

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

MEMORANDUM

JUNE 9, 1994

TO : DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM : DIVISION OF LEGAL SERVICES (O'SULLIVAN) *MO for SFS*
DIVISION OF WATER AND WASTEWATER (RENDELL STARLING) *RP*

RE : UTILITY: SANLANDO UTILITIES CORPORATION
DOCKET NO. : 930256-WS
COUNTY: SEMINOLE

CASE: PETITION FOR LIMITED PROCEEDING TO IMPLEMENT WATER CONSERVATION PLAN IN SEMINOLE COUNTY BY SANLANDO UTILITIES CORPORATION.

AGENDA: JUNE 21, 1994 - DECISION PRIOR TO HEARING -- INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

RECOMMENDATION FILE NAME: I:\PSC\LEG\WP\930256A.RCM

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CASE BACKGROUND

Sanlando Utilities Corporation (Sanlando or utility) is a class A water and wastewater utility located in Altamonte Springs, Florida, which operates three water and two wastewater systems. Sanlando's entire service area lies within the St. Johns River Water Management District (STRWMD), which has declared its entire district as a critical use area.

The Commission last considered these systems within a full rate case in Docket No. 900338-WS. Order No. 23809, issued on November 27, 1990, required Sanlando to submit a plan detailing the actions it would take to implement water conservation initiatives and to file a brief economic study of the feasibility of implementing spray irrigation within 90 days of the effective date of the Order. The utility was also ordered to hold \$25,008 in annual revenues, referred to as "set-aside funds," for future expenses specifically related to water conservation. Sanlando submitted its water conservation plan on June 28, 1991.

By Order No. 24920, issued on August 16, 1991, the Commission approved in part and denied in part the water conservation plan submitted by Sanlando. The utility's filing addressed only two of the three requirements specified in Order No. 23809. The Commission had ordered the utility to file a plan containing the economic feasibility of spray irrigation, rate restructuring recommendations, and any other related suggestions for the use of the set-aside funds by September 30, 1991. The utility filed a supplement to the original water conservation plan on September 26, 1991.

The supplemental plan was presented at the October 22, 1991, Agenda Conference. The Commission determined that the supplemental plan was unsatisfactory and deferred the vote to a later date. On September 21, 1992, the utility filed an addendum to its water conservation plan. The addendum presented Sanlando's plan for an effluent reuse program, an inclining block rate structure, and a report of the utility's conservation expenditures to date and requested information from the SJRWMD.

The plan stated that on July 10, 1992, the Department of Environmental Protection (DEP) renewed the permit authorizing Sanlando to continue operating its Wekiva wastewater treatment plant. The DEP specified as a condition to granting the permit that Sanlando enter into preliminary discussions with this Commission to determine if it would allow implementation of water conservation rates to fund the construction and improvements needed

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to further treat and deliver reclaimed wastewater to the three golf courses located within Sanlando's service area. The permit requires that on-site plant modifications and improvements be completed by December 31, 1995, and that the distribution system be completed by December 31, 1996. However, the permit also states that if the utility lacks sufficient revenue to make these improvements (by the lack of approval of the plan by the FPSC), the DEP will grant extensions of time, or other such relief as is appropriate under the circumstances.

All three golf courses are currently irrigating with on-site wells with a combined estimated average daily usage of approximately 1 million gallons per day (MGD). As a result, Sanlando asserted its proposed reuse program, in addition to encouraging reduced water consumption by its customers, would result in a immediate and significant reduction in water resource withdrawal from Florida's diminishing potable water supply.

Sanlando updated and revised its previous studies related to the reuse of treated effluent produced by Sanlando's Wekiva wastewater treatment plant. The revised study indicated that a system designed to maintain pressure for local system reuse on demand as well as for transmission to the respective golf courses would be advantageous and economical. The system would be designed with both on-site storage and pumping capabilities and have the ability to deliver slightly over 1 MGD to the three golf courses on an annual average basis, and another 225,000 gallons to commercial users in the vicinity of the main transmission route to the respective golf courses. The cost for the three golf course system was approximately \$1,820,000, and according to the utility's estimates, the three golf courses could accept approximately 50 percent of Sanlando's effluent.

