

AGENDA ITEM 2-a

MINUTES OF A SPECIAL MEETING OF THE UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA, HELD MONDAY, NOVEMBER 10, 2008, AT 10:00 A.M., AT 200 CANAL STREET, NEW SMYRNA BEACH, FLORIDA

Chairman Allen opened the Special UC Meeting and requested Commissioner Reynolds to lead in the Pledge of Allegiance. Immediately following, Chairman Allen proceeded with the invocation. A roll call was taken and initially all of the Commissioners were in attendance as follows*:

Commissioner William E. Hall
Commissioner William H. Reynolds
Commissioner Oscar Zeller (*Participated Part of Mtg. Via Conference Phone)
Chairman Walter Allen III
Commissioner Jeanne K. Diesen (*Participated Entire Mtg. Via Conference Phone)

Others in attendance were as follows: R. Rodi, General Manager/ CEO; L. Klinkenberg, Director of Finance; R. Mitchum, Director of Electric Operations; T. Beyrle, Director of System Ops. & Generation; J. White, Director of Engineering; R. Lemoine, Director of I.T.; P. Di Chiara, Director of H.R.; D. Hoover, Director of Water/Water Reclamation; D. Simmons, Executive Administrator/ Recording Secretary; B. Preston, Interim U.C. Legal Counsel; Lynne Plaskett, City Commissioner; Randy Richenberg, Vice Mayor; and Bob Tolley, Richard Spangler, Robert Rees (came in at end of meeting), all members of the public.

(1) Utilities Commission Legal Examination Status:

Chairman Allen stated okay, with everyone here, and as you notice there are two of our Commissioners on conference call with us, and we need to speak into the microphones as we communicate so they can hear. He stated as we look at the first item on the agenda this morning, it is UC legal examination status, and then referred this to Mr. Preston.

Mr. Preston stated okay, you want me to introduce Clay Henderson. The purpose of this item on the agenda is just to bring you up to date as to the status of the request you had made to the City in regards to the legal determination and the comments which had been made by the City Attorney. Pursuant to your approval, Mr. Rodi has brought on board Clay Henderson as a consultant in this regard, and Mr. Henderson is going to make a presentation this morning.

Mr. Henderson addressed the Commission and stated thank you for that impromptu request. He stated Mr. Chairman, Commissioners present, Commissioners in the back of the room, and Commissioners on the conference call, good morning. I'm Clay Henderson, most of you know me, Bill Hall has known me since I was ten years old, so I hope he doesn't hold that against me. But I am a local resident, I'm also a customer and ratepayer, but have a privilege to be a part of a wonderful national law, firm Holland and Knight. Our governmental practice is one of the largest and most diverse in the country and we also have a very diverse water practice too; we'll talk a little bit about that later. When this issue came up, Bob Rodi and I had already been talking about a number of issues and I sort of raised my hand and volunteered and said I did some of the research on this issue about 20 years ago, so I'm somewhat familiar with it. And so with that, I was able to jump right in with Mr. Rodi and Mr. Preston and with our research staff and pull through the memo that I assume has been made available to you, it was made available to the City Commission last week. One of my partners in Orlando, Tommy Burroughs, who I've also known for about 20 years,

(1) Utilities Commission Legal Examination Status (cont.):

is currently the Vice Chairman of Orlando Utilities, has been the Chairman, a very distinguished term, and is also the Chairman of the Florida Energy Commission. So as we were pulling this together I was able to share a lot of experiences with this entity and with Orlando Utilities, which as you know everyone of these is a little different, but there are probably more similarities than there are differences.

Mr. Henderson stated and suffice to say, the memo that is before you, this is a unique arrangement here in New Smyrna. It is unique in the sense that there certainly is oversight that the City Commission has, but there is also a very large realm of autonomy, operational autonomy and independence which this Commission operates, to be able to free it from the political influences that are inherent with City Hall, and allow it to do its job. Very briefly, as you know, the Enabling Act was passed originally in 1967. Back before the Constitution of 1968, all local governments operated under Special Acts by the Legislature. A local government, whether it was a City or a Special District, could only operate under the authority that was given to it by the legislature. And so both the City Commission and this Utilities Commission operated under special grants of authority from the Legislature. In 1968 the Constitution revision passed changing Florida to make it a Limited Home Rule State and in that regard local governments had a full, not quite a full range of Home Rule, but significant amounts of Home Rule. And shortly after that a disgruntled customer here in New Smyrna brought an action against this Utilities Commission challenging the constitutionality of the Utilities Commission as saying it did not survive Home Rule and the Florida Supreme Court in that case, which I've listed in memo, upheld the validity of the Utilities Commission.

