

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: September 7, 2006

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

FROM: Division of Economic Regulation (Brady, Biggins, Romig)
Office of the General Counsel (Brubaker)

RE: Docket No. 010492-WS – Application for rate increase in Orange County by Zellwood Station Co-Op, Inc.

Docket No. 030682-WS – Dual application by Zellwood Station Co-Op, Inc. for transfer of portion of water and wastewater facilities to City of Apopka, for transfer of remaining facilities to Zellwood Station Community Association, Inc., and request for cancellation of Certificate Nos. 602-W and 518-S.
County: Orange

AGENDA: 09/19/06 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\010492.RCM.DOC

Case Background

Zellwood Station Co-Op, Inc. (Zellwood or utility) is a Class B utility that currently provides water and wastewater service in Orange County to approximately 1,100 residential and commercial customers in an adult mobile home community known as Zellwood Station. Zellwood is located in a priority water resource caution area of the St. Johns River Water

Management District (SJRWMD). The utility's 2005 annual report indicates combined net revenues of \$515,631 and a combined net operating income of \$25,791.

The original developer, Cayman Development Corporation (Cayman), constructed the utility facilities in 1975. In 1992, Cayman sold the development to Zellwood Partners, Ltd., which filed for bankruptcy one year later. A group of residents formed Zellwood to purchase the development's real property and utility assets in the bankruptcy proceedings in 1993. Zellwood learned of the need to be certificated in 1997 during the process of renewing the utility's consumptive use permit with the SJRWMD. The SJRWMD wanted Zellwood to promote water conservation by metering the lots and implementing a conservation rate structure. Certification was required because Zellwood provided service to non-members. Shortly thereafter the utility applied for original water and wastewater certificates, which were granted by Order No. PSC-98-1572-FOF-WS.¹ There have been no further certification actions.

Pursuant to a stipulation in Order No. PSC-98-1572-FOF-WS, Zellwood was to charge its proposed flat rate structure, with a conservation surcharge for usage over 10,000 gallons, for three years. By September 2, 2001, after meters had been installed, consumption data obtained, and an original cost study performed, Zellwood was to file for a rate proceeding specifically addressing a consumption-based and/or conservation rate structure. On October 10, 2001, Zellwood completed the initial minimum filing requirements (MFRs) for the rate proceeding in Docket No. 010492-WS. In its application, the utility requested that the rate filing be set directly for administrative hearing. On November 9, 2001, the Office of Public Counsel filed a Notice of Intervention which was acknowledged by Order No. PSC-01-2194-PCO-WS, issued November 13, 2001. Procedures for a hearing on February 7-8, 2002, were established by Order No. PSC-01-2206-PCO-WS, issued on November 14, 2001.

On November 30, 2001, Zellwood filed a motion for extension of the docket schedule dates. Based on preliminary discussions with staff, Zellwood's motion indicated it believed it would need additional time to respond when staff formally requested modifications and adjustments to its MFRs. In addition, Zellwood's motion indicated it had entered into discussions with Orange County (County) regarding potentially becoming a bulk water and wastewater customer of the County which would significantly alter the utility's position in the rate proceedings. Zellwood agreed to temporarily waive the statutory deadline for the Commission to approve its requested rates until new controlling dates could be established. The utility also indicated it had conferred with the parties of record and none had expressed any objection to the motion.

By Order No. PSC-01-2368-PCO-WS, issued December 7, 2001, Zellwood's motion for extension was granted and new controlling dates established. By Order No. PSC-01-2471-PCO-WS, issued December 18, 2001, the final rates, charges, and schedules proposed by Zellwood were suspended in accordance with Section 367.081(6), Florida Statutes, and the production of additional and/or corroborative data was required by the Commission. Since it appeared the utility may be overearning, the utility was also ordered to hold a portion of its annual water and

¹ Order No. PSC-98-1572-FOF-WS, issued November 23, 1998, in Docket No. 980307-WS, In Re: Application for certificate to provide water and wastewater service in Orange County by Zellwood Station Co-Op, Inc.

wastewater revenues subject to refund during the pendency of the case. The utility provided a letter of credit to secure potential refunds.

During the subsequent negotiations between Zellwood and the County, four extensions to the revised MFR filing date and resulting controlling dates were granted by the Commission. Two extensions were by motion of the utility,² and two were due to Commission scheduling conflicts.³ In each of its motions for extension, Zellwood noted that its customers were protected by the security required pursuant to Order No. PSC-01-2471-PCO-WS. For each motion, Zellwood also waived the statutory deadline for the Commission to approve its requested rates and contacted parties who expressed no objections to the extensions.

