

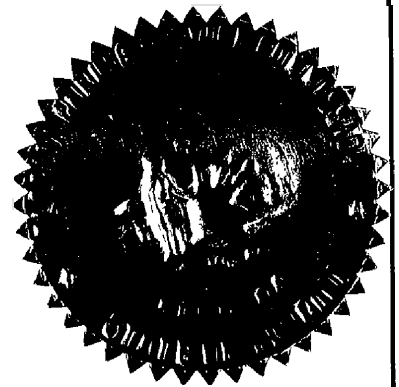
IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

FLORIDA PUBLIC SERVICE COMMISSION,
Plaintiff,

vs. CIVIL DIVISION
FLORIDA WATER SERVICES CORPORATION, CASE NO.: 03-CA-358
Defendant.

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PROCEEDINGS: HEARING
BEFORE: THE HONORABLE WILLIAM L. GARY
Circuit Judge
DATE: Monday, February 17, 2003
TIME: Commenced at 9:30 a.m.
Concluded at 10:15 a.m.
PLACE: Leon County Courthouse
Courtroom 2A
Tallahassee, Florida
REPORTED BY: LINDA BOLES, RPR
Official FPSC Reporter
(850) 413-6734



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4 of Florida Water Services Corporation and Florida Water
5 Services Authority.

6 BRUCE CULPEPPER, Akerman, Senterfitt, 301 South
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13 ARTHUR I. JACOBS, Jacobs & Associates, P.A., 401
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15 Fernandina Beach, Florida 32034, appearing on behalf of Amelia
16 Island Plantation Community Association, Inc.

17 MICHAEL B. TWOMEY, P. O. Box 5256, Tallahassee,
18 Florida 32314-5256, appearing on behalf of Collier County,
19 Florida, and Sugarmill Woods Association, Inc.

20 HAROLD McLEAN, General Counsel, and LORENA HOLLEY,
21 FPSC General Counsel's Office, 2540 Shumard Oak Boulevard,
22 Tallahassee, Florida 32399-0850, appearing on behalf of the
23 Commission Staff.

24

25

1 P R O C E E D I N G S

2 THE COURT: Good morning. We're here on a motion for
3 a temporary injunction; is that correct?

4 MR. McLEAN: Yes, sir.

5 THE COURT: All right. Are you ready to proceed?
6 We've got one hour, folks.

7 MR. McLEAN: Yes, sir.

8 MR. RICHARD: If I might preliminarily, Your Honor,
9 Barry Richard representing the Florida Water Services
10 Corporation and the Authority. The Authority filed a motion to
11 intervene on Friday. Opposing counsel informs me that the PSC
12 is not going to object to it.

13 MR. McLEAN: That's correct, sir.

14 THE COURT: I didn't hear you, Mr. Richard.

15 MR. RICHARD: I said I have a motion for the Florida
16 Water Service Authority to intervene as a party.

17 THE COURT: Well, I've got five motions to intervene,
18 and I'll grant every one of them.

19 MR. RICHARD: Okay.

20 THE COURT: And we've got one hour to hear these
21 motions; however you want to proceed.

22 MR. RICHARD: The PSC is not objecting to that
23 intervention.

24 THE COURT: And I also have them as it relates to
25 Palm Coast -- well, I guess that's the only other one. They

1 just sent me about seven of them. Okay. Are you ready?

2 MR. McLEAN: Your Honor, there should be others, and
3 the Public Service Commission supports all of those, for what
4 that's worth. I believe the folks who are filing those
5 interventions are in the courtroom today.

6 THE COURT: Well, anybody -- any one of these cities
7 that want to intervene, I'm not going to stop them from
8 intervening.

9 MR. McLEAN: Yes, sir.

10 MR. RICHARD: We have no objection.

11 THE COURT: I'll admonish you, you've still got one
12 hour to argue your motion.

13 MR. McLEAN: Good morning, Judge Gary. Thank you for
14 taking the time to hear our case.

15 I'd like to introduce counsel, Lorena Holley, who's
16 on our side at the Public Service Commission; Mr. Barry Richard
17 and Bruce Culpepper, who will be hearing the other side of the
18 case.

19 I want to tell you, first of all, Judge, what we're
20 doing here. The Public Service Commission issued a lawful
21 order on February the 7th. That order has survived indirect
22 challenge in the 1st District Court of Appeal, as you know,
23 under writ of prohibition. I believe you have been provided
24 with the orders in that case.

25 Judge, the Public Service Commission issues many

1 orders every year. It is unusual for those orders to be
2 violated and it is unusual for there to be any notion that they
3 might be violated. We deal with companies like BellSouth,
4 Verizon, Florida Power & Light, Florida Progress, Gulf Power,
5 TECO, the former SSU and the Florida Water, Florida Water
6 Services Corporation. Those orders normally go and they're
7 complied with and it's no big deal.

