

MEMORANDUM

October 23, 1998

10/26 11:35

RECEIVED

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (REYES) *BLR*

RE: DOCKET NO. 961006-WS - APPLICATION FOR CERTIFICATES UNDER GRANDFATHER RIGHTS TO PROVIDE WATER AND WASTEWATER SERVICE BY SPORTS SHINKO UTILITY, INC. D/B/A GRENELEFE UTILITIES IN POLK COUNTY.

PSC - 98-1459-AS-WS

Attached is a NOTICE OF PROPOSED AGENCY ACTION ORDER APPROVING SETTLEMENT AGREEMENT AND ORDER DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS, to be issued in the above-referenced docket.

(Number of pages in order - ~~12~~11)

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Attachment

cc: Division of Water and Wastewater (Walker, Redemann)

I:96100604.BLR

*forwarded - 2/1
mailed - 1*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for
certificates under grandfather
rights to provide water and
wastewater service by Sports
Shinko Utility, Inc. d/b/a
Grenelefe Utilities in Polk
County.

DOCKET NO. 961006-WS
ORDER NO. PSC-98-1459-AS-WS
ISSUED: October 26, 1998

The following Commissioners participated in the disposition of
this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION ORDER
APPROVING SETTLEMENT AGREEMENT AND
ORDER DECLINING TO INITIATE A SHOW CAUSE PROCEEDING

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission that the action discussed herein approving the
settlement agreement regarding the collection of non-potable
irrigation rates and charges is preliminary in nature and will
become final unless a person whose interests are substantially
affected files a petition for a formal proceeding, pursuant to Rule
25-22.029, Florida Administrative Code.

BACKGROUND

On May 14, 1996, the Board of County Commissioners of Polk
County (County Commission, Polk County or County) adopted a
resolution pursuant to Section 367.171, Florida Statutes, declaring
that privately-owned water and wastewater utilities in that County
were subject to the provisions of Chapter 367, Florida Statutes.
This Commission acknowledged the County's resolution by Order No.
PSC-96-0896-FOF-WS, issued July 11, 1996, in Docket No. 960671-WS.

This utility system has provided water and wastewater service
for customers in Polk County since 1977. In 1987, it was acquired

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by Sports Shinko Utility, Inc., d/b/a Grenelefe Utilities (Grenelefe or utility). The utility provides water service for about 646 residential customers and 102 general service customers and wastewater service for about 634 residential customers. In 1996, Grenelefe recorded operating revenues of \$366,000 for water service and \$210,000 for wastewater service. Operating income of \$91,000 was reported for water service, while a \$42,000 operating loss was reported for wastewater service.

Grenelefe has been subject to this Commission's jurisdiction since May 14, 1996. By letter dated July 30, 1996, Grenelefe was advised about its obligation to obtain a certificate. On August 30, 1996, Grenelefe filed an application for grandfather certificates to provide water and wastewater service in Polk County in accordance with Section 367.171(2)(b), Florida Statutes.

On July 2, 1996, Polk County approved a plan to restructure service rates for this system, a rate issue that was pending when the Commission's jurisdiction was first invoked. Before that action, Grenelefe was collecting fixed monthly charges of \$20 for water service and \$15 for wastewater service because meters had not been installed. However, the Southwest Florida Water Management District (SWFWMD) ordered Grenelefe to install meters to measure water service used for domestic and irrigation purposes. Grenelefe uses both potable and non-potable water sources to provide irrigation service. The rates approved by Polk County use the base facility charge and gallonage rate features. In particular, Polk County approved an irrigation rate, which the utility has been charging for both potable and non-potable irrigation service since September 1, 1996.

On December 9, 1997, by Order No. PSC-97-1546-FOF-WS, we issued Certificates Nos. 589-W and 507-S to Grenelefe and approved rates for its potable water and wastewater systems as final agency action. In addition, as a proposed agency action, we ordered Grenelefe to refund all revenues previously collected for non-potable irrigation service because, based on the information available at that time, it did not appear that Polk County had authorized their collection. We also ordered Grenelefe to begin collecting Commission approved base facility and gallonage rates for non-potable irrigation service. Other measures, which are not pertinent here, were also required.