Mr. Henderson stated in 1973 the Legislature passed the Municipal Home Rule Powers Act which gave to the cities a broad grant of home rule and allowed matters that are part of the charters to be amended but with matters that related to appointed boards such as this, it could only be amended by referendum. So in 1982, 1983, the City Commission appointed a Study Commission which came forward with a number of recommendations that led to Charter amendments which were approved by the voters in 1984, and those provided the oversight that you now live with regarding the City Commission. Specifically, approval of contracts more than four years, approval of extra-territorial authority, approval of the budget, and approval of a bond and revenue debt measures. But that still begged the question of whether or not that constituted some kind of issue for long term bond holders, and so your counsel in 1985, went to the Legislative delegation and asked for a Special Bill which was passed in 1985 and that became a new grant of authority to the Utilities Commission and saying right in its first section that in all respects other than as what happened in 1984, that this Commission would operate independently as it did under the 67 Act. So by doing that, in my opinion and the opinion of others, this means that the Enabling Act of the UC is the Special Act that was passed in 1985 and is not subject to further amendment by the City Commission or by Charter amendment, it would have to be approval by the Legislature.

Mr. Henderson stated so I think the most recent act of the City Commission which was to state that the Utilities Commission would operate independent and under the autonomy that is given to it, free from political interference is a clear statement of the legal relationship between the Utilities Commission and the City Commission at this time. He interjected I'm not sure what that sound is.

Commissioner Reynolds stated it's coming from the phone here.

(1) Utilities Commission Legal Examination Status (cont.):

Mr. Henderson stated okay, all right. So we pulled that together, as you know this was a part of the discussion of the City Commission the other night. The Mayor has pretty much requested that Mr. Preston, Mr. Gummey, and I get together and kind of visit about some of these issues. My feeling is that a lot of this goes to the area of cooperation, we can find ways to cooperate but it's important that the Utilities Commission knows where its lines of authority and independence are and be able to carry on its work, provide municipal services in water, wastewater, and electrical to the ratepayers and customers as it can. So that is our opinion and we look forward to continuing to work with the Utilities Commission as we go forward, and hopefully this issue that has sort of come up, will just finally go back to where it's suppose to. It comes up every regularly about every ten years or so, and it needs to kind of go back to where it belongs. So the Utilities Commission has a degree of operational autonomy, and that needs to be defended, and we'll move forward on that basis. I'm happy to answer any questions, but otherwise I'm very happy to be of service to you.

Chairman Allen asked if there were any questions.

Commissioner Reynolds stated to Mr. Henderson I have one. I think the word entity was a key point and what is the legal definition of an entity and how does it apply to what our Charter is.

Mr. Henderson stated well, you know the position that I think Mr. Gummey said was this is not a legal entity. But it certainly is an entity which was established by the Legislature and has inherent powers within it. I mean take eminent domain for instance, that is one of the most powerful powers and one of the most strongest powers any government entity can possess. For instance, there are only two instances in Florida law that require a 12 person jury, and one of them is capital murder. And the other is if this Commission decides it's going to take, (jokingly) they're not going to take my house, but take my neighbor's house, and that requires a 12 person jury to do that; and so that's an inherent governmental power. The Enabling Act also gives to you full power to handle rules and regulations regarding the rates and delivery of those services that you provide to your customers. And so those are full powers within that, so you are an entity. The issue of whether for legal purposes or for property rights or holding legal title, those are all part of that grey area, but there's no question that the Legislature has given you authority to act within a certain area.

Commissioner Reynolds stated thank you.

Commissioner Hall stated to Mr. Henderson I want to be sure that I'm clear on this issue. If a City Commission of New Smyrna Beach wants to abolish this Commission, it has to be by referendum right.

Mr. Henderson stated it would have to be by Act of Legislature.

Commissioner Hall reiterated Act of Legislature, okay.

