

State of Florida



Public Service Commission  
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TALLAHASSEE, FLORIDA 32399-0850

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DATE: JANUARY 28, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &  
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (HOLLEY) *Jan Allert*  
DIVISION OF ECONOMIC REGULATION (DANIEL, KUMMER) *P.D.* *FSK* *FSK*

RE: DOCKET NO. 021066-WS - INVESTIGATION INTO PROPOSED SALE OF  
FLORIDA WATER SERVICES CORPORATION.

AGENDA: 02/04/03 - REGULAR AGENDA - INTERESTED PERSONS MAY  
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\021066.RCM

CASE BACKGROUND

This docket was opened by Commission staff (staff) 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). On November 1, 2002, Charlotte County filed its Petition for Leave of Intervention. By Order No. PSC-02-1568-PCO-WS, Charlotte County was granted Intervenor status. On November 11, 2002, the Office of Public Counsel (OPC) served its Notice of Intervention in this docket. By Order No. PSC-02-1558-PCO-WS, issued November 13, 2002, OPC's intervention was acknowledged.

In the furtherance of its continuing investigation into the proposed sale of FWSC to FWSA, on December 20, 2002, staff solicited comments from parties and interested persons. In particular, staff sought input 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

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pursuant to Section 367.022(2), Florida Statutes. In response to staff's request, 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 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. These concerns are further amplified by reports that suggest that the closing date of the proposed sale is scheduled for February 14, 2003, less than one month away from the date of this recommendation.

This recommendation addresses whether FWSC should be required to file an application for approval of transfer in accordance with Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code, prior to the proposed closing date of February 14, 2003. The Commission has jurisdiction to consider this matter pursuant to Sections 367.071 and 367.121, Florida Statutes.

DISCUSSION OF ISSUES

**ISSUE 1:** Should FWSC be required to file an application for approval of its proposed transfer, pursuant to Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code, prior to the proposed closing date of February 14, 2003?

**RECOMMENDATION:** Yes. FWSC should be required to file an application for approval of its proposed transfer, as required by Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code. The application should be filed no later than Friday, February 7, 2003. (HOLLEY, DANIEL)

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

Staff notes that while it is clear that Commission approval is a prerequisite to any transfer, Commission 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 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.

Staff believes that it is important to note that 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 Commission approval of the transfer still exists. As mentioned previously, the sale of FWSC is scheduled to take place on February 14, 2003. To date, no application by FWSC seeking Commission approval of this transfer has been received.

In addition, staff believes that the Legislature attached great importance to the Commission's 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 as long as the contract arranging the transfer contained a clause preserving the Commission's 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 Commission approval if the contract is made contingent upon Commission approval. Upon request, a copy of the contract for sale of FWSC to FWSA was provided to staff; however, it appears that no such contingency was included.

There is much debate as to whether the acquiring entity, FSWA, is a governmental authority as defined by Section 367.021(7), Florida Statutes. As mentioned previously, comments received by parties and interested persons have raised many questions and concerns as to whether FWSA is a governmental authority. Therefore, staff believes that with such numerous and valid questions raised by this proposed sale, and in consideration of the potentially enormous impact of the proposed sale, the appropriate action for the Commission to take is a precautionary one, in that it should not pre-suppose that FWSA is a governmental authority, and should not pre-suppose that the proposed sale will be approved as a matter of right.

Accordingly, staff believes that the Commission should, in an abundance of caution, require 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.

#### Prior Commission Action

This recommendation is consistent with action taken by the Commission in Docket No. 980767-WS, In re: Joint Application for Transfer of Facilities of Gulf Utility Company to Gulf Environmental Services, Inc. in Lee County and Cancellation of Certificates Nos. 072-W and 064-S. In that docket, Gulf Utility Company (Gulf) and Gulf Environmental Services (GES) filed a joint application for transfer of facilities from Gulf to GES, and for cancellation of Certificates Nos. 523-W and 457-S. The application was filed prior to the proposed sale taking place, in accordance

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with Section 367.071(4)(a), Florida Statutes, in which GES was purporting to be a governmental authority,.

Although a sale to a governmental authority is approved as a matter of right, upon examination of the information filed with the transfer application, staff made a preliminary evaluation that GES was not a governmental authority as defined by Section 367.021(7), Florida Statutes. Further, a determination was made that the transfer could therefore not be approved as a matter of right, but rather the Commission could approve the transfer only after a finding that the transfer was in the public interest in accordance with Section 367.071(1), Florida Statutes. Thus, staff requested that the utility re-file its application in accordance with Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code.

In the Gulf docket, rather than re-file its application, the utility requested that it meet with staff in order to provide further information in support of its being considered a governmental authority. Upon a detailed analysis, GES was ultimately found to be a governmental authority, as defined in Section 367.021(7), Florida Statutes, and the transfer was ultimately acknowledged by the Commission.

#### Time is of the Essence

As mentioned previously, in the Gulf docket, an application for a transfer was filed prior to the sale actually taking place, thereby affording staff and ultimately the Commission the time to examine whether GES should be considered a governmental authority, and consequently, whether the sale should be approved as a matter of right. In the case before us, there is no pending application for approval of the transfer of FWSC before the Commission.

Staff believes that the transfer in question is imminent. Indeed, the latest information obtained by staff shows that the transfer is currently scheduled to close on February 14, 2003. As announcement of the proposed sale occurred in September of 2002, staff believes that FWSC has had more than adequate time for it to file an application seeking Commission approval of the transfer. Commission 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. Given this brief time,

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and given that the contract referenced above lacks any contingency clause (as required by statute) for the exercise of Commission jurisdiction, staff believes that in order to preserve the Commission's opportunity to examine the transfer, FWSC must be ordered to initiate an application seeking Commission approval of the sale, and that it must do so prior to the proposed transfer.

Staff believes 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 the Commission 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, staff recommends that the Commission require 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.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open pending staff's investigation of the proposed sale. (HOLLEY)

**STAFF ANALYSIS:** This docket should remain open pending staff's investigation of the proposed sale.