

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

February 8, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JAEGER) *[Signature]*
DIVISION OF WATER AND WASTEWATER (XANDERS) *[Signature]*

RE: UTILITY: TURKEY CREEK UTILITIES, INC. & FAMILY DINER, INC. D/B/A TURKEY CREEK UTILITIES
DOCKET NO. 921098-WS
COUNTY: ALACHUA

CASE: APPLICATION FOR CERTIFICATES TO PROVIDE WATER AND WASTEWATER SERVICE UNDER GRANDFATHER RIGHTS

AGENDA: FEBRUARY 20, 1995 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\921098-R.RCM

CASE BACKGROUND

Family Diner, Inc. and Turkey Creek, Inc. d/b/a Turkey Creek Utilities (Turkey Creek) was a Class C utility in Alachua County which provided water and wastewater service to approximately 300 customers. On October 26, 1992, Turkey Creek filed an application for a certificate to provide water and wastewater service pursuant to Section 367.171, Florida Statutes. Order No. PSC-93-0229-FOF-WS, issued February 10, 1993, granted the certificates to Turkey Creek, approved its service territory and reduced its rates to those which were in effect the date the Public Service Commission received jurisdiction of Alachua County, June 30, 1992. The utility protested this proposed agency action order and as a result, the certificates were never issued to the utility. A second order, Order No. PSC-93-0816-FOF-WS, issued July 27, 1993, regarding rates and charges was issued and was also protested by the utility. Refunds were required in each of these orders because the utility

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had illegally increased the rates and charges after the Commission assumed jurisdiction over Alachua County on June 30, 1992.

Prior to the Commission's hearing, which was scheduled for November 3, 1993, the utility withdrew the protests. By Order No. PSC-93-1769-FOF-WS, issued December 3, 1993, the two prior orders were made final and effective. Turkey Creek subsequently filed an appeal of Order No. PSC-93-1769-FOF-WS with the First District Court of Appeal on January 6, 1994. On March 27, 1995, the First District Court of Appeal affirmed the decision made by the Commission in this docket. Accordingly, the correct territory was granted to the utility which would allow for the certificates to be issued. However, since the utility had been sold to the City of Alachua on September 23, 1993, no certificates were ever issued to Turkey Creek. The sale to the city and the pending refunds of rates collected by Turkey Creek were considered at the August 15, 1995, Agenda Conference.

Pursuant to the vote of the Commission, an Order Acknowledging Transfer And Initiating Show Cause Proceeding (Order No. PSC-95-1101-FOF-WS) was issued on September 6, 1995. That order required Turkey Creek to show cause in writing within twenty days, why it should not be fined \$5,000 for not complying with Order No. PSC-93-1769-FOF-WS (which order required refunds to be made in accordance with Order Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS).

In response to the Show Cause Order, Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities filed what they styled Respondents' Reply to Show Cause Order which was dated September 27, 1995 (although the reply was dated September 27th, it was not stamped in until September 28, 1995). In the response, Turkey Creek requested deferral of the show cause proceeding.

After considering this reply at the November 7, 1995 Agenda Conference, the Commission issued Order No. PSC-95-1445-FOF-WS, which denied the request for deferral of show cause proceedings, clarified the initial show cause order, and reinitiated show cause proceedings against Turkey Creek. That Order was issued on November 28, 1995, and again gave Turkey Creek 20 days in which to respond.

Turkey Creek timely filed its response on December 18, 1995, and, asserting that there were material issues of fact and law in dispute, requested a formal hearing pursuant to Section 120.57(1), Florida Statutes. Turkey Creek also reiterated its assertion that the Commission did not have jurisdiction to issue the orders requiring a refund, that the question of jurisdiction was properly asserted through a Declaratory Statement Action in Circuit Court, and that the Commission should refrain from taking any action

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pending the outcome of its Declaratory Statement Action in Circuit Court.

This recommendation addresses that response and whether a formal hearing should be held (i.e., whether there is a dispute of material fact), whether the Commission should refrain from taking any action pending the outcome of the Circuit Court action, and whether fines (and the amount) should be imposed.

DISCUSSION OF ISSUES

ISSUE 1: Is there a dispute of material fact such that the Commission should schedule a formal hearing pursuant to Section 120.57(1), Florida Statutes?