Mr. Henderson stated and that issue came up in a couple of cases that I cite in this memo.

Commissioner Hall commented I was trying to read your brief.

(1) Utilities Commission Legal Examination Status (cont.):

Mr. Henderson stated Lake Worth being the best example. Lake Worth has an electrical authority that was established very similar to this. After Home Rule Powers took effect, the City Commission tried to abolish its electrical authority and the Florida Supreme Court found that it could not because it had inherent power under the establishment of the Legislature. So the Legislature would have to do it, and it may still require approval by the voters depending upon how the Legislature did it.

Commissioner Hall stated okay.

Commissioner Diesen stated to Mr. Henderson I have a question. You know I read the information that you gave us and I would like to know, I know everything is a matter of degrees, but can we talk a little bit about interference with the utility. At what point, it is right now and where that might be, is that given the situation that we're in, and if things continue, is that even a possibility.

Mr. Henderson stated that's a good question, that's a fair question. I did not address that in the memo but is something we certainly discussed and perhaps could continue to discuss. The Charter itself for the City of New Smyrna Beach establishes a City Manager or a Commission Manager Plan. It does not have in it a clause that is usually found in most City Charters that have the Manager Plan, which is a non-interference clause. Which is, I'll give you an example, the County Charter, for instance, very clearly says that the County Council may not interfere with the County Manager and the Departments. So that although that is sort of inherent within the Manager Commission system it's not spelled out in the City Charter, but Commissioner Diesen's question goes beyond that which is the level of interference between City Hall and this Commission. I would say that there's an operational issue there and then there are some legal issues. I mean operationally you know each of you are appointed by the City Commission, I know that you are aware of that, and so to a certain extent you individually are accountable to the City Commission. On the other hand, you appoint your Executive Director who hires the employees and those are employees of this entity, the Utilities Commission, so it would behoove you to protect that independence between the employees and the Executive Director of this operation and City Hall, consistent with the last stated word of the City Commission which was to let this run free from political interference. So it's really sort of an operational issue, and I think to the extent that you can protect that independence on the operational level is better. On the other hand, each of you are appointed by the City Commission, I know you are all mindful of that, and your budget is approved by the City Commission, and bonding is approved by the City Commission, so it behooves you to have a good working relationship with the City Commission.

Chairman Allen then asked Commissioner Diesen if that helped her.

Commissioner Diesen stated yes, well it did, but then added so the Federal Law doesn't even come into this, Mr. Henderson, is that right.

Mr. Henderson stated I'm missing, I'm not sure what you mean by that.

Commissioner Diesen stated well isn't there Federal Law about interference with the operation of a utility.

(1) Utilities Commission Legal Examination Status (cont.):

Mr. Henderson stated okay, I have not addressed that, and I think that, let me consider that. You know I was really trying to pull that from an operational level back to the relationship between City Hall and the Utilities Commission, but that begs a very good question and I think I will come back to you with a more specific answer on that.

Commissioner Diesen stated thank you.

Mr. Rodi stated if I may, to follow up, from an organizational structure, I hold the understanding that the Utilities Commission, represented through me as their General Manager and the employees, is not a department of the City. Am I correct in my understanding from your examination?

Mr. Henderson stated well it is part of the government of the City of New Smyrna Beach and that is defined by the Special Act. It is not defined otherwise by the City Charter which was that the City Commission and the City Manager will determine what departments are and how they report to the City Manager. You do not report to the City Manager.

Mr. Rodi stated and that was specifically the issue I was addressing, despite some rumors to the contrary, I do not report, nor am I supervised, nor do I in any way am answerable to the City Manager except for the City Manager's duties as they may interface with the Utilities Commission.

Mr. Henderson stated that's correct. He added and as we have stated, there certainly is general law imposes some high degree of cooperation here, and we've specifically talked about the requirements of the Growth Management Act. There are some things that the City is required to do to comply with the Growth Management Act that are really within the purview of the Utilities Commission, so it imposes a, you know, very strong degree of cooperation in moving that forward.

Chairman Allen stated and the thing is, this Commission, that's one of our goals to strive, is that strong communication and working together, because it takes both of us working together to meet the varied needs of our citizens and those who are our customers. The one question I had is, as we're at this place of looking at and understanding this as a legal entity and being able to, because publicly it was stated that it was not a legal entity, it was a nullity, and it was much like the Police Department. If that is left publicly open like that, where does that leave us?

