

State of Florida



Public Service Commission

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COMMISSION CLERK

DATE: OCTOBER 9, 2003

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

FROM: DIVISION OF ECONOMIC REGULATION (WILLIS, CLAPP, KAPROTH) OFFICE OF THE GENERAL COUNSEL (JAEGER, HOLLEY) *PKK JS 10/8*

RE: DOCKET NO. 030541-WU - APPLICATION FOR ACKNOWLEDGMENT OF TRANSFER OF CLAY COUNTY AND BRADFORD COUNTY LAND AND FACILITIES TO CLAY COUNTY UTILITY AUTHORITY, AND FOR CANCELLATION OF CERTIFICATE NOS. 554-W AND 003-W, BY FLORIDA WATER SERVICES CORPORATION.
COUNTY: BRADFORD AND CLAY

AGENDA: 10/21/03 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: THE FIVE FLORIDA WATER SERVICES CORPORATION DOCKETS (030541-WU, 030542-WS, 030920-WS, 030971-WS, AND 030932-WS) SHOULD BE PLACED IN ORDER.

FILE NAME AND LOCATION: S:\PSC\ECR\WP\030541WU.RCM

CASE BACKGROUND

Florida Water Services Corporation (FWSC or utility) is a Class A utility providing water and wastewater service throughout Florida. Most of its systems are under Commission jurisdiction. FWSC serves approximately 281 Bradford County and 1,258 Clay County water customers. The Bradford and Clay County systems are not located in a priority water resource caution area of the St. Johns River Water Management District. The utility's 2002 annual report indicates that the Bradford and Clay County systems have a combined gross revenue for the water systems of \$552,302 with combined net operating income of \$50,578.

DOCUMENT NUMBER-DATE

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

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

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

This recommendation addresses the transfer of FWSC's Bradford and Clay County water systems to CCUA, and whether the Commission should open a docket to examine whether the transfer involves a gain that should be shared with FWSC's remaining customers. The Commission has jurisdiction pursuant to Sections 367.045, 367.071, and 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the transfer of Florida Water Services Corporation's Bradford and Clay County water facilities to Clay County Utility Authority be approved?

RECOMMENDATION: Yes. The transfer of FWSC's Bradford and Clay County facilities to CCUA should be approved, as a matter of right, pursuant to Section 367.071(4)(a), Florida Statutes, effective May 7, 2003. Regulatory assessment fees should be submitted within 20 days after the issuance of the Order approving the transfer. Certificate Nos. 554-W and 003-W should be cancelled administratively at the conclusion of all pending dockets concerning the Bradford and Clay County facilities. (CLAPP, KAPROTH, JAEGER, HOLLEY)

STAFF ANALYSIS: On June 17, 2003, the Commission received an application to transfer the FWSC facilities to the CCUA pursuant to Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. Included with the application are copies of the Stipulated Order of Taking and Stipulated Final Judgment in Clay County Utility Authority v. Florida Water Services Corporation, pursuant to the condemnation procedures set forth under Chapter 73, Florida Statutes. As a result of the condemnation proceeding, CCUA acquired title to FWSC's land and facilities in Bradford and Clay County as of May 7, 2003, which is the date the documents were issued by the Circuit Court of the Fourth Judicial Circuit.

FWSC filed its application pursuant to Section 367.071(4)(a), Florida Statutes, which provides that the sale of facilities, in whole or in part, to a governmental authority shall be approved as a matter of right. Staff notes that while this proceeding was not a voluntary sale, as CCUA acquired the facilities through condemnation proceedings, pursuant to Section 367.071, Florida Statutes, the Commission still must approve or acknowledge the transfer of FWSC's facilities.

CCUA is a governmental authority pursuant to Section 367.021(7), Florida Statutes, which states that a "governmental authority" is a political subdivision, as defined by Section 1.01(8), Florida Statutes. According to Section 1.01(8), Florida Statutes, a "political subdivision" includes counties, cities, towns, villages, special tax districts, special road and bridge

districts, and all other districts in this state. The CCUA is an independent special district, created and passed in a special act by the 1994 Florida Legislature (Chapter 94-491, HB No. 2299, Clay County Utility Authority Act).

Pursuant to Section 367.071(4)(a), Florida Statutes, the transfer of facilities to a governmental authority shall be approved as a matter of right. As such, no notice of the transfer is required and no filing fees apply. The application had no deficiencies, and is in compliance with Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code.