According to the utility's plan, funding for the reuse facilities could be achieved by implementing an inclining block water rate structure. The utility proposed the structure below, beginning with the utility's existing gallonage charge of \$.355 per thousand gallons of water;

	<u>Charge Per</u> <u>1,000 Gallons</u>
0 to 10,000 gallons per month	\$.355
10,000 to 20,000 gallons per month	\$.50

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20,000 to 30,000 gallons per month	\$.65
over 30,000 gallons per month	\$.85

In addition, the charge per thousand gallons for general service, multi-family and bulk sale users would increase from \$.355 to \$.60 per thousand gallons. In theory, this rate structure would encourage water conservation as well as produce excess revenues which could be used to fund the reuse project. Any excess revenues would be deposited in an escrow account and held solely for capital expenditures related to the water reuse program. There was no intention of earning a profit on the project and any interest earned from the escrow account would be used for the reuse project. The utility also proposed that any unused portion of the \$25,008 currently being set-aside each year for conservation expenses should be applied to the implementation of the effluent reuse program.

After reviewing this plan, the Commission found as follows in Order No. PSC-92-1356-FOF-WS issued November 23, 1992:

... we find that Sanlando has met the requirements set forth in Orders Nos. 23809 and 24920. The utility has followed through with its short term conservation incentives to educate customers on water conservation. Sanlando has more fully developed the long range conservation goals of implementing a reuse program and a conservation rate structure. We hereby approve the addendum and incorporate it into the utility's existing water conservation plan.

The Order went on to identify the amount of money collected from overearnings to be placed in a set-aside fund for water conservation efforts, and also restated that those monies were to be used for educational purposes for one year only. The Order continued:

Accordingly, we believe that the utility's proposal to use the remaining portion of the annual set-aside funds for implementation of the reuse program may be appropriate. However, because we agree that it would be more appropriate to address implementation of the reuse program through a limited proceeding, we are not addressing these issues at this time. Representatives from the SJRWMD, DEP, and Florida Audubon Society have all expressed their approval of the concept and their interest in pursuing implementation of the reuse program.

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Therefore, since the requirements of Orders Nos. 23809 and 24920 have been met, we hereby close this docket. However, the utility shall file a limited proceeding for the purpose of implementing the conservation program discussed in the body of this Order within nine months of the issuance date of this Order."

Sanlando complied with this mandate by filing a Petition for Limited Proceeding to Implement Water Conservation Plan on March 10, 1993, approximately 4 months after the issuance date of Order No. PSC-92-1356-FOF-WS. The St. Johns River Water Management District filed a Petition to Intervene in support of Sanlando Utilities Corporation's Petition for Limited Proceeding to Implement Water Conservation Plan on June 7, 1993. Charles Lee, representing the Florida Audubon Association filed to become an interested party in the docket in July 1993. Staff conducted a customer meeting on July 8, 1993.

On December 10, 1993, the Commission issued Order No. PSC-93-1771-FOF-WS as a proposed agency action. The Order approved Sanlando's petition for a limited proceeding to implement the water conservation plan and required the utility to file a proposed charge for reclaimed water. The Order authorized increased gallonage charges in order to generate revenue for the conservation plan and required the utility establish an escrow account to deposit those funds and any excess revenues.

On December 31, 1993, Jack R. Hiatt filed a timely petition protesting Order No. PSC-93-1771-FOF-WS. Mr. Hiatt stated that his substantial interests were affected by the Commission's decision because he will be charged the increased utility rates. He took issue with the manner in which the proposed rates will be implemented, because he claimed it will cause a "significant amount of taxes being paid by Sanlando's customers." Mr. Hiatt requested a formal hearing.

On January 3, 1994, Robert E. Swett and Tricia Madden, individually and as President of Wekiva Hunt Club Community Association, Inc., filed petitions protesting Order No. PSC-93-1771-FOF-WS. Although the petitions were not filed within the 21-day deadline of December 31, 1993, Mr. Swett and Ms. Madden stated that they had not received a copy of the Order. According to Rule 25-22.029(4), Florida Administrative Code, if an individual is not served with a copy of the order and notice has been published, the deadline for filing the petition may be tolled until after notice is published. Their petitions alleged the same grounds and objections as Mr. Hiatt.

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The Office of Public Counsel (OPC) filed a notice of intervention in this docket on February 4, 1994. On January 26, 1994, the St. John's Water Management District's Petition for Intervention was granted.

On January 24, 1994, Sanlando filed Motion to Dismiss and Answer to Petitions. On February 4, 1994, the Office of Public Counsel filed a Response to Motion to Dismiss and Answer to Petitions. On February 10, 1994, Ms. Madden filed an Amended Response to Motion to Dismiss and Answer to Petitions, and Alternative Motion to Amend.

