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FLORIDA PUBLIC SERVICE COMMISSION

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

M E M O R A N D U M

October 8, 1992

TO : DIRECTOR, DIVISION OF RECORDS AND REPORTING *AK PD bl*

FROM : DIVISION OF WATER AND WASTEWATER (KOSLOSKI) *AK PD bl*
DIVISION OF LEGAL SERVICES (GOLDEN)

RE : UTILITY: STEWART/BARTH UTILITY
DOCKET NO.: 920063-WS
COUNTY: LAKE
CASE: REQUEST FOR COMBINED EXEMPTION FROM FLORIDA PUBLIC
SERVICE COMMISSION REGULATION FOR PROVISION OF WATER AND
WASTEWATER SERVICE IN LAKE COUNTY BY STEWART/BARTH
UTILITY

AGENDA : OCTOBER 20, 1992 - CONTROVERSIAL - PROPOSED AGENCY ACTION
ISSUE 1 ONLY

CRITICAL DATES: NONE

RECOMMENDATION FILE NAME: I:\PSC\WAW\WP\W920063A.REC

DOCUMENT NUMBER-DATE
11769 OCT -8 1992
FPSC-RECORDS/REPORTING

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CASE BACKGROUND

The Stewart/Barth Utility, in Lake County, filed its application for a combined exemption pursuant to Sections 367.022(5) and 367.022(6), Florida Statutes on January 17, 1992. The utility is co-owned by Mr. Charles Stewart and Mr. Robert Barth, as tenants in common. The mailing address for Charles R. Stewart is 37936 Highway 19, Umatilla, FL 32784. Mr. Barth's mailing address is 4590 North Highway 19A, Mount Dora, FL 32757. Stewart/Barth Utility serves an RV park owned by Mr. Stewart, an RV park owned by Mr. Barth, and 30 units of a condominium complex known as Baywood Condominiums in Lake County. These customers receive both water and wastewater service from Stewart/Barth Utility. The Commission denied Stewart/Barth Utility's previous request for a landlord-tenant exemption, Docket No. 900733-WS, Order No. 24311, because Stewart/Barth serves two RV parks and the 30 units in Baywood condominiums. The Commission denied this request based on the fact that the condominiums were not owned by the utility owners.

On April 21, 1992, the Commission deferred staff's recommendation to deny the exemption in order for staff and the utility to work on solutions whereby the utility may qualify for an exemption.

Although staff has met with the utility and had numerous phone conversations, the utility has not filed any additional information since the Commission deferred the recommendation on April 21, 1992. Therefore, staff is proceeding with its original recommendation to deny the combined landlord/tenant and small system exemption pursuant to Sections 367.022(5) and 367.022(6), Florida Statutes, and require the utility to file for an original certificate within 90 days of the final order.

Staff has authority to administratively approve applications for exemptions pursuant to Administrative Procedures Manual 2.08(c)(5), when cases are clear cut and without controversy. However, since this case is a request for combined exemptions pursuant to Sections 367.022(5) and 367.022(6), Florida Statutes, and because staff is recommending denial it is being brought to the Agenda Conference for Commission decision.

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ISSUE 1: Should the request by Stewart/Barth Utility for a combined exemption from Florida Public Service Commission regulation for its water and wastewater utility be granted?

STAFF RECOMMENDATION: No, the request by Stewart/Barth Utility for a combined exemption pursuant to Sections 367.022(5) and 367.022(6), Florida Statutes, should be denied and the utility should be ordered to file an original certificate application within 90 days of the final order. (KOSLOSKI)

STAFF ANALYSIS: Stewart/Barth Utility has requested a combined exemption under the landlord-tenant and small system exemption subsections. The two RV parks represent the landlord-tenant portion of the request. The application was filed in accordance with Sections 367.022(5) and 367.022(6), Florida Statutes. Also, the applicant acknowledged Section 837.06, Florida Statutes, regarding making false statements. In an exhibit attached to its application, the utility included prior Commission orders in which, in the utility's opinion, the Commission had combined exemption subsections to find certain utilities exempt from Commission regulation. On January 30, 1992, staff sent a deficiency letter which requested a copy of the landlord's most recent version of a standard lease or rental agreement, and an assurance by the utility that there was no separate charge for water and wastewater service. Additional information regarding utility bills for Baywood Condominiums was received by staff on March 4, 1992. Deficiencies were corrected on March 27, 1992 regarding the requested landlord-tenant exemption. Mr. Stewart and Mr. Barth are co-owners of Stewart/Barth Utility as tenants in common.

Stewart/Barth Utility provides water and wastewater service to an RV park owned by Mr. Stewart, an RV park owned by Mr. Barth, and 30 units of a condominium complex known as Baywood Condominiums. The utility's water treatment plant has a water capacity of 50,000 gallons per day. The utility has a 30,000 gallon per day extended aeration wastewater treatment facility.

The utility asserts that it qualifies for the landlord-tenant exemption for the two RV Parks. It further asserts that it is sufficient to show that the estimated usage for the condominiums meets the provisions of the rule and statute for a small system. Staff notes that since neither the RV parks or the condominiums are metered, the applicant is unable to show actual usage. Staff strongly disagrees with the utility, because usage is not the test contemplated by the statute and rule for the small system exemption. Rather, the test is the capacity of the system.

