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FLORIDA PUBLIC SERVICE COMMISSION

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Tallahassee, Florida 32399-0850

M E M O R A N D U M

JULY 7, 1994

TO : DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM : DIVISION OF LEGAL SERVICES (O'SULLIVAN)
DIVISION OF WATER AND WASTEWATER (RENDELL, STARLING)

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: JULY 19, 1994 - DECISION PRIOR TO HEARING -- INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

RECOMMENDATION FILE NAME: 930256A.RCM

SPECIAL INSTRUCTIONS: THIS A REVISION OF THE RECOMMENDATION FILED ON JUNE 9, 1994

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 plan supplement was presented at the October 22, 1991 Agenda Conference. The Commission determined that the plan supplement 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

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 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;

	Charge Per 1,000Gallons
0 to 10,000 gallons per month	$ .355
10,000 to 20,000 gallons per month	$ .50

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 be increased 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.

> 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), 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.

The Office of Public Counsel 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. This matter is currently set for a formal hearing in Seminole County on September 26-27, 1994.

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, Tricia 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. The attorney for OPC notified staff that he would file a response to Audubon and Friends' motion to dismiss until after 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 had been 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 Audobon and Friends' motion to dismiss. On that same day, Tricia Madden also filed a response.

On June 9, 1994, Staff filed a recommendation to address the motions to dismiss, which was scheduled to be heard by the Commission at its June 21, 1994, Agenda Conference. On June 16, 1994, Sanlando and Audubon and Friends filed a Notice of Supplemental Authority in support of their motions. On June 17, 1994, OPC and Tricia Madden each filed a motion to delay the scheduled agenda date in order to have sufficient time to respond to the Notice of Supplemental Authority. The other parties did not object to the request, and the item was deferred from the June 21,

1994, Agenda Conference. Both OPC and Tricia Madden have filed written responses to the Notice of Supplemental Authority.

This recommendation addresses Sanlando's and Audubon and Friends' motions to dismiss, the motions filed in response by the other parties, and Sanlando's and Audubon's Notice of Supplemental Authority.

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 alleged any disputed issues of fact, did not allege any 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 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 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 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. 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.

Furthermore, staff 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.

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 D.E.P. 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 the 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 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

Staff agrees with OPC and the Petitioners that they have not challenged the provisions of Chapter 17-40 and Chapter 42-2, Florida Administrative Code, which address specific conservation methods. A 120.56 rule challenge is not the appropriate venue to litigate this matter. As both OPC and Ms. Madden stated, they 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. Orders 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.

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 stated so, it appears that Audubon and Friends argue that because the Commission shall allow utilities to recover the cost of the projects, other 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. They have challenged the Commission's decision in how the recovery for the project should be implemented.

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. The parties and the cause of action 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.

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

ISSUE 3: Should the Commission accept the Notice of Supplemental Authority filed by Sanlando and Audubon and Friends?

RECOMMENDATION: No, the Commission should reject the Notice of Supplemental Authority. Section 367.0817, Florida Statutes, does not apply to these proceedings because the statute was enacted after the initiation of Sanlando's petition. Furthermore, the Notice does not comport with the general requirements of a notice of supplemental authority in that it seeks to raise a new point and contains argument.

STAFF ANALYSIS: During its 1994 session, the Florida Legislature enacted a bill addressing water reuse projects. Chapter 94-243 of the Laws of Florida made substantial amendments to Chapters 367, 373, and 403, Florida Statutes. More specific to this docket, the legislation created Section 367.0817, Florida Statutes, to allow the Public Service Commission to address reuse projects. Section 367.0817 sets forth the requirements for submitting a reuse plan, requires the Commission to review the plan and issue a proposed agency action order, allows the costs of the reuse project to be recovered in rates, allows rates to be approved based upon projected costs, and sets forth procedures for the implementation of the rates. Governor Lawton Chiles signed the bill into law on May 25, 1994. A copy of Chapter 94-243 of the Laws of Florida is attached to this recommendation.

