

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint application for acknowledgment of sale of land and facilities in Osceola County to Osceola County by Florida Water Services Corporation, and for cancellation of Certificates Nos. 66-W and 289-S.

DOCKET NO. 030921-WS
ORDER NO. PSC-03-1275-FOF-WS
ISSUED: November 10, 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 APPROVING TRANSFER OF FACILITIES
IN OSCEOLA COUNTY, CANCELLING CERTIFICATE NOS. 66-W AND 289-S
AND OPENING DOCKET TO INVESTIGATE GAIN ON SALE

BY THE COMMISSION:

Florida Water Services Corporation (FWSC or utility) is a Class A utility providing water and wastewater service throughout Florida. Most of its systems are under Commission jurisdiction. FWSC serves approximately 11,386 water and 7,981 wastewater customers in Osceola County. The one wastewater and eight water systems in Osceola County are not in a priority water resource caution area of the South Florida Water Management District. The utility's 2002 annual report indicates that the Osceola County systems had gross revenue of \$2,866,961 and \$3,600,580 and net operating income of \$879,631 and \$984,706 for water and wastewater, respectively.

The utility's water system was originally issued Certificate No. 66-W pursuant to Order No. 5348, issued March 7, 1972, in Docket No. 71465-W, In Re: Application of Robert Bean and V. E.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Buckley, Partnership, d/b/a Intercession City Waterworks for a certificate to operate an existing water system in Osceola County. The wastewater system was originally issued Certificate No. 289-S pursuant to Order No. 9702, issued December 16, 1980, in Docket No. 770714-WS (AP), In Re: Application of Orange/Osceola Utilities, Inc (formerly known as Real Estate Corporation of Florida, N.V.) For a certificate to operate a water and sewer utility in Osceola County, Florida.

On or about August 25, 2003, FWSC entered into a First Amended and Restated Utility System Asset Acquisition Agreement (Agreement) with Hernando County, The City of Marco Island, The City of Palm Coast, Osceola County, Florida Governmental Utility Authority, and The City of Deltona. FWSC filed four separate applications seeking acknowledgment for the transfers contemplated by this agreement.¹ We have jurisdiction to consider this matter pursuant to Sections 367.045, 367.071, 367.081, Florida Statutes.

TRANSFER OF FACILITIES

On September 19, 2003, FWSC filed its application seeking acknowledgment of the transfer of its Osceola County land and facilities to either Osceola County or its duly authorized assignee, Tohopekaliga Water Authority (TOHO), and for cancellation of Certificate Nos. 66-W and 289-S, pursuant to Section

¹ Docket No. 030920-WS - Joint application for acknowledgment of sale of portion of land and facilities of Florida Water Services Corporation in Volusia County to City of Deltona and for amendment of Certificate Nos. 238-W and 182-S; Docket No. 030931-WS - Joint application for acknowledgment of sale and land and facilities of Florida Water Services Corporation in Charlotte County to Florida Governmental Utility Authority, and for cancellation of Certificate Nos. 570-W and 496-S; Docket No. 030932-WS - Joint application for acknowledgment of sale and land and facilities of Florida Water Services Corporation in Lee County to Florida Governmental Utility Authority, and for cancellation of Certificate Nos. 306-W and 255-S.

367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. Included with the application is a copy of the Agreement, which states the proposed closing date for all of the parties to the agreement is on or before December 8, 2003. Therefore, December 8, 2003, is the anticipated effective date of the acquisition.

As stated previously, both the Agreement and application state that the Osceola facilities will be transferred to either Osceola County or its duly authorized assignee, TOHO. Both Osceola County and TOHO are governmental authorities pursuant to Section 367.021(7), Florida Statutes, which states that a "governmental authority" is a political subdivision, as defined by Section 1.01(8), Florida Statutes. According to Section 1.01(8), Florida Statutes, a "political subdivision" includes counties, cities, towns, villages, special tax districts, special road and bridge districts, and all other districts in this state. TOHO is an independent special district, created and passed in a special act by the 2003 Florida Legislature (Chapter 2003-368, HB No. 1265, Tohopekaliga Water Authority Act).

Pursuant to Section 367.071(4)(a), Florida Statutes, the transfer of facilities to a governmental authority shall be approved as a matter of right. As such, no notice of the transfer is required and no filing fees apply. The application had no deficiencies, and is in compliance with Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code.

