

FLORIDA PUBLIC SERVICE COMMISSION

2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0863

M E M O R A N D U M

July 6, 1995

TO : DIRECTOR OF RECORDS AND REPORTING
FROM : DIVISION OF LEGAL SERVICES (O'SULLIVAN)
DIVISION OF WATER AND WASTEWATER (CHASE)
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

DATE : JULY 18, 1995 - DECISION PRIOR TO HEARING -- INTERESTED
PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

LOCATION OF FILE: I:\PSC\WAW\WP\930256R.RCM

DOCUMENT NUMBER-DATE

06367 JUL -6 95

FPSC-RECORDS/REPORTING

Docket No. 930256-WS
July 6, 1995

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 plants. According to the 1993 Annual Report, Sanlando serves approximately 10,489 water and 8,725 wastewater customers. The revenue collected in 1993 by the utility was \$1,938,944 for the water system and \$2,731,650 for the wastewater system. Sanlando's entire service area lies within the St. John's River Water Management District (SJRWMD), which has declared its entire district as a water use caution area.

This docket was opened for the purpose of implementing Sanlando's water conservation plan approved by the Commission in Order No. PSC-92-1356-FOF-WS, issued November 23, 1992. This conservation plan includes the construction of an effluent reuse system. The Commission issued Order No. PSC-93-1771-FOF-WS as a proposed agency action. The order authorized increased gallonage charges in order to generate revenue for the conservation plan and required the utility to establish an escrow account to deposit those funds and any excess revenues.

Timely petitions protesting Order No. PSC-93-1771-FOF-WS were filed by Jack R. Hiatt, Robert E. Swett and Tricia Madden, individually and as President of Wekiva Hunt Club Community Association, Inc. In addition, The Office of Public Counsel and St. John's River Water Management District filed notices of intervention in this docket. This matter was set for a formal hearing in Seminole County on September 26-27, 1994.

On September 19, 1994, OPC filed a motion to cancel the September 26, 1994 hearing and approve a stipulation among the parties. Order NO. PSC-94-1157-PCO-WS, issued September 20, 1994, granted the motion to cancel the hearing, noting that the stipulation would be reviewed by the Commission at a later date.

The overall goal of the stipulation is to fund the construction of the reuse facilities without incurring income tax liability, thus reducing the total cost of the project by approximately 40 percent. To accomplish this goal, the parties agreed to create a non-profit corporation which would own the reuse facilities and to seek tax exempt status of the corporation from the IRS. Sanlando would act merely as a collection agent for the corporation. Funds collected through a surcharge to Sanlando's water customers would be placed in an escrow account owned and controlled by the non-profit corporation. These funds would be used to construct the reuse facilities, which would then be leased to Sanlando. Sanlando would operate the facility and provide the

Docket No. 930256-WS
July 6, 1995

reuse to potential end users. The operation and maintenance expenses of the facility and any revenue collected from the end users would be included in the determination of Sanlando's revenue requirement in any future rate proceeding.

Staff had concerns about the stipulation which caused us to recommend in our memorandum dated November 21, 1994, that it be denied as filed. We further recommended that the parties be encouraged to address these concerns and file another stipulation. The Commission voted on December 20, 1994, to defer this matter to a future agenda conference, and instructed Staff to work with the parties to see if a stipulation could be reached that satisfactorily answered Staff's concerns. Staff drafted proposed revisions to the stipulation and circulated the revised stipulation to the parties through the Office of Public Counsel. The parties subsequently submitted a proposed stipulation. On February 23, 1995, Staff filed a memorandum which recommended approval of the stipulation. However, Staff filed primary and alternate recommendations as to the issue of whether the Commission could resolve any dispute regarding the reasonableness or prudence of expenditures from the escrowed funds.

At its Agenda Conference on March 21, 1995, the Commission considered the recommendation. There was significant discussion by the Staff, the parties, and the Commissioners concerning the Commission's approval of disputes regarding the expenditures from escrowed funds. The Commission voted to approve staff's primary recommendation, with modifications.