Mr. Henderson stated well, I think you have been proper to raise that as a question, and you have as a Commission passed along a letter to the City Commission, it's been discussed there and I think it still begs a response. And I think in the meeting we had last week, the Mayor had asked for the three attorneys to get together and try to see if we could discuss this a little bit further and come back perhaps to both Commissions with some recommendations. But that's certainly not the type of thing that should be left out there. I know exactly where you're coming from and where Mr. Rodi is, you just can't have customers and ratepayers and bond holders thinking that this is not a legal entity, or a nullity as you say, or as Mr. Gummey said, excuse me, you didn't say that.

Chairman Allen stated so the three of you will meet and discuss and work through some process of coming back with a recommendation?

(1) Utilities Commission Legal Examination Status (cont.):

Mr. Henderson stated yes, I hope there's not a lot to work through, I think it's pretty well straightforward and the issue can fall off of the agenda for another ten years before, I'm sure, it'll come back.

Mr. Rodi stated I'd like to interject on that point. I think there's a fundamental issue here, it's either the law exists or it doesn't exist, and having, with all due respect, the attorneys get together to negotiate what the law means isn't going to, I think, really resolve this. I think essentially what needs to happen is just acknowledgement that the law is there. And that's what has driven all of this, the approach that I've used is since the question was raised, I think we needed a definitive external legal opinion, and that we've received. I think it defines well enough just a restating of the historical nature of the Utilities Commission and the City, and from my perspective there need not be any more time or money spent on that particular issue. If there's a further contest where there are additional statements that go back to that original claim, then I think we should move forward. My suggestion is that there simply be an affirmation of the law, which was the original request made by this Commission. I, from a staff perspective, am not looking for any more acrimony because it's just simply a matter of going ahead and doing business everyday, and until we had this opinion there was some doubt. So my suggestion is that we not continue the discussion even though that was discussed the other night at the City Commission; so I'd look for your guidance on that point.

Mr. Preston stated just as a comment, I'm in support of that strategy. I think that the comments that were made have been discussed, that we have affirmed our legal position. That we, being the Utilities Commission, to ourselves, in the sense that we have confirmed the statutory creation and affirmation of the Utilities Commission. And that for the best working relations between the City and the Utilities Commission, I would think that a simple response, which we have not yet had from the City, simply a letter from its attorney, but a simple response from the City just confirming the statutory creation of the Utilities Commission, would take that which you asked could we leave hanging, the nullity, the non-entity verbiage, and put that to rest. And I think that is all that we need, I don't think that we need anything further from the attorneys or otherwise, and so I'm in support of that strategy as well.

Chairman Allen stated I think it's a good strategy. He interjected to a person in the audience, we'll open it up to public in a little bit. He stated I think that's a great strategy and it needs to be done if we're ever to move forward. I think historically, if you go back and look at every time this issue has come up, it's taking three steps forward and you take two steps backwards. It needs to be clarified and acknowledged, and let's move on and start working together and see things progress for our community.

Mr. Preston stated let me add just one point if I could for clarification. City Commissioner Richenberg, at the last meeting, did in fact ask that the opinion be included in the minutes, and that is a statement of the law. For that, there has been some reference made to the legal opinion in that regard so I didn't want to leave it hanging that nothing had been done in that regard, because there was that affirmation by the reading into the minutes of the opinion by myself and Mr. Henderson.

Commissioner Diesen stated can I make a comment too, in regard to my original question, and it comes back to this, it comes full circle I think, in that interference, and we talked about the

(1) Utilities Commission Legal Examination Status (cont.):

operational level. I think as long as this hangs out there and is not satisfied, I'm not talking about interference Commission to Commission, I think we have a good relationship, but the operational level, I think that encourages interference on a daily basis and that's what I think we have to put to rest. So until we're made whole by a statement by the City Commission, I'm concerned that there will continue to be this operational level noise in the system interference.

Chairman Allen stated good point.

Mr. Rodi stated if I may interject too, I think it would be good if this Commission accepted officially Mr. Henderson's opinion. You know obviously everyone's received copies of this, I'm talking about the City Commission, City Attorney, City Manager, Utilities Commissioners, and I think it would be appropriate to accept that for purposes of the record along with your letter and both public laws, and maybe even Chapter 15 as a packet, because I think they're sort of woven together.

