REVISED 11/20/03

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-

DATE: NOVEMBER 20, 2003

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

FROM: DIVISION OF ECONOMIC REGULATION (CLAPP, REDEMANN, KAPROTH, WILLIS)
OFFICE OF THE GENERAL COUNSEL (JAEGER, CHRISTENSEN, GERVASI)

RE: 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.

DOCKET NO. 990817-WS - APPLICATION BY FLORIDA WATER SERVICES CORPORATION FOR AMENDMENT OF CERTIFICATES NOS. 171-W AND 122-S TO ADD TERRITORY IN NASSAU COUNTY.
COUNTY: NASSAU

AGENDA: 12/02/03 - REGULAR AGENDA - ~~PARTICIPATION ON ISSUE 2 DEPENDENT ON COMMISSION VOTE ON ISSUE 1~~ - INTERESTED PERSONS MAY PARTICIPATE ON ALL OTHER ISSUES

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: THE ~~FIVE~~ TWO FLORIDA WATER SERVICES CORPORATION DOCKETS (~~030541-WU,~~ 030542-WS ~~030920-WS, 030971-WS, AND 030932-WS~~ AND 030976-WS) SHOULD BE PLACED IN ORDER.

FILE NAME AND LOCATION: S:\PSC\ECR\WP\030542WS.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 2,319 water and 2,142 wastewater customers in Nassau County. The Nassau County system is 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 Nassau County system had gross revenue of $875,802 and $1,542,449 and net operating income of $92,597 and $249,751 for water and wastewater, respectively.

The utility was issued Certificate Nos. 171-W and 122-S pursuant to Order No. 6127, issued May 1, 1974, in Docket Nos. 73684-W and 73685-S, In Re: Application of Amelia Island Utility Company for certificates to operate water and sewer systems in Nassau County, Florida, to provide water and wastewater service to a portion of Amelia Island.

On June 17, 2003, an application was filed for the transfer of the utility's water and wastewater facilities to Nassau County (the County or buyer) and for the cancellation of Certificate Nos. 171-W and 122-S. The application states that:

> On March 31, 2003, the Circuit Court of the Fourth Judicial Circuit, in and for Nassau County, Florida, entered a Stipulated Order of Taking and Stipulated Final Judgment in Nassau County v. Florida Water Services Corporation, Nassau County Circuit Court Case No. 03-113-CA, pursuant to the condemnation procedures set forth under Chapter 74, Florida Statutes. As a result of this condemnation proceeding, Nassau County acquired title to Florida Water's land and facilities in Nassau County and is scheduled to commence operations of such facilities on or about August 1, 2003.

On July 15, 2003, the American Beach Property Owners' Association, Inc. (ABPOA) filed a Petition for Leave to Intervene (Petition), which it amended on July 17, 2003. ABPOA is not a current customer of FWSC but is situated within its service territory. Most of the residents in ABPOA receive their water from wells on their lots and utilize septic tanks, which might be in close proximity to the water source.

On July 22, 2003, FWSC filed its Response in Opposition to American Beach Property Owners' Association, Inc.'s Amended Petition for Leave to Intervene (Response). By Order No. PSC-03-0948-PCO-WS, issued August 21, 2003, in this docket, ABPOA was denied intervention. On August 29, 2003, ABPOA filed a Request for Oral Argument and a Motion for Reconsideration for a portion of Order No. PSC-03-0948-PCO-WS denying leave to intervene for lack of standing. These filings are discussed in detail in Issues 1 and 2.

On June 24, 1999, in Docket No. 990817-WS, FWSC applied for an amendment to the territory in Nassau County. A timely objection to the application was filed on July 21, 1999. Filing dates were suspended to allow the parties time to reach a settlement. At this time, the docket is still open, but FWSC filed a notice of withdrawal of the application on July 3, 2003. Therefore, Issue 3 addresses the disposition of this docket.

This recommendation addresses (1) the ABPOA Request for Oral Argument and Motion for Reconsideration, (2) FWSC's withdrawal of its amendment application in Docket No. 990817-WS, (3) the transfer of FWSC's Nassau County system to Nassau County, and (4) whether to open a docket to examine whether FWSC's sale involves a gain that should be shared with FWSC's remaining customers. The Commission has jurisdiction pursuant to Sections 367.045, 367.071(4)(a), and 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Request for Oral Argument by the American Beach Property Owners' Association, Inc. (ABPOA), be granted?

