

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against Tropical Mobile Home Park in Polk County for violation of Section 367.171, F.S., and Rule 25-30.035, F.A.C., Application for Grandfather Certificate.

DOCKET NO. 980586-WS
ORDER NO. PSC-98-0761-SC-WS
ISSUED: June 2, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER TO SHOW CAUSE FOR FAILURE TO FILE
APPLICATION FOR GRANDFATHER CERTIFICATE,
REQUIRING APPLICATION, FILING OF ANNUAL REPORTS
AND PAYMENT OF REGULATORY ASSESSMENT FEES

BY THE COMMISSION:

BACKGROUND

On May 14, 1996, the Polk County Commission, by resolution, transferred jurisdiction to this Commission with respect to the regulation of investor-owned water and wastewater utilities within the county. By Order No. PSC-96-0896-FOF-WS, issued July 11, 1996, we acknowledged the resolution of the Board of Polk County Commissioners declaring Polk County subject to Chapter 367, Florida Statutes.

In order to assist in the transition of regulation, the County staff provided a list of utilities to whom it had granted franchise areas and also provided a list of entities that it believed would qualify for Commission regulation, but had not been franchised by the County. Tropical Mobile Home Park (Tropical or utility) was included in the former list. While Tropical had been franchised by the County, the franchise agreement expired in 1994, and had not been renewed by May 14, 1996.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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Tropical Mobile Home Park is a small utility which serves approximately 42 mobile home park customers and 22 customers outside the park. The customers outside the park are both residential and commercial customers. The park is currently operating near capacity with respect to its water system and over capacity with respect to its wastewater system during the peak winter season. The system is not operating in compliance with the Florida Department of Environmental Protection (FDEP). Consequently, FDEP has not reissued the utility's permit.

We initially believed that Tropical would qualify for dual exemptions pursuant to Sections 367.022(5) and (6), Florida Statutes (landlord/tenant and small system exemption). This was based on the preliminary information received from the county and conversations with the utility owner, Mr. Donald Gugel.

The utility provides water and wastewater service to approximately 42 mobile home customers, which is included as a part of the lot rental fee. However, the utility also separately charges and provides water service to 22 customers and wastewater service to four customers outside the park. These customers include both commercial and residential customers.

We received information indicating that the well capacity of the system exceeds the parameters stated in Rule 25-30.055(1), Florida Administrative Code, which is in excess of the level that would qualify for a small system exemption. A site visit in August 1997 also confirmed the need for a certificate, pursuant to Section 367.171(2)(b), Florida Statutes (grandfather certificate). Further, we have received two complaints concerning billing and obtaining service from this utility.

We have been aware of this utility system since the time that the Commission received regulatory jurisdiction in May 1996. The system was contacted about our staff's trip to the county to assist utilities in completing and filing applications. The utility did not send a representative to the meeting.

Mr. Gugel was contacted in October 1997 to check on the status of the application, and was assured that an application would be filed by the utility. By certified letter dated December 22, 1997, we requested that Mr. Gugel respond to the service complaint and address the necessity for filing the grandfather application. The letter stated that if the application was not received by January

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1998, our staff would recommend the initiation of a show cause proceeding.

Mr. Gugel contacted staff and stated he did not have a copy of the application. An application was sent via certified mail on January 6, 1998. Mr. Gugel was contacted by telephone in February 1998 to verify the status of the application. The phone call was followed by a letter dated February 12, 1998, restating the filing requirements and establishing a filing deadline of March 6, 1998. In response to this letter, Mr. Gugel contacted staff by telephone and stated that the application would be filed no later than the end of March 1998. As of the date of this Order, no application has been filed with the Commission.

SHOW CAUSE

Section 367.171(2)(b), Florida Statutes, provides that on the day Chapter 367, Florida Statutes, becomes applicable to any county, any utility engaged in the operation or construction of a system shall be entitled to receive a certificate for the area served by such utility. Furthermore, within 90 days after the utility becomes subject to regulation by the Commission, the utility shall make application for a certificate of authorization. Rule 25-30.035, Florida Administrative Code, sets forth the requirements for an application for a grandfather certificate.

The utility has been provided with multiple opportunities to comply with the requests of staff and the requirements set forth in Commission statutes and rules. Commission staff has tried to assist the utility by answering any questions, but no such requests have been made. We believe that the utility has not provided sufficient justification for the delay in filing its grandfather application.

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 willfully violated any provision of Chapter 367, Florida Statutes, or lawful rule of the Commission. Utilities are charged with 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 conduct in issue here, would meet the standard for a "willful violation."

As discussed previously, Tropical has been contacted on repeated occasions regarding the need to apply for a grandfather certificate. To our knowledge, no good-faith effort to file an application has been made by the utility, despite our calling the utility's attention directly to the provisions of Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code. We believe that this conduct has been "willful" in the sense intended by Section 367.161, Florida Statutes. 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, 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 intent to do an act, and this is distinct from intent to violate a rule.

