State of Florida

ORIGINAL

Public Service Commission

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

DATE: January 22, 2003
TO: Division of Commission Clerk and Administrative Services
FROM: Lorena A. Holley, Senior Attorney, Office of the General Counsel JAH
RE: Docket No. 021066-WS - Investigation into Proposed Sale of Florida Water Services Corporation

Please file the attached comments from Hernando County, received in response to Commission staff's request for comments, in the above-referenced docket.

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Board of County Commissioners

Hernando County

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FACSIMILE TRANSMITTAL

Date: January 21, 2003

To: **Tim Devlin**
Director of Economic Regulation

Fax: 850-413-6401

From: Kent Weissinger

Phone No: 352-754-4122

Reference: Florida Water Services - Docket No. 021066-WS

Pages: 6 (this cover sheet inclusive)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:

Investigation into the proposed sale of **Florida Water Services Corporation** Docket No. 021066-WS

_____/

COMMENTS OF INTERESTED PARTY HERNANDO COUNTY

Pursuant to the request of the Florida Public Service Commission for comments from interested parties to Docket No. 021066-WS, Hernando County submits the following concerns about the matter:

1. When the Legislature defined "governmental authority" is s. 367.021(7), F.S., as "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," it did so in specific contemplation of the overall intent of Ch. 367, as set forth in s. 367.011(3), F.S.: "The regulation of utilities is declared to be in the public interest, and this law is an exercise of the police power of the state for the protection of the public health, safety, and welfare. The provisions of this chapter shall be liberally construed for the accomplishment of this purpose." A "liberal construction" is therefore required for the definition of "governmental authority."

2. The "Florida Water Services Authority" (hereafter, "Gulf Breeze Authority") is not a "governmental authority" within the meaning of s. 367.021(7). It is clearly not a regional water supply authority, and the latest information from the Department of State Division of Corporations shows no such nonprofit corporation existent in Florida. Is it a

"political subdivision?" Section 1.01(8) defines the term as including "counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state." Individually, the members of the Gulf Breeze Authority are two cities. Collectively, they are not "counties, cities, towns, villages," nor does the Gulf Breeze Authority meet any statutory definition of a "district", special or otherwise. See s.189.403(1), F.S. (" 'Special district' means a local unit of special purpose, as opposed to general-purpose, government within a limited boundary"). The Gulf Breeze Authority is not a "local" unit of government, as its authority spans 26 counties and a dozen or more municipalities, encompassing hundreds of thousands of water and sewer service customers, none of whom live within the territorial boundaries of the two member cities. Nor does the Gulf Breeze Authority (unlike its two small member municipalities) have any boundary whatsoever. Strictly reading the definition of "governmental authority," and liberally construing the legislative intent for regulation in the public interest, the Gulf Breeze Authority is not a "governmental authority" for purposes of Ch. 367.

3. In addition, the legislative history of s. 163.01(7)(g), F.S., under which the Gulf Breeze Authority was created, confirms that the Legislature never intended for municipal powers to be extended to authorize entry into interlocal agreements for the acquisition and maintenance of water supply assets by local governments which did not have any assets or customers of the utility to be acquired within their political borders. See Legislative Staff Report for HB 1323, enacted as Ch. 97-236, Laws of Florida. It is clear from the staff report that the Legislature contemplated exemption of s. 163.01(7)(g) authorities from regulation generally only because of the political accountability of the

members of such authorities to the customers of the water and sewer systems to be acquired. The report explained that "...ch. 163, F.S., regulates interlocal agreements, whereby cities or counties enter into agreements to provide services, or share expenses for services which their residents need." [emphasis added]. If the political entity operating a water and sewer system has no direct or indirect electoral accountability to the system's customers, the Legislature did not and could not intend that such an entity be exempt from regulation.

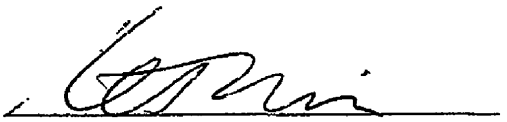
4. The Gulf Breeze Authority's attempted exercise of extraterritorial powers (now being challenged by numerous affected jurisdictions as unconstitutional) serves no public purpose, but rather is clearly intended to enrich the coffers of the member cities. The "governmental authority" exemption from regulation under Ch. 367 contemplates that the exempted authority will serve a public purpose. The exemption has no applicability when a private purpose (operating water and sewer systems for profit) is predominant. In fact, this is the clear intent of Ch. 367's regulatory scheme, to ensure that customers do not bear the brunt of profit-making in the provision of monopoly utility services. The structure of the Florida Water Services/Gulf Breeze Authority transaction itself clearly speaks to the profit motivation, and the Gulf Breeze Authority staff itself has made that motivation clear. See, e.g., e-mail from Richard Lott (Authority bond counsel) to Matt Dannheiser (Gulf Breeze City Attorney), 9/16/02 ("As you know, the objective we are pursuing is to implement a plan to expand the revenue sources of the City without creating liability."); City Council Minutes, City of Milton, 9/17/02 ("The benefit to the city is that this is a profit making company and under the terms of the interlocal agreement 2% of the gross revenue of the corporation, but not less than $1,500,000.00

annually, would be remitted to the City of Gulf Breeze.").

5. The legislative declaration of "public purpose" in s. 163.01(7)(g), F.S., has been squarely rejected by the only court yet to hear and determine the issue. See Florida Governmental Utilities Authority v. Day, Case No. CI-00-OC-0237 (9th Cir., Osceola Co., 8/27/02), in which the court held that "owning and operating a water and wastewater facility to service the citizenry of Osceola County is simply not a valid public purpose for [a governmental utility authority as to which Osceola is not a member]." The court found that there was no exemption from ad valorem taxation in the case. The basic purpose for ad valorem tax exemptions and regulatory exemptions for government entities are sufficiently similar that the regulatory exemption sought by the Gulf Breeze authority should be summarily rejected.

6. Ultimately, the question of legislative intent must turn on political accountability. The Legislature intended that the people themselves, that is, the customers of a utility owned by a true "governmental authority," would have the ability to in effect exercise oversight of any such authority at the ballot box. Absent "ballot box regulation," jurisdiction in either the Public Service Commission or in a local regulatory body, such as Hernando County, was essential to democratic self-government. It is clear and undisputed that the Gulf Breeze Authority, composed of two cities without any customers of the systems it seeks to operate, has no "ballot box regulation," no direct or indirect electoral accountability to the customers, and therefore must be regulated to effectuate the liberally construed legislative intent of Ch. 367, F.S.

Respectfully submitted,



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