

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for
acknowledgment of transfer of
Clay County and Bradford County
land and facilities to Clay
County Utility Authority, and
for cancellation of Certificate
Nos. 554-W and 003-W, by Florida
Water Services Corporation.

DOCKET NO. 030541-WU
ORDER NO. PSC-03-1277-FOF-WU
ISSUED: November 10, 2003

The following Commissioners participated in the disposition of
this matter:

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

ORDER APPROVING TRANSFER OF CLAY AND BRADFORD COUNTY FACILITIES,
CANCELLING CERTIFICATES NOS. 554-W AND 003-W HELD BY FLORIDA
WATER SERVICES CORPORATION AT THE CONCLUSION OF ALL PENDING
DOCKETS CONCERNING THE BRADFORD AND CLAY COUNTY FACILITIES, AND
OPENING DOCKET TO INVESTIGATE GAIN ON SALE

BY THE COMMISSION:

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 this Commission's jurisdiction. FWSC serves approximately 281 Bradford County and 1,258 Clay County water customers. The Bradford and Clay County systems are not located in a priority water resource caution area of the St. Johns River Water Management District. The utility's 2002 annual report indicates that the Bradford and Clay County systems have a combined gross revenue for the water systems of \$552,302 with combined net operating income of \$50,578.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

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The utility was issued Certificate No. 554-W for the Bradford County facilities pursuant to Order No. PSC-93-0713-FOF-WU, issued May 10, 1993, in Docket No. 921264-WU, In Re: Application for a Water Certificate in Bradford County Under Grandfather Rights by Southern States Utilities, Inc. Certificate No. 003-W for Clay County was issued pursuant to Order No. 4784, issued November 12, 1969, in Docket No. 69317-W, In Re: Application of Keystone Water Works Company, Inc., for a certificate to operate a water system in Clay County, Florida.

On June 17, 2003, an application was filed for the acknowledgment of transfer of the utility's water facilities in Bradford and Clay Counties to the Clay County Utility Authority (CCUA or buyer) and for the cancellation of Certificate Nos. 554-W and 003-W. The utility provides water service to Geneva Lake Estates and Keystone Club Estates in Bradford County, and to Keystone Heights, Lakeview Villas, and Postmaster Village in Clay County. The application states that:

On May 7, 2003, the Circuit Court of the Fourth Judicial Circuit, in and for Clay County, Florida, entered a Stipulated Order of Taking and Stipulated Final Judgment in Clay County Utility Authority v. Florida Water Services Corporation, Clay County Circuit Court Case No. 02-1051-CA-E, pursuant to the condemnation procedures set forth under Chapter 73, Florida Statutes. As a result of this condemnation proceeding, CCUA acquired title to Florida Water's land and facilities in Bradford and Clay Counties and is scheduled to commence operations of such facilities on or about August 7, 2003.

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

TRANSFER OF FACILITIES

FWSC filed its application pursuant to Section 367.071(4)(a), Florida Statutes, which provides that the sale of facilities, in whole or in part, to a governmental authority shall be approved as a matter of right. The application to transfer the FWSC facilities to the CCUA pursuant to Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code, included copies

of the Stipulated Order of Taking and Stipulated Final Judgment in Clay County Utility Authority v. Florida Water Services Corporation, pursuant to the condemnation procedures set forth under Chapter 73, Florida Statutes. As a result of the condemnation proceeding, CCUA acquired title to FWSC's land and facilities in Bradford and Clay County as of May 7, 2003, which is the date the documents were issued by the Circuit Court of the Fourth Judicial Circuit. Although this proceeding was not a voluntary sale, as CCUA acquired the facilities through condemnation proceedings, pursuant to Section 367.071, Florida Statutes, we still must approve or acknowledge the transfer of FWSC's facilities.