On April 28, 1995, the Commission issued Order No. PSC-95-0536-S-WS. On May 15, 1995, the Office of Public Counsel filed a motion to clarify the order. All of the parties involved in the stipulation endorsed the motion.

Docket No. 930256-WS
July 6, 1995

ISSUE 1: Should the Commission grant OPC's motion to clarify Order No. PSC-95-0536-S-WS?

PRIMARY STAFF RECOMMENDATION: The Commission should grant in part and deny in part OPC's motion. Order No. PSC-95-0536-S-WS incorrectly refers to the utility's recovery of lease expenses through the surcharge, and should be amended in that regard. However, Order No. PSC-95-0536-S-WS accurately reflects the vote of the Commission panel at its March 21, 1995, Agenda Conference in regard to the resolution of disputes among the parties. Accordingly, in that regard, OPC's motion should be denied. (O'SULLIVAN)

ALTERNATIVE STAFF RECOMMENDATION: The Motion to Clarify should be approved. The last three sentences of paragraph 3 of page 5 of Order No. PSC-95-0536-S-WS should be deleted and replaced with language as contained in the Alternative Staff Analysis. (CHASE)

PRIMARY STAFF ANALYSIS: OPC's motion for clarification asserts that Order No. PSC-95-0536-S-WS does not accurately reflect the decision reached by the Commission in its March 21, 1995, Agenda Conference. Staff notes initially that this motion does not seek clarification so much as it seeks the Commission to amend its order to comport with the parties' interpretation of the Commission vote. This could be construed as a motion for reconsideration pursuant to Rule 25-22.060, Florida Administrative Code. However, for the purposes of review of this motion, Staff has not applied the standard for reconsideration.

The Commission's order is the final statement by the Commission of its decision. Recommendations and discussion by Staff and the parties on the record, while illustrative, should not be utilized to interpret the Commission's final order. However, in this instance, Staff agrees with OPC and the parties that the discussion among the parties and the Commissioners was at times confusing, and that parties and Staff could reasonably differ as to the substance of the Commission's decision.

The primary source of contention is the decision regarding the language of Paragraph 4(c) of the proposed stipulation. That section of the stipulation provides that any dispute concerning the reasonableness or prudence of expenses associated with the construction of the facility will first be addressed by an engineering firm, and that if that resolution is not acceptable, the dispute would then be submitted to the Commission for final resolution.

The Commission staff provided a primary and alternate recommendation as to that issue in its February 23, 1995,

Docket No. 930256-WS
July 6, 1995

memorandum. Staff's primary recommendation stated that while the Commission should approve the stipulation, the parties should be put on notice that the Commission is neither bound nor authorized to resolve disputes. The primary recommendation addressed the Commission's authority and jurisdiction over specific performance of a contract, the Commission's role as an arbitrator, and the expenditure of Commission funds. Staff cited recent decisions in the communications and cogeneration industries regarding the Commission's role in contract disputes.

Staff's alternative recommendation stated that the proposed stipulation should be approved, and that the Commission could resolve disputes among the parties as contemplated in the stipulation. The alternative recommendation contended that the Commission should be innovative in its approach to the stipulation, and that it was in the public interest to seek the lowest cost alternative. In the alternative analysis, Staff noted that the Commission typically gives prior approval for any withdrawal of funds from an escrow account, and that the stipulation simply provides for an earlier review by the Commission if the parties cannot reach consensus on an expenditure.

At the March 21, 1995, Agenda Conference, a significant portion of the discussion focused upon the primary and alternate recommendations regarding this issue. After the discussion, the Commission moved to adopt the primary recommendation as modified. Order No. PSC-95-0536-S-WS addressed the issue in the following paragraph on page 5:

In light of these considerations, we will not resolve disputes concerning the Chief Operating Officer or the Articles of Incorporation contemplated in Paragraph 1(a). Furthermore, we will not resolve disputes among parties or directly approve the reasonableness and prudence of contracts and expenses as contemplated by the current stipulation. However, through our regulatory function as it relates to the utility's recovery of lease expenses through the surcharge, we will review the reasonableness and prudence of expenses as they relate to what we allow the utility to recover in lease expenses. The determination of reasonableness of expenses would flow from our authority to review and approve those expenses when authorizing the release of the escrowed funds.