Commissioner Diesen stated I'll make that motion.

Chairman Allen asked if there was a second for that motion.

Commissioner Hall seconded that motion.

Chairman Allen stated before we do that I know there's probably a couple of folks in the audience who would like to speak. He stated it's good to have City Commissioner Plaskett and Vice Mayor Richenberg. He said to Vice Mayor Richenberg, I know you raised your hand so if you want to step to the podium we'd welcome that.

Vice Mayor Richenberg stated I'm here as a resident and I have a question I'd like to ask Counselor Henderson. Would it be beneficial and proper for the City Commission to state as the elected body that they recognize the U.C. is a legal entity at this point in time. But I believe, I had written this question before the discussion that had just occurred and after listening to that discussion it sounds like that is very important, very imperative to where we stand.

Counselor Henderson stated one thing I needed to say earlier, and I think the fact that you have a couple of City Commissioners here demonstrates that, this is the time I think for the Utilities Commission to help clarify this because I think you have the strong support of the City Commission right now. And so, Vice Mayor Richenberg's suggestion that the City Commission make an overarching statement to that effect today, I think would go a long ways, and hopefully it would work itself down into the management levels where the operational issues have to be resolved. So, I think that might well be a very good suggestion.

Chairman Allen then asked if there was any other participation in the audience, and then recognized Mr. Spangler.

Mr. Richard Spangler addressed the Commission and stated you know who I am. He stated I wanted to make a couple of comments on things that I heard and I want to make it clear that I'm very sympathetic to the U.C., and also I'm sympathetic to the City. There are several things I didn't

(1) Utilities Commission Legal Examination Status (cont.):

really understand. I do not know, but I agree and accept that the CEO is not answerable to the City Manager, but that should not preclude communication. If either of those two individuals make it difficult then that's a management problem. But just because Mr. Rodi doesn't have to answer to the City Manager doesn't mean that the two of them shouldn't communicate, provided it can be done in a constructive way, I don't know if that ever happens or not. The purpose of the Mayor asking for the three attorneys to get together and to come up with something, was not to negotiate. It was to, as Mr. Rodi said, give an acknowledgement that the Utilities is a legal entity and to settle once and for all in the public eye just what that meant; that was the purpose there. I'm a little confused about what Mr. Gummey said, I've never seen the minutes of the meeting, but it was said here that he said that the entity was a nullity. I was at that meeting and I thought he said the easement issue was a nullity. Can anyone straighten me out on that, it's a big difference.

Mr. Preston stated and the transcription of the minutes would be helpful as well, but I think there were at least, if not three times, where out of the context of the easement, even though the discussion began with discussion of the easement, there were those statements that were made that can be taken that in fact the Utilities Commission is a non-entity, a nullity. So just reading the minutes themselves you will see where the context is removed from the easement language.

Mr. Spangler stated I think we're playing with statements that we don't actually know what they are, but I can tell you that my impression was that he said you guys don't exist, rather heatedly and several times. Whether he meant to say that, or what aggravated him to that point, I have no idea, but I think it's important to know whether he said the easement issue was the nullity, which was my impression, but only a recollection, or whether he said that the whole entity. I know he said that you didn't exist, in addition to the nullity. The nullity to me is not being contested and I think that his answer to Mr. Henderson's letter was agreement. But I think that probably what this meeting is suppose to do is say okay, we have three legal minds here who sit down and agree and issue a statement that the utility does exist, and this is what they can do, and this is what they can't do. I think it's perfectly clear and it was not to negotiate what they are or aren't, it was to acknowledge it legally, and I don't see any disagreement between what Mr. Henderson said and what Mr. Gummey finally said for whatever reasons. And I think the City Commission would probably be aloof to say that the City Commission (sic Utilities Commission) was a legal entity because that's a legal matter and I think that's probably why they want the attorneys to sit down and say it's a legal entity. Usually the weight of an attorney is stronger than the weight of a layman, even if they're a Commissioner. So that's just my comments on it; thank you for hearing me.

Chairman Allen stated okay, we appreciate your input, and I'm sure as a Commission and Mr. Rodi, is always open to communicate when it's constructive communication. He then recognized Mr. Rodi to speak.

