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January 21, 2003

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

**HAND DELIVERY**

COMMISSION  
CLERK

JAN 21 PM 3:32

RECEIVED-FPSC

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 Comments in Response to Staff's Memorandum dated December 20, 2002.

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*  
J. Stephen Menton

JSM/knb  
Enclosures  
cc: All Parties of Record

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*L.V.N.*

FPSC-BUREAU OF RECORDS DOCUMENT NUMBER-DATE

00599 JAN 21 03

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: January 21, 2003

**FLORIDA WATER SERVICES CORPORATION'S  
COMMENTS IN RESPONSE TO  
STAFF'S MEMORANDUM DATED DECEMBER 20, 2002**

Florida Water Services Corporation ("Florida Water"), by and through undersigned counsel, hereby files its Comments in response to the issues raised in Staff's Memorandum dated December 20, 2002 regarding the proposed sale of Florida Water's utility assets to the Florida Water Services Authority ("FWSA" or the "Authority"). In the December 20, 2002 Memorandum, PSC Staff requested comments regarding the following issues:

1. Is the FWSA a "governmental authority" as defined by Section 367.021(7), Florida Statutes?; and
2. Is the FWSA exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes?

Florida Water addresses these issues below.

**I. Florida Water Services Authority is a Governmental Authority  
for purposes of Section 367.021(7), Florida Statutes**

Section 367.021(7), Florida Statutes (2002)<sup>1</sup>, defines a "governmental authority" 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.

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<sup>1</sup>All statutory references herein are to the 2002 Florida Statutes.

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FPSC-COMMISSION CLERK

The Authority was formed by Interlocal Agreement between the City of Gulf Breeze and the City of Milton, Florida.<sup>2</sup> A city is a “political subdivision” under Section 1.01(8), Florida Statutes.<sup>3</sup> Importantly, Section 163.01(7)(g)1, Florida Statutes, unequivocally recognizes that an entity created by interlocal agreement pursuant to that section can operate as the functional and statutory equivalent of a county or municipality and such an entity is entitled to the same treatment and regulatory status as its creating public bodies. Specifically, Section 163.01(7)(g)1, Florida Statutes, authorizes cities to create and control entities such as the Authority. Section 163.01(7)(g)1. states that:

Except as may be limited by the interlocal agreement under which the entity is created, all of the privileges, benefits, powers and terms of . . . s. 166.021, relating to municipalities are fully applicable to the entity. [emphasis added].

Section 163.01(9)(c), Florida Statutes, confirms that an entity such as the Authority is entitled to all of the privileges and exemptions from laws and ordinances that apply to the municipalities that created it. Thus, the Authority, like its member municipalities, is a governmental authority for purposes of Chapter 367.

Chapter 166, Florida Statutes, sets forth the powers granted to municipalities generally. Section 166.021, Florida Statutes, provides municipalities with propriety powers and expressly allows municipalities to exercise *any* power for municipal purposes, except when expressly prohibited by law. This broad grant of authority allows cities to enter into interlocal agreements for

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<sup>2</sup>A copy of the Interlocal Agreement has previously been submitted to the Commission.

<sup>3</sup>Section 1.01(8), Florida Statutes, specifically provides that the words “public body,” “public politic,” or “political subdivision” when used in a statute includes “counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.”

a wide-range of functions. This authority is consistent with the broad grant of powers found in Article VIII, Section 2(b) of the Florida Constitution, which provides.

(b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and make exercise any power for municipal purposes except as otherwise provided by law.

A “municipal purpose” is broadly defined in Section 166.021(2) to mean “any activity or power which may be exercised by the state or its political subdivisions.” The powers granted to municipalities by Chapter 166, Florida Statutes, clearly include the ability to provide utility services. Florida courts have specifically recognized that the furnishing of utility services by a municipality constitutes a public purpose. See, Gwin v. City of Tallahassee, 132 So.2d 273 (Fla. 1961). Pursuant to Section 163.01(7)(g)1, all of the powers granted to a municipality are available to an entity (such as the Authority) created a municipality through an interlocal agreement.