OPC's motion asserts that this paragraph, and particularly the last three sentences, do not comport with the Commission's discussion and final vote. OPC has transcribed the audiocassette recording of the Agenda Conference (attached to its motion as Exhibit A), and cites several portions of the transcription to

Docket No. 930256-WS
July 6, 1995

demonstrate that the Commission ultimately concluded that it had the authority to resolve disputes among the parties regarding design and construction of the escrow account. OPC's motion proposes alternative language to Paragraph 5, and requests that the Commission insert that or other language into the Order to indicate that the Commission will resolve disputes regarding expenses from the escrow accounts.

Because of the length of the discussion, Staff took particular care in drafting the order to review the recommendation, vote sheet, and audiotape of the Agenda Conference. Staff believes that while the discussion at Agenda was at times confusing the Commission's decision is appropriately reflected in Order No. PSC-95-0536-S-WS.

The Commission first discussed the issue in substance on pages 7-8 of the transcriptions, with the Chairman noting that

instead of making it the direct overview of disputes relating to prudence of contract design permitting or disputes concerning reasonableness of costs and expenses, that when in our function as regulating the utility to allow the recovery of that expense, lease expense, through the surcharge, we will, in fact, review the reasonableness of the contract and the reasonableness of the expenses and costs as it relates to what we will allow to be recovered in the lease payment, and if that is clear in the order, I think it is clearly within our authority to do that. (Emphasis added)

On pages 9-10 of the transcription, Staff counsel advises the Commissioners that the Commission would look at the expenses before the release of the escrowed funds. The Chairman then requested, "Can you write the order that way, that says that we approve the stipulation with the understanding that the resolutions of disputes concerning contract design and reasonableness flow from the fact that we will have to approve them."

Further discussion by Staff, the Commissioners and the parties followed. The Commissioners discussed which recommendation to approve and the extent to which the Commission would review the prudence of expenses. One commissioner stated that "we will look at the prudence of expenses associated with the construction of the facilities." (Exhibit A, page 17). The Chairman stated that:

Docket No. 930256-WS
July 6, 1995

it's going to be pursuant to our authority over the utility to make sure that expenses charged to customers are reasonable and the way this expenses is being recovered is through the release of escrow funds and to the extent we have that responsibility we will be looking at the reasonableness of contracts for design, permitting a construction of the facility and the cost and expenses incurred in operating the facility. (Exhibit A, page 18)

Staff believes that the Order appropriately reflects the Commission's decision in that it wanted to look at the prudence of expenses pursuant to the Commission's review prior to the release of escrow funds. The discussion did not encompass the resolution of disputes between parties concerning the reasonableness of expenses. In fact, comments made at the beginning of the discussion began with the notion that there should be a method of reviewing expenses, instead of resolving disputes.

OPC contends that if the order is not changed, the stipulation will not comply with the order as it is currently written. As staff has previously recommended, the Commission need not reject the stipulation because of the provisions regarding the settlement of disputes, but that the Commission cannot be bound by provisions that are inconsistent with its authority. Furthermore, Staff notes that in the two pages of the order preceding the paragraph in dispute, the Commission discusses at length the concerns over jurisdiction and enforcement of the terms of the settlement. These concerns would seem to be inconsistent with the language proposed by OPC in its motion. If the Commission does not have jurisdiction over the non-profit corporation, and has concerns over the expenditure of Commission funds, this would preclude the Commission from determining that it can resolve disputes as contemplated by the stipulation. Therefore, Staff recommends that the Commission deny OPC's motion for clarification of Order No. PSC-95-0536-S-WS as it relates to that issue.

