

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: DECEMBER 5, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (ESPINOZA) *YAE RES*
DIVISION OF ECONOMIC REGULATION (PEACOCK) *AP DM RNT 199*

RE: DOCKET NO. 010816-WS - INITIATION OF SHOW CAUSE
PROCEEDINGS AGAINST FLORIDANA HOMEOWNERS, INC., IN MANATEE
COUNTY FOR VIOLATION OF RULE 25-30.110(3), F.A.C., ANNUAL
REPORTS.

AGENDA: 12/17/01 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\010816.RCM

CASE BACKGROUND

Florida Homeowners, Inc. (Floridana or Utility) is a Class C Water and Wastewater utility located in Manatee County. Floridana became subject to Commission jurisdiction on October 10, 1995, and was granted a certificate of operation by Order No. PSC-97-0211-FOF-WS, issued February 24, 1997, in Docket No. 961232-WS. Floridana has 300 water and wastewater customers, and according to its 2000 annual report, has annual gross water revenues of \$41,448 and annual gross wastewater revenues of \$61,930. Floridana has a net operating loss of \$9,567 for water, and a net operating loss of \$37,128 for wastewater.

Floridana became subject to Commission jurisdiction on October 10, 1995, when the Manatee County Board of County Commissioners adopted Resolution No. R-95-109, pursuant to Section 367.171, Florida Statutes, declaring the privately owned water and

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wastewater utilities in Manatee County to be subject to the provisions of Chapter 367, Florida Statutes. The effect of the resolution was to invoke Commission jurisdiction over privately owned water and wastewater systems in Manatee County, and pursuant to Section 367.031, Florida Statutes, all utilities subject to the Commission's jurisdiction were required to obtain from the Commission certificates to provide water and wastewater service.

According to Order No. PSC-97-0211-FOF-WS, in which the utility was granted a grandfather certificate, Floridana was advised of the Commission's jurisdiction and the utility's responsibility to obtain a certificate by letter dated November 10, 1995. The utility originally applied for an exemption as a non-profit association, but did not attain the necessary requirements for such an exemption. The utility's application for a grandfather certificate was then delayed because the utility experienced some difficulty in changing its corporate status. Order No. PSC-97-0211-FOF-WS also stated that because Floridana was subject to Commission jurisdiction as of October 1, 1995, the utility was required by Rules 25-30.110(3) and 25-30.120(2), Florida Administrative Code, to remit past due regulatory assessment fees (RAFs) and file a 1995 annual report for that portion of 1995 when the utility became subject to Commission jurisdiction.

Pursuant to Rule 25-30.110(3), Florida Administrative Code, utilities subject to Commission jurisdiction are required to file an annual report with the Commission on or before March 31 for the preceding year ending December 31. Annual reports are considered filed on the day they are postmarked or received by the Commission. Pursuant to Rule 25-30.110(3)(c), Florida Administrative Code, a utility may file a written request for an extension of time with the Commission no later than March 31, and one extension of 30 days will be automatically granted upon request.

The RAFs for the period of October 1, 1995 through December 31, 1996, were paid on April 29, 1997, and a subsequent late payment was received on September 8, 1997. However, it appears that the annual reports for those periods of time were never filed by the utility.

Staff contacted the utility regarding the missing 1995 and 1996 annual reports on January 23, 2001. Staff later received a letter from the utility's current treasurer dated March 23, 2001, which referenced the 1997 payment of the RAFs for the period of

October 1, 1995 through December 31, 1996, as well as a subsequent late payment, which had been paid by Irwin Keller, the President of the Homeowners Association at the time. The letter stated that Mr. Keller, who was also the accountant at the time, had assured them that everything was in order. The letter went on to state that Mr. Keller was currently unavailable and awaiting trial at the end of the month after an audit of the Homeowner's Association's books had revealed a large amount of unaccounted for funds and other irregularities.

Staff received an additional letter dated March 26, 2001, from the utility's current accountant regarding the matter of the missing 1995 and 1996 annual reports. In her letter, the accountant stated that as the utility's accountant, she could verify that most of the records from the 1995 and 1996 periods are missing, and that it would be impossible to reconstruct the records for an accurate Commission report. She further went on verify that the RAF amounts for 1995 and 1996 had been paid, and that these amounts had been based on amounts previously paid to Manatee County Public Utilities. Along with her letter, she enclosed a copy of a previous letter dated April 29, 1997, which had been sent to the Commission's legal division and which reflected this information. The utility's accountant further verified that Irwin Keller, who was the president and accountant during that time period, was currently awaiting trial on charges of embezzlement from Floridana, and that any records that had been in his possession were missing.

