

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of rates of O&S Water Company, Inc. in Osceola County for possible overearnings.

DOCKET NO. 100400-WU

In re: Application for transfer of water facilities in Osceola County from O&S Water Company, Inc., to Tohopekaliga Water Authority and cancellation of Certificate No. 510-W.

DOCKET NO. 100440-WU
ORDER NO. PSC-11-0223-FOF-WU
ISSUED: May 16, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER ACKNOWLEDGING TRANSFER OF O&S WATER COMPANY, INC.
TO THE TOHOPEKALIGA WATER AUTHORITY AND CLOSING OVEREARNINGS
INVESTIGATION

BY THE COMMISSION:

Background

O&S Water Company, Inc. (O&S or Utility) is a Class A water utility located in western Osceola County in the South Florida Water Management District. The Utility serves approximately 3,073 customers, including 2,186 residential, 29 commercial, and 858 irrigation customers. Wastewater service is provided by the Tohopekaliga Water Authority (TWA). O&S' 2009 annual report indicates that the Utility had gross operating revenues of \$1,205,487 and net operating income of \$56,008.

O&S has been in operation since 1984 and was granted original Certificate No. 510-W in the name of C&S Water Company, Inc. in 1989.¹ Subsequently, in 1992, the Utility changed its name to O&S Water Company, Inc.² The Utility has had two territory amendments and one

¹ See Order No. 20583, issued January 10, 1989, in Docket No. 870392-WU, In re: Application of C&S Water Company for an original water certificate in Osceola County, Florida.

² See Order No. PSC-92-1339-FOF-WU, issued November 18, 1992, in Docket No. 920941-WU, In re: Request for name change on Certificate No. 510-W in Osceola County from C&S Water Company to O&S Water Company, Inc.

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transfer of majority organizational control since it was certificated.³ On November 15, 2010, the Utility filed an application for transfer of its facilities and territory to TWA and cancellation of its Certificate No. 510-W.

By Order No. PSC-10-0656-FOF-WU, issued on November 1, 2010, in Docket No. 100400-WU, we approved the initiation of a formal overearnings investigation of the Utility. Our preliminary analysis of the Utility's 2009 annual report indicated that O&S' achieved return on equity was 19.33 percent, which was in excess of the top of its authorized range of return on equity. We authorized the Utility to continue collecting its previously authorized rates, provided that \$50,961 was held subject to refund. We also required O&S to open an escrow account or file a surety bond or letter of credit to guarantee any potential refund of revenues collected under interim conditions.⁴

In addition, in Docket No. 090322-WU, we denied the Utility's request for a payment plan for the outstanding balance of its 2008 regulatory assessment fees (RAFs), based on its potential overearnings, failure to pay its RAFs for January through June 2010, and failure to make any monthly payments toward its past due RAFs after November 24, 2009.⁵ On December 14, 2010, O&S submitted payment of its total outstanding RAFs and penalties and interest (P&I). As a result, Docket No. 090322-WU was closed by issuance of a Consummating Order on January 14, 2011.⁶

The purpose of this order is to acknowledge the transfer of O&S' water facilities and territory to TWA as a matter of right and cancel the Utility's Certificate No. 510-W, and to close O&S' pending overearnings investigation. We have jurisdiction pursuant to Sections 367.071, 367.081, and 367.022(2), Florida Statutes (F.S.).

Transfer of O&S to TWA

O&S filed an application for transfer of its water system to TWA and cancellation of Certificate No. 510-W on November 15, 2010. TWA is exempt from our regulation as a governmental authority, in accordance with Section 367.022(2), F.S.⁷ Pursuant to Section

³ See Order No. PSC-92-0195-FOF-WU, issued April 13, 1992, in Docket No. 910894-WU, In re: Application for amendment of Certificate No. 510-W in Osceola County by C&S Water Company; Order No. PSC-92-0204-FOF-WU, issued April 14, 1992, in Docket No. 910895-WU, In re: Application for transfer of majority organizational control of C&S Water Company's Certificate No. 510-W in Osceola County from Doug Stewart and the Estate of Jack Chernau to Douglas B. Stewart; Order No. PSC-03-0873-PAA-WU, issued July 29, 2003, in Docket No. 030160-WU, In re: Application for amendment of Certificate No. 510-W to extend water service area in Osceola County by O&S Water Company, Inc.

⁴ See Order No. PSC-10-0656-FOF-WU, issued November 1, 2010, in Docket No. 100400-WU, In re: Investigation of rates of O&S Water Company, Inc. in Osceola County for possible overearnings.

⁵ See Order No. PSC-10-0655-PAA-WU, issued November 1, 2010, in Docket No. 090322-WU, In re: Request to establish payment plan for 2008 regulatory assessment fees by O&S Water Company, Inc. in Osceola County.