8 The Commission has limited remedies with respect to
9 enforcement of our orders. But the public -- strike that. But
10 the Legislature says to us and to you, sir, in legislation that
11 when a violation is likely or when there has been a violation,
12 the Public Service Commission can come to your court and seek
13 to add your authority to our order. And I submit to you that
14 is the only effect of what this injunction does. So it was to
15 add the authority of the circuit court to the order which we
16 have already issued. And the reason for that is I believe the
17 Legislature understood that about all the Public Service
18 Commission can do is fine someone when they don't comply with
19 the order. We have no injunctive powers, we have none of your
20 enviable powers in equity to make people do what you tell them
21 to do. We can only fine them.

22 I believe you will find that important in this case
23 because we have utterly no authority and we do not allege any
24 authority and our order does not suggest that we have any
25 authority over the Authority itself.

1 Now before we go too far with authority, I would like
2 to introduce the real players before you, at least tell you who
3 they are. The Florida Public Service Commission, we're an
4 agency of state government. We regulate lots of investor-owned
5 utilities including Florida Water Services Corporation.

6 There's going to be some confusion in the case
7 because the names are so similar. So what I would prefer to
8 do, with Your Honor's leave, is refer to the Florida Public --
9 I'm sorry -- the Florida Water Services Corporation as the
10 Corporation because that would stand in contrast to the almost
11 identically named entity who is also before you, the Florida
12 Water Services Authority.

13 Florida Water Services Corporation, formerly SSU, has
14 been, has been regulated by the Florida Public Service
15 Commission for many years. I handled a case against them in
16 1977 as a member of the Florida Public Service Commission
17 staff. So they've been around forever; they've been subject to
18 our jurisdiction that whole time.

19 Florida Services Water Authority, that is the
20 Authority, we assert no jurisdiction over them. Our order
21 tells them to do nothing, suggests that they should do nothing.
22 If this transaction occurs, which you're going to hear about,
23 our remedy is inadequate because Florida Water Services
24 Corporation will be an empty shell. All of their assets will
25 be transferred to the Authority. We can't fine the Authority

1 and we can't effectively fine an organization that's
2 transferred all its assets away. That's why we come to you for
3 an extraordinary writ and injunction. We need your authority
4 to enforce our order.

5 I want to tell you a little bit about the order. The
6 order, the Public Service Commission order which was entered on
7 February 7th says to the Corporation, sir, not to the
8 Authority, that you may not sell yourself. Under Chapter 367
9 -- under Section 367.071, the Public Service Commission can
10 require, and no entity under our jurisdiction that's a water
11 and sewer company can transfer its assets without our prior
12 approval.

13 Our order says, don't transfer yourself until you
14 come to us for approval. The order again tells the Authority
15 absolutely nothing, requires nothing of them.

16 You're going to hear some argument, I think, about
17 whether this transfer -- whether the parties are entitled to
18 this transfer as a matter of right.

19 The Public Service Commission order in essence delays
20 that decision to determine whether they are entitled to a
21 matter of right or whether they are subject to a public
22 interest test, and the administrative process of the Public
23 Service Commission will determine that question in time. There
24 is a hearing scheduled in the matter. We have no motion to
25 continue that hearing, no motion to set that hearing earlier,

1 no motion to expedite the process. That's what the order says.
2 It says, don't transfer your system until you seek authority
3 from the Commission.

4 Judge, I want to respectfully suggest that you can't
5 go behind that order. That order is the order of the Public
6 Service Commission. And the only reason that I think -- the
7 only reason we're here for is to add your authority to that
8 order.

9 Appeal of that order lies in the 1st District Court
10 of Appeal. If that order is flawed, if that order misstates
11 the law, if that order misstates fact, then the appellate route
12 is at the 1st District Court of Appeal.

13 Returning to our order and the likelihood that it
14 will be violated, there is an existing transfer -- strike that.
15 There is an existing contract to transfer this utility from the
16 Authority -- I'm sorry, strike that -- from the, from the
17 Corporation to the Authority, from a private entity that we
18 have regulated for years to a governmental entity of some sort
19 which we do not regulate under Chapter 163.

20 So there is an existing contract to transfer would
21 suggest to us that there may soon be a violation. That's not
22 all. There is a statement by Mr. Hoffman, who represented the
23 Corporation at our hearing, who said, in essence -- this is my
24 interpretation. I think it's a fair interpretation. I have
25 the transcript for Your Honor's attention. Irrespective of

1 what the Public Service Commission does, we intend to carry
2 this through and do this deal. He was very up front with our
3 Commissioners, I certainly give Mr. Hoffman credit for that,
4 but he always has been. He said, "I don't want to be any less
5 than frank, Commissioner Bradley, but, you know, it's our
6 intention at this point to proceed to closing." That's when
7 the deal -- that's when whether the Commission was going to
8 issue the order was under active discussion.