CCUA is a governmental authority 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. The CCUA is an independent special district, created and passed in a special act by the 1994 Florida Legislature (Chapter 94-491, HB No. 2299, Clay County Utility 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 County obtained FWSC's most recent income and expense statement, balance sheet, statement of rate base for regulatory purposes, and contributions-in-aid-of-construction pursuant to Rule 25-30.037(4)(e), Florida Administrative Code. A statement that the customer deposits will be transferred to the County for the benefit of the customers as required by Rule 25-30.037(4)(g), Florida Administrative Code, was also included in the application.

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 (RAFTs) and no fines or refunds are owed. The utility has filed its 2002 annual report and paid its 2002 RAFTs, and there are no outstanding penalties and interest. For the period of January 1, 2003 through May 7, 2003, FWSC has agreed to file the RAFT return and remit its RAFT payment for the facilities in Bradford and Clay Counties within 20 days after the issuance of the Order approving the transfer.

Based on the above, we find that the application is in compliance with all provisions of Rule 25-30.037, Florida Administrative Code. Because CCUA is a governmental authority as defined in Chapter 367, Florida Statutes, we approve, pursuant to Section 367.071(4)(a), Florida Statutes, the transfer of FWSC's Bradford County and Clay County water systems to the CCUA as a matter of right effective May 7, 2003. RAFTs should be submitted within 20 days after the issuance of the Order approving the transfer. Certificate Nos. 554-W and 003-W shall be cancelled administratively at the conclusion of all pending dockets concerning FWSC's Bradford County and the Clay County facilities.

OPENING OF GAIN ON SALE DOCKET

Pursuant to the stipulated final judgment issued by the Fourth Judicial Circuit Court on May 7, 2003, FWSC shall have and recover the total sum of \$4,100,000 from the CCUA as full compensation for the taking of the water facilities. That sum appears to exceed the rate base values that we have approved for those facilities. In Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, In Re: Application for rate increase and increase in service availability charges in Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties, the most recent rate proceeding for FWSC, the approved rate base value for the combined water facilities in Bradford County was \$247,269 for the projected test year ending December 31, 1996. Restoring used and useful adjustments, the aggregate rate base balance was \$326,895. In Docket No. 950495-WS, the approved rate base value for the combined water facilities in Clay County was

\$950,197 for the projected test year ending December 31, 1996. Restoring used and useful adjustments, the aggregate rate base balance was \$1,211,596. In its 2002 Annual Report, FWSC reported a rate base of \$229,332 and \$2,370,910 for its Bradford and Clay County systems, respectively. As the taking occurred in 2003, an updated rate base calculation will be needed to determine the gain, if any, due to the sale of these facilities. Initial review indicates that FWSC will record a gain on this transaction, and there is a question of whether this Commission should open a gain on sale docket in regards to this sale.

By letter dated August 29, 2003, the attorney for FWSC discussed the gain on sale issue and whether it was even appropriate to raise the issue in dockets where facilities were transferred pursuant to an involuntary condemnation. In that letter, FWSC cites our decision concerning gain on sale in Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, in Docket No. 920199-WS, In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona) (SSU Order). In the SSU Order, FWSC argues that this 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 we are 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 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 Docket No. 930379-SU, In Re: Application for a limited proceeding concerning the rates and charges for customers of Lake Arrowhead Village, Inc., in Lee County, by North Fort Myers Utility (North Fort Myers Order). In

the North Fort Myers Order, FWSC points to the paragraph where we stated:

[C]ustomers of utilities do not have any proprietary claim to utility assets. Although customers pay a return on utility investment through rates for service, they do not have any ownership rights to the assets, whether contributed or paid for by utility investment.

Finally, in regards to the condemnation proceeding, FWSC argues that the Circuit Court confirmed the amount the utility was entitled to receive for its assets, and that the Commission should not "interfere with the judicially sanctioned value of the utility's assets." FWSC concludes that it would amount to "an unconstitutional taking and deprivation of the shareholder's rights for the Commission to order a sharing of the gain."