RECOMMENDATION: No, there is no dispute of material fact that would warrant a formal hearing.

STAFF ANALYSIS: In its reply, Turkey Creek states that the disputed legal and factual matters are the following:

when did the respondents actually "sell" the utility to the City of Alachua; does the Commission retain jurisdiction over an entity after it divests itself of all utility operations; does a "transferor utility" remain liable for Commission - ordered refunds not reduced to judgment once the transferor quits utility operations; and is a Commission refund order, which became final after the subject utility is sold, binding on a company which no longer operated under the Commission's jurisdiction.

Based on this allegation, Turkey Creek requests a formal hearing pursuant to Section 120.57(1), Florida Statutes. Of the matters listed above, only the question of "when did the respondents actually 'sell' the utility to the City of Alachua" is an alleged dispute of material fact.

However, Order No. PSC-93-1769-FOF-WS, issued on December 9, 1993, specifically states:

On September 15, 1993, the City of Alachua made a preliminary determination to purchase Turkey Creek. The utility states that the City of Alachua began operating the utility effective September 23 1993. According to information provided by the City, the sale has been closed and the proceeds were to be held in escrow pending Department of Environmental Protection permitting. Subsequently, on October 20, 1993, the utility filed a Notice Dismissing Petitions protesting Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS.

Order No. PSC-93-1769-FOF-WS, also revived Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS, and required Turkey Creek to refund,

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with interest, all monies collected in excess of the rates and charges approved in those orders. Turkey Creek appealed this Order, and the First District Court of Appeal affirmed this Order on March 27, 1995. Pursuant to Order No. PSC-93-1769-FOF-WS, the refunds for the monthly service rates, the miscellaneous service charges, and the late payment charges were to be calculated through the date of sale to the City of Alachua.

In its response to both the first and second show cause order, Turkey Creek attached its Complaint for Declaratory Relief. In that Complaint, Turkey Creek specifically states: "Effective on or about September 23, 1993, the plaintiffs sold said utility to the City of Alachua, which thereafter owned and operated it." This is the exact date referred to in Order No. PSC-93-1769-FOF-WS. Therefore, there appears to be no dispute of material fact.

The other issues raised by Turkey Creek are legal questions which the Commission has already answered through issuance of its various orders (see specifically Order No. PSC-93-1769-FOF-WS), i.e., the Commission does retain jurisdiction, the "transferor utility", pursuant to Section 367.071.(2), Florida Statutes, does remain liable for Commission-ordered refunds not reduced to judgement (where the rates are determined to be illegal rates), and the ordered refund is binding on the company even if it has ceased operations.

Section 120.57, Florida Statutes, specifically states in pertinent part:

Unless waived by all parties, subsection (1) applies whenever the proceeding involves a disputed issue of material fact. (e.s.)

Despite claims to the contrary, Staff does not believe there is a dispute of material fact. Therefore, Staff recommends that Turkey Creek's request for a formal hearing, pursuant to Section 120.57(1), Florida Statutes, be denied.

Further, there has been no showing of changed circumstance which would warrant a hearing under either 120.57(1) or (2).

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ISSUE 2: Pursuant to the Respondents' request, should the Commission defer any show cause proceeding pending the outcome of the Respondents' suit in circuit court?

RECOMMENDATION: No, the request for deferral should be denied.

STAFF ANALYSIS: As stated earlier, by Order No. PSC-93-1769-FOF-WS, issued on December 9, 1993, this Commission made Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS final and effective. These orders required Turkey Creek to refund any excess amount, including interest, that it had received that was related to the two unapproved increases in its rates and other charges. On January 6, 1994, Turkey Creek appealed Order No. PSC-93-1769-FOF-WS to the First District Court of Appeal. On March 27, 1995, the First District Court of Appeal affirmed the Commission's order (mandate was issued on April 12, 1995).

Pursuant to the First District Court of Appeal's affirmation of the Commission's order, by letter dated April 6, 1995, staff informed Turkey Creek of its obligation to complete its refund requirement in accordance with Order No. PSC-93-1769-FOF-WS, Section 367.071(2), Florida Statutes, and Rule 25-30.360, Florida Administrative Code. Section 367.071(2), Florida Statutes, states that "[t]he transferor remains liable for any outstanding regulatory assessment fees, fines, or refunds of the utility."

