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DATE: January 21, 2003
TO: Division of the Commission Clerk and Administrative Services
FROM: Lorena A. Holley, Senior Attorney, Office of the General Counsel *JAM*
RE: Docket No. 021066-WS - Investigation into Proposed Sale of the Florida Water Services Corporation

Please file the attached comments from Sugarmill Woods Civic Association, received in response to Commission staff's request for comments, in the above-referenced docket.

- AUS _____
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- OTH Holley

Done 1/23/03

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January 21, 2003

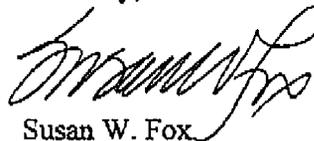
Tim Devlin
Director of Economic Regulation
Florida Public Service Commission
2540 Shumard Oaks Boulevard
Tallahassee, Florida 32399-0850

Re: Comments of Sugarmill Woods Civic Association on PSC current and continuing jurisdiction on proposed sale of Florida Water Services Corp. to Florida Water Services Authority

Dear Mr. Devlin:

Attached are the comments of Sugarmill Woods Civic Association 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."

Sincerely,



Susan W. Fox
Counsel to Sugarmill Woods Civic Assoc.

SWF/cc

cc: Sugarmill Woods Civic Assoc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**IN RE: Docket No.: 021066-WS
 Investigation into Proposed Sale of Florida Water Services Corporation**

COMMENTS OF SUGARMILL WOODS CIVIC ASSOCIATION

Florida Water Services Corp. ("FWSC") proposes to sell its 150 plus utility systems serving some 250,000 Florida households to Florida Water Services Authority ("FWSA"), an interlocal agency comprised of two small communities in the Florida Panhandle, both of which are more than 100 miles from the nearest FWSC utility system. Most of the utility systems are 400 to 600 miles away. FWSA has no assets and no track record for running a utility system, but plans to make a profit of about \$2 million annually, which it will pay to its members, the towns of Gulf Breeze and Milton. FWSC has applied neither to the PSC nor to any county regulatory agency for approval of the sale, nor has it made the sale contingent on such approval.

Many of the counties affected by this transfer, specifically, Collier, Hernando, Citrus, Hillsborough and Flagler Counties, have excluded themselves from PSC jurisdiction pursuant to Section 367.171, Florida Statutes, and thus have retained all powers that the PSC would have under Chapter 367, including the power to approve any sale. Some counties have specific ordinances expressly requiring county approval prior to any sale. FWSC has not applied for approval under these ordinances.

Florida Statutes, Section 367.071, entitled "Sale, assignment, or transfer of certificate of authorization, facilities, or control," provides:

(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.)**

In this statute, "the Commission," refers to the Florida Public Service Commission ("the PSC"), however, where counties have retained regulatory authority, "the Commission" refers to the county regulatory agency.

The FWSA has contended it is a "governmental authority" exempt from PSC or county approval under section 367.071(4), which provides: "The sale of facilities, in whole or part, to a governmental authority will 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."

While approval of a sale to a governmental agency may be approved "as a matter of right" (i.e., without the need for fact findings concerning the public interest) the seller must still obtain the PSC's (or self-regulating county's) approval for the sale. The approval process allows the PSC or county regulatory authority to determine whether the buyer is a bona fide governmental authority.

Under Section 367.011(7), "governmental authority" is limited by definition to: (1) "a political subdivision of the state"; "a regional water supply authority under Section 373.1962;" or, "a non-profit corporation formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility."

