

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for ) DOCKET NO. 921098-WS  
certificates to provide water ) ORDER NO. PSC-95-1445-FOF-WS  
and wastewater service in ) ISSUED: November 28, 1995  
Alachua County under grandfather )  
rights by Turkey Creek, Inc. & )  
Family Diner, Inc., d/b/a Turkey )  
Creek Utilities. )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman  
J. TERRY DEASON  
JOE GARCIA  
JULIA L. JOHNSON  
DIANE K. KIESLING

ORDER DENYING REQUEST FOR DEFERRAL OF SHOW CAUSE  
PROCEEDINGS, CLARIFYING INITIAL SHOW CAUSE ORDER,  
AND  
REINITIATING SHOW CAUSE PROCEEDINGS

BY THE COMMISSION:

Background

Family Diner, Inc. and Turkey Creek, Inc., d/b/a Turkey Creek Utilities (Turkey Creek or utility), was a Class C utility in Alachua County which provided water and wastewater service to approximately 300 customers. On October 26, 1992, Turkey Creek filed an application for a certificate to provide water and wastewater service pursuant to Section 367.171, Florida Statutes.

By Proposed Agency Action Order No. PSC-93-0229-FOF-WS, issued February 10, 1993, the Commission proposed to grant the certificates to Turkey Creek, approve its service territory and reduce its rates to those which were in effect on June 30, 1992, the date the Public Service Commission received jurisdiction of Alachua County. The utility protested this proposed agency action order and as a result, the certificates were never issued to the utility. A second order, Order No. PSC-93-0819-FOF-WS, issued July 27, 1993, regarding rates and charges was issued and was also protested by the utility. Refunds were required in each of these

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orders because the utility had illegally increased on two separate occasions its rates and charges after the Commission was given jurisdiction by Alachua County on June 30, 1992. Pursuant to these protests, a formal hearing was scheduled.

However, prior to the formal hearing, which was scheduled for November 3, 1993, the utility withdrew the protests. By Order No. PSC-93-1769-FOF-WS, issued December 3, 1993, the two prior orders were made final and effective. Turkey Creek subsequently filed an appeal of Order No. PSC-93-1769-FOF-WS with the First District Court of Appeal on January 6, 1994. On March 27, 1995, the First District Court of Appeal affirmed the decision made by the Commission in this docket. Accordingly, the correct territory was granted to the utility which would allow for the certificates to be issued. However, since the utility had been sold to the City of Alachua on September 23, 1993, no certificates were ever issued to Turkey Creek. The sale to the city and the pending refunds of rates collected by Turkey Creek were considered at the August 15, 1995, Agenda Conference.

Pursuant to the vote of the Commission, an Order Acknowledging Transfer And Initiating Show Cause Proceeding (Order No. PSC-95-1101-FOF-WS) was issued on September 6, 1995. That order required Turkey Creek to show cause in writing within twenty days, why it should not be fined \$5,000 for not complying with Order No. PSC-93-1769-FOF-WS (which order required refunds to be made in accordance with Order Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS).

In response to the Show Cause Proceeding, Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities (hereinafter Respondents), filed what they styled Respondents' Reply to Show Cause Order which was dated September 27, 1995, but was not received until September 28, 1995.

Deficiency of Order No. PSC-95-1101-FOF-WS

A review of Order No. PSC-95-1101-FOF-WS, which initiated the show cause proceeding against Turkey Creek pursuant to Section 367.161, Florida Statutes, shows that order did not make it clear that the potential fine of \$5,000 could be for each day the offense continued. Further, that order did not state: details of what should be contained in any response; that failure to file a timely response to the show cause order shall constitute an admission of the facts alleged in the body of the order and a waiver of any right to a hearing; and that the opportunity to file a written response would constitute the Respondents' opportunity to be heard prior to a final determination of noncompliance or assessment of

penalty. Before continuing with the show cause proceeding initiated by Order No. PSC-95-1101-FOF-WS, we believe we should clarify and correct the deficiencies in that order. Also, we will address Respondents' Reply to Show Cause Order.

Respondents' Reply to Show Cause Order and  
Request to Defer Show Cause Proceeding

As stated earlier, by Order No. PSC-93-1769-FOF-WS, issued on December 9, 1993, this Commission made Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS final and effective. These orders required Turkey Creek to refund any excess amount, including interest, that it had received that was related to the two unapproved increases in its rates and service availability charges. On January 6, 1994, Turkey Creek appealed Order No. PSC-93-1769-FOF-WS to the First District Court of Appeal. On March 27, 1995, the First District Court of Appeal affirmed the Commission's orders (mandate was issued on April 12, 1995).

Pursuant to the First District Court of Appeal's affirmation of the Commission's order, by letter dated April 6, 1995, staff informed Turkey Creek of its obligation to complete its refund requirement in accordance with Order No. PSC-93-1769-FOF-WS, Section 367.071(2), Florida Statutes, and Rule 25-30.360, Florida Administrative Code. Section 367.071(2), Florida Statutes, states that "[t]he transferor remains liable for any outstanding regulatory assessment fees, fines, or refunds of the utility."

