

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1107 Utility Cost Containment Bonds

**SPONSOR(S):** Wood

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy & Utilities Subcommittee	13 Y, 0 N	Keating	Keating
2) Finance & Tax Subcommittee			
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

The bill establishes a new financing mechanism – “Utility Cost Containment Bonds” – available to an intergovernmental authority to finance or refinance, on behalf of a municipality, county, special district, or other governmental entity (including the authority itself), projects related to water, wastewater, electric, or stormwater service. The creation of this financing mechanism, referred to as securitization, is designed to satisfy rating agency criteria to achieve a higher bond rating and, therefore, a lower interest rate and more favorable terms for bonds issued to fund eligible utility projects for these entities.

In summary, the financing mechanism created by the bill operates as follows:

- A local agency applies to the intergovernmental utility authority to finance the costs of an eligible project using “utility cost containment bonds.
- The intergovernmental utility authority adopts a financing resolution setting forth certain requirements for issuance of the bonds. (The intergovernmental utility authority may form a single-purpose limited liability company to finance the project and may authorize the company to adopt the financing resolution. The intergovernmental utility authority and two or more of its members may create a new single-purpose entity by local agreement to perform the intergovernmental utility authority duties.)
- The bonds are secured by a separate utility project charge stated on the bill of each customer of the services specified in the financing resolution, regardless of the amount of utility services provided to the customer.
- This charge is levied by the intergovernmental utility authority on behalf of the local agency receiving financing for an eligible project.
- The intergovernmental utility authority and the local agency enter into a servicing agreement under which the local government collects the charge.
- The moneys from the charge are transferred to the intergovernmental utility authority and used to secure bonds issued for the benefit of the local agency.
- The local agency holds the money collected from the charge in trust for the benefit of the bondholders. The moneys collected from the charge are not considered revenues of the local agency but are treated as revenues of the intergovernmental utility authority.
- The intergovernmental utility authority is not permitted to file bankruptcy while any of the bonds are outstanding.

The Florida Governmental Utility Authority is the only intergovernmental authority that currently meets the criteria to provide financing under the bill. FGUA’s current purpose is to own and operate a public utility system for the provision of water and wastewater service.

The bill has no impact on state or local government revenues or state government expenditures. The bill may lower financing costs for eligible local government utility projects and stormwater projects.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### *Financing Authority of Local Government Entities for Public Works Projects*

Local governments are authorized under current law to issue bonds, revenue certificates, and other forms of indebtedness related to the provision of public works projects.

Upon a resolution, a county may issue water revenue bonds, sewer revenue bonds, or general obligation bonds to pay all or part of the cost to purchase, construct, improve, extend, enlarge, or reconstruct water supply systems or sewage disposal systems.<sup>1</sup> Water revenue bonds are payable solely from water service charges.<sup>2</sup> Sewer revenue bonds are payable solely from sewer service charges.<sup>3</sup> Neither type of revenue bond pledges the property, credit, or general tax revenue of the county. General obligation bonds are payable from ad valorem taxes alone or from ad valorem taxes with an additional secured pledge of water service charges, sewer service charges, special assessments, or a combination of these sources.<sup>4</sup> Issuance of general obligation bonds, as required by the State Constitution,<sup>5</sup> requires approval by referendum, and a county is required to levy annually a special tax upon all taxable property within the county to pay the principle and interest as it becomes due.<sup>6</sup> Counties may also create special water and sewer districts to serve unincorporated areas, and the district's board may issue revenue bonds to finance all or part of the cost of a water system, sewer system, or both. Such bonds are payable from the revenues derived from operation of the utility system as provided by law and the authorizing resolution of the district's board.<sup>7</sup>

Upon approval of a municipality's governing body, a municipality may issue revenue bonds, general obligation bonds, ad valorem bonds, and improvement bonds to finance capital expenditures made for a public purpose. Revenue bonds are payable from sources other than ad valorem taxes and are not secured by a pledge of the property, credit, or general tax revenue of the municipality. General obligation bonds are payable from any special taxes levied for the purpose of repayment and any other sources as provided by the authorizing ordinance or resolution. Such bonds are secured by the full faith and credit and taxing power of the municipality and may require approval by referendum. Ad valorem bonds are payable from the proceeds of ad valorem taxes and, as required by the State Constitution<sup>8</sup>, require approval by referendum. Improvement bonds are special obligations payable solely from the proceeds of special assessments levied for a project.<sup>9</sup>

Further, a municipality may issue mortgage revenue certificates or debentures to acquire, construct, or extend any public works, including, among other things, water and alternative water supply facilities, sewage collection and disposal facilities, gas plants and distribution systems, and stormwater projects.<sup>10</sup> These instruments constitute a lien only against the property and revenue of the utility.