On September 27, 2002, Zellwood filed a third motion for extension of the revised MFR filing date which it subsequently amended on December 20, 2002, and April 1, 2003. Early in 2003, staff was also informed that, in addition to the sale of the water and wastewater facilities to the County, Zellwood intended to transfer the remaining collection and distribution facilities to Zellwood Station Community Association, Inc. (HOA). Zellwood stated its belief that the HOA was exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes, which exempts from regulation nonprofit associations providing service solely to members. Therefore, when the dual transfers to the County and the HOA were complete, Zellwood believed its certificates could be cancelled. In April 2003, the utility began filing monthly reports apprising all parties on the status of the transfers.

By Order No. PSC-03-0612-PCO-WS, issued May 19, 2003, the Commission granted Zellwood's third motion for extension of time to file its revised MFRs and suspended the hearing schedule and controlling dates indefinitely. On July 25, 2003, Zellwood filed an application in Docket No. 030682-WS for transfer of its water and wastewater treatment facilities to the County, transfer of its remaining facilities to the HOA, and for cancellation of Certificate Nos. 602-W and 518-S. During contract negotiations with the County, the County assigned its interest in the purchase of the utility's facilities, and resulting bulk service agreements, to the City of Apopka (Apopka). On April 13, 2006, the closing occurred between Zellwood and Apopka for transfer of treatment services. On April 14, 2006, the closing occurred between Zellwood and the HOA for transfer of the remaining facilities. The transfers of water service to Apopka and the HOA are anticipated to occur on October 1, 2006, subject to Commission approval. The transfers of wastewater service are anticipated to occur three months later.

This recommendation addresses the transfer application filed in Docket No. 030682-WS and the disposition of Docket No. 010492-WS. Issue 1 addresses the transfers of the utility's water and wastewater treatment services to Apopka. Issue 2 addresses the transfers of the utility's water distribution and wastewater collection systems to the HOA and the request for cancellation of the utility's certificates. Issue 3 addresses the disposition of the rate relief pending in Docket No. 010492-WS. The Commission has jurisdiction to consider these matters pursuant to Sections 367.022, 367.071, 367.081, and 367.082, Florida Statutes.

² Order No. PSC-02-0339-PCO-WS, issued March 14, 2002, and Order No. PSC-02-0794-PCO-WS, issued June 11, 2002.

³ Order No. PSC-02-0650-PCO-WS, issued May 13, 2002, and Order No. PSC-02-0877-PCO-WS, issued July 1, 2002.

Discussion of Issues

Issue 1: Should the transfers of Zellwood Station Co-Op, Inc.'s water and wastewater treatment services to the City of Apopka be approved?

Recommendation: Yes. The transfers should be approved as a matter of right pursuant to Section 367.071(4)(a), Florida Statutes, effective the date of the transfers. (Brady, Brubaker)

Staff Analysis: On July 25, 2003, an application was filed on behalf of Zellwood for transfer of its water and wastewater treatment facilities to the County, transfer of its remaining facilities to the HOA, and for cancellation of its water and wastewater certificates. The County's interests were subsequently assigned to Apopka. This issue addresses the transfers of the utility's water and wastewater treatment services to Apopka. Issue 2 addresses the transfers of the utility's water distribution and wastewater collection systems to the HOA and the request for cancellation of the utility's certificates.

The application for transfer of the utility's water and wastewater treatment services to Apopka was filed pursuant to Section 367.071(4)(a), Florida Statutes, and Rule 25-30.037(4), Florida Administrative Code. Pursuant to Section 367.071(4)(a), Florida Statutes, transfers 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.

On June 3, 2003, Zellwood and the County executed a purchase agreement, bulk service agreement, and reclaimed water agreement. In the purchase agreement, the County agreed to purchase Zellwood's water and wastewater treatment facilities. In the bulk service agreement, the parties agreed that the purchased facilities would then be used to sell bulk water and wastewater services back to Zellwood. In the reclaimed water agreement, Zellwood agreed to receive reclaimed water service from the County for use on its golf course. After the execution of these agreements, but prior to the closing, the County assigned its interest to Apopka.

