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September 23, 1991

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Item 28

910813-WS

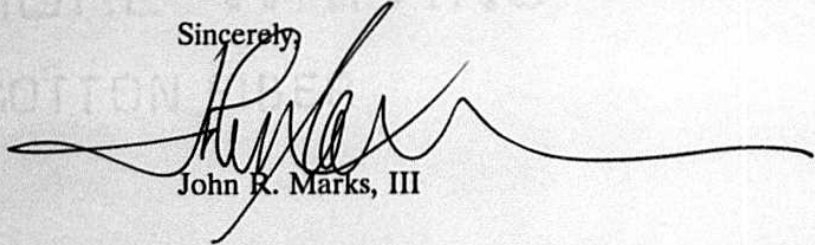
RE: City of Kissimmee/Kings Point Utilities, Inc. Memorandum

Dear Mr. Tribble:

Enclosed please find the original and twelve (12) copies of the Memorandum on filed on behalf of The City of Kissimmee/Kings Point Utilities, Inc.

If additional information is needed, please do not hesitate to contact me.

Sincerely,



John R. Marks, III

- ACK
- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR JRM/tcg
- EAG _____
- LEG Enclosures
- LIN 6
- OPC cc: Thomas Beard, Commission Chairman
- RCH Michael Wilson, Commissioner
- SEC Betty Easley, Commissioner
- SEC J. Terry Deason, Commissioner
- WAS Susan F. Clark, Commissioner
- OTH _____

Catherine Bedell
Noreen Davis
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28
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DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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**IN RE: Petition for Exemption)
From Regulation Pursuant to)
Section 367.022 Florida Statutes)
_____)**

Docket No: 910813 - WS

MEMORANDUM

The City of Kissimmee as Receiver for Kings Point Utilities, Inc. (Petitioner), by and through its undersigned attorneys, hereby files this Memorandum in support of its Petition For Exemption from regulation by the Florida Public Service Commission (Commission) as a utility.

On September 12, 1991, the staff of the Florida Public Service Commission issued its Memorandum outlining its recommendation in the matter of the Petition for Exemption from Florida Public Service Commission regulation filed by the City of Kissimmee as Receiver for Kings Point Utilities, Inc. That memorandum evidences a split in the Commission's staff as to whether the City of Kissimmee (City) should be found exempt. The Legal Staff of Bedell and Davis with the apparent assistance of Joann Chase of the Water and Wastewater staff, recommended that the City not be found exempt. In what has been characterized as an "Alternative Staff Recommendation", the Water and Wastewater staff consisting of Williams and Chase, provided a contrary recommendation. Of curious note is the fact that the Office of Primary Responsibility (OPR), the Water and Wastewater staff

of the Commission, did not provide the "Primary Staff Recommendation". Nevertheless, the City assumes that the Primary Staff Recommendation will not be accorded more weight as a result of this apparent mislabeling. The City of Kissimmee as Receiver for the Kings Point Utilities supports the Alternative Staff Recommendation and urges the Commission to find the City exempt from regulation pursuant to Section 367.022, (2) F.S. In support, the City provides the following:

The City of Kissimmee would initially note that the Legal Staff's analysis purports to be based purely on statutory interpretation and that analysis attempts to show how the "plain language" of the statute does not allow the City to be exempt from the regulatory jurisdiction of the Commission.

The Legal Staff's analysis first addresses the order of the Circuit Court appointing the City receiver. The staff quotes the phrase in the order which authorizes the City "to apply to the Florida Public Service Commission for such rate adjustments as are appropriate for the effective operation, management and control of the Kings Point water and sewer systems". The Legal Staff somehow misinterprets that to mean that the Circuit Court contemplated that the utility would remain regulated by the FPSC. The City submits that the quoted language merely means that there is no need for the City to return to the Court to request permission to apply for rate adjustments and to the extent it is appropriate, the City is authorized to apply to the Florida Public Service Commission for such rate adjustments. In other words, if it is not appropriate or necessary to apply to the Commission for such rate adjustments, the City need not do so. There is nothing in the Court's

statement or the entire order which states or contemplates the necessity for continuing or permanent regulation by the Florida Public Service Commission.

