

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Colonies of) DOCKET NO. 900944-WU
Margate Homeowners' Association)
against COLONIES WATER COMPANY in) ORDER NO. 24234
Broward County to revoke)
Certificate No. 481-W) ISSUED: 3-12-91
_____)

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON
BETTY EASLEY
GERALD L. GUNTER
MICHAEL MCK. WILSON

ORDER DISMISSING COMPLAINT WITH PREJUDICE

AND REQUIRING UTILITY TO FILE PLAN

BY THE COMMISSION:

The Colonies of Margate Homeowners Association (CMHA) filed a complaint against the Colonies Water Company (Colonies). Colonies is a Class C utility certificated by this Commission to provide water and wastewater service to the Colonies of Margate mobile home park. This is the second complaint the CMHA has filed against Colonies. The CMHA voluntarily dismissed its first complaint, which was filed pro se. Colonies has filed a motion to dismiss this second complaint.

The present complaint, which was filed by counsel for CMHA, consists of three counts in which the CMHA attempts to state three separate claims for relief. In Count I, the CMHA alleges that Colonies sought a certificate in order to avoid Section 723.045, Florida Statutes, and that Colonies is simply a water meter which doubles rates for water which could be purchased from the City of Margate. On this basis, the CMHA asks the Commission to: (1) revoke Colonies' certificate and return the Colonies of Margate water service to the City of Margate; (2) refund all payments made to Colonies since its inception and out of the proceeds pay the City of Margate its regular rate with the balance to be paid the CMHA for pro rata distribution among the homeowners; and (3) provide all other relief in the best judgment of the Commission.

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ORDER NO. 24234
DOCKET NO. 900944-WU
PAGE 2

In Count II, the CMHA alleges Colonies failed to report true and correct amounts in its 1988-90 annual reports and that Colonies willfully and intentionally omitted reporting required data. On this basis, the CMHA asks the Commission to revoke Colonies' certificate, "fine and punish" the utility, and grant all other relief the Commission deems appropriate. In Count III, the CMHA seeks to invoke equity jurisdiction to have the Commission dissolve Colonies and restrain it from operating so that it will be subject to Section 723.045, Florida Statutes. Chapter 723, Florida Statutes, governs mobile home lot tenancies. Section 723.045 prohibits mobile home park owners from reselling purchased water at more than actual cost, but that section expressly does not apply to park owners regulated under Chapter 367, Florida Statutes.

Colonies filed a motion to dismiss the complaint for failure to state a cause of action on which relief can be granted. Colonies alleges the CMHA set forth no basis in its statement of facts or in Count I-III of the complaint to revoke its certificate. Colonies also alleges neither the CMHA nor the City of Margate has ever operated the water system, thus it cannot be returned to either of them. Colonies further alleges the Commission could not give the utility's assets to the CMHA without first finding the authority granted to Colonies by its certification is not in the public interest, otherwise it would be an unconstitutional taking. Colonies alleges CMHA has presented no basis on which refunds to the CMHA or payments to the City of Margate could be granted. Colonies alleges that the Commission, as an administrative agency, has no equity jurisdiction. Finally, Colonies alleges the CMHA has set forth no basis in the statutes governing the Commission or in its rules or orders on which any of the requested relief could be granted and that the CMHA has failed to state grounds which, even if true, would support any action against Colonies.

We agree that, taking the facts alleged by the CMHA as true, it has failed to state a basis in the statutes governing the Commission or its rules or orders upon which the requested relief could be granted. Therefore we grant the motion to dismiss.

The CMHA's voluntary dismissal of its first complaint was without prejudice. Colonies moved to dismiss this second complaint with prejudice. At the agenda conference, which both parties were notified of and had an opportunity to participate in, counsel for Colonies argued that under Rule 1.420, Fla. R.C.P., this involuntary dismissal for failure to state a claim upon which

relief can be granted should act as an adjudication on the merits. Colonies argued that the CMHA has had an ample opportunity to correct the deficiencies which led to its voluntary dismissal of the first complaint and that Colonies is entitled to some finality on this matter, which has been at issue since May, 1989.