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<sup>1</sup> Section 153.03(1) and (2), F.S.

<sup>2</sup> Section 153.02(9), F.S.

<sup>3</sup> Section 153.02(10), F.S.

<sup>4</sup> Section 153.02(11), F.S.

<sup>5</sup> S. 12, Article VII, of the State Constitution (providing that counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation only "to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation.")

<sup>6</sup> Section 153.07, F.S.

<sup>7</sup> Section 153.63(1), F.S. Such bonds may also be secured by the pledge of special assessments or the full faith and credit of the district.

<sup>8</sup> See Footnote 5.

<sup>9</sup> Section 166.101, F.S., et seq.

<sup>10</sup> Sections 180.06 and 180.08, F.S.

These instruments may not impose any tax liability upon any real or personal property in the municipality and may not constitute a debt against the issuing municipality.<sup>11</sup>

The Division of Bond Finance (DBF) of the State Board of Administration provides information to, and collects information from, units of local government<sup>12</sup> concerning the issuance of bonds by such entities.<sup>13</sup> Each unit of local government must provide DBF a complete description of its new general obligation bonds and revenue bonds and must provide advanced notice of the impending sale of a new issue of bonds.<sup>14</sup> According to DBF, a public utility generally finances projects with revenue bonds, securing the debt with a pledge of net revenues of the utility system. These net revenues consist of the income of the public utility remaining after paying expenses necessary to operate and maintain the utility. DBF notes that this current practice requires the efficient operation of the utility system to assure that sufficient net revenues are available to pay debt service.

### *Creation and Financing Authority of Intergovernmental Utility Authorities*

The Florida Interlocal Cooperation Act of 1969 (Act) is intended 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.<sup>15</sup> The Act provides that local governmental entities may jointly exercise their powers by entering into a contract in the form of an interlocal agreement.<sup>16</sup> Under such an agreement, the local governmental units may create a separate legal or administrative entity “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.”<sup>17</sup> A separate entity created by an interlocal agreement possesses the authority specified in the agreement.<sup>18</sup> Among the authority granted such an entity is the power to authorize, issue, and sell bonds.<sup>19</sup>

The Act specifically addresses the establishment of such entities to provide water service, sewer service, or electricity service (hereinafter referred to as “intergovernmental utility authorities” or “IGUAs”). Section 163.01(7)(g), F.S., authorizes the creation of IGUAs to acquire, own, construct, improve, operate, and manage public facilities relating to a governmental function or purpose, including water and alternative water supply facilities, wastewater facilities, and water reuse facilities.<sup>20</sup> An IGUA created under this provision may also finance such facilities on behalf of any person. The membership of an IGUA created under this provision is limited to two or more special districts, municipalities, or counties of the state. The IGUA’s facilities may serve populations “within or outside of the members of the entity” but not within the service area of an existing utility system. These entities are not subject to regulation by the Public Service Commission.

An IGUA created under section 163.07(g), F.S., may finance or refinance the acquisition, construction, expansion, and improvement of facilities through the issuance of bonds, notes, or other obligations. Except as may be limited by the interlocal agreement under which the entity is created, all of the privileges, benefits, powers, and terms of the statutes relating to counties<sup>21</sup> and municipalities<sup>22</sup> are fully

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<sup>11</sup> Section 180.08, F.S.

<sup>12</sup> “Unit of local government” is defined in s. 218.369, F.S., as “a county, municipality, special district, district school board, local agency, authority, or consolidated city-county government or any other local governmental body or public body corporate and politic authorized or created by general or special law and granted the power to issue general obligation or revenue bonds.”

<sup>13</sup> Section 218.37, F.S.

<sup>14</sup> *Id.* DBF is authorized only to collect information concerning these bonds; it does not exercise any substantive authority to review or approve these transactions.

<sup>15</sup> Section 163.01(2), F.S.

<sup>16</sup> Section 163.01(5), F.S.

<sup>17</sup> Section 163.01(2), F.S.

<sup>18</sup> Section 163.01(7)(b), F.S.

<sup>19</sup> Section 163.01(7)(d), F.S.