As noted earlier, the City of Alachua purchased the utility on September 23, 1993, but the transfer was not acknowledged until Turkey Creek's appeal had been completed. In a follow-up letter, dated May 26, 1995, staff again informed Turkey Creek of its refund obligation and asked Turkey Creek to submit by June 9, 1995, a scheduled date for completing its refund requirements. Staff also told Turkey Creek that it would pursue show cause proceedings if Turkey Creek did not respond by June 9, 1995. By letter dated June 8, 1995, Turkey Creek stated that it was researching its obligation to make the refunds since it was a "non-utility owner-operator," which it estimated would take two weeks to complete.

However, as of August 3, 1995, no other response was received from Turkey Creek, and staff filed its recommendation that the transfer to the City of Alachua be acknowledged and that show cause proceedings be initiated. Order No. PSC-95-1101-FOF-WS (initiating show cause proceedings) was issued on September 6, 1995, and Turkey Creek, Inc. and Family Diner, Inc. (Respondents), filed their response, requesting deferral of show cause proceedings, on September 28, 1995. Order No. PSC-95-1445-FOF-WS, issued on November 28, 1995, specifically denied the request for deferral of show cause proceedings finding that Turkey Creek had already appealed Order No. PSC-93-1769-FOF-WS, and lost, and that the

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Circuit Court did not have the jurisdiction to review Commission orders.

In this response, the Respondents again refer to their action in circuit court contesting Commission jurisdiction (filed in mid-September) and request this Commission to defer any action pending the outcome of that action. Asserting that the Circuit Court does not have subject matter jurisdiction to review an order of this Commission, the Commission has moved the Circuit Court to dismiss the complaint. However, the hearing on this motion is now scheduled for February 15, 1996.

In Turkey Creek's Complaint for Declaratory Relief, they claim that, at the time Order No. PSC-93-1769-FOF-WS was issued, the Commission did not have jurisdiction. Although many appeals courts have held that the defense of lack of subject matter jurisdiction may be raised at any time (see, Hill Top Developers v. Holiday Pines Service Corporation, 478 So. 2d 368 (Fla. 2d DCA 1985; Department of Health and Rehabilitative Services v. Schreiber, 561 So. 2d 1236 (Fla. 4th DCA 1990)), this does not mean that the circuit court is the proper place to raise such a question.

The Commission is an arm of the legislative branch of government. Pursuant to Section 367.011(2), Florida Statutes, the legislature has invested the Commission with "exclusive jurisdiction over each utility with respect to its authority, service, and rates." Section 367.011(4), Florida Statutes, states, "This chapter shall supersede all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. This chapter shall not impair or take away vested rights other than procedural rights or benefits." [An agency's interpretation of a statute it is charged with enforcing is entitled to great deference. Florida Cable Television Association v. Deason 635 So.2d. 14, 15 (Fla. 1994).] Pursuant to Article I, Section 3(b)(2), of the State Constitution and Section 350.128(1), Florida Statutes, the First District Court of Appeal shall review any action of the Commission which does not relate to rates or service of utilities providing electric, gas or telephone service (by Article V, Section 3(b)(2), Fla. Const., those actions are reviewed by the Florida Supreme Court).

The Commission is authorized to regulate the rates, terms and conditions of water and wastewater service as well as the operations inherent in the provision of such service. See e.g. Sections 367.081, 367.111 and 367.121, Florida Statutes. The fixing of rates and charges for a water and wastewater utility by this Commission is specifically set out in Section 367.081(1), Florida Statutes, and clearly within the Commission's jurisdiction

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to regulate. The actions of the Commission set forth in Order No. PSC-93-1769-FOF-WS, requiring a reduction of the rates and a refund were and are clearly within the Commission's jurisdiction.

In view of the Commission's exclusive jurisdiction in the regulation of water and wastewater utilities, the Circuit Court is without jurisdiction to consider the Commission's decision in Order No. PSC-93-1769-FOF-WS. Where the Commission has jurisdiction to issue an order, the Circuit Court has no jurisdiction to conduct further proceedings. Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989). Moreover, neither general law nor the constitution provide a circuit court with concurrent or cumulative power of direct review of Commission actions. Fuller at 1213. In addition, in Florida Public Service Commission v. Bryson 569 So.2d 1253 (Fla. 1990), the Court held that the Commission must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute. Bryson, at 1255. If the Commission is alleged to act without jurisdiction, it is the duty of the appellate court to review the allegation and correct the Commission's error, if any. Id. at 1255. The First District Court of Appeal, in Case No. 94-64, specifically reviewed and upheld Order No. PSC-93-1769-FOF-WS.

