Water, sewer or waste water utility, sale/purchase

Number: INFORMAL

Date: April 03, 2008

The Honorable Marti Coley
Representative, District 7
319 Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300

Dear Representative Coley:

You ask this office to comment upon the interpretation of section 125.3401, Florida Statutes, as well as the intent of the Legislature at the time the law went into effect.

Section 125.3401, Florida Statutes, requires the governing body of a county purchasing or selling a water, sewer, or wastewater reuse utility that provides service to the public for compensation, or entering into a wastewater facility privatization contract for a wastewater facility, to hold a public hearing on the purchase, sale, or wastewater facility privatization contract and make a determination that the purchase, sale, or wastewater facility privatization contract is in the public interest. In making such a determination, the statute requires that the governing body consider, at a minimum, the criteria specified therein.[1] The county is required to prepare a statement showing that the purchase, sale, or wastewater facility privatization contract is in the public interest, including a summary of the purchaser's or private firm's experience in water, sewer, and wastewater reuse utility operation and a showing of financial ability to provide the service, whether the purchaser or private firm is the county or the entity purchasing the utility from the county.

Section 125.3401, Florida Statutes, was originally enacted in 1984 by Chapter 84-84, Laws of Florida. Similar provisions were also adopted for municipalities, community development districts, and special districts.[2] Chapter 367, Florida Statutes, the "Water and Wastewater System Regulatory Law," gave the Florida Public Service Commission (commission) exclusive jurisdiction over water or wastewater utilities with respect to its authority, service, and rates.[3] Section 367.071(1), Florida Statutes, provides in part that no utility regulated under Chapter 367 shall be sold, assigned or transferred "without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest[.]"[4]

Section 367.022, Florida Statutes, however, exempts systems controlled by governmental entities.[5] Such utilities are not subject to the provisions of Chapter 367, Florida Statutes, except as expressly provided. Section 367.171(1), Florida Statutes, authorizes a county, by the adoption of a resolution by the board of county commissioners of such county, or, in counties operating under a countywide charter, by the appropriate board, to declare that the county is subject to the provisions of Chapter 367. The staff analysis for the bill enacted as Chapter 84-84, Laws of Florida, indicates that at the time the bill was being considered, 31 counties were being regulated under the chapter.[6]

Section 367.071(4)(a), Florida Statutes, provides for the commission's authority regarding the sale of a utility's facilities to a governmental authority, and states in pertinent part:

"The sale of facilities, in whole or part, to a governmental authority shall be approved as a matter of right; however, the governmental authority shall, prior to taking any official action, obtain from the utility or commission with respect to the facilities to be sold *the most recent available income and expense statement, balance sheet, and statement of rate base for regulatory purposes and contributions-in-aid-of-construction*. . . ."[7] (e.s.)

A review of the legislative history surrounding the enactment of section 125.3401, Florida Statutes, in 1994, indicates that the Legislature was aware that the above statute required certain information when the sale of facilities was made *to* a governmental authority, but that there were no criteria to determine whether the sale, assignment, or transfer of a water or sewer facility *from* a local government to a private entity was in the public interest.[8] The staff analysis for the 1984 legislation notes:

"Section 367.071(1), Florida Statutes, provides that utilities regulated under chapter 367, Florida Statutes, shall not be sold or transferred without determination and approval of the PSC that the proposed sale or transfer is in the public interest. The PSC has not adopted by rule nor been directed by statute to use specific criteria to determine that the sale, assignment, or transfer of a water or sewer utility to a private company in counties regulated under chapter 367, Florida Statutes, is in the public interest. *Commission Rule 25-10.07, Florida Administrative Code, specifies the contents of an application for the sale or transfer of a utility under PSC jurisdiction and requires information about the buyer's financial integrity and expertise in operating a utility. The criteria contained in CS/SB 91 are similar to the information required in the PSC applications* ."[9] (e.s.)