The Notice of Supplemental Authority, filed by Sanlando and Audubon and Friends on June 16, 1994, is intended to support the parties' Motions to Dismiss. The Notice draws attention to Section 1 of Chapter 94-243 of the Laws of Florida, and argues that the provisions of Section 367.0817 obviate the need for a formal hearing. Sanlando and Audubon and Friends claim that because the new reuse statute addresses all of the objections raised by the protestors, the objections should be dismissed. The parties state that "the Legislature has essentially written the elements of Sanlando's proposal that were in dispute into law, and has obviated the usefulness of a formal proceeding." (Notice, pg. 6) The Notice also points out that this proceeding would have to be substantially expedited because the new statute requires a final decision to be rendered within eight months of the filing of a protest.

In its Citizens Response to Notice of Supplemental Authority, filed on June 28, 1994, OPC argues that the Notice of Supplemental Authority is in fact an amended motion to dismiss. OPC concedes that Section 367.0817 may address one of the issues raised by the objectors, but states that it does not dispose of all of the issues. OPC also points out that the new statute expressly

requires the Commission to use the PAA process wherein parties may object to the implementation of a reuse plan. Finally, OPC raises objection to Sanlando and Audubon and Friends' attempt to apply Section 367.0817 retroactively.

In her Response to Notice of Supplemental Authority, filed June 27, 1994, Tricia Madden raises similar arguments to those made by OPC. Ms. Madden also objects to the attempt to apply the new statute retroactively to the issues and timeline in this case.

On July 5, 1994, SJRWMD filed a response to the Notice of Supplemental Authority. In its response, SJRWMD argues that the new statute gives the Commission the authority to approve the method of implementation proposed by Sanlando, and that the remaining issues in this case should be whether the costs are prudent and whether the proposed rates are reasonable and in the public interest. Because the Notice was filed on June 15, 1994, parties should have filed any response to the Notice by June 28, 1994 (allowing seven days for a response, plus an additional five days for mailing, pursuant to Rule 25-22.037(2)(b), Florida Administrative Code). Even though SJRWMD's response may be considered untimely, Staff has considered SJRWMD's motion to the extent that it concurs with the Notice filed by Sanlando and Audubon and Friends.

Staff recommends that the Commission reject the Notice of Supplemental Authority on both substantive and procedural grounds, as discussed separately below.

Applicability of Section 367.0817, Florida Statutes

Even though Staff believes that the Notice is procedurally inappropriate, as detailed herein, Staff has also addressed the arguments contained within the Notice and believes that the Notice should be rejected on substantive grounds. Staff does not believe that Section 367.0817, Florida Statutes, is applicable to this proceeding. Section 6 of Chapter 94-243 states that "This act shall take effect upon becoming a law." There is no express indication that the act should be applied retroactively.

According to Sanlando and Audubon and Friends, the bill was signed into law on May 25, 1994. This proceeding was initiated by a petition filed by Sanlando in February of 1993. As noted by OPC and Ms. Madden, statutes are presumed to be prospective in application unless the Legislature manifests an intention to the contrary. Cove Club Investors v. Sandalfoot South One, 438 So.2d 354 (Fla. 1983), Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239

(Fla. 1977), Freeman v. Case, 342 So.2d 815 (Fla. 1976), Keystone Water Co. v. Bevis, 278 So.2d 606 (Fla. 1973). Therefore, the new statute has no bearing upon a petition filed prior to its official enactment date.

Even if the Commission were to consider the statute applicabile to this proceeding, Staff would point out that the new statute contemplates the very procedures that are taking place in this docket. Section 367.0817(2) requires the Commission to issue a proposed agency action order approving or disapproving the reuse plan. That is exactly what has happened in this docket. Staff does not believe that the new statute, if it were applicable in this docket, would require this Commission to approve a reuse project automatically, without allowing substantially affected persons the opportunity to file a protest. As noted in Issues 1 and 2 of this recommendation, the protestors have raised concerns about the implementation and funding of Sanlando's plan, and have filed a protest to the PAA order which dealt with the plan. If Sanlando were to file a petition for approval of a reuse plan under Section 367.0817 today, the same PAA procedure would apply.