On December 30, 1997, Grenelefe timely filed a protest to the proposed agency actions contained in Order No. PSC-97-1546-FOF-WS

in the form of a Petition for Formal Proceeding. Grenelefe argued that the non-potable irrigation rate was approved by Polk County, that the refund was inappropriate, and that other factors must be considered when setting non-potable irrigation rates. On January 15, 1998, Grenelefe Association of Condominium Owners No. 1, Inc., (Association) filed a Counter-Petition for a Formal Administrative Proceeding. On February 20, 1998, the Association filed an Amended Counter-Petition to further clarify that its interests would not be served by imposing a fine, which it had previously requested in its Counter-Petition, on Grenelefe for its collection of non-potable irrigation rates. However, the Association contends that Polk County did not approve non-potable irrigation service rates. An administrative hearing on this matter was scheduled for September 17-18, 1998.

Because one possible outcome of the proceeding may have been a finding that Polk County had authorized non-potable irrigation rates, the utility would have suffered an unrecoverable loss of revenues if it were not allowed to continue to collect those rates during the pendency of the proceeding. Accordingly, by Order No. PSC-98-0503-PCO-WS, issued April 13, 1998, we approved the utility's collection of temporary rates subject to refund with interest during this proceeding.

During the pendency of this matter, Grenelefe and the Association have been engaged in settlement negotiations, and by Order No. PSC-98-0845-PCO-WS, issued June 25, 1998, the parties' stipulated request for a continuance of the proceedings was granted for a period of twenty days to allow the parties time to finalize their settlement agreement.

SETTLEMENT AGREEMENT

On July 17, 1998, Grenelefe and the Association filed a proposed settlement agreement concerning Grenelefe's collection of non-potable irrigation rates since September, 1996. That agreement accepts the non-potable irrigation rates and charges approved by Order No. PSC-97-1546-FOF-WS with this modification: usage above 50,000 gallons per month, per Equivalent Residential Connection (ERC) unit, will increase from \$0.61 per thousand gallons to \$2.16 per thousand gallons. The agreement also provides that these rates shall apply retroactive to September, 1996, with this further provision: monthly consumption charges shall not apply for usage beyond 25,000 gallons per ERC.

PAA/TEMPORARY RATES

Since September 1, 1996, Grenelefe has been collecting the same rates for non-potable irrigation service that it collects for potable irrigation service. The rates approved by Order No. PSC-97-1546-FOF-WS for non-potable irrigation service are listed below. However, as stated earlier, Grenelefe timely filed a protest to the proposed agency actions regarding non-potable irrigation rates.

Base Facility Charge

5/8" x 3/4"	\$ 2.83
1"	\$ 7.07
1-1/2"	\$ 14.15
2"	\$ 22.64

Gallonage Charge

\$.61

(Per 1,000 gallons)

By Order No. PSC-98-0503-PCO-WS, issued on April 13, 1998, we observed that one possible outcome of the hearing might be a finding that Polk County intended one rate to apply for both systems. We also observed that a full refund of the disputed charges might result. Accordingly, in order to protect both Grenelefe and its customers, we authorized collection of the following temporary rates and charges:

<u>Meter Size</u>	<u>Base Rate</u>	<u>Usage \$/Kgals</u>	<u>Inverted Rate</u>
All Meters	\$5.50	\$1.44 to 25K	\$2.16 > 25K

According to Grenelefe, its customers were only billed \$274.11 at the \$2.16 inverted rate level since September, 1996. On a going-forward basis, the stipulation enlarges the usage allowance, further reducing the chance that the \$2.16 rate will be incurred.

