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December 31, 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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02 DEC 31 PM 4:40  
COMMISSION  
CLERK

Re: Docket No. 021066-WS

Dear Ms. Bayo:

Enclosed with this letter on behalf of Florida Water Services Corporation ("Florida Water") are the original and fifteen copies of Florida Water's Response to Office of Public Counsel's Motion to Compel.

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,

  
J. Stephen Menton

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OPC \_\_\_\_\_ cc: All Parties of Record  
MMS \_\_\_\_\_  
SEC 1  
OTH \_\_\_\_\_ 021066\Bayo.1231

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Investigation into proposed sale of )  
Florida Water Services Corporation )  
\_\_\_\_\_)

Docket No. 021066-WS  
Filed: December 31, 2002

**FLORIDA WATER SERVICES CORPORATION'S  
RESPONSE TO OFFICE OF PUBLIC COUNSEL'S  
MOTION TO COMPEL**

Florida Water Services Corporation ("Florida Water"), by and through its undersigned counsel, hereby responds to the Motion to Compel (the "Motion") filed in the above-referenced docket by the Office of Public Counsel ("OPC") on December 17, 2002. In opposition to the Motion, Florida Water states as follows:

1. The docket was opened to investigate the proposed sale of Florida Water's utility assets to the Florida Water Services Authority ("the Authority"), a governmental entity created pursuant to Chapter 163, Florida Statutes. The docket was opened shortly after the public announcement on September 19, 2002, that Florida Water had entered into a contract with the Authority for the sale of all of its state-wide utility assets including assets located in several non-jurisdictional counties.

2. Consistent with established Commission precedent regarding the sale of utility assets to a governmental entity, no application has been filed with the Commission by Florida Water pending finalization of all of the terms of the deal and the closing of the transaction. As discussed below, Florida Water and the Authority have been actively involved in extensive due diligence efforts and have been engaged in complex negotiations over the terms and financing for the transaction.

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FPSC-COMMISSION CLERK

3. Through correspondence dated October 4 and November 12, 2002 from Florida Water's undersigned counsel to Mr. Tim Devlin, Director of the Division of Economic Regulation for the Commission, Florida Water responded to Staff's "Information Requests" regarding the proposed sale and provided evidence that the Authority is a governmental entity created pursuant to Chapter 163. Under Florida statutory law and established Commission precedent, Florida Water's sale to the Authority must be approved as a matter of right pursuant to Section 367.071(4)(a), Florida Statutes.

4. The nature and scope of this proceeding is currently undefined. No issues have been identified for this docket. Nonetheless, shortly after this docket was opened, OPC served its First Set of Requests for Production of Documents ("OPC's Requests") to Florida Water. On November 25, 2002, Florida Water filed objections (the "Objection") to OPC's Request. In the meantime and notwithstanding Florida Water's Objections, Florida Water provided OPC with numerous documents related to the creation of the Authority confirming its status as a governmental entity pursuant to Chapter 163, Florida Statutes. Florida Water also provided OPC with numerous documents related to the proposed sale.

5. OPC's Motion pre-supposes that the lack of any specific qualification or limit on the scope of the investigation to be conducted by the Commission in opening this docket opens the door to wide-spread discovery into the on-going negotiations of an extremely complicated transaction. OPC's Motion suggests "it is not at all clear whether Florida Water Services Authority is a 'governmental authority' entitled to approval of the transfer as a matter of right for the purposes of Section 367.071(4), Florida Statutes." OPC ignores the existing precedent cited in Florida Water's Objections that clearly demonstrates the Authority qualifies for such treatment. OPC also fails to

note that Section 367.071(1), Florida Statutes, specifically authorizes a post-closing filing of an application with the Commission following a sale. Indeed, there are numerous prior situations where the Commission has accepted and approved post-closing applications for the sale of facilities to a governmental entity. OPC has provided no basis for ignoring those precedents and to proceed with an extensive pre-closing evaluation of this particular transaction.

6. Before launching into broad discovery that is premature, beyond the scope of any issue that can be considered by the Commission, and potentially a hindrance to on-going negotiations over the terms of the transaction, OPC should provide a basis for deviating from the Commission's prior precedent on the threshold legal issue.

7. Florida law dictates that the transfer of Florida Water's assets to a governmental entity must be approved by the Commission as a matter of right. Specifically, Section 367.071(4)(a), Florida Statutes, states in pertinent part:

*The sale of facilities, in whole or in part, to a governmental authority shall be approved as a matter of right [.]*

8. Section 367.022, Florida Statutes, states in pertinent part:

The following are not subject to regulation by the Commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided:

\* \* \*

(2) Systems owned, operated, managed or controlled by governmental authorities....

9. The Commission has previously treated an entity such as the Authority created under Chapter 163, Florida Statutes, as a governmental authority for purposes of Chapter 367, Florida

Statutes. See, Order No. PSC-00-2351-FOF-WS issued December 2, 2000 in Docket No. 990484-WS (the “FGUA Order”).

10. There have been no pertinent statutory or rule changes since the issuance of the FGUA Order. Based on the clear dictates of Chapter 367 and established Commission precedent, the Authority is not subject to Commission regulation and the sale to the Authority “shall be approved as a matter of right.”

11. Section 163.01(7)(g)(4), Florida Statutes, provides a legislative recognition that accomplishment of the conversion of privately owned utility assets to public ownership by an entity created under Chapter 163 accomplishes a public purpose. That statute provides:

The accomplishment of the authorized purposes of a legal entity created under this paragraph is in all respects for the benefit of the people of the state, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions.