This recommendation addresses whether Floridana should be ordered to show cause, in writing, within 21 days, why it should not be fined for failure to comply with Rule 25-30.110(3)(a), Florida Administrative Code, whether the penalties set forth in Rule 25-30.110(7), Florida Administrative Codes should be assessed against the utility, and whether the utility should be required to file its 1995 and 1996 annual reports. The Commission has jurisdiction pursuant to Section 367.161, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Floridana be ordered to show cause, in writing, within 21 days, why it should not be fined for failure to file its 1995 and 1996 annual reports in apparent violation of Rule 25-30.110(3), Florida Administrative Code?

RECOMMENDATION: No. Show cause proceedings should not be initiated at this time. Staff further recommends that the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should not be assessed, as the information contained in the delinquent reports is no longer needed for the ongoing regulation of the utility. In addition, Floridana should not be required to file the 1995 and 1996 annual reports. (ESPINOZA, PEACOCK)

STAFF ANALYSIS: Rule 25-30.110(3), Florida Administrative Code, requires utilities subject to Commission jurisdiction as of December 31 of each year to file an annual report on or before March 31 of the following year. Annual reports are considered filed on the day they are postmarked or received by the Commission. Pursuant to Rule 25-30.110(3)(c), Florida Administrative Code, a utility may file a written request for an extension of time with the Commission no later than March 31, and one extension of 30 days will be automatically granted upon request. Floridana is in apparent violation of Rule 25-30.110(3), Florida Administrative Code, for the failure to file its 1995 and 1996 annual reports.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally," Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's failure to timely file its 1995 and 1996 annual reports, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "in our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Section 367.161, Florida Statutes, authorizes this Commission to assess a penalty of not more than \$5,000 for

each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order or provision of Chapter 367, Florida Statutes.

Moreover, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to file a timely, complete annual report is subject to penalties, absent demonstration of good cause for noncompliance. The penalty set out in Rule 25-30.110(7), Florida Administrative Code, for Class C utilities is \$3 per day, based on the number of calendar days elapsed from March 31, or from an approved extended filing date. As of the date of the December 17, 2001 Agenda Conference, for the utility's 1995 and 1996 annual reports, staff has calculated that the total penalty would be \$11,433 calculated as follows:

YEAR	CALCULATION	AMOUNT
1995	2,088 Days late x \$3.00 per day	\$6,264
1996	1,723 Days late x \$3.00 per day	\$5,169
	TOTAL DUE	\$11,433

The penalty, if it were assessed, would continue to accrue until such time as Floridana files its 1995 and 1996 annual reports. Staff notes that pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, the Commission may, in its discretion, impose greater or lesser penalties for such noncompliance.

Staff believes, however, that there are mitigating circumstances in this case which lead staff to recommend that show cause proceedings are not warranted at this time, nor should penalties be assessed. As discussed in the case background, the utility's understanding was that the former president and treasurer of the utility, along with paying the RAFs for 1995 and 1996, had also filed the annual reports for that time period. Further, staff has verified that the RAFs were paid for 1995 and 1996, and that these amounts were based on records of previous reports of revenues paid to Manatee County Public Utilities. The utility is current on its RAFs, and has continued to file its annual reports since 1997 through the present. In light of these circumstances, the information contained in the delinquent 1995 and 1996 annual reports is no longer needed for the ongoing regulation of the utility.

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For the foregoing reasons, staff does not believe that the apparent violation of Rule 25-30.110(3), Florida Administrative Code, rises in these circumstances to the level of warranting the initiation of a show cause proceeding. Moreover, staff believes that the utility has demonstrated good cause for its apparent noncompliance. Therefore, staff recommends that the Commission not order Floridana to show cause, in writing within 21 days, why it should not be fined for its failure to file its 1995 and 1996 annual reports. Staff further recommends that the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should not be assessed, as the information contained in the delinquent reports is no longer needed for the ongoing regulation of the utility. Additionally, staff recommends that Floridana should not be required to file its 1995 and 1996 annual reports.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, because no further action is necessary, this docket should be closed. (ESPINOZA)

STAFF ANALYSIS: Because no further action is necessary, this docket should be closed.