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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate under grandfather rights to provide water and wastewater service by Sports Shinko Utility, Inc. d/b/a Grenelefe Utilities in Polk County.

DOCKET NO.: 961006-WS
ORDER NO.: PSC-97-1546-FOF-WS
ISSUED: December 9, 1997

PETITION ON PROPOSED AGENCY ACTION;
PETITION FOR FORMAL PROCEEDING

COMES NOW Petitioner **Sports Shinko Utility, Inc., d/b/a Grenelefe Utilities, Polk County, Florida** ("Grenelefe Utilities"), by and through undersigned counsel, and pursuant to Rules 25-22.029(4) and 25-22.036(7)(a)-(f), Florida Administrative Code, files this Petition for Formal Proceeding regarding the erroneous ruling of the Florida Public Service Commissions Order Number PSC-97-1546-FOF-WS, ("the Order"), Florida Docket Number 961006-WS, issued December 9, 1997, and does show this Honorable Commission as follows:

I. STATEMENT OF PETITIONER'S SUBSTANTIAL INTEREST

Petitioner, Grenelefe Utilities, is located at 3200 State Road 546, Haines City, Florida 33844. Petitioner's substantial interests are affected because Petitioner is the utility subject to the clearly noncompensatory and confiscatory rate for non-potable irrigation water service set by the Public Service Commission ("the Commission" or "PSC") in Order Number PSC-97-1546-FOF-WS. Petitioner's substantial interests are further severely harmed by the erroneous Order requiring a refund of all amounts collected for non-potable irrigation water during the fifteen month pendency of Petitioner's grandfather application before the Commission. Petitioner's substantial rights and interests are harmed because the order of refund is unjust,

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unlawful and improper and will result in severe and unjustified harm to Petitioner's business interests. Petitioner will lose substantial sums of money and will be forced to operate at a substantial material loss due to the wrongful, inequitable and unlawful actions of the Commission.

II. STATEMENT OF DISPUTED ISSUES OF MATERIAL FACT

1. Whether the irrigation rate approved on July 2, 1996, by the Board of County Commissioners of Polk County ("Polk County") included both potable and non-potable sources.

2. Whether Polk County "officially" excluded non-potable irrigation water services from the approved irrigation water rates established for Petitioner.

3. Whether the non-potable irrigation water rate charged by Petitioner was an unauthorized rate.

4. Whether it is appropriate to require Petitioner to refund all of the revenues collected from provision of non-potable irrigation water services.

5. Whether the refund of all revenues collected by Petitioner for non-potable irrigation water service from September 1, 1996, to date must be completed within ninety (90) days.

6. Whether the Commission erred in not grandfathering Petitioner's existing non-potable irrigation water rate of $1.44 per 1,000 gallons, with an incline block rate structure for additional use.

7. Whether the setting of a non-potable irrigation water rate in this case is beyond the authorized scope of the Commission's grandfathering certification process

8. Whether the Commission violated Florida statutory and constitutional law in creating and approving a rate for non-potable irrigation water service without due consideration of rate base, depreciation expenses, amortization expenses, operating income, and return on the Petitioner's investment in the non-potable water system.

9. Whether the approved rate of $.61 per 1,000 gallons for non-potable irrigation water is reasonable and lawful.

10. Whether the approved non-potable irrigation water rate of $.61 per 1,000 gallons is proper because it does not have an inclined block rate structure to encourage water use conservation.

11. Whether the base facility charges contained in the Order are reasonable and lawful.

12. Whether the $.61 per 1,000 gallon rate for non-potable irrigation water provides Petitioner with a fair return on its investment in property used and useful.

13. Whether the non-potable irrigation water system is separate and distinct from the potable water irrigation system.

14. Whether it is possible to include all costs of providing non-potable irrigation water services within a calculation of the costs of service for potable water irrigation service.

15. Whether the non-potable irrigation system is nearly three times as large as the potable irrigation system.

16. Whether the non-potable irrigation system involves twenty eight percent (28%) greater use than the potable water irrigation system.

17. Whether the non-potable irrigation system is more expensive for Petitioner to maintain because, inter alia, it operates at a head pressure of approximately one hundred and twenty (120) psi, which is nearly two and a half (2 ½) times that of the potable water system.

