

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: DECEMBER 23, 2003

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

FROM: DIVISION OF ECONOMIC REGULATION (CLAPP, KAPROTH, WILLIS) OFFICE OF THE GENERAL COUNSEL (HOLLEY) *@ KK JS PR JAM [signature] JDT Tgs*

RE: DOCKET NO. 030931-WS - JOINT APPLICATION FOR ACKNOWLEDGMENT OF SALE OF LAND AND FACILITIES OF FLORIDA WATER SERVICES CORPORATION TO CHARLOTTE COUNTY; AND FOR CANCELLATION OF CERTIFICATE NOS. 570-W AND 496-S IN CHARLOTTE COUNTY, AND CERTIFICATE NOS. 306-W AND 255-S IN CHARLOTTE AND LEE COUNTIES.
COUNTY: CHARLOTTE AND LEE

AGENDA: 01/06/04 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\030931WS.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's Burnt Store and Deep Creek systems serve approximately 5,254 water and 5,006 wastewater customers in Charlotte and Lee County. The systems are in a priority water resource caution area of the Southwest Florida Water Management District. The utility's 2002 annual report indicates that the two systems had gross revenue of \$2,563,056 and \$2,452,903 and net operating income of (\$136,335) and \$99,750 for water and wastewater, respectively.

DOCUMENT NUMBER

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FPSC-COMMISSION CLERK

The water and wastewater systems of Deep Creek were originally issued Certificate Nos. 90-W and 78-S pursuant to Order No. 5430, issued May 24, 1972, in Docket Nos. 71591-W and 71592-S, In Re: Application of Ecological Science Corporation for certificates to operate its existing Harbor Heights Water and Sewer Systems in Charlotte County, Florida. Pursuant to Order No. 5649, issued February 7, 1973, in Docket No. C-72699-WS, In Re: Joint Application of Ecological Utilities, Inc. for transfer of Certificates Nos. 78-S and 90-W from Harbor Heights Water System and Harbor Heights Sewer System in Charlotte County to Deep Creek Utilities, Inc., the systems received their current name of Deep Creek.

The Burnt Store water and wastewater systems were originally issued Certificate Nos. 306-W and 255-S pursuant to Order No. 8334, issued June 5, 1978, in Docket Nos. 770391-W and 770392-S, In Re: Application of Burnt Store Utilities, Inc., for certificates to operate a water and sewer utility in Charlotte County, Florida. Section 367.041, Florida Statutes. Burnt Store is located in both Lee and Charlotte County. Certificate Nos. 306-W and 255-S were amended to include the Lehigh systems in Lee County pursuant to Order No. PSC-93-0500-FOF-WS, issued April 5, 1993, in Docket No. 930086-WS, In Re: Petition for acknowledgment of corporate reorganization by merger, cancellation of Certificates Nos. 9-W and 7-S in Lee County issued to Lehigh Utilities, Inc. and amendment of Certificates Nos. 306-W and 255-S in Lee/Charlotte Counties by Southern States Utilities, Inc. The transfer of FWSC's Lehigh system was approved by the Commission by Order No. PSC-03-1284-FOF-WS, issued November 10, 2003, in Docket No. 030932-WS, In re: Joint application for acknowledgment of sale and land and facilities of Florida Water Services Corporation in Lee County to Florida Governmental Utility Authority and for amendment of Certificate Nos. 306-W and 255-S.

On or about August 25, 2003, FWSC entered into a First Amended and Restated Utility System Asset Acquisition Agreement (Agreement) with Hernando County, The City of Marco Island, The City of Palm Coast, Osceola County, Florida Governmental Utility Authority, and The City of Deltona. FWSC filed four separate applications seeking acknowledgment for the transfers contemplated by this Agreement.¹

¹ Docket No. 030920-WS - Joint application for acknowledgment of sale of portion of land and facilities of Florida Water Services

On September 24, 2003, the Commission received a joint application for acknowledgment of the sale of FWSC land and facilities located in Charlotte County to the Florida Governmental Utility Authority (FGUA) and cancellation of certificates. On October 22, 2003, Staff filed a recommendation addressing the proposed sale of FWSC's Charlotte County land and facilities to the FGUA for the Commission's November 3, 2003, Agenda Conference. On October 29, 2003, FWSC requested that this matter be deferred pending the finalization of an agreement between Charlotte County and the FGUA, wherein the transfer of FWSC's Charlotte County facilities would be made directly to the County, rather than the FGUA.

On December 2, 2003, the FGUA approved the Assignment, Assumption and Amendment to its Agreement with FWSC under which the FGUA would assign, and Charlotte County would assume the right to acquire the Burnt Store and Deep Creek Systems. On December 11, 2003, FWSC and Charlotte County filed a joint amended application for acknowledgment of the sale and transfer of the land and facilities of FWSC in Charlotte County to Charlotte County.

Because the transfer of FWSC's Deep Creek water and wastewater land and facilities located in Charlotte County, and its Burnt Store water and wastewater land and facilities located in Charlotte and Lee County (hereinafter referred to collectively as the Charlotte System), are now being transferred to Charlotte County (the County), rather than the FGUA, staff is filing this substantially revised recommendation.

