

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Communications, Energy, and Public Utilities

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BILL: SB 272

INTRODUCER: Senator Simpson

SUBJECT: Water and Wastewater Utilities

DATE: November 25, 2013      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Caldwell	Caldwell	CU	<b>Pre-meeting</b>
2.			CA	

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**I. Summary:**

SB 272 limits the rates an investor-owned water or wastewater utility may charge to be no greater than the rates charged by a government-owned utility in the county in which the utility is operated. The bill requires that any rate that is higher than the government-owned utility be adjusted retroactively to the date of the most recent rate adjustment of the government-owned water or wastewater utility and that the investor-owned utility refund any amounts due to the customer within 12 months of the adjustment.

The bill adds secondary water standards to the criteria the Florida Public Service Commission (FPSC, PSC, or commission) must consider when setting rates for water or wastewater service. The bill provides guidelines for the secondary water standards. The bill requires a utility to provide an estimate of the costs and benefits of plausible solutions for each concern that the commission finds, meet with the customers to discuss the costs and solutions, and report to the commission. The bill authorizes the commission to adopt rules to assess and enforce compliance with the secondary water standards and proscribe penalties for a utility's failure to adequately address each concern.

**II. Present Situation:**

**Regulatory Compact**

Utilities subject to economic regulation have what is called a "regulatory compact" with the regulators, which is a method of balancing rights and obligations of a utility and its ratepayers. The regulatory compact has been described as follows:

The utility business represents a compact of sorts; a monopoly on service in a particular geographic area (coupled with state-conferred rights of eminent domain or condemnation) is granted the utility in exchange for a regime of intensive regulation, including price regulation, quite alien to free market. . . .

Each party to the compact gets something in the bargain. As a general rule, utility investors are provided a level of stability in earnings and value less likely to be attained in the unregulated or moderately regulated sector; in turn, ratepayers are afforded universal, non-discriminatory service and protection from monopoly profits through political control over an economic enterprise.<sup>1</sup>

**Public Service Commission jurisdiction over water and wastewater utilities**

Chapter 367, F.S., is the Water and Wastewater System Regulatory Law. Section 367.011, F.S., grants the commission exclusive jurisdiction over each utility with respect to its authority, service, and rates. It also declares the regulation of utilities to be in the public interest, and the chapter to be an exercise of the police power of the state for the protection of the public health, safety, and welfare.

Despite this broad grant of authority, the PSC does not have authority over all water and wastewater utilities. Section 367.022(2), F.S., exempts from PSC regulation or application of this chapter water or wastewater systems owned, operated, managed, or controlled by governmental authorities, including water or wastewater facilities operated by private firms under water or wastewater facility privatization contracts. Section 367.021(7), F.S., defines the term “governmental authority” to mean a political subdivision, a regional water supply authority, or a nonprofit corporation formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility.

Section 367.171, F.S., provides that, after 10 continuous years under the jurisdiction of the commission, a county can opt-out of commission jurisdiction by resolution or ordinance. In such a case, the county regulates the rates of all utilities in that county. However, the commission has exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries. According to the PSC webpage, the commission has jurisdiction over 143 investor-owned utilities in 37 counties that serve 120,567 water and 74,317 wastewater customers<sup>2</sup> and counties have jurisdiction in 30 counties, as listed in the following table.<sup>3</sup>

Jurisdictional Counties (37)	Non-Jurisdictional Counties (30)
Alachua	Baker
Bradford	Bay
Brevard	Calhoun
Broward	Citrus
Charlotte	Collier
Clay	Columbia
Duval	Dade
Escambia	Desoto

<sup>1</sup> Tomain and Cudahy, *Energy Law*, 121-122, quoting from *Jersey Cent. Power and Light Co. v. F.E.R.C.* (D.C. Cir. 1987).

<sup>2</sup> <http://www.psc.state.fl.us/publications/pdf/general/factsandfigures2013.pdf>

<sup>3</sup> <http://www.psc.state.fl.us/utilities/waterwastewater/wawtextchart.pdf>

Jurisdictional Counties (37)	Non-Jurisdictional Counties (30)
Franklin	Dixie
Gadsden	Flagler
Gulf	Gilchrist
Hardee	Glades
Highlands	Hamilton
Jackson	Hendry
Lake	Hernando
Lee	Hillsborough
Levy	Holmes
Manatee	Indian River
Marion	Jefferson
Martin	Lafayette
Monroe	Leon
Nassau	Liberty
Okaloosa	Madison
Okeechobee	Santa Rosa
Orange	Santa Rosa
Osceola	Suwanee
Palm Beach	Taylor
Pasco	Union
Pinellas	Wakulla
Polk	Walton
Putnam	
Seminole	
St. Johns	
St. Lucie	
Sumter	
Volusia	
Washington	

**Public Service Commission rate-making and water quality**

Pursuant to s. 367.081, F.S., the PSC is to establish rates which are just, reasonable, compensatory, and not unfairly discriminatory. In doing so, the commission must consider the value and quality of the service and the cost of providing the service, which includes, but is not limited to: debt interest; the requirements of the utility for working capital; maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service.

