

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into
proposed sale of Florida Water
Services Corporation.

DOCKET NO. 021066-WS
ORDER NO. PSC-03-0193-FOF-WS
ISSUED: February 7, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER REQUIRING FLORIDA WATER SERVICES CORPORATION TO FILE
AN APPLICATION FOR APPROVAL OF ITS PROPOSED SALE PURSUANT TO
SECTION 367.071(1), FLORIDA STATUTES, AND RULE 25-30.037(2),
FLORIDA ADMINISTRATIVE CODE

BY THE COMMISSION:

The Commission opened this docket in October of 2002, for the purpose of investigating the proposed sale of Florida Water Services Corporation (FWSC) to a newly created entity named Florida Water Services Authority (FWSA). Charlotte County and the Office of Public Counsel (OPC) have been granted intervention in this docket.

In the furtherance of the continuing investigation into the proposed sale of FWSC to FWSA, on December 20, 2002, comments were solicited from parties and interested persons. In particular, input was sought as to whether the FWSA is a "governmental authority" as defined by Section 367.021(7), Florida Statutes, and whether the FWSA is exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes. Numerous responses were received from persons and parties in areas served by FWSC, including Senator Nancy Argenziano, Hernando County, the City of Palm Coast, Collier County, Charlotte County, Citrus County, Sugarmill Woods Civic Association, as well as FWSC. The responses

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raised many concerns as to whether FWSA is a "governmental authority" as defined by Section 367.021(7), Florida Statutes, and therefore, whether the FWSA should be exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes.

FWSC is Florida's largest investor-owned water and wastewater treatment utility, consisting of over 150 systems located throughout Florida in 26 counties, and serving over 500,000 customers. A large number of those systems are located in counties that we regulate, and thus, hold a certificate of authorization from this Commission. Section 367.071(1), Florida Statutes, clearly states that no utility shall sell its facilities or any portion thereof, without obtaining our approval, thereby putting the responsibility on FWSC to obtain our approval prior to the sale to FWSA.

We note that while it is clear that our approval is a prerequisite to any transfer, such approval is to be rendered according to the nature of the entity that is purchasing or acquiring the utility. Specifically, pursuant to Section 367.071(4)(a), Florida Statutes, the sale of facilities, in whole or in part, to a governmental authority shall be approved as a matter of right. However, pursuant to Section 367.071(1), Florida Statutes, no sale to a private entity shall take place without Commission determination and approval that the proposed sale is in the public interest and that the buyer will fulfill the commitments, obligations, and representations of the utility.

Irrespective of the nature of the acquiring entity, whether it is a governmental authority or a private entity, the obligation of the transferring utility to seek our approval of the transfer still exists. The sale of FWSC is scheduled to take place on February 14, 2003; however, to date, no application by FWSC seeking our approval of this transfer has been received.

In addition, we believe that the Legislature attached great importance to our authority to consider transfers, whether as a matter of right or upon a public interest finding, because it provided a device by which the transfer could legally take place prior to Commission approval as long as the contract arranging the

transfer contains a clause preserving our authority to examine the sale. Specifically, Section 367.071(1), Florida Statutes, states that a transfer of a utility's facilities, or any portion thereof, may occur prior to our approval if the contract is made contingent upon our approval.

Upon request, a copy of the contract for sale of FWSC to FWSA was provided to our staff, and it appeared that no such contingency was included. However, prior to our consideration of this matter at the February 4, 2003, Agenda Conference, our staff was made aware that on December 20, 2002, the contract for the proposed sale was amended to include contingency language. On February 4, 2003, our staff was provided with a copy of the amended application. Specifically, the amended contract includes the following provision:

10.12 Regulatory Transfer Contingency

The sale and transfer of the Assets pursuant to this Agreement is contingent upon the approval by the Florida Public Service Commission and the other applicable County Regulatory Agencies. Pursuant to Section 163.01(7), Florida Statutes, Section 367.071(4)(a), Florida Statutes, and prior legal precedent, such approvals may be obtained after Closing and must be granted as a matter of right.

In consideration of the efficacy of this language, we find that this language, as it exists in the amended contract for sale, is inadequate to protect the consumers that will be affected by FWSC's proposed sale.

Time is of the Essence

We believe that the transfer in question is imminent. Indeed, the latest information obtained indicates that the transfer is currently scheduled to close on February 14, 2003. As announcement of the proposed sale occurred in September of 2002, we believe that FWSC has had more than adequate time to file an application seeking our approval of the transfer. Our approval under Florida's

Administrative Code, which requires due process to all substantially affected parties, will take more time than that afforded by the few weeks which remain between this date and the proposed closing.

In addition, several parties and interested persons have raised many questions and concerns as to whether the acquiring entity, FWSA, is a governmental authority as defined by Section 367.021(7), Florida Statutes. In consideration of these concerns and the potentially enormous impact of the proposed sale, the appropriate action to take is a precautionary one. Therefore, we will not pre-suppose that FWSA is a governmental authority, nor that the proposed sale will be approved as a matter of right.

Given the brief time before the proposed sale is scheduled to take place, and in order to preserve our opportunity to examine the transfer, FWSC must initiate an application seeking our approval of the transfer by no later than Friday, February 7, 2003. We believe that this action is necessary in order to protect the customers of FWSC prior to the proposed sale taking place, and also to prevent an irreversible situation whereby we would be deprived of determining whether this sale should be approved as a matter of right, or whether there must be a determination made that the sale is in the public interest.

Accordingly, we hereby order FWSC to file an application for approval of the proposed transfer as mandated by Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code, by Friday, February 7, 2003. FWSC shall also address questions raised as to whether the application should be approved as a matter of right or whether there should be a public interest standard applied by the Commission. The application shall also include further information and explanation supporting the statements made by FWSC that as of Tuesday, February 4, 2003, FWSA has been re-formed as a non-profit corporation as defined by 367.021(7), Florida Statutes.

In addition, on our own motion, this matter shall be set for hearing. Furthermore, we find that continued negotiations shall be permissible, and are encouraged among the parties of record and the

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interested persons, for the purpose of reaching an agreement that would address the concerns raised regarding this proposed sale.

Further, we find that the existing contingency language that in the amended contract for sale is inadequate to protect consumers. Accordingly, FWSC is hereby prohibited from selling its assets prior to obtaining Commission approval of its application, or Commission approval of satisfactory contingency language in its contract for sale. This directive is predicated on this Commission's inherent authority to protect the customers of FWSC; a power that is enumerated in Sections 367.011 and 367.121, Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Water Services Corporation shall file an application for approval of its proposed transfer to Florida Water Services Authority, in accordance with Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code, by Friday, February 7, 2003, and shall include the information set out in the body of this Order. It is further

ORDERED that this matter shall be set for hearing. It is further

ORDERED that in accordance with our finding that the existing contingency language that has been included in the amended contract for sale is inadequate to protect consumers, FWSC is hereby prohibited from selling its assets prior to obtaining Commission approval of its application, or until it obtains Commission approval of satisfactory contingency language in its contract for sale. It is further

ORDERED that this docket shall remain open pending resolution of the matters stated herein.

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By ORDER of the Florida Public Service Commission this 7th day
of February, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

LAH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of

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the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.