

State of Florida



Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

DATE: NOVEMBER 7, 1995

TO: CHAIRMAN SUSAN F. CLARK
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER JOE GARCIA
 COMMISSIONER JULIA L. JOHNSON
 COMMISSIONER DIANE K. KIESLING

FROM: ROBERT VANDIVER, GENERAL COUNSEL
 LILA A. JABER, BUREAU CHIEF
 RALPH R. JAEGER, SENIOR ATTORNEY

RE: TURKEY CREEK, INC. AND FAMILY DINER, INC., DECLARATORY ACTION SEEKING CIRCUIT COURT ORDER DECLARING THAT PLAINTIFFS ARE NO LONGER SUBJECT TO PSC JURISDICTION

921098-WS

On June 30, 1992, the Board of County Commissioners of Alachua County adopted a resolution pursuant to Section 367.171, Florida Statutes, declaring that, as of June 30, 1992, the water and wastewater utilities in that County shall be subject to the provisions of Chapter 367, Florida Statutes. Turkey Creek, Inc., and Family Diner, Inc., are Florida corporations and did business as Turkey Creek Utilities (Turkey Creek), a Class C utility in Alachua County providing water and wastewater services to approximately 300 residential and general service customers within the Turkey Creek development.

By proposed agency action (PAA) Order No. PSC-93-0229-FOF-WS, issued February 10, 1993, the Commission proposed to grant Turkey Creek, Inc. and Family Diner, Inc. d/b/a Turkey Creek Utilities (Turkey Creek) Water Certificate No. 550-W and Wastewater Certificate No. 480-S. The Commission also determined that the appropriate rates for Turkey Creek were those rates it was charging on June 30, 1992, the date the Commission received jurisdiction in Alachua County. Also, the Commission determined that Turkey Creek had violated Sections 367.081 and 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, by raising its rates in September of 1992, and November of 1992, without Commission approval. This Commission, therefore, directed Turkey Creek to cease collection of the unauthorized rates and make a refund. Subsequently, on March 4, 1993, Turkey Creek filed a timely petition protesting PAA Order No. PSC-93-0229-FOF-WS, and requested a hearing (Turkey Creek also protested a second order (Order No. PSC-93-0816-FOF-WS)).

However, before that hearing could take place, the city of Alachua purchased Turkey Creek, and began operating the utility effective September 23, 1993. Subsequently, on October 20, 1993, the utility filed a Notice Dismissing Petitions protesting Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS.

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FPSC-RECORDS/REPORTING

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All Commissioners

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Based on this Notice Dismissing Petitions and the fact that no other protests to the orders were filed, the Commission issued Order No. PSC-93-1769-FOF-WS, on December 9, 1993, which made Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS final and effective, and specifically required Turkey Creek to refund all monies collected in excess of the rates and charges approved in Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS, and to pay the interest that had accrued from the collection of the charges to the date of the refunds, calculated in accordance with Rule 25-30.360, Florida Administrative Code. The refunds were to be made on a per customer basis, and were to be accomplished within ninety days from the issuance date of the order with reports as required by Rule 25-30.360, Florida Administrative Code.

On January 5, 1994, Turkey Creek appealed Order No. 93-1769-FOF-WS to the First District Court of Appeal. In its initial brief, Turkey Creek stated the issue on appeal to be as follows:

The Orders From Which The Utility Appealed Are Impermissible Deviations From The Public Service Commission's Officially Stated Policy And Practice, And They Should Be Reversed."

On March 27, 1995, the First District Court of Appeal issued its Per Curiam Affirmed opinion. Mandate was subsequently issued on April 12, 1995. Turkey Creek, Inc., and Family Diner, Inc., then, on September 19, 1995, served their Summons and a copy of this Complaint For Declaratory Relief (attached) on the Commission. This complaint is in the nature of a second appeal of Order No. PSC-93-1769-FOF-WS. In their Complaint for Declaratory Relief, Turkey Creek, Inc., and Family Diner, Inc., claim that they are no longer subject to the PSC's jurisdiction (because of prior sale to City of Alachua and cessation of utilities operations), and that Order No. PSC-93-1769-FOF-WS (requiring refunds) is a nullity and unenforceable. They request a judgement of the circuit court declaring the rights and obligations of the parties in this dispute, and taxing costs.

