

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

ORIGINAL

STEPHEN A ECENIA
RICHARD M ELLIS
KENNETH A HOFFMAN
THOMAS W KONRAD
MICHAEL G MAIDA
MARTIN P McDONNELL
J STEPHEN MENTON

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

R DAVID PRESCOTT
HAROLD F X PURNELL
MARSHA E RULE
GARY R RUTLEDGE
GOVERNMENTAL CONSULTANTS
MARGARET A MENDUNI
M LANE STEPHENS

November 27, 2002

Ms. Blanca Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

HAND DELIVERY

RECEIVED
02 NOV 27 PM 12:38
COMMISSION
CLERK

Re: Docket No. 021128-WS

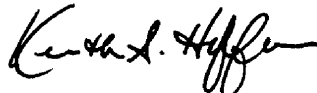
Dear Ms. Bayo:

Enclosed with this letter on behalf of Florida Services Corporation ("Florida Water") are the original and fifteen copies of Florida Water's Motion to Dismiss City of Palm Coast's Petition to Initiate Rulemaking.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance with this filing.

Sincerely,



Kenneth A. Hoffman

KAH/rl
Enclosures
cc: All Parties of Record
021128\Bayo.ltr

Hand - original.

RECEIVED & FILED

R.V.N.
DOCUMENT NUMBER-DATE
FPSC-BUREAU OF RECORDS
1304 | NOV 27 02

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition to Initiate Rulemaking to Amend)
Rule 25-30.041, F.A.C., Application for)
Approval of Transfer to Governmental)
Agency, by City of Palm Coast.)
_____)

Docket No. 021128-WS

Filed: November 27, 2002

**FLORIDA WATER SERVICES CORPORATION'S
MOTION TO DISMISS CITY OF PALM COAST'S
PETITION TO INITIATE RULEMAKING**

Florida Water Services Corporation ("Florida Water"), by and through its undersigned counsel, and pursuant to Rule 28-106.204(2), Florida Administrative Code, hereby moves to dismiss the Petition to Initiate Rulemaking filed by the City of Palm Coast ("City"). In support of this Motion, Florida Water states as follows:

1. On or about November 2, 2002, the City filed a Petition to Initiate Rulemaking ("Petition"). The City's Petition requests the Commission to initiate rulemaking to adopt a new proposed rule 25-30.041 ("New Rule"). Under the proposed New Rule, a proposed sale, assignment or transfer of a Commission regulated water or wastewater utility to an entity created by interlocal agreement pursuant to Section 163.01(7)(g)1., Florida Statutes, would be:

- (a) evaluated for approval pursuant to criteria proposed by the City in the New Rule;
- (b) evaluated for approval "as provided in Section 367.171(5), Florida Statutes."¹; and
- (c) subject to a requirement that the Commission regulated (selling or transferring) utility

¹See City's Petition, at 3. Florida Water notes that the City's reference to Section 367.171(5), Florida Statutes, may be a typographical error and that the City may have intended to reference Section 367.071(5), Florida Statutes.

DOCUMENT NUMBER-DATE

1304 | NOV 27 02

FPSC-COMMISSION CLERK

first submit an application with the Commission “to fix and change its rates.”²

2. Under current statutory law and Commission precedent, a sale of facilities by a water or wastewater utility regulated by the Commission to a governmental entity such as an entity created under Section 163.01(7)(g)1., Florida Statutes, must be approved as a matter of right. See Section 367.107(4)(a), Florida Statutes; and, Order No. PSC-00-2351-FOF-WS.

3. By this Motion, Florida Water does not seek dismissal based on the Commission’s lack of statutory and rulemaking authority to promulgate the proposed New Rule. This Motion focuses only on the City’s lack of standing to initiate this proceeding to propose the New Rule. However, Florida Water would point out that the Commission is a creature of statute and its “powers, duties and authority are those and only those that are conferred expressly or impliedly by statute....” City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493, 496 (Fla. 1973). The Commission lacks the statutory authority to adopt a rule that modifies, contravenes or expands the statutory standard applicable to a sale of facilities to a governmental entity created under Section 163.01(7)(g)1., Florida Statutes. See, e.g., State, Dept. of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Salvation Ltd., Inc., 452 So.2d 65, (Fla. 1st DCA 1984); see also Great American Banks, Inc. v. Division of Administration Hearings, Dept. of Administration, 412 So.2d 373, 375 (Fla. 1st DCA 1981) (“The rulemaking process cannot be used to make legal that which there was no authority to do in the first place.”)

²City’s Petition, at 3.

4. Under Section 120.54(8)(a), Florida Statutes, and Rule 28-103.006(1), Florida Administrative Code, a person or entity seeking to initiate a rulemaking proceeding must allege facts in its petition demonstrating that the petitioner is regulated by the agency or has a substantial interest in the agency rule that the petitioner proposes for adoption. The City is not regulated by the Commission. Accordingly, the only possible basis for the City's standing is if the City's Petition alleges and demonstrates that the City has a substantial interest in this proposed New Rule. The City's Petition does not and cannot meet that test.

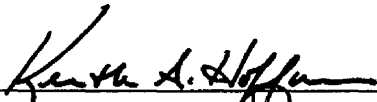
5. In its Petition, the City attempts to meet the requisite statutory test for standing by alleging that the acquisition of Florida Water's water and wastewater systems by an entity created under Section 163.01(7)(g)1., Florida Statutes, could impact the rates and quality of service provided to the citizens of the City. City's Petition, at 3. As a matter of law, the City cannot manufacture legal standing by unlawfully anointing itself as the representative of its citizens who are customers of Florida Water. There is no authority under Chapter 120, Florida Statutes, for the City to appear as a representative of its citizens in a rulemaking proceeding under Chapter 120, Florida Statutes.³ Moreover, the water and wastewater services provided by Florida Water to residents of the City who are customers of Florida Water are exclusively regulated by the Flagler County Utility Regulatory Authority, and not this Commission.

³Compare Section 120.52(12)(d), Florida Statutes, which defines a "Party" in an administrative proceeding to include a county acting on behalf of the interests of the consumers of a county "when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative... to represent the class of interested persons.... (in a) specific proceeding...."

6. The City lacks standing to initiate the instant rulemaking proceeding as it is not regulated by the Commission and is not substantially affected by the unlawful New Rule proposed in its Petition.

WHEREFORE, for the foregoing reasons, Florida Water respectfully requests that the Commission enter an Order dismissing with prejudice the City of Palm Coast's Petition to Initiate Rulemaking.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQUIRE
J. STEPHEN MENTION, ESQUIRE
RUTLEDGE, ECENIA, PURNELL & HOFFMAN, P.A.
P.O. BOX 551
TALLAHASSEE, FLORIDA
(850) 681-6788 (Telephone)
(850) 681-6515 (Telecopier)


Attorneys for Florida Water Services Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Florida Water Services Corporation's Motion to Dismiss City of Palm Coast's Petition to Initiate Rulemaking was furnished by United States Mail, this 27th day of November, 2002, to the following:

Samantha Cibula, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

William L. Colbert, Esq.
Lonnie N. Groot, Esq.
Stenstrom, McIntosh, Colbert, Whigham
& Simmons, P.A.
P. O. Box 4848
200 W. First Street, Suite 22
Sanford, FL 32772-4848



KENNETH A. HOFFMAN, ESQ.

021128\motiontodismiss