According to the PSC staff:

The FPSC establishes rates for investor-owned water and wastewater utilities on an individualized, prospective basis. In the rate-setting process, a utility submits investments it believes are appropriate for inclusion into its rate base,

and expenses that it considers appropriate for recovery in rates. The role of the FPSC is to determine the extent to which such investments and expenses submitted are reasonable and prudent. Once the PSC determines which items are allowable for the purpose of recovery, rates are established that allow the utility an opportunity to earn a fair rate of return on its investment and to recover all prudently incurred expenses associated with the provision of utility service. The FPSC does not set rates for government-owned utilities.

The FPSC establishes rates for investor-owned water and wastewater utilities pursuant to Chapter 367, Florida Statutes, in those counties that have elected to place utilities under FPSC jurisdiction. The objective of regulation under the statute is to provide safe potable water and wastewater services at fair and reasonable rates. The FPSC sets rates through an evidentiary administrative proceeding, or through a process known as a Staff Assisted Rate Case (SARC). The Commission holds customer service hearings in the investor-owned utility's service area to accept customer testimony as part of the record of the proceeding. The FPSC reviews the utility's costs to determine if they are prudently incurred. The FPSC also reviews the utility's earnings to determine a fair rate of return on investment.

When setting rates, the FPSC takes into account customer concerns and issues with water and wastewater utilities, including the value and the quality of the service. The Commission has the flexibility to adjust rates based on the evidence on record in a rate case. Current law, however, does not give the FPSC specific authority to consider secondary drinking water standards or wastewater standards.<sup>4</sup>

As noted, although the statute requires the commission to consider quality of service in setting rates, the focus is on the quality of the service provided; that is, the focus is primarily on how well the utility provides water, not the quality of the water itself. The quality of the water and compliance with secondary water quality standards are recurrent issues at both the PSC and the Legislature. In 2012, the Legislature created the Study Committee on Investor-Owned Water & Wastewater Utility Systems (Study Committee) and directed it to study a list of issues, including water quality.<sup>5</sup> The Study Committee recommended amending Section 367.081, F.S., to establish a mechanism within a rate case proceeding to require the PSC to consider the extent to which a utility meets secondary water and wastewater standards.<sup>6</sup>

### **Penalties**

Section 367.161, F.S., provides penalties. If a utility knowingly refuses to comply with or willfully violates any provision of chapter 367, F.S., or any commission rule or order, the utility is subject to a penalty for each such offense of not more than \$5,000, to be fixed, imposed, and

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<sup>4</sup> Agency Analysis by the Florida Public Service Commission (FPSC), Nov. 13, 2013.

<sup>5</sup> The Study Committee was created by Section 2, Chapter 2012-187, Laws of Florida (CS/HB 1389)

<sup>6</sup> The text of the recommended statutory change is contained in Attachment IV.9-D, which is on page 115 of the Study Committee report, available at <http://www.psc.state.fl.us/utilities/waterwastewater/Water-Wastewater%20Sub%20Committee%20Report.pdf>.

collected by the commission. Each day that the refusal or violation continues constitutes a separate offense. Each penalty is a lien upon the real and personal property of the utility, enforceable by the commission as a statutory lien under chapter 85, F.S. The proceeds from the enforcement of a lien are deposited into the General Revenue Fund.

### III. Effect of Proposed Changes:

The bill amends s. 367.081, F.S., to prohibit the rates of a public water or wastewater utility from exceeding the rates charged by a government-owned water or wastewater utility which is located in the same county as the public utility. If more than one government-owned water or wastewater utility is located in the same county, the maximum rate is the average of the government-owned utilities' rates. The PSC is required to adjust the rates of a public water or wastewater utility that exceeds this limitation, with the rates to be adjusted retroactively to the date of the most recent rate adjustment of the government-owned water or wastewater utility. The investor-owned water or wastewater utility must refund the amounts due within 12 months after such adjustment.

There are differences between water or wastewater utilities owned by governmental authorities and those owned by private firms that may affect rates, perhaps significantly, including the following.

