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December 16, 2002

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

**HAND DELIVERY**

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COMMISSION CLERK

Re: Docket No. 021188-WS

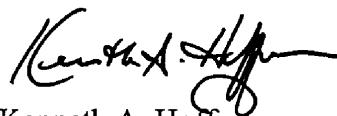
Dear Ms. Bayo:

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

AUS \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP \_\_\_\_\_  
COM \_\_\_\_\_ KAH/rl  
CTR \_\_\_\_\_ Enclosures  
ECR \_\_\_\_\_ cc: All Parties of Record  
GCL \_\_\_\_\_  
OPC \_\_\_\_\_  
MMS \_\_\_\_\_ Flawater\Bayo 1216  
SEC \_\_\_\_\_  
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FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Petition to Initiate Rulemaking relating )  
to Capital Charges filed by City of Palm )  
Coast, Florida. )  
\_\_\_\_\_)

Docket No. 021188-WS

Filed: December 16, 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 25, 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 Commission regulated and non-Commission regulated water and/or wastewater utility systems to an entity created by interlocal agreement pursuant to Section 163.01(7)(g)1., Florida Statutes, would be:

- (a) "evaluated" by the Commission; and
- (b) subject to a prohibition on the payment of "Capital Charges"<sup>1</sup> by the Section 163.01(7)(g)1, F.S. purchasing entity to the selling utility.

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<sup>1</sup>The City's Petition, at 2, defines "Capital Charges" as "revenues such as impact fees, guaranteed revenues, service availability fees, or such other charges or fees imposed upon landowners, builders or developers in connection with the improvement of property utilizing a water or wastewater utility system to defray the costs of capital facilities."

DOCUMENT NUMBER-DATE

13669 DEC 16 02

FPSC-COMMISSION CLERK

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. 1<sup>st</sup> DCA 1984); see also Great American Banks, Inc. v. Division of Administration Hearings, Dept. of Administration, 412 So.2d 373, 375 (Fla. 1<sup>st</sup> DCA 1981) ("The rulemaking process cannot be used to make legal that which there was no authority to do in the first place.")

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 City will "benefit" from a Commission rule that ensures that Capital Charges paid by customers within a certain (presumably geographical) jurisdiction are utilized for capital needs, deficiencies and improvements within that jurisdiction. City's Petition, at 4. 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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<sup>2</sup>Although the City points to Article VIII, Section 2 of the Florida Constitution and Section 166.021(a), Florida Statutes (the City was presumably referring to Section 166.021(1), F.S.), in its Response to Florida Water's Motion to Dismiss a similar rulemaking petition filed by the City in Docket No. 021128-WS, Florida Water found no case law and none was cited by the City for the proposition that a municipality may initiate a Ch. 120, Florida Statutes, proceeding on behalf of its citizens.

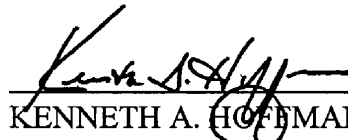
<sup>3</sup>Compare Section 120.52(12)(d), Florida Statutes, which defines a "Party" in an administrative proceeding to include a county acting on behalf of the interests of the consumers of a county "when the proceeding involves the substantial interests of a significant number of residents of the county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

<sup>4</sup>The City is a customer of Florida Water and any relief it seeks concerning the regulatory rules applicable to Florida Water's operations and services in Flagler County lie exclusively with the Flagler County Utility Regulatory Authority.

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,



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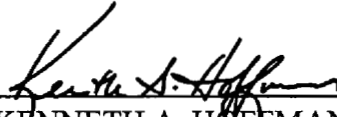
Attorneys for Florida Water Services Corporation

**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 16<sup>th</sup> day of December, 2002, to the following:

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