9 Next, sir, I have a statement by a board member, a
10 Mrs., a Ms. Pollock, I believe, who as recently as this
11 Saturday said, "If they deny the injunction, then I believe we
12 can move toward closing." Mr. Barry (sic.) himself -- I'm
13 sorry. Yes. Mr. Barry himself indicated, Authority officials
14 believe that they have the right to close on the deal prior to
15 gaining PSC approval, which they also reiterate as a
16 perfunctory duty.

17 Three reasons why we believe our order is going to be
18 violated, but it is not the last, in a statement by Mr. Gray, I
19 believe, Mr. Gray indicated that -- this is my interpretation
20 again. I have his words for Your Honor, if you'd wish to see
21 them. That they may go forward and they may, and there is no
22 requirement that they notice anybody. If the two parties agree
23 between each other, then they can do this deal when they decide
24 to do it with no notice to us. We believe the violation is
25 imminent because there's a contract, because Mr. Hoffman said

1 they were going to go forward anyway, a board member says they
2 can go forward if Your Honor doesn't enjoin them, our order
3 notwithstanding which prohibits the transfer. And, finally,
4 there's mention that they can do so without notice.

5 I've explained briefly why we believe our existing
6 remedies are ineffective. It is a fact argued by, ably argued
7 by Mr. Jacobs at our agency that you can't unring the bell.
8 Once this deal goes down, the Corporation is empty; we can't
9 fine it, we can't take a lien against it, we can't do anything.
10 The Authority, we have no jurisdiction over them at all. We
11 can't enforce any remedy against them.

12 But, Judge, I don't think that the provisions that
13 permit you to issue your injunction require us to show that our
14 existing remedies are ineffective. You'll notice the statute
15 which we have quoted in our petition finds, I believe, as a
16 matter of law that there is irreparable injury and that there's
17 no adequate remedy involved.

18 I'd like to turn my attention briefly to the bond
19 because normally when Your Honor issues an injunction, the
20 parties seeking the injunction ought to post bond.

21 I'd like to urge upon Your Honor that the existing
22 Commission order operates as a prohibition to this sale until
23 the Commission sits in judgment on either whether it is a
24 matter of right or whether it serves the public interest. But
25 in any case, our order clearly on its face prohibits this

1 utility from selling itself to anyone, including the Authority.

2 If Your Honor should see fit to issue an injunction
3 in this case, there is no marginal harm -- if there were any
4 harm at all, there's certainly no marginal harm occasioned by
5 your injunction. All your injunction will do is tell this
6 utility under the authority of this Court that they had better
7 honor our order, and beyond that it doesn't do anything else.
8 It doesn't move the date a moment, it doesn't, it doesn't lift
9 the prohibition, it doesn't do anything except tell this
10 company that they must comply with a Commission order and,
11 Judge, it adds your authority to that, to that prohibition.
12 And that's what we're here for. We can't make them do it
13 without your authority.

14 The Legislature has found that a violation would
15 present irreparable injury and the Legislature has found that
16 the Commission has no adequate remedy at law.

17 I'd like to conclude. Again, with all due respect,
18 sir, I don't believe that you can go behind the order. I don't
19 believe that you could or should hear anything from the party
20 that suggests any infirmity in the order. First of all, they
21 took that item to the 1st DCA last week and lost almost
22 summarily.

23 Secondly -- second, this is not an appeal of our
24 order. If they bring you words of infirmity about our order,
25 they should take that argument back to the 1st DCA in the form

1 of appeal, in a writ of mandamus or something where
2 jurisdiction over the Public Service Commission lies in matters
3 such as this. This is not an appeal. I, again, suggest to
4 you, sir, with respect, you can't and ought not go behind the
5 order itself. It is a lawful order of the Commission. It's
6 unchallenged. It was challenged briefly at the 1st DCA. The
7 1st DCA signed off on it.

8 We believe the violation is imminent. I think the
9 things that I mentioned to you show that the violation is
10 imminent. But I would also tell you, sir, that your authority
11 to issue the injunction does not depend on whether violation is
12 imminent. It simply enjoins a violation. That said, the
13 Commission remedy is ineffective. We can't enforce this order
14 without your help. We can't enforce this order without your
15 authority.

16 Judge, I believe we have shown that we're entitled to
17 an injunction, and we'd like to add the Court's authority to
18 our order. And, finally, I believe that a nominal bond is
19 appropriate. We're not asking for a zero bond. We're asking
20 for a nominal bond. And we'd urge upon you the notion that
21 your injunction adds no adverse consequences to either the
22 Authority or to the utility because it orders them to do that
23 which they're already obliged to do and simply orders them to
24 do so under your authority, sir. And I thank you very much.