Therefore, Staff recommends that the Commission reject the Notice of Supplemental Authority filed by Sanlando and Audubon and Friends, on the grounds that the statute is not retroactive and cannot be applied to Sanlando's petition to implement its reuse plan.

Procedural considerations

Pursuant to Rule 25-22.037(2), Florida Administrative Code, parties may file motions in opposition to a Commission proceeding or for other purposes. However, the Commission does not have a specific mechanism for the filing of a notice of supplemental authority. Such a notice is generally filed in the course of an appellate proceeding after a brief has been served. Rule 9.210 of the Rules of Appellate Procedure sets forth the requirements:

> (g) **Notice of Supplemental Authority.** Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal which the supplemental authorities are pertinent, but shall not contain argument. Copies of the supplemental

authorities shall be attached to the notice.

Although the Commission does not have a specific procedure for filing a notice of supplemental authority, Staff believes that on certain occasions it might be appropriate to permit a party to file a notice if conditions similar to Rule 9.210(g), Fla.R.App.P. were met. For example, if, after a formal hearing, a party files its brief with the Commission, and then later discovers a relevant case which directly addresses its position, the Commission may wish to allow the party to file a notice of supplemental authority.

However, the Notice of Supplemental Authority filed by Sanlando and Audubon and Friends does not comport with the rationale for allowing notices of this type to be filed. The Notice does not simply draw the Commission's attention to a statute. Sanlando and Audubon and Friends are essentially attempting to amend their original motions to dismiss by raising an entirely new argument. A supplemental notice should not be used to raise an argument for the first time. In Bing v. A.G. Edwards & Sons, Inc., 498 So.2d 1279 (Fla. 4th DCA), the appellate court declined to consider arguments raised for the first time in a party's notice of supplemental authority. Furthermore, a notice of supplemental authority should not contain argument of any kind. It is simply intended to draw a court's attention to a previously overlooked case, statute or authority. The Notice filed by Sanlando and Audubon and Friends contains argument as to the application of the new statute to these proceedings. On these grounds, the Commission should reject the Notice of Supplemental Authority.

ISSUE 4: Should this docket remain open?

RECOMMENDATION: Yes, if the Commission denies the motions to dismiss, and rejects the Notice of Supplemental Authority, 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.

An act relating to water and wastewater systems; creating s. 367.0817, F.S.; providing for water reuse projects to be approved by the Public Service Commission; providing that prudent and reasonable costs of reuse shall be recovered in rates approved by the commission; providing for escrow of revenues attributed to such rates, subject to refund; providing for true-up of reuse costs and such rates; creating s. 373.250, F.S.; providing for the encouragement of reuse of reclaimed water; providing a definition; requiring the water management districts to adopt rules to allocate reclaimed water and to provide for emergency situations; providing for application; amending s. 403.064, F.S.; providing requirements for the use of reclaimed water; providing permit requirements for wastewater treatment facilities in water resource caution areas; providing for feasibility studies for reuse of reclaimed water; providing that permits issued by the Department of Environmental Protection for domestic wastewater treatment facilities must be consistent with requirements for reuse in applicable consumptive use permits; limiting disposal of effluent by deep well injection; amending s. 403.1838, F.S.; expanding the scope of the Small Community Sewer Construction Assistance Act; authorizing grants by the Department of Environmental Protection to

financially disadvantaged small communities in accordance with rules adopted by the Environmental Regulation Commission; prescribing criteria for the commission's rules; requiring the department to review each grant; providing for grant funds to be used to pay the costs of program administration; providing for a continuation of current department rules for grants previously awarded; authorizing the Department of Enviromental Protection to expend federal drinking water funds to make grants and loans; directing the Department of Environmental Protection to report on the status of any federally authorized drinking water state revolving fund program; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 367.0817, Florida Statutes, is created to read as follows:

367.0817 Reuse Projects.--

(1) A utility may submit a reuse project plan for commission approval. A reuse project plan shall include:

(a) A description of the project and other effluent disposal options considered by the utility.

