

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for) DOCKET NO. 921098-WS
certificates to provide water) ORDER NO.3 PSC-96-1526-FOF-WS
and wastewater service in) ISSUED: December 16, 1996
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 REJECTING OFFER OF SETTLEMENT

BY THE COMMISSION:

CASE 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 270 customers. On October 26, 1992, Turkey Creek filed an application for a grandfather certificate to provide water and wastewater service pursuant to Section 367.171, Florida Statutes. Order No. PSC-93-0229-FOF-WS, issued February 10, 1993, 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 this Commission received jurisdiction of Alachua County. The utility protested this proposed agency action (PAA) order and as a result, the certificates were never issued to Turkey Creek.

A second PAA order, Order No. PSC-93-0816-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 orders because the Commission found that the utility had improperly increased its rates and charges after the Commission assumed jurisdiction over Alachua County on June 30, 1992. Based on the protests to these two orders, the Commission scheduled a formal hearing to be held on November 3, 1993.

DOCUMENT NUMBER-DATE

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However, before this hearing could be held, 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 (the City) on September 23, 1993, no certificates were ever issued to Turkey Creek. The sale to the City and the pending refunds of the rates and charges 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 Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS).

In response to the Show Cause Order, Turkey Creek filed both a Complaint for Declaratory Relief (served on the Commission on September 19, 1995) in the Eighth Judicial Circuit, and, also, what was entitled Respondents' Reply to Show Cause Order (which was received by the Commission on September 28, 1995). In the response, Turkey Creek requested deferral of the show cause proceeding.

After considering this reply at the November 7, 1995 Agenda Conference, we issued Order No. PSC-95-1445-FOF-WS, which denied the request for deferral of show cause proceedings, clarified the initial show cause order, and reinitiated show cause proceedings against Turkey Creek. That Order was issued on November 28, 1995, and again gave Turkey Creek 20 days in which to respond.

Turkey Creek timely filed its response on December 18, 1995, and, asserting that there were material issues of fact and law in dispute, requested a formal hearing pursuant to Section 120.57(1), Florida Statutes. Turkey Creek also reiterated its assertion that the Commission did not have jurisdiction to issue the orders requiring a refund, that the question of jurisdiction was properly asserted through a Declaratory Statement Action in Circuit Court, and that the Commission should refrain from taking any action pending the outcome of Turkey Creek's Declaratory Statement Action in Circuit Court. Also, by letter dated February 19, 1996, Turkey

Creek offered that, if the Commission would abate the penalty proceedings, it would deposit with an appropriate escrow agent an amount of money which it considered sufficient to cover the refunds, and make the refunds from that escrow account if it was unsuccessful in its circuit court action.

We considered both the utility's response and the offer at the February 20, 1996 Agenda Conference. Based on the data available, we calculated that the maximum amount of any refund would not exceed \$42,000. Accordingly, we issued Order No. PSC-96-0350-FOF-WS on March 11, 1996, which found:

- 1) there was no dispute of material fact; therefore no formal hearing was required on the show cause proceedings;
- 2) there was no reason to defer any show cause proceeding pending the outcome of Turkey Creek's suit in circuit court; and
- 3) imposed a \$5,000 fine for Turkey Creek's failure to make refunds as required by Order No. PSC-93-1769-FOF-WS, but suspended such fine if the utility deposited \$42,000 in an appropriate escrow account within three weeks of the date of the Order.

Also, on March 5, 1996, the Eighth Judicial Circuit issued its Order dismissing with prejudice Turkey Creek's Declaratory Statement action. However, on March 12, 1996, Turkey Creek petitioned the Circuit Court for reconsideration of that Order.

With respect to Order No. PSC-96-0350-FOF-WS, Turkey Creek disagreed that the appropriate amount to be deposited in the escrow account was \$42,000, and timely filed its Notice of Administrative Appeal of Order No. PSC-96-0350-FOF-WS on April 10, 1996. However, while this appeal was pending, Turkey Creek, by letter dated June 13, 1996, offered to make all refunds which it calculated to be due if the Commission would waive interest and any penalty or fine. Turkey Creek presented its calculations of the appropriate refund, and, under separate cover, provided the supporting documentation. Also, Turkey Creek proposed that the Commission agree to a stay of the proceedings in the Circuit Court and District Court of Appeal and agreed that it would make such refunds "very shortly" after it signed off on any settlement agreement.

