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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for limited proceeding )  
to implement water conservation plan in )  
Seminole County by SANLANDO UTILITIES )  
CORPORATION )

Docket No. 930256-WS  
Order No. PSC-95-0536-S-WS  
Filed: May 15, 1995

MOTION TO CLARIFY ORDER NO. PSC-95-0536-S-WS

The Citizens of the State of Florida, (Citizens) by and through their undersigned attorney, hereby move the Commission to clarify its decision in Order No. PSC-95-0536-S-WS. In support of this motion the Citizens state:

1. All of the Parties to the Stipulation endorse this motion.
2. In an effort to respond to questions posed by Staff the Parties submitted a Revised Stipulation. On February 23, 1995, Staff filed a memorandum concerning the Revised

ACK \_\_\_\_\_ Stipulation. The memorandum provided primary and alternative recommendations.

AFA \_\_\_\_\_  
APP \_\_\_\_\_ 3. The primary recommendation (sponsored by Legal Staff) recommended the

CAF \_\_\_\_\_ Commission approve the Revised Stipulation as submitted, but with the Parties being put

CMU \_\_\_\_\_  
CTR \_\_\_\_\_ on notice that the Commission would be neither bound nor authorized to resolve

EAG \_\_\_\_\_ disputes which arise from the Stipulation. Specifically, the Legal Staff does not believe

LEG 1 \_\_\_\_\_  
LIN 3 \_\_\_\_\_ the Commission has authority to resolve disputes concerning selection of the chief

OPC \_\_\_\_\_  
RCH \_\_\_\_\_ operating officer or approval of the articles of incorporation or by-laws of the nonprofit

SEC 1 \_\_\_\_\_ nonregulated corporation. Further, Legal Staff does not believe that the Commission has

WAS *Randell*

DTH \_\_\_\_\_

authority to resolve disputes concerning the prudence and reasonableness of expenditures of funds from the escrow account to pay for the design and construction of the reuse facilities. In fact, Legal Staff somehow viewed the Revised Stipulation as requiring the Commission to interpret specific provisions of the Stipulation agreement and resolve disputes regarding the Parties interpretation or performance under the Stipulation.

4. The alternative recommendation recommended the Commission approve the Revised Stipulation as worded. Technical Staff believed that the level of Commission involvement specified in the Revised Stipulation was reasonable. The costs involved in the design, permitting and construction of the reuse facilities and the reasonable costs and expenses incurred by the nonprofit corporation in undertaking its obligations are all funded by withdrawals from the escrow account, ordered and approved by the Commission. After the facility is built any review of the prudence of expenses associated with the operation and leasing of the facility would be a statutorily required job of the Commission.

5. At the March 21, 1995 agenda conference Technical Staff and all of the Parties to this docket disagreed with Legal Staff and engaged in a detailed debate concerning the Commission's authority to resolve the disputes outlined in the Revised Stipulation. (See entire transcript of the Commission's deliberations on item no. 23 of the March 21, 1995 agenda conference attached as Exhibit "A").

6. After discussing recovery of lease expenses from the escrow account, which will not happen, and reviewing design and construction contracts before collecting the

surcharge, which will also not happen (pages 7 - 9, Transcript) the Commissioners ultimately concluded that they had the authority to resolve disputes concerning design and construction of the reuse facilities as a function of their responsibility to approve release of funds from the escrow account.

7. The following exchange took place between Commissioner Clark and Ms. Jaber:

COMMISSIONER CLARK: Well the fact of the matter is we will review the contract and the correct cost before we allow it to be recovered in the surcharge, right?

(Simultaneous conversation)

COMMISSIONER CLARK: I apologize for sort of, I may be mixing - you all have dealt with this every day and I may be mixing terms, but it seems to me .....

MS. JABER: Before the release of the escrow funds we'll take a look at those expenses.

COMMISSIONER CLARK: The escrow funds?

MS. JABER: That's correct.

COMMISSIONER CLARK: And we will look at that, and that is clearly within our authority to do?

MS. JABER : That's correct.

COMMISSIONER CLARK: O.K.

COMMISSIONER CLARK: Can you write the order that way, that says that we approve the stipulation with the understanding that the resolutions of the disputes concerning contract design and reasonableness of costs flow from the fact that we will have to, ah, approve them.

MS. JABER: Right.

COMMISSIONER CLARK: As being prudent expenses when we authorized the release of the escrow funds. (Pages 9 and 10 of the Transcript).