Staff does recommend, however, that the Commission grant OPC's motion as to one particular detail of the order. OPC notes on page 12 of its motion that the utility will not recover lease expenses through the surcharge. Order No. PSC-95-0536-S-WS states on page 5 that, "[H]owever, through our regulatory function as it relates to the utility's recovery of lease expenses through the surcharge, we will review the reasonableness and prudence of expenses as they relate to what we allow the utility to recover in lease expenses." While this was discussed at one point in the agenda conference, Staff then noted to the Commissioners that the Commission would review the expenses when the funds are released from the escrow account. (Exhibit A, page 9). Therefore, Staff recommends that that sentence be stricken from Order No. PSC-95-0536-S-WS, and that

Docket No. 930256-WS
July 6, 1995

the following sentence be inserted: "However, it is within our authority to review the prudence of these expenses when releasing the funds from the escrow account."

ALTERNATIVE STAFF ANALYSIS: Staff of the Division of Water and Wastewater agrees with the parties in this case that Order No. PSC-95-0536-S-WS is not consistent with the decision rendered by the Commission at its March 21, 1995 Agenda Conference. As mentioned previously, the discussion at the agenda conference among the parties and the Commissioners was confusing and the parties and staff could reasonably differ as to the substance of the Commission's decision. After reading the transcription of the agenda conference, we believe the confusion arose because, after all parties agreed that the Commission would not resolve disputes relating to the selection of the chief operating officer or approval of the language of the articles of incorporation or by laws of the nonprofit corporation, it appeared that the recommendations of Legal staff (primary) and technical staff (alternative) were the same. In fact, there remained a substantial difference. The primary recommendation was that the Commission cannot resolve disputes among the parties. The alternative recommendation was that the Commission should resolve disputes as contemplated in the Stipulation, which would be only as a last resort after other measures have been taken to reach agreement, including the hiring of an independent engineering firm to conduct a prudence review. The only disputes to be resolved by the Commission (as a last resort) would involve reasonableness of costs and expenses incurred by the Corporation, and prudence of contracts related to the construction of the reuse facility. These areas involve activities that will be funded by the escrow account, which will be controlled by the Commission.

The basic area of confusion in the discussion at the agenda conference involved releases from the escrow account. Normally, the Commission, through its staff, reviews requests for withdrawal from an escrow account **after** the amount has been determined. The Revised Stipulation provides for an earlier review by the Commission in cases where the parties are not able to resolve disputes. This is admittedly beyond what the Commission normally does with escrow accounts. Legal staff contends that the Commission does not have the legal authority to do this. Technical staff believes that it is in the public interest to promote this project and the Commission should take a proactive stance and agree to this additional level of involvement. We believe that the intent of the Commission vote was to agree to resolve disputes as a last resort, using its authority to approve the release of funds from the escrow account as the legal basis for such involvement.

Accordingly, we recommend that the Motion to Clarify Order No.

Docket No. 930256-WS
July 6, 1995

PSC-95-0536-S-WS be granted. Further, we recommend that the Commission delete the last three sentences of paragraph 3 of page 5 of the order, as follows:

Furthermore, we will not resolve disputes among Parties or directly approve the reasonableness and prudence of contracts and expenses as contemplated by the current stipulation. However, through our regulatory function as it relates to the utility's recovery of lease expenses through the surcharge, we will review the reasonableness and prudence of expenses as they relate to what we allow the utility to recover in lease expenses. The determination of reasonableness of expenses would flow from our authority to review and approve those expenses when authorizing the release of the escrowed funds.

These sentences should be substituted with the following language as contained in the Motion to Clarify:

However, under its authority to regulate the expenditures of the surcharge funds placed in the escrow account, the Commission shall resolve any dispute that cannot be resolved by the Parties concerning the reasonableness or prudence of any expenditure of escrowed funds to construct the reuse facilities. After the reuse facilities have been constructed, the Commission shall continue to have jurisdiction to approve the reasonableness and prudence of expenses relating to the leasing and operation of the reuse facilities.

Docket No. 930256-WS
July 6, 1995

ISSUE 2: Should this docket remain open?

RECOMMENDATION: Yes. The docket should remain open until the letter rulings from the Internal Revenue Service (IRS) have been issued.

STAFF ANALYSIS: In Order No. PSC-95-0536-S-WS, the Commission approved the stipulation, and ordered the parties to advise the Commission of the results of the letter ruling from the IRS. Therefore, this docket should remain open while the parties seek approval from the IRS.