(b) Copies of the pertinent Department of Environmental Protection and water management district permit applications filed or, in lieu thereof, a statement of the project's permit status.

(c) A statement that the reuse project is required or recommended pursuant to section 403.064, Florida Statutes, or other relevant authority.

(d) The number and identity of the project's proposed reuse customer(s) and copies of written agreements, if any, between the utility and the customer(s) regarding the project.

(e) The projected costs associated with the reuse project. As used in this section, the term "costs" includes, but is not limited to, all capital investments, including a rate of return, any applicable taxes, and all expenses related to or resulting from the reuse project which were not considered in the utility's last rate proceeding.

(f) The utility's proposal for recovering the project's costs through rates.

(g) A proposed in-service schedule for the project.

(h) Any other information the commission may require pursuant to rule.

(2) The commission shall review the utility's reuse project plan and shall determine whether the projected costs are prudent and the proposed rates are reasonable and in the public interest. The commission shall issue a proposed agency action order to approve or disapprove the utility's reuse project plan. The commission shall enter its vote on the proposed agency action within 5 months of the date of filing. If the commission's proposed action is protested, the final decision shall be rendered by the commission within 8 months of the date the protest is filed.

(3) All prudent costs of a reuse project shall be recovered in rates. The Legislature finds that reuse benefits water, wastewater, and reuse customers. The commission shall allow a utility to recover the costs of a reuse project from

the utility's water, wastewater, or reuse customers or any combination thereof as deemed appropriate by the commission.

(4) The commission's order approving the reuse project plan shall approve rates based on projected costs and shall provide for the implementation of rates without the need for a subsequent proceeding. The commission shall allow the approved rates to be implemented when the reuse project plan is approved or when the project is placed in service. If the commission allows the rates to be implemented when the plan is approved, the commission may order the utility to escrow the resulting revenues until the project is placed in service. Escrowed revenues shall be used exclusively for the reuse project.

(5) If the commission allows the rates to be implemented when the plan is approved, the utility may place its proposed rates into effect on a temporary basis, subject to refund, in the event of a protest by a party other than the utility. If the utility has requested rate implementation upon approval of the plan and the commission has exceeded the time allowed in subsection (2), the utility may place its proposed rates into effect on a temporary basis, subject to refund.

(6) After the reuse project is placed in service, the commission, by petition or on its own motion, may initiate a proceeding to true-up the costs of the reuse project and the resulting rates.

Section 2. Section 373.250, Florida Statutes, is created to read:

373.250 Reuse of reclaimed water.--

(1) The encouragement and promotion of water conservation and reuse of reclaimed water, as defined by the

department, are state objectives and considered to be in the public interest. The Legislature finds that the use of reclaimed water provided by domestic wastewater treatment plants permitted and operated under a reuse program approved by the department is environmentally acceptable and not a threat to public health and safety.

(2)(a) For purposes of this section, "uncommitted" means the average amount of reclaimed water produced during the three lowest-flow months minus the amount of reclaimed water that a reclaimed water provider is contractually obligated to provide to a customer or user.

(b) Reclaimed water may be presumed available to a consumptive use permit applicant when a utility exists which provides reclaimed water, which has uncommitted reclaimed water capacity, and which has distribution facilities, which are initially provided by the utility at its cost, to the site of the affected applicant's proposed use.

(3) The water management district shall, in consultation with the department, adopt rules to implement this section. Such rules shall include, but not be limited to:

(a) Provisions to permit use of water from other sources in emergency situations or if reclaimed water becomes unavailable, for the duration of the emergency or the unavailability of reclaimed water. These provisions shall also specify the method for establishing the quantity of water to be set aside for use in emergencies or when reclaimed water becomes unavailable. The amount set aside is subject to periodic review and revision. The methodology shall take into account the risk that reclaimed water may not be available in the future, the risk that other sources may be fully allocated

to other uses in the future, the nature of the uses served with reclaimed water, the extent to which the applicant intends to rely upon reclaimed water and the extent of economic harm which may result if other sources are not available to replace the reclaimed water. It is the intent of this paragraph to ensure that users of reclaimed water have the same access to ground or surface water and will otherwise be treated in the same manner as other users of the same class not relying on reclaimed water.