The FWSA is not "a political subdivision" of the state as that term is defined in section 1.01 (8), Florida Statutes (2002). This term includes only municipalities (i.e., cities, towns, and villages), counties, and districts. As to each of these types of "political subdivision," the Legislature has enacted a specific statute requiring a separate public hearing and public interest determination before a political subdivision can acquire a water or wastewater system. No municipality, county or district may purchase a water or wastewater utility system until it holds a public hearing and makes a finding that the purchase is in the public interest. See §§ 180.301, 125.3401, 189.423, Florida Statutes (2002). These statutes are identical and provide, respectively, "*No [county/municipality/dependent or independent special district] may purchase or sell a water, sewer, or wastewater reuse utility that provides service to the public for compensation . . . until the governing body of the [county/municipality/district] has held a public hearing on the purchase [or] sale and made a determination that the purchase [or] sale is in the public interest.*" The FWSA has taken the position it is exempt from the requirement to hold such a hearing. The FWSA has taken the position it is not a "district" for purposes of compliance with other provisions applicable to "districts," and that Chapter 163 does not require it to comply with the prerequisites applicable to municipalities.

Besides not being "a political subdivision," FWSA does not meet the other criteria to be a "governmental authority" under section 367.011. It is not a regional water supply authority under

Section 373.1962, or “a non-profit corporation formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility.” Here, FWSA’s members, Gulf Breeze and Milton, will operate the entity for local profit.

Reading section 367.011 together with sections 180.301, 125.3401, 189.423, Florida Statutes (2002) leads to the conclusion that the Legislature intended only to require approval “as of right” to those governmental authorities that must conduct a separate public interest hearing. Only such governmental authorities are exempt from the requirements of section 367.011, because a PSC determination of the public interest would duplicate the authority’s determination.

Moreover, Chapter 163 recognizes that “entities” formed pursuant to interlocal agreement are “separate legal entities” and does not refer to these as governmental authorities. A circuit court in Osceola County has recently determined that an entity acquiring utility systems outside the territorial jurisdiction of its members pursuant to an interlocal agreement under Section 163.01(7)(g), neither acts as a governmental agency, nor serves a public purpose, and thus is not exempt from ad valorem tax. Florida Governmental Utilities Authority v. Day, Case No. CI-00-OC-0237 (Fla. 9th Cir. Ct. August 27, 2002). Rather, such an authority is acting in a non-governmental, proprietary capacity.

Section 367.071 allows the PSC or other county regulatory agency to determine, through the application process, whether the purchaser of a utility system is a “governmental authority.” Neither FWSC nor FWSA have applied for approval of the sale and apparently deem the approval process insignificant. As such, they seem to have no intention of even allowing the PSC to go through the formalities of determining whether approval as of right is appropriate. Such would not even ensure compliance with the requirement that any buyer who is a “governmental authority” obtain the proper

information for setting rates, i.e., most recent available income and expense statement, balance sheet, and statement of rate base and CIAC. These factors are important, because failure of a government entity to consider these facts may result in it paying too much for the system, which will in turn adversely affect the public interest.

During the course of proceedings to determine whether FWSA is a "governmental authority", the customers and affected local governments would have a right to notice and hearing. As such, the failure of FWSC/FWSA to satisfy these requirement for approval pursuant to section 367.071 or to make the contract contingent on such approval deprives interested parties of a substantial level of protection guaranteed by law and renders the sale unlawful.

FWSC has argued that Section 163.01(9)(c) gives FWSA immunity from compliance with Section 367.071. This argument is contrary section 367.011 which states that Chapter 367 "supercede[s] all other laws on the same subject", and that subsequent inconsistent laws will supercede this chapter only when they do so "by express reference." Section 163.01(7)(g)1 provides the only reference to Chapter 367 and states, "Notwithstanding s. 367.171(7), any separate legal entity created under this paragraph is not subject to commission jurisdiction . . ." Section 367.171(7) gives the commission exclusive jurisdiction over utility systems that traverse county boundaries and has nothing to do with the requirements of section 367.071 which prohibits the regulated utility (i.e., FWSC) from performing a prohibited act, i.e., selling the system without commission approval. Chapter 163 does not give an entity created under that chapter specific exemption from Chapter 367.

Section 367.071 *specifically* requires approval by the PSC or county regulatory board of transfers of utility systems, including transfers to municipalities. Specific statutes control over general statutes. *M.W. v. Davis*, 756 So .2d 90, 106 n. 31 (Fla. 2000).



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