

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED-TPSC
JAN 9 AM 10:39
COMMISSION CLERK

DATE: JANUARY 9, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (CIBULA, HOLLEY) *SMC JAN 14 11 45 DS*
DIVISION OF ECONOMIC REGULATION (DANIEL) *JDT 1/9/03*

RE: DOCKET NO. 021128-WS - PETITION TO INITIATE RULEMAKING TO AMEND RULE 25-30.041, F.A.C., APPLICATION FOR APPROVAL OF TRANSFER TO GOVERNMENTAL AGENCY, BY CITY OF PALM COAST.

DOCKET NO. 021188-WS - PETITION TO INITIATE RULEMAKING CONCERNING CAPITAL CHARGES BY CITY OF PALM COAST.

AGENDA: 1/21/03 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

RULE STATUS: JANUARY 21, 2003 - STATUTORY DEADLINE WAIVED UNTIL THIS DATE.

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\021128.RCM

CASE BACKGROUND

On November 6, 2002, the City of Palm Coast (City) filed a petition to initiate rulemaking. That filing was assigned Docket No. 021128-WS. In Docket No. 021128-WS, the City proposes that the Commission adopt a rule that would require the Commission to evaluate any proposed sale, assignment or transfer from a private water and wastewater utility to a legal entity created by interlocal agreement under section 163.01(7)(g)1., Florida Statutes, prior to the sale, assignment or transfer of the utility's certificate of authorization, facilities, or any portion thereof, or majority organizational control.

DOCUMENT NUMBER-DATE

00269 JAN-98

FPSC-COMMISSION CLERK

DOCKET NOS. 021128-WS, 021188-WS
DATE: JANUARY 9, 2003

On November 25, 2002, the City filed a second petition to initiate rulemaking. This filing was assigned Docket No. 021188-WS. In Docket No. 021188-WS, the City proposes that the Commission adopt a rule that would require the Commission to evaluate a proposed sale, assignment, or transfer of a private water and wastewater utility to a legal entity created by a interlocal agreement under section 163.01(7)(g)1. to determine whether "capital charges" are being paid to the selling utility. The City's proposed rule defines "capital charges" as "revenues such as impact fees, guaranteed revenues, service availability fees, or such other charges or fees imposed upon landowners, builders, or developers in connection with the improvement of property utilizing a water or wastewater utility system to defray the costs of capital facilities." The rule proposal prohibits the legal entity from paying "capital charges" to the selling utility.

On November 27, 2002, Florida Water Services Corporation (Florida Water or utility) filed a Motion to Dismiss the City's Petition to Initiate Rulemaking in Docket No. 021128-WS. On December 16, 2002, Florida Water filed a Motion to Dismiss the City's Petition to Initiate Rulemaking in Docket No. 021188-WS. Florida Water asserts that the City lacks standing to initiate these rulemakings. The City filed responses to the Motions to Dismiss.

Pursuant to section 120.54(7), Florida Statutes, the Commission has 30 days from the date of the filing of a petition to initiate rulemaking proceedings, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial. The City waived the deadline until January 21, 2003, to allow it time to respond to the Motions to Dismiss and to allow the Commission to consider both petitions at the same agenda conference.

The Commission has jurisdiction to consider the petitions pursuant to section 120.54, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Florida Water's Motions to Dismiss the City's Petitions for Rulemaking?

RECOMMENDATION: No. Florida Water's Motions to Dismiss filed in Dockets No. 021128-WS and 021188-WS should be denied. (CIBULA, HOLLEY, DANIEL)

STAFF ANALYSIS: As stated in the case background, Florida Water filed Motions to Dismiss both of the City's Petitions to Initiate Rulemaking. The City filed responses to Florida Water's motions.

Motion to Dismiss

In both of the Motions, Florida Water asserts that the City does not have standing to file the petitions for rulemaking. More specifically, Florida Water states that under section 120.54(8)(a), Florida Statutes, and Rule 28-103.006(1), Florida Administrative Code, an entity seeking to initiate rulemaking must allege facts demonstrating that the petitioner is either regulated by the agency or has a substantial interest in the agency rule that the petitioner proposes for adoption. Florida Water states that because the City is not regulated by the Commission, it must demonstrate the latter.

Florida Water argues that there is no authority under Chapter 120, Florida Statutes, for the City to appear as a representative of its citizens in a rulemaking proceeding. Florida Water points out that while section 120.52(12)(d), Florida Statutes, includes counties in the definition of a "party," Chapter 120 does not include cities in the definition. Florida Water further states that the water and wastewater services provided by Florida Water to residents of the City who are customers of Florida Water are exclusively regulated by the Flagler County Utility Regulatory Authority, not the Commission.

Response

In its responses to the Motions to Dismiss, the City argues that it has standing to file the petitions to initiate rulemaking and that Florida Water's motions should be denied. The City asserts that it is a customer of Florida Water. The City provided copies of its bills to prove that it is a customer of the utility.