The Legal Staff then states that the "plain language" of the applicable statute, Section 367.165, F.S., indicates that receivers who are political subdivisions are no different from other receivers. The language in Section 367.165, F.S., in fact, does not so plainly read. This section states that the county shall petition the Circuit Court for the appointment of a receiver and the governing body of a political subdivision may be the receiver. It does not state in "plain language" that the governing body of a political subdivision, if appointed receiver, shall be subject to continuing or permanent regulation by the Florida Public Service Commission. In inexplicable fashion, the Legal Staff interprets the language in Section 367.165, F.S. as plain in its pronunciation that a governing body of a political subdivision remains within the regulatory jurisdiction of the Commission and interprets the language in Section 367.022(2), F.S., as superficial in its exemption of governmental authorities. However, as shown clearly from the language of the present statutes and their history, it is the language of Section 367.165, F.S. which is superficial and has been subjected to muddled and circuitous interpretations by the Legal Staff in order to reach the conclusion that the City should not be found exempt. Whereas the language in Section 367.022(2), F.S. is plain, clear and direct in its pronunciation that governmental authorities which own, operate, manage or control a utility are not subject to regulation by the Florida Public Service Commission.

The specific language of Section 367.022(2), F.S. is worth noting. It states:

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 authorities; (Emphasis Added)

The rules of statutory construction dictate that the language contained in Section 367.022(2), F.S. should prevail over any interpretation given to Section 367.165, F.S. First, in Section 367.022(2), F.S. the exemption is absolute and unequivocal unless there is an express statement otherwise in the statutes. Section 367.165, F.S. does not contain express language requiring the Commission to regulate a governmental authority appointed receiver. Secondly, a statute must be given its plain and obvious meaning. When the legislative intent is clear from words used in the enactment, it is unnecessary and improper to seek a meaning different from ordinary or common usage. The plain and obvious meaning of Section 362.022(2), F.S. is that "systems owned, operated, managed or controlled by governmental authorities are not subject to regulation by the Florida Public Service Commission. In further support of this, the order of the Court, page 7, clearly states that as receiver, the City of Kissimmee shall:

- (i) operate, manage and control the Kings Point Water and Sewer systems. (Emphasis added)

It is a fundamental rule of statutory construction that where provisions of a statute are inconsistent, the last expression of legislative will prevails. The Legal Staff concedes that Sections 367.022(2), F.S. and 367.165, F.S. are inconsistent or in conflict; therefore, the latest

expression of the legislature provides guidance to the Commission as to the appropriate interpretation. During the 1990 regular session, the Florida Legislature specifically and directly addressed the issue of the exemption of governmental authorities from regulation by the Commission. They specifically revised Section 367.022(2), F.S., to include the wording "systems operated, managed or controlled by governmental authorities". The legislature could have, but did not, expressly provide that governmental authorities appointed receivers would remain subject to regulation by the Commission.

After "superficially" interpreting the language in Section 367.022(2), F.S. the Legal Staff provides the following:

Further, when a system is directly operated by a governmental authority, other statutory regulation applies (Chapter 180, Florida Statutes, regulates Municipal Public Works). Chapter 180, F.S. does not apply in this receivership because the authority to operate derives from the authority granted by the Circuit Court.

The City is uncertain as to what point the Legal Staff is attempting to make, but Chapter 180 clearly provides an adequate regulatory scheme to protect the ratepayers receiving utility service from a governmental authority. The bald assertion by Legal Staff that Chapter 180, F.S., does not apply in this receivership is not supported by the statute or any statutory interpretation. The City of Kissimmee finds nothing in Chapter 180, F.S. which precludes its applicability to municipalities under circumstances where the City acts as a receiver.