25 MR. RICHARD: May it please the Court. I appear here

1 -- Barry Richard, and I appear here today as counsel for both
2 the Florida Water Services Corporation, which is the seller,
3 and the Florida Water Services Authority, which is the buyer.

4 Counsel suggested at the beginning of his remarks
5 that this is a basic garden variety case in which the PSC has
6 issued an order that the parties are subject to and that it is
7 unusual, to say the least, for parties to be disregarding that
8 order. In fact, this is not a garden variety case. The reason
9 that my client is contemplating closing despite the order is
10 that the PSC has no jurisdiction in this case. At its
11 inception it has no authority to have issued the order in
12 addition. Section 367.071, 367 being the chapter that provides
13 whatever authority exists to the Public Service Commission,
14 provides in unambiguous terms that, "An application which is an
15 application for sale or transfer of assets by a private
16 regulated entity shall be disposed of as provided in Section
17 367.045, except that, A, the sale of facilities in whole or in
18 part to a governmental authority shall be approved as a matter
19 of right," period.

20 My client is a governmental authority, Your Honor.
21 Governmental authority is defined by the same chapter,
22 367.021(7), as a political subdivision as defined in Section
23 1.01(8) of the Florida Statutes, which includes municipalities.
24 My client, by the way, is an interlocal authority composed of
25 two Florida municipalities and no others.

1 And then it goes on to say, "or a nonprofit
2 corporation formed for the purpose of acting on behalf of a
3 political subdivision with respect to a water or wastewater
4 facility." The Authority is also a Florida nonprofit
5 corporation which exists for the sole purpose of acting on
6 behalf of the two cities that are its members for the purpose
7 of creating and managing water and wastewater facilities.

8 There's no question that my client, the Authority, is
9 a governmental authority and, and at the very least is a
10 nonprofit organization acting on behalf of two cities with
11 water and wastewater facilities. And, consequently, it is
12 unambiguously true that by Florida Statute, the very chapter
13 that provides and limits the authority of the PSC, it must
14 grant this application as a matter of right.

15 Second, there's a provision in Florida Statute
16 367.071, which is the provision relating to the sale or
17 assignment of assets, and requiring that a private entity which
18 is regulated by the PSC submit the proposed sale to the PSC for
19 a determination of probable cause of, of public interest which
20 it does not have the authority to do when it's being
21 transferred to a governmental authority. But even when it's
22 being transferred from a private entity to another private
23 entity, the provision says that the PSC has the authority to
24 make a determination of public interest. However, it says the
25 sale, assignment or transfer, and I'm reading only the

1 pertinent portions, may occur prior to Commission approval if
2 the contract for sale, assignment or transfer is made
3 contingent upon Commission approval. The contract between the
4 Public -- the Water Services Corporation and the Water Services
5 Authority include that contingency.

6 In its order in which the Public Service Commission
7 required that or prohibited that the sale be closed prior to
8 the Public Service Commission's approval, it said that it
9 considered the contingency clause that was included in the
10 contract was insufficient to meet the requirements of that
11 statutory exemption that I just read to you. In my mind it was
12 not insufficient. It said exactly what the statute said. All
13 it did was add in addition a statement that the Public Service
14 Commission was required as a matter of right to transfer.

15 However, to remove that issue from the table, my
16 client, both of my clients have now amended their contract so
17 that the provision now reads as follows: "The sale and transfer
18 of the assets pursuant to this agreement is contingent upon
19 approval by the Florida Public Service Commission and other
20 applicable county regulatory agencies," period. There can be
21 no question that the contingency provision of the contract
22 meets the requirements of the Florida Statute, which expressly
23 states that they are entitled to close on this deal as long as
24 they have that contingency provision prior to Commission
25 approval.

1 The Florida Supreme Court in Hernando County
2 versus -- I'm sorry. The 1st District Court of Appeal in
3 Hernando County versus the Florida Public Service Commission, a
4 1997 case, made the following statement which was quoted from a
5 decision of the Florida Supreme Court and that has been
6 reiterated in Florida law a number of times.

7 "Any reasonable doubt as to the lawful existence of a
8 particular power that is being exercised by the Commission,
9 referring to the Public Service Commission, must be resolved
10 against the exercise thereof, and the further exercise of the
11 power should be arrested." Interestingly, the Florida Public
12 Service Commission itself in 2002 utilized, quoted that same
13 provision in refusing to exercise power. And when the case was
14 appealed to the Florida Supreme Court, the Supreme Court said
15 the Public Service Commission was correct, that any reasonable
16 doubt regarding the Public Service Commission's authority must
17 be resolved against the Commission and that the exercise of
18 that power must be resolved.

