

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/CS/SB's 140, 998 and 1060

SPONSOR: Communication & Public Utilities Committee, Comprehensive Planning Committee,
Senator Argenziano and others

SUBJECT: Utilities

DATE: April 1, 2003 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|-----------------|
| 1. | Herrin | Yeatman | CP | Fav/Combined CS |
| 2. | Wiehle | Caldwell | CU | Fav/CS |
| 3. | _____ | _____ | ATD | _____ |
| 4. | _____ | _____ | AP | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |
| 7. | _____ | _____ | _____ | _____ |
| 8. | _____ | _____ | _____ | _____ |

I. Summary:

The bill implements the recommendations of an OPPAGA report and makes conforming changes. It requires that any separate legal entity seeking to acquire a utility provide written notice of the proposed acquisition to the relevant local government. The local government may either: adopt a resolution to become a member of the separate legal entity; 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 90-day period to allow sufficient time for the host government to evaluate the proposed acquisition; or take no action, which is to be construed as a denial of the acquisition. If the local government adopts a prohibition resolution, the separate legal entity is prohibited from acquiring the utility unless the local government subsequently gives consent by another resolution.

The bill gives a host government the right to review and approve as fair and reasonable any proposed changes to rates and terms of service and changes to the financing of the utilities which may result in increased costs to customers. The right of review and approval is subject to the obligation of the separate legal entity to establish rates that allow it to comply with bond requirements and to pay debts. If the host government reviews the proposed changes and determines that they are in the public interest, it may approve the changes. If the host government determines that the proposed changes are not in the public interest, it may negotiate with the separate legal entity to resolve the host government's concerns. If the parties are unable to reach agreement with 30 days of the determination that the proposed changes are not in the public interest, the host government may request binding arbitration through the PSC.

The bill guarantees the right of a host government to acquire any separate-legal-entity-owned utility within its boundaries. If the parties cannot agree to the terms and conditions of the acquisitions, the host government may request binding arbitration through the PSC.

The PSC is to develop and adopt administrative rules governing the arbitration processes and establishing fees.

The bill 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 to more efficiently provide services and facilities. In 1997, s. 163.01(7)(g), F.S., was created to allow municipalities and counties to form a “separate legal entity” to:

acquire, own, construct, improve, operate, and manage public facilities 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.¹

The first such entity created was the Florida Governmental Utility Authority (FGUA).² The FGUA was created on February 1, 1999, and bought six water utilities from a private company on April 15, 1999.³ In September, 2001, it began negotiations with another private company, Florida Water Services Corporation (FWSC), to buy that company’s utilities.⁴ The FWSC owns 156 utilities in 25 counties, serving over 500,000 customers.⁵ Most of the utilities are small, having fewer than 3,300 customers.⁶

After approximately a year of negotiations with the FGUA, the FWSC 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.⁷ Numerous lawsuits were filed over the proposed acquisition and the PSC asserted jurisdiction to review whether the sale is in the public interest. The PSC issued an order requiring FWSC to file an application for approval of its proposed transfer to Florida Water Services Authority.⁸ Following issuance of the order,

¹ s. 19, ch. 97-236, L.O.F.

² Office of Program Policy Analysis and Governmental Accountability, Special Examination, *Intergovernmental Authorities Provide Public Benefits, But they Lack Accountability*, Report 02-67 (Dec. 2002), page 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Bridget Hall Grumet, *Panhandle Towns Snap Up Utility Giant*, St. Petersburg Times (Sept. 21, 2002).

⁸ Florida Pub. Serv. Comm’n, Order No. PSC-03-0193-FOF-WS (Feb. 7, 2003). There is an apparent statutory conflict regarding the purchase by a separate legal entity of an existing system. While s. 163.01(7)(g)1., F.S., provides that a separate legal entity is not subject to PSC jurisdiction, s. 367.071(4)(a), F.S., provides that an existing water or wastewater facilities cannot be sold without the approval of the PSC, although the sale to a governmental authority is to be approved as a matter of right.

the PSC sought and received temporary injunctive relief to delay the proposed sale pending further review by the PSC. The First District Court of Appeal refused to overturn the commission's order delaying the sale.⁹ The Florida Water Services Authority announced its intention to finance and close the sale even if contrary to the PSC's order. On March 7, 2003 in an order from the Circuit Court of the Second Judicial Circuit, the temporary injunction was continued.¹⁰ Subsequently, FWSC announced it would not sell its utility systems to the Florida Water Services Authority.¹¹

During these negotiations, the Legislature became concerned about the proposed sale and the Joint Legislative Auditing Committee directed the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) to conduct a review of the separate legal entities or intergovernmental authorities created under s. 163.01(7)(g), F.S.¹² The review was to focus on the following issues:

- The specific purpose of intergovernmental authorities as well as any public benefit derived therefrom;
- 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.¹³

OPPAGA found that economic regulation of water utilities is fragmented, with utilities owned by private companies regulated by either the PSC or the county in which the utility is located and utilities owned by counties, municipalities, and intergovernmental authorities self-regulated.¹⁴