8. At the end of the discussion on item 23 a dialog took place between Commissioner Clark, Ms. Jaber, Commissioner Garcia, Mr. Simmons, Ms. Chase and Commissioner Johnson. While the discussion becomes a little confusing because the various Parties make statements with reference to the primary recommendation, alternative recommendation and Revised Stipulation, a consensus is ultimately reached between all three Commissioners. That consensus provided that the Commission would not resolve disputes relating to selection of the chief operating officer or approval of the language of the articles of incorporation or by-laws for the nonprofit corporation, but would resolve disputes relating to the expenditure of escrow funds for the design and construction of the reuse facility.

9. The following exchange took place between Commissioner Clark, Ms. Jaber, Commissioner Garcia, Mr. Simmons, Ms. Chase and Commissioner Johnson:

COMMISSIONER GARCIA: We will be releasing the funds to the utility so that they can build this plant which will be a non-profit, but clearly they are going to be leasing, they are going to managing and let me make a motion here cause I have no idea what to move anymore whether primary or alternative, are they both one and the same at this point now, after the changes?

COMMISSIONER CLARK: No.

MS. JABER: No, they are not one and the same. I think what you've heard the Parties and staff say is we're all in agreement over the primary with the changes.

COMMISSIONER GARCIA: Is that correct?

MR. SIMMONS: Let me see if I can understand what the changes were. What we said was if you limited the primary to not reviewing the appointment of the executive officer and the approval of the articles of incorporation we would be happy with the primary.

COMMISSIONER GARCIA: Okay, well that's exactly what it says, correct, with that limitation.

MS. JABER: Well I think there is that clarification about looking at the prudence of the expenses when we're releasing the escrow funds.

COMMISSIONER GARCIA: There's a problem in that?

MS. JABER: No.

MS. JABER: No, I'm just saying that that was the second, that was the third change and we're all happy with that.

COMMISSIONER GARCIA: Okay, so I'm gonna be before I move primary.

COMMISSIONER CLARK: Just a minute, Ms. Chase do you want to make a comment.

MS. CHASE: Well I just don't think that that's a change, I think the only change was made [from the revised stipulation] is that we're not going to be looking at the chief operating officer, or the articles and by-laws.

COMMISSIONER GARCIA: Exactly.

COMMISSIONER CLARK: O.K.

COMMISSIONER JOHNSON: But we will look at the prudence of expenses associated with the construction of the facilities.

MS. CHASE: Yes, we were, right the alternative recommendation we were going to look at that anyway. So that's no change in our [technical staff] recommendation [alternative recommendation].

COMMISSIONER CLARK: And its going to be pursuant to our authority over the utility to make sure that expenses charged to customers are reasonable and the way this expense is being recovered is through the release of escrow funds and to the extent we have that responsibility we will be looking at the reasonableness of contracts for design, permitting a construction of the facility and the cost and expenses occurred in operating the facility.

MS. JABER: That's correct.

10. All of the Parties to the Stipulation left the agenda conference with the assurance that the matter had been settled. All the Parties and even Technical Staff agree that the Commission at its March 21, 1995 agenda conference approved the Revised Stipulation, with the Commission's dispute resolution role intact, except as it relates to resolving disputes concerning selection of the chief operating officer or approval of the articles of incorporation or by-laws of the nonprofit corporation.

11. Notwithstanding the above, the following three sentences were included in the third paragraph of page 5 of Commission Order No. PSC-95-0536-S-WS:

Furthermore, we will not resolve disputes among Parties or directly approve the reasonableness and prudence of contracts and expenses as contemplated by the current stipulation. However, through our regulatory function as it relates to the utility's recovery of lease expenses through the surcharge, we will review the reasonableness and prudence of expenses as they relate to what we allow the utility to recover in lease expenses. The determination of reasonableness of expenses would flow from our authority to review and approve those expenses when authorizing the release of the escrowed funds.

12. Apart from the fact that the utility will not be recovering lease expenses through the surcharge, the above language materially misconstrues what the Parties understood the Commission agreed to do at its March 21, 1995 agenda conference.

13. Alternative language which more accurately reflects the decision reached by the Commission at its March 21, 1995 agenda is as follows:

However, under its authority to regulate the expenditure of the surcharge funds placed in the escrow account, the Commission shall resolve any dispute that cannot be resolved by the Parties concerning the reasonableness or prudence of any expenditure of escrowed funds to construct the reuse facilities. After the reuse facilities have been constructed the Commission shall continue to have jurisdiction to approve the reasonableness and prudence of expenses relating to the leasing and operation of the reuse facilities.

