

FLORIDA PUBLIC SERVICE COMMISSION

**Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850**

MEMORANDUM

September 12, 1991

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

**FROM: DIVISION OF WATER AND SEWER (CHASE, WILLIAMS) *jc*
DIVISION OF LEGAL SERVICES (BEDELL, DAVIS) *cb***

**RE: UTILITY: KINGS POINT UTILITIES, INC.
DOCKET NO. 910813-WS
COUNTY: OSCEOLA
CASE: PETITION FOR EXEMPTION FROM FLORIDA PUBLIC SERVICE
COMMISSION REGULATION AS A UTILITY BY CITY OF KISSIMEE
AS RECEIVER FOR KINGS POINT UTILITIES, INC. IN OSCEOLA
COUNTY**

**AGENDA: SEPTEMBER 24, 1991 - CONTROVERSIAL - PARTIES MAY
PARTICIPATE - PROPOSED AGENCY ACTION**

CRITICAL DATES: NONE

CASE BACKGROUND

Kings Point Utilities (Kings Point or utility) is a Class C utility which provides water and wastewater service to approximately 155 single family homes in Osceola County. By Order No. 24414 issued on April 22, 1991, in Docket No. 891323-WS, the Commission initiated proceedings to cancel the utility's water and wastewater certificates. This action was taken by the Commission as a last resort with the intention of revoking Kings Point's authority to charge for water and wastewater service. The current owner of the utility, Walter D. Medlin, had repeatedly failed to comply with directives from the Department of Environmental Regulation (DER) and the Commission, as well as a judgment by the Circuit Court for the Ninth Judicial Circuit, all of which involved

DOCUMENT NUMBER-DATE

09096 SEP 12 1991

FPSC-RECORDS/REPORTING

DOCKET NO. 910813-WS
SEPTEMBER 12, 1991

steps needed to correct serious operational and environmental problems with both the water and wastewater systems. The Notice of Revocation was published in the Orlando Sentinel on April 24, May 1 and May 8, 1991, and no objection to the Notice was filed. Therefore, the certificates have been cancelled.

Prior to the cancellation of the certificates, DER filed a motion in the Circuit Court for an order of contempt against Kings Point and petitioned the Court to appoint the City of Kissimmee as receiver of the water and wastewater systems. By order dated April 1, 1991, the Court appointed the City receiver of the utility systems. On July 30, 1991, the City of Kissimmee filed a petition requesting exemption from regulation by the Commission pursuant to Section 367.022, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the City of Kissimmee, as receiver for Kings Point Utilities, Inc., be found exempt from regulation pursuant to Section 367.022, Florida Statutes?

PRIMARY STAFF RECOMMENDATION: No. (BEDELL, DAVIS, CHASE)

PRIMARY STAFF ANALYSIS: Kings Point filed a notice of abandonment in September, 1989. Before the actual abandonment occurred, DER moved the circuit court to enter a contempt order against the utility and appoint the City as receiver. The court found that Kings Point was unable to make the required repairs. The order appointing the City as receiver expressly provides that the City shall, "be authorized to apply to the Florida Public Service Commission for such rate adjustments as are appropriate for the effective operation, management, and control of the Kings Point water and sewer systems...." The circuit court contemplated that the utility would remain regulated by this Commission.

The plain language of the applicable statute Section 367.165, Florida Statutes, indicates that receivers who are political subdivision are no different from other receivers. Subsection 367.165(2), Florida Statutes, provides:

After receiving such notice, the county or counties acting jointly if more than one county is affected, shall petition the circuit court of the judicial circuit in which such utility is domiciled to appoint a receiver, which may be the governing body of a political subdivision or any other person deemed appropriate. (Emphasis supplied)

Subsection 367.165(3), Florida Statutes, provides:

...The receiver operating such utility shall be considered to hold a temporary authorization from the commission, and the approved rates of the utility shall be deemed to be the interim rates of the receiver until modified by the commission.

Even though the statute clearly contemplates that a governmental authority, such as the City of Kissimmee, may be appointed receiver, it does not exclude such a receiver from the temporary Commission authorization provision. Thus, the plain language of the statute clearly supports a finding that a utility does not become exempt by virtue of having a governmental authority appointed as its receiver. The language of the statute indicates the intention for the receiver to stand in the shoes of the former utility owner and continue charging the existing rates until changed by the Commission. Also, on its face, the statute does not contemplate that a governmental authority serving as a receiver will be treated differently from any other receiver.

Superficially, the language in Section 367.022(2), Florida Statutes, seems to conflict with the language of Section 367.165, Florida Statutes, in that it exempts from Commission regulation "[s]ystems owned, operated, managed or controlled by governmental authorities." (e.s.) Exemptions granted pursuant to Section 367.022, Florida Statutes, are presumably intended to be long term, and applicable so long as circumstances remain the same and the utility fits within one of the exempt categories. If such exemptions were not expected to be long term, regulation would be inconsistent and ineffective. Further, when a system is directly operated by a governmental authority, other statutory regulation applies (Chapter 180, Florida Statutes, regulates Municipal Public Works). Chapter 180 does not apply in this receivership because the authority to operate derives from the authority granted by the circuit court.