18. Whether the non-potable irrigation system has substantially more mechanical components, pumps and valves, and is therefore more difficult to maintain and more costly to repair and replace than the potable irrigation water system.

19. Whether it is just and equitable to require Petitioner to refund the difference between the Commission's proposed non-potable irrigation water rate of $.61 and the actual $1.44 rate collected, assuming the $.61 rate is determined to be valid.

20. Whether it is just and equitable to require Petitioner to refund over $200,000.00 non-potable irrigation water service revenues Petitioner collected given the Petitioner's previous fine from Southwest Florida Management District (SWFMD) of over $90,000.00.

21. Whether the Commission is authorized to order a refund in light of the conflict with the SWFMD mandate and consent decree.

22. Whether the Commission violated Florida law and caused damages to Petitioner as a result of the Commission's failure to determine the issues presented in Petitioner's grandfather rights application within the prescribed 12 month period.

III. ARGUMENT

Petitioner alleges the following ultimate facts and grounds for relief from the Order:

A. The Refusal to Grandfather in Petitioner's Non-Potable Irrigation Water Rate Is Erroneous as a Matter of Law.

1. The Commission should have grandfathered in all rates Petitioner has historically charged for its irrigation water services, including non-potable irrigation water. Fla. Admin Code Rule 25-30.035 and § 367.171, Fla. Stat.

2. The Order is in direct conflict with the mandate of SWFWMD that required Petitioner to charge for its irrigation water services, particularly non-potable irrigation water, and is thereby unlawful pursuant to Fla. Admin Code Rule 25-30.011(5).

3. The Commission erred in determining that the irrigation water rates approved by Polk County did not include an approved rate for non-potable irrigation water. This finding by the Commission is not supported by competent substantial evidence and is contrary to the essential requirements of law. The Order must accordingly be vacated in its entirety. See Osceola Service Co. v. Hawkins, 357 So.2d 403, 405 (Fla. 1978).

B. The Refund Order is Unjust and Erroneous as a Matter of Law.

1. The Order requiring a refund of all amounts charged by Petitioner for non-potable irrigation water is invalid and should be vacated because Petitioner's rate for irrigation water was approved by Polk County.

2. The Commission violated § 367.081, Fla. Stat. (1996), by wrongfully delaying a decision on Petitioner's application for fifteen (15) months. This excessive and unlawful delay harmed Petitioner, and caused substantial hardship and damages to Petitioner, especially in light of the onerous and burdensome refund requirements imposed by the

Commission. Any delay should be determined to be the responsibility of the Commission and Petitioner should not be required to refund any amounts collected past a reasonable time period, which should not exceed 90 days. 90 Days is a reasonable time period for the Commission to have determined whether the non-potable rate charged by Petitioner was approved, and, if not, to establish a valid rate.

3. It is inequitable to require Petitioner to refund any amount more than the difference between the rate it has charged ($1.44 per 1000 gal.), based on a good faith belief that the rate was valid and the rate imposed by the Commission ($.61 per 1000 gal.), albeit wrongfully.

4. It is unjust, unreasonable and inequitable to require Petitioner to refund the amounts ordered due by the Commission in 90 days, given the extenuating facts and circumstances of this case whereby Petitioner has suffered at the hands of SWFWMD, Polk County and the Commission, through no fault of its own. The Commission has the discretion to extend the refund period beyond 90 days and its refusal to do so was an abuse of discretion. Fla. Admin. Code Rule 25-30.360(2).

C. The Non-Potable Irrigation Rate Established by the Commission is Unconstitutional, Unlawful and Erroneous as a Matter of Law.