19 Now what is the significance of that to this case?
20 The significance of it is that there is no presumption here, as
21 counsel would suggest, that there should be deference to the
22 Public Service Commission. As a matter of fact, in the Supreme
23 Court case I was referring to, the first thing they say is that
24 the usual deference to be accorded to the Public Service
25 Commission disappears when there's a question as to the PSC's

1 authority and jurisdiction, and that that must be addressed
2 first. And, second, this goes to the question of one of the
3 heavy burdens that the PSC has in this case in which they seek
4 a temporary injunction.

5 Before I reach that, however, there's another issue
6 that counsel addressed that I want to call to the attention of
7 this Court.

8 The Public Service Commission was notified in
9 November of 2002, November of 2002 of the fact that my client
10 intended to go through with this closing, and all of the
11 documents were provided to the Public Service Commission: The
12 interlocal agreement, contract for the sale and transfer. And
13 the Public Service Commission was advised in November of 2002
14 that my client at that time intended to close in December of
15 2002. That date has been moved forward and was eventually
16 moved forward until February 14th, yet the Public Service
17 Commission took no action until last week, which on the eve of
18 the February 14th closing, they finally, after over \$5 million
19 had been spent by my client in preparing to sell bonds and
20 conclude this closing, on the eve of the closing they suddenly
21 issued an order telling us not to close.

22 If there is an emergency in this case, which I would
23 suggest and will explain in a moment there is not, but if there
24 is one, it is one created not by my client, but by the Public
25 Service Commission, which, despite full knowledge of my

1 client's intentions as early as November of last year, did
2 nothing until literally the eve, two days or three days, before
3 the closing was expected to take place.

4 Now there are two burdens that the Public Service
5 Commission has here. They've come before this Court to ask
6 this Court to order my client not to fulfill this closing.
7 They really have three burdens. The first is to show that they
8 have the authority to come to the Court in the first place, and
9 the second is to show this Court that there is irreparable
10 injury, and the third is to show the Court that they have a
11 substantial likelihood of success on the merits; the elementary
12 burdens that a plaintiff has seeking a temporary injunction.

13 In the motion that they filed with the Court, the
14 Public Service Commission cites Section 367.121(j), which
15 authorizes the PSC to seek judicial relief under appropriate
16 circumstances. And the one in particular that they referred to
17 is the one that authorizes it to seek in circuit court relief
18 including temporary injunction. But what that provision says,
19 and it is a provision I would have cited if they had not, is
20 that they have the power to seek relief in circuit court,
21 including temporary and permanent injunctions, restraining
22 orders or other appropriate order because the Legislature finds
23 that violations of Commission orders or rules in connection
24 with the impairment of the utility's operations or services
25 constitute irreparable harm.

1 There's nothing in that statute to begin with that
2 says that the PSC has no requirement to show the existence of
3 irreparable harm, if not for the temporary injunction. But the
4 Legislature has simply made a finding that when we are dealing
5 with the threat of impairment of the utility's operations or
6 services, that the Legislature has created a presumption of
7 irreparable harm. That's not what's before this Court today.
8 There is no suggestion in this record, there is no evidence in
9 this record to suggest that there's any threat to the
10 impairment of any utility's operations or services, which means
11 two things. The first is that the PSC has no authority to be
12 seeking this in the first place since they do not have general
13 authority to seek a temporary injunction. But the second is
14 that there's no reason why they should be relieved of the
15 obligation to show irreparable harm.

16 Now the PSC counsel suggests to the Court that
17 there's irreparable harm because he tells this Court, as he
18 told the PSC, that once this bell is rung, it cannot be unring.
19 But he has failed to explain why that's true, and I honestly,
20 Your Honor, cannot understand what that means.

21 What we're dealing with here is a proposed sale of an
22 asset from one corporation to another corporation. If the
23 Courts ultimately, as unlikely as I believe it is, determine
24 that the PSC does have authority despite the clear language of
25 Florida Statutes, and if the PSC ultimately determines that it

1 will not approve this sale, why can it not be undone? That
2 asset will revert to the Corporation, Water Services
3 Corporation.

4 The only ones that stand to suffer any loss, if that
5 occurs, are the bondholders. And if anybody buys these bonds,
6 they buy them with full knowledge of the risk.

7 Why can't it be undone? The ownership reverts back
8 to the Corporation. The money received, if any money was
9 received, because no money will be received unless bonds are
10 sold, but the money received by the Corporation from the
11 Authority would be returned to the Authority. Presumably the
12 only one who would lose or the only thing that would be lost
13 would be whatever the loss on investments would have been by
14 the bondholders who purchased them. But the Public Service
15 Commission loses nothing. The customers of the utility lose
16 nothing. The suggestion that this cannot be undone is a
17 suggestion that is beyond my understanding, and perhaps counsel
18 could explain it to Your Honor when he returns to the rostrum.
19 There is no question that somebody might lose some money if
20 it's undone, but the somebody can only be the bondholders who
21 are buying them with full understanding of that risk.