On February 16, 1994, the Florida Audubon Society, Inc. (Audubon) and Friends of the Wekiva River, Inc. (Friends) filed a Petition to Intervene in support of Sanlando's conservation plan. On that same date, Audubon and Friends filed a Motion to Dismiss and Response to Motion to Amend of Tricia Madden. Audubon and Friends had not been granted intervention at the time of the filing of their motion to dismiss. OPC counsel notified staff that OPC would not file a response to Audubon and Friends' motion to dismiss until a decision was made as to the petition to intervene. On February 28, 1994, Tricia Madden filed a Motion to Strike Florida Audubon Society and Friends of the Wekiva River Inc.'s Motion to Dismiss and Response, on the grounds that Audubon and Friends were not parties in the docket.

On April 25, 1994, after Charles Lee was approved as a Class B Practitioner, Audubon and Friends were granted intervention in this docket. The Order Granting Intervention noted that Audubon and Friends had also filed a motion to dismiss, and deemed that motion to have been filed on the date that Audubon and Friends were granted intervention, April 25, 1994. This allowed the parties to respond to Audubon and Friends' motion to dismiss. Thereafter, on May 9, 1994, OPC filed a response to Audubon and Friends' motion to dismiss. On that same day, Tricia Madden also filed a response to Audubon and Friends' motion.

This matter is currently set for formal hearing in Seminole County on September 26-27, 1994. This recommendation addresses Sanlando's and Audubon and Friends' motions to dismiss, and the motions filed in response by the other parties.

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ISSUE 1: Should the Commission grant Sanlando's Motion to Dismiss?

STAFF RECOMMENDATION: No. Sanlando's Motion to Dismiss should be denied. (O'SULLIVAN)

STAFF ANALYSIS: In its Motion to Dismiss and Answer to Petitions, Sanlando denies all of the allegations of fact presented by the Petitioners who filed objections to Order No. PSC-93-1771-FOF-WS. The utility also sets forth several grounds to support its motion to dismiss the objections filed by the Petitioners. Specifically, the utility states that the Petitioners have not demonstrated a substantial interest in the proceedings, have not alleged disputed issues of fact, did not allege ultimate facts, and did not make any demand for relief. Sanlando also asserts that because the Petitioners did not allege any disputed issues of fact, the Commission should convert the case to an informal proceeding.

In its Citizen's Response to Motion to Dismiss and Answer to Petitions, OPC states that the Petitioners who protested the Order have a substantial interest, as they are rate-payers who will pay higher rates if the utility's conservation plan is approved. OPC notes that "the Commission has always held that a ratepayer who is subject to a rate increase has a substantial interest in the outcome of the rate increase proceeding." In response to the utility's argument that the Petitioners have not stated the ultimate facts or alleged any disputed issues of fact, OPC states that there are numerous factual arguments and lists several of them. OPC also argues that they are unable to state the ultimate facts in the case until they have had the opportunity to engage in discovery. Finally, OPC points out that the Petitioners made a demand for relief, in that they requested a formal hearing in order to present testimony to oppose the proposed water conservation plan.

In her Amended Response to Motion to Dismiss and Answer to Petitions and Alternative Motion to Amend, Tricia Madden asserts that the Petitioners have complied with Commission rules concerning the filing of petitions. She states that the Petitioners have alleged that their substantial interests will be affected because as customers they will be paying the higher rates. She further notes that Paragraph 5 of her original petition alleges the facts which are in dispute, and states that until the Petitioners engage in discovery, they will be unable to determine all of the specific issues and ultimate facts. Finally, Ms. Madden claims that the Petitioners have made an appropriate demand for relief, as they have opposed Order No. PSC-93-1771-FOF-WS and requested a formal

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hearing to present testimony in opposition to the conservation program. Ms. Madden requests that the Commission deny Sanlando's motion and in the alternative, that the Petitioners be permitted to amend their Petitions.

According to Rule 25-22.029, Florida Administrative Code, an individual who opposes a Proposed Agency Action order may file a petition in the form provided for in Rule 25-22.036. Sanlando's motion is premised upon the fact that the Petitioners did not comply with the provisions of Rule 25-22.036(7), Florida Administrative Code. That rule states in relevant part:

- (7) Form and Content
- (a) Generally except for orders or notices issued by the Commission, each initial pleading shall contain:
 - 1. The name of the Commission and the Commission's docket number, if known;
 - 2. The name and address of the applicant, complainant or petitioners, and an explanation for how his or her substantial interests will be or are affected by the Commission determination;
 - 3. A statement of all known disputed issues of material fact. If there are none, the petition must so indicate;
 - 4. A concise statement of the ultimate facts alleged as well as the rules and statutes which entitle the petitioner to relief;
 - 5. A demand for relief; and
 - 6. Other information which the applicant, complainant or petitioner contends is material.

Sanlando claims that the Petitioners have not complied with subsections 2, 3, 4, and 5 of the Rule. These concerns are discussed below.