The Interlocal Agreement creating the Authority clearly assigns the broad powers of the creating municipalities to the Authority. For example, Section 1(G) of the Interlocal Agreement provides:

It is the intent of the parties hereto that the Authority shall have all possible powers which may be conferred upon the Authority pursuant to law which may be necessary or desirable to enable the Authority to acquire, construct, finance, own, manage, operate and dispose of projects and programs and to fulfill the objectives and purposes of this Interlocal Agreement.

Because there are no limitations in the Interlocal Agreement, the FWSA enjoys *all* of the privileges, benefits, powers and terms granted by Section 166.021, Florida Statutes, to municipalities including

the power, as a governmental authority, to own, operate, manage or control a water and wastewater facility.

There is no prohibition, statutory or otherwise, that limits the furnishing of utility services by a municipality. The provision of utility services beyond municipal boundaries is not only common, it is expressly recognized in Section 163.01(7)(g), Florida Statutes, which provides in pertinent part:

Notwithstanding any other provisions of this section, any separate legal entity created under this section, the membership of which is limited to municipalities and counties of this state, may acquire, own, construct, improve, operate, and manage public facilities or finance facilities on behalf of any person, relating to a governmental function or purpose, including, but not limited to, wastewater facilities, water or alternative water supply facilities, and water reuse facilities *which may serve populations within or outside* of the members of the entity. [emphasis added].

Municipalities can limit the powers of a Chapter 163 entity by including provisions in the interlocal agreement. No such limitations were placed on the Authority. Section 4 of the Interlocal Agreement expressly grants the Authority the power to acquire public utilities, such as Florida Water:

**Section 4. Powers of the Authority**

.... to the extent not inconsistent with general or special law [the Authority's] power shall include, but not be restricted to:

\* \* \*

(O) [E]xercise all powers heretofore or hereafter granted by law to the Authority in respect to the acquisition, construction, ownership, operation, financing and disposition of public utilities, including, without limitation, the powers granted under Section 163.01(7), Florida Statutes.

Section 4 of the Interlocal Agreement further provides that:

The Authority shall have the powers to, and all powers necessary and incidental to, accomplish the purpose or objectives of this agreement, including, without limiting the generality of the foregoing, the power to promote, plan, establish, acquire, construct, erect, finance, expand, improve, consolidate, furnish, equipment, operate, maintain, manage, diversify and develop programs and projects from time to time, and issue bonds from time to time to finance the cost thereof...

In sum, the creation of the Authority by the cities of Gulf Breeze and Milton was clearly within the scope of the powers granted by Chapters 163 and 166, Florida Statutes. Section 163.01(7)(g)4, Florida Statutes, provides specific statutory recognition that:

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.

Because the Authority has all the privileges, benefits, powers and terms that apply to municipalities and there are no limitations in the Interlocal Agreement limiting the power of the Authority to own and operate water and wastewater facilities, the Authority must be treated as a “governmental authority” for purposes of Section 367.021(7), Florida Statutes.

**Ia. The Commission has previously recognized that a legal entity created by Interlocal Agreement pursuant to Section 163.01(7)(g), Florida Statutes, Constitutes a Governmental Authority**

In Docket No. 990489-WS, the Commission approved the transfer of the facilities of Florida Cities Water Company and Poinciana Utilities (“PUT”) to the Florida Governmental Utility Authority (“GUA”). See Order No. PSC-00-2351-FOF-WS issued December 7, 2000 (the “FGUA

Order”). In the Amended Application for Transfer of Facilities to the Florida GUA filed October 4, 2000 in Docket No. 990489-WS, the applicants asserted that:

Florida Governmental Utility Authority, a legal entity and public body created by Interlocal Agreement pursuant to Section 163.01(7)(g), Florida Statutes.... [is] exempt from regulation by the Commission pursuant to Section 367.022(2), Florida Statutes.<sup>4</sup>