<sup>20</sup> Section 163.01(7)(g), F.S.

<sup>21</sup> Section 125.01, F.S.

<sup>22</sup> Section 166.021, F.S.

applicable to the entity. Bonds, notes, and other obligations issued by the entity are issued on behalf of the public agencies that are members of the entity.<sup>23</sup>

The Act also specifically addresses the powers of certain IGUAs that consist solely of electric utilities.<sup>24</sup> Such entities may, for the purpose of financing or refinancing an electric project, exercise the powers granted to counties and municipalities to authorize, issue, and sell bonds.<sup>25,26</sup>

The Florida Governmental Utility Authority (FGUA) was formed in 1999 pursuant to s. 163.01(7)(g), F.S. As noted on its website, FGUA is a separate legal entity created by interlocal agreement with the limited purpose of owning and operating a public utility system. It provides retail water and wastewater utility services in several portions of the state. The FGUA consists of 14 counties: Alachua, Citrus, Collier, Hardee, Hillsborough, Lake, Lee, Marion, Orange, Pasco, Polk, Putnam, Seminole, and Volusia counties have systems in the FGUA.<sup>27</sup> FGUA's governing board is comprised of seven members representing Citrus, DeSoto, Hendry, Lee, Marion, Pasco, and Polk counties.<sup>28</sup> Each board member is a county employee appointed by their local government.<sup>29</sup>

### *Utility Securitization Financing in Florida*

Following the severe tropical storm seasons that Florida faced in 2004 and 2005, the Legislature created a new financing mechanism, referred to as securitization, by which investor-owned electric utilities could petition the Public Service Commission for issuance of a financing order authorizing the utility to issue bonds through a separate legal entity.<sup>30</sup> If granted, the financing order was required to establish a nonbypassable charge to the utility's customers in order to provide a secure stream of revenues to the separate legal entity from which the bonds would be paid. The purpose of this mechanism was to allow the utilities access to low-cost financing to cover storm recovery costs and replenishment of storm reserve funds. This mechanism has been implemented in only one instance.<sup>31</sup>

### Effect of Proposed Changes

The bill establishes a new mechanism – “Utility Cost Containment Bonds” – available to an intergovernmental authority to finance, on behalf of a municipality, county, special district, or other governmental entity (including the IGUA itself), projects related to water, wastewater, electric, and stormwater service. The creation of this financing mechanism, referred to as securitization, is designed to satisfy rating agency criteria to achieve a higher bond rating and, therefore, a lower interest rate and more favorable terms for bonds issued to fund eligible utility projects.

In summary, the financing mechanism created by the bill operates as follows:

- A “local agency” applies to the intergovernmental utility authority to finance the costs of an eligible project using “utility cost containment bonds.”
- The intergovernmental utility authority adopts a “financing resolution” setting forth certain requirements for issuance of the bonds. (The intergovernmental utility authority may form a single-purpose limited liability company to finance the project and may authorize the company

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<sup>23</sup> Section 163.01(7)(g)7., F.S.

<sup>24</sup> See section 163.01(7)(c) and (15), F.S.

<sup>25</sup> Section 163.01(7)(c), F.S.

<sup>26</sup> The Florida Municipal Power Agency was formed in 1978 and primarily provides wholesale electric generation and transmission services. It is comprised of 31 municipal electric utilities: Alachua, Bartow, Blountstown, Bushnell, Chattahoochee, Clewiston, Fort Meade, Fort Pierce, Gainesville, Green Cove Springs, Havana, Homestead, Jacksonville Beach, Key West, Kissimmee, Lake Worth, Lakeland, Leesburg, Moore Haven, Mount Dora, New Smyrna Beach, Newberry, Ocala, Orlando, Quincy, St. Cloud, Starke, Vero Beach, Wauchula, Williston, and Winter Park. See <http://www.fmpa.com/index.php/about-us/members> (last accessed March 20, 2014).

<sup>27</sup> <http://www.fgua.com/fgua-history> (last accessed March 20, 2014).

<sup>28</sup> <http://www.fgua.com/the-board> (last accessed March 20, 2014).

<sup>29</sup> *Id.*

<sup>30</sup> Section 366.8260, F.S.

<sup>31</sup> Docket No. 060038-EI, Florida Public Service Commission.

to adopt the financing resolution. The intergovernmental utility authority and two or more of its members may create a new single-purpose entity by local agreement to perform the intergovernmental utility authority duties.)