Mr. Rodi stated to Mr. Spangler that he would give him a copy of the transcript of the meeting that we had made, for the 14th. But part of why some of the actions were taken, in that meeting on the 14th, at least three City Commissioners, in addition to our own attorney, felt that there was a different topic other than the easement. And I'll quote, it said "Vice Mayor Richenberg stated that sounds like that's a major argument for another time. City Commissioner Hathaway stated yes, I agree, I agree. Mayor Mackay stated I think so." Then Vice Mayor Richenberg stated "I mean this seems to be quite a simple thing to do you know. If it's an exercise in futility, then I guess we'll all

(1) Utilities Commission Legal Examination Status (cont.):

learn that at some later time, but the way I look at it there's an established use here." So it seems as if three City Commissioners at the time that was going on realized that whatever was occurring between the two attorneys was outside of the discussion of the lease (sic easement) issue. So I just wanted to make that point, and when you read the context of all of the actual language that was used, it might be helpful.

Chairman Allen then asked if there was any other participation and recognized Mr. Tolley to speak.

Mr. Tolley addressed the Commission and stated Bob Tolley, 803 Fairway. I'm going to continue saying it at every meeting I go to or not, it has been clear for years, even pre-Gummey, and there continues to be a concerted effort to undermine the authority of this U.C., of this utility, and to undermine the authority of this Commission and the General Manager. Why, I can't get a consensus of the people across the street to realize this, I don't have a clue, but you keep saying it long enough, loud enough, we go back to if it smells like you know what, it tastes like you what, then I guess it's got to be you know what. I will not change my opinion. As far as the attorneys negotiating, I agree with Mr. Rodi and Mr. Preston. I wouldn't negotiate any more, it is what it is. I think that's the position that this Commission and entity needs to take. Because if you're going to sit down with the three attorneys, you know what you're going to have, another Chinese Fire Drill, he said, she said, and you know what's going to happen across the street. I think we have to keep looking at this and open the eyes and say what drove all this. Some of you were at the meeting that night, some of you could see, just look at the reaction that the City Attorney had, this went way beyond any easement issue. And I think we have to stay vigilant of that, and we have to work under that, and I think sooner or later we'll all clear out, and I think we'll get to the bottom line truth on all this. Thank you.

Chairman Allen thanked Mr. Tolley. He then stated I have to affirm Mr. Spangler's comment that it's not a negotiation, it's an affirming of the law, and that's where we need to go. He then asked if there were any other comments.

Commissioner Reynolds stated yes. First of all it displeases me that we're wasting valuable time and money on a statement that could be a misstatement, whatever the motives are, and I would like to see the City Commission just basically state as far as we're concerned it's an entity, period. That way we can get on with the business. But the second, and most important point, which I believe and I reaffirm Mr. Spangler's comments, is that without cooperation between the City Manager and the Utilities Commission's Manager, we can sit here all day and talk and argue about certain things, but that's friction that we do not need in the City, we need cooperation. So from my standpoint I would just like to see this end and go ahead and ask the City Commission to make that affirmation.

Chairman Allen stated okay, and we've asked that previously and I think as the attorneys work through that, I think we'll see that come about, and you have that on record as we progress forward on that. He then asked if there were any other questions.

Commissioner Reynolds stated there's a motion on the floor.

(1) Utilities Commission Legal Examination Status (cont.):

Chairman Allen stated right, come back to the original motion that was made in reference to Mr. Henderson's report to us and the packet of the process that we've walked through here. He stated as we bring that back is there...

Commissioner Hall then asked if the motion could be read again.

The Recording Secretary commented she had some of the motion, that the letter to the City Commission, and then the letters from Mr. Preston and Mr. Henderson, and the laws and the Charter chapter will all be part of the permanent record.

Commissioner Diesen's officially stated motion was for the Utilities Commission to accept officially Mr. Henderson's opinion and to accept for purposes of the record, the letter to the City Commission from the Utilities Commission (asking for affirmation of the law), and then the letters from Mr. Preston and Mr. Henderson, and copies of the laws, and of Chapter 15 of the City Charter as a packet.

Commissioner Diesen was still on conference call and the motion was reaffirmed with her.