Substantial interest

In determining a party's standing and substantial interest, this Commission has followed the two-part test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). In order to have a substantial interest in a proceeding, an individual must show that he or she will suffer injury in fact, and that the injury is of a type or nature which the proceeding is designed to protect. As ratepayers and customers of Sanlando, the Petitioners' rates will increase if the

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conservation plan is implemented. In other words, there is a direct nexus between the Commission's decision to implement the conservation rates, and the Petitioner's payment of those increased rates. Agrico's second requirement has also been met, in that the Commission is charged by Section 367.121(1)(a), Florida Statutes to prescribe fair and reasonable rates. The limited proceeding and proposed agency action procedures are intended to address and protect the interests of both the customers and company in achieving fair and reasonable rates. The Petitioners' alleged injury of paying higher rates is of a type intended to be addressed in this proceeding. Therefore, staff recommends that the Commission find that the Petitioners have adequately explained their substantial interests.

Disputed issues of Material Facts and Ultimate Facts

Staff believes that the Petitioners have all alleged sufficient disputed issues of material facts. Each petition protests the findings of Order No. PSC-93-1771-FOF-WS, and takes issue with "among other things, the manner in which the proposed increased rates will be implemented." While the petitions do not allege each specific disputed fact, it is clear that the Petitioners have objected to the PAA Order's findings, and the implementation of the rates upon Sanlando's customers. Furthermore, at the point at which a protest is filed to a PAA order, parties have generally not conducted discovery. The Commission has implemented pre-hearing procedures in order to develop issues prior to the hearing.

Demand for Relief

The proposed agency action process allows substantially affected persons to protest an order and request a Section 120.57(1) formal hearing. (See Rule 25-22.029(4), Florida Administrative Code). Each of the Petitioners has objected to the PAA Order and requested that the Commission convene a formal hearing to resolve the dispute. The Petitioners have therefore stated a demand for relief in compliance with the Commission's procedure.

Staff recommends that the Commission determine that the Petitioners have complied with the provisions of Rule 25-22.036(7), Florida Administrative Code. The Petitioners adequately explained how their substantial interests will be affected, alleged sufficient issues of material fact and ultimate facts, and made a demand for relief. Staff also recommends that Tricia Madden's motion to amend her petition is moot if the Commission denies

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Sanlando's motion to dismiss.

Staff further recommends that the Commission deny Sanlando's request to convert the proceedings into an informal proceeding. An informal proceeding pursuant to Section 120.57(2), Florida Statutes, is appropriate when there are no disputed issues of material fact. In this case the Petitioners have protested the findings of Order No. PSC-93-1771-FOF-WS. Although the Order does not distinguish between findings of fact and findings of law, it is clear that by their protest the Petitioners have raised disputes as to factual issues. They have specifically objected to the implementation of rates. As noted in Order No. PSC-93-0028-FOF-WS in Docket No. 920754-WU, the question of approved rates is a combined question of fact and law. The Petitioners have clearly raised disputed issues of material facts by protesting Order No. PSC-93-1771-FOF-WS.

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ISSUE 2: Should the Commission grant Audubon and Friends' Motion to Dismiss?

RECOMMENDATION: No. Audubon and Friends' Motion should be denied.

STAFF ANALYSIS: In their Motion to Dismiss of Audubon Society and Friends of the Wekiva River, Inc. and Response to Motion to Amend of Tricia A. Madden and the Citizen's Response of Public Counsel, Audubon and Friends have joined in support of Sanlando's motion to dismiss discussed above, and have raised additional grounds to support their own motion to dismiss.

Audobon and Friends have raised three arguments in opposition to the Petitioners' protests. First, they argue that to the extent that the Petitioners and OPC have attempted to address the appropriateness of water conservation, they should have filed a rule challenge to the administrative rules which address water conservation. Secondly, they argue that to they extent that the Petitioners and OPC have challenged the legislative directive which allows utilities to recover the cost of reuse projects through rate structure, the proper forum for such a challenge is a Circuit Court. Finally, Audubon and Friends point out that the Petitioners and Public Counsel did not respond to any of the published notices concerning DEP permits. They argue that a hearing on the Petitioner's protests is barred by the doctrine of res judicata and laches, to the extent that they are attempting to reopen long-decided issues relating to the need for a water reuse facility.