We believe that the utility's apparent violation of Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, rises to the level warranting that a show cause order be issued. We accordingly find that Tropical Mobile Home Park shall show cause, in writing, within 20 days of the issuance of this Order, why it should not be fined in the amount of \$5,000 for failing to file an application for a grandfather certificate in accordance with Section 367.171, Florida Statutes and Rule 25-30.035, Florida Administrative Code.

Tropical's response to the show cause order must contain specific allegations of fact and law. This opportunity to file a written response shall constitute Tropical's opportunity to be heard prior to a final determination of noncompliance or assessment of penalty. A failure to file a timely written response to a show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. Should Tropical file a timely written response that raises material questions of fact and request a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings will be scheduled before a final determination on this matter is made. If the utility fails to respond to the show cause order within 20 days of the issuance of the order, a fine in the amount of \$5,000 shall be imposed without further action of the Commission.

APPLICATION, REGULATORY ASSESSMENT FEES, AND ANNUAL REPORTS

The utility shall file an application for a grandfather certificate in compliance with Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, by close of business on June 12, 1998.

In addition, as an entity subject to the Commission's jurisdiction, Tropical has the obligation to remit regulatory assessment fees and file annual reports from the jurisdictional date, May 14, 1996, in accordance with Rules 25-30.110 and 25-30.120, Florida Administrative Code. To date, the utility has not filed the 1996 or 1997 annual reports or paid regulatory assessment fees for those years.

By letter dated April 10, 1998, the utility was advised of these requirements and given 45 days in which to comply. Therefore, we also find that the utility shall file its annual report and regulatory assessment fees for the period of May 14, 1996, through calendars year 1996 and 1997, by May 25, 1998.

Because Tropical was only recently given official notification of its obligation to remit regulatory assessment fees and file annual reports from the jurisdictional date, no show cause proceedings shall be initiated at this time for Tropical's failure to remit its regulatory assessment fees and annual reports. Rather, if the utility does not respond, staff shall present a subsequent recommendation in another docket that show cause proceedings should be initiated.

CLOSING OF DOCKET

If the utility timely responds to the show cause order, we find that this docket shall remain open pending disposition of the response. If the utility fails to timely respond to the show cause order, the penalty shall be deemed assessed with no further action required by the Commission, and this docket shall remain open pending remittance of the penalty. If the utility timely responds in writing to the show cause order and requests a hearing, this docket shall remain open for final disposition. Further, we find that this docket shall remain open pending receipt of the utility's application for a grandfather certificate and final disposition of the application.

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Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tropical Mobile Home Park, 118 Village Road, Winter Haven, Florida 33880-6144, shall show cause, in writing, within 20 days of the issuance of this Order, why it should not be fined in the amount of \$5,000 for failing to file an application for a grandfather certificate in accordance with Section 367.171, Florida Statutes and Rule 25-30.035, Florida Administrative Code. It is further

ORDERED that Tropical Mobile Home Park's written response must contain specific allegations of fact and law. It is further

ORDERED that Tropical Mobile Home Park's written response shall constitute its opportunity to be heard prior to a final determination of noncompliance or assessment of penalty by this Commission. It is further

ORDERED that the failure to file a timely written response to this Order shall constitute an admission of the facts alleged in the body of this Order and a waiver of the right to a hearing. It is further

ORDERED that, in the event Tropical Mobile Home Park files a timely written response that raises material questions of fact and requests a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings will be scheduled before a final determination on this matter is made. It is further

ORDERED that if Tropical Mobile Home Park fails to respond to this Order within 20 days of its issuance, a fine in the amount of \$5,000 shall be imposed without further action of the Commission. It is further

ORDERED that Tropical Mobile Home Park shall file an application for a grandfather certificate in compliance with Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, by close of business on June 12, 1998. It is further

ORDERED that Tropical Mobile Home Park shall file its annual report and regulatory assessment fees for the period of May 14, 1996, through calendar year 1996 and 1997, by May 25, 1998. It is further

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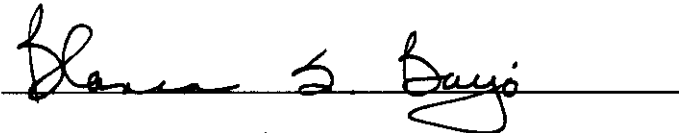
ORDERED that if Tropical Mobile Home Park timely responds to this show cause Order, this docket shall remain open pending disposition of the response. It is further

ORDERED that if Tropical Mobile Home Park fails to timely respond to this show cause Order and the penalty is thereby deemed assessed without further action by the Commission, this docket shall remain open pending remittance of the penalty. It is further

ORDERED that if Tropical Mobile Home Park timely responds in writing to this show cause Order and requests a hearing, this docket shall remain open for final disposition. It is further

ORDERED that this docket shall remain open pending receipt of Tropical Mobile Home Park's application for a grandfather certificate and final disposition of the application.

By ORDER of the Florida Public Service Commission this 2nd day of June, 1998.

A handwritten signature in cursive script, reading "Blanca S. Bayó", is written over a horizontal line.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

JSB

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

This order 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 June 22, 1998.

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.

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.