



PHONE (850) 425-6654 FAX (850) 425-6694 WEB WWW.RADEYLAW.COM
MAIL POST OFFICE BOX 10967 | TALLAHASSEE, FL 32302 OFFICE 301 SOUTH BRONOUGH ST. | STE. 200 | TALLAHASSEE, FL 32301

May 4, 2023

Douglas D. Sunshine, B.C.S.
Florida Public Service Commission
Senior Attorney
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Via email: (douglas.sunshine@florida.psc.com)

Re: Post-Workshop Comments – 4/13/2023 Staff Workshop to Examine
Regulatory Policies and Practices in the Water and Wastewater Industries

Dear Mr. Sunshine:

Attached please find CSWR-Florida's Post-Workshop Comments and draft rule for the Florida Public Service Commission Staff's above-referenced Rule Development Workshop. Please let me know if you have any questions.

Sincerely,

/s/ Susan F. Clark

Susan F. Clark

SFC/dmg
Enclosure

**Central States Water Resources Post-Workshop Comments
For April 13, 2023 Workshop on Proposed Amendments to Acquisition
Adjustment Rule, 25-30.0371, F.A.C**

Introduction

Central States Water Resources (“CSWR”) appreciates the careful consideration the Staff has given to our comments made at the February 1, 2023 Workshop and the post-workshop comments CSWR filed on March 1, 2023 and March 22, 2023, as reflected in the draft proposed amendments to the Acquisition Adjustment Rule, 25-0371, Florida Administrative Code (F.A.C.). In addition to the attached draft rule, we offer these comments for Staff’s consideration, and CSWR looks forward to another workshop to provide further input on proposed amendments to the Acquisition Adjustment Rule.

Response to Office of Public Counsel’s comments and draft rule amendments

CSWR appreciates the Office of Public Counsel’s (“OPC”) efforts to approach this rulemaking with an open mind and a cooperative spirit, and the draft rule and comments presented by OPC at the workshop were evidence of those efforts. However, there are proposals made by OPC with which CSWR disagrees.

Time for decision on an acquisition adjustment

First and foremost, CSWR disagrees with OPC’s proposal that the time at which a utility must make a request for recovery of an acquisition adjustment is at the time of transfer. For the reasons CSWR has stated at the previous workshop and in recent transfer applications, CSWR continues to believe that an acquiring utility should have the opportunity to operate a system to identify needed improvements and efficiencies and provide a more complete picture of the benefit customers would receive from the acquisition. With this in mind, CSWR’s attached draft makes modifications to the section on the timing of requests for an acquisition adjustment to provide the flexibility to request the recovery of an acquisition adjustment either at the time that the utility seeks to acquire a utility or at a later

date within 3 years of the acquisition. Also, the attached draft allows for extension of the 3-year period, and states that the request may be made as a separate filing or as part of a rate case.

Factors to consider in a decision on acquisition adjustment

OPC also recommends a change to the factors to be considered in deciding whether an acquisition adjustment should be allowed. Specifically, OPC recommends adding the words “competent substantial evidence that constitutes a demonstrable, verifiable and quantifiable evidence [or showing]” to subsections (1)(d), (2) and (3). This language does not describe a factor to be considered, but rather relates to evidentiary requirements to support a finding on a factor. The Public Service Commission (“PSC”) proceedings are governed by the Florida Administrative Procedure Act (“APA”) which provides an evidentiary standard of competent substantial evidence, i.e., sufficiently relevant and material evidence that a reasonable mind would accept as support for a conclusion.¹ The language proposed by OPC suggests a different, higher standard than is required by the APA and in other PSC hearings. It is CSWR’s understanding that OPC only intended that the standard for a transfer be the same as in rate cases and not a higher standard, so the proposed language is not needed.

Negative Acquisition adjustment.

CSWR disagrees with OPC that negative acquisition adjustments should continue as provided for in the current rule. As Staff has pointed out, no other state imposes a negative acquisition adjustment and there is a lack of parity in the treatment of rate base in a transfer situation in that the rate base of the existing utility carries over to the acquiring utility unless the acquiring utility pays less than the existing rate base. Imposition of a negative adjustment discourages an acquiring utility to negotiate the lowest price or from acquiring a small troubled system at all. Furthermore, allowing the acquiring utility to earn on the seller’s actual rate base provides an additional source of revenue that could be used to reinvest in the utility.

¹ [See sections 120.57(1)(l) and 120.68 (7)(b), Fla.Stat.]

CPVRR

Here, OPC's draft rule amendment would preclude a positive acquisition for a viable utility unless it is shown that the transfer "incorporating a Positive Acquisition Adjustment is projected to provide a positive cumulative present value of revenue requirements (CPVRR) benefit for customers over a five-year period." A full or partial acquisition should still be allowed if there are other qualitative benefits such as improved customer service, improved monitoring and reporting of and response to health and safety requirements, or improved billing, record keeping and compliance with regulatory reporting requirements.