OPPAGA found that intergovernmental authority ownership of water utilities may achieve financial benefits as the authority may be able to better meet capital expenditure needs and to realize operating efficiencies.¹⁵ As they are government entities, intergovernmental authorities can reduce the cost of financing capital improvements by issuing tax-exempt bonds.¹⁶ They also may be exempt from certain state and local taxes and may be eligible for some federal and state fund programs, which private utilities would not be.¹⁷

Intergovernmental authorities are also an effective way to consolidate the operations of small utilities, for example centralized billing and customer service, which can achieve efficiencies and economies of scale not available to those small utilities.¹⁸ These consolidation benefits can result

⁹ Carrie Johnson, *Court Lets PSC Delay Water Deal*, St. Petersburg Times (Feb. 14, 2002).

¹⁰ Florida Pub. Serv. Comm'n v. Florida Water Servs. Corp., Order No. 20030022687 (Fla. 2nd Cir. Ct. Mar. 7, 2003).

¹¹ Ludmilla Lelis, *Utility Ends Deal to Sell to 2 Small Towns*, Orlando Sentinel (Mar. 11, 2003).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, at 2-4.

¹⁵ *Id.*, at 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*, at 5.

in lower prices, which can then be spread over a larger customer base, and in improved services.¹⁹

However, OPPAGA also found several possible disadvantages.²⁰ Most customers of utilities not owned by an intergovernmental authority are assured oversight and representation by some means; customers of privately-owned utilities have representation through the regulatory process of either the PSC or the county and customers of a government-owned utility that reside within the boundaries of that government have representation through their elected local government.²¹ In contrast, intergovernmental-authority-owned utilities are self-regulated and may own utilities outside their governmental boundaries, so there is a question as to whether the interests of customers residing outside the territorial limits of the local governments forming the intergovernmental authority will be fairly represented.²² Even customers represented by a member government may not be sufficiently protected as current statutes do not require that member governments approve changes in rates or services.²³

Another potential problem is that local governments may not be able to acquire a utility owned by an intergovernmental authority.²⁴ The statutes allow local governments to acquire privately-owned utilities through negotiated purchase or eminent domain.²⁵ This can assist in long-term growth planning and in assuring accountability to customers.²⁶ It is uncertain that a local government could exercise eminent domain power over property owned by an intergovernmental authority.²⁷

Additionally, the intergovernmental authority may not realize the efficiency and economy of scale cost savings, or even if it does, it is not clear those savings would be passed on to customers.²⁸ Finally, the state and local governments may lose some tax revenues as a result of the acquisition.²⁹

Based on these findings, OPPAGA recommended the following amendments to s. 163.01(7)(g), F.S.

- An intergovernmental authority seeking to acquire a water utility should be required to obtain the affirmative consent of the county or municipality where the majority of customers reside as a condition of the acquisition.³⁰ Should the relevant county or municipality not approve the acquisition, that specific acquisition would be removed

¹⁹ *Id.*, at 5-6.

²⁰ *Id.*, at 6. Pursuant to s. 180.191, F.S., customers residing outside the territorial limits of a municipality may be assessed a surcharge of up to 50 percent of the rates, fees, and charges to customers residing within the municipality's territorial boundaries.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*, at 7.

²⁵ *Id.* (citing to ss. 127.02(1) and 166.401(1), F.S.)

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*, at 4.

²⁹ *Id.*, at 5.

³⁰ *Id.*, at 7.

- from the proposed acquisition agreement.³¹This would help assure representation of customers through their local government.³²It would also give the local governments some leverage in the negotiations of purchase price and sale terms and in assuring that benefits of intergovernmental ownership are passed on to customers.³³
- A process should be created under which, when customers do not agree with the rates and terms of service provided by an intergovernmental authority, they may request their local government to petition the PSC for arbitration services.³⁴ The PSC would be required to develop and promulgate rules to govern the process and to determine the fee for dispute resolution services.³⁵
 - Similarly, a process should be created under which a county or municipality that is seeking to acquire a utility from an intergovernmental authority and that is unable to come to terms with that intergovernmental authority may petition the PSC for “redress,” presumably facilitation of the negotiated purchase.³⁶ Again the PSC would be required to promulgate rules governing the process and to determine the fee for services.³⁷

III. Effect of Proposed Changes:

Section 1 implements the recommendations of the OPPAGA report.

Initially, it establishes the following definitions for purposes of the intergovernmental authority or separate legal entity statute, s. 163.01(7)(g), F.S.:

- A “utility” is “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.”
- A “system” is “each separate water or wastewater facility providing service.”
- A “host government” is “either the governing body of the county, if the largest number of equivalent residential connections currently served by a system of the utility is located in the unincorporated area, or the governing body of a municipality, if the largest number of equivalent residential connections currently served by a system of the utility is located within that municipality's boundaries.”
- A “separate legal entity” may mean “any entity created by interlocal agreement the membership of which is limited to two or more municipalities or counties of the state, but which entity is legally separate and apart from any of its member governments.”