Thus, it appears that it was the intent of the Legislature in 1984 to require local governments to determine in a manner somewhat similar to that required of the Public Service Commission that a proposed sale of water or sewer facilities was in the public interest. To accomplish this, the Legislature required the local counties to hold a public hearing on the proposed sale or transfer and to evaluate the sale or transfer according to certain minimum criteria similar to that used by the Public Service Commission.

Section 125.3401, Florida Statutes, was subsequently amended in 1993 to insert references to wastewater reuse.[10] In 1996, the statute was again amended to recognize the authority of a public entity to enter into a privatization contract with a private firm and to provide that such privatization contracts were subject to the terms of the statute.[11] While the scope of the statute has been broadened, its intent appears to be the same: to require that a county seeking to purchase or sell the specified utilities providing service for compensation, or entering into a wastewater facility privatization contract for a wastewater facility, hold a public hearing on the transaction and make a determination that the purchase, sale, or wastewater facility privatization contract is in the public interest.

I hope that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

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[1] *See* s. 125.3401(1)-(10), Fla. Stat., setting forth the criteria to be considered.

[2] *See* ss. 180.301, 190.0125, and 189.423, Fla. Stat., respectively.

[3] *See* s. 367.011(2), Fla. Stat. Since 1984, only one substantive amendment to the language of s. 367.011 has been made; s. 1, Ch. 89-353, Laws of Fla., changed the name from the "Water and Sewer System Regulatory Law" to the "Water and Wastewater System Regulatory Law." *And see* s. 367.021(12), Fla. Stat., defining "Utility" to mean a water or wastewater utility and, except as provided in s. 367.022, includes every person, 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. The only substantive amendment to the definition of "Utility" in s. 367.021 was by s. 2, Ch. 89-353, Laws of Fla., which changed "sewer" to "wastewater" and renumbered the subsection.

[4] Section s. 6, Ch. 89-353, Laws of Fla., added to this provision the following: "and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility." In 1999, the Legislature authorized a sale, assignment, or transfer to occur prior to commission approval if such contract for sale, assignment, or transfer is made contingent upon commission approval. *See* s. 5, Ch. 99-319, Laws of Fla.

[5] Section 367.022(2), Fla. Stat. 1983, provided:

"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 agencies[.]"

Section 3, Ch. 89-353, Laws of Fla., amended the language to read: "Systems owned, or systems of which the rates and charges for utility service to the public are controlled, by governmental authorities[.]" Section 1, Ch. 90-166, Laws of Fla., amended the language to read: "Systems owned, operated, managed, or controlled by governmental authorities[.]" Section s. 10, Ch. 96-202, Laws of Fla., added the phrase "including wastewater facilities operated by private firms under wastewater facility privatization contracts as defined in section 2[.]" In s. 4, Ch. 99-319, Laws of Fla., subsection (2) was again amended to read, as it does in the current statute, that the following are not subject to regulation by the commission as a utility nor are they subject to the provisions of Chapter 367, except as expressly provided:

"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."

[6] Senate Staff Analysis and Economic Impact Statement on CS/SB 91, dated May 24, 1984.

[7] In 1984, this provision was s. 367.071(3)(a), Fla. Stat. 1984, and provided:

"The sale or transfer of a certificate or facilities to a governmental agency shall be approved as a matter of right; however, the governmental agency shall, prior to taking any official action, obtain from the commission with respect to the authority or facilities to be sold or transferred the most recent available income and expense statement, balance sheet, and statement of rate base for regulatory purposes and contributions-in-aid-of-construction."

See s. 6, Ch. 89-353, Laws of Fla., which amended and renumbered the subsection.

[8] Senate Staff Analysis and Economic Impact Statement on CS/SB 91, dated May 24, 1984.

[9] *Id.* at III. Comments, p. 2. Rule 25-10.07, Fla. Admin. C., no longer exists; *see now* Rule 25-30.037, Fla. Admin. C., which provides for an application for authority to transfer utilities.

[10] Section 1, Ch. 93-51, Laws of Fla.

[11] Section 6, Ch. 96-202, Laws of Fla.