RECOMMENDATION: Yes, the Request for Oral Argument should be granted if the Commission finds that oral argument will aid it in comprehending and evaluating the issues before it. If granted, oral argument should be limited to five minutes for each party to address reconsideration of the order denying ABPOA intervention. (JAEGER)

STAFF ANALYSIS: Pursuant to Rule 25-22.058, Florida Administrative Code, on August 29, 2003, ABPOA requested Oral Argument for its Motion for Reconsideration filed on the same date. ABPOA states that oral argument will assist the Commission in addressing the implications of the Commission's past practices concerning American Beach and the injuries suffered as a result of Florida Water Services Corporation's refusal to serve the residents of American Beach.

FWSC responded in opposition to both the Request for Oral Argument and the Motion for Reconsideration. With regards to the Request for Oral Argument, FWSC states that the "Commission has no past practices concerning American Beach." Therefore, FWSC argues that the Request for Oral Argument should be denied.

Rule 25-22.060, Florida Administrative Code, entitled Motion for Reconsideration, provides that "[o]ral argument on any pleading filed under this rule shall be granted solely at the discretion of the Commission." Staff believes that oral argument in this instance may aid the Commission in comprehending and evaluating the position of ABPOA. Staff recommends that if the Commission agrees, the Request for Oral Argument should be granted, but limited to five minutes for each party to address reconsideration of the order denying ABPOA intervention.

ISSUE 2: Should the American Beach Property Owners' Association, Inc.'s Motion for Reconsideration of the Prehearing Officer's Order No. PSC-03-0948-PCO-WS be granted?

RECOMMENDATION: No, the Motion for Reconsideration should be denied. (JAEGER)

STAFF ANALYSIS: In its Motion for Reconsideration filed on August 29, 2003, ABPOA requests that the Commission reconsider that portion of Order No. PSC-03-0948-PCO-WS denying ABPOA leave to intervene for lack of standing. That Order specifically found that the Amended Petition of "ABPOA did not 'demonstrate a possible injury that is real and immediate and not conjectural' and that the Amended Petition thus failed to satisfy the 'first prong' of the standing test in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). (Order at 3)."

Motion for Reconsideration

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958)). A motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

ABPOA's Motion for Reconsideration

ABPOA notes that the Prehearing Officer found in Order No. PSC-03-0948-PCO-WS "that ABPOA had failed to demonstrate a possible injury that is real and immediate and not conjectural." However, ABPOA argues that:

> language in the Order indicates that the Prehearing Officer either overlooked or failed to consider that the

> injuries ABPOA identifies in this proceeding are: (1) not conjectural or fabricated, but are injuries that ABPOA members are actually suffering today; and (2) precisely the same injuries alleged by residents of American Beach in an earlier complaint filed against Florida Water Services Corporation ("Florida Water" or "FWSC") in 2001.

ABPOA contends that the Prehearing Officer failed "to consider that ABPOA members are continuing to suffer real and immediate injuries today." (Emphasis supplied by ABPOA). ABPOA alleges that by "ignoring its commitment to serve and employing other delay tactics, Florida Water has forced ABPOA members to continue to receive water from questionable sources and to utilize substandard septic tanks, both of which pose significant public health and environmental risks." (Emphasis by ABPOA) As to the prior complaint in 2001, ABPOA alleges that the Commission did not dismiss those injuries as conjectural or speculative, but "acknowledged the immediacy and reality of the injuries, vigorously investigated the complaint, and assured the residents of American Beach that it would initiate further investigations if the utility failed to provide service within a reasonable time." ABPOA states that the "injuries suffered by residents by American Beach are just as real and just as serious today as they were in 2001." ABPOA concludes that for the Commission to now deny ABPOA standing on the basis that ABPOA's injuries are "conjectural" would deviate "from prior agency practice" and thus violate Section 120.68(7)(e), Florida Statutes,[1] and principles of fundamental fairness.

