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 2668

SPONSOR: Comprehensive Planning Committee and Senator Atwater

SUBJECT: Water and Wastewater Utilities

DATE: April 17, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CP	Fav/CS
2.			CU	
3.			ATD	
4.			AP	
5.				
6.				

I. Summary:

The committee substitute (CS) significantly revises the method by which a separate legal entity, created under the Florida Interlocal Cooperation Act of 1969, may acquire a water or wastewater utility. It adds to the possible membership of any separate legal entity created under this act, a special district in addition to a municipality or county or both. The CS codifies existing law regarding what happens to any gains or losses in the purchase of a privately-owned utility by specifying that any loss in future revenues must be borne by the shareholders of the utility. This provision applies to all transactions prior to and after the effective date of the section. In addition, the CS changes the timing of the payments of regulatory assessment fees by large water and wastewater utilities from annual to semi-annual.

This CS substantially amends sections 163.01 and 367.145, and creates s. 367.0813, of the Florida Statutes.

II. Present Situation:

Section 163.01, F.S., is known as the "Florida Interlocal Cooperation Act of 1969." The purpose of the act is to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.

Section 163.01(7)(g)1., F.S., provides that any separate legal entity created under chapter 163, F.S., the membership of which is limited to municipalities and counties of the 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. The Office of Program Policy Analysis and Governmental Accountability (OPPAGA) conducted a review of separate legal entities created under this provision.[1] 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. [2]

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.[3] As they are government entities, intergovernmental authorities can reduce the cost of financing capital improvements by issuing tax-exempt bonds.[4] 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.[5] 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.[6] These consolidation benefits can result in lower prices, which can then be spread over a larger customer base, and in improved services.[7]

However, OPPAGA also found several possible disadvantages.[8] 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.[9] 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.[10]

Regulatory Assessment Fees for Water and Wastewater Utilities

Subsection 367.145(1), F.S., requires water and wastewater utilities that are regulated by the PSC to pay regulatory assessment fees once a year in conjunction with the filing of its annual financial report. The amount of the regulatory assessment can not exceed 4.5 percent of the gross revenues of the utility derived from intrastate business, excluding sales for resale made to a

[1] *See* OPPAGA: Special Examination, *Intergovernmental Authorities Provide Public Benefits, But They Lack Accountability,* Report No. 02-67 (Dec. 2002), <http://www.oppaga.state.fl.us/reports/pdf/0267rpt.pdf>.
[2] *Id.* at 2-4.
[3] *Id.* at 4.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 5.
[7] *Id.* at 5-6.
[8] *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.
[9] *Id.*
[10] *Id.*

regulated company. Annual reports are due by March 30 of the following year. Financial reports are used to determine the amount due in regulatory assessment fees. This practice results in fewer mistakes which would otherwise require a "true-up" of rates.

Section 350.113, F.S., authorizes the Florida Public Service Commission Regulatory Trust Fund in the State Treasury where all regulatory assessment fees are deposited. Subsection 350.113(3), F.S., requires each regulated company under the jurisdiction of the PSC to pay regulatory assessment fees every six months.

III. Effect of Proposed Changes:

Section 1 amends s. 163.01(7)(g), F.S., to add to the possible membership of any separate legal entity created under this act, a special district in addition to a municipality or county or both.

The CS also provides definitions for the following terms:

- "Host government" means 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.
- "Separate legal entity" means any entity created by interlocal agreement the membership of which is limited to two or more special districts, municipalities, or counties of the state, but which entity is legally separate and apart from any of its member governments.
- "System" means a water or wastewater facility or group of such facilities owned by one entity or affiliate entities.
- "Utility" means 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 proposing to provide, water or wastewater service to the public for compensation.

The CS provides that a separate legal entity that seeks to acquire any utility shall notify the host government in writing by certified mail about the contemplated acquisition not less than 30 days before any proposed transfer of ownership, use, or possession of any utility assets by such separate legal entity. Such notice shall include contact person and information identified in s. 367.071(4)(a), F.S., (e.g., the most recent available income and expense statement, balance sheet, and statement of rate base for regulatory purposes and contributions-in-aid-of-construction).

Within 30 days following receipt of the notice, the host government may adopt a resolution to become a member of the separate legal entity, adopt a resolution to approve the utility acquisition, or adopt a resolution to prohibit the utility acquisition by the separate legal entity if the host government determines that the proposed acquisition is not in the public interest. A resolution prohibiting the acquisition may include conditions that would make the proposal acceptable to the host government.

If the host government adopts a membership resolution, the separate legal entity shall accept the host government as a member on the same basis as its existing members before any transfer of

ownership, use, or possession of the utility or the utility facilities. If a host government adopts a resolution to approve the utility acquisition, the separate legal entity may complete the transaction. If a host government adopts a prohibition resolution, the separate legal entity may not acquire the utility within the host government's territory without the specific consent of the host government by future resolution. If a host government does not adopt a prohibition resolution or an approval resolution, the separate legal entity may proceed to acquire the utility after the 30-day notice period without further notice.

After the acquisition or construction of any utility system by a separate legal entity, revenues or any other income may not be transferred or paid to a member of a separate legal entity, or to any other special district, county, or municipality, from user fees or other charges or revenues generated from customers that are not physically located within the jurisdictional or service delivery boundaries of the member, special district, county, or municipality receiving the transfer or payment. Any transfer or payment to a member, special district or other local government must be solely from user fees or other charges or revenues generated from customers that are physically located within the jurisdictional or service delivery boundaries of the member, special district, or local government receiving the transfer of payment.

