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ORIGINAL

January 21, 2003

Tim Devlin
Director of Economic Regulation
Florida Public Service Commission
2540 Shumard Oaks Boulevard
Tallahassee, Florida 32399-0850

Re: Joint Comments of Collier County and Charlotte County on PSC current and continuing jurisdiction on proposed sale of Florida Water Services Corp. to Florida Water Services Authority 021066-WS

Dear Mr. Devlin:

Attached are the joint comments of Collier County and Charlotte County in response to your December 20, 2002 Memorandum requesting comments "as to the Commission's current and continuing jurisdiction over the proposed sale and the FWSA," which I am filing on behalf of Collier County and John Marks, Special Counsel to Charlotte County on this matter.

Sincerely,

Michael B. Twomey
Special Counsel to
Collier County Government

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cc: Collier County

Collier Comments to Florida Public Service Commission.wpd

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the proposed sale)	Docket No. 021066-WS
of **Florida Water Services Corporation**)	Submitted: 01/21/03

JOINT COMMENTS OF COLLIER COUNTY AND CHARLOTTE COUNTY

Pursuant to the December 20, 2002 Tim Devlin Memorandum requesting comments "as to the Commission's current and continuing jurisdiction over the proposed sale and the FWSA," below are the joint comments submitted by Collier County and Charlotte County.

Executive Summary

The Florida Water Services Authority (the "Authority") is not a governmental authority as defined by Sections 367.021(7) and 367.071, Florida Statutes, and, thus, is not entitled to the transfer of Florida Water Service Corporation's (the "Utility") certificates of authorization as a matter of right. Consequently, the Florida Public Service Commission ("Commission") must hold a Chapter 120, Florida Statutes, hearing to consider and to make a determination that the transfer is in the "public interest."

The Authority will not be exempt from Commission jurisdiction pursuant to 367.022(2), Florida Statutes, but appears to be exempt from jurisdiction pursuant to Section 163.01(7)(g)1.

Preface

All administrative bodies, including this Commission, created by the legislature are simply creatures of statute and their powers, duties, and authority are those and only those that are conferred expressly or implicitly by statute of the state. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493 (Fla. 1973). The Commission's powers are strictly limited to those described in its authorizing legislation and any reasonable doubt as to the lawful existence of a particular power that is being exercised is resolved against the exercise of that power. Id. at 3. In short, the Commission can only do those things that are clearly described in the statutes, or those things which are necessarily implicit from the statutory law. The Commission can do no more than authorized by law, but, on the other hand, must do those things it is mandated by the statutes to accomplish.

Another, perhaps obvious, but too often overlooked, foundation of our laws and our forms of government is that we seek to hold our leaders, whether they be at the national, state or local levels, politically accountable for their actions. This accountability has existed for the most part in Florida utility regulation, but it may be completely lost if the Utility's certificates are transferred to the Authority without a prior determination from this Commission that the sale and transfer are in the "public interest."

The crux of Collier County's and Charlotte County's comments are that they believe this Commission does not have the statutory authority to grant an automatic transfer of the certificates of the Utility to the Authority, or any other interlocal authority established pursuant to Chapter 163, Florida Statutes, because the Authority is not a "governmental authority" within the meaning of Sections 367.021(7) and 367.071, Florida Statutes. If the Authority is not a "governmental authority," then the Commission must hold an evidentiary hearing and determine that the transfer is in the "public interest" and that the "buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility," pursuant to Section 367.071(1), Florida Statutes. Furthermore, the Authority is not politically accountable to a single one of the over 250,000 customers served by Florida Water Services Corp. since the Authority's members are appointed by the city commissions of the City of Gulf Breeze and the City of Milton, neither of which municipality contains a single Florida Water Services Corp. customer account and both of which are at least 100 miles to the west of the nearest Florida Water Services Corp. facility in Washington County. Additionally, Collier County has pled in litigation filed in both Santa Rosa and Orange Counties that it is unconstitutional for the Authority to attempt to unilaterally take powers granted to other Florida governments. Lastly, Collier County and Charlotte County would suggest to this Commission that the better course of action would be for it to prohibit the Utility from selling its assets and attempting to transfer its certificates until after the Utility makes application to this Commission for such a transfer and until after the Commission has approved such an application.