Chairman Allen stated Commissioner Hall had seconded that motion and then he asked for a vote to be taken on the motion.

Commissioner Diesen's previous motion then passed unanimously (excluding Commissioner Zeller) on a roll call vote. It was determined that Commissioner Zeller was no longer participating on the speaker phone at this point in time.

Mr. Rodi stated at this point, because I don't think it's clear as far as the attorneys, and what I'd suggest is that probably at this point for Counselor Henderson to just restate the request to the City Commission, at the regular meeting, saying just affirm the law, whether it's 85-503, just a simple affirmation that it exists. And I think that is something that wouldn't require any interpretation, either it exists or it doesn't exist, and all the rest of it gets into I think the splitting of hairs. Does that make sense?

Counselor Henderson interjected I'll do what you ask me to do.

Chairman Allen and Commissioner Hall both confirmed they thought that made sense.

Commissioner Hall asked if a motion was needed.

Mr. Rodi stated yes.

Commissioner Hall stated so moved.

Commissioner Reynolds seconded the motion.

Commissioner Hall's motion to approve Counselor Henderson (from the law firm of Holland and Knight) to restate the U.C.'s request to the City Commission, at a regular City Commission

(1) Utilities Commission Legal Examination Status (cont.):

meeting, to affirm the existence of Chapter 85-503, Laws of Florida, then passed unanimously on a roll call vote.

Chairman Allen stated okay, that's item one.

(2) Alternative Water Supply Project:

Chairman Allen stated as we move on to item two on the agenda here, the Alternative Water Supply Project, we need a motion to approve and authorize special legal and technical consultant services in the amount of \$250,000 for the U.C.'s Alternate Water Supply Project.

Mr. Rodi stated let me give some background as to why this is on the agenda. Over the last two years in particular, we've had presentations about an alternate water supply plan that would be hosted on the property adjacent to I-95. That plan in particular incorporated a deep well, about a 1,200 ft. deep well, perhaps some type of water processing technology, whether it's an RO membrane or some technology from one of R&D Projects that has proprietary technology, and we blend with irrigation water, including reuse. As you know we have received our approval with a CUP in 2006 that allowed us to have potable wells on that same property and the wells are adjacent to the Wastewater Treatment Plant. We drilled the first well and have results that still bear watching and we've approached St. John's to work with them from a standpoint of proving out that well. The well has good water, we're just watching the chloride levels, so we need to run that.

Mr. Rodi stated however, recently, and you're aware of this as well, the City had to redo their land development regulations, and this is one of those cooperative efforts, whereby the City must meet the concurrency from the standpoint of all new developments and we had a concurrency plan that we've used since 2006 in support of our City's needs. What that amounts to is we have also then applied for an alternative water supply project, which is this deep well. And what is on the books right now is the Swoope Plant and an old desal plant proposed for that location with St. Johns. So what we have done is we have asked St. Johns to transfer the alternate water supply to our new deep well and we've made several initial contacts and filings and so we're in the early stages of that. And the U.C. recently provided a letter to the City designating that alternate water supply plan for purposes of the LDR. However, that's a long journey, and with that journey we need actually the expertise of someone like Mr. Henderson and his firm. And we also need expertise in certain technical aspects of water analysis and development. We, you know, have running needs from time to time for a variety of issues that relate to water and it's our feeling it's going to become more and more technical. So what this item proposes is both a legal approach and also a technical approach that goes well beyond the bounds of any in-house capability we have. We don't know what will be needed so the amount that was listed there was an amount that was just a guess, that was based upon where we think this is going to go with filings. Some of the technical analysis we may have would get into even some everyday issues about water permeability through the soil that would be out there as it might relate to some of our neighbors; we really don't know what the full range is.

Mr. Rodi stated so that's why this item is here now. We, obviously, will not spend unless we need to spend. And I wish I could be more definitive, but with St. Johns becoming more and more involved with more technical detail and proving out the detail within the model, I think we have this combination of needs right now, both technical and legal. So that's why it's before you.

(2) Alternative Water Supply Project (cont.):

Chairman Allen then asked if there were any other questions.

Commissioner Reynolds asked Mr. Rodi, would you just give us the various cases of outcomes on this, best case, worst case, somewhere in the middle, so that we can sort of get a handle of what the possibilities are.