1. To the extent that the Commissions findings regarding the refusal to grandfather in the non-potable water rates is upheld, and it should not be, Florida law requires that the Commission **shall** consider the following criteria in establishing a valid rate for services:

D. value of quality of the service;

E. cost of providing the service, including:

1. debt interest;

2. working capital requirements;

3. maintenance;

4. depreciation;

5. tax expenses;

6. operating expenses incurred in operation of all used and useful property. § 367.081, Fla. Stat. (1996). There is no dispute, and the Order makes clear, that the Commission admittedly failed to take into consideration each of the required criteria when it imposed the confiscatory and non-compensable rate of $.61 per 1,000 gallons for non-potable irrigation water. Therefore the rate of $.61 per 1000 gal. for non-potable irrigation water is unlawful, as well as an unfair and unconstitutional denial of Petitioner's due process rights. Westwood Lake, Inc. v. Dade County, 264 So.2d 7, 9, 11 (Fla. 1972). The Order must be vacated and is not to be accorded any deference because the Commission has exceeded it powers in imposing an unlawful rate on Petitioner. Osceola Service Co., 357 So.2d at 405.

7. Additionally, the Commission refused to consider Petitioner's right to a fair return on its investment in the property used and useful for the non-potable irrigation system, as required by Florida law. § 367.081, Fla. Stat. (1996). As a result, the Order should be vacated because it unlawfully establishes a confiscatory rate. Citrus County v. Southern States Utilities, Inc., 656 So.2d 1307, 1311 (Fla. 1st DCA 1995). The previous rate of $1.44 per 1000 gal. for all irrigation water service provides a return on Petitioner's investment of $30,000. Petitioner will lose over $70,000 with the $.61 per 1000 gal. rate imposed by the Order.

8. The Order violates the constitutional rights of Petitioner. The Fla. Supreme Court has held that "in establishing rates, the value of the system must be considered, or constitutional requirements are not met. Keystone Water Company, Inc. v. Bevis, 278 So.2d 606, 610-11 (Fla. 1973).

9. The "fair value" of Petitioner's non-potable irrigation water system was ignored by the Commission in setting the unlawful and confiscatory non-potable irrigation water rate of $.61 per 1,000 gallons. The fair value of Petitioner's system is determined, as a matter of binding and valid Florida Supreme precedent, to be the cost to replace the system, as set forth in the Keystone Water Co. case and the U.S. Supreme Court cases cited therein. Id. Here, the replacement value of the non-potable irrigation water system is $850,000.

10. The Commission's reliance on the unsupported and demonstrably false allegations of the Grenelefe Association of Condominium Owners that the rate established for the potable water irrigation system included all costs for the provision of non-potable irrigation water violates Florida statutory and constitutional law, as set forth above. Id. In effect, the Commission believed the assertions of the Association that there are not two separate irrigation systems, notwithstanding Petitioner's clear proof otherwise, which the Commission either lost, misplaced or simply ignored.

11. The Commission had all information reasonably required to arrive at a lawful, fair, and reasonable rate for non-potable irrigation water, but instead chose to improperly ignore, lose or simply refuse to consider the information provided to it by Petitioner during the fifteen (15) month pendency of Petitioner's grandfather application.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Marshall Deterding, Esq., The Rose Law Firm, 2548 Blairstone Drive, Tallahassee, Florida 32301, by U.P.S. Overnight Delivery, postage prepaid, this 29th day of December, 1997.

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IV. STATEMENT OF RECEIPT OF NOTICE OF PROPOSED AGENCY ACTION

The undersigned did not receive notice from Commission or staff of the proposed agency action in question. Instead, Chuck Edge, a representative of Petitioner, received a telephone call from a PSC staff member on or about November 11, 1997, referencing the November 11, 1997, staff report. The undersigned counsel was not able to obtain a copy of the proposed agency action from the Florida Public Service Commission until November 13, 1997, despite the fact that undersigned counsel had given formal notice of appearance in this matter. Petitioner strongly objects to the lack of adequate notice and the resulting unreasonable time limits imposed on Petitioner in preparation of this matter for the November 18, 1997, agenda hearing.

V. DEMAND FOR RELIEF

Petitioner Grenelefe Utilities hereby demands the grandfathering of the irrigation rate in its entirety, which includes non-potable irrigation water service. Further, Petitioner demands the Order be vacated; that the unlawful and unconstitutional rate created and approved by the Commission for non-potable irrigation water of $.61 per 1,000 gallons be stricken and that Petitioner be permitted to charge its existing incline block rate of $1.44 per 1,000 gallons for all irrigation water services. Finally, Petitioner demands that the Commission's Order of refund be vacated.

Respectfully submitted this 2nd day of December, 1997.

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