

JZANNE BROWNLESS, P. A.  
ATTORNEY AT LAW  
1311-B Paul Russell Road, Suite 201  
Tallahassee, Florida 32301

ORIGINAL

ADMINISTRATIVE LAW  
GOVERNMENTAL LAW  
PUBLIC UTILITY LAW

TELEPHONE (850) 877-5200  
TELECOPIER (850) 878-0090

December 16, 1999

VIA FAX AND HAND DELIVERY

Martha Carter Brown, Esquire  
Florida Public Service Commission  
Legal Department  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

RECEIVED-FPSC  
99 DEC 16 PM 2:04  
RECORDS AND REPORTING

RE: Docket No. 991746-WU  
In re: Petition of Destin Water Users, Inc. (DWU) for declaratory statement on Section 367.011, Florida Statutes

Dear Ms. Carter Brown:

November 24, 1999, the City of Destin, Florida (City) became aware that Destin Water Users, Inc. (DWU) had filed a petition for declaratory statement with the Florida Public Service Commission (FPSC) regarding its regulatory status and the effect of that status on the ability of the City to regulate its water and sewer rates and charges pursuant to City Ordinances 263 and 264, as amended.

The City has subsequently verified that jurisdiction over all water and sewer utilities was transferred from Okaloosa County to the FPSC by the adoption of County Ordinance 92-131 on October 20, 1992, and that no subsequent County ordinances have been passed, nor has the Legislature adopted any special or general laws, transferring jurisdiction back to Okaloosa County.

It has always been the City's position that the City's ability to regulate the rates and charges of Okaloosa County was dependent on Okaloosa County being a nonjurisdictional county, i.e., one not regulated by the FPSC. Based on the newly discovered information concerning Okaloosa County's jurisdictional status, on Monday, December 13, 1999, the Destin City Council voted by a 7-0 vote to:

1. Notify both the FPSC and the DWU that it does not have any regulatory authority over the utility and that the City will cancel the quasi-judicial hearings currently scheduled for March, 2000, on DWU's rates and charges for water and sewer services;
2. Amend City Ordinances 263 and 264 to delete Section 35 dealing with City approval of water and sewer rates; and

APP Brown  
CAF  
CWA  
CTR  
EAG  
LEG  
MAS  
OPC  
RRR  
SEC  
WAW  
OTH

RECEIVED & FILED  
*[Signature]*  
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE  
15387 DEC 16 99  
FPSC-RECORDS/REPORTING

3. Amend/Repeal Ordinances 263.1, 263.2, 264.1 and 264.2 to remove all references to rates or rate approval by the City.

Attached to this letter is an excerpt from the City Clerk's minutes of the City's December 13th Council meeting regarding this item. In sum, the City is no longer seeking to conduct a rate hearing or to exercise any jurisdiction over DWU's rates, service or authority in contravention of Section 367.011, Florida Statutes. Further, amendment of the City Ordinances 263 and 264, Florida Statutes, as stated in sections 2 and 3 of the Council's motion, will preclude any jurisdictional conflict from arising in the future.

In order to receive a declaratory statement pursuant to Section 120.565, Florida Statutes, there must be an actual controversy or doubt concerning the applicability of a statutory provision, rule or order of the agency from whom the declaratory statement is requested. State, Department of Health and Rehabilitative Services v. Professional Firefighters of Florida, Inc., 366 So.2d 1276 (Fla. 1st DCA 1979). And, DWU must have a bona fide, actual, present, and practical need for the declaration which results from a present controversy as to a state of facts. Sutton v. Department of Environmental Protection, 654 So.2d 1047, 1048-9 (Fla. 5th DCA 1995). There is no need for an agency to issue a declaratory statement where the petitioner's rights, status and other equitable or legal relations are not in doubt. Sutton at 1049.

In the instant docket DWU has requested that the FPSC issue a declaratory statement that "[a] Utility determined by the PSC to be exempt from PSC regulation pursuant to Section 367.022(7), F.S., exempting nonprofit corporations providing service solely to member owners, remains under PSC jurisdiction and is not subject to regulation by any municipal or other regulatory authority." Petition at 9. The City Council has acknowledged that it cannot regulate the rates, charges, service or authority of DWU by its December 13th vote. The City Council has also voted to amend its franchise ordinances such that a conflict regarding its regulatory jurisdiction cannot occur in the future. Under these circumstances, DWU has no bona fide, actual, present or practical need for the declaration it has requested. Without such a bona fide need, a declaratory statement cannot issue since it has become a mere advisory opinion which Florida courts have consistently

Ms. Martha Carter Brown  
December 15, 1999  
Page 3

---

refused to issue.<sup>1</sup> Santa Rosa County v. Administration Commission, Division of Administrative Hearings, 661 So.2d 1190, 1193 (Fla. 1995), reh.den., 642 So.2d 618 (Fla. 1995).

For the reasons stated above, the City of Destin would request that the FPSC decline to issue a declaratory statement in this case and close this docket.

Should you have any questions or need any additional information concerning the City's position please contact me.

Very truly yours,



Suzanne Brownless  
Attorney for the City of Destin

cc: Kenneth G. Oertel, Esq.  
Larry Rubenstein, City Manager

---

<sup>1</sup> Although it is unclear in its petition, DWU may argue that a controversy still exists since City Ordinances 263 and 264 impose a 1% of gross revenues franchise fee on DWU for City's regulation, and DWU's use, of the City's rights-of-way. Petition at ¶ 11. However, the right of the City to impose a franchise fee for the use of its rights-of-way is granted by Chapter 180 and §166.201, Florida Statutes; Article I, Section 1.01(b) of the City Charter; and Article VIII, s.2(b) of the Florida Constitution. The FPSC does not have any regulatory jurisdiction over municipal franchise fees other than to review them as a legitimate utility expense. Further, the FPSC does not have any statutory authority to regulate the use of a city's property.

Excerpt from the 12/13/99 Minutes  
Destin City Council Special Meeting

Transcription by Donnese Way  
(Motion and Action only)

Councilmember Destin made a motion to do the things recommended to cancel the rate case, put the Public Service Commission/Destin Water Users on notice, and to bring ordinances back to correct the appropriate language, second Councilmember Barker.

A roll call vote of 7-0 for approval was taken with Councilmembers Barker, Destin, Foreman, Kelly, Najarian, Rice and Slivko voting yes.

Councilmember Destin made a motion to direct the City Manager to enter into negotiations with Destin Water Users and ask them to join with us to go to the Legislature and request a special act that would allow the city to regulate the rates, at the same time we will continue with our engineering evaluation of the value of the system as our fall back position, second Councilmember Barker.

Councilmember Kelly made a substitute motion to send Destin Water Users a letter asking them to go hand in hand with the City to the Legislature and give the City the power to oversee and protect our citizen's interest and to work with them; if that fails then the City will take another course of action, for lack of second motion dies.

Ms. Brownless gave clarification as to the contents of the motion.

Councilmember Destin made a motion for the City Manager to be instructed to negotiate with Destin Water Users to jointly approach the Legislature to get a special act to return jurisdiction from the Florida Public Service Commission to Okaloosa County, and that Destin Water Users should such special act be passed would not contest the City's Jurisdiction to regulate their rates and charges, second Councilmember Barker.

A roll call vote of 7-0 for approval was taken with Councilmembers Barker, Destin, Foreman, Kelly, Najarian, Rice, and Slivko voting yes.