

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into
retention of certificated area
of Ellis & Company, Ltd.
(Holiday Mall) by Floralino
Properties, Inc. in Pasco
County.

DOCKET NO. 991486-WU
ORDER NO. PSC-01-0555-FOF-WU
ISSUED: March 12, 2001

The following Commissioners participated in the disposition of
this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER INITIATING PROCEEDINGS TO
DELETE AREA ENCOMPASSING HOLIDAY MALL FROM
FLORALINO PROPERTIES, INC.'S CERTIFICATE NO. 153-W,
ISSUING NOTICE, AND DENYING MOTION TO STRIKE AND DISMISS

BY THE COMMISSION:

BACKGROUND

Floralino Properties, Inc., (Floralino or utility), is a Class C utility located in southwestern Pasco County (County), which is in the Northern Tampa Bay Water-Use Caution Area, as designated by the Southwest Florida Water Management District. Floralino owns and operates water facilities on the east side of US Highway 19. According to its 1997 annual report, Floralino serves approximately 730 water customers with 1999 annual operating revenues of \$137,017 and a net income of \$4,535.

Ellis & Company, Ltd. (Holiday Mall), a Floralino customer, completed some remodeling to Holiday Mall in 1999. Due to the remodeling, Holiday Mall needed increased fire flow to comply with the County code. Holiday Mall retained an outside consultant to test Floralino's fire line system on June 24, 1999, and July 7, 1999, and the results showed the utility's system to be deficient. After Holiday Mall notified Floralino of this deficiency by letter

DOCUMENT NUMBER-DATE

03103 MAR 12 01

FPSC-RECORDS/REPORTING

on July 15, 1999, Floralino responded to Holiday Mall by telephone that if a fire emergency were to arise, Floralino would connect with the County. Holiday Mall notified Floralino by letter on July 30, 1999, that this condition was not acceptable, since should a fire occur, the need would be immediate and there would not be time for an interconnect to be manually activated. Floralino responded through its consultant, H2O Utility Services, Inc. (H2O), that the fire flow test conducted was not representative since neither of the two existing interconnections with the County were in operation at the time of the test. A new six-inch pressure sustaining valve was to be installed, which would automatically activate when demand occurred (such as a fire), and H2O suggested that Holiday Mall re-test the system for fire flow after the valve was installed.

On October 1, 1999, Holiday Mall filed an Application for Deletion of Service Area - Emergency or Temporary Relief Requested. In its application, Holiday Mall requested to be deleted from Floralino's service area because the utility was unable to provide adequate fire flow protection for the recently upgraded mall. Holiday Mall also alleged that the utility had low pressure problems in the past and would be unable to meet its current needs. In the alternative, Holiday Mall requested that it be released from Floralino's certificated territory for fire safety service alone. Included in its application, Holiday Mall attached a letter from the County which indicated that it would only be willing to serve the mall if the mall were released for water and wastewater service.

On October 8, 1999, Floralino filed a letter which released Holiday Mall from Floralino's service territory for fire flow protection only. On October 25, 1999, Floralino requested that the fire flow tariff be deleted and held blank for future use. However, no revised tariff sheet was enclosed with the letter. Floralino does not provide wastewater service.

In a letter dated December 1, 1999, Holiday Mall requested that the Commission not act on Floralino's request to delete its fire flow tariff because of the uncertainty as to whether the County would provide fire flow service only and because of its expectation that it would be filing an amended deletion application. Subsequently, the parties advised that the County had agreed to provide temporary fire flow service for a period of two

years beginning on or about November 28, 1999, but that the issue of a long-term solution had not been reached.

On April 10, 2000, Floralino filed a Motion to Strike or Dismiss Application. On April 18, 2000, Holiday Mall filed its response to Floralino's motion.

Upon review of the above motion and response, our staff was concerned that Holiday Mall had never made a formal request for improved fire flow service or filed a complaint for low water pressure with the utility and thus, the utility had not had an opportunity to respond to the need for increased fire flow or low water pressure. In a letter dated May 9, 2000, our staff expressed its belief that Holiday Mall should register a written request to the utility regarding its needs for increased fire flow service and low pressure complaint.