Response to PSC Staff comments and rule suggestions.

Definition of "arms-length transaction"

During the workshop, Staff asked whether there needed to be a definition of "arms-length transaction" and raised the concern that, in the purchase and sale of a water or wastewater utility, both parties would pursue a higher price because of the possibility of positive acquisition adjustment. The term "arms-length transaction" is commonly understood to mean a transaction in which the parties act independently and in their own self-interest. As such, CSWR believes that Staff's concern is misplaced. Given this common understanding of this term, there is no need to otherwise define it. Recognizing that there is no guarantee that a full or partial acquisition adjustment will be allowed recovery, the proposed rule changes do not provide the purchaser with an incentive to agree to a high purchase price. Given this lack of certainty, purchasers will still seek to minimize its purchase price.

CPVRR

Subsection (3) of Staff's draft discussed at the workshop provided for the granting of an acquisition adjustment for a viable utility if "the full or partial acquisition adjustment is projected to provide a positive cumulative present value of revenue requirements (CPVRR) benefit over a five-year period." It is CSWR's

understanding that, under Staff's proposal, applicants would not be required to use the methodology described in the rule or the form attached to the rule, but may use their own methodology as long as it is transparent with regard to assumptions and inputs.

As with the OPC proposal, it should be made clear that a partial or full adjustment can still be allowed if it is shown that there will be customer benefits without a showing of a positive CPVRR within the five-year time period. Specifically, benefits such as improved customer service, improved monitoring and reporting of and response to health and safety requirements, and improved billing, record keeping and compliance with regulatory reporting requirements should still provide the evidentiary justification for the recovery of an acquisition adjustment.

CSWR's Draft Rule Amendments

CSWR's draft rule amendments:

1. Incorporate the modifications to the definition of non-viable utility made by Sunshine Water Services in their draft rule presented at the April 23, 2023 workshop.
2. Make clear that a positive acquisition adjustment for a viable utility can be made without the showing of a positive CPVRR if there are other customer benefits that will result from the acquisition.
3. Provide that the three-year period for requesting an acquisition adjustment may be extended for good cause shown and may be made as a separate filing or as part of a rate case.
4. Provide for extension of the five-year period for modifications to an acquisition adjustment upon a showing of good cause.

1 **25-30.0371 Acquisition Adjustments.**

2 (1) Definitions. ~~For the purpose of this rule, an acquisition adjustment is defined as the~~

3 (a) “Acquisition Adjustment” means the difference between the purchase price of utility
4 system assets to an acquiring utility and the net book value of the utility assets. A positive
5 acquisition adjustment exists when the purchase price is greater than the net book value. A
6 negative acquisition adjustment exists when the purchase price is less than the net book value.

7 (b) “Positive Acquisition Adjustment” means the purchase price is greater than the net
8 book value.

9 (c) “Negative Acquisition Adjustment” means the purchase price is less than the net book
10 value.

11 (d) “Non-Viable Utility” means a utility that

12 1. Demonstrates a lack of historical compliance with primary and or secondary water
13 quality standards or other health, safety, and environmental standards established by federal,
14 state or local agencies that affect the quality of service provided;

15 2. Demonstrates a lack of historical investment, repair, or adequate sustainable
16 maintenance to support the provision of safe and adequate service;

17 3. Demonstrates an inability to acquire and maintain adequate managerial, operational,
18 financial, or technical capabilities to ensure safe and adequate service to its customers in the
19 long-term;

20 4. Is not reasonably expected to furnish and maintain safe and reliable service facilities in
21 the future;

22 5. Is insolvent, i.e. unable to pay debts owed or generate sufficient cash to fund operations
23 in the long-term; or

24 6. Has a negative or zero rate base.

25 (2) Positive Acquisition Adjustments for a Non-Viable Utility. ~~A positive acquisition~~

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from existing law.

1 ~~adjustment shall not be included in rate base absent proof of extraordinary circumstances. Any~~
2 ~~entity that believes a~~ A full or partial positive acquisition adjustment ~~should be made has the~~
3 ~~bureden to prove the existence of extraordinary circumetanees.~~ will be allowed for inclusion in
4 rate base for the acquisition of a non-viable utility if it is demonstrated that customers will
5 benefit from the acquisition. In determining whether customers benefit, ~~extraordinary~~
6 ~~circumstances have been demonstrated,~~ the Commission will ~~shall~~ consider ~~evidence provided~~
7 ~~to the Commission~~ such things as anticipated improvements in quality of service, anticipated
8 improvements in compliance with regulatory mandates, anticipated rate reductions or rate
9 stability over a long-term period, anticipated cost efficiencies, increased ability to attract
10 capital at a reasonable cost, more professional and experienced managerial, financial, technical
11 and operational resources, and whether the purchase was made as part of an arms-length
12 transaction. The list of customer benefits is not exclusive and the acquiring utility is not
13 required to meet all the listed benefits in order to receive a full or partial acquisition
14 adjustment. Amortization of a positive acquisition adjustment will ~~shall~~ be pursuant to
15 subsection (6) paragraph (4)(a) below.