As noted earlier, the City of Alachua purchased the utility on September 23, 1993, but the transfer was not acknowledged until Turkey Creek's appeal had been completed. In a follow-up letter, dated May 26, 1995, the Commission staff again informed Turkey Creek of its refund obligation and asked Turkey Creek to submit by June 9, 1995, a scheduled date for completing its refund requirements. Commission Staff also told Turkey Creek that it would pursue show cause proceedings if Turkey Creek did not respond by June 9, 1995. By letter dated June 8, 1995, Turkey Creek stated that it was researching its obligation to make the refunds since it was a "non-utility owner-operator," which it estimated would take two weeks to complete.

However, as of August 3, 1995, no other response was received from Turkey Creek, and staff filed its recommendation that the transfer to the City of Alachua be acknowledged and that show cause proceedings be initiated. The Commission accepted staff's recommendation at Agenda Conference. Order No. PSC-95-1101-FOF-WS

(initiating show cause proceedings) was issued on September 6, 1995, and Turkey Creek, Inc. and Family Diner, Inc. (Respondents), filed their response on September 28, 1995.

In responding to that order, the Respondents state that there is a genuine issue as to the Commission's jurisdiction and that they have filed suit (filed in mid-September) in circuit court for declaratory relief (suit was served on the Commission on September 19, 1995). In their response, the Respondents request this Commission to allow the parties to pursue this matter to conclusion in the courts, reserving jurisdiction to revisit the matter when the circuit court case is resolved. The Respondents specifically request that no penalty or fine be imposed at this time pending the final determination of jurisdiction and the outcome of their suit in circuit court. In effect, the Respondents have requested that the Commission defer any action on the show cause proceeding.

In reviewing the Respondents' Reply, we note that the circuit court does not have subject matter jurisdiction to review an order of this Commission, and the Commission has moved the circuit court to dismiss the complaint. However, the earliest a hearing on this motion to dismiss can be held is January 1996. Also, the Respondents have already appealed the order requiring the refunds to the First District Court of Appeal and lost, and it appears that the defenses of collateral estoppel and res judicata would prevent the Respondents from relitigating the validity of Order No. PSC-93-1769-FOF-WS.

In I.A. Durbin, Inc. v. Jefferson National Bank, 793 F. 2d 1541 (11th Cir. 1986), the 11th Circuit both defined the doctrines of res judicata and collateral estoppel, and set out the elements necessary in order for these doctrines to apply. That court, at 1549 stated:

Res judicata or claim preclusion refers to the preclusive effect of a judgment in foreclosing relitigation of matters that were litigated or could have been litigated in an earlier suit. See, elg., Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984); Interstate Pipe Maintenance, Inc. v. FMC Corp., 775 F.2d 1495, 1497 (11th Cir. 1985). In order for the doctrine of res judicata to bar a subsequent suit, four elements must be present: (1) there must be a final judgement on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both

cases. See, e.g., Harte v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Ray v. Tennessee Valley Authority, 677 F.2d 813, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (1993).

\* \* \* \* \*

The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. See, e.g., Ray, 677 F.2d at 821; White v. World Finance of Meridian, Inc., 653 F.2d 147, 150 (5th Cir. Unit A 1981). In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form. See, e.g., White, 653 F.2d at 150. (e.s.) (footnote omitted)

In order for collateral estoppel (defined as issue preclusion), to be applicable, the 11th Circuit, in Greenplatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (1985) and I.A. Durbin, at 1549, determined that the following prerequisites must be present.

(1) The issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgement in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

In this case, all of the elements of both are satisfied. Therefore, it is our determination that we should not defer taking action on the show cause proceeding.

Section 367.161(1), Florida Statutes, 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, Florida Statutes, or any lawful rule or order by the Commission. Utilities are charged with the knowledge of the Commission's rules and statutes. Also, as stated by the Commission in Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, "'Willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule."

Order No. PSC-93-1769-FOF-WS required the Respondents to accomplish the refunds within ninety days of the issuance date of that order. That order was "Per Curiam Affirmed" by the First District Court of Appeal on March 27, 1995, and mandate was issued on April 12, 1995. Therefore, it is clear that the Respondents have willfully violated an order of this Commission.

Further, our staff has, on numerous occasions, informed Turkey Creek of its obligation to comply with Order No. PSC-93-1769-FOF-WS. Therefore, Turkey Creek has been given ample time and sufficient information to comply with the Commission's order. Accordingly, based on the foregoing, we deny the Respondents' request to defer any show cause proceeding pending the outcome of the circuit court declaratory action.