Corporation in Volusia County to City of Deltona and for amendment of Certificate Nos. 238-W and 182-S; Docket No. 030921-WS - Joint application for acknowledgment of sale of land and facilities in Osceola County to Osceola County by Florida Water Services Corporation and for cancellation of Certificate Nos. 66-W and 289-S; Docket No. 030932-WS - Joint application for acknowledgment of sale and land and facilities of Florida Water Services Corporation in Lee County to Florida Governmental Utility Authority and for amendment of Certificate Nos. 306-W and 255-S.

This revised recommendation addresses FWSC's amended application for acknowledgment of the proposed sale of its Deep Creek water and wastewater land and facilities located in Charlotte County, and its Burnt Store water and wastewater land and facilities located in Charlotte and Lee County to Charlotte County, and for the cancellation of Certificate Nos. 306-W, 570-W, 255-S, and 496-S. This recommendation also addresses whether the Commission should 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, and 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the transfer of Florida Water Services Corporation's Deep Creek water and wastewater land and facilities located in Charlotte County, and the Burnt Store water and wastewater land and facilities located in Charlotte and Lee County to Charlotte County be approved?

RECOMMENDATION: Yes. The transfer of Florida Water Service Corporation's Deep Creek water and wastewater land and facilities located in Charlotte County, and the Burnt Store water and wastewater land and facilities located in Charlotte and Lee County to Charlotte County should be approved, as a matter of right as of December 12, 2003, pursuant to Section 367.071(4)(a), Florida Statutes. The utility should submit an actual Regulatory Assessment Fee (RAF) return with a final RAF payment, if needed, by March 31, 2004. Certificate Nos. 306-W, 570-W, 255-S, and 496-S should be cancelled administratively at the conclusion of any pending dockets concerning the Charlotte and Lee County facilities. (CLAPP, KAPROTH, HOLLEY)

STAFF ANALYSIS: On December 11, 2003, FWSC and Charlotte County filed a joint amended application for acknowledgment of the sale and transfer of FWSC's Deep Creek water and wastewater land and facilities located in Charlotte County, and the Burnt Store water and wastewater land and facilities located in Charlotte and Lee County to Charlotte County (the Charlotte System), pursuant to Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. The amended application received on

December 11, 2003, stated that the closing date on the sale is on or before December 12, 2003. Staff confirmed that the closing took place on December 12, 2003, which is the effective date of the transfer.

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 and interest earned, less any unpaid balances, 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. 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 December 12, 2003, FWSC paid an estimated amount of RAF on December 12, 2003. When the final revenue number is available, the utility will submit an actual RAF return with a true-up check, if needed, by March 31, 2004.

Staff recommends that the Commission find that the application is in compliance with the 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 of the Charlotte Systems to the County should be approved, as a matter of right as of December 12, 2003, pursuant to Section 367.071(4)(a), Florida Statutes. The utility should submit an actual RAF return with a final RAF payment, if needed by March 31, 2004. Certificate Nos. 306-W, 570-W, 255-S,

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and 496-S should be cancelled administratively at the conclusion of any pending dockets concerning the Charlotte and Lee County facilities.

ISSUE 2: Should the Commission open a docket to examine whether FWSC's sale of the Charlotte Systems to the County 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 the Charlotte Systems involves a gain that should be shared with FWSC's remaining customers. (WILLIS, CLAPP, HOLLEY)

STAFF ANALYSIS: The acquisition agreement entered into on August 25, 2003, and assigned on December 2, 2003, indicates a cash purchase price of \$3,753,122, for sale of the Charlotte Systems systems to the County. Section 4.04(A) of the agreement states:

Within 3 days after Closing, each Buyer participating in such Closing shall: (i) dismiss with prejudice any and all complaints, claims, lawsuits and/or regulatory proceedings pending against Florida Water . . ., This includes, without limitation, dismissal by Charlotte County of its litigation against Florida Water.

Counsel for FWSC indicated that the referenced litigation involved a suit by Charlotte County against FWSC in excess of \$6,000,000. If Charlotte County had prevailed, and if the purchase price is based on the estimated value of the terminated lawsuit plus the cash purchase price, the estimated value of the transaction is approximately \$10,000,000. 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 Charlotte Systems systems was \$4,139,404 for the projected test year ending December 31, 1996. Restoring used and useful adjustments, the aggregate rate base balance was \$8,478,934. In its 2002 Annual Report, FWSC reported a rate base of \$9,390,758 for the Charlotte Systems systems. As the sale 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 provided the utility's position with respect to whether the Commission should initiate a gain on sale issue in this docket. 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 Nos. 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 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.

Staff's Position

Staff notes that the sale to the County does not involve a condemnation proceeding. Moreover, 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. Staff believes that a review of the appropriate disposition of any gain on sale is appropriate, and to do so, 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 the Charlotte Systems were purchased by the County, the 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 Charlotte Systems had net operating income of (\$136,335) and \$99,750 for water and wastewater, respectively. Whether the Charlotte Systems were subsidized by other systems has yet to be determined.

Further study to examine sharing considerations for the Charlotte Systems 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 Charlotte Systems 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 3: Should this docket be closed?

RECOMMENDATION: This docket should remain open until the conclusion of any pending dockets concerning the Charlotte and Lee County facilities, and until Certificate Nos. 306-W, 570-W, 255-S, and 496-S are cancelled administratively. (HOLLEY)

STAFF ANALYSIS: This docket should remain open until the conclusion of any pending dockets concerning the Charlotte and Lee County facilities, and until Certificate Nos. 306-W, 570-W, 255-S, and 496-S are cancelled administratively.