



# Public Service Commission

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**DATE:** OCTOBER 22, 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)

**RE:** DOCKET NO. 030931-WS - JOINT APPLICATION FOR  
ACKNOWLEDGMENT OF SALE OF 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.  
COUNTY: CHARLOTTE

**AGENDA:** 11/03/03 - REGULAR AGENDA - INTERESTED PERSONS MAY  
PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** THE THREE FLORIDA WATER SERVICES  
CORPORATION DOCKETS (030931-WS, 030966-WS,  
AND 030967-WS) SHOULD BE PLACED IN ORDER.

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\030931WS.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'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.

DOCUMENT NUMBER- DATE

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FPSC-COMMISSION CLERK

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 systems has been addressed by the Commission on October 21, 2003, in Docket No. 030932-WS.

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.<sup>1</sup>

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<sup>1</sup> 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

For ease of reference within this recommendation, the FWSC's Deep Creek water and wastewater land and facilities located in Charlotte County and the FWSC's Burnt Store water and wastewater land and facilities located in Charlotte and Lee County will collectively be referred to as the DC/BS systems.

At issue in this docket is FWSC's application for acknowledgment of the proposed sale of the DC/BS systems to the Florida Governmental Utility Association (FGUA) and for the cancellation of Certificate Nos. 306-W, 570-W, 255-S, and 496-S. 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 a portion of Florida Water Services Corporation's Charlotte and Lee County water and wastewater facilities to FGUA be approved?

**RECOMMENDATION:** Yes. The transfer of the DC/BS systems to the FGUA should be approved, as a matter of right, pursuant to Section 367.071(4)(a), Florida Statutes. Certificate Nos. 306-W, 570-W, 255-S, and 496-S should be cancelled administratively at the conclusion of any pending dockets concerning the Charlotte and Lee County facilities. FWSC should provide the Commission with proof of transfer to the FGUA within 30 days of closing for purposes of

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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.

establishing an effective date. Regulatory assessment fees (RAFs) should be submitted within 60 days of closing on the transfer. (CLAPP, KAPROTH, HOLLEY)

**STAFF ANALYSIS:** On September 24, 2003, the Commission received an application to transfer FWSC's Deep Creek and Burnt Store facilities to FGUA 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, 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.

The FGUA is an interlocal entity created pursuant to Chapter 163, Florida Statutes, by political subdivisions of the State. Its members include Citrus County, Osceola County, Polk County, and Nassau County. In its application, FWSC states that with the acquiescence and consent of the Board of County Commissioners of Charlotte County, the FGUA had been negotiating with FWSC toward the acquisition of the Deep Creek system located within Charlotte County and Burnt Store system located in both Charlotte and Lee County since September of 2001. The application further states that Section 163.01(9)(c), Florida Statutes, confirms that an entity such as the FGUA is entitled to all of the privileges and exemptions from laws and ordinances that apply to the local government or governments that created it. Thus, because political subdivisions of the State such as the County members of the FGUA are governmental authorities as defined by Section 367.021(8), Florida Statutes, the FGUA should likewise be treated as such.

The Commission has previously determined that the FGUA is a governmental authority for purposes of Section 367.071(4), Florida Statutes, in Order No. PSC-00-2351-FOF-WS, issued December 7, 200, in Docket No. 990489-WS, In re: Application by Florida Cities Water Company, holder of Certificate Nos. 027-W and 024-S in Lee County and 007-W and 003-S in Brevard County, and Poinciana Utilities, Inc., holder of Certificate Nos. 146-W and 103-S in Polk and Osceola Counties for transfer of facilities to Florida Governmental Utility Authority and cancellation of Certificate Nos. 027-W, 024-S, 007-W, 003-S, 146-W and 103-S. In that Order, the Commission specifically held:

[W]e find that the application as amended is in compliance with Section 367.071(4), Florida Statutes and Rule 25-30.037(4), Florida Administrative Code. Pursuant to Section 367.071(4)(a), Florida Statutes, the sale or transfer of facilities to a governmental authority is approved as a matter of right. Accordingly, we hereby approve the transfer of facilities from FCWS and PUI to the GUA. (Order, pages 4-5).

Staff believes that it is consistent with the above-noted Order that the FGUA in the present case be treated as a governmental authority for the purposes of the proposed transfer. Furthermore, staff sees no public policy reason to deviate from the Commission's prior decision.

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 FGUA 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 FGUA 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 is not provided, FWSC should provide the Commission with proof of the transfer, including the actual closing date, within 30 days of closing in order to establish the effective date of the transfer.

Additionally, pursuant to the requirements of Rule 25-30.037(4)(h), Florida Administrative Code, a statement was

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included that FWSC has no outstanding RAFs and no fines or refunds are owed. Staff has verified that the utility has filed its 2002 annual report and 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 Deep Creek and Burnt Store systems within 60 days of the closing date.

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 must be approved as a matter of right. As indicated previously, staff believes that the FGUA should be treated as a governmental authority as defined in Section 367.021(7), Florida Statutes, for the purposes of this transfer. Therefore, staff recommends that the transfer of the DC/BS systems to the FGUA should be approved, as a matter of right. Certificate Nos. 306-W, 570-W, 255-S, and 496-S should be cancelled administratively at the conclusion of any pending dockets concerning the Charlotte and Lee County facilities. FWSC should provide the Commission with proof of transfer to the FGUA within 30 days of closing for purposes of establishing an effective date. Regulatory assessment fees should be submitted within 60 days of closing on the transfer.

**ISSUE 2:** Should the Commission open a docket to examine whether FWSC's sale of the DC/BS systems to FGUA 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 the DC/BS systems involves a gain that should be shared with FWSC's remaining customers. (WILLIS, CLAPP, HOLLEY)

**STAFF ANALYSIS:** The acquisition agreement entered into on August 25, 2003, indicates a cash purchase price of \$3,753,122, for sale of the DC/BS systems to FGUA. 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 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 DC/BS 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 DC/BS 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 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 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.



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Staff's Position

Staff notes that the sale to FGUA 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 the DC/BS systems are purchased by FGUA, the facilities are subject to this Commission's jurisdiction. Their service rates

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were established in FWSC's 1995 rate proceedings in Docket No. 950495-WS. According to FWSC's 2002 annual report the DC/BS systems had net operating income of (\$136,335) and \$99,750 for water and wastewater, respectively. Whether the DC/BS systems were subsidized by other systems has yet to be determined.

Further study to examine sharing considerations for the DC/BS systems gain on sale is recommended to permit timely examination of this topic. Staff recommends that the Commission open a docket to examine whether FWSC's sale of its DC/BS systems involves a gain that should be shared with FWSC's remaining customers. This is consistent with prior 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 DC/BS systems, and until Certificate Nos. 306-W, 570-W, 255-S, and 496-S are cancelled administratively. (HOLLEY)

**STAFF ANALYSIS:** This docket should remain open until the conclusion of any pending dockets concerning the DC/BS systems, and until Certificate Nos. 306-W, 570-W, 255-S, and 496-S are cancelled administratively.