The Commission has the authority to regulate the rates and charges of water and wastewater utilities, and to order refunds, pursuant to Chapter 367, Florida Statutes. It is clear that Turkey Creek is seeking a second judicial determination on the validity of Order No. PSC-93-1769-FOF-WS (see paragraph 6 of Turkey Creek's complaint which is attached) and the First District has already issued its mandate. The First District upheld the Commission's jurisdiction. If the Commission has a mere colorable claim to jurisdiction, the Circuit Court is prohibited from acting. The facts in this case show far more than a mere colorable claim of exclusive jurisdiction. In this case, the Commission's jurisdiction is clear.

This case is procedurally similar to State of Florida, Public Service Commission v. Lindahl 613 So.2d 63 (Fla. 2d DCA 1993). In Lindahl, the Commission entered an order approving a rate increase for water and sewer service. Certain residents filed a class action against the utility and requested the Circuit Court enjoin the utility from collecting the new rates. The Circuit Court entered the injunction and the Commission appealed. The Court held that a circuit court did not have jurisdiction to issue an emergency temporary injunction to prevent the collection of Commission-approved rates. The Court noted that "we again face judicial interference with the regulatory function, and, as we did

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in Hill Top Developers¹, condemn the trial court's intrusion into the PSC's statutorily delegated responsibility." Lindahl at 64.

Likewise, the Circuit Court lacks the authority to consider the plaintiffs' Complaint for Declaratory Relief as the Commission has exclusive jurisdiction over the rates and charges of a water and wastewater utility, and any appeal of such decision must go to the First District Court of Appeal. Turkey Creek did in fact appeal to the First District Court of Appeal and lost on appeal. Turkey Creek, Inc. and Family Diner, Inc. d/b/a Turkey Creek Utilities v. Florida Public Service Commission, 652 So.2d 822 (Fla. 1st DCA 1995). For the Circuit Court to proceed in this case would appear to be the same judicial overreaching disapproved of in Lindahl and Hill Top Developers. Also, since the Respondents already appealed the order requiring the refunds to the First District Court of Appeal and lost, it appears that the defenses of collateral estoppel and res judicata would prevent the Respondents from relitigating the validity of Order No. PSC-93-1769-FOF-WS.

In I.A. Durbin, Inc. v. Jefferson National Bank, 793 F. 2d 1541 (11th Cir. 1986), the 11th Circuit both defined the doctrines of res judicata and collateral estoppel, and set out the elements necessary in order for these doctrines to apply. That court, at 1549 stated:

Res judicata or claim preclusion refers to the preclusive effect of a judgment in foreclosing relitigation of matters that were litigated or could have been litigated in an earlier suit. See, e.g., Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984); Interstate Pipe Maintenance, Inc. v. FMC Corp., 775 F.2d 1495, 1497 (11th Cir. 1985). In order for the doctrine of res judicata to bar a subsequent suit, four elements must be present: (1) there must be a final judgement on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases. See, e.g., Harte v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Ray v. Tennessee Valley Authority, 677 F.2d 813, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (1993).

¹Hill Top Developers v. Holiday Pines Services, 478 So.2d 368 (Fla. 2DCA 1985).

* * * * *

The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. See, e.g., Ray, 677 F.2d at 821; White v. World Finance of Meridian, Inc., 653 F.2d 147, 150 (5th Cir. Unit A 1981). In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form. See, e.g., White, 653 F.2d at 150. (e.s.) (footnote omitted)

In order for collateral estoppel (defined as issue preclusion), to be applicable, the 11th Circuit, in Greenplatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (1985) and I.A. Durbin, at 1549, determined that the following prerequisites must be present.

(1) The issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgement in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

In this case, all of the elements of both are satisfied. Therefore, staff does not believe that the Commission should defer any action.

Further, staff has, on numerous occasions, informed Turkey Creek of its obligation to comply with Order No. PSC-93-1769-FOF-WS. Staff believes that Turkey Creek has been given ample time and sufficient information to comply with the Commission's order. Accordingly, based on the foregoing, staff recommends that the Commission, again refuse the Respondents' request to defer any show cause proceeding pending the outcome of the circuit court declaratory action.

