

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

M E M O R A N D U M

June 14, 1990

TO : DIRECTOR OF RECORDS AND REPORTING

FROM : DIVISION OF WATER AND SEWER (CHASE)
DIVISION OF LEGAL SERVICES (PIERSON)

RE : UTILITY: FLORILOW, INC.

DOCKET NO. 870060-WS

COUNTY: SUMTER

CASE: RESOLUTION BY BOARD OF SUMTER COUNTY COMMISSIONERS
DECLARING SUMTER COUNTY SUBJECT TO JURISDICTION OF
FLORIDA PUBLIC SERVICE COMMISSION

AGENDA : JUNE 27, 1990 - CONTROVERSIAL - PARTIES MAY PARTICIPATE

PANEL : FULL COMMISSION

CRITICAL DATES: NONE

ISSUE AND RECOMMENDATION SUMMARY

ISSUE 1: Is Florilow, Inc. exempt from this Commission's jurisdiction pursuant to Section 367.022(5), Florida Statutes?

PRIMARY RECOMMENDATION: Yes, service is provided without specific compensation, therefore, Florilow, Inc. qualifies for the landlord-tenant exemption, Section 367.022(5), Florida Statutes. This represents a departure from current Commission policy. (CHASE, PIERSON)

ALTERNATE RECOMMENDATION: No, the lease agreement which controls service to 37 lots contains a maintenance fee which includes water and sewer service among other services. Florilow, Inc. should be directed to file an application for certificate pursuant to Section 367.045, Florida Statutes, within 180 days of the date of the order. (CHASE, PIERSON)

DOCUMENT NUMBER-DATE

05244 JUN 14 1990

PSC-RECORDS/REPORTING

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, no further action is required in this docket and it should be closed. (PIERSON)

CASE BACKGROUND

This docket was opened in January, 1987 after the Board of County Commissioners of Sumter County adopted a resolution, pursuant to Section 367.171, Florida Statutes, whereby jurisdiction over the authority, service and rates of water and sewer utilities in Sumter County was transferred to this Commission. By Order No. 17207, issued February 18, 1987, this Commission acknowledged the jurisdictional transfer and directed all persons providing water or sewer service in Sumter County to register with the Commission for review of their regulatory status. This docket has remained open to determine the jurisdictional status of the systems in that county.

In April of 1988, Florilow, Inc. (Florilow) requested that it be found exempt from this Commission's regulation under either the landlord-tenant exemption or the small system exemption, Sections 367.022(5) and (6), respectively. Order No. 21203, issued June 1, 1989, as proposed agency action, determined that Florilow, Inc. was subject to this Commission's jurisdiction. A protest to that order and request for hearing was filed by Florilow, Inc. and this matter was set for hearing.

On February 12, 1990, Florilow prefiled testimony in favor of its position. Following its receipt and review of Florilow's testimony, staff suggested that, since there do not appear to be any issues of material fact in controversy in this case, it would be appropriate to treat this case as a Section 120.57(2), Florida Statutes, proceeding. In addition, staff suggested that Florilow consider requesting cancellation of the hearing and submitting this matter for the Commission's consideration based upon the record as it stands now: Florilow's prefiled testimony.

By letter dated March 20, 1990, Florilow agreed that it would not be in its best interest to hold a hearing on this matter and, therefore, the hearing was cancelled. This matter is being brought to the Commission for final determination on the jurisdictional status of Florilow, Inc. and to close the docket, since there are no outstanding jurisdictional decisions to make in this docket.

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STAFF ANALYSIS: Florilow, Inc. (Florilow) was formed in 1983 for the purpose of purchasing a campground. Oak Haven Estates was purchased and the name changed to Florilow Oaks. Florilow Oaks has a total of 121 sites. All except 37 lots are rented on a daily, weekly or monthly basis at varying fees which do not specifically include charges for water or sewer service. The remaining 37 lots are rented by long-term 99-year leases. The lease agreement provides for a maintenance fee separate and apart from any lot rental amounts. According to the lease agreement, this maintenance fee will be collected as the lessee's proportionate share of the "costs of maintenance of the park's sewage plant, water system, roads, taxes, and garbage service...". The current maintenance fee is \$300 per year. A copy of the lease agreement is attached to the testimony of Mary Roark, president of Florilow.

Florilow is requesting exempt status based on Section 367.022(5), Florida Statutes, which provides an exemption for landlords providing service to their tenants without specific compensation for the service. Pursuant to testimony filed by Mary Roark, as president of the corporation, Florilow believes it qualifies for a landlord-tenant exemption maintaining that it provides service to its tenants without specific compensation for water and wastewater services. In her testimony, Mrs. Roark further asserts that if it were found to be jurisdictional, complying with the Commission's regulations would place an undue burden on the corporation. In support of this statement, she states that the corporation has a very small staff--a part time manager and a part time maintenance man--and a rather simple accounting system. Regulation by the PSC would require that a bookkeeper be hired and that a much more sophisticated accounting system be established. Further, she asserts that the corporation is not presently equipped to complete the required annual reports. If meters were required, the corporation would have to purchase meters and initiate a billing and collection system which is not now in existence. Further, Florilow would be required to pay the annual regulatory assessment fees of 4.5% of gross revenues. Mrs. Roark asserts that all of these requirements would result in additional costs to the lessees with no commensurate benefit to them.