- The bonds are secured by a separate “utility project charge” stated on the bill of each customer of the services specified in the financing resolution, regardless of the amount of utility services provided to the customer.
- This charge is levied by the intergovernmental utility authority on behalf of the local government receiving financing for an eligible project.
- The intergovernmental utility authority and the local government enter into a servicing agreement under which the local government collects the charge.
- The moneys from the charge are transferred to the intergovernmental utility authority and used to secure bonds issued for the benefit of the local government.
- The local government holds the money collected from the charge in trust for the benefit of the bondholders. The moneys collected from the charge are not considered revenues of the local government but are treated as revenues of the intergovernmental utility authority.
- The intergovernmental utility authority is not permitted to file bankruptcy while any of the bonds are outstanding.

The Florida Governmental Utility Authority is the only intergovernmental authority that currently meets the criteria to provide financing under the bill. Thus, the bill expands FGUA’s original limited purpose of owning and operating a public utility system.

### *Definitions*

The bill provides the following definitions:

- **"Authority"** means an entity, including a successor to the powers and functions of such entity, created pursuant to s. 163.01(7)(g), F.S., that provides public utility services and whose membership consists of at least three counties.<sup>32</sup>
- **"Cost,"** as applied to a utility project or portion of a utility project financed under this section, means all of the following:
  - Any part of the cost of constructing, renovating, or acquiring lands, structures, real or personal property, rights, rights-of-way, franchises, easements, and interests acquired or used for a utility project.
  - The cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which the buildings or structures may be moved, and the cost of all machinery and equipment used for demolishing or removing such buildings or structures.
  - Finance charges.
  - Interest, as determined by the authority.
  - Provisions for working capital and debt service reserves.
  - Costs for extensions, enlargements, additions, replacements, renovations, and improvements.
  - The cost of architectural, engineering, financial, and accounting services, plans, specifications, and estimates. The term also includes administrative expenses and legal services.
  - Other expenses necessary or incidental to determining the feasibility of constructing a utility project or incidental to the construction, acquisition, or financing of a utility project.
- **"Customer"** means a person receiving water, wastewater, electric, or stormwater service from a publicly owned utility.
- **"Financing cost"** means any of the following:
  - Interest and redemption premiums that are payable on utility cost containment bonds.

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<sup>32</sup> Only the Florida Governmental Utility Authority currently meets this definition.

- The cost of retiring the principal of utility cost containment bonds, whether at maturity, including acceleration of maturity upon an event of default, or upon redemption, including sinking fund redemption.
  - The cost of issuing or servicing utility cost containment bonds, including payment under an interest rate swap agreement, and all types of fees tied to the issuance or servicing of the bonds.
  - A payment or expense associated with a bond insurance policy, financial guaranty, or contract, agreement, or other credit or liquidity enhancement for bonds or a contract, agreement, or other financial agreement entered into in connection with utility cost containment bonds.
  - Any coverage charges.
  - The funding of one or more reserve accounts related to utility cost containment bonds.
- **"Financing resolution"** means a resolution adopted by the governing body of an authority that finances or refinances a utility project with utility cost containment bonds and that imposes a utility project charge in connection with the utility cost containment bonds. A financing resolution may be separate from a resolution authorizing the issuance of the bonds.
  - **"Local agency"** means a member of the authority, or an agency or subdivision of that member, that is sponsoring or refinancing a utility project, or any city, county, authority, special district, public corporation, or other governmental entity of the state that is sponsoring or refinancing a utility project.<sup>33</sup>
  - **"Public utility services"** means water, wastewater, stormwater, or electric services provided by a publicly owned utility.
  - **"Publicly owned utility"** means a utility furnishing water, wastewater, electric, or stormwater services that is owned and operated by a local agency. The term includes any successor to the powers and functions of such local agency.
  - **"Revenue"** means income and receipts of the authority from any of the following:
    - A bond purchase agreement.
    - Bonds acquired by the authority.
    - Installment sale agreements and other revenue-producing agreements entered into by the authority.
    - Utility projects financed by the authority.
    - Grants and other sources of income.
    - Moneys paid by a local agency.
    - Interlocal agreements with a local agency.
    - Interest or other income from any investment of any money in any fund or account established for the payment of principal or interest or premiums on bonds, or any fund or account in which proceeds of utility cost containment bonds are deposited.
  - **"Utility cost containment bonds" or "bonds"** mean bonds that are issued by an authority, the proceeds of which are used directly or indirectly to pay or reimburse a local agency or its publicly owned utility for the costs of a utility project, and that are secured by a pledge of, and are payable from, utility project property as provided in this section. Utility cost containment bonds may also be used to refinance indebtedness incurred by a local agency to finance or refinance utility projects or to refinance utility cost containment bonds. The term includes bonds, notes, commercial paper, variable rate securities, and any other evidences of indebtedness.
  - **"Utility project"** means the acquisition, construction, installation, retrofitting, or rebuilding of, or other addition to or improvement of, any equipment, device, structure, process, facility,