22 So counsel has failed, not only failed to prove
23 irreparable injury, but failed to, to carry the very elemental
24 burden of introducing any evidence to establish irreparable
25 harm.

1 Now if there's irreparable harm that would be
2 suffered in this case or harm at least, because there's some
3 question as to whether or not financial damage is ever
4 considered irreparable, but it clearly would be my clients.
5 Any movement in the interest rate in this volatile market that
6 currently exists can mean a difference of millions and millions
7 of dollars and, in fact, can mean the difference of the ability
8 to even carry through this transaction.

9 My clients dutifully notified the Public Service
10 Commission in November of last year of their intention to go
11 through with this. Months and months have now gone by. The
12 Public Service Commission has waited without explanation all of
13 this time and if -- and they have now scheduled a hearing in
14 July. In July. And counsel says, well, Your Honor, nobody has
15 moved to expedite this. But the Public Service Commission had
16 an all-day hearing several weeks ago in which it was made
17 patently clear to them that time is of the essence by both
18 sides. Scheduling this in July is a message that they don't
19 intend to rush. So if anybody stands to be harmed in this
20 case, it's my client.

21 THE COURT: Excuse me, Counsel. I thought May was
22 when the scheduled hearing was.

23 MR. RICHARD: My understanding is it's July, Your
24 Honor. On the calendar that's posted on the web site for the
25 Public Service Commission, it's shown in July. But if it's

1 May, that's still, that's still a long time and could mean, it
2 could mean the death of this deal, far more expense in the
3 deal.

4 Finally, Your Honor, they've got to prove substantial
5 likelihood of success. We have heard nothing. By the way,
6 there's nothing even in that statute that says that they're
7 relieved of the obligation to prove substantial likelihood of
8 success. And I cannot imagine how they're going to prove it in
9 this courtroom today given what the statutes say.

10 And that leads me to one comment on the 1st District
11 Court of Appeal decision so that it cannot be suggested that
12 the Court did more than it did. I saw it from the Public --
13 from the 1st District Court of Appeal on an emergency basis, a
14 writ of prohibition to keep the Public Service Commission from
15 attempting to stop this sale.

16 One of the responses, as a matter of fact, I think
17 the primary response made by the respondents, which was not
18 only the Public Service Commission but a group of cities, was
19 that the public -- it was not appropriate for the 1st District
20 Court of Appeal to consider this because of the lack of an
21 evidentiary record before the Court. And the primary response
22 that I believe -- although the Court gave us no reason, it just
23 denied the petition. I think the primary reason for the
24 Court's concern was because a lot of issues were raised,
25 factual issues in the responses that were filed. Of course,

1 the 1st District Court of Appeal has no way of resolving
2 factual disputes. That has nothing to do with the obligation
3 of the Public Service Commission now that it comes before this
4 Court, nothing to do with its obligation to show this Court
5 that it has a substantial likelihood of success on the, on the
6 merits. And considering the fact that the statutes are crystal
7 clear that my client is entitled to this transfer as a matter
8 of right, number one, and that, number two, we are entitled to
9 close prior to approval because of the contingency clause in
10 the contract -- I'm not saying that Your Honor can determine
11 that we're going to win, but surely the PSC cannot come before
12 you and tell you today that there's a substantial likelihood
13 that it's going to succeed on the merits.

14 Your Honor, this motion for a temporary injunction is
15 inappropriate. It comes much too late. If the PSC intended to
16 do this, they should have done it in November. They didn't
17 consider it an emergency at that time, despite the fact that
18 the closing was then scheduled for December. And they -- it's
19 inappropriate for them to be before the Court asking for this
20 relief now.

21 MR. McLEAN: Judge Gary, I believe you heard
22 Mr. Barry concede at the opening of his remarks that he would
23 violate the order unless this Court enjoined his client from
24 doing so. I want to again make the point that I'm not sure
25 Mr. Barry has yet that we have told his client, the Authority,

1 to do nothing, they need do nothing to comply with our order.
2 We didn't tell them to do anything.

3 Mr. Barry brought a number of supposed infirmities of
4 our order to your attention. He should bring those to the
5 attention of the 1st District Court of Appeal that has a full
6 menu of remedies before it, including a stay, including
7 mandamus and any other writ that seems appropriate in the
8 premises. He has not challenged a valid order, which he now
9 says he is prepared to violate in the absence of an injunction
10 from this Court, sir, and that's why we need your injunction.

