



Public Service Commission

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COMMISSION CLERK

DATE: OCTOBER 9, 2003

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

FROM: DIVISION OF ECONOMIC REGULATION (CLAPP, KAPROTH, WILLIS) & OFFICE OF THE GENERAL COUNSEL (HOLLEY) *gammal*

RE: 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 CERTIFICATES NOS. 66-W AND 289-S.
COUNTY: OSCEOLA

AGENDA: 10/21/03 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: THE FIVE FLORIDA WATER SERVICES CORPORATION DOCKETS (030541-WU, 030542-WS, 030920-WS, 030971-WS, AND 030932-WS) SHOULD BE PLACED IN ORDER.

FILE NAME AND LOCATION: S:\PSC\ECR\WP\030921WS.RCM

CASE BACKGROUND

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

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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. 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

At issue in this docket is FWSC's application for acknowledgment of the sale of the utility's Osceola County land and water and wastewater facilities to either Osceola County (the County) or its duly authorized assignee, Tohopekaliga Water Authority (TOHO), and for the cancellation of Certificate Nos. 66-W

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.

and 289-S, filed on September 19, 2003. For purposes of this recommendation, the entity purchasing the Osceola systems will be referred to as the Buyer. This recommendation also addresses whether the Commission should open a docket to examine whether FWSC's sale involves a gain that should be shared with FWSC's remaining customers. The Commission has jurisdiction pursuant to Sections 367.045, 367.071 and 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the transfer of the Florida Water Services Corporation's Osceola County water and wastewater facilities to The Buyer be approved?

RECOMMENDATION: Yes. The transfer of FWSC's Osceola County facilities to Osceola County or its duly authorized assignee, TOHO, should be approved, as a matter of right, pursuant to Section 367.071(4)(a), Florida Statutes. FWSC should provide the Commission with proof of transfer to the Buyer within 30 days of closing for purposes of establishing an effective closing date. Regulatory assessment fees should be submitted within 60 days from the closing date. Certificate Nos. 66-W and 289-S should be cancelled administratively at the conclusion of all pending dockets concerning the Osceola County facilities. (CLAPP, KAPROTH, HOLLEY)

STAFF ANALYSIS: On September 19, 2003, the Commission received an application to transfer the FWSC Osceola land and facilities to the Buyer pursuant to Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. Included with the application is a copy of the First Amended and Restated Utility System Asset Acquisition Agreement (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 the Commission 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. Staff has 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.

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Staff recommends that the Commission 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. As indicated previously, staff believes that both Osceola County and TOHO are government authorities, as defined in Section 367.021(7), Florida Statutes. Therefore, staff recommends that the transfer of FWSC's Osceola County facilities to Osceola County or its duly authorized assignee, TOHO, should be approved, as a matter of right pursuant to Section 367.071(4)(a), Florida Statutes. FWSC should provide the Commission 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, should be submitted within 60 days of the closing date. Certificate Nos. 66-W and 289-S should be cancelled administratively at the conclusion of all pending dockets concerning the Osceola County facilities.

ISSUE 2: Should the Commission open a docket to examine whether FWSC's sale of its Osceola County facilities to The Buyer involves a gain that should be shared with FWSC's remaining customers?

RECOMMENDATION: Yes. The Commission should open a docket to examine whether FWSC's sale of its Osceola facilities involves a gain that should be shared with FWSC's remaining customers. (WILLIS, CLAPP, HOLLEY)

STAFF ANALYSIS: 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 the Commission has 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, staff recommends that the Commission should decide whether to open a separate docket to determine if the gain should be allocated among the remaining water and wastewater customers.

Utility's Position

By letter to staff dated August 29, 2003, the attorney for FWSC provided the utility's position with respect to whether the Commission should initiate a gain on sale issue in this docket. In that letter, FWSC cites the Commission's 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 the Commission 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 the Commission is 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 the Commission 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.

Staff's Position

Staff notes that the sale to The Buyer does not involve a condemnation proceeding. Moreover, staff believes that FWSC has misinterpreted each of the above-noted Orders and court decision. In the SSU Order, the Commission, in addressing whether a sharing of the gain on sale was appropriate, 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, the Commission's 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, the Commission 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, the Commission again, on a factual basis, determined that a gain on sale adjustment was not appropriate. Staff believes that a review of the appropriate disposition of any gain on sale is appropriate and to do so, the Commission is merely carrying out its 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 purchased by the Buyer, the facilities are subject to this Commission's 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 recommended to permit timely examination of this topic. Accordingly, staff recommends that the Commission open 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. This is consistent with prior

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Commission 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, the Commission acknowledged the transfer to the respective governmental authority and opened another docket to evaluate the gain on sale.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: This docket should remain open until the conclusion of any pending dockets concerning the Osceola County facilities, and until Certificate Nos. 66-W and 289-S are cancelled administratively. (HOLLEY)

STAFF ANALYSIS: This docket should remain open until the conclusion of any pending dockets concerning the Osceola County facilities, and until Certificate Nos. 66-W and 289-S are cancelled administratively.