12. The scope and parameters of this docket must be framed by the statutory presumption of public purpose and the directive that the sale is to be approved as a matter of right. There is nothing in this docket that would justify a modification of this statutory standard in evaluating Florida Water’s proposed sale to the Authority. Accordingly, there is no basis to allow OPC to disrupt the on-going negotiations of this proposed sale.

13. On December 20, 2002, Commission Staff solicited briefs from all interested parties as to the Commission’s current and continuing jurisdiction over the proposed sale. The requested briefs are intended “to assist the Commission in appraising the proposed sale.” Staff has specifically sought input as to whether the Authority constitutes a “governmental authority” and whether it is exempt from Commission regulation. For the reasons set forth above, Florida Water believes the

answers to Staff's inquiries are self-evident from the face of the statutes and the prior precedent. In any event, these issues will ultimately determine the scope of any inquiry to be conducted in this docket. Since no application is currently pending before the Commission and no basis has been provided for deviating from prior Commission precedent or the statutory standard for review of the transaction, the only issues currently ripe for consideration in this docket are those outlined in Staff's briefing request.

14. OPC's Motion reflects an attempt to engage in extensive discovery that is unrelated to any issue that is presently framed in this docket. OPC's Requests seek a broad range of documents that are not relevant to the status of the Authority as a government entity. Florida Water has already provided OPC with evidence demonstrating that the Authority was duly created pursuant to Chapter 163. Unless and until OPC establishes that such an entity is not entitled to treatment as a governmental authority for purposes of Chapter 367, there is no basis for the Commission to inquire any further with respect to the sale. Because the Requests seek documents that are outside the lawful regulatory authority of the Commission they are overbroad.

15. OPC's Motion fails to address the substance of Florida Water's claim that many of the Requests are premature since the parties to the proposed sale are still in negotiations and due diligence has not been completed. In addition, subsequent to the announcement of the contract between Florida Water and the Authority on September 19, 2002, the parties have been engaged in extensive discussions with bond underwriters and credit enhancers over possible financing arrangements for the sale. All of these efforts are at a critical juncture. OPC has provided no basis for interrupting those discussions to produce sensitive documents related to the on-going negotiations. As Florida Water has pointed out several times, there is no application even pending

before the Commission at this time. There is simply no role for the Commission to play with respect to any such issues at this time.

16. As noted in the Objections, subsequent to the service of the Requests, the Authority conducted a public hearing in Orlando, Florida on November 18, 2002 to take public comment and testimony and to determine whether to proceed with the transaction. At the November 18 hearing, the parties to the sale confirmed that they were actively involved in the due diligence process and additional negotiations over possible changes to the Asset Purchase Agreement based upon engineering due diligence results and other investigations were possible. Subsequent to that meeting, Florida Water provided OPC and Commission Staff with a copy of extensive written documentation submitted to the Authority.

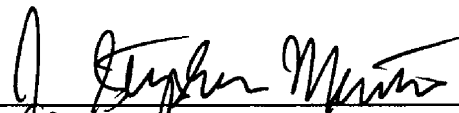
17. On December 20, 2002, the Authority conducted another public meeting at which it approved significant changes to the purchase Agreement. The changes were incorporated into an Amendment and Restatement of Asset Purchase Agreement executed by Florida Water and the Authority on that date. Florida Water will voluntarily provide OPC and Staff with a copy of the Amended Agreement and additional documents related to the December 20 Authority meeting. This production, as well as the documents previously produced by Florida Water demonstrating the status of the Authority as a governmental entity, should not be construed as a waiver of Florida Water's legal position as to the standard for evaluation of the proposed sale.

18. It is important to recognize the proposed sale involves utility assets located in more than 26 counties around the state. Several local governments who have been seeking to acquire the utility assets through an alternate sales proposal have challenged the proposed sale alleging a variety of legal theories in several different forums. Some of the objections raised by the local governments

are reflected by the Resolutions submitted to the Commission by Hernando County and Collier County (two non-jurisdictional counties) prior to the opening of this docket. Lawsuits are currently pending regarding the issues raised by those counties challenging the ability of the Authority to consummate the transaction with Florida Water. The pending litigation is further justification for limiting OPC's discovery efforts to matters within the Commission's jurisdiction. The courts, not the Commission, are the appropriate forum to resolve the objections reflected in the Resolutions which are also implicit in the discovery Requests propounded by OPC.

19. In sum, Staff has requested interested parties to brief the threshold issue of whether the Authority is exempt from Commission regulation and whether the proposed sale is entitled to approval as a matter of right. Unless and until the established Commission precedent for treatment of an entity created pursuant to Chapter 163 is overturned, the Authority is entitled to such treatment. OPC should not be permitted to interfere with the ongoing business negotiations by engaging in unfettered discovery that ignores the statutory directive that the proposed sale is entitled to approval as a matter of right.

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 Response to Office of Public Counsel's Motion to Compel was furnished by U.S. Mail, this 31<sup>st</sup> day of December, 2002, to the following:

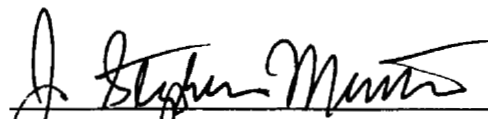
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\_\_\_\_\_  
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