In further support of this interpretation of the plain meaning of the statute, we can also look at the statutory scheme of utility regulation as a whole. One reason for the exemption of governmental entities in Chapter 367, Florida Statutes, is that the operation of utilities by governmental entities is governed by Chapters 153 and 180, Florida Statutes. Thus, to avoid duplicate or conflicting regulation, the Legislature exempted governmental entities from regulation under Chapter 367, Florida Statutes. However, having removed the operation of utilities by governmental entities from Chapter 367, Florida Statutes, the legislature then proceeded, at a later time, to add back into the regulatory scheme of Chapter 367, Florida Statutes, a provision that a receiver may be a governmental entity. In so doing, the Legislature placed the operation of a utility in receivership by a governmental entity under the authority of Section 367.165, Florida Statutes, and the

jurisdiction of the Commission, while remaining silent as to any exemption for the governmental entity. Therefore, it is reasonable to conclude that in adding this section of the statute, there was no intent to exempt a governmental entity which is appointed receiver for a certificated utility.

The legislative intent expressed in Section 367.011, Florida Statutes, is that Chapter 367, Florida Statutes, should be liberally construed to accomplish the regulation of utilities in the public interest and for the protection of the public health, safety, and welfare. Presumably it is in the public interest for utilities to be regulated with consistency. It would be absurd to allow a situation in which a governmental authority could become receiver for a regulated utility and be exempt from regulation during the receivership, so that it could change rates and be exempt from filing annual reports, and then dispose of the utility by selling it to another private entity, making it subject to Commission regulation again. The Commission would have to deal with rates it had not set during the receivership, and with a gap in annual reports that the receiver had not filed. Regulation would be ineffective because it would be inconsistent and incomplete, and because there is a potential for rates being set based on policies different from the Commission's. Clearly, this is not in the public interest.

In the Petition for Exemption the City states : "Equity would dictate that the Commission relinquish its regulatory authority born in statutory law." It is well established that equity and law have been merged procedurally, and that the state courts have authority over both. In this case, the issue is which of the two provisions in law, i.e. in the statutes, governs the operation of the utility. There is no reason for the Commission to relinquish or abandon its jurisdiction. The Commission's responsibility is to determine the appropriate application of existing law.

In making the recommendation that this utility remain under Commission jurisdiction, Staff does not wish to diminish the importance of the efforts and the costliness of funds expended by the City in attempting to bring this utility into compliance with DER requirements, nor does Staff wish to discourage the City or any other governmental authorities from taking over abandoned utilities. However, Staff believes that the plain meaning of the statute, the legislative intent, and the interest in complete and consistent regulation compel a conclusion that the request of the

DOCKET NO. 910813-WS
SEPTEMBER 12, 1991

City of Kissimmee, as receiver for Kings Point Utilities, Inc., for statutory exemption should be denied.

Based on this conclusion and on the City's immediate need for relief expressed in its filing for price index and pass-through rate adjustments, Staff also recommends that the City file for a staff-assisted rate case and include a request for emergency, interim rates. This proceeding had been recommended to the receiver's counsel prior to the filing of the exemption request.

The regulatory burden discussed by the receiver has been addressed by the Commission in the Three "S" Disposal Company receivership case (Order No. 24189, issued March 4, 1991). There, when the receiver (a non-profit corporation) complained of the annual report requirement, the Commission directed Staff to work with the receiver to compile an abbreviated report containing essential information using estimated figures if necessary, recognizing the limited amount of records the receiver had. Thus, regulatory requirements need not be considered a barrier.

While the alternative recommendation is based on the expediency of the situation, and has good intentions, it is not consistent with the statutory scheme and is a departure from past Commission practice. If the Commission believes such an approach would be desirable, Staff believes a statutory amendment would be necessary to expressly exempt governmental receivers from being temporary holders of a Commission certificate as the statute now provides.

ALTERNATIVE STAFF RECOMMENDATION: Yes. (CHASE, WILLIAMS)

ALTERNATIVE STAFF ANALYSIS: The City of Kissimmee was appointed receiver for Kings Point Utilities, Inc. on April 1, 1991, by order of the Circuit Court of Osceola County. The receivership was a result of a Motion for Contempt filed by the DER with the Circuit Court, not the abandonment of the systems. While, as mentioned in the Primary Analysis, Kings Point had filed a notice of abandonment of its wastewater system only in September, 1989 (Docket No. 891132-SU), the notice was subsequently withdrawn by the utility and the docket was closed. This receivership was initiated by the DER and the City only after repeated efforts by the DER, PSC and the Court to force the owners of the utility to bring the systems into some degree of compliance. The City of Kissimmee had

DOCKET NO. 910813-WS
SEPTEMBER 12, 1991

expressed an interest in obtaining ownership of the systems, which is the reason it is involved in this receivership.