Issue 1. Is the FWSA a "governmental authority" as defined by Section 367.021(7), Florida Statutes?

Collier County's and Charlotte County's Position: No, the FWSA is not a "governmental authority."

Not all Florida "governments" are "Governmental Authorities"

Florida Water Services Corp. holds certificates of authorization, either from this Commission, or from several non-jurisdictional counties, permitting it to operate some 150 water and wastewater facilities in at least 26 Florida counties. If it wishes to divest itself of these systems, as it has said it will, it must first obtain the statutory approval of this Commission for those systems in counties under Commission jurisdiction. The statutory provision requiring such approval is Section 367.071, Florida Statutes. This law provides a rather straight forward two-track methodology for the sale, assignment, or transfer of certificates of authorization under the Commission's jurisdiction. The first track requires that the sale, assignment, or transfer of Commission granted certificates can only be made with the "determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility." Section 367.071(1), F.S. The actual sale, assignment, or transfer of the certificates may occur prior to Commission approval, but only if the contract for sale, assignment or transfer is made contingent upon commission approval. Section 367.071(1), F.S. It is clear that such a sale, assignment or transfer, if challenged, must be approved through an evidentiary hearing conducted by the Commission in which persons substantially affected by the proposed sale, assignment, or transfer have an opportunity to participate and protect their interests through the processes

afforded by Chapter 120, F.S.

Not all sales, assignments or transfers of certificates of authorization require a Commission determination that they are in the public interest and that the buyer, assignee or transferee will fulfill the commitment, obligations and representations of the utility. Specifically, Section 367.071(4), F.S. provides that sales to a "governmental authority" shall be approved as a matter of right. This subsection reads in its entirety as follows:

> (4) An application shall be disposed of as provided in s. 367.045, except that:
>
> (a) The sale of facilities, in whole or part, to a governmental authority shall be approved as a matter of right; however, the governmental authority shall, prior to taking any official action, obtain from the utility or commission with respect to the facilities to be sold the most recent available income and expense statement, balance sheet, and statement of rate base for regulatory purposes and contributions-in-aid-of-construction. Any request for rate relief pending before the commission at the time of sale is deemed to have been withdrawn. Interim rates, if previously approved by the commission, must be discontinued, and any money collected pursuant to interim rate relief must be refunded to the customers of the utility with interest.
>
> (b) When paragraph (a) does not apply, the commission shall amend the certificate of authorization as necessary to reflect the change resulting from the sale, assignment, or transfer.

On the surface, the uninitiated might wrongly conclude that the exception provided by Section 367.071(4), F.S. was applicable to any form of "government" within the State of Florida. However, that is clearly not the case inasmuch as the Legislature went to some effort to specifically define which governments were entitled to the exemption from the "public interest" determination. The rules of statutory construction hold that when clear, express exceptions are made in a statute, there is a strong inference that no other exceptions are intended, nor will other exceptions be implied where the words of that statute are not ambiguous. State Road Department v. Joseph V. Levato, 192 So.2d 35 (Fla. 4th DCA 1966). Specifically, at Section 367.021(7), F.S. the statute strictly defines a "governmental authority" as follows:

> (7) "Governmental authority" means a political subdivision, as defined by s. 1.01(8), a regional water supply authority created pursuant to s. 373.1962, or a nonprofit corporation formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility.

If the Authority qualifies as a "governmental authority" under any of the three enumerated governmental bodies, then it is entitled to a certificate transfer as a matter of right. If it does not so qualify, then the transfer must be preceded by the Commission's public interest determination. An examination of the governmental authority definition clearly discloses that the Authority is not a "governmental authority" and, thus, not entitled to a certificate transfer as a matter of right.

The FWSA is not a political subdivision as defined by 1.01(8)

Section 1.01, F.S. includes definitions to be used in connection with all Florida Statutes. Section 1.01(8), F.S. states as follows:

1.01 Definitions.—In construing these statutes and each and every word, phrase, or part hereof, where the context will permit:

(8) The words "public body," "body politic," or "political subdivision" include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.

