

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB's 140, 998 and 1060

SPONSOR: Senators Argenziano, Cowin, Constantine and others

SUBJECT: Utilities

DATE: March 17, 2003      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CP	Fav/Combined CS
2.	_____	_____	CU	_____
3.	_____	_____	GO	_____
4.	_____	_____	CM	_____
5.	_____	_____	NR	_____
6.	_____	_____	ATD	_____
7.	_____	_____	AP	_____
8.	_____	_____	RC	_____

## I. Summary:

The committee substitute requires a separate legal entity created under s. 163.01(7)(g)1., F.S., to provide written notice at least 90 days prior to the proposed acquisition of a utility or utility system to the host government. A “host government” is defined as the governing body of a county or municipality, depending upon where the majority of equivalent residential connections currently served are located. This committee substitute allows a host government within 90 days of receipt of the acquisition notice to adopt an approval resolution, adopt a prohibition resolution upon determining the acquisition is not in the public interest, or request in writing an automatic 45-day extension of time. Failure to agenda the proposed acquisition for discussion at a public meeting shall be construed as approval. Absent an approval or prohibition resolution from the host government, a written request for an extension of time or any action by the host government to initiate judicial proceedings, the separate legal entity may proceed with the acquisition. The host government may review and approve, as fair and reasonable, the rates, charges, customer classifications, and terms of service in place at the time of acquisition.

This committee substitute also requires the Public Service Commission (PSC) to review the sale of a utility involving two or more host governments to determine if the sale is in the public interest. It also requires each county regulating water and wastewater utility systems under s. 367.171, F.S., to consider whether the sale of utilities within its jurisdiction is in the public interest pursuant to county ordinances governing water and wastewater utility regulation.

In addition, the committee substitute provides that a county with equivalent residential connections within its boundaries may review and approve, as fair and reasonable, later changes after the acquisition to rates, charges, customer classifications, and terms of service before

adoption by the separate legal entity. Such counties also have the right to review any changes in the financing of facilities that may result in increased costs to customers. The separate legal entity is required under this committee substitute to notify the county in writing 90 days prior to any later changes. A county, after receiving notice of the proposed changes, may pass a resolution approving the changes or enter into negotiations with the separate legal entity. If the parties are unable to reach agreement within 30 days, the PSC shall resolve the dispute through binding arbitration at the request of the county.

In addition, the committee substitute allows a host government to acquire a utility within its boundaries from a separate legal entity and if the parties cannot reach agreement on terms and conditions of the acquisition, the host government may request binding arbitration through the PSC. The PSC is authorized to develop and adopt administrative rules governing the arbitration process and establishing fees for this dispute resolution service, as well as the resolution of disputes between the county and the separate legal entity regarding later changes to the rates, charges, and customer classifications. In developing its rules governing the acquisition price for a host government to acquire a utility, the commission is required, to the greatest extent possible, to base the acquisition price on the same percentage to the total bonded indebtedness of the separate legal entity upon acquiring the utility as the acquired system's rate base was to the utility's total rate base at the time it was transferred from a regulated utility to the separate legal entity.

Further, the committee substitute provides that powers exercised by the entity under the terms of the interlocal agreement and the entity's issuance of bond anticipation notes may be limited by the terms and conditions of the utility acquisition agreement as approved by the applicable host government. This committee substitute deletes the exception for separate legal entities from the definition of "agency" as used in ch. 120, F.S., the Administrative Procedure Act. Also, the committee substitute excludes a separate legal entity created under s. 163.01(7)(g)1., F.S., from the definition of "governmental authority" as used in ch. 367, F.S. The committee substitute deletes a provision in s. 367.071, F.S., that allows a utility to be sold or transferred contingent upon the approval of the PSC. Finally, the committee substitute provides a cross-reference in s. 367.071(4), F.S., to the definition of "governmental authority" in s. 367.021(7), F.S.

This committee substitute substantially amends the following sections of the Florida Statutes: 163.01, 120.52, 367.021, and 367.071.