On October 9, 1995, we filed, with the circuit court, a Motion to Dismiss and Request for Attorney's Fees (attached). In our motion, we asserted that the Commission had exclusive jurisdiction over this matter as provided by case law and Chapter 367, Florida Statutes. A hearing on the motion to dismiss is now being scheduled.

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All Commissioners

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By this memorandum, Staff is advising the Commission of our action in Circuit Court. A copy of the Complaint and the Motion to Dismiss are attached to this memorandum.

RRJ/mw

Attachments

IN THE CIRCUIT/COUNTY COURT OF THE EIGHTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR ALACHUA COUNTY, FLORIDA
CIVIL DIVISION, ALACHUA COUNTY COURTHOUSE
201 E. UNIVERSITY AVENUE, P.O. BOX 600
GAINESVILLE, FLORIDA 32602
PHONE: (904) 374-3616 • FAX (904) 338-3201

Turkey Creek, Inc., and
Family Diner, Inc.,
PLAINTIFF

95-1098-WS

-VS-

Case Number: 95-3065-CA
Division K

Florida Public Service Commission,
DEFENDANT

SEAL
A TRUE COPY

SUMMONS

[Signature]
SHERIFF, LEON CO., FLORIDA

THE STATE OF FLORIDA
To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in this action on defendant
Florida Public Service Commission c/o Division of Records
101 East Gaines Street, Fletcher Building & Reporting
Tallahassee, Florida 32399 4075 Esplanade Way

Each defendant is required to serve written defenses to the complaint or petition on plaintiff's attorney whose name and address is

Michael W. Jones, P.A.
Post Office Box 90099
4046 Newberry Road
Gainesville, Florida 32607

within ³⁰ ~~25~~ days after service of this summons on that defendant, exclusive to the day of service, and to file the original of the defenses with the clerk of this court either before service on plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

WITNESS my hand and the seal of said Court on September 14, 19 95

J.K. "Buddy" Irby
Clerk Circuit Court

[Signature]
ALACHUA COUNTY, FLORIDA

By: Landra Stalner
As Deputy Clerk

(Court Seal)

INDEXED - DATE
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RECORDS/REPORTING

IN THE CIRCUIT COURT OF FLORIDA, EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA
CIVIL ACTION

| | | |
|------------------------------------|---|----------------------|
| TURKEY CREEK, INC., and |) | |
| FAMILY DINER, INC., | : | |
| |) | CASE NO.: 95-3065-CA |
| Plaintiffs, | : | |
| |) | DIVISION: K |
| vs. | : | |
| |) | |
| FLORIDA PUBLIC SERVICE COMMISSION, | : | |
| |) | |
| Defendant. | : | |
| |) | |

COMPLAINT FOR DECLARATORY RELIEF

The plaintiffs, TURKEY CREEK, INC., and FAMILY DINER, INC., sue the defendant, FLORIDA PUBLIC SERVICE COMMISSION, and say:

1. This is an action for declaratory relief, pursuant to Chapter 86, Florida Statutes (1993).

2. The plaintiffs were the former owners and operators of a water and wastewater utility facility, located in Alachua County, Florida. At all material times, the plaintiffs were active Florida corporations headquartered in Alachua County, Florida.

3. The defendant is an agency of the State of Florida which, among other things, regulates certain water and wastewater utilities.

4. On or about June 30, 1992, the defendant assumed jurisdiction over the plaintiffs' utilities operation, and thereafter, issued several orders affecting the plaintiffs' utility.

5. Effective on or about September 23, 1993, the plaintiffs sold said utility to the City of Alachua, which thereafter owned

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and operated it. Since said date, the plaintiffs have neither owned nor operated any utility under the defendant's jurisdiction.

6. On or about December 3, 1993, the defendant issued its Order No.: PSC-93-1769-FOF-WS, which finalized two underlying orders of the Commission. The effect of these orders from the Commission was to direct the plaintiffs to make certain refunds to its former customers, failing which the utility may be subject to various fines and penalties.