While the assignment to Apopka was for the same purchase price and bulk service terms and conditions, Apopka did not need Zellwood's treatment facilities. Zellwood subsequently agreed to assume the responsibility and cost of decommissioning and dismantling its water and wastewater treatments plants. In addition, the assignment to Apopka required the development of new grants and easements to accommodate a different interconnection route. In order to resolve these and other due diligence matters, the closing with Apopka was delayed for several years. The final transfer was accomplished by a series of agreements which included a Water, Wastewater, and Reclaimed Water Service Area Agreement; Wholesale Potable Water and Wastewater Agreement; Agreement for Delivery and Use of Reclaimed Water; as well other easement, indemnity, and assumption agreements.

The closing between Apopka and Zellwood occurred on April 13, 2006, and the interconnection of the water system was completed on June 30, 2006. However, Zellwood has chosen not to transfer water treatment service to Apopka until after the Commission approves the transfers of its distribution and collection facilities to the HOA (Issue 2). Subject to Commission approval, the transfer of the utility's water treatment service to Apopka is anticipated to occur on October 1, 2006, with the simultaneous transfer of the utility's water distribution system to the

HOA. The simultaneous transfers of the utility's wastewater treatment service to Apopka and wastewater collection system to the HOA are anticipated to occur three months later after the completion of the wastewater interconnection with Apopka.

The application contains a statement that Apopka has obtained a copy of the utility's most recent annual report as required by Section 367.071(4)(a), Florida Statutes. The disposition of customer deposits and interest is not an issue since Zellwood did not collect customer deposits. Otherwise, the utility's books and records will be transferred to the HOA. However, responsibility for annual reports and regulatory assessment fees (RAFs) up through the transfers of services will be the responsibility of Zellwood, as will be discussed further in Issue 2.

Staff recommends that the application is in compliance with the provisions of Rule 25-30.037(4), Florida Administrative Code. Pursuant to section 367.071(4)(a), Florida Statutes, transfers to a governmental authority shall be approved as a matter of right. Therefore, staff recommends that the transfers of Zellwood's water and wastewater treatment services to Apopka should be approved, as a matter of right, effective the date of the transfers. Currently, the transfer of water treatment service is anticipated to occur October 1, 2006, subject to Commission approval, with the transfer of wastewater treatment service anticipated to occur three months later.

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Issue 2: Should the transfers of Zellwood Station Co-Op, Inc.'s water distribution and wastewater collection systems to Zellwood Station Community Association, Inc. be approved and Certificate Nos. 602-W and 518-S cancelled?

Recommendation: Yes. The transfers are in the public interest and should be approved. Certificate Nos. 602-W and 518-S should be cancelled administratively upon notification to the Commission of the transfer dates and verification of the payment of regulatory assessment fees up through the date of the transfers. The effective dates for the cancellation of the utility's certificates should be the date of the transfers. Zellwood should continue to be responsible for regulatory assessment fees for any part of the utility that remains jurisdictional until the related certificate is cancelled. Further, the jurisdictional entity, if any, at December 31, 2006, and December 31st of any future year, should be responsible for filing the Annual Report. Zellwood Station Community Association, Inc., or any successors in interest, should be put on notice that if there is a change in circumstance or method of operation which causes it to no longer qualify for exemption pursuant to Section 367.022(7), Florida Statutes, it should inform the Commission within 30 days. (Brady, Romig, Brubaker)

Staff Analysis: This issue addresses the transfers of the utility's water distribution and wastewater collection facilities to the HOA and the request for cancellation of the utility's certificates. The application is in compliance with the governing statute, Section 367.071(1), Florida Statutes, and other pertinent statutes and rules concerning an application for transfer. Pursuant to Rule 25-30.030, Florida Administrative Code, the application contains proof of compliance with the noticing provisions. No objections to the notice of application have been received and the time for filing such has expired.

Pursuant to Section 367.022(7), Florida Administrative Code, nonprofit corporations, associations or cooperatives providing service solely to members who own and control such nonprofit corporations, associations or cooperatives are exempt from Commission regulation. A copy of the HOA's nonprofit registration with the Florida Department of State is included in the application along with a copy of its Articles of Incorporation, By-Laws, and Declaration of Covenants, Restrictions and Easements (Declaration).

The Zellwood Station development consists of mobile home lots, common areas with facilities, a church, and a restaurant. The mobile home lots are both owned and leased. In 1979, the 283 individually owned lots were organized by the original developer into three separate condominium associations. At the same time, the developer established the HOA for purposes of owning, operating and maintaining the common areas throughout Zellwood Station. When the HOA's Declaration was established, membership was by lot ownership. Therefore, the 283 individually owned lots currently receiving service from the Zellwood have automatic voting rights in the HOA.