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<sup>33</sup> Because FGUA provides "public utility services" (water and wastewater services) that may be supported by a financeable "utility project," it appears to qualify as an authority or other governmental entity of the state and would meet the definition of a "local agency." Thus, FGUA could be both an "authority" and a "local agency" under the bill. See Comments section for further discussion.

technology, rights, or property located in or out of the state that is used in connection with the operations of a publicly owned utility.

- **"Utility project charge"** means a charge levied on customers of a publicly owned utility to pay the financing costs of utility cost containment bonds issued pursuant to the bill. The term includes any authorized adjustment to the utility project charge.
- **"Utility project property"** means the property right created by the bill, including the right, title, and interest of an authority for any of the following:
  - The financing resolution and the utility project charge, including any adjustment to the utility project charge.
  - The financing costs of the utility cost containment bonds and all revenues from, and all collections, claims, payments, moneys, or proceeds for, or arising from, the utility project charge.
  - All rights to obtain adjustments to the utility project charge pursuant to the bill.

### *Local Agency Authority*

The bill provides that a local agency that owns and operates a publicly owned utility may apply to the intergovernmental utility authority to finance the costs of an eligible utility project using the proceeds of utility cost containment bonds. In its application, the local agency must specify the utility project to be financed, the maximum principal amount, the maximum interest rate, and the maximum stated terms of the utility cost containment bonds.

Before applying, the governing body of the local agency must determine the following:

- The project to be financed is an eligible utility project.<sup>34</sup>
- The local agency will finance costs of the utility project and the associated financing costs will be paid from utility project property (i.e., the charge to utility customers).
- Based on the best information available, the rates charged to the local agency's retail customers by the publicly owned utility, including the utility project charge resulting from the financing of the utility project with utility cost containment bonds, are expected to be lower than the rates that would be charged if the project was financed with bonds payable from revenues of the publicly owned utility.

The local agency or its publicly-owned utility must provide the authority with information concerning the utility as required by the authority in establishing or adjusting the utility project charge.

If a local agency that has outstanding utility cost containment bonds ceases to operate a water, wastewater, electric, or stormwater utility, directly or through its publicly owned utility, any successor entity must assume and perform all obligations of the local agency and its publicly owned utility and assume the servicing agreement with the authority while the utility cost containment bonds remain outstanding.

### *Powers of the Intergovernmental Utility Authority*

In addition to its existing powers under s. 163.01(7)(g), F.S., the bill provides that an intergovernmental utility authority may issue utility cost containment bonds to finance eligible utility projects; to refinance debt of a local agency previously issued to finance or refinance such projects, if the refinancing results in new present value savings; and, upon approval of a local agency's governing body, to refinance previously issued utility cost containment bonds.

The governing body of an authority that is financing the costs of an eligible utility project must adopt a financing resolution and impose a utility project charge. All provisions of the financing resolution are binding on the authority. The financing resolution must include the following:

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<sup>34</sup> This determination is deemed "final and conclusive" by the bill.

- A requirement that a separate utility project charge be stated on the bill of each customer of the utility that is in the class or classes of customers specified in the financing resolution.
- A description of the financial calculation method the authority will use to determine the utility project charge. The calculation method must include a periodic adjustment methodology to be applied at least annually to the utility project charge to ensure timely payment of the financing costs of the bonds. The adjustment methodology may not be changed. The authority must establish the allocation of the utility project charge among classes of customers of the publicly owned utility.<sup>35</sup> The decisions of the authority are final and conclusive.
- A requirement that the authority enter into a servicing agreement with the local agency or its publicly-owned utility to collect the utility project charge.
- A requirement that each customer in the class or classes of customers specified in the financing resolution at the time of its adoption, and each future customer in such class or classes, who receives water, wastewater, electric, or stormwater service through the publicly owned utility must pay a “nonbypassable” utility project charge, regardless of whether the customer has, or enters into, an agreement to receive water, wastewater, electric, or stormwater service from a person other than the publicly owned utility. If the customer enters into an agreement to take service from another provider, the customer remains liable for its share of the utility project charge. The customer may discharge the liability by continuing to pay the utility project charge as it accrues or by making a one-time payment, as determined by the authority.<sup>36</sup>

The financing resolution may also require that, in the event of default by the local agency or its publicly-owned utility, the authority must order the sequestration and payment to the beneficiaries of the revenues arising from the “utility project property” (i.e., the revenues deriving from the utility project charge) if the beneficiaries apply for payment of the revenues under a lien.