The City further states that it has standing to represent its citizens under the provisions of Article VIII, Section 2 of the Constitution of the State of Florida and Chapter 166, Florida Statutes. It argues that Article VIII states that the City "may exercise any power for municipal purposes except as otherwise provided by law." It states that section 166.021(b) defines the term "municipal purpose" as "...any activity or power which may be exercised by the state or its political subdivisions." The City states that it has the "right and obligation to take any and all administrative and legislative actions that it deems appropriate and in the public interest in order to protect the citizens of the City of Palm Coast and the economic well being of the businesses within the City."

In regard to Florida Water's argument that Chapter 120 specifically includes counties but not cities in the definition of a "party," the City asserts that counties to some extent may need to obtain express legislative approval to take certain action, action which cities are constitutionally entitled to take. It asserts that section 120.52(12)(d) "indicates that the power granted to counties by that statute is a local government power in a general sense that municipalities have not been prohibited from exercising by constitutional or statutory provision."

Analysis

Staff believes that whether or not the City has standing to initiate rulemaking as the representative of its citizens, it is clear that the City is a customer of Florida Water. As a customer of the utility, actions taken by the utility will have an effect on the City. Thus, staff believes that the City has the requisite "substantial interest" to initiate these rulemakings. Consequently, staff recommends that Florida Water's Motions to Dismiss filed in Dockets No. 021128-WS and 021188-WS should be denied.

ISSUE 2: Should the Commission grant the City's Petitions to Initiate Rulemaking?

RECOMMENDATION: No. The Commission should deny the City's Petitions to Initiate Rulemaking filed in Dockets No. 021128-WS and 021188-WS. (CIBULA, HOLLEY, DANIEL)

STAFF ANALYSIS: The City filed two separate, but related, petitions to initiate rulemaking. In Docket No. 021128-WS, the City has requested that the Commission adopt the following rule:

25-30.041 Transfer of Water and Wastewater Utility to Specified Entities Created Under Section 163.01(7)(q)1., Florida Statutes.

- a. This Rule is adopted under the exclusive jurisdiction of the Commission over the authority of water or wastewater utilities and to ensure that the rates of water and wastewater utilities are not raised indirectly without Commission action when rates could not be raised directly without Commission action. This Rule is also appropriate to exercise the police power of the State, as vested in the Commission, to protect the public interest by ensuring that water and wastewater utility rates are not raised and transfers of water and wastewater utilities do not occur in such a manner that would result in a detriment to the public without appropriate Commission action and oversight.
- b. As used in this Rule, the term "Entity" means a legal entity created under the authority of Section 163.01(7)(q)1., Florida Statutes, which, except for populations included under the authority in Section 180.02(3), Florida Statutes, serves populations outside of the county or counties of the members of the legal entity.
- c. The sale, assignment or transfer of a non-exempt water or wastewater utility to an Entity can be used as a means of raising rates that could not otherwise be raised and circumventing the

regulatory authority of the Commission which is implemented to protect the public interest.

- d. The provisions of Section 367.071, Florida Statutes, are intended to protect the public from sales, assignments or transfers of water and wastewater utilities that are contrary to or inconsistent with the public interest.
- e. Prior to a water or wastewater utility selling, assigning or transferring its certificate of authorization, facilities, or any portion thereof, or major organizational control to any Entity, the Commission shall docket and evaluate the proposed sale, assignment or transfer. This requirement relates to utilities that are under the regulation of the Commission and those that have systems that are both under the regulation of the Commission and regulated by other governmental entities.
- f. This evaluation by the Commission of any proposed sale, assignment or transfer of a water or wastewater utility to an Entity shall include, but not be limited to, the following:
 - (1) Whether the proposed sale, assignment or transfer will result in the commitments of the regulated utility being fulfilled.
 - (2) Whether the proposed sale, assignment or transfer will result in the obligations of the regulated utility being fulfilled.
 - (3) Whether the proposed sale, assignment or transfer will result in the representations of the regulated utility being fulfilled.
- g. An Entity shall not be deemed to be a governmental authority and shall not be deemed to be a district as set forth in Section 1.01(8), Florida Statutes.
- h. Any privately owned water or wastewater utility that sells, transfers or assigns its certificate of authorization, facilities, or any portion thereof,

or major organizational control to an Entity, shall first submit an application to the Commission, or to the applicable regulator in conjunction with the Commission, to fix and change its rates.

- i. Notwithstanding the provisions of Section 367.171, Florida Statutes, any water or wastewater utility that owns or operates water or wastewater systems that propose to sell, transfer or assign said systems to an Entity shall be subject to Commission evaluation as provided in Section 367.171(5), Florida Statutes.

