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Re: Legal Issues Concerning Operational Autonomy of Utilities Commission

Dear Bill:

You have asked for our analysis of various legal issues concerning the operational autonomy of the Utilities Commission. We are pleased to provide you this letter which sets forth our findings and conclusions.

For over 40 years, the Utilities Commission City of New Smyrna Beach, Florida (UCNSB) has provided vital municipal services to the New Smyrna Beach area. Pursuant to specific grants of authority by the Legislature, UCNSB provides electric, water, and sewer services to ratepayers within the municipal limits of New Smyrna Beach and established service areas in neighboring unincorporated areas on the mainland and beach. The Utilities Commission is part of the city government and there is some established oversight by the City Commission. On the other hand, UCNSB has some level of operational autonomy under the direction of appointed commissioners and a general manager. This memo will discuss the legal basis for the autonomy of UCNSB and specific oversight by the City Commission together with constitutional and operational issues.

The Utilities Commission, City of New Smyrna Beach, Florida is a "part of the government of the City of New Smyrna Beach[1]" and was established by Special Act of the Legislature Ch 67-1754 Laws of Florida. This Enabling Act gave the Utilities Commission "full and exclusive authority over the management, operation and control of all of the city's utilities.[2]" Further, specific grants of authority included the ability to hire employees[3], set rates[4], borrow money[5], and condemn property[6]. Under the Enabling Act, the only measure of supervision by the City Commission was its power to appoint members of the Utilities Commission. In all respects, UCNSB operated with "full and exclusive power and authority to prescribe rules, rates, and regulations"[7] independent of the City Commission or City Manager.

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[1] Ch. 67-1754 Laws of Florida Section 1.
[2] Ch 67-1754 Laws of Florida Section 6.
[3] Ch 67-1754 Laws of Florida Section 6.
[4] Ch 67-1754 Laws of Florida Section 9
[5] Ch 67-1754 Laws of Florida Section 14
[6] Ch 67-1754 Laws of Florida Section 11
[7] Ch 67-1754 Laws of Florida Section 9

As a Special Act, the Utilities Commission was a political subdivision of the State of Florida fully empowered under the authority of the 1885 Florida Constitution. Article VIII Section provided as follows:

> The Legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.

Prior to 1968, Florida operated under "Dillon's Rule" and all municipalities and special districts were creatures of the state. In other words, while the Enabling Act of the Utilities Commission was made part of the City Charter, it was essentially on par with the City Commission which was also given specific powers by a series of Special Acts beginning with. Ch. 22408 Special Acts of Florida 1943.

The establishment of the Utilities Commission was not unlike similar grants of authority to other municipalities which operate electric utilities. The Orlando Utilities Commission is similarly authorized and in the first half of the last century, the Florida Supreme Court heard a constitutional challenge to its establishment. In *City of Orlando v. Evans,* 182 So. 264 (Fla. 1938), the court upheld the OUC and confirmed that it had full authority:

> The Utilities Commission was granted by the provisions "full authority over the management and control of the electric light and water works plants in the City of Orlando. *Bouvier Law Dictionary* defines the word "full" as "complete, entire, detailed." *Webster* defines "full" as "abundantly furnished or provided; sufficient in quantity or degree. Copious plenteous, ample or adequate. It is positive that the management and control of the electric light and water plats of the City of Orlando by the Utilities Commission shall not only be entire but adequate and complete.

The 1968 Constitution Revision effectively dissolved Dillon's Rule and brought limited "home rule" to Florida counties and municipalities. Article VIII Sec 2 now provides as follows:

> **SECTION 2. Municipalities.--**
> (a) ESTABLISHMENT. Municipalities may be established or abolished and their charters amended pursuant to general or special law. When any municipality is abolished, provision shall be made for the protection of its creditors.
>
> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

It is said that Florida has limited Home Rule because the Legislature still maintains power to limit municipal power by preemption, general law, and special law. Art II of the Florida Constitution provides that all legislative power vests in the Legislature and Art II Sections 10 and 11 provide for Special Laws. Art X Section 12 defines a Special Law. Clearly, the Legislature retains the power to pass locals laws including municipal charters.

Because Home Rule was not self executing, the Florida Legislature more fully described it with passage of the Municipal Home Rule Powers act in 1973[8]. Therein, the Legislature set forth how Special Acts could be incorporated into municipal charters and under what circumstances they could be subsequently amended. The operative provisions of the Act are contained in Section 166.021, Fl. Stat.

> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. However, nothing in this act shall be construed to permit any changes in a special law or municipal charter which affect the exercise of extraterritorial powers or which affect an area which includes lands within and without a municipality or any changes in a special law or municipal charter which affect the creation or existence of a municipality, the terms of elected officers and the manner of their election except for the selection of election dates and qualifying periods for candidates and for changes in terms of office necessitated by such changes in election dates, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, any change in the form of government, or any rights of municipal employees, without approval by referendum of the electors as provided in s. 166.031. Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed.
>
> (5) All existing special acts pertaining exclusively to the power or jurisdiction of a particular municipality except as otherwise provided in subsection (4) shall become an ordinance of that municipality on the effective date of this act, subject to modification or repeal as other ordinances.