- Governmental authorities do not have to pay some taxes that investor-owned utilities do.
- Governmental authorities generally are not subject to Chapter 367, F.S., or to regulation by the PSC or local government regulation, and can charge whatever the local electorate will allow.
- Governmental authorities have other sources of revenue which *may* be used to provide rates that are lower than they otherwise might be.
- On the other hand, governmental authorities have other duties and obligations which they *may* apply to the water or wastewater expenses, resulting in rates that are higher than they otherwise might be.

The bill also creates s. 367.0812, F.S., to provide that when the PSC is setting rates for a water or wastewater utility, it must consider the extent to which the utility provides water service that meets secondary water quality standards for taste, odor, color, or corrosiveness, as established by the Department of Environmental Protection (DEP), the respective water management district, or a local governmental entity. In determining whether a utility has met these standards, the PSC must consider:

- Testimony and evidence provided by customers and the utility;
- The results of past tests required by DEP or a county health department which measure the utility's compliance with the applicable secondary water quality standards;
- Complaints filed by customers with the relevant regulatory authority regarding the applicable secondary water quality standards during the past 5 years; and
- If the commission deems necessary, the results of any updated test.

The bill also requires that, in setting rates, the PSC must consider the extent to which the utility provides wastewater service to its customers without generating odor, noise, aerosol drift, or light that adversely affects customers. In determining whether the utility met these standards, the PSC must consider:

- Testimony and evidence provided by customers and the utility; and

- Complaints regarding the alleged odor, noise, aerosol drift, or light filed with the appropriate regulatory agency during the past 5 years.

If the commission determines that a utility has failed to meet either standard, the utility must:

- Estimate the costs and benefits of plausible solutions to each concern identified by the PSC;
- Meet with its customers to discuss these estimated costs and benefits of plausible solutions to each concern identified by the commission; and
- Report the conclusions of such meetings to the commission.

The commission is required to adopt rules to assess and enforce a utility's compliance with this section. The rules must prescribe penalties for a utility's failure to adequately address or resolve each concern, which should include fines as provided in s. 367.161, F.S., and a reduction of return on equity of up to 100 basis points (one percent).

This portion of the bill, on secondary water quality standards, is the modified proposed legislation from the Study Committee on Investor-Owned Water & Wastewater Utility Systems Report discussed above.<sup>7</sup>

The bill takes effect July 1, 2014.

#### **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:**

The PSC staff's bill analysis states that some of the provisions in the bill could be interpreted to result in a regulatory taking in violation of law: Amendments V and XIV of the U.S. Constitution, Article I, Sections 2 and 9 of the Florida Constitution, and Article X Section 6 of the Florida Constitution. The United States Supreme Court and the Florida Supreme Court have held in a series of rulings that a regulated public utility is entitled to earn a fair rate of return on its invested capital, and failure to allow a utility to earn a fair rate of return would violate its rights to due process,<sup>8</sup> to just compensation for taking of

<sup>7</sup> Report of the Study Committee on Investor-Owned Water & Wastewater Utility Systems, February 15, 2013 pp. 105-116.

<sup>8</sup> Article I, Section 9 of the Florida Constitution; Amendments V and XIV of the U.S. Constitution; and – case cites

property,<sup>9</sup> and the right to possess and protect property.<sup>10</sup> Additionally, the Florida Supreme Court prohibits retroactive ratemaking, which the bill requires in the provisions requiring a retroactive decrease in a private utilities rates to match the lower rates of a government-owned utility in the same county.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The PSC bill analysis on this bill states:

Staff cannot determine the precise impacts of the bill on investor-owned water and wastewater utilities at this time. Government-owned water and wastewater rates are set based on accounting criteria separate from those applied to investor-owned utilities. Government-owned water and wastewater rates may be set to subsidize other services provided by the county or municipality. This could result in local governments that charge higher water and wastewater rates than those currently charged by investor-owned utilities in the same county. The bill does not address what action the commission should take if the rates of an investor-owned water or wastewater utility are lower than the rates charged by a government-owned utility.

As noted above, governmental authorities have other sources of revenue which *may* be applied to the water or wastewater expenses, resulting in rates that are lower than they otherwise might be.

C. Government Sector Impact:

The government sector does not appear to be impacted by this bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The PSC staff notes that given the subjective nature of secondary water quality standards such as color and odor, rule promulgation may pose threshold issues. However, because the DEP or other governmental entities set the standards, the commission would only have to know whether the standards are met.

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<sup>9</sup> Article X, Section 6 of the Florida Constitution – case cites

<sup>10</sup> Article I, Section 2 of the Florida Constitution – case cites

**VIII. Statutes Affected:**

This bill substantially amends section 367.081 of the Florida Statutes.  
This bill creates section 367.0812 of the Florida Statutes.

**IX. Additional Information:**

A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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