At least annually and as required by the financing resolution, the authority must determine whether adjustments to the utility project charge are required, and shall expeditiously make such adjustments using the financial methodology provided in the financing resolution. Any adjustment may not impose the charge upon a class of customers not previously subject to the charge.

The authority must pledge all “utility project property” (i.e., the revenues deriving from the utility project charge) as security for payment of the bonds. All rights of the authority with respect to the pledged property are for the benefit of and enforceable by the beneficiaries of the pledge.

The authority may form a single-purpose limited liability company to finance the project and may authorize the company to adopt the financing resolution. In such case, reference to the authority includes the company as necessary to implement the bill. Further, the authority and two or more of its members may create a new single-purpose entity by local agreement to perform the authority’s duties. In such case, the new entity takes the place of the authority under the bill.

### *Utility Project Charges*

The bill provides that the utility project charge constitutes “utility project property” when a financing resolution authorizing the charge becomes effective. The utility project property continuously exists as property for the period provided in the financing resolution, but at least until all financing costs with respect to the related utility cost containment bonds are paid in full.

Revenue from a utility project charge is deemed special revenue of the authority and does not constitute revenue of the local agency or its publicly owned utility for any purpose. All revenues with respect to utility project property related to utility cost containment bonds, including payments of the utility project charge, must first be applied to the payment of the financing costs of the bonds then due,

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<sup>35</sup> The bill does not specify how the authority must determine the appropriate class or classes of customers to which the utility project charge will apply. Local agencies that seek financing through the authority but do not join the authority may not be involved in the adoption of a financing resolution setting the charge and identifying the rate classes. See Comments section for further discussion.

<sup>36</sup> See Comments section for a discussion of implementation issues related to the utility project charge.



including the funding of reserves for the bonds. Any excess revenues will be applied as determined by the authority for the benefit of the utility for which the bonds were issued.

The pledge of a utility project charge to secure payment of utility cost containment bonds is irrevocable, and the state or any other entity is not permitted to reduce, impair, or otherwise adjust the utility project charge, except as required through the authority's financing resolution providing for periodic adjustments to the charge.

The timely and complete payment of all utility project charges by a person liable for the charges is a condition of receiving water, wastewater, electric, or stormwater services from the publicly owned utility. The bill authorizes the local agency or its publicly owned utility to use its established collection policies and remedies provided by law to enforce collection of the charge. A person liable for a utility project charge is not permitted to withhold payment of the charge.

### *Utility Cost Containment Bonds*

The bill provides that the proceeds of utility cost containment bonds made available to the local agency or its publicly owned utility must be used for the utility project identified in the application for financing of the project or used to refinance indebtedness of the local agency that financed or refinanced the project.

The utility cost containment bonds are nonrecourse to the credit or any assets of the local agency or the publicly owned utility but are payable from, and secured by a pledge of, the utility project property relating to the bonds and any additional security or credit enhancement specified in the documents relating to the bonds.

If utility project property is pledged as security for the payment of utility cost containment bonds, the local agency or its publicly owned utility must enter into a contract with the authority which requires that the local agency or publicly owned utility:

- Continue to operate the utility, including the utility project that is being financed or refinanced.
- Collect the utility project charge from customers for the benefit and account of the authority and the beneficiaries of the pledge of the charge.
- Separately account for and remit revenue from the utility project charge to, or for the account of, the authority.

The issuance of utility cost containment bonds does not obligate the state or any political subdivision of the state to levy or to pledge any form of taxation to pay the bonds or to make any appropriation for their payment.

The bonds must be issued pursuant to existing procedures specified for intergovernmental utility authorities under s. 163.01(7)(g)8., F.S., and may be validated pursuant to existing procedures for such entities under s. 163.01(7)(g)9., F.S.

The authority may not rescind, alter, or amend any resolution or document that pledges utility cost charges for payment of utility cost containment bonds.

