

M E M O R A N D U M

February 13, 1990

**ORIGINAL
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TO : STEVE TRIBBLE, DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM : DIVISION OF LEGAL SERVICES (SCHWARTZ) *RS*
 DIVISION OF WATER AND SEWER (CHASE) *PC*

RE : DOCKET NO. 890459-WU - OBJECTION TO NOTICE OF CONROCK
 UTILITY COMPANY OF INTENT TO APPLY FOR A WATER
 CERTIFICATE IN HERNANDO COUNTY.

Attached are Exceptions to Hearing Officer's Recommended
 Order to be filed in the above-referenced docket.

DCS/lp

cc: Susan Clark, General Counsel
 Division of Legal Services (Vandiver, Davis)
 Division of Water and Sewer

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DOCUMENT NUMBER-DATE

01416 FEB 14 1990

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Objection to notice of)
CONROCK UTILITY COMPANY of)
intent to apply for a water)
certificate in Hernando County.)
_____)

DOCKET NO. 890459-WU

ROLLING ACRES ENTERPRISES,)
CITY OF BROOKSVILLE, and)
HERNANDO COUNTY,)
)
Petitioners,)
)
vs.)
)
CONROCK UTILITY COMPANY,)
)
Respondent.)
_____)

DOAH CASE NO. 89-2700

INTERVENOR FLORIDA PUBLIC SERVICE COMMISSION'S
EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED ORDER

Intervenor, Florida Public Service Commission (FPSC), pursuant to Section 120.57(1)(b)4., Florida Statutes, and Rule 28-5.404, Florida Administrative Code, hereby files its exceptions to the hearing officer's recommended order rendered January 23, 1990.

I. Exception to Hearing Officer's Finding of Fact No. 12

The hearing officer erroneously found that Conrock's president has an income interest in the Sumner A. Williams Family Trust. It is the president's father, Mr. Sumner A. Williams, who shares a lifetime income interest in the trust (T. 53-55, IP-1, p.11, 13). The president, Mark Williams, holds no personal interest in the Sumner A. Williams Family Trust (IP-1, p.14).

II. Exceptions to Hearing Officer's Conclusions of Law

A. The Hearing Officer Erred in Finding that Respondent Complied with Rule 25-30.035(3)(f), Florida Administrative Code.

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FPSC-RECORDS/REPORTING

Rule 25-30.035(3)(f), Florida Administrative Code, states that the utility shall provide:

Evidence that the utility owns the land where the utility treatment facilities are located or a copy of the agreement which provides for the continuous use of the land.

In Finding of Fact No. 3, the hearing officer specifically found that Respondent, Conrock Utility Company (Conrock), did not establish that it owns or has a written lease for the land where the water facilities are proposed to be located. However, based upon the testimony of Conrock's president that a verbal agreement exists, the hearing officer found that Conrock established that a written agreement can be consummated in the near future. Hence, in his Conclusions of Law, on p. 17 of the recommended order, the hearing officer suggests that Conrock complied with Rule 25-30.035(3)(f), Florida Administrative Code, as it proved that it can secure the required land dedicated to its proposed facilities in the event the certificate is granted.

The hearing officer misinterprets the Rule as requiring a mere technical filing, as opposed to setting forth a precondition to receiving a certificate. Rule 25-30.035(3), Florida Administrative Code, implements Section 367.041, Florida Statutes, which states:

Each applicant for a certificate shall: (1) Provide information required by rule or order of the commission . . .

Rule 25-30.035(3), Florida Administrative Code, states:

In addition to meeting the requirements of Section 367.041, F.S., the utility shall provide: . . . (Emphasis Supplied).

Conrock's failure to comply with subparagraph (f) of the above-cited rule proscribes the Commission from granting it a certificate. Therefore, the hearing officer erred in concluding that Rule 25-30.035(3)(f), Florida Administrative Code, can be met after Conrock has obtained a certificate.

B. The Hearing Officer Erred in Finding that Respondent Complied with Rule 25-30.035(3)(k),(m), and (n), Florida Administrative Code.

Rule 25-30.035(3)(k),(m), and (n), Florida Administrative Code, embody requirements to show the financial ability of the

applicant to own and operate a utility. Subparagraphs (k) and (m) of the above-cited rule require financial statements of the applicant. The applicant in this case is Conrock, not its owners or potential principal funders.

The hearing officer found, in Finding of Fact No. 13, that Conrock does not have assets or independent worth establishing its financial responsibility. In his Conclusions of Law, on p. 19 of the recommended order, the hearing officer stated that Conrock did not formally demonstrate its financial capability by presentation of financial statements.

Based on the foregoing, Conrock did not prove that it independently has the financial ability to own and operate a water utility, pursuant to Rule 25-30.035(k) and (m), Florida Administrative Code. Therefore, Conrock relies on the net worth of its potential principal funders in attempt to establish financial ability.

Rule 25-30.035(3)(n), Florida Administrative Code, requires the applicant to provide:

A statement listing those providing the principal funding to the utility, along with their financial statement and copies of any financial agreements.