The application contains a statement that the County obtained FWSC's most recent income and expense statement, balance sheet, statement of rate base for regulatory purposes, and contributions-in-aid-of-construction pursuant to Rule 25-30.037(4)(e), Florida Administrative Code. A statement that the customer deposits will be transferred to the County for the benefit of the customers as required by Rule 25-30.037(4)(g), Florida Administrative Code, was also included in the application.

Pursuant to the requirements of Rule 25-30.037(4)(h), Florida Administrative Code, a statement was included that FWSC has no outstanding regulatory assessment fees (RAFs) and no fines or refunds are owed. Staff has verified that the utility has filed its 2002 annual report and paid its 2002 RAFs, and that there are no outstanding penalties and interest. For the period of January 1, 2003 through May 7, 2003, FWSC has agreed to file the RAF return and remit its RAF payment for the facilities in Bradford and Clay Counties within 20 days after the issuance of the Order approving the transfer.

Staff recommends that the Commission find that the application is in compliance with all provisions of Rule 25-30.037, Florida Administrative Code. Pursuant to Section 367.071(4)(a), Florida Statutes, the transfer of facilities to a governmental authority shall be approved as a matter of right. As indicated previously, staff believes that CCUA is a governmental authority, as defined in Chapter 367, Florida Statutes. Therefore, staff recommends that the Commission approve, as a matter of right, the transfer of FWSC's Bradford County and Clay County water systems to the CCUA effective May 7, 2003. RAFs should be submitted within 20 days after the issuance of the Order approving the transfer.

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Certificate Nos. 554-W and 003-W should be cancelled administratively at the conclusion of all pending dockets concerning FWSC's Bradford County and the Clay County facilities.

ISSUE 2: Should the Commission open a docket to examine whether FWSC's sale of its Bradford County and Clay County facilities involves a gain that should be shared with FWSC's remaining customers?

RECOMMENDATION: Yes. The Commission should open a docket to examine whether FWSC's sale of its Bradford County and Clay County facilities involves a gain that should be shared with FWSC's remaining customers. (WILLIS, CLAPP, JAEGER, HOLLEY)

STAFF ANALYSIS: Per the stipulated final judgment issued by the Fourth Judicial Circuit Court on May 7, 2003, FWSC shall have and recover the total sum of \$4,100,000 from the CCUA as full compensation for the taking of the water facilities. That sum appears to exceed the rate base values that the Commission has approved for those facilities. In Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, In Re: Application for rate increase and increase in service availability charges in Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties, the most recent rate proceeding for FWSC, the approved rate base value for the combined water facilities in Bradford County was \$247,269 for the projected test year ending December 31, 1996. Restoring used and useful adjustments, the aggregate rate base balance was \$326,895. In Docket No. 950495-WS, the approved rate base value for the combined water facilities in Clay County was \$950,197 for the projected test year ending December 31, 1996. Restoring used and useful adjustments, the aggregate rate base balance was \$1,211,596. In its 2002 Annual Report, FWSC reported a rate base of \$229,332 and \$2,370,910 for its Bradford and Clay County systems, respectively. As the taking occurred in 2003, an updated rate base calculation will be needed to determine the gain, if any, due to the sale of these facilities. Initial review indicates that FWSC will record a gain on this transaction. Therefore, staff recommends that the Commission should decide whether to open a separate docket to determine if the gain should be allocated among the remaining water and wastewater customers.

Utility's Position

By letter to staff dated August 29, 2003, the attorney for FWSC discussed the gain on sale issue and whether it was even appropriate to raise the issue in this docket, where the facilities were transferred pursuant to an involuntary condemnation. In that letter, FWSC cites the Commission's decision concerning gain on sale in Order No. PSC-93-0423-FOF-WS, issued March 22, 1993, in Docket No. 920199-WS, In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona) (SSU Order). In the SSU Order, FWSC argues that the Commission concluded that there should be no sharing in the gain arising from the condemnation of water and wastewater systems previously operated by FWSC. Because that decision concerning gain on sale was affirmed by the First District Court of Appeal in Citrus County v. Southern States Utilities, Inc., 656 So. 2d 1307 (Fla. 1st DCA 1995), FWSC argues that the Commission is bound by the "Citrus County precedent."