FWSC's Response

FWSC filed its timely Response on September 5, 2003, and in that Response alleges that ABPOA's Motion for Reconsideration fails to meet the standards for reconsideration and argues that ABPOA's dissatisfaction with this ruling, regurgitation of arguments not accepted by the Prehearing Officer, and last minute proffer of new legal theories provide no basis for reconsideration. FWSC argues

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[1] Section 120.68(7)(e), Florida Statutes, states in pertinent part that the court shall remand a case to the agency for further proceedings when it finds that the agency's exercise of discretion is "inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency."

that language in Order No. PSC-92-0132-FOF-TL), issued March 31, 1992, in Docket No. 900633-TL, Development of Local Exchange Company Cost Methodologies, the Commission determined that a motion for reconsideration is not an appropriate vehicle to raise new matters or arguments that were not raised by the party seeking reconsideration." In that Order, the Commission noted that the motion more fully developed some arguments and added entirely new arguments. The Commission specifically said on page 2: "Neither new arguments nor better explanations are appropriate matters for reconsideration."

In its Response, FWSC states:

> ABPOA simply sought to intervene and sought no specific relief, predicating its request for intervention on allegations that Florida Water had allegedly discussed the provision of water service to the American Beach residents in late 2000/early 2001, resulting in a letter complaint filed with the Commission on March 26, 2001. ABPOA went on to state in its Amended Petition that on April 18, 2001, the Commission responded to the complaint and that Florida Water stood prepared to investigate the possibility of expanding its service territory to determine the feasibility of providing water service to the American Beach residents. In its Response to ABPOA's Amended Petition, Florida Water noted that it had never provided any form of "service commitment" to the American Beach residents and that the purported "service commitment" claimed by ABPOA based on the correspondence two years ago fell far short of any actual, immediate damage or loss that could potentially be sustained by the ABPOA residents as a result of the application filed by Florida Water in this proceeding.

FWSC argues that ABPOA is now just expanding the same argument that it has already made, and such argument was rejected by the Prehearing Officer. FWSC also notes that ABPOA took "no action before the Commission concerning these so-called "service commitments" over the last two years."

With respect to ABPOA's argument that the Order at issue here violates Section 120.68(7)(e), Florida Statutes, FWSC states that this "argument should be rejected both because it is a new argument on reconsideration and because the Commission has no prior agency

practice on this issue - - i.e., the Commission has never rendered any determination concerning any so-called 'service commitments' on the part of Florida Water to the American Beach residents." Because it believes that the Prehearing Officer has made no mistake of fact or law in determining that ABPOA fails to satisfy the first prong of the Agrico test, FWSC states that the Commission should deny ABPOA's Motion for Reconsideration.

In addition, FWSC notes that this transfer proceeding is governed by Section 367.071(4)(a), Florida Statutes. Because a transfer under this type of proceeding must be approved as a matter of right and such approval is basically mandatory and administrative in nature, FWSC argues that "ABPOA's Amended Petition also fails to allege any injury of the type or nature sought to be protected by a proceeding governed by Section 367.071(4)(a), Florida Statutes." Therefore, FWSC argues that ABPOA's Petition fails the second prong of the Agrico test as well. Based on all the above, and noting that FWSC "no longer owns or operates the Nassau County facilities in question," FWSC concludes that "ABPOA's request for reconsideration of the Prehearing Officer's denial of its Amended Petition should be denied."

Analysis and Recommendation

As noted above, the purpose of a Motion for Reconsideration is not to reargue the whole case, but to bring to the attention of the decision maker some point of fact or law which was overlooked or failed to be considered in rendering the decision in the first instance. See Diamond Cab, at 891. In this case, staff believes that ABPOA merely cites passages in its Amended Petition and in its Memorandum in Opposition to Florida Water Services Corporation's Response which were already before the prehearing officer. ABPOA argues that those passages demonstrate the injury that is being incurred by the members of ABPOA. It then claims that there is an "indication" that the Prehearing Officer in his Order somehow overlooked or failed to consider those injuries so identified.

Staff believes that the Order denying intervention merely followed the holding in Village Park Mobile Home Assoc., Inc. v. Dept. of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987). In Village Park, at 433, the First District Court of Appeal states:

> The injury or threat of injury must be both real and immediate, not conjectural, hypothetical or abstract. .