11 The lawful doubt argument is an argument that is made
12 before the 1st District Court of Appeal and the Supreme Court
13 cases -- and in the Supreme Court when our orders are
14 challenged routinely. Those are appellate arguments which he
15 should make to that court.

16 Mr. Barry made much of the bell ringing argument that
17 I gave you, so let me give it to you again. And I take his
18 invitation to take the rostrum to tell you why we can't enforce
19 it: Because when the deal goes down, the Corporation is an
20 empty shell. All we can do is fine them. That is our ultimate
21 remedy without your, without your injunction. They will be
22 gone. I don't know that we can make them answer our process.
23 All the assets are somewhere else and the money for the assets
24 will be in Minnesota. They don't have to answer us because we
25 can't make them answer us. We can make them answer us with

1 your injunction. You, sir, can make them answer you very well
2 if they should choose to violate your injunction, and that's
3 why we're here.

4 The expedition, they can take a petition for writ of
5 mandamus to the appropriate appellate court and mandate us to
6 hold a hearing sooner, if they care to, although they'll be
7 subject there to the defense of having failed to exhaust
8 administrative remedies. They haven't asked us. They said
9 nothing to us about speeding the matter up. They still can.
10 And they may well get relief in that regard, if that's what
11 they want. The Commission calendar is a somewhat crowded
12 calendar, but we have made arrangements many times to hear
13 matters early of great public interest.

14 And, again, if, if the order doesn't set the hearing
15 soon enough for their tastes, the order can be attacked in the
16 appellate court or it could be attacked at our level. They
17 could ask us to expedite.

18 Last, I don't quite understand the likelihood of
19 success. What we're asking for is the opportunity to have a
20 hearing. We're definitely going to succeed in that with the
21 help of your injunction, should you choose to issue it. We're
22 not trying to prevail, we're not trying to seek damages, we're
23 not trying to get gain time. We are in the business of trying
24 to hold a hearing to determine some issues of great public
25 interest which have been presented to our agency and upon which

1 our Commissioners have ruled.

2 And, lastly, it is our fear, and I believe now more
3 well-founded than ever, that our lawful order which stands as
4 the law of Florida has not been challenged, that our lawful
5 order will be violated. And I believe you've heard that from
6 Mr. Richard this morning, sir. Thank you very much.

7 MR. GROOT: Your Honor, Lonnie Groot representing the
8 City of Palm Coast. Just briefly, we would adopt the arguments
9 of the PSC, but we would also just point out to the Court that
10 it's our view that the issue of whether Florida Water Services
11 Authority is, is or is not a governmental authority is not
12 before the Court. And it's the position of the City of Palm
13 Coast that it clearly is not, it clearly doesn't meet the
14 definition set forth in the statute, and that that matter has
15 been and will continue to be presented to the Public Service
16 Commission. And we believe that that determination will be
17 appropriate by either a rule adoption or order of the Public
18 Service Commission. Thank you, Your Honor.

19 THE COURT: Very well.

20 MR. JACOBS: Good morning, Your Honor. My name is
21 Arthur Jacobs. I'm here on behalf of the Amelia Island
22 Plantation Community Association, Inc., and we have asked the
23 Court to allow us to appear as amicus curiae in our pleadings
24 before the Court.

25 I represent 2,500 users of, of Florida Water Services,

1 the Corporation. There's some several hundred thousand in 26
2 counties in Florida users of Florida Water Services water and
3 sewer.

4 Your Honor, I think it's important to note that, that
5 the two cities that formed this particular, attempted to form
6 this Authority, none of the users of Florida Water Services are
7 in those cities.

8 Your Honor, the arguments that I've heard today from
9 Mr. Richards regarding their position, these are the same
10 arguments that were made in the 1st District Court of Appeals,
11 and for whatever reason the 1st District Court of Appeals did
12 not grant their writ of prohibition.

13 I would submit to you, Your Honor, that particularly
14 in my folks' instance there's \$171 million of contributions in
15 aid of construction, which are part of this deal, as
16 Mr. Richards calls it, the deal. In this deal there's
17 \$171 million of contributions in aid of construction. My
18 little folks over on Amelia Island only have about \$500,000
19 tied up in that. These are monies that are being utilized, as
20 we understand it, to purchase -- these are, these monies are
21 being utilized in this deal, and we will lose those monies as
22 they would be applied to future growth of our utility. So
23 we're certainly in imminent danger and peril. We do not have
24 any vote or any authority to react to people out in Milton and
25 Gulf Breeze as to how they're going to regulate the utilities

1 over in Nassau County.