In the FGUA Order, the Commission agreed with the applicants and established the legal precedent that entities created pursuant to Section 163.01(7)(g), Florida Statutes, (such as the GUA and the FWSA) are “governmental authorities” for purposes of Chapter 367. The Commission specifically held:

[W]e find that the application as amended is in compliance with Section 367.071(4), Florida Statutes and Rule 25-30.037(4), Florida Administrative Code. Pursuant to Section 367.071(4)(a), Florida Statutes, the sale or transfer of facilities *to a governmental authority* is approved as a matter of right. Accordingly, we hereby approve the transfer of facilities from FCWS and PUI to the GUA. [Emphasis supplied].

See Order No. PSC-00-2351-FOF-WS at pg. 3.

Since the issuance of the GUA Order, there have been no relevant changes to the statutory language in Chapters 163, 166 or 367. There is no legal basis for the Commission to deviate from its prior ruling that an entity created pursuant to Section 163.01(7)(g), Florida Statutes, is a governmental authority. This determination is binding and controlling precedent and, accordingly, the Commission must treat the Authority as a government entity in reviewing the Authority’s

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<sup>4</sup>The applicants in Docket No. 990489-WS also requested that portions of their facilities be transferred to Lee County. That aspect of the application is irrelevant to the questions raised by Staff in the current docket. Staff’s questions are directly answered by the controlling Commission precedent that an entity created pursuant to Chapter 163 is treated as a governmental authority.

proposed purchase of Florida Water's assets.<sup>5</sup> See, Southern States Utilities v. Florida Public Service Commission, 714 So.2d 1046 (Fla. 1<sup>st</sup> DCA 1998); Palm Coast Utility Corporation v. Florida Public Service Commission, 742 So.2d 482 (Fla. 1<sup>st</sup> DCA 1999); Martin Memorial Hospital Association v. Dept. of Health and Rehabilitative Services, 584 So.2d 39, 40 (Fla. 4<sup>th</sup> DCA 1991).

## II. The FWSA is Exempt from Commission Regulation Pursuant to Section 367.022(2), Florida Statutes

Section 367.022(2) specifically exempts from Commission regulation:

Systems owned, operated, managed, or controlled by *governmental authorities*, including water or wastewater facilities operated by private firms under water or wastewater facility privatization contracts as defined in s.153.91, and nonprofit corporations formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility. [Emphasis supplied].

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<sup>5</sup>Florida Water has previously objected and continues to object to the Commission's method of investigation into the proposed sale of Florida Water in the instant docket. The Commission is treating the sale of Florida Water differently than it has treated other sales or transfers of facilities to governmental authorities in the past. Historically, the Commission has entertained applications for transfers of facilities to governmental authorities either contemporaneous with the sale or after the sale is consummated. Examples of the Commission's historical precedent in this regard can be found in the following orders: Order No. PSC-00-2351-FOF-WS issued December 7, 2000, in Docket No. 990489-WS, *In re: Application by Florida City Water Company, holder of Certificate Nos. 027-W and 024-S in Lee and 007-W and 003-S in Brevard County, and Poinciana Utilities, Inc., holder of Certificate Nos. 146-W and 103-S in Polk and Osceola Counties, for transfer of facilities to Florida Governmental Utility Authority and Cancellation of Certificate Nos. 027-W, 024-S, 007-W, 003-S, 146-W, and 103-S*; Order No. PSC-97-0455-FOF-WS, issued April 21, 1997, in Docket No. 961445-WS, *In re: Request for Approval of Sale of William C. Demetree and Jack C. Demetree, d/b/a Demetree Enterprises in Duval County to City of Jacksonville, Department of Public Utilities, and Cancellation of Certificates Nos. 547-w and 477-S*; Order No. PSC-00-1516-FOF-WS issued August 21, 2000, in Docket No. 000671-WS, *In re: Application for Transfer of Facilities of L.H.T.W. Properties, Inc. d/b/a Wildwood Estates to City of Wildwood in Sumpter County, and for cancellation of Certificate Nos. 523-W and 457-S*; Order No. PSC-01-0142-FOF-SU issued January 18, 2001 in Docket No. 000241-SU, *In re: Application for Transfer of Facilities of J. Strauss Utility to JEA and cancellation of Certificate No. 244-S in Duval County*.