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The Commission has allowed combined exemptions in the past, where appropriate. The utility argues that in Order No. 13259, issued May 3, 1984, the Commission combined the small system exemption with another exemption to find Continental Home Parks, Inc., d/b/a/ Colony Mobile Park exempt from our regulation. However, in that order, the Commission found the system non-jurisdictional. In a subsequent case, the Commission applied the small system exemption criteria to the whole system, not to the remainder of the system, after other exemptions were applied. Section 367.022(6), Florida Statutes, exempts systems with the capacity or proposed capacity to serve 100 or fewer persons. The Commission's Rule 25-30.060, Florida Administrative Code, interpreting the small system exemption provides that:

"a water or sewer system is exempt under Section 367.022(6), Florida Statutes, if the system has or will have the capacity, to serve 100 or fewer persons."

In Order No. 20576, issued January 9, 1989, an exemption was denied in a scenario similar to the facts in the instant case. In that case, Gate Petrol filed for a combined exemption pursuant to Sections 367.021(3) (1987 F.S.) and 367.022(6), Florida Statutes. Gate Petrol provided water and sewer service to a motel and a service station, without charge, but charged a Burger King \$1,000 per year for sewer service. The Commission held that the utility's sewer service provided to Burger King was service to the public for compensation and thus the utility was subject to the Commission's jurisdiction citing P.W. Ventures. The Commission concluded that the capacity of Gate Petrol was over 10,000 gpd and thus the small system did not meet the exemption requirement. Thus, the Commission looked to the capacity of Gate Petrol's entire system, and not to the individual customer usage, when it denied the Section 367.022(6), Florida Statutes exemption.

Staff recommends that the statute contemplates that the Commission look to the capacity of Stewart/Barth's entire system when applying the small system exemption. This analysis, staff believes, is supported by the Commission's past decisions and is within the clear meaning of the statute.

As mentioned in the case background, the Commission denied Stewart/Barth Utility's previous request for a landlord-tenant exemption for the two RV parks and the 30 units in Baywood condominiums. Order No. 24311, issued April 2, 1991, states that "The obstacle to granting a landlord-tenant exemption in this case is that the utility currently serves condominiums, and these

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condominiums are not owned wholly or in part by the utility's owners. Thus, for that portion of the service area, the utility's owners are not landlords. If the utility's owners are not the landlords for all customers served by the systems, the landlord-tenant exemption cannot apply."

Therefore, the Commission should deny the utility's exemption request for small system and landlord/tenant since the utility did not meet the established rule and statutory criteria. In addition, staff recommends that the utility file for an original certificate within 90 days of the final order.

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ISSUE 2: Should Stewart/Barth Utility be show caused for operating without a certificate?

STAFF RECOMMENDATION: Yes, Stewart/Barth Utility should be ordered to show cause in writing why it should not be fined for operating without a certificate. (KOSLOSKI)

STAFF ANALYSIS: Stewart/Barth Utility is providing water and wastewater service to two RV parks and 30 units at Baywood Condominiums without a certificate or order granting an exemption, in violation of Section 367.031, Florida Statutes. Mr. Stewart and Mr. Barth closed on the purchase of the utility on August 13, 1990. The prior owner of the utility was Lake Saunders, Inc.

The utility's initial application, Docket No. 900733-WS, for a landlord/tenant exemption was filed on September 4, 1990. Order No. 24311, issued on April 2, 1991 denied the exemption and gave the applicant three months to file for an original certificate.

On January 17, 1992, six months after the Commission's deadline, the utility filed a combined exemption application as landlord/tenant and small system. At the April 21, 1992 Agenda conference, staff recommended the application be denied. Mr. Barth attended the Agenda Conference and the Commission deferred voting to allow the utility time to talk to staff. Staff met with Mr. Barth's counsel on May 6, 1992 and discussed feasible alternatives that the utility could utilize to qualify for an exemption. There were three alternatives which were seriously discussed. One of the alternatives was to give service away to the condominiums and apply for a Landlord/Tenant exemption for the two RV parks. Another alternative was to form a nonprofit corporation, where the two RV parks and the 30 condominiums are each members who own and control the nonprofit corporation. The last alternative was to file for an original certificate if Mr. Stewart and Mr. Barth were not interested in the first two alternatives. Staff sent a followup letter on May 14, 1992 to Mr. Stewart and Mr. Barth which outlined what was discussed at the May 6 meeting and requested the utility to either file an amended exemption application or an original certificate application by August 12, 1992.

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Stewart/Barth's counsel advised staff that he no longer represents the utility. On September 3, 1992, staff contacted both Mr. Stewart and Mr. Barth. Mr. Barth said he planned to hire a new attorney to form the nonprofit corporation and file the nonprofit exemption application. The utility requested an extension until October 1, 1992 to file. A followup letter to the September 3 phone calls was sent to Mr. Stewart and Mr. Barth on September 10 as a reminder that they have agreed to file an amended application by October 1, 1992 and that staff would recommend a show cause proceeding if the utility failed to comply with the deadline. As of this writing, the application has not been received.

The utility has not been cooperative and has consistently ignored the Commission's deadlines. Therefore, Staff recommends that a show cause proceeding be initiated for violation of Section 367.031, Florida Statutes. Section 367.161, Florida Statutes, authorizes the Commission to fine a utility up to \$5,000 per day for willfully violating any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission.

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