(b) A water management district shall not adopt any rule which gives preference to users within any class of use established under s. 373.246 who do not use reclaimed water over users within the same class who use reclaimed water.

(4) Nothing in this section shall impair a water management district's authority to plan for and regulate consumptive uses of water under this chapter.

(5) This section applies to new consumptive use permits and renewals of existing consumptive use permits.

(6) Each water management district shall submit to the Legislature, by January 30 of each year, an annual report which describes the district's progress in promoting the reuse of reclaimed water. The report shall include, but not be limited to:

(a) The number of permits issued during the year which required reuse of reclaimed water and, by category, the percentages of reuse required.

(b) The number of permits issued during the year which did not require the reuse of reclaimed water and, of those permits, the number which reasonably could have required reuse.

(c) In the second and subsequent annual reports, a statistical comparison of reuse required through consumptive use permitting between the current and preceding years.

(d) A comparison of the volume of reclaimed water available in the district to the volume of reclaimed water required to be reused through consumptive use permits.

(e) A comparison of the volume of reuse of reclaimed water required in water resource caution areas through consumptive use permitting to the volume required in other areas in the district through consumptive use permitting.

(f) An explanation of the factors the district considered when determining how much, if any, reuse of reclaimed water to require through consumptive use permitting.

(g) A description of the district's efforts to work in cooperation with local government and private domestic wastewater treatment facilities to increase the reuse of reclaimed water. The districts, in consultation with the department, shall devise a uniform format for the report required by this subsection and for presenting the information provided in the report.

Section 3. Section 403.064, Florida Statutes, is amended to read:

403.064 Reuse of reclaimed water.--

(1) The encouragement and promotion of water conservation, and reuse of reclaimed water, as defined by the department, are state objectives and are considered to be in the public interest. The Legislature finds that for those wastewater treatment plants permitted and operated under an approved reuse program by the department, the reclaimed water shall be considered environmentally acceptable and not a threat to public health and safety.

(2) After-January-1,-1992, All applicants for permits to construct or operate a domestic wastewater treatment facility located within, serving a population located within, or discharging within in a critical water resource caution supply area shall prepare a reuse feasibility study evaluate the-costs-and-benefits-of-reuse-of-reclaimed-water as part of their application for the permit. Reuse feasibility studies shall be prepared in accordance with department guidelines adopted by rule and shall include, but are not limited to:

(a) Evaluation of monetary costs and benefits for several levels and types of reuse.

(b) Evaluation of water savings if reuse is implemented.

(c) Evaluation of rates and fees necessary to implement reuse.

(d) Evaluation of environmental and water resource benefits associated with reuse.

(e) Evaluation of economic, environmental, and technical constraints.

(f) A schedule for implementation of reuse. The schedule shall consider phased implementation.

(3) The study required under subsection (2) evaluation shall be performed by the applicant, and the applicant's determination of feasibility is evaluation-shall-be final if the study complies with the requirements of subsection (2).

(4)(3) A reuse feasibility study is not required if:

(a) The domestic wastewater treatment facility has an existing or proposed permitted or design capacity less than 0.1 million gallons per day; or

(b) The permitted reuse capacity equals or exceeds the total permitted capacity of the domestic wastewater treatment

facility. ~~The requirements of this section for such evaluation shall apply to domestic wastewater treatment facilities located within, serving a population located within, or discharging within critical water supply problem areas.~~

(5) A reuse feasibility study prepared under subsection (2) satisfies a water management district requirement to conduct a reuse feasibility study imposed on a local government or utility that has responsibility for wastewater management.

(6) Local governments may allow the use of reclaimed water for inside activities, including, but not limited to, toilet flushing, fire protection, and decorative water features, as well as for outdoor uses, provided the reclaimed water is from domestic wastewater treatment facilities which are permitted, constructed, and operated in accordance with department rules.