On May 15, 2000, Holiday Mall sent a letter to the utility requesting adequate service to the mall and restating its complaint regarding the lack of adequate fire protection service. On May 25, 2000, the utility responded to Holiday Mall's request stating that it was ready and willing to provide fire flow service. In this letter, the utility proposed that Holiday Mall provide a deposit of \$5000 dollars to cover any engineering, inspection and plan review by its engineer. By a letter dated May 25, 2000, Holiday Mall advised the utility that a formal response to the utility's letter would be forth coming and that the silence was not to be considered acquiescence. On June 9, 2000, the utility provided a written withdrawal of its request to cancel the fire flow tariff.

On November 29, 2000, Holiday Mall filed an Amended Application for Deletion of Service Area -- Emergency or Temporary Relief. In its prayer for relief, Holiday Mall renewed its request to be deleted from Floralino's service territory, added to the County's territory, and any emergency or temporary relief necessary to maintain service during the pendency of its application.

On December 29, 2000, our staff engineer visited the utility to gather information. In a letter dated January 9, 2001, Holiday Mall requested that the Commission issue a proposed agency action order to delete it from Floralino's service territory. The utility has not filed a response to Holiday Mall's amended application. We

are not aware of any improvements that have been made to Floralino's system since the initial tests were performed in June and July, 1999.

We have jurisdiction pursuant to Sections 367.011, 367.021, 367.045, and 367.111, Florida Statutes.

INITIATION OF DELETION PROCEEDINGS

Holiday Mall's complaint regarding insufficient fire flow and low pressure in conjunction with the utility's lack of responsiveness supports the initiation of a proceeding to delete the portion of Floralino's territory which encompasses Holiday Mall. Section 367.111(1), Florida Statutes, states that

Each utility shall provide service to the area described in its certificate of authorization within a reasonable time. If the commission finds that any utility has failed to provide service to any person reasonably entitled thereto, or finds that extension of service to any such person could be accomplished only at an unreasonable cost and that addition of the deleted area to that of another utility company is economical and feasible, it may amend the certificate of authorization to delete the area not served or not properly served by the utility, or it may rescind the certificate of authorization.

In accordance with Section 367.111(1), Florida Statutes, we may, upon our own motion, initiate a proceeding to amend the certificate of authorization to delete an area not properly served. Currently, Holiday Mall is receiving temporary fire flow service from the County. Holiday Mall asserts that Floralino's facilities are unable to provide adequate service. Moreover, Holiday Mall has indicated that the County is only willing to continue to provide fire flow service until November 2001, after which time the service will be terminated unless the mall is released from Floralino's territory. We are not aware of any improvements that have been made to Floralino's system since the time that the initial fire flow tests conducted in June and July 1999. We believe that the utility has not provided a long-term resolution to the fire flow problem. For the foregoing reasons, we find that there are sufficient facts to support the initiation of a proceeding to

delete the portion of Floralino's territory from Floralino's Certificate No. 153-W which encompasses Holiday Mall.

Section 367.045(6), Florida Statutes, requires that we give 30 days' notice before we initiate a revocation, suspension, transfer or amendment action. We find it appropriate to notice our intent to amend Floralino Properties, Inc.'s Certificate No. 153-W to delete the area encompassing Holiday Mall in Pasco County, Florida. Notice shall be issued within seven days of the issuance date of this Order in accordance with Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Administrative Code. Subsections (5) and (6) of Rule 25-30.030, Florida Administrative Code, require that certain governing bodies, governmental agencies, and affected persons, including customers in the territory at issue, be noticed by regular mail or personal service. Subsection (7) of Rule 25-30.030, Florida Administrative Code, requires that notice be published once in a newspaper of general circulation in the territory proposed to be deleted. Additionally, we find it appropriate to publish notice in the Florida Administrative Weekly.

MOTION TO STRIKE AND DISMISS

As noted previously, on October 1, 1999, Holiday Mall, filed an Application for Deletion of Service Area - Emergency or Temporary Relief Requested. In its application, Holiday Mall requested to be deleted from Floralino's service area because the utility was unable to provide adequate fire flow protection for the recently upgraded mall. As an alternative request for relief, Holiday Mall asked that it be released from Floralino's service territory for fire safety service only.