We are aware of the general principle that leave to amend a complaint should be liberally granted; however, we do not believe the CMHA would benefit from an opportunity to amend this complaint. In other words, we do not believe that amendment can cure this complaint to state a claim for the requested relief. As noted above, this is the second complaint filed by the CMHA. The CMHA has failed to allege facts which, if true, would entitle it to the relief requested. Further, for the most part, the CMHA has asked for relief the Commission is not in a position to grant regardless of the sufficiency of the facts alleged. For example, this Commission does not interpret Chapter 723. In addition, there is no basis in our statutes or rules for turning the water company over to the city or refunding all payments made to Colonies as the complainant requests. Further, the complaint itself exhibits a misunderstanding of the jurisdiction and functions of this Commission and of Commission practice generally. For example, the CMHA alleges in its complaint that Colonies reported certain figures for utility plant-in-service on its annual reports "when no utility plant exists." This is simply incorrect. Colonies is a certificated utility, and as such it does have utility plant-in-service consisting of water transmission and distribution lines.

The CMHA also sought to invoke the equity jurisdiction of the Commission in Count III of the complaint. As an administrative agency, we have no equity jurisdiction. Further, some issues are raised in the complaint that are not appropriately addressed through the Commission's complaint process. If there are errors in annual reports, the Commission first asks the utility to correct the errors. We may ultimately fine a utility for intentionally submitting erroneous reports. Colonies was notified of a discrepancy in one annual report and promptly corrected it.

We do not wish to prevent the CMHA from bringing a legitimate complaint that this Commission can address pursuant to governing statutes, rules, and orders; however, we do not believe this complaint can be cured by amendment. We hereby dismiss the complaint with prejudice.

In its motion to dismiss the complaint, Colonies requested an award of attorney's fees pursuant to Section 120.59(6), Florida Statutes. Colonies alleges that the CMHA's complaint contains allegations designed to harass, intimidate, and force needless use of Colonies' resources in framing a response. Section 120.59(6) provides for an award of attorneys fees to the prevailing party in a Section 120.57 administrative proceeding when the hearing officer determines that the nonprevailing party participated for an improper purpose. We decline to assess attorney's fees at this time pursuant to the above provision.

Because of the previous complaint filed by the CMHA, we are aware that the utility has a significant problem with unaccounted for water. According to the utility's 1989 annual report, unaccounted for water represented approximately 50% of the total water purchased from the City of Margate in that year. A utility operating in a normal, proper manner can usually keep unaccounted for water below 10%. We are also aware that the utility has taken some steps in the past year to correct this problem. Meters were installed at certain facilities owned by the mobile home park which were not previously metered for water service. The master meter which registers the water purchased from the City of Margate was replaced. A sample of the customer meters were bench tested and found to be operating within established guidelines. In addition, Colonies hired an engineering consultant to address this problem. The consultant has located and repaired some minor leaks in the distribution system. Despite the measures taken, the utility has advised us that it is still experiencing unaccounted for water in the range of 40% to 50% of the total water purchased.

This level of unaccounted for water is unacceptable. However, the customers are not paying for the wasted water. The present rates were designed so that the purchased water costs are recovered through the gallonage charge. Since customers are billed only for their actual consumption based on their meter readings, they are not paying for unaccounted for water. The utility pays the cost of the unaccounted for water.

Because of this rate structure, Colonies has a strong financial incentive to lower the level of unaccounted for water. The utility is absorbing a significant expense which it does not pass on to the ratepayers. In addition, since it is Commission policy in rate proceedings to disallow expenses related to

ORDER NO. 24234
DOCKET NO. 900944-WU
PAGE 5

unaccounted for water above 10%, Colonies cannot expect to recover these costs in any future rate case.

Prudent use of our water resources is a concern of growing importance in Florida, however. We believe all reasonable measures should be taken to lower the unaccounted for water to an acceptable level. Therefore, we direct Colonies to file a plan within ninety days of this Order outlining the measures it will take to isolate the cause or causes of the problem, the steps needed to fix the leaks, and the estimated cost of the repairs.

It is therefore

ORDERED that the motion to dismiss the complaint of the Colonies of Margate Homeowners' Association against Colonies Water Company is granted. It is further

ORDERED that this dismissal is with prejudice. It is further

ORDERED that Colonies Water Company file within ninety days a plan for dealing with unaccounted for water as discussed in more detail in the body of this Order. It is further

ORDERED that Colonies Water Company's request for attorney's fees is denied. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission, this
12th day of MARCH, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MJL

by: Kay Flynn
Chief, Bureau of Records

ORDER NO. 24234
DOCKET NO. 900944-WU
PAGE 6

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.