(7) Permits issued by the department for domestic wastewater treatment facilities shall be consistent with requirements for reuse included in applicable consumptive use permits issued by the water management district, if such requirements are consistent with department rules governing reuse of reclaimed water. This subsection applies only to domestic wastewater treatment facilities which are located within, or serve a population located within, or discharge within water resource caution areas and are owned, operated, or controlled by a local government or utility which has responsibility for water supply and wastewater management.

(8)~~(4)~~ Local governments may and are encouraged to implement programs for the reuse of reclaimed water. Nothing

in this chapter shall be construed to prohibit or preempt such local reuse programs.

(9)~~(5)~~ A local government that implements a reuse program under this section shall be allowed to allocate the costs in a reasonable manner.

(10)~~(6)~~ Pursuant to chapter 367, the Florida Public Service Commission shall allow entities under its jurisdiction which conduct studies or implement reuse projects, including, but not limited to, any study required by s. 403.064(2) or facilities used for reliability purposes for a reclaimed water reuse system, to recover the full, prudently incurred cost of such studies and facilities through their rate structure.

(11)~~(7)~~ In issuing consumptive use permits, the permitting agency shall consider ~~take into consideration~~ the local reuse program.

(12)~~(8)~~ A local government shall require a developer, as a condition for obtaining a development order, to comply with the local reuse program.

(13) If, after conducting a feasibility study under subsection (2), an applicant determines that reuse of reclaimed water is feasible, domestic wastewater treatment facilities that dispose of effluent by Class I deep well injection, as defined in 40 C.F.R. Part 144.6(a), must implement reuse according to the schedule for implementation contained in the study conducted under subsection (2), to the degree that reuse is determined feasible. Applicable permits issued by the department shall be consistent with the requirements of this subsection.

(a) This subsection does not limit the use of a Class I deep well injection facility as backup for a reclaimed water reuse system.

(b) This subsection applies only to domestic wastewater treatment facilities located within, serving a population located within, or discharging within a water resource caution area.

Section 4. Section 403.1838, Florida Statutes, is amended to read:

403.1838 Small Community Sewer Construction Assistance Act.--

(1) This section may be cited as the "Small Community Sewer Construction Assistance Act."

(2)(a) There is established within the Department of Environmental Protection Regulation the Small Community Sewer Construction Assistance Trust Fund.

(b) The department shall use the funds shall-be-used by-the-department to assist financially disadvantaged small communities with their needs for adequate sewer facilities. For purposes of this section, the term "financially disadvantaged small community" means a an-incorporated municipality with a population of 7,500 35;000 or less, according to the latest decennial census and a per capita annual income less than the state per capita annual income as determined by the United States Department of Commerce.

(3)(a) In accordance with rules adopted by the Environmental Regulation Commission under this section, the department may provide grants from the Small Community Sewer Construction Trust Fund to financially disadvantaged small communities for up to 100 percent of the costs of planning, designing, constructing, upgrading, or replacing wastewater collection, transmission, treatment, disposal, and reuse facilities, including necessary legal and administrative expenses. Grants-shall-be-made-from-the-Small-Community-Sewer

Construction-Assistance-Trust-Fund-in-accordance-with-rules adopted-by-the-Environmental-Regulation-Commission:--The department-may-grant-up-to-$3-million-to-any-small-community:

(b) The rules of the Environmental Regulation Commission must:

1. Require that projects to plan, design, construct, upgrade, or replace wastewater collection, transmission, treatment, disposal, and reuse facilities be cost-effective, environmentally sound, permittable, and implementable.

2. Require appropriate user charges, connection fees, and other charges sufficient to ensure the long-term operation, maintenance, and replacement of the facilities constructed under each grant.

3. Require grant applications to be submitted on appropriate forms with appropriate supporting documentation, and require records to be maintained.

4. Establish a system to determine eligibility of grant applications.

5. Establish a system to determine the relative priority of grant applications. The system must consider public health protection and water pollution abatement.

6. Establish requirements for competitive procurement of engineering and construction services, materials, and equipment.

7. Provide for termination of grants when program requirements are not met.

(c) The department must perform adequate overview of each grant, including technical review, regular inspections, disbursement approvals, and auditing, to successfully implement this section.