Conrock did not provide copies of any financial agreements committing funds to the utility. In Finding of Fact No. 11, the hearing officer found that the president of Conrock has not committed any personal funds to the project, and that no efforts have been made to obtain bonds, loans, or grants. However, in his Conclusions of Law, on p. 19 of the recommended order, the hearing officer found that the testimony of the president demonstrates that ample financial resources are readily available should the certificate be granted, and that such a technical deficiency would not justify a denial of the application. As discussed above, the requirements of Rule 25-30.035(3), Florida Administrative Code, must be met before a certificate can be granted.

The hearing officer's conclusion that Conrock proved its financial ability is also based on the erroneous finding of fact that the president owns an income interest in the trust. However, it is the president's father who owns the income interest. Additionally, the financial statements of the parents are not certified and are misleading. The financial statements of the president's father include in his net worth \$3,069,907 from a trust, although he only shares a lifetime income interest in the trust (T.53-55, IP-1, p.11, 13).

\$3,069,907 is the entire trust corpus. It was not shown what the income interest is nor how many other income beneficiaries share in the income.

Based on the above, the hearing officer's conclusion of law that Conrock complied with Rule 25-30.035(k), (m), and (n), Florida Administrative Code, thereby proving its financial ability to construct and operate a water utility, is erroneous. Failure to prove that the utility is financially capable, coupled with the failure to provide commitments, or at least testimony, from the principal funders, is not a mere technical deficiency that may be cured after a certificate is granted.

C. The Hearing Officer Erred in Finding that Respondent Possesses the Technical Ability to Operate a Water Utility

The hearing officer, in his Conclusions of Law, on p. 19 of the recommended order, states that Conrock's present lack of technical expertise in operating a water system is a mere technical deficiency in the application. The hearing officer went on to state:

Conrock did establish, however, that should a certificate be granted, it is financially and otherwise capable of retaining a permanent, trained operator for the water system.

The hearing officer errs by finding that Conrock's financial ability, which was not sufficiently demonstrated, provides the applicant with the technical ability to operate a water utility. Most significantly, if upheld, the hearing officer's conclusion would send the message that an applicant need only state that it will hire experienced personnel after it is granted a certificate in order to prove its technical ability. It is not in the public interest to grant applicants certificates to operate public utilities on such a weak showing of technical ability. Therefore, based upon legal and policy considerations, the hearing officer's conclusion of law that Conrock possesses the technical ability to operate a water utility is in error.

D. The Hearing Officer Mischaracterizes the Significance of a Local Government Comprehensive Plan to the Commission in an Application for a Water or Sewer Certificate

Section 367.051(3)(b), Florida Statutes, states:

If such an objection [based on the comprehensive plan] has been timely raised, the

Commission shall consider, but not be bound by, the local comprehensive plan of the county or municipality. (Emphasis Supplied).

The hearing officer, in his Conclusions of Law, on p. 15 of the recommended order, goes a step further by declaring:

. . . the consistency of the proposed utility service with the provisions of the approved comprehensive plan involved is an important consideration and should be persuasive in making the decision to grant or deny. (Emphasis supplied).

Intervenor, FPSC does not wholly disagree with the hearing officer's opinion, and even praises the hearing officer in his attempt to give force to growth management principles. However, FPSC suggests to the Commission that by adopting the hearing officer's conclusion of law on this point, it would appear to be attempting to make comprehensive plans binding on the Commission in its decision to grant or deny a certificate application, or to assign comprehensive plans a standard or weight in such a decision. If the legislature intended that comprehensive plans be "persuasive", as opposed to "considered", it certainly could have effectuated that intent.

Based on the foregoing, FPSC suggests that the Commission reject the hearing officer's conclusion of law that local government comprehensive plans should be persuasive in the Commission's decision to grant or deny a certificate application.

III. Conclusion

Although Intervenor, FPSC, hereby files exceptions to the hearing officer's recommended order, FPSC agrees with the hearing officer's ultimate conclusion of law that Conrock failed to adequately prove entitlement to a certificate. FPSC's concern is the potentially harmful precedent that might be established by the hearing officer's conclusion of law regarding the ownership or use of utility land and the applicant's financial and technical ability to own and operate a water utility. In this case, numerous deficiencies resulted in the recommendation to deny the application. However, the hearing officer's conclusions of law may be relied upon in another case where such other deficiencies do not exist. FPSC fears that, in such a case, a certificate might be granted where the applicant does not own or have continuous use of the utility land, or does not have the financial or technical ability to operate a public utility. FPSC is also concerned

that the hearing officer's conclusion of law regarding comprehensive plans may result in a greater significance of the plans being imposed on the Commission than was intended by the legislature.

Wherefore, Intervenor FPSC requests the Commission to enter a final order adopting the above exceptions to the hearing officer's recommended order.

Respectfully submitted on this
14th day of February, 1990,
by:

David Schwartz

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DOAH CASE NO. 89-2700

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vs.)

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Respondent.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was furnished by regular U.S. Mail to the following individuals at the addresses indicated, this 14th day of February, 1990:

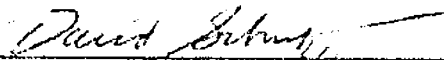
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