

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement by Continental Utility, Inc. that in providing service only to other entities owned by Continental Country Club R.O., Inc., Continental Utility, Inc. would be exempt from Public Service Commission jurisdiction.

DOCKET NO. 140115-WS  
ORDER NO. PSC-14-0465-DS-WS  
ISSUED: August 26, 2014

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman  
LISA POLAK EDGAR  
RONALD A. BRISÉ  
EDUARDO E. BALBIS  
JULIE I. BROWN

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

On May 28, 2014, pursuant to Section 120.565, Florida Statutes (F.S.), and Rule 28-105.002, Florida Administrative Code (F.A.C.), Continental Utility, Inc. (Continental) filed a Petition for Declaratory Statement (Petition) regarding the applicability of Section 367.022(7), F.S., to Continental. Continental requests that we issue an order declaring that it would be exempt from our jurisdiction under the nonprofit exemption in Section 367.022(7), F.S.

Pursuant to Rule 28-105.0024, F.A.C., a Notice of Declaratory Statement was published in the June 4, 2014, edition of the Florida Administrative Register. Pursuant to Rule 28-105.0027(1), F.A.C., and as stated in the notice, substantially affected persons were given 21 days to intervene in the proceeding. No petitions to intervene were filed.

We have jurisdiction pursuant to Section 120.565 and Chapter 367, F.S.

STATUTES AND RULES GOVERNING DECLARATORY STATEMENTS

Declaratory statements are governed by Section 120.565, F.S., and by the Uniform Rules of Procedure in Chapter 28-105, F.A.C. Section 120.565, F.S., provides, in pertinent part, that:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's particular set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to a petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include a description of how the statutes, rules, or orders on which the declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. The Florida Supreme Court has noted that:

The purposes of the declaratory statement are "to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs" and "to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts."<sup>1</sup>

Moreover, the Courts and the Commission have repeatedly stated that one of the benefits of a declaratory statement is to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation.<sup>2</sup>

Pursuant to Rule 28-105.003, F.A.C., an agency may rely on the statements of facts contained in a petition for declaratory statement without taking a position on the validity of the facts. In accordance with Rule 28-105.003, F.A.C., we rely solely on the statements of facts contained in Continental's Petition and on the Responses to a Staff Data Request filed by Continental on June 23, 2014.<sup>3</sup> This Order is controlling as to those facts, and not as to other, different or additional facts.

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<sup>1</sup> DBPR, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374, 382 (Fla. 1999) (quoting Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U. L. Rev. 965, 1052 (1986)).

<sup>2</sup> See, e.g., Adventist Health Sys./Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007); Order No. PSC-02-1459-DS-EC, issued October 23, in Docket No. 020829-EC, In re: Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc., pursuant to Section 366.04, Florida Statutes.

<sup>3</sup> To the extent the agency does not have enough facts to make a decision on a petition for declaratory statement, it may request additional information from the petitioner. See Adventist Health Sys./Sunbelt, Inc., 955 So. 2d at 1176-77.

CONTINENTAL UTILITY'S PETITION FOR DECLARATORY STATEMENT

Continental's Petition raises the applicability of Sections 367.021 and 367.022, F.S., to its particular circumstances. Section 367.021(12), F.S., states that "'Utility' means a water or wastewater utility, and except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system . . . who is providing, or proposes to provide, water or wastewater service to the public for compensation." Section 367.022, F.S., exempts certain entities from our regulation, even though they would otherwise meet the jurisdictional definition of a utility. Specifically, subsection (7) states that, "[n]onprofit 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 us as a utility.

Continental states that it is a for-profit corporation owned by Continental Country Club R.O., Inc., a nonprofit corporation and that the officers and directors of both corporations are identical. Continental also states that it currently provides water and wastewater service to the residents of Continental Country Club (Country Club), all of whom are members of Continental Country Club, R.O., Inc., and to the golf club and restaurant which are owned by Continental Country Club, R.O., Inc. Continental indicates that it provides water and wastewater service to an unrelated party, Sandalwood Condominium (Sandalwood). With the exception of Sandalwood, all of the customers of Continental own and control Continental as a subsidiary of Continental Country Club R.O., Inc. Continental states that the agreement by which Sandalwood receives water and wastewater service from Continental terminates on December 16, 2015. Continental states that it is in need of a declaratory statement to determine whether to enter into negotiations to renew its agreement with Sandalwood.

FINDINGS AND CONCLUSIONS

For the reasons discussed in detail below, we deny the request for declaratory statement and find that, based on the facts set forth in the petition, Continental would not be exempt from our jurisdiction under Section 367.022 (7), F.S., because it is a for-profit corporation.

In order to qualify for the exemption under Section 367.022(7), F.S., a nonprofit corporation must provide service solely to its members who own and control it. According to the Petition, the customers of Continental include the Country Club, all of whom are members of Continental Country Club, R.O., Inc., and a golf club and restaurant which are owned by Country Club, R.O., Inc. Although Continental provides service to Sandalwood, an unrelated party, Continental states that this agreement to provide service terminates on December 16, 2015. Thus, the issue is whether Continental would be subject to the Commission's jurisdiction if it were to provide service to the residents of the Country Club, all of whom are members of Continental Country Club, R.O., Inc., and to the golf club and restaurant which are owned by Continental Country Club, R.O., Inc.

Section 367.022(7), F.S., expressly states that a corporation must be a nonprofit corporation to qualify for the exemption to our jurisdiction as provided in Section 367.011, F.S. In Order No. 24125, issued February 18, 1991, Docket No. 900860-WU, In re: Request for exemption from Florida Public Service Commission regulation for a water system in Lake County by Bella Vista Community Association, Inc., we stated that “for an entity to qualify under Section 367.022(7), Florida Statutes, it must first be a nonprofit corporation, association, or cooperative.” Although Continental is owned by Continental Country Club, R.O., Inc., there is no language in the statutory exemption stating that a for-profit corporation which is a subsidiary of a nonprofit corporation is a nonprofit corporation under Section 367.022(7), F.S. Continental states in its Petition that it is a for-profit corporation.

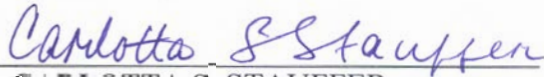
Exemptions are to be strictly construed against the one claiming the exemption. See Coe v. Broward County, 327 So. 2d 69 (Fla. 4th DCA 1976), and State v. Nourse, 340 So. 2d 966 (Fla. 3d DCA 1976)(statutory exceptions to general laws should usually be strictly construed against the one claiming the exemption). Even if Continental did provide service solely to its members who own and control it, Continental is a for-profit corporation, and thus does not satisfy the criteria for an exemption pursuant to Section 367.022(7), F.S.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement is denied and that, based on the facts set forth in the petition, Continental Utility, Inc., would not be exempt from our jurisdiction under Section 367.022(7), F.S., because it is a for-profit corporation. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 26th day of August, 2014.



CARLOTTA S. STAUFFER

Commission Clerk

Florida Public Service Commission

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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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 Office of Commission Clerk, 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 First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, 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.