2 So I submit to you, Your Honor, that the injunction
3 is the appropriate measure for this Court so that the Public
4 Service Commission can determine whether or not, number one, do
5 they have this as a matter of right or, number two, is it in
6 the public interest that this deal, as Mr. Richards calls it,
7 goes down? So I would ask you to grant this injunction. We
8 adopt the comments of the Public Service Commission. Your
9 Honor, I think we have no other remedy but this, particularly
10 whenever the shot's been fired over the bow and they say, no
11 matter what the Public Service Commission is doing, they told
12 them, I think it was on February the 7th, I was there, they
13 said, we're going to go ahead and close anyway. And
14 Mr. Richards told you, said to you today that without this
15 injunction they would proceed to closing in spite of what the
16 Public Service Commission wishes to do.

17 So, Your Honor, we ask that you do grant this
18 injunction. Thank you for your time.

19 MR. TWOMEY: May it please the Court. Your Honor,
20 I'm Mike Twomey appearing on behalf of Collier County, Florida,
21 and the Sugarmill Woods Association, Inc., which is located in
22 Citrus County.

23 Your Honor, I want to stress again that as best I can
24 tell Mr. Richard has told you and told us all indeed that this
25 deal, as he called it, is going to go through, they're going to

1 close this. It's going to require \$550 million worth of the
2 issuance of bonds. I heard him tell you it's going to happen
3 unless you or someone else enjoins the transaction.

4 The question, Your Honor, of governmental authority
5 that Mr. Richards so, so confidently told you was out of
6 question was clear is indeed not. That is a question of fact
7 and law. It'll be considered by the Florida Public Service
8 Commission at the time they have their hearing.

9 Likewise, whether or not the contingency clause that
10 Mr. Richard spoke to, Your Honor, whether it is adequate or not
11 is, again, a question of law and fact that has to be determined
12 by the Florida Public Service Commission, the agency, as Your
13 Honor is aware, which is charged with interpreting the utility
14 statutes it's charged with enforcing.

15 Again, Your Honor, likewise, the nonprofit status of
16 the Authority corporation, which was entered into at the last
17 minute at the Public Service Commission hearing on February the
18 4th, whether that meets the requirement of the statute that
19 would allow for a matter of right transfer, Your Honor, is,
20 again, a question of law and fact to be considered by the
21 Public Service Commission in their expertise.

22 The -- consequently, Your Honor, the, the issues to
23 be heard, to be decided have to be heard at the Public Service
24 Commission. And as pointed out by Mr. McLean, if the utility,
25 which is the only body that is regulated by the Public Service

1 Commission, if the utility finds fault with the Commission's
2 decisions on those three points and its ultimate decision on
3 whether this sale is in the public interest or entitled to a
4 matter of right transfer, then it should take it to the
5 1st District Court of Appeals, which by constitution and by
6 statute is the sole court to hearing water and sewer cases.

7 My, my clients and Sugarmill Woods have many millions
8 of dollars of this contributed property, CIAC, that will be
9 lost to them if this deal goes through. There's more even for
10 the customers that reside in Marco Island.

11 So, Your Honor, we think there's irreparable harm.
12 The deal will go down, the money will be lost, we think, and we
13 would urge you, for the reasons given by the Public Service
14 Commission and others; to grant the injunction and protect us
15 from the deal closing. Thank you, sir.

16 THE COURT: Anything else? Okay. I think it's
17 pretty well conceded by both sides that the PSC may have no
18 authority over the Florida Water Services Authority. I think
19 that's conceded by everyone.

20 However, the Public Service Commission does have
21 authority under the statute over the Florida Water Services
22 Corporation, and the Court so finds.

23 The Court also finds that there will be irreparable
24 harm and that there is a substantial likelihood of success. I
25 will grant the temporary injunction with a nominal amount in

1 the amount of \$5,000 required.

2 Judge Francis will hear this case further. I'm kind
3 of a pinch hitter first. So I would suggest that you get with
4 his judicial assistant to set up the, whatever further hearings
5 you may have.

6 I will have an order entered today and available for
7 all parties. Okay. Thank you. Good luck to all of you.

8 (Hearing concluded at approximately 10:15 a.m.)

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1 STATE OF FLORIDA)
 :
2 COUNTY OF LEON)
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CERTIFICATE OF REPORTER

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4 I, LINDA BOLES, RPR, Official Commission
5 Reporter, do hereby certify that the foregoing proceeding was
6 heard at the time and place herein stated.

6 IT IS FURTHER CERTIFIED that I stenographically
7 reported the said proceedings; that the same has been
8 transcribed under my direct supervision; and that this
9 transcript constitutes a true transcription of my notes of said
10 proceedings.

9 I FURTHER CERTIFY that I am not a relative, employee,
10 attorney or counsel of any of the parties, nor am I a relative
11 or employee of any of the parties' attorneys or counsel
12 connected with the action, nor am I financially interested in
13 the action.

12 DATED THIS 19th DAY OF FEBRUARY, 2003.

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