14. If the alternative language (or similar language with the same content) is not substituted for the last three sentences of paragraph 3 of page 5 of Order No. PSC-95-0536-S-WS, the Second Revised Stipulation Agreement will not comport with the Commission's order. The ratepayers have to have some reasonable mechanism to assure the prudence of the costs to build the reuse facilities. Without the alternative or similar language the ratepayers will have no such reasonable mechanism.

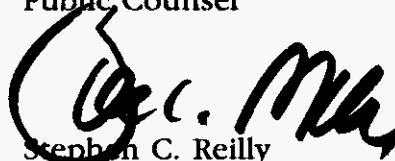
15. At the present time we have an impasse which must be resolved. We need an order which is consistent with the decision rendered by the Commission at its March 21, 1995 agenda conference, and which is consistent with the Second Revised Stipulation. Failing this the Parties will have to return to the Commission to attempt to produce an order and a Stipulation which is consistent with each other.

WHEREFORE, the Citizens and all of the Parties to the Stipulation respectfully request the Commission to delete the last three sentences of paragraph 3 of page 5 of Order No.

PSC-95-0536-S-WS and substitute in its place the alternative language offered by this motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE  
DOCKET NO. 930256-WS**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or \*hand-delivery to the following parties on this 15th day of May, 1995.

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**EXHIBIT "A"**

**TRANSCRIPT OF THE COMMISSION'S DELIBERATIONS  
ON ITEM 23 OF THE MARCH 21, 1995 AGENDA CONFERENCE**

1 Item 23:

2 MS. JOANN CHASE: Commissioners Item 23 is the proposed stipulation by the  
3 parties in the limited proceeding of Sanlando Utilities to implement a water conservation  
4 plan which includes the construction of a reuse facility. Pursuant to the stipulation the  
5 parties agreed to create a nonprofit corporation to own the reuse facilities and seek tax  
6 exempt status from the IRS. Funds collected from the surcharge to Sanlando's water  
7 customers would be placed in an escrow account owned by the corporation and used to  
8 construct the reuse facility. The facility would be leased to Sanlando which would  
9 operate it and provide reuse to the end users. Staff recommended at the December 20th  
10 agenda that the stipulation be denied mainly because we believe that the Commission's  
11 role in the stipulation was basically administering the terms of the stipulation and went  
12 beyond the level of involvement that the Commission should have in day to day  
13 operations. There is also a question of whether the Commission had the jurisdictional  
14 authority to perform these duties. The matter was deferred at the December 20th agenda  
15 and Staff and the parties have attempted to work on a stipulation that address these  
16 concerns. We basically believe the revised stipulation addressed in our recommendation  
17 should be approved since the Commission's involvement has been reduced to being a  
18 final decision maker in the event the parties cannot come to terms. However, there's a  
19 difference between technical and legal staff on this point as to whether the Commission  
20 should agree to resolve disputes among the parties as a last resort. Technical staff  
21 believes the Commission should fill this role, legal staff believes the Commission is  
22 neither bound nor authorized to resolve these disputes which arise in the stipulation and

1 the parties should be put on notice of this. We're recommending approval of the revised  
2 stipulation and that the parties be given 30 days to submit a executed copy. There are  
3 representatives from Sanlando, from Public Counsel, Florida Audubon and the St. Johns  
4 River Water Management District here to address the Commission.

5 COMMISSIONER SUSAN CLARK: Do you each wish to make a presentation at this  
6 time or are you here to answer questions.

7 MR. CLEATOUS SIMMONS: Commissioner, I'm Cleat Simmons, and I represent  
8 Sanlando Utilities, I'd like to make a short statement I don't think that we all want to  
9 make a statement. We will be happy to answer questions. If I might make a short  
10 statement. Number one, we appreciate the willingness Staff has shown in working with  
11 us since the last hearing that we had and we have worked out a stipulation which we  
12 believe serves the interest of the various parties and also is something that the  
13 Commission can accept. We strongly recommend that the Commission adopt the  
14 alternative recommendation of the Staff which is to accept the revised stipulation without  
15 the caveat that the Commission is not bound or authorized to resolve disputes which  
16 arise from the stipulation and believe that the Commission does in fact, have the  
17 authority to resolve those disputes. They would be in the nature of mediating disputes  
18 between the parties, they concern matters which the Commission already in other similar  
19 types of situations has jurisdiction and has the authority and has the experience to resolve  
20 these types of disputes and we believe that we're not asking the Commission to serve in  
21 a role in which in cannot serve nor in a role which it does not have the authority to  
22 serve.

1           COMMISSIONER CLARK: I need clarification on that point. You indicated that this  
2 is a role we have fulfilled in other proceedings or in other situations.