⁶ See Order No. PSC-11-0032-CO-WU, issued January 14, 2011, in Docket No. 090322-WU, In re: Request to establish payment plan for 2008 regulatory assessment fees by O&S Water Company, Inc. in Osceola County.

⁷ See Order No. PSC-03-1275-FOF-WS, issued November 10, 2003, in Docket No. 030921-WS, In re: 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 Certificates Nos. 66-W and 289-S.

367.071(4)(a), F.S., the sale 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 Utility's application is in compliance with Section 367.071(4)(a), F.S., and Rule 25-30.037(4), Florida Administrative Code (F.A.C.).

On November 1, 2010, the Utility and TWA executed an Asset Purchase Agreement (Agreement). A copy of this contract was included in the application. The closing on the sale of the Utility's water system took place on December 8, 2010, the effective date of the transfer.

The application contained a statement that prior to purchase, TWA obtained copies of the Utility's most recent available 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), F.A.C. The Agreement also indicated that all customer deposits and interest accrued through the closing date would be transferred to TWA. We have confirmed with a Utility representative that TWA received credit for current customers' deposits at closing, and former customers' deposits have been refunded by O&S.

As noted above, O&S had outstanding RAFs owed for 2004, 2008, 2009, and 2010. As a result of the Utility's failure to make timely payments, the total amount owed included charges for P&I, as authorized by Rules 25-30.120(7) and 25-30.120(9), F.A.C. The Utility's application included a statement acknowledging that it owed delinquent RAFs and P&I and a commitment to pay all such fees owed through June 2010 at closing. Additionally, the Utility stated that it would file a final Regulatory Assessment Fee Return for the period July 2010 through closing prior to our approval of the application. On November 30, 2010, Commission staff sent the Utility a reminder of outstanding RAFs and P&I due by December 8, 2010, for 2004, 2008, 2009, and January through June 2010, totaling \$165,036.33. The Utility submitted payment in this amount on December 14, 2010. Subsequently, on December 22, 2010, O&S paid \$29,003.84 for RAFs owed for July 1, 2010, through the closing date of December 8, 2010. Accordingly, the Utility has no outstanding RAFs or P&I.

In accordance with Rule 25-30.110, F.A.C., O&S has filed annual reports for 2009 and all prior years. If we acknowledge the transfer to TWA, the Utility will be exempt from our regulation and, therefore, will not be required to file a 2010 annual report pursuant to Rule 25-30.110(3), F.A.C.

We hereby acknowledge the transfer of O&S' water facilities and territory to TWA as a matter of right pursuant to Section 367.071(4)(a), F.S., and cancel Certificate No. 510-W, effective December 8, 2010.

Overearnings Investigation

We voted to open a formal overearnings investigation of O&S on October 12, 2010.⁸ Although we authorized the Utility to continue collecting its previously authorized rates, we

⁸ See Order No. PSC-10-0656-FOF-WU, issued November 1, 2010, in Docket No. 100400-WU, In re: Investigation of rates of O&S Water Company, Inc. in Osceola County for possible overearnings.

ordered that \$50,961 be held subject to refund under an appropriate security pending resolution of the overearnings investigation. Before we could conduct an overearnings investigation, the sale of O&S' water system to TWA, a governmental authority, closed on December 8, 2010, the effective date of the transfer.

The sale of a utility to a governmental authority shall be approved by us as a matter of right pursuant to Section 367.071(4)(a), F.S. In addition, once we approve the transfer, the Utility will be exempt from our regulation as a system owned, operated, managed, or controlled by a governmental authority under Section 367.022(2), F.S. However, this does not mean that we lose jurisdiction over the secured funds held subject to refund as required by Order No. PSC-10-0656-FOF-WU. Section 367.071(2), F.S., which governs sales or transfers of regulated utilities, states that the "transferor remains liable for any outstanding regulatory assessment fees, fines, or refunds of the utility."⁹ We also retain jurisdiction over other matters arising prior to approval of a transfer to an exempt or non-regulated entity.¹⁰ Accordingly, we have jurisdiction to proceed with the overearnings investigation of O&S and to require refunds to the Utility's customers, in the event we determine that refunds are warranted.