Through a somewhat circuitous and inexplicit interpretation of the Florida statutes, the Legal Staff reasons that since Chapter 367.022(2), F.S. exempts governmental entities and Chapters 153 and 180 governs operations of governmental utilities, then the fact that the legislature referred to governmental entities in Section 367.165, F.S. somehow confers continuing FPSC regulatory authority over governmental entities appointed receivers. This however, does not address or explain the application of the basic rules of statutory construction which provide that a statute must be given its plain and obvious meaning. Nor does it address the fundamental rule of statutory construction that the last expression of legislative will prevails.

The Legal Staff next indicates that it would be absurd to allow a utility to be exempt and then subsequently to be made subject to the Commission's regulation. There is nothing at all absurd about such a situation. The Commission has assumed regulatory jurisdiction over formally exempt utilities or formally non-regulated utilities many times in the past. To assume that regulation would be ineffective because there is the potential for rates being set based on policies different from the Florida Public Service Commission presumes that the Commission is the only regulatory body capable of providing effective regulation. As good as the Florida Public Service Commission may be in carrying out its regulatory responsibilities, there are other governmental entities which can and do provide regulatory functions in a similar manner as the Commission. The City of Kissimmee submits that it is capable of providing the appropriate regulatory oversight and protect the interest of the Kings Point Utilities ratepayers.

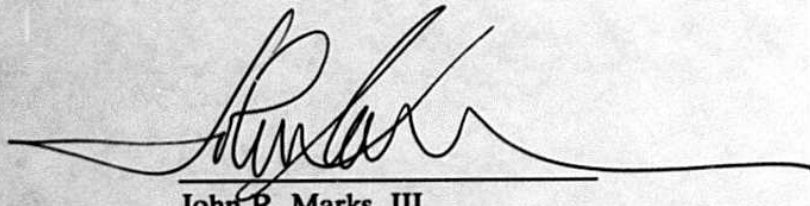
The City of Kissimmee outlined its position regarding the application of equitable principles and statutory law in its Petition. The City agrees with the Legal Staff that equity and law have been merged procedurally and that the State courts have authority over both. Such a merger does not however, preclude the application of equitable principles, and, in this case, equity should prevail and the Commission should find that the City is not subject to the regulatory authority of the Commission.

The staff indicates that it is the Commission's responsibility "to determine the appropriate application of existing law". The City submits that the more important responsibility of the Commission is to regulate in the public interest, and the City contends that it does not serve the public interest to have the City of Kissimmee, as receiver for the Kings Point Utilities, burdened with the continued regulatory oversight of the Florida Public Service Commission. As indicated in the City's Petition, the Commission should avoid imposing an added burden on the City and no valid public purpose or policy is served with the continuing and permanent regulation of the City by the Commission. It is worthy to note that the Legal Staff did not, in its recommendation, present to this Commission any public purpose or policy to support the continuing or permanent regulation by the Commission in this instance. They have based their recommendation solely on a very narrow and restrictive interpretation on Section 367.165, F.S. By contrast, the Water and Wastewater staff of the Commission has outlined valid and appropriate public purposes and policies supporting a finding that the City is exempt.

CONCLUSION

The Legal Staff of the Commission has based their recommendation on the "plain language" of Section 367.165, F.S. However, as shown above, the language in Section 367.165, F.S., does not support the Legal Staff's position that the City should not be found exempt. It is the plain language of Section 367.022(2), F.S., which clearly supports the position that the City is not subject to regulation by the Commission. Further, as stated in the City's Petition and the Alternative Staff Recommendation, public purpose and policy and principles of equity support a finding that the City is not subject to regulation by the Florida Public Service Commission. Therefore, the City urges the Commission to adopt the Alternative Staff Recommendation and find the City of Kissimmee as Receiver for Kings Point Utilities, Inc. is not subject to regulation as a utility, nor is it subject to the provisions of Chapter 367.

Respectfully submitted this 23rd day of September, 1991.



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