On the effective date of the Act, the Utilities Commission Enabling Act became subject to home rule as other parts of the City Charter. In *Cooksey v. Utilities Commission*, 261 So.2d 129 (Fla. 1972), the Florida Supreme Court took up a direct challenge on the viability of Enabling Act and

[8] Ch 73-129 Laws of Florida

found that it survived home rule. The court found certain implied powers in the Enabling Act stating "implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities."

Home Rule also provided an opportunity for the City Commission to consider an oversight role over the Utilities Commission. In the early 1980"s a citizens committee was appointed to review the Enabling Act and it recommended a series of amendments to the City Charter. The extent of the City Commission's home rule power was stated in two opinions requested of the Attorney General. Therein the Attorney General advised that the Enabling Act was part of the Charter of the City of New Smyrna Beach but it could only be amended by vote of the electorate.[9]

In 1984, the City Commission adopted Ordinance 25-84 which proposed numerous amendments to the Enabling Act as posed in four ballot questions. These provisions changed the terms of members of the Utilities Commission from five years to three, changed the "full and exclusive authority" clause, restricted extension of utilities beyond the city limits, established budgetary oversight with the City Commission, and gave the City Commission authority to approve bonding and contracts longer than four years. These amendments approved by the voters gave the City Commission a new oversight role over the Utilities Commission.

The passage of the 1984 amendments set off a legal debate about the extent of the oversight by the City Commission and the remaining operational autonomy of the Utilities Commission. While the amendment removed the "full and exclusive authority" clause, it still provided a significant grant of authority to "manage, operate, and control all the city's utilities." There was no change to Section 217 which authorized "full and exclusive authority to prescribe rules, rates, and regulations, governing the sale and use of electricity, water, gas, and sewage." Even the oversight provisions came with a limitation that "the city commission shall not withhold its approval or deny the passage of an ordinance proving the budget where such a withholding or denial would cause the commission to violate any of the covenants or terms of its bond resolutions and related contract, resolutions and documents.[10]"

In an attempt to clarify the operational autonomy of the Utilities Commission, a local bill was requested of the legislative delegation in 1985 which was introduced as HB1149, passed by the Legislature, and became law without the Governor's signature on June 12, 1985. Ch. 85-5033 Laws of Florida constituted an amendment to Ch 67-1754 Laws of Florida and became the Revised Enabling Act for the Utilities Commission. The Special Act was a complete restatement of the 1967 Enabling Act but it included the 1984 charter amendments. Of particular importance was the inclusion of a new provision in Section 1 as follows:

> Except as otherwise authorized the utilities commission shall function the same as it previously functioned under chapter 67-1754 Laws of Florida. This act shall

[9] Unpublished Attorney General Opinions dated May 24, 1984, and AGO August 7, 1984.
[10] Secs 217, 223, 224 New Smyrna Beach Charter

> not supersede or alter the general law in effect and agreements entered into prior to the effective date of this act.[11]

Obviously, the Utilities Commission functioned with significant autonomy under its Enabling Act and continued to do so after the passage of the Revised Enabling Act. While it clearly makes the UCNSB part of the city government, it continues the pre-home rule status of the UCNSB as having some measure of independence. While certainly the City Commission now has oversight over the budget, appoints the utilities commissioners, and approves extra-territorial extensions, the UCNSB fully possesses the power of eminent domain, can adopt its own rules and regulations, and can hire and control its employees. Even as part of the government of the city, the UCNSB has significant operational autonomy.

The Revised Special Act presents an interesting constitutional question. Because the Revised Special Act was enacted by the Legislature subsequent to the Municipal Home Rule Powers Act, it begs the question of whether it can be amended by charter amendment or must be revised by the Legislature. If it is the former, then the city commission could by referendum further limit the power of the UCNSB. If it is the latter, then the limited autonomy of the UCNSB could only be changed by the Legislature. The plain language of the Constitution provides guidance for the answer: "Municipalities may be established or abolished and their charters amended pursuant to general or special law." In this case, the general law (Municipal Home Rule Power Act) clearly relates to amendment of a charter in effect in 1973. Accordingly, the subsequent amendment of a charter by Special Act means that it can only be subsequently amended by the Legislature.

Florida courts have examined similar issues relating to electric utilities in Orlando and Lake Worth. In *Lake Worth Utilities Authority v. City of Lake Worth* 468 So2d 215 (Fla. 1985) the Florida Supreme Court reviewed the action of the City Commission to abolish the Utilities Authority which was established by special act in 1969. The court stated that before the 1968 Constitution, municipalities "were creatures of legislative grace." After 1968, municipalities are possessed of inherent but not absolute power. "The legislature retained power is one of limitation rather than one of grace, but it remains all-pervasive power, nonetheless." Accordingly, the special act that established the utilities authority under the 1968 Constitution could not be superseded by the local city commission but only the Legislature.