Moreover, FWSC notes that "the Citrus County appellate court decision is consistent with" Order No. PSC-93-1821-FOF-WS, issued December 22, 1993, in Docket Nos. 930373-WS, In Re: Application for amendment of Certificate No. 247-S by North Fort Myers Utility, Inc., and cancellation of Certificate No. 240-S issued to Lake Arrowhead Village, Inc., in Lee County, and 930379-SU, In Re: Application for a limited proceeding concerning the rates and charges for customers of Lake Arrowhead Village, Inc., in Lee County, by North Fort Myers Utility (North Fort Myers Order). In the North Fort Myers Order, FWSC points to the paragraph where the Commission stated:

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

Finally, in regards to the condemnation proceeding, FWSC argues that the Circuit Court confirmed the amount the utility was entitled to receive for its assets, and that the Commission should

not "interfere with the judicially sanctioned value of the utility's assets." FWSC concludes that it would amount to "an unconstitutional taking and deprivation of the shareholder's rights for the Commission to order a sharing of the gain."

Staff's Position

Staff believes that FWSC has misinterpreted each of the above-noted Orders and court decision. In the SSU Order, the Commission, in addressing whether a sharing of the gain on sale was appropriate, specifically said, "Since SSU's remaining customers never subsidized the investment in the SAS [St. Augustine Shores] system, they are no more entitled to share in the gain from that sale than they would be required to absorb a loss from it." Therefore, the Commission's determination that a sharing of the gain on sale was not appropriate was limited to the specific facts of that case and was not a "blanket" legal determination that a gain on sale would never be appropriate. The Citrus County case merely confirmed this factual interpretation.

As to the North Fort Myers Order, the language quoted by FWSC was merely addressing whether there should be a refund to the customers of the former utility, Lake Arrowhead Village, Inc. (LAVI). As to consideration of the gain on sale, the Commission said:

We first examined whether any gain on sale should be passed on to the customers. The costs to dismantle the plant would range from \$20,000 to \$50,000, depending on the public health and other sanitary requirements for the intended use of the land where the treatment and disposal facilities are located. Therefore, even if the few lots which might be created by clearing the former plant site were sold, a significant portion of the gain would be greatly offset by the cost of clearing the site and preparing the lots for sale.

Therefore, the Commission again, on a factual basis, determined that a gain on sale adjustment was not appropriate.

Finally, staff does not agree that a review of the appropriate disposition of any gain on sale would constitute an interference "with the judicially sanctioned value of the utility's assets," or an "unconstitutional taking and deprivation of the shareholders'

property rights" as alleged by FWSC. The Commission is merely carrying out its jurisdictional duty to "fix rates which are just, reasonable, compensatory, and not unfairly discriminatory" to the remaining customers of FWSC, as required by Section 367.081(2)(a)1., Florida Statutes.

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

Further study to examine sharing considerations for the Bradford County and Clay County gain on sale is recommended to permit timely examination of this topic. Staff recommends that the Commission open a docket to examine whether FWSC's sale of its Bradford and Clay County facilities involves a gain that should be shared with FWSC's remaining customers. This is consistent with prior Commission decisions in the following Orders: Order No. PSC-98-0688-FOF-WS, issued May 19, 1998, in Docket No. 971667-WS, In Re: Application for approval of transfer of facilities of Florida Water Services Corporation to Orange County and cancellation of Certificate Nos. 84-W and 73-S in Orange County; Order No. PSC-99-2171-FOF-WU, issued November 8, 1999, in Docket No. 981589-WU, In re: Application for approval of transfer of a portion of the facilities operated under Certificate No. 40-W in Orange County from Utilities, Inc. of Florida to the City of Maitland; and Order No. PSC-99-2373-FOF-WS, issued December 6, 1999, in Docket No. 991288-WS, In re: Application for transfer of a portion of Certificates Nos. 278-W and 225-S in Seminole County from Utilities, Inc. of Florida to the City of Altamonte Springs. In each of the above-three Orders, the Commission acknowledged the transfer to the respective governmental authority and opened another docket to evaluate the gain on sale.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: This docket should remain open until the conclusion of any pending dockets concerning the Bradford and Clay County facilities, and until Certificate Nos. 554-W and 003-W are cancelled administratively. (JAEGER, HOLLEY)

STAFF ANALYSIS: This docket should remain open until the conclusion of any pending dockets concerning the Bradford and Clay County facilities, and until Certificate Nos. 554-W and 003-W are cancelled administratively.