However, after the establishment of the condominium associations in 1979, all subsequent lots have been leased. To accommodate the acquisition of the utility facilities, the HOA's Declaration was modified such that any leased lot that is required to establish an account for utility services is deemed to have the lot owner's proxy vote on all matters relating to the

operation of the utility systems. The Commission has previously determined that such a provision meets the standard for exemption pursuant to Section 367.022(7), Florida Statutes.⁴

The condominium associations, Zellwood, the church, and the restaurant also receive utility service, but are not members of the HOA. The HOA granted the condominium associations, Zellwood, and the restaurant a contractual right through a Customer Membership and Participation Agreement to become a “Customer Member” of the HOA with the right to participate in and vote on all utility matters. In addition, the HOA provided an affidavit of its intent to provide service to the church without compensation until it can become a direct customer of Apopka. Both the church and Apopka have acknowledged this temporary accommodation. The Commission has previously determined that service by a nonprofit corporation to non-members without compensation is nonjurisdictional.⁵ Finally, the application contained a blanket affidavit from the Board of Directors of the HOA attesting that all retail water and wastewater customers will be voting members of the HOA.

Staff believes that the application contains sufficient evidence that the HOA meets the exemption requirements of Section 367.022(7), Florida Administrative Code. Therefore, if the Commission approves the transfers of Zellwood’s water distribution and wastewater collection facilities to the HOA, the utility’s water and wastewater certificates should be cancelled effective the date of the transfer of the systems.

Zellwood is intending to convey the utility’s water distribution and wastewater collection facilities, along with the necessary easements and rights of access, to the HOA on an “as-is, where-is” basis pursuant to a Utility Easement and Bill of Sale entered into on July 24, 2003, between Zellwood and the HOA. On January 19, 2006, Zellwood and the HOA also entered into an Operation and Maintenance Transition Agreement (Transition Agreement) which, among other matters, provides for the assignment to the HOA of Zellwood’s rights, duties, and responsibilities under the Bulk Service Agreement with Apopka. The application further contains a statement from Apopka that it recognizes and concurs with the assignment to the HOA of Zellwood’s interest in the Bulk Service Agreement.

In addition to the above, the Transition Agreement also indicates that the utility personnel utilized by Zellwood will be employed by the HOA, protects the HOA from any debt occurred by Zellwood prior to transfer, and has provisions for Zellwood to loan the HOA up to \$19,000 for use in performing any repairs or corrective maintenance. Also in the application is a statement that, after reasonable investigation, the HOA has determined that the utility facilities are in satisfactory condition and in compliance with all applicable standards set by the Department of Environmental Protection.

The closing between Zellwood and the HOA occurred on April 14, 2006, one day after the closing between Zellwood and Apopka (Issue 1). In conjunction with the transfer of the

⁴ Order No. PSC-98-0153-FOF-WS, January 27, 1998, Docket No. 961343-WS, In re: Petition by Southern Pines Homeowners of Bonita Springs, Inc. to rescind exemption granted to Bonita Springs Utilities in Lee County.

⁵ Order No. PSC-95-1436-FOF-WU, November 27, 1995, Docket No. 951154-WU, In re: Application for exemption from Florida Public Service Commission regulation for provision of water service in Orange County by Montpelier Village Club, Inc.

utility's water treatment service to Apopka, the transfer of the utility's water distribution facilities to the HOA is anticipated to occur on October 1, 2006, subject to prior Commission approval. The transfer of the utility's wastewater collection facilities to the HOA is anticipated to occur three months later in conjunction with the interconnection and transfer of the utility's wastewater treatment service to Apopka.

Zellwood reported and timely paid RAFs for 2005 and for the first six months of 2006. It also timely filed its 2005 Annual Report. In accordance with Rule 25-30.120, Florida Administrative Code, Zellwood will continue to be responsible for the water and wastewater RAFs for any part of the utility that remains jurisdictional until the related certificate is cancelled. Further, in accordance with Rule 25-30.110, Florida Administrative Code, the jurisdictional entity, if any, at December 31, 2006, and December 31st of any future year, will be responsible for filing the Annual Report.