Under this definition, counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state would qualify as a "governmental authority" pursuant to Sections 367.071(4) and 367.021(7), F.S. and be entitled to a transfer as a matter of right. The Authority does not meet any of the definitions delineated above. It is not a "county," not a "city," not a "town," not a "village," not a "special tax school district," not a "special road and bridge district," not a "bridge district," and not an "other district." Understanding the plain and common meaning of the term "district," the dictionary defines it as "a territorial division (as for administrative or electoral purposes)...section with a distinguishing character." Webster's Ninth New Collegiate Dictionary (1986) at 368. Legally it is defined as "one of the territorial areas into which an entire state or country, county, municipality, or other political subdivision is divided, for judicial, political, electoral, or administrative purposes." Deluxe Black's Law Dictionary, 6th ed. (1990) at 476. The Authority is not representative of any of these things. As its name states, the Authority is an interlocal "authority" created pursuant to Chapter 163, F.S. It is not a "district" of any kind.

There are statutory creatures known as "water and sewer districts," but they are created pursuant to Chapter 153, F.S. and may be created only by counties. Tellingly, Chapter 153, F.S. provides a host of notice and due process procedures counties must follow when attempting to establish a Chapter 153 water and sewer district, none of which were observed by the Authority in either its formation or several attempts to approve the purchase of the Utility's assets.

The legal bottom line is that the Authority is not "a political subdivision, as defined by Section 1.01(8).

The FWSA is not a regional water supply authority created pursuant to Section 373.1962

The second possible basis for an exemption as a "governmental authority" is if the buyer is a "regional water supply authority created pursuant to s. 373.1962." The Authority is not such a statutory creature.

Section 373.1962, F.S. states, in pertinent part:

373.1962 Regional water supply authorities.—

(1) By agreement between local governmental units created or existing pursuant to the provisions of Art. VIII of the State Constitution, pursuant to the Florida Interlocal Cooperation Act of 1969, s. 163.01, and upon the approval of the Secretary of Environmental Protection to ensure that such agreement will be in the public interest and complies with the intent and purposes of this act, regional water supply authorities may be created for the purpose of developing, recovering, storing, and supplying water for county or municipal purposes in such a manner as will give priority to reducing adverse environmental effects of excessive or improper withdrawals of water from concentrated areas. In approving said agreement the Secretary of Environmental Protection shall consider, but not be limited to, the following:

* * *

(2) In addition to other powers and duties agreed upon, and notwithstanding the provisions of s. 163.01, such authority may:

(a) Upon approval of the electors residing in each county or municipality within the territory to be included in any authority, levy ad valorem taxes, not to exceed 0.5 mill, pursuant to s. 9(b), Art. VII of the State Constitution. No tax authorized by this paragraph shall be levied in any county or municipality without an affirmative vote of the electors residing in such county or municipality.

* * *

(d) Not engage in local distribution.

(Emphasis supplied.) As should be clear even from a cursory examination of Chapter 373, F.S., regional water supply authorities are engaged in "developing, recovering, storing and supplying water for county or municipal purposes," are statutorily prohibited from "engaging in local distribution," are taxing authorities, and must obtain the approval of electors residing in each county or municipality prior to engaging in the taxation. Importantly, the Authority intends to assume the operations of the Utility, which are entirely involved in "local distribution," which is prohibited to water supply authorities. Lastly, the Authority is not a taxing authority and it clearly has not attempted to obtain the approval of the electors, or anyone else for that matter, within the political boundaries in which it proposes to operate.

With respect to the second possible exemption, FWSA is not "a regional water supply authority created pursuant to s. 373.1962."

The FWSA is not "a non-profit corporation formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility."

