

State of Florida



Public Service Commission

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COMMISSION CLERK

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DATE: March 4, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Helton) *Walt*
Division of Economic Regulation (Daniel, Kummer, Willis) *P i D SW TGD*

RE: Docket No. 021066-WS – Investigation into proposed sale of Florida Water Services Corporation.

AGENDA: 03/16/04 – Regular Agenda – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\021066.RCM.DOC

Case Background

This docket was opened by Commission staff (staff) in October of 2002, for the purpose of investigating the proposed sale of Florida Water Services Corporation (FWSC) to a newly created entity named Florida Water Services Authority (FWSA). The Office of Public Counsel (OPC), Charlotte County, Nassau County, the City of Palm Coast, the City of Marco Island, and the Flagler County Utility Regulatory Authority intervened.

By Order No. PSC-03-0193-FOF-WS, issued February 7, 2003, the Commission ordered FWSC to file an application for approval of the proposed transfer of its assets as mandated by Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code, by no later than February 7, 2003. In addition, the Commission, on its own motion, set the matter for hearing, and prohibited FWSC from selling its assets prior to obtaining Commission approval of its application, or Commission approval of satisfactory contingency language in its contract for sale. FWSC filed its Application for Acknowledgment of Sale of Facilities to FWSA on February 7, 2003. In addition, FWSC filed an appeal of the Commission's Order with the First District Court of Appeal.

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FWSC complied with the Commission's Order inasmuch as it filed its application seeking approval of the sale; however, it quickly became evident that FWSC intended to go forward with the sale, with or without the Commission's approval of its application, thereby potentially violating the specific mandate of the Commission's Order requiring the company to obtain prior approval of the sale. Accordingly, pursuant to Section 367.121(1)(j), Florida Statutes, on February 12, 2003, staff filed its Verified Complaint in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, seeking an injunction prohibiting FWSC from proceeding with its proposed sale to FWSA prior to obtaining approval from the Commission. On February 17, 2003, the Circuit Court issued its Order Granting Motion for Temporary Injunction. Through its Order, the court set a hearing for February 28, 2003, to consider permanent injunctive relief, and ordered the Commission to post a nominal bond in the amount of \$5,000.¹

A hearing was held before the Circuit Court, and on March 7, 2003, the Court issued its Final Order Granting Plaintiff's Request for Continuation of Injunction and Granting Plaintiff's Motion to Dismiss Counterclaim for Writ of Mandamus. The Circuit Court's Final Order enjoined FWSC from failing to comply with the Commission's Order, selling its assets to FWSA without approval of the Commission, and from selling its assets to the FWSA without prior Commission approval of the contingency language pursuant to the Commission's Order. The Circuit Court's Order also stated that the injunction was to remain in full force and effect until further order of the Court. FWSC subsequently filed an appeal of the Circuit Court's Order with the First District Court of Appeal.

On May 15, 2003, FWSC filed its Notice of Cancellation of Contract and Suggestion of Mootness. This recommendation addresses FWSC's Notice of Cancellation of Contract and Suggestion of Mootness and whether the Commission should close this docket.

The Commission has jurisdiction to consider these matters pursuant to Section 367.121, Florida Statutes.

¹ The bond was released on January 28, 2004.

Discussion of Issues

Issue 1: Should FWSC's Application for Acknowledgment of Sale of Facilities to FWSA submitted February 7, 2003, be considered moot?

Recommendation: Yes. In light of the termination of the purchase agreement between FWSC and FWSA, the Commission should find that FWSC's Application for Acknowledgment of Sale of Facilities to FWSA is moot. (HELTON)

Staff Analysis: On May 15, 2003, FWSC filed its Notice of Cancellation of Contract and Suggestion of Mootness (Notice of Cancellation). In its Notice of Cancellation, FWSC states that on March 10, 2003, FWSC advised FWSA that it was terminating its purchase agreement in accordance with terms of that agreement. Attached to its Notice of Cancellation is a copy of FWSC's termination letter. In addition, FWSC states that on April 3, 2003, FWSC filed a Notice of Voluntary Dismissal with respect to its appeal of the Commission's Order, and on April 10, 2003, FWSC filed a Notice of Voluntary Dismissal of the appeal of the Circuit Court Order granting the Commission's request for injunction. FWSC states that in view of the termination of the purchase agreement and the dismissal of appeal related to the Commission's Order, FWSC believes that the application submitted pursuant to the Commission's Order is moot and this docket should be closed.

Subsequent to FWSC's filing of its Notice of Cancellation, the City of Palm Coast filed its Response and Objection to FWSC's Notice of Cancellation of Contract and Suggestion of Mootness. However, on January 9, 2004, the City of Palm Coast filed its Withdrawal of its Response and Objection, respectfully requesting that the Commission issue an order concluding that the application submitted in this matter is moot, and that this docket be closed.

As stated previously, this docket was opened for the purpose of investigating the proposed sale of FWSC to the newly created entity, FWSA. Further, staff recognizes that the application FWSC filed seeking approval of the proposed sale was required by Order of the Commission. For that reason, it would not be appropriate for FWSC to withdraw its application; however, staff believes that it is appropriate for the Commission to find that the application is now moot. The sale agreement between FWSC and FWSA was terminated as of March 10, 2003. Furthermore, since the termination of the contract, FWSC has begun selling its land and facilities to the local governments where those facilities are located. To date, the Commission has approved or acknowledged the sale of 32 of FWSC's 81 systems that are under Commission regulation to various governmental authorities.

Accordingly, staff recommends that in light of the termination of the purchase agreement between FWSC and FWSA, the Commission should find that FWSC's Application for Acknowledgment of Sale of Facilities to FWSA is moot.

Docket No. 021066-WS
Date: March 4, 2004

Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, this docket should be closed. (HELTON)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, this docket should be closed.