7. The plaintiffs have not made the refunds ordered by the Commission, challenging the Commission's jurisdiction and authority over companies which no longer own or operate utilities systems. The plaintiffs believe that, by virtue of their prior sale of the utilities to the City of Alachua, and by virtue of their cessation of utilities operations, they are no longer subject to the defendant's jurisdiction, and therefore, that the order requiring refunds is a nullity and is unenforceable. Also, Family Diner, Inc. did not own or operate the utilities when the order was entered.

8. The defendant disputes the plaintiffs' jurisdictional contentions and asserts its continuing authority over the plaintiffs. In fact, as recently as August 1995, the defendant's staff recommended to the defendant that the plaintiffs be sanctioned and that the highest monetary fine be imposed on the plaintiffs.

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9. There is a genuine dispute between the parties about their respective rights and obligations under the statutes and orders which govern these matters, and about the plaintiffs' obligation to comply with Commission orders. The dispute is real, current, and genuine.

WHEREFORE, the plaintiffs, TURKEY CREEK, INC., and FAMILY DINER, INC., request a judgment of this court declaring the rights and obligations of the parties in this dispute, and taxing costs against the non-prevailing party.

DATED this day of September, 1995.

Respectfully submitted,


Michael W. Jones

IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT IN AND
FOR ALACHUA COUNTY, FLORIDA.

CASE NO. 95-3065-CA

DIVISION K

TURKEY CREEK, INC. AND FAMILY
DINER, INC.,

Plaintiffs,

vs.

FLORIDA PUBLIC SERVICE COMMISSION

Defendant,

DEFENDANT, FLORIDA PUBLIC SERVICE COMMISSION'S
MOTION TO DISMISS AND REQUEST FOR ATTORNEY'S FEES

Defendant, Florida Public Service Commission (Commission) by and through its undersigned attorneys and pursuant to Fla. R. Civ. P. 1.140, moves this Court for an Order dismissing this cause for lack of jurisdiction over the subject matter, and in support thereof states:

MOTION TO DISMISS

1. From the period June 30, 1992 (and before) through September 23, 1993, Turkey Creek, Inc. and Family Diner, Inc. (Plaintiffs) operated a water and wastewater utility. However, as of September 23, 1993, the Plaintiffs turned over operation of the utility to the City of Alachua (see paragraphs 2, 4, and 5 of the Complaint).

2. By this complaint the Plaintiffs seek a declaration regarding their respective rights and obligations in regards to

Order No. PSC-93-1769-FOF-WS, which finalized two other orders of the Commission. The effect of these orders from the Commission was to direct the Plaintiffs to make certain refunds to their former customers, failing which the utility may be subject to various fines and penalties (see paragraphs 1 and 6 of the complaint).

3. Despite Order No. PSC-93-1769-FOF-WS being issued on or about December 3, 1993, the Plaintiffs have still not made the refunds ordered by the Commission¹, saying they are challenging the Commission's jurisdiction and authority over companies which no longer own or operate utility systems (see paragraph 6 of the complaint).

4. Pursuant to Section 367.011(2), Florida Statutes, the Florida Public Service Commission has exclusive jurisdiction over each utility with respect to its authority, service and rates. Chapter 367, Florida Statutes, supersedes all other laws on the same subject, and any subsequent inconsistent laws supersede Chapter 367, Florida Statutes, only to the extent they do so by express reference. See, Section 367.011 (4), Florida Statutes.

5. Therefore, pursuant to Section 367.011(2), Florida Statutes, the Florida Public Service Commission had exclusive jurisdiction over Turkey Creek, Inc. and Family Diner, Inc. as of June 30, 1992. However, pursuant to Section 367.022(2), Florida Statutes, systems owned, operated, managed or controlled by governmental authorities are not subject to regulation by the

¹Pursuant to Section 350.128, Florida Statutes the Plaintiffs appealed the validity of Order No. PSC-93-1769-FOF-WS to the First District Court of Appeal, and on March 27, 1995, the First District Court "Per Curiam. Affirmed." that order.

Commission.

