP |
| 23.3 | Consent of KPMG LLP |
| 24.1 | Power of Attorney (included on the signature page hereto) |

Item 9. Undertakings.

(a) The undersigned Registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933 ("Securities Act");

(ii) To reflect in the prospectus any facts or events arising after the effective date of this registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement; and

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(iii) To include any material information with respect to the plan of distribution not previously disclosed in this registration statement or any material change to such information in this registration statement.

Provided, however, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by the Registrant pursuant to Section 13 or 15(d) of the Exchange Act that are incorporated by reference in this registration statement.

(2) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered that remain unsold at the termination of the offering.

(b) The undersigned Registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the Registrant's annual report pursuant to Section 13(a) or 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Exchange Act) that is incorporated by reference in this registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(c) Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer or controlling person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Post-Effective Amendment No. 1 to Registration Statement Nos. 333-61764 and 333-113622 to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Fort Lauderdale, State of Florida, on June 6, 2007.

SMF ENERGY CORPORATION

By: /s/ Richard E. Gathright

Name: Richard E. Gathright
Title: Chief Executive Officer and President

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below hereby constitutes and appoints Richard E. Gathright and Michael S. Shore, and each of them, as his true and lawful attorneys-in-fact and agents, with full powers of substitution and resubstitution, for him and in his name, place and stead, in any and all capacities, to sign any or all amendments, including any post-effective amendments, to this registration statement, and to file the same, with all exhibits thereto, and all documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents full power and authority to do and perform each and every act and thing requisite and necessary to be done in connection therewith, as fully to all intents and purposes as he might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them, or their or his substitutes or substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Post-Effective Amendment No. 1 to Registration Statement Nos. 333-61764 and 333-113622 has been signed by the following persons in the capacities and on the date indicated.

| Signature | Title | Date |
|---|---|--------------|
| <u>/s/ Richard E. Gathright</u> Richard E. Gathright | Chief Executive Officer and President, and Chairman of the Board (Principal Executive Officer) | June 6, 2007 |
| <u>/s/ Michael S. Shore</u> Michael S. Shore | Chief Financial Officer and Senior Vice President (Principal Financial and Accounting Officer) | June 6, 2007 |
| <u>/s/ Wendell R. Beard</u> | Director | June 6, 2007 |

Wendell R. Beard

/s/ Larry S. Mulkey

Director

June 6, 2007

Larry S. Mulkey

/s/ C. Rodney O'Connor

Director

June 6, 2007

C. Rodney O'Connor

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| Signature | Title | Date |
|---|--------------|--------------|
| <u>/s/ Robert S. Picow</u> Robert S. Picow | Director | June 6, 2007 |
| <u>/s/ Steven R. Goldberg</u> Steven R. Goldberg | Director | June 6, 2007 |
| <u>/s/ Nat Moore</u> Nat Moore | Director | June 6, 2007 |

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EXHIBIT INDEX

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