FWSC has misinterpreted each of the above-noted Orders and court decision. In the SSU Order, this 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, our determination that a sharing of the gain on sale was not appropriate was limited to the specific facts of that case and was not a "blanket" legal determination that a gain on sale would never be appropriate. The Citrus County case merely confirmed this factual interpretation.

As to the North Fort Myers Order, the language quoted by FWSC was merely addressing whether there should be a refund to the customers of the former utility, Lake Arrowhead Village, Inc. (LAVI). As to consideration of the gain on sale, this 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, we again, on a factual basis, determined that a gain on sale adjustment was not appropriate.

Finally, a review of the appropriate disposition of any gain on sale would not constitute an interference "with the judicially sanctioned value of the utility's assets," or an "unconstitutional taking and deprivation of the shareholders' property rights" as alleged by FWSC. In considering the appropriate disposition of any gain on sale, we are merely carrying out our jurisdictional duty to "fix rates which are just, reasonable, compensatory, and not unfairly discriminatory" to the remaining customers of FWSC, as required by Section 367.081(2)(a)1., Florida Statutes.

Before FWSC's Bradford and Clay County facilities were taken by CCUA, those facilities were subject to this Commission's jurisdiction. Their service rates were established in FWSC's 1995 rate proceedings in Docket No. 950495-WS, along with all of the other water and wastewater systems that FWSC owned at that time. Thus, service rates for other FWSC operating facilities were influenced by its ownership of the Bradford County and Clay County facilities. According to FWSC's 2002 annual report, the Bradford and Clay County systems had a combined net operating income of \$50,578. Whether the Bradford and Clay County facilities were subsidized by other systems has yet to be determined.

Further study to examine sharing considerations for the Bradford County and Clay County gain on sale is required to permit timely examination of this topic. Therefore, a docket to examine whether FWSC's sale of its Bradford and Clay County facilities involves a gain that should be shared with FWSC's remaining customers shall be opened. This is consistent with our prior decisions in the following Orders: Order No. PSC-98-0688-FOF-WS, issued May 19, 1998, in Docket No. 971667-WS, In Re: Application for approval of transfer of facilities of Florida Water Services Corporation to Orange County and cancellation of Certificate Nos. 84-W and 73-S in Orange County; Order No. PSC-99-2171-FOF-WU, issued November 8, 1999, in Docket No. 981589-WU, In re:

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Application for approval of transfer of a portion of the facilities operated under Certificate No. 40-W in Orange County from Utilities, Inc. of Florida to the City of Maitland; and Order No. PSC-99-2373-FOF-WS, issued December 6, 1999, in Docket No. 991288-WS, In re: Application for transfer of a portion of Certificates Nos. 278-W and 225-S in Seminole County from Utilities, Inc. of Florida to the City of Altamonte Springs. In each of the above-three Orders, we acknowledged the transfer to the respective governmental authority and opened another docket to evaluate the gain on sale.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the transfer of the Bradford County and Clay County facilities of Florida Water Services Corporation to the Clay County Utility Authority shall be approved, as a matter of right. It is further

ORDERED that Certificate Nos. 554-W and 003-W shall be cancelled administratively at the conclusion of all pending dockets concerning the Bradford and Clay County facilities. It is further

ORDERED that, as set out in the body of this Order, Florida Water Services Corporation shall submit regulatory assessment fees within 20 days of the date of this Order. It is further

ORDERED that a docket to examine whether Florida Water Services Corporation's sale of its Clay County and Bradford County facilities involves a gain that should be shared with Florida Water Services Corporation's remaining customers shall be opened. It is further

ORDERED that this docket shall remain open until the conclusion of any pending dockets concerning the Bradford and Clay County facilities, and until Certificate Nos. 554-W and 003-W are cancelled administratively.

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By ORDER of the Florida Public Service Commission this 10th
Day of November, 2003.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action on the transfer in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative

Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the decision to open a docket to examine gain on sale in this order, which is procedural in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure. Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.