Thus, staff believes this is not the usual type of receivership discussed in the primary analysis, wherein a utility has been abandoned and another utility (or governmental entity) agrees to operate the utility in receivership until it can be disposed of. That type of receivership is clearly addressed in Section 367.165, Florida Statutes (FS), which is titled "Abandonment". In this case, the receivership is the result of a court action due to DER citations and the receiver is the City of Kissimmee which has been working in cooperation with the DER since late in 1989 to obtain ownership of the utility systems.

Since this receivership is not the result of an abandonment, we do not believe the Commission has to first look to the abandonment statute for guidance. Section 367.022(2), FS, provides an exemption for [s]ystems owned, operated, managed, or controlled by governmental authorities" (emphasis added). That exemption is very broad and is the only exemption allowed by the statute which does not contemplate ownership of the system as a requirement for exempt status. In this case, as is expressly provided for in the court order regarding receivership, the City of Kissimmee is operating, managing and controlling the utility. We believe the exemption allowed in Section 367.022(2), FS, can apply in this circumstance. In fact, it is difficult to think of any other scenario wherein a system would be operated, managed or controlled by a governmental authority, but not be owned by it.

As mentioned in the primary analysis, the legislative intent expressed in Section 367.011, FS, is that Chapter 367, FS, should be liberally construed to accomplish the regulation of utilities in the public interest and for the protection of the public health, safety, and welfare. An argument can be made that the public health, safety, and welfare of these utility customers can be protected under the control of the City of Kissimmee and oversight of the circuit court, without the PSC asserting jurisdiction. In fact, the delay and added cost which will result from PSC regulation could hinder the very intent expressed in Section 367.011, FS.

Mr. Medlin, the current owner of Kings Point, as well as the prior owners had allowed the utility systems to deteriorate to such an extent that substantial investment will be required in order to

bring them into compliance with DER standards. The City has been operating the systems and working with DER on a schedule for bringing the systems into compliance or tying the residents into another utility facility.

The City, as receiver, has undertaken a difficult and costly task in attempting to bring these systems into compliance with DER standards and provide safe and adequate service to the customers of Kings Point subdivision. Requiring the City to comply with the Commission's rules and regulations makes the City's task more burdensome, costly and less flexible. For example, the City of Kissimmee, as receiver for Kings Point, has applied for a price index rate adjustment. Pursuant to Commission rule, no utility shall implement such a rate adjustment unless the utility has on file with the Commission a current annual report. Annual reports have not been filed by Kings Point since 1987. In addition, Mr. Medlin has been uncooperative and refused to give the City any records regarding the utility systems. Therefore, the City has no records for the year 1990 or any years previous to that. Completing an annual report for 1990 would be difficult and time consuming, if possible at all.

In addition, the City would not be allowed rate relief under a limited proceeding pursuant to Section 367.0822, FS, to recover the costs it is incurring to improve the utility systems because Kings Point has never filed a rate case and thus the Commission has not established an authorized rate of return. As suggested in the primary analysis, the City would have to file a full staff-assisted rate case and request interim emergency rates. Clearly, requiring the City to undergo a full staff-assisted rate case where the receiver has no utility records for staff to audit, would add to the City's burden as receiver of this utility. Staff does not believe this added burden is necessary in this case. The legislature, in deciding that certain entities should be exempt from PSC regulation, determined that the purposes and objectives of regulation were being adequately met by other means and the safeguards provided by the Commission were not needed. Staff believes the Kings Point systems no longer need the pervasive regulatory oversight of the Commission while under the control of the City and oversight of the court. Thus, no valid public purpose is served by continuing regulation of these utility systems.

Additionally, we believe there would be no harm done in finding the systems exempt from PSC jurisdiction while under the

DOCKET NO. 910813-WS
SEPTEMBER 12, 1991

control of the City of Kissimmee. The utility will remain in receivership until such time as there is a permanent transfer of ownership to the City of Kissimmee or some other potential buyer or until the systems are returned to Kings Point Utilities. As discussed previously, it is highly unlikely that any entity other than the City will be awarded ownership of this utility. However, if ultimate ownership of the utilities is given to some other entity which should be regulated by the PSC, the Commission will be able to assert its jurisdiction at that time. The Commission is on the list of parties in the circuit court case involving the receivership and we will be made aware of the resolution of ownership.

In conclusion, staff believes there may be two legal avenues to go in this case. The alternative recommendation is to look at what is truly in the public interest and best serves the customers of this utility system. For the reasons discussed above, we believe it may be in the public interest to find the City of Kissimmee exempt as receiver of Kings Point.

DOCKET NO. 910813-WS
SEPTEMBER 12, 1991

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. (BEDELL)

STAFF ANALYSIS: Once a determination as to the jurisdictional status of the Kings Point water and wastewater systems is made, no further action is required in this docket and the docket can be closed.

WAS/KINGSPT.JC