In Docket No. 021188-WS, the City requests that the Commission adopt the following rule:

Retention of Capital Charges Upon Transfer of Water or Wastewater Utility to Specified Entities Created Under Section 163.01(7)(g)1., Florida Statutes

- a. This Rule is adopted under the exclusive jurisdiction of the Commission over the authority of water or wastewater utility systems to ensure that capital charges paid by or assessed against consumers and customers such as landowners, builders or developers by means of sources such as impact fees, guaranteed revenues, service availability fees and other such fees and charges are not paid by such consumers and customers without being dedicated for the use of the systems used by the consumers and customers. It is hereby prohibited for such capital charges to be paid by an Entity to any firm or person to include, but not be limited to, a seller of a water or wastewater utility system. This Rule is also appropriate to exercise the police power of the State, as vested in the Commission, to protect the public interest by ensuring that payments of capital charges by consumers and customers do not occur in such a manner that would result in a detriment to the public without appropriate Commission action and oversight.

- b. As used in this Rule, the term "Entity" means a legal entity created under the authority of Section 163.01(7)(q)1., Florida Statutes, which, except for populations included under the authority in Section 180.02(3), Florida Statutes, serve populations outside of the county or counties of the members of the legal entity.

- c. As used in this Rule, the term "Capital Charges" means revenues such as impact fees, guaranteed revenues, service availability fees, or such other charges or fees imposed upon landowners, builders or developers in connection with the improvement of property utilizing a water or wastewater utility system to defray the costs of capital facilities.

- d. The sales, assignment or transfer of a non-exempt water or wastewater utility to an Entity can be used as a means of shifting the benefits of capital charges from those utility consumers and customers making such payments to those who would not invest such capital charges to the public utility system upon whom the consuming public rely thereby circumventing the regulatory jurisdiction of the Commission which is implemented to protect the public interest.

- e. The provisions of Section 367.071, Florida Statutes, are intended to protect the public from sales, assignments or transfers of water and wastewater utilities, and their assets (such as "Capital Charges"), that are contrary to or inconsistent with the public interest.

- f. Prior to a water or wastewater utility selling, assigning or transferring its certificate of authorization, facilities, or any portion or assets (such as "Capital Charges") thereof, or major organizational control to any Entity, the Commission shall docket and evaluate the proposed sale, assignment or transfer. This requirement relates to utilities which are to be sold or transferred that are under the regulation of the Commission and those that have systems that are

DATE: JANUARY 9, 2003

both under the regulation of the Commission and regulated by other governmental entities.

g. An Entity shall not be deemed a governmental authority and shall not be deemed to be a district as set forth in Section 1.01(8), Florida Statutes.

h. It is prohibited for any privately owned water or wastewater utility that sells, transfers or assigns its certificate of authorization, facilities, or any portion thereof, or major organizational control to an Entity, to be paid Capital Charges paid to the Entity by consumers and customers being served by the Entity.

In both of its Petitions to Initiate Rulemaking, the City in essence states that the rules it wants the Commission to adopt will address some of the ramifications resulting from the potential sale of Florida Water to a legal entity created under section 163.01(7)(g)1., known as the Florida Water Services Authority (FWSA). The FWSA was purportedly created by the cities of Gulf Breeze and Milton. The City states that none of Florida Water's water and/or wastewater systems are located within the jurisdictional boundaries of Santa Rosa County, where the cities of Gulf Breeze and Milton are located.

The City states that it "will benefit from the Commission having the maximum lawful and practicable participation in terms of the sale, assignment or transfer of the [Florida Water] systems to the purported FWSA." The City asserts that the Commission has the jurisdiction, organization, professional staff, and expertise to protect the public interest in circumstances such as this that would "result in regulated actions being indirectly accomplished when such actions could not be directly accomplished" and when "the interests of the consuming public are jeopardized."

Analysis

As the City notes in its Petitions to Initiate Rulemaking, the Commission currently has a docket open, Docket No. 021066-WS, in which it is investigating the proposed sale of Florida Water to the FWSA. In Docket No. 021066-WS, Commission staff is conducting discovery on the issues surrounding the sale. One issue that the staff is exploring is the Commission's jurisdiction over the

DOCKET NOS. 021128-WS, 021188-WS
DATE: JANUARY 9, 2003

proposed sale and the FWSA.¹ Because the Commission has not yet made any determination as to its jurisdiction over the matter and because it is already investigating the proposed sale, staff believes that it would be premature to proceed with the City's rulemaking requests. Moreover, staff believes that it would be more administratively efficient for all efforts and resources to be focused on Docket No. 021066-WS at this time. Any rulemaking that may be necessary can be pursued once the Commission's investigation in Docket No. 021066-WS has concluded. Thus, staff recommends that the City's Petitions to Initiate Rulemaking filed in Dockets No. 021128-WS and 021188-WS should be denied.

¹ On December 20, 2002, staff sent out a memorandum to all parties in Docket No. 021066-WS and interested persons requesting comments on the Commission's current and continuing jurisdiction over the proposed sale and the FWSA. Staff has requested that the comments be submitted by January 21, 2003.

DOCKET NOS. 021128-WS, 021188-WS
DATE: JANUARY 9, 2003

ISSUE 3: Should these dockets be closed?

RECOMMENDATION: Yes. Dockets Nos. 021128-WS and 021188-WS should be closed. (CIBULA, HOLLEY, DANIEL)

STAFF ANALYSIS: No further action is required; therefore, Dockets Nos. 021128-WS and 021188-WS should be closed.