The CS provides that s. 163.01(7)(g), F.S., is an alternative provision otherwise provided by law as authorized in s. 4, Art. VIII of the State Constitution for any transfer of power as a result of an acquisition of a utility by a separate legal entity from a municipality, county, or special district.

Section 2 creates s. 367.0813, F.S., which provides that in order to provide appropriate incentives to encourage the private sector to participate in the investment in water and wastewater infrastructure, to protect private sector property rights of a utility's shareholders, and to avoid an additional burden of costs placed on ratepayers by re-litigating this issue, the Legislature affirms and clarifies the clear policy of Florida that gains or losses from a purchase or condemnation of a utility's assets which results in the loss of customers served by such assets and the associated future revenue streams shall be borne by the shareholders of the utility. This provision applies to all transactions prior to and after the effective date of the section.

Section 3 is a severability clause.

Section 4 amends subsection 367.145(1), F.S., to require water and wastewater utilities with annual revenues above $200,000, that are regulated by the PSC, to pay regulatory assessment fees every six months rather than every 12 months. This changes makes the payment for regulatory assessment fees for large water and wastewater utilities consistent with the provisions of section 350.113, F.S., which are applicable to all other utilities regulated by the PSC.

Section 5 provides that this act shall take effect upon becoming a law and shall apply to all contracts pending on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Section 2 of this CS contains a provision that applies to all transactions prior to and after the effective date of the section. Also, section 5 of the CS provides that this act shall apply to all contracts pending on or after the effective date of the act. Retroactive application of this CS may raise the issue of impairing obligations of contracts.[11]

Article I, Section 10 of the United States Constitution prohibits state legislatures from enacting laws impairing the obligation of contracts. As early as 1880, the federal courts recognized that the contract clause does not override the police power of the states to establish regulations to promote the health, safety, and morals of the community.[12] The severity of the impairment is a key issue when evaluating whether a state law impairs a contract.[13] In *Exxon Corp. v. Eagerton*[14], the Supreme Court suggested it would uphold legislation that imposes a generally applicable rule of conduct designed to advance a broad societal interest that only incidentally disrupts existing contractual relationships.

Article I, Section 10 of the Florida Constitution also prohibits the state from enacting laws impairing the obligation of contracts. While Florida courts have historically strictly applied this restriction, they have exempted laws when they find there is an overriding public necessity for the state to exercise its police powers.[15] This exception extends to laws that are reasonable and necessary to serve an important public purpose,[16] to include protecting the public's health, safety or welfare.[17]

Historically, both the state and federal courts have attempted to find a rational and defensible compromise between individual rights and public welfare when laws are enacted that may impair existing contracts.[18]

[11] Art. I, § 10, Fla. Const.; Art. I, § 10 U.S. Const.
[12] Stone v. Mississippi*,* 101 U.S. 814 (1880).
[13] General Motors Corp. v. Romein*,* 503 U.S. 181 (1992).
[14] 462 U.S. 176 (1983).
[15] Park Benziger & Co. v. Southern Wine & Spirits, Inc., 391 So. 2d 681 (Fla. 1980).
[16] Yellow Cab Co. v. Dade County*,* 412 So. 2d 395 (Fla. 3rd DCA 1982), *cert. denied,* 424 So. 2d 764 (Fla. 1982).
[17] Khoury v. Carvel Homes South, Inc., 403 So. 2d 1043 (Fla. 1st DCA 1981), *cert. denied,* 412 So. 2d 467 (Fla. 1981).
[18] Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The CS changes the timing of the payments of regulatory assessment fees by large water and wastewater utilities from annual to semi-annual. This change does not impact the total annual amount of regulatory assessments paid by such utilities. Instead, this requirement evens out the receipt of regulatory assessment fees paid by the water and wastewater industry and provides for more timely recovery of the costs of regulating the industry.

The PSC states that the 60 large companies will pay approximately $1.5 million in July and an additional $1.5 million in January. The 120 or so small water and wastewater utilities, those with annual revenues of less than $200,000, will continue to be required to pay the regulatory fees only once a year at the time they file their annual financial report. According to the PSC, the larger Class A and B utilities should have little difficulty in estimating the semi-annual payments.

B. Private Sector Impact:

Large water and wastewater utilities (Class A and B) will have to adjust their cash flow to accommodate the semi-annual payment. Payments of approximately $1.5 million are due by July 31 and January 30 of each year. The total amount of the payments, which is approximately $3,000,000, will not change. Smaller Class C utilities generally remit a total of approximately $500,000 annually.

The CS also codifies existing law regarding what happens to any gains or losses in the purchase of a privately-owned utility by specifying that any loss in future revenues must be borne by the shareholders of the utility.

C. Government Sector Impact:

The PSC will be better able to manage its cash flow and will provide for more timely recovery of the costs of regulating the industry.

The CS gives local governments in which other governments want to operate a utility, certain protections which do not currently exist. These protections are:

- Notice that a separate legal entity created by interlocal agreement wants to operate within the host government's territory.
- Automatic membership of the host government.
- The ability to oppose the separate legal entity's service in the host governments' territory.
- That any transfer or payment by the separate legal entity to a member or other local government must be made solely from user fees or other charges or revenues generated from customers that are physically located within the

jurisdictional boundaries of the member or local government receiving the transfer or payment.

VI. Technical Deficiencies:

Section 1 of this bill on page 2, lines 17 and 18, allows a separate legal entity created under s. 163.01(7)(g)1., F.S., to include a special district in addition to a municipality or county or both. On page 3, lines 8 through 12, define a "separate legal entity" as an entity created by an interlocal agreement and which consists of two or more special districts, municipalities, or counties. These provisions are inconsistent and it is unclear whether a separate legal entity can contain more than one special district.

VII. Related Issues:

None.

VIII. Amendments:

None.