16 (3) Positive Acquisition Adjustments for a Viable Utility. A full or partial positive
17 acquisition adjustment will be allowed for the acquisition of a viable utility if it is
18 demonstrated that the transaction incorporating the full or partial positive acquisition
19 adjustment is projected to provide a positive cumulative present value of the revenue
20 requirements (CPVRR) benefit over a five-year period or longer period as approved by the
21 Commission. All data and assumptions used in such CPVRR analysis, including the
22 spreadsheet with formulas intact used to calculate the CPVRR, must be provided in the
23 application requesting a full or partial positive acquisition adjustment. Form PSC XXXX
24 (XX/23), entitled “Water and/or Wastewater Utilities Cumulative Present Value of the
25 Revenue Requirements for Acquisition Adjustment Worksheet,” which is incorporated by

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from existing law.

1 reference in this rule and is available at <hyperlink>, is an example CVPRR that may be
2 completed by the applicant and included in the application required by subsection (4) of this
3 rule. This form may also be obtained from the Commission's website, www.floridapsc.com.
4 A partial or full acquisition may be made in the absence of such positive CPVRR if it can be
5 shown that there are other customer benefits that will result from the acquisition.~~Acquisition~~
6 ~~Adjustments. If the purchase price is greater than 80 percent of net book value, a negative~~
7 ~~acquisition adjustment will not be included in rate base. When the purchase price is equal to or~~
8 ~~less than 80 percent of net book value, a negative acquisition adjustment shall be included in~~
9 ~~rate base and will be equal to 80 percent of net book value less the purchase price.~~
10 ~~Amortization of a negative acquisition adjustment shall be pursuant to subparagraph (4)(b)1.~~
11 ~~or (4)(b)2. below.~~

12 (4) Application. An application for a full or partial positive acquisition adjustment may be
13 made at the time of transfer of ownership or at any time within three years of the date of the
14 order approving of the transfer of ownership and assets. The three year period may be
15 extended for good cause shown, and the application for a positive adjustment may be made as
16 a separate filing or as part of a rate case.

17 (5) Negative Acquisition Adjustment. A negative acquisition adjustment will not be
18 included in rate base.

19 (6) (4) Amortization Period. (a)~~In setting the amortization period for a Commission~~
20 ~~approved positive acquisition adjustment pursuant to subsections (2) or (3) above, the~~
21 ~~Commission will shall~~ consider evidence such as the composite remaining life of the assets
22 purchased and the condition of the assets purchased. Amortization of the acquisition
23 adjustment ~~will shall~~ begin on the date of issuance of the order approving the acquisition
24 adjustment transfer of assets.

25 ~~(b) The appropriate period over which to amortize a Commission approved negative~~
CODING: Words underlined are additions; words in ~~struck through~~ type are deletions
from existing law.

1 acquisition adjustment pursuant to subsection (3) above, shall be determined as follows:

2 1. If the purchase price is greater than 50 percent of net book value, the negative
3 acquisition adjustment shall be amortized over a 7-year period from the date of issuance of the
4 order approving the transfer of assets. In this case, the negative acquisition adjustment shall
5 not be recorded on the books for ratemaking purposes or used for any earnings review unless
6 the purchaser files for a rate increase pursuant to Section 367.081(2), 367.0814, 367.0817 or
7 367.0822, F.S., that will be effective during the amortization period.

8 2. If the purchase price is 50 percent of net book value or less, the negative acquisition
9 adjustment shall be amortized from the date of issuance of the order approving the transfer of
10 assets as follows:

11 a. 50 percent of the negative acquisition adjustment shall be amortized over a 7 year
12 period; and

13 b. 50 percent of the negative acquisition adjustment shall be amortized over the remaining
14 life of the assets.

15 (7) (5)-Subsequent Modification. Any full or partial positive acquisition adjustment, once
16 made by the Commission pursuant to subsections (2) or (3) above, may be subsequently
17 modified if the anticipated customer benefits ~~extraordinary circumstances~~ do not materialize
18 or subsequently are substantially changed due to factors within the acquiring utility's control .
19 Any subsequent modification by the Commission must be initiated within five (5) years of the
20 date of issuance of the order approving the acquisition adjustment. Upon good cause shown,
21 the 5-year period may be extended. ~~transfer of assets.~~

22 *Rulemaking Authority 350.127(2), 367.121(1)(f) FS. Law Implemented 367.071(5),*
23 *367.081(2)(a), 367.121(1)(a), (b) FS. History—New 8-4-02, Amended 11-22-10, _____*

24

25

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from existing law.