3           MR. SIMMONS: Yes. Some of the types of things, let me give you some examples.  
4 Some of the things that were in the stipulation that the Commission would do, is if we  
5 can't reach agreement on the construction of facility... the design of it, or whether or not  
6 it's a cadillac facility as opposed to a chevrolet, because that would relate to the expense,  
7 at some point in time if the parties cannot resolve that dispute, then we would like to  
8 have the Commission resolve that dispute. That's something the Commission can do for  
9 a utility, it has done that in the past. We believe that when the legislature passed the  
10 statue that authorized reuse facilities it basically gave the Commission oversight for those  
11 reuse facilities and whatever nature that it needed to have in order to cause those to  
12 occur, and we believe that this is well within the ambit of that statute. Let me go on if  
13 I might, one of the concerns that the Staff has raised is, frankly surprised us because we  
14 never considered it. But the Staff was concerned that that we were attempting to get  
15 non-tax treatment of revenue that would come from the reuse facility. The way its going  
16 to operate is the utility will lease it from the non-profit corporation and operate the reuse  
17 facility and will apply to the Commission and have a rate structure authorized for the  
18 reused water. That revenue would be part of the revenue that the utility would realize  
19 and it would also be off set with expenses, and we never intended that to be not treated  
20 as a taxable consequence. I can see in looking at paragraph 2 on page 6 of the proposed  
21 stipulation that there is one phrase that might have given the Staff some cause to think  
22 otherwise and its in the first full paragraph that appears on page 6; if you will read down

1 with me in the first, second, third, fourth, fifth line there's a phrase that says and the  
2 provisions in paragraph 6 of the stipulation if we deleted that phrase and we just have  
3 the thing read notwithstanding the above, the commission, the corporation, shall  
4 immediately seek an opinion from the Internal Revenue Service that the collection  
5 remittance by Sanlando of the reuse facility surcharge and the construction of the reuse  
6 facility for the corporation are not taxable. I think that deletes the concern that the Staff  
7 has, and we would recommend that change.

8 COMMISSIONER CLARK: Is that correct? Does that address Staff's concern?

9 MS. CHASE: Commissioners I'm really not aware of the concerns that he is talking  
10 about. I don't, ...we're having a problem understanding where in our recommendation  
11 you think that...

12 MR. SIMMONS: Well bear with me for just a minute... On page 4 of the Staff's  
13 analysis, section, paragraph number 3, entitled section 2, it says in revised stipulation the  
14 parties have agreed that the letter ruling would also include the expenses and revenues  
15 associated with the operation of the reuse facility. That's not true. It would not, and  
16 that's what I'm addressing here.

17 COMMISSIONER CLARK: Okay.

18 MS. CHASE: Okay. And that the deletion he just made does clarify that. That is  
19 is not included.

20 MR. SIMMONS: Other than that, I don't have any other prepared remarks. We'll  
21 be happy to answer any questions that you have, or anyone else will, if you have any  
22 questions.

1           COMMISSIONER JULIA JOHNSON: Let me ask a question of legal staff with respect  
2 to our authority in this regard. What are the duties and responsibilities under the  
3 settlement that a... that cause a problem with legal?

4           MS LILA JABER: In answering your question, can I go back and tell you where we  
5 were coming from in our primary and address all of those concerns. First, I want to  
6 emphasize to the Commission and to the parties that we are not recommending that you  
7 deny this settlement agreement. We are recommending something exactly similar to, if  
8 not exact to what you did in the Southern Bell case. And the idea being that you as a  
9 Commission can not arbitrate or settle a contract dispute, but that's better left for the  
10 court. Um, that you can't bind a future Commission from something that you would like  
11 to do today. That we don't have the authority under 350 to expend funds to do  
12 something that is outside of this Commission's jurisdiction and that we don't have any  
13 authority over the other parties, we only regulate water and wastewater utilities. Now in  
14 answering your question, obviously I don't think that we would have a problem sitting  
15 down and talking about the construction of the facilities and which is the best way to go.  
16 The concern is if you look at page 10 of the Recommendation, paragraph 1C talks about  
17 the corporation's selection of the CEO; paragraph 4C, and I'm talking about page 10 of  
18 the recommendation, 4C talks about disputes arising out of the prudence of the expenses  
19 and... also any disagreement between the parties with regard to costs or fees and you are,  
20 I think, that contemplates any kind of a contact dispute that the parties would have  
21 amongst each other and you have long said in past commission orders that you don't  
22 have that jurisdiction. You don't want to arbitrate contract disputes nor can you and

1 that's better left for the court. Um, Southern Bell was very similar and that settlement  
2 agreement has worked to the best of my knowledge, I don't think that by virtue of what  
3 you did in Southern Bell that any contract between the parties has failed. And you know  
4 if I could just tell you a little bit about what the Southern Bell order specifically said  
5 because I think its right on point: "When we approve a stipulation between parties, the  
6 provisions of the stipulation become part of our order, however, we can not by our own  
7 order require or preclude a future Commission from carry out its mandate. This is  
8 analogous to the principle that in adopting legislation, the legislature is not bound by  
9 actions of prior legislators, nor can it bind future legislators." Now the general concept  
10 with settlements is that we approve them, were not parties to them. With that I could  
11 try and answer any other questions that you may have.