According to the application, the transfer of the utility's distribution and collection facilities from Zellwood to the HOA is in the public interest because all retail customers, except the Church which will receive service for free, will have a vote in the pricing and manner of service. In addition, as an exempt entity, the HOA will no longer be responsible for the reporting and administrative costs of regulation which should reduce its operating cost. The public interest statement also indicates that, while the HOA itself has no prior utility experience, it intends to draw on the experience of personnel previously employed by Zellwood. Finally, the application contained a statement that the HOA understands and intends to fulfill the commitments, obligations and representations of Zellwood with regard to retail utility matters.

Based on the above, staff recommends that the transfers of Zellwood Station Co-Op, Inc.'s water distribution and wastewater collection systems to Zellwood Station Community Association, Inc., are in the public interest and should be approved. Certificate Nos. 602-W and 518-S should be cancelled administratively upon notification to the Commission of the transfer dates and verification of the payment of regulatory assessment fees up through the date of the transfers. The effective dates for the cancellation of the utility's certificates should be the date of the transfers. Zellwood should continue to be responsible for regulatory assessment fees for any part of the utility that remains jurisdictional until the related certificate is cancelled. Further, the jurisdictional entity, if any, at December 31, 2006, and December 31st of any future year, should be responsible for filing the Annual Report. Zellwood Station Community Association, Inc., or any successors in interest, should be put on notice that if there is a change in circumstance or method of operation which causes it to no longer qualify for exemption pursuant to Section 367.022(7), Florida Statutes, it should inform the Commission within 30 days.

Issue 3: What should be the disposition of Docket No. 010492-WS?

Recommendation: If the Commission approves the transfers in Issues 1 and 2, Zellwood Station Co-Op, Inc.'s request for rate relief pending in Docket No. 010492-WS should be deemed withdrawn pursuant to Section 367.0814(8), Florida Statutes, the security for any possible overearnings pursuant to Order No. PSC-01-2471-PCO-WS should be released, and Docket No. 014092-WS should be administratively closed upon the closing of Docket No. 030682-WS. (Biggins, Brubaker)

Staff Analysis: Docket No. 014092-WS was a request by Zellwood for a rate increase. Based on staff's preliminary analysis, Order No. PSC-01-2471-PCO-WS determined that the utility may have been overearning. Therefore, in accordance with Section 367.081(6), Florida Statutes, the Commission suspended the utility's final rates and charges and required the utility to hold a portion of its annual water and wastewater revenues subject to refund. Pursuant to Section 367.0814(8), if a utility becomes exempt from Commission regulation during the pendency of a rate case, the request for rate relief is deemed to have been withdrawn and interim rates, if previously approved, become final.

In Issue 1, staff recommends that the Commission approve the transfers of Zellwood's water and wastewater treatment services to Apopka, which is a governmental entity exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes. In Issue 2, staff recommends that the Commission approve the transfers of Zellwood's remaining water distribution and wastewater collection facilities to the HOA, which staff recommends is a nonprofit association exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes. Therefore, staff also recommends in Issue 2 that Zellwood's water and wastewater certificates be cancelled administratively upon notification to the Commission of the transfer dates and verification of the payment of RAFs up through the date of the transfers.

If the Commission approves the transfers in Issues 1 and 2, staff recommends that Zellwood's request for rate relief pending in Docket No. 010492-WS be deemed withdrawn pursuant to Section 367.0814(8), Florida Statutes, the security for any possible overearnings pursuant to Order No. PSC-01-2471-PCO-WS be released, and Docket No. 014092-WS be administratively closed upon the closing of Docket No. 030682-WS.

Docket No. 010492-WS, 030682-WS

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Issue 4: Should Docket Nos. 010492-WS and 030682-WS be closed?

Recommendation: No. The dockets should remain open pending confirmation of the transfers of the utility's water and wastewater treatment services to the City of Apopka and the utility's water distribution and wastewater collection systems to Zellwood Station Community Association, Inc. Upon confirmation of these transfers and verification of the payment of water and wastewater RAFs up through the transfer dates, Docket Nos. 010492-WS and 030682-WS should be administratively closed and the security being held pursuant to Order No. PSC-02-2471-PCO-WS released. (Brubaker)

Staff Analysis: The dockets should remain open pending confirmation of the transfers of the utility's water and wastewater treatment services to the City of Apopka and the utility's water distribution and wastewater collection systems to Zellwood Station Community Association, Inc. Upon confirmation of these transfers and verification of the payment of water and wastewater RAFs up through the transfer dates, Docket Nos. 010492-WS and 030682-WS should be administratively closed and the security being held pursuant to Order No. PSC-02-2471-PCO-WS released.