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Testimony was also filed by Winston Brown, one of the 99 year leaseholders in support of Florilow's request for exemption from PSC regulation. He states that he and the other leaseholders are satisfied that the maintenance fee is fair and reasonable. Further, if Florilow were to propose an increase in the maintenance fee, the lessees would request a conference with the Board of Directors to discuss the justification for the increase. If they were not satisfied with the outcome of that meeting, he believes that their contract rights would be adequately protected by arbitration or judicial proceedings. Attached to his testimony, is a petition signed by all the 99-year lessees objecting to any increase in costs which would result from Florilow being subjected to the jurisdiction of the Commission.

Under Section 367.022(5), Florida Statutes, "[l]andlords providing service to their tenants without specific compensation for the service" are exempt from the Commission's regulation. Thus, if a landlord provides water and/or wastewater services and does not specifically charge for, but includes such services as, nonspecific portions of the overall rent charges, the landlord is exempt from the Commission's regulation, whether or not the provision of such services is identified in the rental agreement. The Commission has held, however, that if these services are enumerated in a separate maintenance agreement, the landlord is not exempt, regardless of whether the maintenance agreement identifies any specific charge for such services.

Staff does not believe that the situations discussed above require such disparate treatment. Section 367.022(5), Florida Statutes, does not require that the services be included in rental charges, only that the services be provided without specific compensation therefor. If the landlord included the provisions of the maintenance agreement in a lease, it would be exempt, so long as it did not identify any specific charge for the services. Staff does not believe that it should be any different if the services are provided pursuant to a maintenance agreement, so long as the maintenance agreement does not identify any specific charge. Staff further believes that, if the Commission was to adopt the interpretation urged in this recommendation, the protection inherent in the landlord-tenant exemption would remain intact; if a tenant is dissatisfied with a maintenance agreement, as with a rental agreement, he or she can move to another residence.

Based upon the discussion above, Staff recommends that the Commission modify its current policy in order to allow separate maintenance agreements that do not identify specific charges for utility service to qualify for the landlord-tenant exemption.

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ALTERNATE STAFF ANALYSIS: Staff believes this system is jurisdictional since the 99-year lease agreement does identify compensation for water and wastewater service within the maintenance fee, as discussed above. While the maintenance agreement does not specifically state that portion of the total fee that is attributable to water or sewer service, it is clearly included in the total. This position is consistent with past decisions of this Commission. Staff agrees with the testimony presented in this case that regulation by the PSC would result in some changes to Florilow's method of operation at present. It would have to set up its books in accordance with the NARUC system of accounts, pay regulatory assessment fees and file annual reports. With regard to the question of requiring meters, Rule 25-30.255, Florida Administrative Code, states that "...each utility shall measure water sold upon the basis of metered volume sales unless the Commission approved flat rate service arrangements for that utility". Based on this rule, the Commission could approve flat rates for Florilow, if requested.

Staff has been in contact with Mary Roark, the president of Florilow, on numerous occasions regarding this matter. The Articles of Incorporation of Florilow state that it is a for profit corporation, thus it cannot qualify for exempt status pursuant to Chapter 367.022(7), Florida Statutes, as a nonprofit association owned and controlled by its members. Staff has suggested that Florilow explore the possibility of changing its status to a nonprofit corporation and requesting exemption on that basis. However, Florilow has been reluctant to do so.

While staff understands and sympathizes with the arguments expressed in the testimony, we maintain that the system is jurisdictional pursuant to the Commission's current interpretation of this provision of Chapter 367, Florida Statutes. Further, staff does not believe there is anything in the lease agreement that prohibits Florilow from raising the maintenance fee, or controls how much the fee can be increased. Thus, we do not agree with the utility or the leaseholders that adequate protection exists against arbitrary increases in the fee for water and wastewater service. We recommend that Florilow be found jurisdictional and given six months to file an application for certificate pursuant to Section 367.045, Florida Statutes. However, if the corporation does reorganize with the Secretary of State's office as a nonprofit association and provides documentation that it provides service solely to members which own and control it, Florilow would qualify for exemption pursuant to Section 367.022(7), Florida Statutes.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, no further action is required in this docket and it should be closed. (PIERSON)

STAFF ANALYSIS: This completes the jurisdictional review of the utilities in Sumter County. Since no further action is required, this docket should be closed.

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