12 COMMISSIONER JOHNSON: So our involvement, I didn't understand that last, um,  
13 statement that you made.

14 COMMISSIONER JOHNSON: If we were to, um, agree to resolve some of the  
15 disputes as they're stated in the settlement agreement, we are somehow exceeding...

16 MS. JABER: Your jurisdiction, yes.

17 COMMISSIONER JOHNSON: And exceeding... and why are we exceeding our  
18 jurisdiction?

19 MS. JABER: Because under 367 you have the power to regulate water and  
20 wastewater utilities, you don't have any contract dispute authority or any arbitration  
21 authority; under 350 you're not allowed to expend funds outside of those perimeters.



1           **COMMISSIONER JOHNSON**: The provisions that you cited paragraph 1C, 4C and  
2 10, to you are contractual disputes?

3           **MS. JABER**: Yes, I think that they could be contractual disputes, because what they  
4 are saying is that if there is disagreement as to the appointment of the chief operating  
5 officer, we're going to come to the Commission for that, and if we have any disputes over  
6 the reasonableness of the expenses, costs, or fees or any construction of the facility, we're  
7 going to come back to the Commission for that.

8           **COMMISSIONER CLARK**: And it's a facility that going to be owned by a corporation  
9 we don't regulate but leased to an entity we do regulate.

10          **MS. JABER**: That's right, it is a nonprofit corporation that you will not regulate.

11          **MS. CHASE**: Commissioners I would like to point out though that as far as those  
12 fees go, we the Commission will be signing off on disbursements from the escrow  
13 account and what they are talking about here, as far as those engineering or design  
14 criteria that they can't resolve they would've - number 1, hired an independent  
15 engineering consultant to help resolve that and if that doesn't... they would come to the  
16 Commission. Now the Commission. Now the Commission does have responsibility to  
17 ultimately sign off on the release of those funds anyways. So, ....

18          **COMMISSIONER CLARK**: That may be our out, it seems to me, that instead of  
19 making it the direct overview of disputes relating to prudence of contract design  
20 permitting or disputes concerning reasonableness of costs and expenses, that when in our  
21 function as regulating the utility to allow the recovery of that expense, lease expense,  
22 through the surcharge, we will, in fact, review the reasonableness of the contract and the

1     reasonableness of the expenses and costs as it relates to what we will allow to be  
2     recovered in the lease payment, and if that is clear in the order, I think it is clearly within  
3     our authority to do that. The thing I do have a problem with is the selection of the chief  
4     operating officer or drafting of the articles of incorporation. I'm having difficulty  
5     understanding how we could finesse that one quite frankly.

6             MR. SIMMONS: Commissioner the parties would agree that if you want to limit  
7     your order so that you aren't required to approve the selection of the chief operating  
8     officer or the articles of incorporation we'll be happy with that.

9             COMMISSIONER CLARK: OK.

10            MR. SIMMONS: But we do want you to retain the oversight function as it relates  
11     to the contract for construction of this facility and the cost associated with it, because in  
12     the final analysis, you are going to be setting rate, that we can charge and we think that  
13     that's within your jurisdiction.

14            COMMISSIONER CLARK: I think it should,... the way it should work is the way  
15     contracts with the cogenerators work, if your not allowed the recovery of the expense,  
16     if we review it and determine it, it's imprudent then, that in affect is an arbitration of the  
17     dispute, as to whether it is prudent or not. If its not allowed, then its not prudent.

18            MR. JACK SHREVE: And as far as your involvement with a plan or a facility owned  
19     by a nonprofit corporation, I don't see that that has that much to do with it, you've  
20     already approved millions of dollars to be collected by Florida Power & Light to lease a  
21     plant that is going to be owned by Venezuela and if we have any problems with any of  
22     that or the operation of the plant or any of the money or anything, we're going to come

1 right back to this Commission. So, I think you do have jurisdiction, you ordered that this  
2 facility be built and just because it's now going to be owned by a different entity, the  
3 reason for this facility being built is that you ordered it and so I just don't see that logic  
4 there, because you're sitting out there with Venezuela holding a plant.