## **II. Present Situation:**

The Florida Interlocal Cooperation Act of 1969 authorizes local governments to enter into interlocal agreements that allow these governmental entities to act more efficiently with regard to the provision of services and facilities. In 1997, s. 163.01, F.S., was amended to allow municipalities and counties to form a "separate legal entity" in order to:

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.<sup>1</sup>

S. 163.01(7)(g)1., F.S., provides that a separate legal entity created under that paragraph is not subject to commission jurisdiction. However, s. 367.071(4)(a), F.S., states that the sale of waste or wastewater facilities shall be approved, as a matter of right, by the Public Service Commission (PSC). After a separate legal entity has acquired a water utility, it is self-regulated with sole authority over rates and terms and conditions of service. State-imposed limitations on rates assessed to customers do not apply to a separate legal entity formed under s. 163.01, F.S., although the limitations apply to municipalities that own water utilities.

Some local governments, not operating under s. 163.01, F.S., but operating as a governmental authority, own water utilities that serve customers within their territorial limits. Because government-owned utilities are self-regulated, they establish rates and terms of service for customers within their territorial boundaries. Customers residing outside the territorial limits of a local government may be assessed a surcharge of up to 50 percent of the rates, fees, and charges to customers residing in the local government's territorial boundaries.

Private water utilities operate as monopolies because of the costs associated with construction and maintenance of infrastructure. A county has the discretion to regulate utility operations or subject the private water utility to the jurisdiction of the PSC.<sup>2</sup> However, a county that retains jurisdiction over a private water utility must follow the same regulatory methodology as the commission.<sup>3</sup> Any privately-owned utility that operates in more than one county is subject to the jurisdiction of the commission. The Office of the Public Counsel provides representation for customers in proceedings under s. 367.171(8), F.S., before the commission and counties.<sup>4</sup> It is also important to note that a local government can acquire a privately-owned utility through direct negotiations or by exercising their power of eminent domain.<sup>5</sup>

The acquisition of a water utility by a separate legal entity may prove financially beneficial, assuming the utility is able to realize operating efficiencies and better meet capital expenditure needs.<sup>6</sup> Because a separate legal entity is comprised of governmental authorities, the government-owned utility will enjoy some benefits that a privately owned utility would not. For example, the separate legal entity can issue tax-exempt bonds which reduces the cost of financing capital improvements. Tax-exempt bonds can be offered at lower interest rates and, therefore, reduces the associated debt financing costs by as much as 20 percent or more. These cost savings can be used either to meet outstanding capital expenditure requirements or passed on to customers in the form of reduced utility rates.<sup>7</sup>

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<sup>1</sup> Ch. 97-236, L.O.F., codified as amended at s. 163.01, F.S.

<sup>2</sup> S. 367.171, Fla. Stat. (2002). The Department of Health and county health departments exercise regulatory authority over small water utilities serving fewer than 25 people.

<sup>3</sup> S. 367.171(8), Fla. Stat. (2002).

<sup>4</sup> S. 350.0611, Fla. Stat. (2002). The Public Counsel is appointed an attorney appointed by and serving at the pleasure of the Joint Legislative Auditing Committee. S. 350.061(1), Fla. Stat. (2002).

<sup>5</sup> Ss. 127.01(1)(a) and 166.401(1), Fla. Stat. (2002).

<sup>6</sup> OPPAGA, Special Examination, Report No. 02-67, at 4 (Dec. 2002)

<sup>7</sup> *See id.*

A separate legal entity may be exempt from certain state and local taxes. Section 163.01(9)(c), F.S., provides that “all of the privileges and immunities from liability and exemptions from laws, ordinances, and rules which apply to the municipalities and counties of this state apply to the same degree and extent to any separate legal entity, created pursuant to the provisions of this section. . . .” However, the Ninth Judicial Circuit recently held that property owned by an entity created under s. 163.01, F.S., is subject to ad valorem taxation. This decision is on appeal.<sup>8</sup>