Clarification of Order No. PSC-95-1101-FOF-WS and  
Reinitiation of Show Cause Proceeding

As stated above, Order No. PSC-95-1101-FOF-WS did not adequately set forth the requirements for responding to such order and did not adequately apprise the Respondents of their duties and rights under such order. Accordingly, we shall reinitiate the show cause proceeding. The Respondents shall show cause, in writing within twenty days of this order, why they should not be fined not more than \$5,000 per day for not complying with Order No. PSC-93-1769-FOF-WS.

By this order, we are advising the Respondents: that the proposed fine, pursuant to Section 367.161, Florida Statutes, may be as much as \$5,000 per day; that each day of the refusal to make the required refunds constitutes a separate offense; that the response must contain specific allegations of fact and law; that the opportunity to file a written response shall constitute the opportunity of the respondents to be heard prior to a final determination of noncompliance or assessment of penalty; that failure to file a timely response to this show cause order shall constitute an admission of the facts alleged in the body of the order and a waiver of any right to a hearing; that if the response raises material questions of fact and requests a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings may be scheduled before a final determination is made; that if a fine is assessable and payment is not remitted after reasonable collection efforts, the Commission may deem the fine to be uncollectible and refer the matter to the Comptroller's Office for further disposition; that the Respondents are required to make refunds in accordance with Orders Nos. PSC-93-0229-FOF-WS, PSC-93-0816-FOF-WS, and PSC-93-1769-FOF-WS.

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Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the request of Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, for the Commission to allow the parties to pursue this matter to conclusion in the courts, reserving jurisdiction to revisit the matter when the case is resolved, and to defer any action on the show cause proceeding, is denied. It is further

ORDERED that because of the deficiencies in Order No. PSC-95-1101-FOF-WS no fines or penalties shall be imposed pursuant to that order at this time. It is further

ORDERED that, because of the above-noted deficiencies, the show cause proceeding initiated by Order No. PSC-95-1101-FOF-WS is hereby reinitiated and clarified as set out in this order. It is further

ORDERED by the Florida Public Service Commission that Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities shall show cause, in writing, within twenty days from the date of this Order, why they should not be fined not more than \$5,000 per day for not complying with Orders Nos. PSC-93-1769-FOF-WS, PSC-93-0229-FOF-WS, and PSC-93-0819-FOF-WS. It is further

ORDERED that each day of the refusal of Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, to make the required refunds shall constitute a separate offense. It is further

ORDERED that the response of Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, must contain specific allegations of fact and law. It is further

ORDERED that the opportunity of Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, to file a written response shall constitute its opportunity to be heard prior to a final determination of noncompliance or assessment of penalty. It is further

ORDERED that the failure of Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, to file a timely written response to this show cause order shall constitute an admission of the facts alleged in the body of this order and a waiver of any right to a hearing. It is further

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ORDERED that in the event Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, file a written response that raises material questions of fact and request a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings may be scheduled before a final determination of these matters is made. It is further

ORDERED that if a fine is assessable and Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, do not remit payment after reasonable collection efforts, the Commission deems the fine to be uncollectible and authorizes referral to the Comptroller's Office for further disposition. It is further

ORDERED that Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, shall make refunds as required by Orders Nos. PSC-93-0229-FOF-WS, PSC-93-0816-FOF-WS, and PSC-93-1769-FOF-WS.

By ORDER of the Florida Public Service Commission, this 28th day of November, 1995.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

by: Kay Flynn  
Chief, Bureau of Records

( S E A L )

RRJ



NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 regarding denying the request for deferral of the show cause proceeding 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 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.

That part of the order reinitiating the show cause proceeding is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.037(1), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 18, 1995.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing pursuant to Rule 25-22.037(3), Florida Administrative Code, and a default pursuant to Rule 25-22.037(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

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If an adversely affected person fails to respond to this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water 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 of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.

M E M O R A N D U M

November 27, 1995

**RECEIVED**  
NOV 28 1995

11:50  
FPSC-RECORDS/REPORTING

TO: DIVISION OF RECORDS AND REPORTING  
FROM: DIVISION OF LEGAL SERVICES (JAEGER)  
RE: DOCKET NO. 921098-WS - Application for certificates to provide water and wastewater service in Alachua County under grandfather rights by Turkey Creek, Inc. & Family Diner, Inc., d/b/a Turkey Creek Utilities.

1495-FOF

20 days  
12/18

Attached is an ORDER DENYING REQUEST FOR DEFERRAL OF SHOW CAUSE PROCEEDINGS, CLARIFYING INITIAL SHOW CAUSE ORDER, AND REINITIATING SHOW CAUSE PROCEEDINGS to be issued in the above-referenced docket. (Number of pages in Order - 10)

Please note to add the date in the Notice of Further Proceedings or Judicial Review. That date should be twenty (20) days from the date of issuance of this order.

RRJ/dp

Attachment

cc: Division of Water and Wastewater (Xanders)

I: 921098-O.RRJ

cont.  
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