The application contains a statement that the Buyer obtained FWSC's most recent income and expense statement, balance sheet, statement of rate base for regulatory purposes, and contributions-in-aid-of-construction pursuant to Rule 25-30.037(4)(e), Florida Administrative Code. A statement that the customer deposits and interest earned, less any unpaid balances, will be transferred to the City for the benefit of the customers as required by Rule 25-30.037(4)(g), Florida Administrative Code, was also included in the application.

Pursuant to Rule 25-30.037(4)(f), Florida Administrative Code, the application is to contain the date on which the governmental authority proposes to take official action to acquire the utility. According to the Agreement, the closing will take place on or before December 8, 2003. Since a firm date has not been provided, FWSC should provide us with proof of the transfer, including the actual closing date, within 30 days of closing in order to establish the effective date of the transfer.

Additionally, pursuant to the requirements of Rule 25-30.037(4)(h), Florida Administrative Code, a statement was included that FWSC has no outstanding regulatory assessment fees (RAFs) and no fines or refunds are owed. We have verified that the utility has filed its 2002 annual report, paid its 2002 RAFs, and that there are no outstanding penalties and interest. For the period of January 1, 2003 through the closing date, FWSC has agreed to file a RAF return and remit RAF payment for the Osceola County systems within 60 days of the closing date.

In consideration of the above, we find that FWSC's application is in compliance with the provisions of Rule 25-30.037, Florida Administrative Code. Pursuant to Section 367.071(4)(a), Florida Statutes, the transfer of facilities to a governmental authority shall be approved as a matter of right. As indicated previously, both Osceola County and TOHO are governmental authorities, as defined in Section 367.021(7), Florida Statutes. Therefore, the transfer of FWSC's Osceola County facilities to Osceola County or its duly authorized assignee, TOHO, shall be approved, as a matter of right, pursuant to Section 367.071(4)(a), Florida Statutes.

FWSC shall provide us with proof of the transfer within 30 days of closing in order to establish an effective date. RAFs for the period of January 1, 2003 through the date of closing, shall be submitted within 60 days of the closing date. Certificate Nos. 66-W and 289-S shall be cancelled administratively at the conclusion of any pending dockets concerning FWSC's Osceola County facilities.

GAIN ON SALE

Per the acquisition agreement entered into on August 25, 2003, FWSC will receive a total of \$38,070,835 from the Buyer for the water and wastewater facilities. That sum appears to exceed the rate base values that we have approved for those facilities. In Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, In Re: Application for rate increase and increase in service availability charges in Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties, the most recent rate proceeding for FWSC, the approved rate base value for the combined Osceola water and wastewater facilities was \$10,163,255 for the projected test year ending December 31, 1996. Restoring used and useful adjustments, the aggregate rate base balance was \$10,871,366. In its 2002 Annual Report, FWSC reported a rate base of \$11,642,081 for its Osceola County systems. As the sale is planned to occur in 2003, an updated rate base calculation will be needed to determine the gain, if any, due to sale of these facilities. Initial review indicates that FWSC will record a gain on this transaction; therefore, we must consider whether to open a separate docket to determine if the gain should be allocated among the remaining water and wastewater customers.

By letter dated August 29, 2003, the attorney for FWSC provided the utility's position with respect to whether we should initiate a gain on sale issue in this docket. In that letter, FWSC cites our decision concerning gain on sale in Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, in Docket No. 920199-WS, In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona) (SSU Order). In the SSU Order, FWSC argues that we concluded that there should be no sharing in the gain arising from the condemnation of water and wastewater systems previously operated by

FWSC. Because that decision concerning gain on sale was affirmed by the First District Court of Appeal in Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995), FWSC argues that we are bound by the "Citrus County precedent."

Moreover, FWSC notes that "the Citrus County appellate court decision is consistent with" Order No. PSC-93-1821-FOF-WS, issued December 22, 1993, in Docket Nos. 930373-WS, In Re: Application for amendment of Certificate No. 247-S by North Fort Myers Utility, Inc., and cancellation of Certificate No. 240-S issued to Lake Arrowhead Village, Inc., in Lee County, and 930379-SU, In Re: Application for a limited proceeding concerning the rates and charges for customers of Lake Arrowhead Village, Inc., in Lee County, by North Fort Myers Utility (North Fort Myers Order). In the North Fort Myers Order, FWSC points to the paragraph where we stated:

[C]ustomers of utilities do not have any proprietary claim to utility assets. Although customers pay a return on utility investment through rates for service, they do not have any ownership rights to the assets, whether contributed or paid for by utility investment.