> . . [A] petitioner can satisfy the injury-in-fact standard set forth in Agrico by demonstrating in his petition either: 1) that he had sustained actual injury in fact at the time of filing his petition; or 2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action.

In this case, the Prehearing Officer concluded that on the facts presented to him, ABPOA "failed to demonstrate a possible injury that is real and immediate and not conjectural." Order No. PSC-03-0948-PCO-WS, page 3, issued August 21, 2003.

ABPOA states in its Amended Petition, at Paragraph 14, page 5, that as a result of the transfer of FWSC's water facilities to Nassau County, it is "questionable" whether the commitments of FWSC will be honored. This statement itself is conjectural. Moreover, ABPOA has not received water service from FWSC, and it is unknown whether ABPOA will pursue connecting to the system and pay the costs necessary for obtaining such service. The Prehearing Officer properly considered all the facts presented and properly concluded that any injury based on this proceeding was conjectural.

In conclusion, staff believes that the injury complained of by ABPOA is conjectural and not real or immediate. Therefore, staff believes that ABPOA has failed to demonstrate a mistake of fact or law as to the Prehearing Officer's determination that ABPOA has failed the first prong of the Agrico test for standing. Staff therefore recommends that ABPOA's Motion for Reconsideration be denied.

Although staff believes there is no need to consider the second prong of the Agrico test, staff notes that the second prong requires that the substantial injury be of a type or nature which the proceeding is designed to protect. Because the transfer must be approved as a matter of right, FWSC argues that "ABPOA's Amended Petition fails to set forth any injury that is designed to be protected in a proceeding such as this." When there is no question that the transfer is to a governmental authority, then staff agrees with FWSC. Therefore, if the Commission finds it necessary to consider the second prong of the Agrico test, staff believes that ABPOA also fails this prong of the test for standing.

ISSUE 3: Should the Commission acknowledge Florida Water Services Corporation's withdrawal of its amendment application?

RECOMMENDATION: Yes, the Commission should acknowledge Florida Water Services Corporation's withdrawal of its amendment application in Docket No. 990817-WS. (JAEGER, CHRISTENSEN, GERVASI)

STAFF ANALYSIS: As stated in the Case Background, on June 24, 1999, in Docket No. 990817-WS, FWSC applied for an amendment to Water Certificate No. 171-W and Wastewater Certificate No. 122-S in Nassau County, Florida, pursuant to Rule 25-30.036(3), Florida Administrative Code. The purpose of the amendment was to provide water and wastewater service to a proposed development on Crane Island.

On July 21, 1999, Florida Public Utility Corporation (FPUC) timely filed an objection to the application, and the matter was scheduled for an administrative hearing to be held on May 23 and May 24, 2000. By Order No. PSC-99-2235-PCO-WS, issued November 12, 1999, certain filing dates were suspended to allow the parties time to reach a settlement which would resolve the protest. On January 6, 2002, the parties filed a written Settlement Agreement which they amended on April 6, 2002. By Order No. PSC-02-1025-AS-WS, issued July 29, 2002, the settlement agreement was approved and FPUC's withdrawal of its protest was acknowledged. The Prehearing and Hearing dates scheduled in this matter were canceled.

Despite this Settlement Agreement, pursuant to a Memorandum of Understanding, the Department of Community Affairs (DCA) filed their comments stating that there was no need for service in the proposed area and that development as proposed in the certificate application appeared to be inconsistent with the Nassau County Comprehensive Plan. FWSC responded to the DCA's comments, and the DCA provided a follow-up response.

Subsequent to all the above actions, on June 17, 2003, FWSC filed an Application for Acknowledgment of Transfer of its Nassau County land and facilities to Nassau County and cancellation of Certificates Nos. 171-W and 122-S, which application was assigned Docket No. 030542-WS. In that application, FWSC noted that Nassau County had assumed ownership of FWSC's utility assets in Nassau County pursuant to the Stipulated Final Judgment and Stipulated Order of Taking entered in the Circuit Court, Fourth Judicial

Circuit, in and for Nassau County, Circuit Court Case No. 03-113-CA.