REFUND PROVISIONS

<u>Meter Size</u>	<u>Base Rate</u>	<u>Usage \$/Kgals</u>	<u>Inverted Rate</u>
5/8" x 3/4"	\$2.83	\$0.61 to 25K	\$0.00 > 25K
1"	\$7.07	\$0.61 to 62.5K	\$0.00 > 62.5K
1 1/2"	\$14.15	\$0.61 to 125K	\$0.00 > 125K
2"	\$22.64	\$0.61 to 200K	\$0.00 > 200K

On July 31, 1998, Grenelefe notified us that under the proposed settlement the overall refund for non-potable irrigation service was \$144,474, which includes a \$64,933 refund to the Association. The Association's portion of the refund will be offset by amounts it owes Grenelefe for irrigation service. On September 2, 1998, Grenelefe reported that revenues for non-potable irrigation service from September, 1996 through June, 1998 totaled \$260,153, including \$128,099 billed to the Association.

The base facility charges originally approved in Order No. PSC-97-1546-FOF-WS will be used to calculate any potential refunds from September, 1996 through the date this Commission's order becomes final. These base facility charges will also apply in the future. For refund purposes, the parties agreed that the consumption charge for consumption below 25,000 gallons per month, per ERC, will be \$0.61 per thousand gallons, and that this charge should apply retroactive to September, 1996. The utility accordingly will refund in full the difference between the \$0.61 rate and the \$1.44 rate to its customers pursuant to the settlement agreement. The parties further agreed that all charges for consumption beyond 25,000 gallons, per ERC unit, should be refunded in full as well. As previously noted, the refund balance for the Association will be offset by previously unpaid charges for non-potable irrigation service.

By stipulation, the parties agreed that all refunds shall be accorded the treatment prescribed by Rule 25-30.360, Florida Administrative Code. Accordingly, the refunds shall be made with interest as required by Rule 25-30.360(4), Florida Administrative Code, and the utility shall submit the proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. In addition, the utility shall treat any unclaimed refunds as contributions in aid of construction pursuant to Rule 25-30.360(8), Florida Administrative Code.

PROSPECTIVE RATES

<u>Meter Size</u>	<u>Base Rate</u>	<u>Usage \$/Kgals</u>	<u>Inverted Rate</u>
5/8" x 3/4"	\$2.83	\$0.61 to 50K	\$2.16 > 50K
1"	\$7.07	\$0.61 to 125K	\$2.16 > 125K
1 1/2"	\$14.15	\$0.61 to 250K	\$2.16 > 250K
2"	\$22.64	\$0.61 to 400K	\$2.16 > 400K

For prospective billings, the parties have agreed that the appropriate rate will be \$0.61/1000 gallons for usage below 50,000 gallons, per ERC, and \$2.16 for consumption beyond that level. These rates will be implemented after this order becomes final. For stipulation purposes, the parties have adopted an alternative rate structure whereby rates will increase as consumption rises. This rate structure uses a rate concept based on relative meter sizes, whereby the usage allowance is increased to agree with the larger meter. For example, a 5/8 inch x 3/4 inch meter is considered 1 ERC, whereas a 1 inch meter is 2.5 ERCs, a 1 1/2 inch meter is 5 ERCs, and a 2 inch meter is 8 ERCs. The stipulated \$2.16 rate for non-potable irrigation service after 50,000 gallons, per month per ERC, will match the potable irrigation rate approved by Polk County for consumption beyond 25,000 gallons per month per ERC. These inverted rates are heavily weighed to encourage conservation.

In addition, Grenelefe agreed to purchase leak monitors for the Association's use, to retain its non-potable irrigation rates for at least one year, and to not file a rate index for one year. The parties also agreed that enforcement of the Settlement Agreement is contingent upon Commission acceptance of the terms and conditions of the agreement.

For customers other than the Association, the stipulated rates represent a substantial reduction to the rates that were previously being collected. The agreement to hold those rates constant for one year also benefits these customers. In addition, settlement of this matter will result in savings of both time and money for the utility, the Association, and other customers. Based on the foregoing, we find it appropriate to approve the proposed settlement agreement.