### *Financing Costs*

The bill provides that financing costs in connection with utility cost containment bonds are a special obligation of the authority and do not constitute a liability of the state or any political subdivision of the state. Financing costs are not a pledge of the full faith and credit of the state or any political subdivision, including the authority, but are payable solely from the funds in the documents relating to the utility cost containment bonds. This does not preclude guarantees or credit enhancements in connection with the bonds.

The face of all utility cost containment bonds must contain the following statement or a similar statement: "Neither the full faith and credit nor the taxing power of the State of Florida or any political subdivision thereof is pledged to the payment of the principal of, or interest on, this utility cost containment bond."

Except as provided with respect to adjustments to a utility project charge, recovery of the financing costs for utility cost containment bonds from the utility project charge is irrevocable. The amount of revenues arising with respect to the financing costs for the related bonds or the charge are not subject to reduction, impairment, postponement, or termination for any reason until all financing costs to be paid from the charge are fully met and discharged. Further, the authority is prohibited from: rescinding, altering, or amending the applicable financing resolution, to revalue or revise for ratemaking purposes the financing costs of the bonds; determining that the financing costs for the related utility bonds or the charge is unjust or unreasonable; or in any way reducing or impairing the value of utility project property that includes the charge.

Further, except as provided with respect to adjustments to a utility project charge, the bill establishes a state pledge that it shall not limit or alter the financing costs or the utility project property, including the utility project charge associated with the bonds, or any rights in, to, or under the utility project property until all financing costs with respect to the bonds are fully discharged. This provision does not preclude limitation or alteration if adequate provision is made by law to protect the owners of the bonds.

#### *Utility Project Property*

As defined by the bill, utility project property constitutes property for all purposes, including contracts that secure utility cost containment bonds, whether or not the revenues and proceeds arising with respect to the utility project property have accrued. Further, utility project property constitutes a current property right. All rights of an authority with respect to utility project property pledged as security for the payment of utility cost containment bonds is for the benefit of, and is enforceable by, the beneficiaries of the pledge, as provided in the financing documents relating to the bonds.

Subject to the terms of the pledge document, the validity and relative priority of a pledge is not defeated or adversely affected by the commingling of revenues generated by the utility project property with other funds of the local agency or the publicly owned utility collecting a utility project charge on behalf of an authority.

Upon the effective date of the financing resolution, the utility project property is subject to a first priority statutory lien to secure the payment of the utility cost containment bonds. The lien secures the payment of all financing costs that exist at that time or that subsequently arise to the holders of the bonds, the trustee or representative for the holders of the bonds, and any other entity specified in the financing resolution or the documents relating to the bonds. The lien attaches to the utility project property regardless of the current ownership of the utility project property, including any local agency or its publicly owned utility, the authority, or other person. Upon the effectiveness of the financing resolution, the lien is valid and enforceable against the owner of the utility project property and all third parties, and additional public notice is not required. The lien is a continuously perfected lien on all revenues and proceeds generated from the utility project property, regardless of whether the revenues or proceeds have accrued.

#### *Bankruptcy Prohibition*

The bill provides that, notwithstanding any other law, an authority that has issued utility cost containment bonds may not become a debtor under the United States Bankruptcy Code or become the subject of any similar case or proceeding under any other state or federal law if any payment obligation from utility project property remains with respect to the utility cost containment bonds. Further, no governmental officer or organization may authorize the authority to become such a debtor or become subject to such a case or proceeding in this circumstance.

#### *Construction*

The bill provides for its liberal construction to effectively carry out its intent and purposes.

**B. SECTION DIRECTORY:**

**Section 1.** Creates an unnumbered section of law to be cited as the Utility Cost Containment Bond Act.

**Section 2.** Provides an effective date of July 1, 2014.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

Indeterminate. The bill may lower financing costs for eligible local government utility projects and stormwater projects.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Customers may benefit from lower financing costs for eligible local government utility projects, if the resulting savings are passed through to customers. The bill does not require that savings be passed through to customers.

**D. FISCAL COMMENTS:**

The creation of the utility cost containment bond financing mechanism is designed to satisfy rating agency criteria to achieve a higher bond rating and, therefore, a lower interest rate on bonds issued to fund eligible local government utility projects. The lower rate could result in lower financing costs for these projects.