5 MS. JABER: No, I don't... we didn't order the nonprofit corporation scenario, I  
6 think that in your proposed agency action, and Ms. Chase can correct me if I'm wrong,  
7 you approved a conservation plan that contemplated the utility constructing those  
8 facilities and I can tell you with the modifications and clarification from Mr. Simmons that  
9 that would probably work. If you want to, uh, limit .....

10 COMMISSIONER CLARK: Well the fact of the matter is we will review the contract  
11 and the correct cost before we allow it to be recovered in the surcharge, right?

12 (Simultaneous conversation)

13 COMMISSIONER CLARK: I apologize for sort of, I may be mixing - you all have  
14 dealt with this every day and I may be mixing terms, but it seems to me .....

15 MS. JABER: Before the release of the escrow funds we'll take a look at those  
16 expenses.

17 COMMISSIONER CLARK: The escrow funds?

18 MS. JABER: That's correct.

19 COMMISSIONER CLARK: And we will look at that, and that is clearly within our  
20 authority to do?

21 MS. JABER : That's correct.

22 COMMISSIONER CLARK: O.K.

1           COMMISSIONER CLARK: Can you write the order that way, that says that we  
2 approve the stipulation with the understanding that the resolutions of the disputes  
3 concerning contract design and reasonableness of costs flow from the fact that we will  
4 have to, ah, approve them.

5           MS. JABER: Right.

6           COMMISSIONER CLARK: As being prudent expenses when we authorized the  
7 release of the escrow funds.

8           MS. JABER: And do you want it clarified that we are not going to tell them  
9 specifically how to build it?

10          COMMISSIONER CLARK: Um, what I see, I think they would have a concern that,  
11 um, they need to have some assurances that what they're doing is OK, before they spend  
12 the money and not, um, is there anything wrong with prior approval?

13          MS. JABER: That's the part that we have never done before. I don't see though  
14 that there is anything wrong with on an informal basis talking to staff before they...

15          COMMISSIONER CLARK: I'm trying to think that when we have companies, utility,  
16 water and wastewater companies that are sometimes in distress we do perhaps venture  
17 into the management a little bit more than we would in another company and we will  
18 look at what their planning to do ahead of time to let them know, um, it looks  
19 reasonable. I don't know whether we've ever done that on a formal basis or how we've  
20 accomplished that, but I, it sure seems to me that we have done it especially when they  
21 are in some financial distress and they aren't going to get loans they need unless they  
22 have the assurances that cost for the facility is going to be allowed in rates, help me out.

1           MR. WILLIS: Commissioner I really don't think there's a problem.

2           COMMISSIONER CLARK: What?

3           MR. WILLIS: I don't think there's a problem reviewing something prior to the  
4 disposition taking money out of an escrow account.

5           COMMISSIONER CLARK: Okay.

6           MR. WILLIS: If you got a utility out there whose expecting us to release funds and  
7 we've done this for St. George Island. We haven't done it that far in advance but the  
8 Commission by way of its orders had told St. George Island exactly what to do.

9           COMMISSIONER CLARK: Okay.

10          MR. WILLIS: They didn't actually approve the cost of those things but we did it at  
11 a point and time where the funds were extracted from the escrow account. I see no  
12 problem with this Commission looking at the cost of the facilities ahead of time because  
13 we have the expertise here to do that and look at the prudence of those cost and inform  
14 somebody at that point in time what we might recommend or bring it to the Commission  
15 and let the Commissioners decide.

16          COMMISSIONER CLARK: Okay and they could ask for declaratory judgement as to  
17 whether or not if you had some concerns about it you could indicate your concerns and  
18 I suppose that they could ask for a declaratory judgement.

19          MR. WILLIS: That's correct.

20          COMMISSIONER CLARK: Saying before we make a move to invest this we want to  
21 know whether under your order this would be considered a prudent cost to be recovered  
22 through the release of escrow funds, how about that.

1           MS. DAVIS: Commissioner, the only case that I can recall on the water and sewer  
2 area where, I think it was Deltona Lakes...