Approval of proposed acquisitions by a separate legal entity

Any separate legal entity seeking to acquire a utility must provide written notice of the proposed acquisition to the host government by certified mail not less than 90 days prior to any proposed transfer of ownership, use, or possession of any utility assets by the separate legal entity. The

³¹ *Id.*

³² *Id.*

³³ *Id.*, at 8.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

notice must be mailed to the legislative head of the governing body of the host government and to its chief administrative officer. It must include the name and address of a contact person and information identified in s. 367.071(4)(a), F.S., which is the utility's most recent available income and expense statement, balance sheet, and statement of rate base for regulatory purposes and contributions-in-aid-of-construction.

Within 90 days after receipt of the notice, the host government may either: adopt a resolution to become a member of the separate legal entity; 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 90-day 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 is to be construed as a denial of the acquisition. If the host government adopts a prohibition resolution, the separate legal entity is prohibited from acquiring the utility unless the host government subsequently gives consent by another resolution. If a host government adopts a membership resolution, the separate legal entity must accept the host government as a member before transfer of ownership, use, or possession of the utility on the same basis as existing members. If the host government does not prohibit or approve the acquisition, does not request an extension of time, and does not institute judicial action, the separate legal entity may proceed with the acquisition after the 90-day notice period without further notice. If a proposed utility acquisition involves two or more host governments, the PSC is to consider whether the sale of the utility or utility systems within its jurisdiction is in the public interest.

Disagreements on rates and services

The bill gives the host government the right to review and approve as fair and reasonable any proposed changes to rates, charges, customer classifications, and terms of service. The host government also has the right to review and approve any changes to the financing of the utilities which may result in increased costs to customers. The right of review and approval is subject to the obligation of the separate legal entity to establish rates and charges that comply with the requirements relating to the issuance of bonds to acquire and improve the facility. The right does not affect the obligation of the separate legal entity to set rates at a level sufficient to pay debts.

A separate legal entity that proposes making any changes to rates or other specified terms of service must notify the host government of the proposed changes in writing by certified mail not less than 90 days before implementation of the proposed changes. The notice must be sent to the legislative head of the governing body of each affected host government and to its chief administrative officer and must 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.

If the host government reviews the proposed changes and determines that they are in the public interest, it may pass a resolution approving the changes. If the host government determines that the proposed changes are not in the public interest, it may negotiate with the separate legal entity to resolve the host government's concerns. If the parties are unable to reach agreement within 30 days of the determination that the proposed changes are not in the public interest, the host government may request binding arbitration through the PSC. The PSC is to develop and adopt rules to govern the process and to establish fees for the dispute-resolution service.

Payments from a utility owned by a separate legal entity

The bill requires that any payments or transfers to a member or a county or municipality from a utility owned by a separate legal entity come from user fees or other charges or revenues from customers physically located within the jurisdictional or service boundaries of the member or county or municipality.

Local government right to acquire a utility

The bill guarantees the right of a host government to acquire any separate-legal-entity-owned utility within its boundaries. If the parties cannot agree to the terms and conditions of the acquisitions, the host government may request binding arbitration through the PSC. Again, the PSC is to develop and adopt administrative rules governing the arbitration process and establishing fees. In developing these rules, the PSC is 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. The bill 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 bill 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 amends s. 120.52(1), F.S. That section defines the term "agency" for purposes of ch. 120, F.S., the Administrative Procedure Act. There is an existing exception from this definition for a legal or administrative entity created by an interlocal agreement under s. 163.01(7), F.S. The bill amends this exception to specify that a separate legal entity created under s. 163.07(7)(g)1. is included in the definition of "agency" and subject to the Act.

Section 3 amends s. 367.021, F.S., to exclude a separate legal entity from the definition of "governmental authority." Under s. 367.071(4)(a), F.S., a governmental authority that is purchasing a privately-owned utility is entitled to PSC approval of that purchase as a matter of right.

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 is a severability clause.

Section 6 provides that the bill takes effect upon becoming a law and applies to all pending contracts.

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:

The bill clarifies the law on purchase and operation of utilities by a separate legal entity, providing more certainty to all involved in such transactions and avoiding some litigation. As it provides for increased participation by local governments in these transactions, their residents are better protected.

C. Government Sector Impact:

The bill clarifies the law on purchase and operation of utilities by a separate legal entity, providing more certainty to all involved in such transactions and avoiding some litigation. As it provides for increased participation by local governments in these transactions, their residents are better protected.

VI. Technical Deficiencies:

The bill provides that if the host government takes no action to agenda the proposed acquisition, this constitutes a denial of the acquisition. However, it also provides that if the host government does not prohibit or approve the acquisition, does not request an extension of time, and does not institute judicial action, the separate legal entity may acquire the utility without further notice. As none of these actions would happen if the host government takes no action to agenda the proposed acquisition, these provisions appear to be in conflict.

The words “host government utility” on page 5, line 17, probably should be “affected utility.”

VII. Related Issues:

None.

VIII. Amendments:

None.

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