NO SHOW CAUSE REQUIRED

By Order No. PSC-98-0503-PCO-WS we approved the utility's collection of temporary rates during the pendency of the proceeding in order to prevent any unrecoverable loss of revenues if we later determined that Polk County had authorized non-potable irrigation rates. In order to protect the customers, we also required the utility to hold all revenues collected pursuant to these rates subject to refund with interest. As a guarantee for the revenues collected subject to refund, we ordered Grenelefe to provide security in the form of a letter of credit, bond, or escrow agreement. However, the security for the potential refund was never established.

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 of the Commission. Each day that such refusal or violation continues constitutes a separate offense.

Utilities are charged with the 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 failure to comply with a Commission order, would meet the standard for a "willful violation." 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 an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

By letter dated July 31, 1998, Grenelefe addressed its apparent violation of the Order by stating that the security unfortunately was never obtained because the utility was involved in intensive and time-consuming settlement negotiations. The utility also states that this issue is compounded by the fact that the Order does not specify a date by which the security must be posted. Due to the utility's decision to dedicate its time,

efforts, and money toward resolution of this matter short of a full-blown hearing and avoidance of the attendant litigation expenses that would have been incurred as a result, the utility never obtained the security.

Grenelefe requests that no show cause proceeding be initiated, especially in light of the fact that a settlement agreement has been reached. Grenelefe points out that the settlement terms are in an amount far less than the amount of the security required, and that settlement involves a refund in the nature of a credit for the majority of customers and should not involve the actual payment of monies. Grenelefe further states that this is not to say that the need for security was obviated by the settlement process, but that the facts are clear that the peculiar circumstances of this case provide justification for the Commission to decline to initiate show cause proceedings.

Finally, Grenelefe points out that it immediately offered to obtain the security in question once this essentially overlooked issue was brought to the utility's attention. Should it be determined that the security is in fact required, Grenelefe states that it will expend every effort to obtain same as rapidly as is practicable.

Although the utility appears to have violated the security requirement of Order No. PSC-98-0503-PCO-WS, we do not believe the violation warrants the initiation of a show cause proceeding. Given the expansive nature of the proceeding and the attendant time and cost that would be involved in litigating this matter, the parties in good faith have been engaged in extensive, time-consuming negotiations in an effort to settle this matter. While these negotiations did not obviate the need for the security, we are cognizant that the utility's time, efforts, and attention have been dedicated to amicably resolving this matter, and the utility's involvement in the settlement process may have resulted in an oversight with regards to the required security provisions. In addition, we note that the settlement proposal involves a refund in the form of a credit for the majority of customers and should not involve the actual payment of monies, thereby alleviating the need or concern for security provisions. Finally, we are cognizant that the utility has been very cooperative and has offered to immediately resolve the matter if security provisions are still deemed appropriate.

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In light of the foregoing, we do not find that the utility's apparent violation of Order No. PSC-98-0503-PCO-WS by failing to provide security in the form of a letter of credit, bond, or escrow agreement rises to the level of warranting the issuance of a show cause order. Accordingly, we decline to initiate a show cause proceeding against Grenelefe.

CLOSING OF DOCKET

Upon expiration of the protest period, if no timely protest is received from a substantially affected person, and upon completion and verification of the required refund, this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the settlement agreement proposed by Sports Shinko Utility, Inc., d/b/a Grenelefe Utilities and Grenelefe Association of Condominium Owners No. 1, Inc., set forth in the body of this Order is hereby approved. It is further

ORDERED that a show cause proceeding shall not be initiated against Sports Shinko Utility, Inc., d/b/a Grenelefe Utilities as set forth herein. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final and upon completion and verification of the required refund, this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 26th
day of October, 1998.



KAY FLYNN, Chief
Bureau of Records

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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.

As identified in the body of this order, our action approving the settlement agreement regarding the collection of non-potable irrigation rates and charges is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 16, 1998. If such a petition is filed, 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. In the

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absence of such a petition, this order shall become effective on the date subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an 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. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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 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 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.