On April 10, 2000, Floralino filed a Motion to Strike or Dismiss Application. In support of its Motion to Strike, Floralino states that the rules do not provide standing or a point of entry for Holiday Mall to apply to remove itself from a utility's territory. In its Motion to Strike, the utility asserts that a request for deletion must come from the utility, or come from this Commission if the utility refuses to serve the territory which would result from a show cause or unresolved complaint. Further, Floralino asserts that the application should be dismissed because Holiday Mall failed to state facts sufficient to support the deletion. In support of its Motion to Dismiss, the utility states

that it is standard practice accepted by the Commission that when a commercial customer has special needs which require improvement in the utility's facilities, the customer bears the costs. Moreover, Floralino contends that should the application be treated as a complaint, there is no factual support for the complaint.

On April 18, 2000, Holiday Mall filed its response to Floralino's motions. Holiday Mall denies that an application for deletion by a customer is an inappropriate mechanism. Holiday Mall cites to several decisions which it believes stands for this proposition. In its Response, Holiday Mall requested an additional three months to file an amended petition for deletion with supporting factual details.

Upon review of the motions and response, our staff believed that the request for deletion was premature because Holiday Mall had not made a formal request for increased fire flow service from the utility. In addition, as requested in its application, Holiday Mall had received a release from Floralino for fire flow service. However, our staff noted that because the County would only provide fire flow service for 24 months, a long-term resolution was required.

On November 29, 2000, Holiday Mall filed an Amended Application for Deletion of Service Area -- Emergency or Temporary Relief. In its amended application, Holiday Mall asserts that the utility is unable to provide adequate service. Holiday Mall alleges that the utility's facilities are unable to provide the necessary fire flow and is unable to revert back to the utility for its fire flow needs. Further, the County has agreed to provide only temporary fire flow protection for two years and will terminate its fire flow service unless the mall is released or deleted from Floralino's territory. Moreover, Holiday Mall asserts that the utility has low pressure problems. Holiday Mall contends that the utility has abdicated its duty to provide adequate water service. In its prayer for relief, Holiday Mall requests to be deleted from Floralino's service territory, added to the County's territory, and any emergency or temporary relief necessary to maintain service during the pendency of its application.

Pursuant to Rule 28-106.204, Florida Administrative Code, a motion to dismiss shall be filed no later than 20 days after the

petition is served. We note that the utility's Motion to Strike and Dismiss was not filed until approximately six months after the original application was filed. Therefore, the Motion to Dismiss shall be dismissed as untimely.

In addition, the original application for deletion has been superseded by the amended application for deletion, which rendered the Motion to Strike and Dismiss moot. The utility has not responded to the amended application or renewed its Motion to Strike and Dismiss. While we agree with the utility's position that the statute and rules do not provide for a customer to request deletion from a territory, Section 367.111(1), Florida Statutes, provides that we, upon our own motion, "may amend the certificate of authorization to delete the area not served or not properly served by the utility." In Storey v. Mayo, 217 So. 2d 304, 307-8 (Fla. 1968), the Florida Supreme Court held, "An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." However, we find that the application as amended alleges sufficient facts to warrant the initiation of deletion proceedings. Since Section 367.111(1), Florida Statutes, does not provide for a customer to request deletion from a utility's territory, we find it appropriate to treat the application as a complaint.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that proceedings shall be initiated to delete certain territory from Floralino Properties, Inc.'s Certificate No. 153-W. Notice of our intent to amend Floralino Properties, Inc.'s Certificate No. 153-W to delete the area encompassing Holiday Mall in Pasco County, Florida, shall be issued within seven days of the issuance date of this Order in accordance with Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Administrative Code, as set forth in the body of this Order. It is further

ORDERED that Floralino Properties, Inc.'s Motion to Strike and Dismiss Application is hereby denied. It is further

ORDERED that Ellis & Company, Ltd.'s Amended Application for Deletion of Service Area -- Emergency or Temporary Relief shall be treated as a complaint.

ORDER NO. PSC-01-0555-FOF-WU
DOCKET NO. 991486-WU
PAGE 8

By ORDER of the Florida Public Service Commission this 12th
day of March, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

PAC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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

ORDER NO. PSC-01-0555-FOF-WU

DOCKET NO. 991486-WU

PAGE 9

First District Court of Appeal in the case of a water and/or wastewater 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.