A utility owned by a separate legal entity, unlike a privately-owned water utility, is also eligible for some federal and state fund programs. These programs assist water utilities with financing capital improvement needs necessary to meet environmental standards, the replacement of existing infrastructure, and the ability to increase capacity as needed to meet long-term growth requirements.<sup>9</sup>

Efficiencies for utilities owned by a separate legal entity may also occur in the operation of these utilities. The 4,500 utilities providing water services in Florida confront similar challenges including increased regulatory requirements, a growth population, resource scarcity, and aging infrastructure.<sup>10</sup> The economies of scale resulting from the consolidation of water utilities can provide lower prices and improved service for customers. Lower prices are achieved because of the larger customer base created by the consolidation of smaller water utilities which allows the owner of the utility to spread the costs associated with infrastructure, pumping, and treatment across a greater number of customers. Other operational efficiencies may include a centralized billing system and customer service. The separate local entity could also contract with a private company “to provide centralized operations and maintenance services for all utilities.”<sup>11</sup>

Although the acquisition of a utility by a separate legal entity may have some economic advantages, there are also several possible disadvantages. There is a question as to whether the interests of customers residing outside the territorial limits of the local governments forming the separate legal entity will be fairly represented.<sup>12</sup> Also, local governments may not be able to subsequently acquire a utility owned by a separate legal entity. The state and local governments may lose some tax revenues as a result of the acquisition. In addition, the separate legal entity may not consolidate operations effectively and will not realize the cost savings projected for these efficiencies. Even if the separate legal entity achieves cost savings through consolidation of operations, it is not clear those savings would be passed on to customers.<sup>13</sup>

At the direction of the Joint Legislative Auditing Committee, the Office of Program Policy Analysis (OPPAGA) conducted a review of the Florida Governmental Utility Authority (FGUA), an intergovernmental authority or separate legal entity consisting of Citrus, Nassau, and Polk counties and created for the purpose of acquiring, financing, and operating water utilities.<sup>14</sup>

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<sup>8</sup> *See id.*

<sup>9</sup> *See id.* at 5. One example of a federal program is the Clean Water Act State Revolving Fund Program which provides low interest loans to government-owned utilities for water pollution control activities and facilities.

<sup>10</sup> *See id.* at 5.

<sup>11</sup> *See id.* at 6.

<sup>12</sup> Customers of privately-owned utilities have representation through the regulatory process of the commission or the county. Customers of a government-owned utility, that reside within its territorial limits, have representation through their local government.

<sup>13</sup> *See id.* at 4.

<sup>14</sup> OPPAGA, Special Examination, Report No. 02-67, at 1 (Dec. 2002)

OPPAGA's review of water utilities owned by an intergovernmental authority focused on the following issues:

- The specific purpose of intergovernmental authorities as well as any public benefit derived therefrom; and
- Whether intergovernmental authorities are sufficiently accountable to the public and customers;
- Whether it would be sound public policy for the commission to have jurisdiction over an intergovernmental authority's services and rates; and
- Alternative courses of action that would improve the accountability, efficiency, and economy of intergovernmental authorities.

OPPAGA's review of FGUA was prompted in part by its negotiations with Florida Water Services Corporation, a private entity with 156 utilities in 25 counties.<sup>15</sup> Florida Water Services announced in September, 2002 that it would sell its utility systems to the Florida Water Services Authority, a separate legal entity comprised of the towns of Gulf Breeze and Milton, Florida.<sup>16</sup> Numerous lawsuits were filed over the proposed acquisition and the PSC asserted jurisdiction to review whether the sale is in the public interest. The commission issued an order requiring Florida Water Services to file an application for approval of its proposed transfer to Florida Water Services Authority.<sup>17</sup> Following issuance of the order, the commission sought and received temporary injunctive relief to delay the proposed sale pending further review by the commission. The First District Court of Appeal refused to overturn the commission's order delaying the sale.<sup>18</sup> The intergovernmental authority, Florida Water Services Authority, announced its intention to finance and close the sale even if contrary to the commission's order. On March 7, 2003 in an order from the Circuit Court of the Second Judicial Circuit, the temporary injunction was continued.<sup>19</sup> Subsequently, Florida Water Services Corporation announced it would not sell its utility systems to the intergovernmental authority.<sup>20</sup>