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ISSUE 3: Pursuant to Order No. PSC-95-1445-FOF-WS and Section 367.161(1), Florida Statutes, should the Commission immediately fine Turkey Creek, Inc. and Family Diner, Inc., d/b/a Turkey Creek Utilities (Respondents), for failure to make refunds as required by Order No. PSC-93-1769-FOF-WS?

RECOMMENDATION: Yes, the Commission should impose a fine of \$5,000 for the failure of Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, to make the refunds required by Order No. PSC-93-1769-FOF-WS. Reasonable efforts should be made to collect the fine. Reasonable efforts should be defined as two certified letters demanding payment. If reasonable collection efforts fail, the fine should be deemed uncollectible and the matter should be referred to the Office of the Comptroller for further action, with any collection to be deposited in the State General Revenue Fund pursuant to Section 367.161, Florida Statutes.

STAFF ANALYSIS: As stated above, by Order No. PSC-93-1769 FOF-WS, the Commission ordered Turkey Creek to make the refunds required by Orders Nos. PSC-93-0224-FOF-WS and PSC-93-0816-FOF-WS. Turkey Creek appealed this Order and the First District Court of Appeal affirmed the Commission's action.

However, instead of complying with the decision of the First District, Turkey Creek then filed a Declaratory Statement Action in Circuit Court. The Commission then issued its two orders, Orders Nos. PSC-95-1101-FOF-WS and PSC-95-1445-FOF-WS, ordering Turkey Creek to show cause why it should not be fined for its failure to comply with Order No. PSC-93-1769-FOF-WS. A review of Order No. PSC-95-1445-FOF-WS, which reinitiated show cause proceedings against Turkey Creek pursuant to Section 367.161, Florida Statutes, shows that that order made it clear that the threatened fine of up to \$5,000 could be for each day the offense continued.

In responding to that order, the Respondents claim that there is a material issue of fact as to when the Respondents sold the utility to the City of Alachua. This allegation was addressed in Issue 1. The Respondents also state that there is a genuine issue as to the Commission's jurisdiction and that they have filed suit in circuit court for declaratory relief (suit was served on the Commission on September 19, 1995). Based on this issue of jurisdiction, the Respondents again request that no penalty or fine be imposed at this time pending the final determination of jurisdiction and the outcome of their suit in circuit court. This response was addressed in Issue 2.

Pursuant to Section 367.161(1), Florida Statutes, the Commission is authorized to assess a penalty of up to \$5,000 per day for each offense, if a utility is found to have willfully

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violated any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission. Further, utilities are charged with the knowledge of the Commission's rules and orders. In Order No. PSC-93-1769-FOF-WS, the Commission determined that Turkey Creek should make the refunds required by Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS, and that such refunds should be accomplished within 90 days. Even allowing for the time of the appeal, the 90 days have long since expired (order was affirmed on March 27, 1995, and mandate was issued on April 12, 1995). The refusal to make the refunds would appear to be a willful violation of a Commission order (see Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, whereby the Commission, finding no intent to violate the rule, still initiated show cause proceedings, stating that "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule."). Therefore, it is clear that the Respondents have willfully violated Orders Nos. PSC-93-1769-FOF-WS, PSC-93-0229-FOF-WS, and PSC-93-0816-FOF-WS. Those orders found that Turkey Creek had violated Sections 367.081 and 367.171, Florida Statutes, by raising its rates in September and November of 1992, and required refunds to be made within 90 days of the issuance date of Order No. PSC-93-1769-FOF-WS. This, Turkey Creek has not done.

Based on this continuing willful violation, Staff recommends that a fine of \$5,000 be imposed for the failure of Turkey Creek to make the required refunds. Reasonable efforts should be made to collect the fine. Reasonable efforts should be defined as two certified letters demanding payment. If reasonable collection efforts fail, the fine should be deemed uncollectible and the matter should be referred to the Office of the Comptroller for further action, with any collection to be deposited in the State General Revenue Fund pursuant to Section 367.161, Florida Statutes.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open for the continued processing of this case. (JAEGER)

STAFF ANALYSIS: Whether the Commission decides to fine Turkey Creek or not, this docket should remain open for the continued processing of this case.