Because the intergovernmental utility authority (or a single purpose limited liability company created by the authority or a new single-purpose entity formed by interlocal agreement) is the obligor on the bonds, the debt from an issuance of utility cost containment bonds will not be reflected on the local government or utility's balance sheet. Also, revenues from the utility property charge and expenses for debt service on the bonds will not be reflected on the local government or utility's financial statements.

Thus, according to DBF, a local government that uses this financing mechanism may have less incentive to carefully control operating expenses of its public utility, because bondholders are paid from the separate fee regardless of the utility's financial condition. Also, according to DBF, the mechanism may encourage the issuance of additional debt because the debt is paid from the revenues of the authority regardless of any change in the utility's operating expenses.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

Not applicable.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides the intergovernmental utility authority with sole authority and discretion to establish, in a "final and conclusive manner," the utility project charges and the application of those charges to rate classes selected by the authority. The bill does not specify how the authority will determine the appropriate rate classes and charges. Local agencies that use this financing mechanism are not required to be or to become members of the authority. Those that do not become members may not be involved in the adoption of a financing resolution setting the charge and the rate classes and, in turn, the customers of those local agencies' public utilities may lack representation in the decision making process.

The bill requires interaction between the local agency and the intergovernmental utility authority in certain instances, including the requirement that a local agency apply to the authority for financing and the requirement that the authority enter into a servicing agreement with the local agency. However, as defined in the bill, it appears that an intergovernmental utility authority could seek financing itself as a "local agency," creating a situation in which the authority must seek approval from itself and enter into an agreement with itself. The bill authorizes the authority to form a single-purpose limited liability company or, together with two or more of its members, to create a new single-purpose entity by local agreement to perform the intergovernmental utility authority duties. If the authority creates one of these entities, it may avoid a situation in which it must apply to itself for financing or enter into a servicing agreement with itself. However, the authority may have a role in the governance of either entity.

The bill provides for the creation of a nonbypassable charge imposed on customers of certain services to ensure timely repayment of the bonds. In particular, the bill provides that:

- Each customer in the class or classes identified in the financing resolution at the time of its adoption must pay the charge.
- Each future customer in the class or classes identified in the financing resolution must pay the charge.
- Any person identified as a customer at any time will remain liable for the charge even if the customer enters into an agreement to take service from a different provider, and the customer's liability may discharge its liability by either continuing to pay its share of the utility project charge as it accrues or in a lump-sum.
- The timely and complete payment of all utility project charges by a person liable for the charges shall be a condition of receiving water, wastewater, electric, or stormwater services from the publicly owned utility.
- The local agency or its publicly-owned utility may use its established collections policies and remedies provided by law to enforce collection of the charge.

Because the charge is applied to and remains the liability of a customer – even when that customer is no longer truly a customer of the publicly-owned utility – the bill appears to allow the authority to impose the equivalent of a special assessment, but on persons rather than property.<sup>37</sup> Thus, it is not clear how customer liability will attach in certain circumstances. For example, a customer, whether a property owner or tenant, who moves out of the local agency’s jurisdiction and begins to take service from a different provider could arguably remain liable for a share of the utility project charge under the bill, either indefinitely or until a new customer begins to take service at the previous customer’s service location and to pick up payment of the charge. Further, it is not clear whether a former customer who now provides a particular service for itself (e.g., self-generated electricity) will remain liable for a share of the charge. This provision may need clarification.

In addition, the bill provides that each customer in the designated class or classes is liable for the charge regardless of whether the customer “has an agreement” to take service from a different provider. This language suggests that a customer is liable for the charge even if it has an agreement with and is taking service from another provider at the time the financing resolution is adopted. i.e., even when it is not a customer at the time the charge is established. This provision may need clarification to ensure consistency with the related provision, discussed above, concerning the liability of customers who enter into an agreement to take service from a different provider after the financing resolution is adopted.

Stormwater service is not a traditional utility service directly provided to a particular end-use customer. Thus, it is not clear how stormwater service customers will be designated by the authority or how payment of a charge related to stormwater service can be made a condition of receiving the service.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>37</sup> The charges established in this provision can be distinguished from charges established in similar provisions found in s. 366.8260, F.S., related to storm-cost recovery financing for investor-owned electric utilities. Section 366.8260, F.S., addresses a scenario in which retail competition for electricity may be introduced in the state and customers would have the choice to select an alternative electricity supplier. In this scenario, the customer would continue to receive transmission and/or distribution service from the investor-owned electric utility and, therefore, would remain a true customer of the utility for purposes of liability for the charge.