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Public Service Commission

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COMMISSION
CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: February 10, 2011

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Jones-Alexis, Fletcher, Kaproth, Maurey, Prestwood, Slemkewicz) *AS*
Office of the General Counsel (Williams, Crawford) *AW*

RE: Docket No. 100400-WU – Investigation of rates of O&S Water Company, Inc. in Osceola County for possible overearnings.

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Docket No. 100440-WU – 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.

County(ies): Osceola

AGENDA: 02/22/11 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\100440.RCM.DOC

Case 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'

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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 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, the Commission approved the initiation of a formal overearnings investigation of the Utility. Staff's 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. The Utility was authorized to continue collecting its previously authorized rates, provided that \$50,961 would be held subject to refund. The Commission 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, the Commission 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 recommendation 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 address staff's recommendation regarding the resolution of O&S' pending

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.

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.

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overearnings investigation. The Commission has jurisdiction pursuant to Sections 367.071, 367.081, and 367.022(2), Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission acknowledge the transfer of O&S' water facilities and territory to TWA as a matter of right and cancel Certificate No. 510-W?

Recommendation: Yes. The Commission should acknowledge the transfer of O&S' water facilities and territory as a matter of right pursuant to Section 367.071(4)(a), F.S., and cancel Certificate No. 510-W effective December 8, 2010. (Jones-Alexis, Kaproth, Williams)

Staff Analysis: 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 regulation by the Commission as a governmental authority, in accordance with Section 367.022(2), F.S.⁷ Pursuant to Section 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. Staff has 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 in the Case Background, 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 the Commission's approval of the application. On November 30, 2010, 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.

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.

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

Staff recommends that the Commission 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.

Issue 2: Should the Commission initiate an overearnings investigation of O&S, as ordered in Order No. PSC-10-0656-FOF-WU in Docket No. 100400-WU?

Recommendation: No. If the Commission acknowledges the transfer of O&S to TWA and cancels Certificate No. 510-W, the Commission should close the overearnings investigation of O&S as initiated by Order No. PSC-10-0656-FOF-WU, and any funds held subject to refund should be released to the Utility. (Fletcher, Williams)

Staff Analysis: The Commission voted to open a formal overearnings investigation of O&S on October 12, 2010.⁸ Although the Commission authorized the Utility to continue collecting its previously authorized rates, it ordered that \$50,961 be held subject to refund under an appropriate security pending resolution of the overearnings investigation. Before the Commission 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.

As noted in Issue 1, the sale of a utility to a governmental authority shall be approved by the Commission as a matter of right pursuant to Section 367.071(4)(a), F.S. In addition, once the Commission approves the transfer, the Utility will be exempt from Commission 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 the Commission loses 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 The Commission also retains jurisdiction over other matters arising prior to approval of a transfer to an exempt or non-regulated entity.¹⁰ Accordingly, the Commission has jurisdiction to proceed

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.

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 the Commission's acknowledgement of the sale in no way relieved the utility of its responsibility to perform whatever refund the Commission determined was appropriate for the period of service rendered while the utility was under the Commission's 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 the Commission had continuing jurisdiction to enforce its 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 the Commission maintains jurisdiction to pursue collection efforts of delinquent regulatory assessment fees, although utilities were no longer subject to the Commission's regulatory jurisdiction).

¹⁰ Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995) (holding that the Commission 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 the Commission had jurisdiction to conclude an overearnings investigation, although the Commission 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

with the overearnings investigation of O&S and to require refunds to the Utility's customers, in the event the Commission determines that refunds are warranted.

However, staff does 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 the Commission's decision to initiate a formal overearnings investigation of O&S to the closing date of the sale of O&S to TWA, staff has calculated that the total approximate amount of possible overearnings over which the Commission has jurisdiction is \$11,829. Recognizing the Commission practice of allowing regulatory commission expense in overearnings investigation cases,¹¹ staff believes 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 staff's discovery requests. In the most recent rate case for Utilities, Inc. of Florida (UIF), for example, the Commission allowed total rate case expense of \$16,824 for UIF's Marion County water system, wherein the Commission also lowered the rates for that system.¹² In light of the sale of O&S' water system to TWA, the Commission does not have jurisdiction to lower TWA's rates as it did UIF's rates in the UIF rate case.

Accordingly, if the Commission acknowledges the transfer of O&S to TWA and cancels Certificate No. 510-W, staff recommends that the Commission close the overearnings investigation of O&S as initiated by Order No. PSC-10-0656-FOF-WU and that any funds held subject to refund be released to the Utility.

noting that the Commission 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 the Commission 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 the Commission's jurisdiction).

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.

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Issue 3: Should Docket Nos. 100400-WU and 100440-WU be closed?

Recommendation: Yes. If the Commission approves staff's recommendations in Issues 1 and 2, Docket Nos. 100400-WU and 100440-WU should be closed, as no further action is required. (Williams)

Staff Analysis: If the Commission approves staff's recommendations in Issues 1 and 2, the docket should be closed, as no further action is required.