This provision is clearly intended to encompass non-profit corporations formed by, and serving, counties and municipalities and their water and wastewater customers. The Authority is not such a corporation. To the contrary, the Authority was established by the City of Gulf Breeze

and the City of Milton for the express purpose of making a profit for the respective cities. Specifically, Section 7(B) and (D) of the Interlocal Agreement creating the Authority state:

> Section 7 Facilities and Staff Assistance; Disposition of Surpluses
>
> (B) So long as the Authority shall own or operate any public utilities, the Authority shall establish, levy and collect sufficient rates, fees and charges for the services and facilities thereof to enable the Authority to include in its annual budget, and to pay over to Gulf Breeze, an amount equal to not less than two percent (2%) of the annual gross revenues of such utilities, but in no event less than $1,500,000. Such amount shall be in addition to all amounts otherwise due and payable to Gulf Breeze for services or facilities provided or furnished by Gulf Breeze to the Authority. It is hereby acknowledged and agreed that the obligation of the Authority to transfer any such annual amount to Gulf Breeze shall be payable from the net revenues of such project, after provision has been made for reasonable costs of operation, maintenance capital improvement programs of the Authority, and junior and subordinate to the payment of all bonded indebtedness of the Authority secured by any portion of such net revenues.
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> * * *
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> (D) Gulf Breeze hereby agrees to promptly remit to Milton twenty percent (20%) of all amounts received by Gulf Breeze from the Authority pursuant to the Subsection 7(B) hereof; provided that computation of the portion due to Milton hereunder shall not take into account the portion of any such transfers from the Authority constituting (i) amounts received by Gulf Breeze for the provision of services, properly allocable administrative overhead, or the sale of assets, to the Authority, and (ii) amounts described in subsection 7(C) above, and (iii) amounts distributed by Gulf Breeze to other public agencies for the purpose of maintaining good will in the operation of the utilities of the Authority.

As should be apparent from these provisions of the Interlocal Agreement, the rates and charges the Authority imposes on its customers must include a minimum profit of no less than $1,500,000 per year, which amount may easily be larger when calculated as 2 percent of the annual gross revenues of the utility systems. Note that this amount to the cities is in addition to reimbursement to them for the provision of services, administrative overhead, or the sale of assets. This minimum of $1,500,000 per year is a profit to the cities, of which the dominant city, City of Gulf Breeze, retains 80 percent.

The FWSA is not "a non-profit corporation formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility.

Conclusion as to first question

The Authority is not a "governmental authority" as defined by Section 367.021(7), Florida Statutes, and, consequently is not statutorily eligible for a transfer of the Utility's

certificates of authorization as "a matter of right," as is allowed for real, qualifying "governmental authorities" pursuant to Section 367.071, Florida Statutes. As a result, if the Authority is to obtain a transfer of the Utility's certificates, as it must if it is to legally operate the system and if the Utility is to legally sell the systems, such a transfer must be as the result of a "determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility," pursuant to Section 367.071(1), F.S.

Issue 2. Is the FWSA exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes?

Collier County's and Charlotte County's Position: No, the FWSA is not exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes, however, it does appear to be exempt from Commission regulation pursuant to a different statutory provision, namely Section 163.01(7)(g)1.

Section 367.022(2), Florida Statutes is inapplicable

Section 367.022(2), Florida Statutes, quite simply provides exemptions from Commission jurisdiction and regulation to those same bodies otherwise entitled to transfers of certificates of authorization as "a matter of right" pursuant to Sections 367.021(7) and 367.071, Florida Statutes, as well as to facilities operated by "private firms under water or wastewater facility privatization contracts as defined in s. 153.91." The Authority is none of these.

Section 367.022(2), Florida Statutes, states:

> 367.022 Exemptions.—The following are not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided:
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> * * *
>
> (2) Systems owned, operated, managed, or controlled by governmental authorities, including water or wastewater facilities operated by private firms under water or wastewater facility privatization contracts as defined in s. 153.91, and nonprofit corporations formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility.

In short, and for the reasons stated in response to the first question above, the Authority is neither a "governmental authority," nor "a nonprofit corporation formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility." Likewise, the Authority is not "a water or wastewater facility operated by private firms under water or wastewater facility privatization contracts as defined in s. 153.91." There is no exemption from Commission jurisdiction and regulation pursuant to this provision, but the inquiry should not stop here because the proponents of such interlocal authorities owning and operating water and wastewater systems have taken other less obvious, but apparently still successful, measures to try

to ensure that they are exempt from this Commission's jurisdiction after the sale of assets and transfer of certificates.

