



Public Service Commission

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COMMISSION CLERK

DATE: October 20, 2003
TO: Division of Commission Clerk and Administrative Service
FROM: Division of Economic Regulation (Clapp)
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.

Docket No. 030542-WS - Application for acknowledgment of transfer of Nassau County land and facilities to Nassau County and for cancellation of Certificate Nos. 171-W and 122-S by Florida Water Services Corporation.

Please add to the docket files the attached letter from Kenneth A. Hoffman, Esquire, on behalf of Florida Water Services Corporation, which addresses why the utility believes a gain on sale docket should not be opened in the above dockets..

Thank you.

Attachment

cc: Office of the General Counsel (Holley, Jaeger)

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August 29, 2003

Ms. Stephanie Clapp
Florida Public Service Commission
Division of Economic Regulation
2540 Shumard Oak Boulevard
Room 152B, Gunter Building
Tallahassee, Florida 32399-0850

Re: Docket Nos. 030541-WS and 030542-WS

Dear Ms. Clapp:

You have asked me to provide you with a discussion supporting the position of Florida Water Services Corporation ("Florida Water") that the Commission should not initiate a gain on sale issue in the above-referenced dockets. These dockets arise from applications filed by Florida Water requesting that the Commission acknowledge the condemnation of Florida Water's systems in Nassau County (Docket No. 030542-WS) and Clay and Bradford Counties (Docket No. 030541-WS) and cancel the applicable certificates of authorization.

The Commission has previously determined that it is inappropriate to allocate any portion of a gain arising from the involuntary condemnation of a regulated utility's water or wastewater systems. Such a forced partial liquidation, as in the case of a voluntary sale, results in the loss of both the facilities necessary to provide service as well as the loss of the customers and their associated revenue streams.

In Order No. PSC-93-0423-FOF-WS issued March 22, 1993, in Docket No. 920199-WS, the Commission concluded that there should be no sharing in the gain arising from the condemnation of water and wastewater systems previously owned and operated by Florida Water. That decision was appealed by the Office of Public Counsel and the Commission's gain on sale determination was affirmed by the First District Court of Appeal in Citrus County v. Southern States Utilities, 656 So.2d 1307 (Fla. 1st DCA 1995). The Citrus County precedent is binding on the Commission.

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ECONOMIC REGULATION
PUBLIC SERVICE

Page 2

August 29, 2003

The Citrus County appellate court decision is consistent with a 1993 decision of the Commission in Order No. PSC-93-1821-FOF-WS issued December 22, 1993, where the Commission confirmed that:

... customers 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.

The grounds supporting Florida Water's position that the gains on these condemnations remain with the shareholders are developed in detail by Mr. Hugh Gower, a recognized expert in utility ratemaking, who has filed testimony setting forth the legal, regulatory policy and accounting reasons supporting the continuation by the Commission of its policy of not sharing the gain on the sale of a system including the facilities and associated future customer revenue streams.¹ Florida Water adopts and incorporates by reference herein the direct and rebuttal testimony filed by Mr. Gower in those dockets in support of its position that it would be inappropriate and unlawful to confiscate any portion of the gains on the condemnations of the Nassau and Clay/Bradford systems.

A threshold question, of course, is whether the gain on sale issue should even be raised in the above-referenced two dockets. It should not. Because the current transfers arise from condemnation proceedings, there has necessarily been a court-approved determination of the compensation owed to the utility by the condemning authority. The Nassau and Clay/Bradford dockets come to this Commission after a final order from the Circuit Court confirming the amount the utility was entitled to receive for the assets it owed. The Commission should not attempt to interfere with the judicially sanctioned value of the utility's assets.²

The bottom line is that the money paid to Florida Water for the Nassau and Clay/Bradford systems was intended to compensate the company for the sale of its assets and the associated loss of the revenue stream arising from the transfer of the customers of the sold systems. There is simply no precedent or basis for the Commission to deprive the utility shareholders of the gains associated with their investment when a portion of that investment is liquidated. Whether the termination of a portion of the business arises from condemnation or voluntary agreement, it would be an

¹See Order No. PSC-93-0301-FOF-WS issued February 25, 1993 (Lehigh Utilities, Inc.) and Order No. PSC-02-0657-PAA-WU issued May 14, 2002 (Utilities, Inc.).

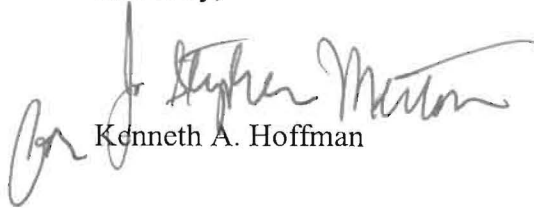
²At the time the court was presented with the issue of the value to be paid to the utility for the Nassau and Clay/Bradford County systems, there was no Commission precedent indicating that anyone other than the utility was entitled to the gain arising from the transaction.

Page 3
August 29, 2003

unconstitutional taking and deprivation of the shareholders' property rights for the Commission to order a sharing of the gain.

For the reasons expressed above, Florida Water respectfully submits that a gain on sale issue should not be added to the applications filed in the above-referenced dockets.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ken J. Hoffman", is written over the typed name "Kenneth A. Hoffman".

Kenneth A. Hoffman

KAH/rl

cc: Ralph Jaeger, Esq.
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