

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 4, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Brubaker) *JSB* *SDB* *PC*
Division of Economic Regulation (Clapp, Marsh, Rieger) *PC* *HR*

RE: Docket No. 070405-WU – Application for certificate to operate water utility in Putnam County by Wilcox Investments, Inc. (MT ROYAL WTP).

AGENDA: 12/16/08 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070405.RCM.DOC

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Case Background

On July 10, 2007, Wilcox Investments, Inc., (Wilcox or utility) filed its application for original water certificate in Putnam County. The requested territory includes approximately 245 acres. The area is in the St. Johns River Water Management District where water use restrictions apply. The utility anticipates providing water service to a total of approximately 156 residential service customers when it reaches build out.

The utility was established over 20 years ago and has been providing water service to 35 single family homes as the first phase of the development. The utility believed it was exempt from Commission regulation because it was a small system. The developer is planning an additional 121 residential development. The utility intends to build a larger capacity water

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treatment facility, which the owner intends to eventually transfer to the homeowners' association.

The application was deficient. Staff contacted the utility on August 1, 2007, regarding the deficiencies. Upon further discussion with the utility, it appeared to staff that a transfer to the homeowners' association would meet the requirements to qualify for exemption from Commission regulation pursuant to Section 367.022(7), Florida Statutes (F.S.).¹ Staff advised the utility that transferring the facilities to the homeowners' association would cause the utility to be exempt, at which point, the certificate application would be moot. Wilcox indicated that a signed agreement for the transfer would be filed soon.

Staff has been in contact with the utility by phone, email, or letter on a monthly basis in an effort to either receive the signed and recorded transfer agreement or receive the responses to staff's deficiency letters. Wilcox's response has been that agreements are being drafted and/or signed and will be filed the following week. Each time Wilcox is contacted, an explanation as to why the previous deadline was not met is given and a new deadline is set. To date, seven letters and multiple telephone calls and e-mails have been sent to the utility, but still no agreement or deficiency response has been received. The most recent contact with Wilcox was on November 14, when the utility representative indicated he would express mail the transfer documents by November 21, 2008. To date, no documents have been received.

This recommendation addresses the lack of cooperation by the utility to complete the application for original water certificate. The Commission has jurisdiction pursuant to Sections 367.031, 367.045, and 367.161(1), F.S.

¹ Section 367.022(7), F.S., provides that nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such nonprofit corporations, associations, or cooperatives are not subject to regulation by the Commission as a utility, nor are they subject to the provisions of Chapter 367, except as expressly provided.

Discussion of Issues

Issue 1: Should Wilcox Investments, Inc., be ordered to show cause, in writing within 21 days, why it should not be fined for operating without a certificate in apparent violation of Section 367.031, F.S.?

Recommendation: Yes. Wilcox should be ordered to show cause, in writing, within 21 days why it should not be fined a total of \$500 for its apparent violation of Section 367.031, F.S., for its failure to obtain a certificate of authorization. The utility should also be required to file documentation with this Commission by February 2, 2009, either demonstrating its exempt status or completing its application for original water certificate. Further, the utility should be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to \$5,000 per day per violation for each day the violation continues as set forth in Section 367.161, Florida Statutes. (Brubaker, Clapp)

Staff Analysis: Section 367.031, F.S., states:

Original certificate.--Each utility subject to the jurisdiction of the commission must obtain from the commission a certificate of authorization to provide water or wastewater service. A utility must obtain a certificate of authorization from the commission prior to being issued a permit by the Department of Environmental Protection for the construction of a new water or wastewater facility or prior to being issued a consumptive use or drilling permit by a water management district. The commission shall grant or deny an application for a certificate of authorization within 90 days after the official filing date of the completed application, unless an objection is filed pursuant to ss. 120.569 and 120.57, or the application will be deemed granted.

Section 367.045(1), F.S., sets forth the information which is to be provided by a utility when applying for an initial certificate of authorization from the Commission, including:

- (b) Provide all information required by rule or order of the commission, which information may include a detailed inquiry into the ability of the applicant to provide service, the area and facilities involved, the need for service in the area involved, and the existence or nonexistence of service from other sources within geographical proximity to the area in which the applicant seeks to provide service;
- (c) File with the commission schedules showing all rates, classifications, and charges for service of every kind proposed by it and all rules, regulations, and contracts relating thereto....

Utilities are charged with the knowledge of the Commission's orders, 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). Section 367.161(1), F.S., authorizes the 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 provision of Chapter 367, F.S., or any lawful order of the Commission.

Wilcox has failed to provide the documentation necessary for staff to determine its exempt status pursuant to Section 367.022(7), F.S. Wilcox has further failed to obtain a certificate of authorization to provide water or wastewater service, or to provide the information necessary to process the utility's application. In doing so, it appears that the utility's act was "willful" in the sense intended by Section 367.161, F.S. In Commission Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., 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 "willful" implies an intent to do an act, and this is distinct from an intent to violate a statute or rule. Id. at 6.

Staff believes that the utility has not provided circumstances or justification which satisfactorily mitigate the utility's apparent violation. Based on the above, staff recommends that Wilcox be made to show cause, in writing, within 21 days, why it should not be fined a total of \$500 for its apparent violation noted above. Staff recommends that the show cause order incorporate the following conditions:

1. The utility's response to the show cause order should identify material facts in dispute;
2. Should Wilcox file a timely written response that identifies material facts in dispute and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), F.S., a further proceeding will be scheduled before a final determination of this matter is made;
3. A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;
4. In the event that Wilcox fails to file a timely response to the show cause order, the fine should be deemed assessed with no further action required by the Commission; and
5. If the utility responds to the show cause order by remitting the fine, this instant show cause matter should be considered resolved.

The utility should also be required to file documentation with this Commission by February 2, 2009, either demonstrating its exempt status or completing its application for original water certificate. Although payment of the fine would resolve this instant show cause proceeding, nothing would prevent the Commission from again initiating show cause proceedings if Wilcox fails to timely file the information indicated above.

Further, the utility should be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to \$5,000 per day per violation for each day the violation continues as set forth in Section 367.161, F.S.

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Issue 2: Should the docket be closed?

Recommendation: No. If Wilcox pays the \$500 in fines, this show cause matter should be considered resolved. If the utility timely responds in writing to the Order to show cause, the docket should remain open to allow for the appropriate processing of the response. This docket should also remain open to address the disposition of Wilcox's pending application for a certificate of authority. (Brubaker)

Staff Analysis: If Wilcox pays the \$500 in fines, this show cause matter should be considered resolved. If the utility timely responds in writing to the Order to show cause, the docket should remain open to allow for the appropriate processing of the response. This docket should also remain open to address the disposition of Wilcox's pending application for a certificate of authority.