Mr. Rodi stated well the worse case is no alternate water supply and essentially it may mean that reuse water would have to be processed into potable water. And that's something that's happened in California. The best case is a combination of water sourcing needs that would allow us to draw upon available water, like when we have heavy rains, to store it somewhere, and we're proposing in the lower Floridan, and then being able to process that water to varying degrees of quality. The use of a RO membrane system at Swoope is one that we have shied away from, not only from a cost standpoint. If you think back to the 2003 era, I think that is when that was first proposed. At that point that plant was a 15 MGD plant, and we don't need 15 MGD, so that meant it was a regional supply, never proposed by the U.C., so somehow it ended up in the plan. He stated \$186 million, \$15 million a year in O&M costs, so staring at a \$200 million investment. I don't know that, at least this Commission since I've been here, has ever proposed that we be a regional provider. And so the approach is to meet the needs of New Smyrna Beach. The needs as we've understood them have been defined by the projected and anticipated growth, and you've seen all those studies that we've done, and the layouts, and the number of ERU's, and we've stepped through all of that.

Mr. Rodi stated so our best guess is that since the slow down in construction, we had initially anticipated in the 2012, 2013 time frame with a build rate of 125 units a month, to need an alternate water supply plan. Our build rates now, I think are probably down to two units a month, so the need for the water, which is when the alternate supply will be necessary, is when we reach that threshold. So we see that threshold now starting to approach the end state of our CUP, which is 2020. And so I think there's more time than what we had previously, but if the construction picks back up again, where we want to be is to have our alternative supply plan documented. And the nice thing about this plan is it's modular, it gets into adding components as we need them, roughly about a million and a half gallons a day as a modular component. And that's very doable with this technology, and it's a proven technology. So that's the best case, and of course the worse, as I've just said, will be processing like the astronauts. He then stated to Commissioner Reynolds, I hope that I answered your question.

Commissioner Reynolds stated thank you, I just wanted everyone to have sort of a feel for how we're spending \$250,000.

Mr. Rodi stated yes, and most of this will, as we anticipate it, is going to be in technical study, whether it's legal technical study and application, or actual hydrology studies. You know if we get into a well, just drilling one well is \$750,000, so that wasn't included in this concept, but we will have to move into a test well at some point.

Chairman Allen then asked if there were any other questions.

(2) Alternative Water Supply Project (cont.):

Commissioner Reynolds stated well, speaking of that if I may, with a test well, is there some way that we should maybe apply for some funding from St. Johns to assist us in this since overall it will assist them if it's successful or not successful.

Mr. Rodi stated the answer is yes, and we did that, and they told us to go away. There were several objections, we've overcome one of the objections and we're continuing to work on that. We are also trying to leverage out electrical R&D project with funding since the combination of leveraged projects provide both water and energy, we're going to try to find some additional funding that way. But I do think that our main objective is to form a template that cities our size, little cities, can replicate elsewhere, and with that maybe we'll be able to get some funding. But with the economic crises as we see them, I think our chances are diminishing daily for that.

Chairman Allen then restated the motion as listed on the agenda item.

Commissioner Reynolds stated we had a motion and a second.

Chairman Allen asked if there were any further questions. It was, at that point, determined a motion had not been made yet.

Commissioner Hall then made a motion to approve and authorize specialized legal and technical consultant services in the amount of \$250,000 for the U.C.'s Alternative Water Supply Project. Commissioner Reynolds seconded the motion

Chairman Allen confirmed there was no public participation at this time on this issue and then asked for the vote on the motion.

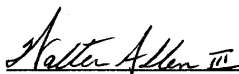
Commissioner Hall's previous motion then passed unanimously on a roll call vote.

(3) Possible Other Business – Time for Commissioners:

Chairman Allen then stated it was time for Commissioners and any questions or other business that may arise. He then stated with none, do we have a motion to adjourn the meeting.

There being no further business to come before the Commission, Commissioner Diesen made a motion to adjourn and Commissioner Reynolds seconded the motion. Chairman Allen closed the Special U.C. meeting at 10:53 p.m.

APPROVED:


CHAIRMAN

ATTEST:


SECRETARY-TREASURER

These minutes were formally approved by the Utilities Commission at their December 15, 2008 meeting.