In 1984 citizens attempted to utilize the initiative provisions contained in the Municipal Home Rule Powers Act to stop construction of a coal fired power plant by the Orlando Utilities Commission. In *Gaines v. City of Orlando* 450 So2d 1174 (5th DCA 1984), the court examined the "unique" relationship between the City of Orlando and OUC and found that for some purposes it was part of the city but for other purposes it was independent and beyond the control of the city as set forth in "the powers granted to it under the Special Acts." The court found that Municipal Home Rule Powers is not exclusive and is limited by acts of the legislature. The limiting language in Art VIII grants cities inherent home rule powers, "except as otherwise provided by law." Thus home rule powers could not prevail over subsequent state law.

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[11] Ch. 85-5033 Laws of Florida Section 1.

Obviously, there are provisions of general law which apply to municipalities which affect the operations of the Utilities Commission. The Local Government Comprehensive Planning and Land Development Regulation Act (Growth Management Act) Sec. 163.3164 et seq, Fl. Stat. is a case in point. The Act imposes specific requirements over local governments including counties and municipalities with specific requirements over city governing bodies. Essential to the requirements of the Growth Management Act is establishment of comprehensive plans and land development regulations with required elements for water and wastewater. Another provision found at Sec. 163.3080, Fl. Stat. requires concurrency for water and wastewater services. Also required is a capital improvements element which sets forth the schedule for completion of adequate public facilities including water and wastewater. While the Utilities Commission control and management over water and wastewater public facilities, the City Commission has specific responsibilities under the Growth Management Act to include these policies in the comprehensive plan and capital improvements element. This imposes a degree of cooperation upon the Utilities Commission and City Commission.

The City Commission attempted to impose cooperation with the adoption of Ordinance 19-05 which required the Utilities Commission to perform certain duties by a certain date. The ordinance purportedly based on the City Commission's exercise of Home Rule Powers but was disputed as exceeding the authority and limitations in the Revised Enabling Act. In 2007, a subsequent city commission repealed the ordinance[12]. The revised Sec. 82-2 of the municipal code now provides as follows:

> Sec. 82-2. Policy to vest power in utility commission.
> It is declared to be the public policy of the city that the utilities commission established by chapter 15 of the Charter shall be in complete charge of all utilities in accordance with the resolution of intent adopted by the city commission. It is the further declaration of policy that the utilities commission shall be separate from the city commission of the city insofar as the laws of the state and the previous ordinances and covenants will allow and that the city commission shall cooperate to the fullest extent to guarantee the separation of the operation of the utilities from the politics of the city.

A significant reason for operational autonomy of the Utilities Commission is the manner in which long term debt is used. Like most utilities, issuance of revenue bonds in an important aspect in capital construction and is secured and retired through rate payments rather than tax dollars. Bond covenants of the Utilities Commission are secured through rates and constitute a contract between bond holders and utility. None of the obligations of the Utilities Commission are obligations of the City of New Smyrna Beach and do not affect credit worthiness of the City. Bond resolutions contain the following language which is important to the security of the debt:

> The Utilities Commission is a political subdivision of the State of Florida (the "State") and had and has good right and lawful authority under the Constitution

[12] Ordinance No. 94-07

> and laws of the State to adopt the Resolution, to authorize and issue the Certificates, and to enter into and perform its obligations under the Loan Agreement[13].

At a recent City Commission meeting, the City Attorney stated "there is no such legal entity as the Utilities Commission, City of New Smyrna Beach.[14] While the City Attorney later apologized for this statement, it brought to light operational tensions which have existed between City Hall and the Utilities Commission. While the Utilities Commission is clearly a part of the government of the City of New Smyrna Beach, it clearly has a level of operational autonomy. Indeed in a recent refunding certificate approved by the Utilities Commission and City Commission, the Utilities Commission is referred to as "an independent agency of the city."[15] It possesses the most significant governmental power to condemn private property for utility purposes. It is one of the largest independent employers in Southeast Volusia and has revenues in excess of $65 million. While it performs municipal services, it operates more like a private electric utility than a local government and maintains ownership interests in multi-billion dollar power generating facilities located far from New Smyrna Beach. Bondholders and employees certainly see the Utilities Commission as a separate contractual entity and depend upon its ability to control and manage its sale of electric, water, and sewer free from political influence in order to meet its contractual obligations.

We trust that this answers your questions concerning the Utilities Commission Enabling Acts and are prepared to provide further clarification if the need arises.

Very truly yours,

HOLLAND & KNIGHT, LLP

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[13] Utilities Commission Resolution 9-07
[14] Transcript of City Commission Meeting October 14, 2008.
[15] Utilities Commission Resolution 9-07