3           MR. WILLIS: Florida Cities, there was a Florida Cities' order.

4           MS. DAVIS: No, no, no.

5           MS. DAVIS: It wasn't Florida Cities it was a golf course I think around the Deltona  
6 area and they wanted prior approval before they went into some construction program  
7 and the Commission said we won't give you prior approval but we will tell you when you  
8 come in for recovery whether those costs were prudent, and there's a big difference  
9 between approving a construction project up front and approving the expenses for  
10 prudence when they seek recovery. For the distress companies we will give them  
11 proforma expenses up front if they have a contractor commitment on the construction  
12 project. But again, that's for a distress utility, which this is not, and there is no nonprofit  
13 entity involved in those other types of situations. But I think I agree with Mr. Willis, an  
14 informal look at what they are contemplating would not be inappropriate, but I think  
15 coming to the Commission for prior approval before they expend those funds would be  
16 something new.

17           COMMISSIONER CLARK: But let me ask the question though, if Staff looked at it  
18 and have some concerns about it and indicated that they didn't think that this was an  
19 appropriate way to go about it. Could the company come in and through a declaratory  
20 statement say before we spend, we move on our lease with this company or this non-  
21 profit entity, we want to be assured that we're going to be able to get the release of the

1 funds from escrow. Isn't that what a declaratory statement is? What are my rights and  
2 obligations under the order that we would issue in this case?

3 MR. WILLIS: Commissioners, I know I'm not a lawyer, but I will tell you that there  
4 was a Florida Cities' order back in 1981 I believe which was a declaratory statement. The  
5 utility came in and requested given certain facts whether the Commission would approve  
6 the construction of a larger wastewater treatment plant where the utility plant was going  
7 to build something in the order of a 5 million gallon wastewater treatment plant the  
8 declaratory statement was whether the Commission would treat it as a 3.5 looking at the  
9 cost.

10 COMMISSIONER CLARK: Ah hum.

11 MR. WILLIS: And the Commission did consider that in a declaratory statement  
12 given facts. Now when the utility came in for the rate case they decided the facts had  
13 changed and therefore the Commission decision had to treat that change, but there has  
14 been such a thing like that in the past.

15 COMMISSIONER CLARK: Mr. Pruitt, do you have any advice.

16 MR. PRENTICE PRUITT: Madam Chairman, my main concern is that you're dealing  
17 with an unregulated utility and concern is further is that your authority is limited to  
18 regulating public utilities and the Staff cited one of my blue book cases in its  
19 recommendation as legal staff, but didn't tell you exactly what the court said and that's  
20 Swabilius vs. Florida Industry Licensing Board 367 So.2d.1069. Court there said that  
21 administrative agency may not enlarge its jurisdiction nor may it have jurisdiction  
22 conferred upon it by agreement or consent of the parties. And if you don't regulate this

1 utility after this order is entered, you don't have the jurisdiction or authority to approve  
2 anything they do or don't do.

3 COMMISSIONER CLARK: Well let me ask the question this way, if this corporation  
4 is going to build a facility that it then leases to the utility and it is the lease payments that  
5 we are going to have to look at in terms of authorizing release of escrow funds. When  
6 we authorize the release of those escrow funds to pay the lease, do we have the authority  
7 to look at whether or not cost included in the lease are prudent?

8 MR. PRUITT: I'll try to answer the question with a question. Who in this scenario  
9 are we regulating? Rates and service.

10 COMMISSIONER CLARK: We would be regulating the rates and service of the  
11 lessee.

12 COMMISSIONER JOE GARCIA: It's whether the expenditures are prudent, I think  
13 we do that in distress cases when we have escrow accounts. You were trying to be a little  
14 bit creative here and what's been done here is something I'm sure we're stretching the  
15 bounds a little bit, but there is nothing wrong with that. I mean we should push the  
16 edge here because I think maybe we've come up with an innovated way to solve a problem  
17 that we're having statewide and that we are going to continue to have, and no good deed  
18 goes unpunished, and we may be back here very soon, but clearly what's been done here  
19 is amazing, and before I move on I want to make sure, are we after the changes do we  
20 just, is primary exceptable to everyone?

21 MR. SIMMONS: With the changes that we've talk about, I think it makes both of  
22 them pretty much the same, but let me see if I can't address this point because I think



1 that the Legislature has answered the question for us. If you look at the language that  
2 is contained in 367.0817 subparagraph 4, which is the reuse statute itself, it says the  
3 Commission's order approving the reuse project plan shall approve rates based on  
4 projected cost and shall provide for the implementation of rates without the need for  
5 subsequent proceeding. It sounds to me like that has to be on the front end. I mean you  
6 have no other choice, and then it goes on in the same paragraph to talk about  
7 authorizing and even ordering the utility to escrow the funds. The only distinction that  
8 we have between the utility doing this all on its own and not is that we have this non-  
9 profit corporation we've interposed in here for tax reasons.

