

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint application for acknowledgment of sale of land and facilities of Florida Water Services Corporation to Charlotte County; and for cancellation of Certificate Nos. 570-W and 496-S in Charlotte County, and Certificate Nos. 306-W and 255-S in Charlotte and Lee Counties.

DOCKET NO. 030931-WS
ORDER NO. PSC-04-0071-FOF-WS
ISSUED: January 26, 2004

The following Commissioners participated in the disposition of this matter:

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

ORDER APPROVING TRANSFER OF LAND AND FACILITIES
IN CHARLOTTE AND LEE COUNTIES, CANCELLING CERTIFICATE
NOS. 570-W, 496-S, 306-W, AND 255-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 our jurisdiction. FWSC's Burnt Store and Deep Creek systems serve approximately 5,254 water and 5,006 wastewater customers in Charlotte and Lee County. The systems are in a priority water resource caution area of the Southwest Florida Water Management District. The utility's 2002 annual report indicates that the two systems had gross revenue of \$2,563,056 and \$2,452,903 and net operating income of (\$136,335) and \$99,750 for water and wastewater, respectively.

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The water and wastewater systems of Deep Creek were originally issued Certificate Nos. 90-W and 78-S pursuant to Order No. 5430, issued May 24, 1972, in Docket Nos. 71591-W and 71592-S, In Re: Application of Ecological Science Corporation for certificates to operate its existing Harbor Heights Water and Sewer Systems in Charlotte County, Florida. Pursuant to Order No. 5649, issued February 7, 1973, in Docket No. C-72699-WS, In Re: Joint Application of Ecological Utilities, Inc. for transfer of Certificates Nos. 78-S and 90-W from Harbor Heights Water System and Harbor Heights Sewer System in Charlotte County to Deep Creek Utilities, Inc., the systems received their current name of Deep Creek.

The Burnt Store water and wastewater systems were originally issued Certificate Nos. 306-W and 255-S pursuant to Order No. 8334, issued June 5, 1978, in Docket Nos. 770391-W and 770392-S, In Re: Application of Burnt Store Utilities, Inc., for certificates to operate a water and sewer utility in Charlotte County, Florida. Section 367.041, Florida Statutes. Burnt Store is located in both Lee and Charlotte County. Certificate Nos. 306-W and 255-S were amended to include the Lehigh systems in Lee County pursuant to Order No. PSC-93-0500-FOF-WS, issued April 5, 1993, in Docket No. 930086-WS, In Re: Petition for acknowledgment of corporate reorganization by merger, cancellation of Certificates Nos. 9-W and 7-S in Lee County issued to Lehigh Utilities, Inc. and amendment of Certificates Nos. 306-W and 255-S in Lee/Charlotte Counties by Southern States Utilities, Inc. The transfer of FWSC's Lehigh system was approved by Order No. PSC-03-1284-FOF-WS, issued November 10, 2003, in Docket No. 030932-WS, In re: 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 amendment of Certificate Nos. 306-W and 255-S.

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

On September 24, 2003, we received a joint application for acknowledgment of the sale of FWSC land and facilities located in Charlotte County to the Florida Governmental Utility Authority (FGUA) and cancellation of certificates. On October 22, 2003, our staff filed a recommendation addressing the proposed sale of FWSC's Charlotte County land and facilities to the FGUA for our November 3, 2003, Agenda Conference. On October 29, 2003, FWSC requested that this matter be deferred pending the finalization of an agreement between Charlotte County and the FGUA, wherein the transfer of FWSC's Charlotte County facilities would be made directly to the County, rather than the FGUA.

On December 2, 2003, the FGUA approved the Assignment, Assumption and Amendment to its Agreement with FWSC under which the FGUA would assign, and Charlotte County would assume, the right to acquire the Burnt Store and Deep Creek Systems (hereinafter referred to collectively as the Charlotte Systems). On December 11, 2003, FWSC and Charlotte County filed a joint amended application for acknowledgment of the sale and transfer of the land and facilities of FWSC in Charlotte County to Charlotte County.

We have jurisdiction pursuant to Sections 367.045, 367.071, and 367.081, Florida Statutes.

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. 030921-WS - 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 Certificate Nos. 66-W and 289-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 amendment of Certificate Nos. 306-W and 255-S.