In her Response to Motion to Dismiss of Florida Audubon Society and Friends of the Wekiva River, Inc., and Response to Motion to Amend of Tricia A. Madden and the Citizens Response of Public Counsel, Tricia Madden rebuts the arguments made by Audobon and Friends. Ms. Madden notes that issues such as the methods of water conservation are not before the Commission in this proceeding. This docket and her protest concerns the proper method of funding the proposed conservation project. She and the other Protestors have not sought to challenge the validity of a rule, but have requested a Section 120.57(1) hearing as they are permitted to do in the Commission's Proposed Agency Action process. Ms. Madden also argues that her petition is not barred by the doctrine of res judicata and laches because this is a new cause of action resulting from Order No. PSC-93-1771-FOF-WS. She also notes that as an intervenor, Audubon and Friends must take the case at they find it.

OPC raises similar arguments in its Response to Motion to Dismiss Filed by Florida Audubon Society and Friends of the Wekiva River, Inc. OPC states that it has not challenged the provisions

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of any rules, but that it has challenged the method of funding the conservation program. OPC further states that it has not challenged the legislative directive of 403.064(6), Florida Statutes, but has instead taken issue with the method by which Sanlando is attempting to recover the cost of the facilities. Finally, OPC argues that its protest is not barred by res judicata. Neither OPC nor the Protestors were parties in the previous proceedings. Furthermore, OPC and Protestors have exercised their right according to Commission procedure to protest the proposed agency action.

Each of Audubon and Friends' arguments is discussed and analyzed separately below.

Rule challenge

Audubon and Friends have misconstrued the scope of this proceeding. Staff agrees with OPC and the Petitioners that the protests have not challenged the provisions of Chapter 17-40 and Chapter 42-2, Florida Administrative Code, which address specific conservation methods under the Department of Environmental Protection and the Florida Land and Water Adjudicatory Commission. As both OPC and Ms. Madden stated, the Petitioners have not raised issues concerning water conservation methods or other technical issues. Instead, they are concerned with how the conservation plan will be funded. Furthermore, the Commission has considered the appropriateness of a water conservation in earlier dockets. Order Nos. 23089, 24920 and PSC-92-1356-FOF-WS addressed the conservation plan itself. The Order at issue in this docket, Order No. PSC-93-1771-FOF-WS, addresses the implementation of a rate structure designed to allow the utility to recover the cost of the conservation plan. The protests filed to that Order are specifically directed to the findings of that Order.

Audubon and Friends have also acknowledged elsewhere in their motion that the Commission has jurisdiction under Section 403.064(6) to address recovery for a reuse project. In the scope of its jurisdiction and pursuant to a petition for a limited proceeding filed by Sanlando, the Commission issued a proposed agency action order. The Protestors have the opportunity and right to file a petition in opposition to the Commission's proposed agency action order. They have not launched a collateral attack on water conservation rules. Therefore, a 120.56 rule challenge is not the appropriate venue to litigate this matter.

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Challenge to legislative directive

Staff disagrees with Audubon and Friends' contention that the Protestors are actually challenging the language of the Section 403.064(6), Florida Statutes, and that they should test its validity in a Circuit Court. Audubon and Friends have cited Section 403.064(6) for the proposition that:

Pursuant to Chapter 367, the Florida Public Service Commission shall allow entities which implement reuse projects to recover the full cost of such facilities through their rate structure. (emphasis added)

Even though they have not made it clear, Audubon and Friends apparently argue that because the Commission shall allow utilities to recover the cost of the projects, parties may not challenge the method of recovery. Clearly, this is not the case. OPC and the Petitioners have not challenged the PSC's authority under Section 403.064(6), Florida Statutes to allow recovery. They have challenged Order No. PSC-93-1771-FOF-WS, which sets forth the Commission's decision as to how the recovery for the project shall be implemented. This is a proper venue to protest the rate structure.

Res judicata and the doctrine of laches

The doctrine of res judicata bars the relitigation of causes of action between the same parties or their privies, if there is a final judgment on the merits. Albrecht v. State, 444 So.2d 8 (Fla. 1984). The parties and the cause of action in the subsequent case must be identical. Staff believes that Audubon and Friends' claim of res judicata fails on both counts. While the issue of the water conservation project has been raised in a previous docket before the Commission, and several consumptive use permits have been issued to Sanlando in the past, this docket is the first opportunity to address the issue of rate structure and recovery. The protests to Order No. PSC-93-1771-FOF-WS are not barred by res judicata.

For the reasons set forth herein, staff recommends that the Commission deny Audubon and Friends' motion to dismiss.

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ISSUE 3: Should this docket remain open?

RECOMMENDATION: Yes, if the Commission denies the motions to dismiss, this docket should remain open.

STAFF ANALYSIS: This docket should remain open in order to address the objections filed to Order No. PSC-93-1771-FOF-WS. A formal hearing in this matter is scheduled for September 26-27, 1994.