10 COMMISSIONER CLARK: That's a big difference.

11 MR. SIMMONS: But the utility is building this facility.

12 COMMISSIONER GARCIA: And you're regulating the utility on the expenditures on  
13 this facility, on this issue.

14 MR. SIMMONS: Yes, you are. Exactly and the utility is going to be coming to you  
15 and asking you for a rate based on the expenditure of this facility.

16 COMMISSIONER GARCIA: Whether that expenditure is appropriate or not?

17 MR. SIMMONS: Exactly, and then we're going to be wanting to operate it and the  
18 cost of operation is going to be directly attributable to what it cost to build and of course  
19 the rate that you give us, and the tax consequences of that, so you have to do it by this  
20 statute.

21 COMMISSIONER GARCIA: I don't think there is a choice.

1           MS. JABER: May I try and clarify something I realize that this has always been a  
2 bone of contention between staff and the parties. 367.0817 was enacted after this project  
3 was filed by the parties in front of the Commission. 367.0817 even if you were to look  
4 at it doesn't confer any kind of jurisdiction regarding these matters.

5           COMMISSIONER CLARK: It is nonjurisdictional isn't it?

6           MS. JABER: Right, and third it is not the utility that is constructing these facilities  
7 its the surcharge that has been collected by the utility customers but it is this non-profit  
8 entity that's constructing the utility.

9           MR. SIMMONS: No it is not. It is the utility, if you read the stipulation the utility  
10 is building this facility and we're going to contract to do that.

11           MS. CHASE: Commissioners, I think the important piece that maybe is getting lost  
12 is that the surcharge is collected from Sanlando's customers and that the Commission will  
13 be releasing the funds to build it and that's where the technical Staff...

14           COMMISSIONER GARCIA: We will be releasing the funds to the utility so that they  
15 can build this plant which will be a non-profit, but clearly they are going to be leasing,  
16 they are going to managing and let me make a motion here cause I have no idea what  
17 to move anymore whether primary or alternative, are they both one and the same at this  
18 point now, after the changes?

19           COMMISSIONER CLARK: No.

20           MS. JABER: No, they are not one and the same. I think what you've heard the  
21 parties and staff say is we're all in agreement over the primary with the changes.

22           COMMISSIONER GARCIA: Is that correct?

1 MR. SIMMONS: Let me see if I can understand what the changes were. What we  
2 said was if you limited the primary to not reviewing the appointment of the executive  
3 officer and the approval of the articles of incorporation we would be happy with the  
4 primary.

5 COMMISSIONER GARCIA: Okay, well that's exactly what it says, correct, with that  
6 limitation.

7 MS. JABER: Well I think there is that clarification about looking at the prudence  
8 of the expenses when we're releasing the escrow funds.

9 COMMISSIONER GARCIA: There's a problem in that?

10 MS. JABER: No.

11 MS. JABER: No, I'm just saying that that was the second, that was the third change  
12 and we're all happy with that.

13 COMMISSIONER GARCIA: Okay, so I'm gonna before I move primary.

14 COMMISSIONER CLARK: Just a minute, Ms. Chase do you want to make a  
15 comment.

16 MS. CHASE: Well I just don't think that that's a change, I think the only change  
17 was made [from the revised stipulation] is that we're not going to be looking at the chief  
18 operating officer, or the articles and by-laws.

19 COMMISSIONER GARCIA: Exactly.

20 COMMISSIONER CLARK: O.K.

21 COMMISSIONER JOHNSON: But we will look at the prudence of expenses  
22 associated with the construction of the facilities.

1           MS. CHASE: Yes, we were, right the alternative recommendation we were going  
2 to look at that anyway. So that's no change in our [technical staff] recommendation  
3 [alternative recommendation].

4           COMMISSIONER CLARK: And its going to be pursuant to our authority over the  
5 utility to make sure that expenses charged to customers are reasonable and the way this  
6 expense is being recovered is through the release of escrow funds and to the extent we  
7 have that responsibility we will be looking at the reasonableness of contracts for design,  
8 permitting a construction of the facility and the cost and expenses occurred in operating  
9 the facility.

10          MS. JABER: That's correct.

11          COMMISSIONER GARCIA: Okay, I'm going to move a primary and congratulate all  
12 of you for doing this this is in God's work hopefully it will work our properly in the end,  
13 but this is fantastic that we are and I thank Staff for being so willing to work with Public  
14 Counsel and the company in this.

15          COMMISSIONER CLARK: Is there a second?

16          COMMISSIONER JOHNSON: Second.

17          COMMISSIONER CLARK: Show item 23 approved without objection with those  
18 modifications. Is there anything further we need to (END OF TAPE).