TRANSFER OF FACILITIES

On December 11, 2003, FWSC and Charlotte County filed a joint amended application seeking acknowledgment of the sale and transfer of FWSC's Charlotte System to Charlotte County pursuant to Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. The amended application received on December 11, 2003, stated that the closing date on the sale is on or before December 12, 2003. We have confirmed that the closing took place on December 12, 2003, which is the effective date of the transfer.

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 County 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 County for the benefit of the customers as required by Rule 25-30.037(4)(g), Florida Administrative Code, was also included in the application.

Additionally, pursuant to the requirements of Rule 25-30.037(4)(h), Florida Administrative Code, a statement was included that FWSC has no outstanding RAFs and no fines or refunds are owed. The utility has filed its 2002 annual report, has paid its 2002 RAFs, and owes no outstanding penalties and interest. On December 12, 2003, FWSC paid an estimated amount of RAFs for the period of January 1, 2003 through December 12, 2003. When the final revenue number is available, the utility shall submit an actual RAF return with a true-up check, if needed, by March 31, 2004.

In consideration of the above, we find that the 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. Therefore, the transfer of the Charlotte Systems to the County shall be approved, as a matter of right as of December 12, 2003, pursuant to Section 367.071(4)(a), Florida Statutes. The utility shall submit an actual RAF return with a final RAF payment, if needed, by March 31, 2004. Certificate Nos. 306-W, 570-W, 255-S, and 496-S shall be cancelled administratively at the conclusion of any pending dockets concerning the Charlotte and Lee County facilities.

OPENING OF GAIN ON SALE DOCKET

The acquisition agreement entered into on August 25, 2003, and assigned on December 2, 2003, indicates a cash purchase price of \$3,753,122, for sale of the Charlotte systems to the County. Section 4.04(A) of the agreement states:

Within 3 days after Closing, each Buyer participating in such Closing shall: (i) dismiss with prejudice any and all complaints, claims, lawsuits and/or regulatory proceedings pending against Florida Water . . . This includes, without limitation, dismissal by Charlotte County of its litigation against Florida Water.

Counsel for FWSC indicated that the referenced litigation involved a suit by Charlotte County against FWSC in excess of \$6,000,000. If Charlotte County had prevailed, and if the purchase price is based on the estimated value of the terminated lawsuit plus the cash purchase price, the estimated value of the transaction is approximately \$10,000,000. 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 Charlotte systems was \$4,139,404 for the projected test year ending December 31, 1996. Restoring used and

useful adjustments, the aggregate rate base balance was \$8,478,934. In its 2002 Annual Report, FWSC reported a rate base of \$9,390,758 for the Charlotte Systems systems. As the sale occurred 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 Nos. PSC-93-1821-FOF-WS, issued December 22, 1993, in Docket No. 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 the sale to the County 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, "Since 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 the Charlotte Systems were purchased by the County, the facilities were 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 Charlotte Systems had net operating income of (\$136,335) and \$99,750 for water and wastewater, respectively. Whether the Charlotte Systems were subsidized by other systems has yet to be determined.

Further study to examine sharing considerations for the Charlotte Systems gain on sale is necessary to permit timely examination of this topic. Accordingly, a docket to examine whether FWSC's sale of its Charlotte Systems 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 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 Burnt Store System located in Charlotte and Lee County, and the Deep Creek System located in Charlotte County to Charlotte County shall be approved as a matter of right. It is further

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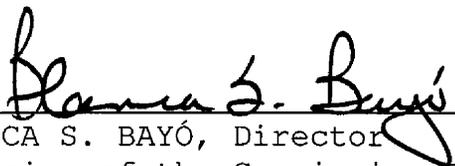
ORDERED that Certificate Nos. 306-W, 570-W, 255-S, and 496-S shall be cancelled administratively at the conclusion of any pending dockets concerning the Charlotte and Lee County facilities. It is further

ORDERED that when the final revenue number is available for the period of January 1, 2003, through December 12, 2003, is available, the utility shall submit an actual RAF return with a true-up check, if needed, by March 31, 2004. It is further

ORDERED that a docket to examine whether Florida Water Services Corporation's sale of its Charlotte and Lee County land and facilities involves a gain on sale that should be shared with Florida Water Service'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 Charlotte and Lee County facilities, and until Certificate Nos. 306-W, 570-W, 255-S, and 496-S are cancelled administratively.

By ORDER of the Florida Public Service Commission this 26th day of January, 2004.



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

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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 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

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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.