6. In exercising this jurisdiction, the Commission issued, Order No. PSC-93-1769-FOF-WS on or about December 3, 1993, which finalized two other orders of the Commission. These orders directed the Plaintiffs to make certain refunds to their former customers. This the Plaintiffs have not done despite it being over 21 months since the issuance of that order.

7. Pursuant to Chapter 367, Florida Statutes, the Florida Public Service Commission is the proper agency to determine whether a refund was due for the period June 30, 1992, through September 23, 1993. This it did. Further, any review of that decision must be through the First District Court of Appeal as set out in Section 350.128, Florida Statutes. The Plaintiffs are well aware of this requirement, and did, in fact, seek such review. The Plaintiffs are just not happy with the First District Court's affirmance of the order and now improperly seek relief in the circuit court. The appellate courts have cautioned trial courts about infringing upon the jurisdiction of the Florida Public Service Commission. See, Public Service Commission v. Lindahl, 613 So.2d 63 (Fla. 2d DCA 1993) and Hill Top Developers v. Holiday Pines Service Corporation, 478 So. 2d 368 (Fla. 2d DCA 1985).

8. Moreover, neither general law nor the constitution provide a circuit court with concurrent or cumulative power of direct review of Commission actions. Public Service Commission v. Fuller, So. 2d 1210, 1213 (Fla. 1984). In addition, in Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1255 (Fla. 1990), the Court held that the Commission must be allowed to act

when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute. If the Commission is alleged to act without jurisdiction, it is the duty of the appellate court to review the allegation and correct the Commission's error, if any. Id. at 1255.

9. Therefore, as a matter of law, the complaint of the Plaintiffs shows on its face that they have failed to state a cause of action on which the circuit court may grant relief, and the Court must grant the Motion to Dismiss. See, Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

REQUEST FOR ATTORNEY'S FEES

The Defendant, Florida Public Service Commission (Commission), moves this Court to enter an order requiring Plaintiffs, Turkey Creek, Inc., and Family Diner, Inc., to pay reasonable attorney's fees and costs to the Defendant, and, as grounds for this motion, states:

1. Section 57.105, Florida Statutes (1993), authorizes this Court to award reasonable attorney's fees to the prevailing party in any civil action where the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint of the losing party.

2. The Petitioner's complaint is devoid of any justiciable issue of either law or fact and an abuse of the judicial process in that:

a. The current suit in circuit court presents no justiciable question because the Florida Public Service Commission, pursuant to Sections 367.011(2) and

350.128(1), Florida Statutes, has exclusive jurisdiction over each water and wastewater utility with respect to its authority, service, and rates, and any review of any Commission decision must be made by the First District Court of Appeal; and

b. The Petitioner should have recognized, in the light of current case law on jurisdiction, that its complaint was devoid of merit on its face and that its only remedy was an appeal to the First District Court of Appeal.

3. Because the Plaintiffs sought an additional remedy in circuit court, which such remedy is not authorized by either general law or the constitution, the Defendant was forced to divert its resources and the time of its staff to respond to the Plaintiffs' frivolous lawsuit.

Wherefore, the Defendant, the Florida Public Service Commission, requests this court to dismiss this case with prejudice, assess costs, and award reasonable attorney fees in accordance with Section 57.105, Florida Statutes.

Respectfully submitted,



Ralph R. Jaeger, Senior Attorney
Florida Bar No. 326534
Robert Vandiver, General Counsel
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2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
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IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT IN AND
FOR ALACHUA COUNTY, FLORIDA.

CASE NO. 95-3065-CA

DIVISION K

TURKEY CREEK, INC. AND FAMILY
DINER, INC.,

Plaintiffs,

vs.


FLORIDA PUBLIC SERVICE COMMISSION

Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
DEFENDANT, FLORIDA PUBLIC SERVICE COMMISSION'S MOTION TO DISMISS
AND REQUEST FOR ATTORNEY'S FEES, has been furnished by Federal
Express to Michael W. Jones, P.A., 4046 Newberry Road, Gainesville,
Florida 32399 on this 6th day of October, 1995.

Respectfully submitted,



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Robert Vandiver, General Counsel
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