Based on this taking, FWSC states that the amendment application is now moot. Therefore, on July 3, 2003, the utility filed its Notice of Withdrawal of Application. Staff agrees that the withdrawal of the application does make any further action on the application moot. Therefore, staff recommends the Commission acknowledge FWSC's withdrawal of its application for amendment of Certificates Nos. 171-W and 122-S.

ISSUE 4: Should the transfer of Florida Water Services Corporation's Nassau County water and wastewater facilities to the County of Nassau be approved?

RECOMMENDATION: Yes. The transfer to Nassau County should be approved, as a matter of right, pursuant to Section 367.071(4)(a), Florida Statues, effective March 31, 2003. Regulatory Assessment Fees (RAFs) for January 1 through March 31, 2003, should be submitted within 20 days after the issuance of the order approving the transfer. Certificate Nos. 171-W and 122-S should be cancelled administratively at the conclusion of all pending cases for the Nassau County facilities. (CLAPP, KAPROTH, JAEGER)

STAFF ANALYSIS: On June 17, 2003, FWSC filed an application to transfer its Nassau County facilities to the County pursuant to Section 367.071, 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 Nassau County v. Florida Water Services Corporation pursuant to the condemnation procedures set forth under Chapter 74, Florida Statutes. As a result of the condemnation proceeding, Nassau County acquired title to FWSC's land and facilities as of March 31, 2003, the date the documents were issued by the Circuit Court of the Fourth Judicial Circuit. Therefore, March 31, 2003, is the effective date of the acquisition.

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. The application 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. Additionally, pursuant to the requirements of Rule 25-30.037(4)(h), Florida Administrative Code, a statement was included that FWSC has no outstanding RAFs and no

fines or refunds are owed. The utility has filed its 2002 annual report and paid its 2002 RAFs and there are no outstanding penalties and interest. For the period of January 1, 2003 through March 31, 2003, FWSC has agreed to file its RAF returns and RAF payments for the Nassau County facilities within 20 days after the date the Order is issued approving the transfer.

Staff recommends 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. Therefore, staff recommends that the transfer to Nassau County should be approved, as a matter of right, effective March 31, 2003. RAFs for January 1 through March 31, 2003, should be submitted within 20 days after the issuance of the order approving the transfer. Certificate Nos. 171-W and 122-S should be cancelled administratively at the conclusion of all pending cases for the Nassau County facilities.

ISSUE 5: Should the Commission open a docket to examine whether FWSC's sale of its Nassau 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 Nassau County facilities involves a gain that should be shared with FWSC's remaining customers. (WILLIS, CLAPP, JAEGER)

STAFF ANALYSIS: Per the stipulated final judgment issued by the Fourth Judicial Circuit Court on March 31, 2003, FWSC shall have and recover the total sum of $17,200,000 from Nassau County as full compensation for the taking of the water and wastewater property. 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 and wastewater facilities in Nassau County was $2,997,154 for the projected test year ending December 31, 1996. Restoring used and useful adjustments, the aggregate rate base balance was $4,316,469. In its 2002 Annual Report, FWSC reported a combined rate base of $1,759,627 for its Nassau County systems. As the taking occurred in 2003, an updated rate base calculation will be needed to determine the gain, if any, due to 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 No. 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 Docket No. 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 as follows:

> [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 Nassau County facilities were taken by Nassau County, 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. According to FWSC's 2002 annual report the Nassau County systems had net operating income of $92,597 and $249,751 for water and wastewater, respectively. Whether the Nassau County systems were subsidized by other systems outside Nassau County needs to be determined.

Further study to examine sharing considerations for the Nassau 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 Nassau 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.

ISSUE 6: Should ~~these~~ ~~this~~ dockets be closed?

RECOMMENDATION: If the Commission approves Issue 3 of this recommendation, then Docket No. 990817-WS should be closed. Docket No. 030542-WS ~~This docket~~ should remain open until the conclusion of any pending dockets concerning the Nassau County facilities, and until Certificate Nos. 171-W and 122-S are cancelled administratively. (JAEGER)

STAFF ANALYSIS: If the Commission approves Issue 3 of this recommendation, then Docket No. 990817-WS should be closed. Docket No. 030542-WS ~~This docket~~ should remain open until the conclusion of any pending dockets concerning the Nassau County facilities, and until Certificate Nos. 171-W and 122-S are cancelled administratively.