Section 163.01(7)(g)1, Florida Statutes, states, in relevant part:

> (g)1. Notwithstanding any other provisions of this section, any separate legal entity created under this section, the membership of which is limited to municipalities and counties of the state, may acquire, own, construct, improve, operate, and manage public facilities, or finance facilities on behalf of any person, relating to a governmental function or purpose, including, but not limited to, wastewater facilities, water or alternative water supply facilities, and water reuse facilities, which may serve populations within or outside of the members of the entity. Notwithstanding s. 367.171(7), any separate legal entity created under this paragraph is not subject to commission jurisdiction and may not provide utility services within the service area of an existing utility system unless it has received the consent of the utility. (Emphasis supplied.)

The above provision is seemingly straightforward and it appears clear that a Chapter 163 interlocal water or wastewater authority, if it legally constructs or purchases such systems, will not be subject to Commission jurisdiction. This provision, with its specific reference to Section 367.171(7), Florida Statutes, appears to meet the requirements of Section 367.011(4), Florida Statutes, which states;

> 367.011 Jurisdiction; legislative intent.—
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> * * *
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> (4) This chapter shall supersede all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. This chapter shall not impair or take away vested rights other than procedural rights or benefits.

Conclusion as to second question

The Authority appears not to be exempt from this Commission's jurisdiction and regulation as a result of the provisions of Section 367.022(2), Florida Statutes, but does, however, appear to be exempt from Commission jurisdiction per the controlling provisions of Section 163.01(7)(g)1, Florida Statutes.

Overall Conclusions

If the Authority legally obtains the certificates of authorization issued by this Commission to the Utility it apparently will be exempt from this Commission's jurisdiction and regulation pursuant to the provisions of Section 163.01(7)(g)1, Florida Statutes. As opposed to the status quo in which all the systems owned and operated by the Utility are regulated either by bodies established by the elected and directly politically accountable commissioners of the non-

jurisdictional counties it operates in, or by this more indirectly politically accountable Commission, the operation, rates and charges and quality of service under the Authority of the some 150 or more systems in at least 26 counties will be left to the complete discretion of three board members appointed by city council members, not one of whom is politically accountable to a single customer of the over 250.000 currently served by the Utility.

This Commission has a statutory responsibility to protect its jurisdiction for the benefit of the citizens of the State of Florida. It is clear, or should be clear, from the discussion above, that the Authority is not a "governmental authority" within the meaning of Chapter 367, Florida Statutes, and that it, therefore, is not entitled to a transfer of the Utility's certificates of authorization as "a matter of right." Given the absence of any provision by which the certificates can be transferred "automatically," this Commission must make a "public interest" determination supporting the sale of assets and transfer of the certificates of authorization. Under the present circumstances, such a public interest determination can only be made at the conclusion of a Chapter 120, Florida Statutes, public hearing, at which substantially affected parties are allowed to appear and present evidence. Since the contract between the Utility and the Authority does not make the sale of the assets and the transfer of the certificates of authorization contingent upon the retroactive Commission approval of a sale of assets provided by Section 367.071(1), Florida Statutes, this Commission must conduct the investigation and make the public interest determination prior to the consummation of the sale and transfer of the assets between these two parties.[1]

To properly exercise its jurisdiction and responsibility to the public, this Commission, faced with the clear intention of these parties not to seek a public interest determination from the Commission at any point, should, on its own motion, issue an order to the Utility, which is still within the clear jurisdiction of the agency, prohibiting it from disposing of any of its regulated assets until after it has made written application for a transfer to this Commission and until after this Commission has made such a public interest determination that the sale of assets is legal.

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[1] 367.071 Sale, assignment, or transfer of certificate of authorization, facilities, or control.—

(1) No utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organizational control without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility. However, a sale, assignment, or transfer of its certificate of authorization, facilities or any portion thereof, or majority organizational control may occur prior to commission approval if the contract for sale, assignment, or transfer is made contingent upon commission approval. (Emphasis supplied.)

Respectfully submitted,

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