However, we do not believe that it would be in the public interest to proceed with an overearnings investigation of O&S. From October 12 through December 8, 2010, which is the period from our decision to initiate a formal overearnings investigation of O&S to the closing date of the sale of O&S to TWA, we have calculated that the total approximate amount of

⁹ See Order No. 18714, issued January 21, 1988, in Docket No. 861627-WS, In re: Application for approval of the purchase of Du-Lay Company Inc. by the City of Jacksonville in Duval County, Florida (approving transfer as a matter of right, but noting that our acknowledgement of the sale in no way relieved the utility of its responsibility to perform whatever refund we determined was appropriate for the period of service rendered while the utility was under our regulatory authority); Order No. PSC-01-0945-FOF-SU, issued April 16, 2001, in Docket No. 950387-SU, In re: Application for a rate increase for North Ft. Myers Division in Lee County by Florida Cities Water Company – Lee County Division (approving transfer as a matter of right, but noting that we had continuing jurisdiction to enforce our earlier rate case order requiring the utility to refund the difference between interim and final rates); Order No. PSC-03-0017-FOF-WS, issued January 3, 2003, in Docket No. 021058-WS, In re: Disposition of delinquent regulatory assessment fees and penalties for DeBary Associates, Inc., Econ Utilities Corporation, and Sandalhaven Utility, Inc. (finding that we maintain jurisdiction to pursue collection efforts of delinquent regulatory assessment fees, although utilities were no longer subject to our regulatory jurisdiction).

¹⁰ Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995) (holding that we had jurisdiction to resolve a question of alleged overcharges occurring before the transfer of the utility to a governmental authority); Order No. PSC-01-0759-FOF-SU, issued March 26, 2001, in Docket No. 970991-SU, In re: Investigation into rates and charges of Florida Cities Water Company - Lee County Division (South Ft. Myers Wastewater System) for potential overearnings (holding that we had jurisdiction to conclude an overearnings investigation, although we lost regulatory authority over the utility as of the date the utility was transferred to a governmental authority); Order No. PSC-05-0953-FOF-WU, issued October 6, 2005, in Docket No. 050314-WU, In re: Application for transfer of facilities operated under Certificate 434-W in Highlands County from Sebring Ridge Utilities, Inc. to City of Avon Park Utilities (approving transfer as a matter of right, but noting that we had continuing jurisdiction over an unresolved billing dispute which arose before the transfer); Order No. PSC-09-0334-PAA-WS, issued May 14, 2009, in Docket No. 090120-WS, In re: Joint notice by Aloha Utilities, Inc. and the Florida Governmental Utility Authority of transfer of water and wastewater assets to the Florida Governmental Utility Authority, in Pasco County, and cancellation of Certificate Nos. 136-W and 97-S (finding that we had authority to determine the proper disposition of the escrow funds at issue because the funds were collected from the utility's customers prior to the sale of the utility to the governmental authority, and thus remained under our jurisdiction).

possible overearnings over which we have jurisdiction is \$11,829. Recognizing our practice of allowing regulatory commission expense in overearnings investigation cases,¹¹ we find that the entire possible overearnings amount would be offset, if not exceeded, by reasonable regulatory commission expense associated with the Utility defending itself in the investigation. O&S would likely incur attorney fees and consulting fees in responding to Commission staff's discovery requests. In the most recent rate case for Utilities, Inc. of Florida (UIF), for example, we allowed total rate case expense of \$16,824 for UIF's Marion County water system, wherein we also lowered the rates for that system.¹² In light of the sale of O&S' water system to TWA, we do not have jurisdiction to lower TWA's rates as we did UIF's rates in the UIF rate case.

Since we have acknowledged the transfer of O&S to TWA and cancelled Certificate No. 510-W, the overearnings investigation of O&S initiated by Order No. PSC-10-0656-FOF-WU shall be closed, and any funds held subject to refund shall be released to the Utility.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the transfer of O&S Water Company, Inc. to Tohopekaliga Water Authority is hereby acknowledged effective December 8, 2010. It is further

ORDERED that Certificate No. 510-W shall be cancelled effective December 8, 2010. It is further

ORDERED that the overearnings investigation of O&S Water Company initiated by Order No. PSC-10-0656-FOF-WU shall be closed, and any funds held subject to refund shall be released to the Utility. It is further

ORDERED that these dockets shall be closed.

¹¹ See Order No. PSC-97-0847-FOF-WS, issued July 15, 1997, in Docket No. 960234-WS, In re: Investigation of rates of Gulf Utility Company in Lee County for possible overearnings; Order No. PSC-10-0585-PAA-WS, issued September 22, 2010, in Docket No. 090462-WS, In re: Application for increase in water and wastewater rates in Marion, Orange, Pasco, Pinellas and Seminole Counties by Utilities, Inc. of Florida.

¹² See Order No. PSC-10-0585-PAA-WS, issued September 22, 2010, in Docket No. 090462-WS, In re: Application for increase in water and wastewater rates in Marion, Orange, Pasco, Pinellas and Seminole Counties by Utilities, Inc. of Florida at 29.

By ORDER of the Florida Public Service Commission this 6th day of May, 2011.



ANN COLE
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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or
- 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.