As explained *supra*, because the Authority was lawfully created pursuant to Chapter 163.01, Florida Statutes, it is entitled to the same exemptions from Commission regulation as its constitute member municipalities. See, Sections 163.01(7)(g)1 and (9)(c), Florida Statutes. Thus, pursuant to Section 367.022(2), the Authority is exempt from Commission regulation.

The conclusion that the FWSA is exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes, is also mandated by the fact that the FWSA is “owned, operated, managed, or controlled by governmental authorities” i.e., the cities of Gulf Breeze and Milton, Florida. Resolution No. 1040-02 of the City Council of the City of Milton, Florida has previously been provided to the Commission. That resolution authorized the execution of the Interlocal Agreement creating the FWSA and established the manner in which it will be operated, managed and controlled. As described in the title of Resolution No. 1040-02, it is a resolution:

[O]f the city council of the City of Milton, Florida, empowering a separate legal entity, Florida Water Services Authority to exercise powers pursuant to Chapter 163, Part I, Florida Statutes, in regard to the acquisition, ownership and operation of a public water, wastewater, and reuse water utility *on behalf of the City of Milton* and on behalf of other governmental entities and entities not for profit within the State of Florida pursuant to an Interlocal Agreement with the City of Gulf Breeze, Florida; approving the form of an interlocal agreement empowering and creating Florida Water Services Authority; . . . [emphasis supplied].

See, Title to Resolution No. 1040-02. Additionally, the first WHEREAS clause of the Resolution states that:

Milton and Gulf Breeze each own and operate public water and sewer utility systems within and outside their political boundaries, and have determined that there is a substantial need and demand for *public ownership and operation* of essential purpose public utilities within the State. [emphasis supplied].

The Resolution specifically acknowledges that the FWSA is to be organized and governed in accordance with the Interlocal Agreement. The Interlocal Agreement outlines the control and management of the FWSA by the cities, thereby confirming that the FWSA is “owned, operated, managed or controlled” by its municipal members.

Section 5 of the Interlocal Agreement, titled “Board of Directors; Organization”, states in pertinent part:

(D). All meetings shall be given public notice and shall be open to the public, and the authority shall use its best efforts to give notice thereof at least 48 hours prior to any such meeting; . . .The authority shall keep a record of its transactions, findings and determinations, and all records of the authority and its staff shall be *public records*.

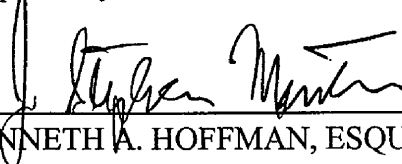
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(G). ... Notices of all meetings of the Authority shall be distributed in accordance with the requirements of the Florida Government in the Sunshine Law.

Thus, it is clear that the Authority will operate in the manner required of all governmental authorities in this State.

In sum, the FWSA is a “governmental authority” exempt from Commission regulation and there is no basis in law for the Commission to deviate from the established precedent that the sale of utility assets by an investor owned utility to such an entity must be approved by the Commission as a matter of right pursuant to Section 367.071(4), Florida Statutes.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of Florida Water Services Corporation's Comments in Response to Staff's Memorandum dated December 20, 2002, was furnished by U.S. Mail, this 21<sup>st</sup> day of January, 2003, to the following:

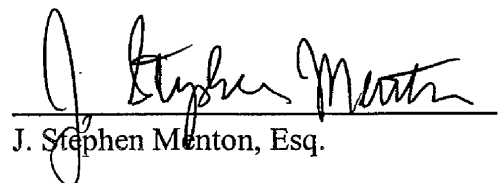
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