We note that this sale does not involve a condemnation proceeding. Moreover, we believe that FWSC has misinterpreted each of the above-noted Orders and court decision. In the SSU Order, in addressing whether a sharing of the gain on sale was appropriate, we specifically said, "[s]ince SSU's remaining customers never subsidized the investment in the SAS [St. Augustine Shores] system, they are no more entitled to share in the gain from that sale than they would be required to absorb a loss from it." Therefore, our determination that a sharing of the gain on sale was not appropriate was limited to the specific facts of that case and was not a "blanket" legal determination that a gain on sale would never be appropriate. The Citrus County case merely confirmed this factual interpretation.

As to the North Fort Myers Order, the language quoted by FWSC was merely addressing whether there should be a refund to the customers of the former utility, Lake Arrowhead Village, Inc. (LAVI). As to consideration of the gain on sale, we said:

We first examined whether any gain on sale should be passed on to the customers. The costs to dismantle the plant would range from \$20,000 to \$50,000, depending on the public health and other sanitary requirements for the intended use of the land where the treatment and disposal facilities are located. Therefore, even if the few lots which might be created by clearing the former plant site were sold, a significant portion of the gain would be greatly offset by the cost of clearing the site and preparing the lots for sale.

Therefore, again on a factual basis, we determined that a gain on sale adjustment was not appropriate. We believe that a review of the appropriate disposition of any gain on sale is appropriate and to do so, we are merely carrying out our jurisdictional duty to "fix rates which are just, reasonable, compensatory, and not unfairly discriminatory" to the remaining customers of FWSC, as required by Section 367.081(2)(a)1, Florida Statutes.

Before FWSC's Osceola County facilities are sold, the facilities are subject to our jurisdiction. Their service rates were established in FWSC's 1995 rate proceedings in Docket No. 950495-WS. According to FWSC's 2002 annual report, the Osceola County systems had net operating income of \$879,631 and \$984,706 for water and wastewater, respectively. Whether the Osceola County facilities were subsidized by other systems has yet to be determined.

Further study to examine sharing considerations for the Osceola County utility gain on sale is required to permit timely examination of this topic. Accordingly, a docket to examine whether FWSC's sale of its Osceola County facilities involves a gain that should be shared with FWSC's remaining customers shall be opened. This is consistent with our prior decisions in the following Orders: Order No. PSC-98-0688-FOF-WS, issued May 19, 1998, in Docket No. 971667-WS, In Re: Application for approval of transfer of facilities of Florida Water Services Corporation to Orange County and cancellation of Certificate Nos. 84-W and 73-S in Orange County; Order No. PSC-99-2171-FOF-WU, issued November 8, 1999, in Docket No. 981589-WU, In re: Application for approval of

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transfer of a portion of the facilities operated under Certificate No. 40-W in Orange County from Utilities, Inc. of Florida to the City of Maitland; and Order No. PSC-99-2373-FOF-WS, issued December 6, 1999, in Docket No. 991288-WS, In re: Application for transfer of a portion of Certificates Nos. 278-W and 225-S in Seminole County from Utilities, Inc. of Florida to the City of Altamonte Springs. In each of the above-three Orders, we acknowledged the transfer to the respective governmental authority and opened another docket to evaluate the gain on sale.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the transfer of Florida Water Services Corporation's Osceola County land and facilities to either Osceola County or to its duly authorized designee, Tohopekaliga Water Authority, shall be approved as a matter of right. It is further

ORDERED that Certificate Nos. 66-W and 289-S shall be canceled administratively at the conclusion of any pending dockets concerning Florida Water Services Corporation's Osceola County land and facilities. It is further

ORDERED that Florida Water Services Corporation shall provide proof of transfer within 30 days of closing for purposes of establishing an effective closing date. It is further

ORDERED that for the period of January 1, 2003, through the effective closing date, Florida Water Services Corporation shall submit a regulatory assessment fees payment within 60 days from the closing date. It is further

ORDERED that a docket to examine whether Florida Water Services Corporation's sale of its Osceola County land and facilities involves a gain that should be shared with Florida Water Services Corporation's remaining customers shall be opened. It is further

ORDERED that this docket shall remain open until the conclusion of any pending dockets concerning the Osceola County

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facilities, and until Certificate Nos. 66-W and 289-S are cancelled administratively.

By ORDER of the Florida Public Service Commission this 10th Day of November, 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 on the transfer in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the

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Director, Division of 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.

Any party adversely affected by the decision to open a docket to examine gain on sale in this order, which is procedural in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure. Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.