(d) The department may use up to 2 percent of the grant funds made available each year for the costs of program administration.

(e) Any grant awarded before July 1, 1994, under this section, remains subject to the applicable department rules in existence on June 30, 1993, until all rule requirements have been met.

(4)--The-Environmental-Regulation-Commission-shall:

(a)--Require-a-45-percent-nonstate-match;-except-that;-for-a-grant-of-less-than-$50;000;-the-commission-may-waive-all-or-a-part-of-the-matching-requirement:

1.--Where-water-quality-standards-have-been-exceeded-by-an-amount-that-constitutes-an-immediate-health-hazard;-or

2.--In-a-community-where-the-gross-per-capita-income-is-below-the-state-average;-as-determined-by-the-United-States-Department-of-Commerce;-and-where-sewer-systems-have-failed-to-meet-department-standards:

(b)--Require-appropriate-user-charges-and-connection-fees-sufficient-to-ensure-the-long-term-operation-and-maintenance-of-the-facility-to-be-constructed-under-any-grant:

(c)--Require-compliance-with-all-water-quality-standards:

(d)--Establish-a-system-to-determine-eligibility-and-relative-priority-for-applications-for-grants-by-small-communities:

(e)--Require-applications-for-grants-to-be-submitted-on-appropriate-forms-with-appropriate-supporting-documentation;-require-construction-to-be-in-accordance-with-plans-approved-by-the-department;-and-require-recordkeeping:

(5)--Any-project-satisfactorily-planned-and-designed-in-accordance-with-the-requirements-of-the-United-States

Environmental-Protection-Agency-is-eligible-for-funding-under-this-act:

(6)--A-grant-may-not-be-made-unless-the-local-governmental-agency-assures-the-department-of-the-proper-and-efficient-operation-and-maintenance-of-the-project-after-construction:--Revenue-sufficient-to-ensure-that-the-facility-will-be-self-supporting-shall-be-generated-from-sources-which-include;-but-are-not-limited-to;-service-charges-and-connection-fees:--The-revenue-generated-shall-provide-for-financing-future-sanitary-sewerage-capital-improvements:--The-grantee-shall-accumulate;-during-the-design-life-of-the-grant-funded-project;-moneys-in-an-amount-equivalent-to-the-grant-amount-adjusted-for-inflationary-cost-increases:

(7)--Any-local-government-agency-which-receives-assistance-under-this-section-shall-keep-such-records-as-the-department-prescribes;-including-records-which-fully-disclose-the-amount-and-disposition-by-the-recipient-of-the-proceeds-of-such-assistance;-the-total-cost-of-the-project;-the-amount-of-that-portion-of-the-project-supplied-by-other-sources;-and-such-other-records-as-will-facilitate-effective-audit:--The-department-and-the-Auditor-General-or-any-of-their-duly-authorized-representatives-shall-have-access;-for-the-purpose-of-audit-and-examination;-to-any-books;-documents;-papers;-and-records-of-the-recipient-that-are-pertinent-to-grants-received-under-this-section:--Upon-project-completion;-the-local-government-agency-shall-submit-to-the-department-a-separate-audit;-by-an-independent-certified-public-accountant;-of-the-grant-expenditures:

Section 5. (1) If federal funds become available for a drinking water state revolving loan fund, the Department of Environmental Protection may use the funds to make grants and

loans to the owners of public water systems, as defined in s. 403.852(2), and as otherwise authorized by the law making the funds available. The department may adopt rules necessary to satisfy requirements to receive these federal funds and to carry out the provisions of this subsection. The rules shall include, but not be limited to, a priority system based on public health considerations, system type, and population served; requirements for proper system operation and maintenance; and, where applicable, consideration of ability to repay loans.

(2) The department shall, by January 1, 1995, report to the Legislature the status of any drinking water state revolving fund program authorized by federal law and shall include in the report recommendations as to appropriate and necessary statutory changes to govern its implementation.

Section 6. This act shall take effect upon becoming a law.

CODING: Words stricken are deletions; words underlined are additions.