Based on its review, OPPAGA recommended amending s. 163.01(7)(g)1., F.S., as follows to ensure that an intergovernmental authority is sufficiently accountable to the public and its customers:

- Require the affirmative consent of the county or municipality where the majority of customers reside to be obtained as a condition of acquisition of a water utility by an intergovernmental authority. The requirement to obtain approval as a condition of purchase will provide greater accountability in these utility acquisitions because affected customers would be assured representation through their local government.
- Authorize commission involvement over the rates and terms of service offered by a utility when agreement cannot be reached. The ability to request commission involvement in disputes over the rates and terms of service offered by a utility should be provided to any county with customers served by an intergovernmental authority. To ensure public participation, the administrative rulemaking process should be used to structure the process and determine the fee for dispute resolution services.

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<sup>15</sup> See *id.*

<sup>16</sup> See Bridget Hall Grumet, *Panhandle Towns Snap Up Utility Giant*, St. Petersburg Times (Sept. 21, 2002).

<sup>17</sup> See Florida Pub. Serv. Comm'n, Order No. PSC-03-0193-FOF-WS (Feb. 7, 2003).

<sup>18</sup> See Carrie Johnson, *Court Lets PSC Delay Water Deal*, St. Petersburg Times (Feb. 14, 2002).

<sup>19</sup> See Florida Pub. Serv. Comm'n v. Florida Water Servs. Corp., Order No. 20030022687 (Fla. 2nd Cir. Ct. Mar. 7, 2003).

<sup>20</sup> See Ludmilla Lelis, *Utility Ends Deal to Sell to 2 Small Towns*, Orlando Sentinel (Mar. 11, 2003).

- Ensure that the county or municipality where the majority of customers reside is able to subsequently acquire utilities owned by an intergovernmental authority. In those instances when the authority and the county or municipality cannot agree on the terms and conditions of the acquisition, the applicable local government should be provided the right to redress through the commission. As with rates and terms of service disputes, the costs assessed to local governments should reflect the amount required to recover all associated costs, with the specific structure determined through the administrative rulemaking process.

### III. Effect of Proposed Changes:

**Section 1** of the committee substitute does the following:

- Defines “utility” as a water or wastewater utility and includes every person, separate legal entity, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation;
- Defines “system” as each separate water or wastewater facility providing service.
- Defines “host government” as the governing body of the county or municipality depending upon whether the largest number of equivalent residential connections currently served by the utility are located in an unincorporated area or within the municipality’s boundaries;
- Requires written notice via certified mail of a proposed acquisition of a utility by a separate legal entity to be sent, not less than 90 days prior to any proposed transfer of ownership, to the legislative head of the governing body of the host government and to its chief administrative officer and to include the name and address of a contact person;
- Provides that within 90 days after receiving notice of the proposed acquisition, the host government may adopt a resolution approving the acquisition; adopt a resolution prohibiting the acquisition based on a determination that the acquisition is not in the public interest; request in writing an automatic 45-day extension of the notice period to allow sufficient time for the host government to evaluate the proposed acquisition; or take no action to agenda discussion of the acquisition at a public meeting which shall be construed as approval;
- Provides a separate legal entity, after the host government has adopted a resolution prohibiting the entity’s acquisition of a utility, may not acquire a utility within that host government’s jurisdiction without its specific consent by future resolution;
- Provides the separate legal entity may proceed with the acquisition after the 90-day notice period without further notice if the host government does not adopt an approval resolution or a prohibition resolution, make a written request for an extension of time, or take action to initiate a judicial proceeding;
- Requires the Public Service Commission (PSC) to review the sale of a utility involving two or more host governments to determine if the sale, assignment, or transfer of the utility is in the public interest;
- Requires each county regulating water and wastewater utilities or systems under s. 367.171, F.S., to consider whether the sale of a utility or utility systems within its jurisdiction is in the public interest pursuant to county ordinances governing water and wastewater utility regulation; and

- Provides a host government may review and approve, as fair and reasonable, the rates, charges, customer classifications, and terms of service in place at the time of acquisition.