While our staff was reviewing these proposals, the Eighth Judicial Circuit issued, on June 24, 1996, its order denying

rehearing and affirming its decision to dismiss with prejudice Turkey Creek's Declaratory Statement action. Turkey Creek's appeal of Order No. PSC-96-0350-FOF-WS in the First District Court of Appeal is still pending.

By letter dated September 10, 1996, Turkey Creek clarified its offer of settlement, and, if the Commission would suspend all fines or penalties, offered that it would:

1. Pay the full amount of the refund (\$24,576.46), without interest;
2. Make such payment to the City of Alachua (City), which now serves those customers, within 30 days of the date of the order accepting such settlement offer; and
3. Withdraw its appeal in the First District Court of Appeal.

The City has agreed to process the refunds, but with the understanding that it would be allowed to keep all unclaimed refunds.

SETTLEMENT OFFER

As stated above, by Order No. PSC-96-0350-FOF-WS, issued on March 11, 1996, we imposed a fine of \$5,000 on Turkey Creek for its failure to make refunds as required by Order No. PSC-93-1769-FOF-WS. Order No. PSC-93-1769-FOF-WS required Turkey Creek to refund with interest the excess rates and charges as follows:

1. Monthly service rates from June 30, 1992, through the date of the sale to the City of Alachua (September 23, 1993);
2. Accrued interest on customer deposits from June 30, 1992, through the date each customer's deposit was returned;
3. Public fire protection charge to the Turkey Creek Master Owners Association (TCMOA) - all of 1992 and 1993, if any;
4. Miscellaneous service charges - July 6, 1993, through the date of the sale to the City of Alachua; and

5. Late payment charges - July 6, 1993, through the date of the sale to the City of Alachua.

Although Order No. PSC-93-1769-FOF-WS was appealed, that Order was affirmed by the First District Court of Appeal on March 27, 1995. Further, the Declaratory Statement Action challenging the jurisdiction of the Commission in ordering a refund, and filed in the Eighth Judicial Circuit in September of 1995, was dismissed with prejudice with a final order being issued on June 24, 1996.

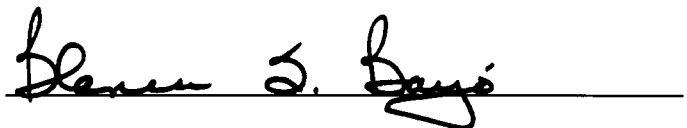
Now, Turkey Creek has proposed a settlement offer whereby it will pay the refund, without interest, within 30 days, if the Commission will approve the settlement offer and suspend the \$5,000 fine. We calculate that through June 13, 1996, the interest that Turkey Creek would have had to pay would be about \$3,993.23. Also, we have verified that the refund, without interest, is \$24,576.46.

Upon review of this settlement offer, we have serious concerns about the appropriateness of approving any refund without interest. This is especially true where the order requiring the refunds to be with interest has been upheld on appeal. Based on the above, we find, as we have already previously determined, that any refund to the customers shall be with interest. Therefore, we reject this offer of settlement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the settlement offer of Turkey Creek Utilities, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, is rejected.

By ORDER of the Florida Public Service Commission, this 16th day of December, 1996.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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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 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.

MEMORANDUM

December 13, 1996

RECEIVED
DEC 16 1996

10:25
FPSC-RECORDS/REPORTING

TO: DIVISION OF RECORDS AND REPORTING
FROM: DIVISION OF LEGAL SERVICES (JABBER)
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

1526-JDF

Attached is an ORDER REJECTING OFFER OF SETTLEMENT to be issued in the above-referenced docket. (Number of pages in Order - 6)

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Attachment

cc: Division of Water and Wastewater (Xanders)

I: 921098OR.RRJ

1/4 - Jess PC