After the proposed acquisition is complete, the committee substitute requires the separate legal entity to send written notice via certified mail of later changes to any county with equivalent residential connections from that utility located within its boundaries not less than 90 days prior to implementation of those changes. The notice must be sent to the legislative head of the governing body of each affected county and to its chief administrative officer and include the name and address of a contact person as well as information identified in s. 367.081(2)(a)1., F.S., as it applies to publicly-owned utilities. In response to the notice of proposed changes, the committee substitute allows a county to do the following:

- Review and approve as fair and reasonable any later changes proposed by the separate legal entity to the rates, charges, customer classifications, and terms of service, before the changes are adopted by the separate legal entity;
- Review and approve any changes to the financing of facilities which may result in increased costs to customers, although this review is subject to the entity's obligation to establish rates and charges that comply with requirements contained in a resolution or trust agreement relating to the issuance of bonds to acquire and improve the utility;
- Allows the county to pass a resolution approving the changes; and
- Allows the county, if it believes the proposed changes are not in the public interest to enter into negotiations with the separate legal entity and, if unable to reach agreement with 30 days, to request binding arbitration through the PSC.

In addition, this section of the committee substitute allows a host government to acquire any utility or utility system within its boundaries that is owned by a separate legal entity and to request binding arbitration if the parties cannot reach agreement on the terms and conditions of the acquisition. The committee substitute also authorizes the PSC to develop and adopt administrative rules governing the arbitration process and establishing fees for this dispute resolution service, as well as for binding arbitration services when requested by an affected county concerning a dispute over a separate legal entity's proposed changes, after the acquisition of a utility, to the rates, charges, customer classifications, and terms of service.

This committee substitute requires the PSC, in developing rules governing the acquisition price for a given host government to acquire a utility within its boundaries, to base the acquisition price, to the greatest extent possible, on the same percentage to the total bonded indebtedness of the separate legal entity upon acquiring the utility as the acquired system's rate base was to the utility's total rate base at the time transferred from a regulated utility to the separate legal entity. Also, the committee substitute provides that the amended paragraph operates as a general law, under s. 4, Article VIII of the State Constitution, allowing for the transfer of power as the result of an acquisition of a utility or utility system by a separate legal entity from a municipality, county, or special district.

Finally, this section of the committee substitute provides that powers exercised by the entity under the terms of the interlocal agreement and the entity's issuance of bond anticipation notes may be limited by the terms and conditions of the utility acquisition agreement as approved by the host government.

**Section 2** of the committee substitute deletes the exception for a separate legal entity from the definition of “agency” for the purposes of ch. 120, F.S., the Administrative Procedure Act.

**Section 3** amends s. 367.021, F.S., to exclude a separate legal entity created under s. 163.01(7)(g)1., F.S., from the definition of “governmental authority.”

**Section 4** amends s. 367.071, F.S., to delete a provision that allows a utility to be sold or transferred prior to the approval of the PSC if the contract for sale is contingent upon PSC approval.

**Section 5** provides the committee substitute shall take effect upon becoming a law.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A separate legal entity may provide customers with lower rates and more efficient service because of the economies of scale that result from the consolidation of water utilities. Presently, the entity is not required to pass along any savings achieved as the result of consolidation to its customers in the form of lower rates.

C. Government Sector Impact:

Ownership of the utility by a separate legal entity may provide some financial benefits for the local governments that form the authority. Member governments of the authority may benefit from increased net revenues achieved, in part, because of the savings realized from the issuance of tax-exempt bonds, possible exemption from some state and federal taxes, and being eligible for certain state and federal funding programs. However, the acquisition of a utility by a separate legal entity may also result in state and local governments losing some annual tax revenues.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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