

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

CASE NO. 95-3065-CA

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

Plaintiffs,

vs.

FLORIDA PUBLIC SERVICE COMMISSION

Defendant,

921098

DEFENDANT, FLORIDA PUBLIC SERVICE COMMISSION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Defendant, Florida Public Service Commission (PSC or Commission), respectfully submits its Memorandum of Law in Support of its Motion to Dismiss and Request for Attorney's Fees.

STATEMENT OF FACTS

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 become subject to the provisions of Chapter 367, Florida Statutes. This resolution gave jurisdiction over rates and charges of water and wastewater utilities in Alachua County to the Commission. The resolution was acknowledged by the Commission on September 9, 1992, by Order No. PSC-92-0964-FOF-WS.

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FPSC-RECORDS/REPORTING

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DEFENDANT, FPSC'S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO DISMISS

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.

On October 26, 1992, Turkey Creek Utilities (Turkey Creek) filed an application for water and wastewater certificates under grandfather rights pursuant to Section 367.171, Florida Statutes, to provide service in Alachua County. In response to that application, the Commission issued Order No. PSC-93-0229-FOF-WS.

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. The Commission, therefore, directed Turkey Creek to cease collection of the unauthorized rates and make a refund. Subsequently, on March 4,

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Furthermore, by PAA Order No. PSC-93-0816-FOF-WS, issued May 27, 1993, this Commission required discontinuance of a charge for public fire protection, a reduction in certain miscellaneous service charges, a refund of accrued interest, the installation of irrigation meters, the replacement of certain residential meters, and a revision of the service application. On June 17, 1993, Turkey Creek filed a timely protest of PAA Order No. PSC-93-0816-FOF-WS. As a result of Turkey Creek's timely filed protest to both orders, an administrative hearing was set for November 3, 1993.

Pending the outcome of the November 3rd hearing, by Order No. PSC-93-1090-FOF-WS, issued July 27, 1993, the Commission ordered the utility to hold the difference between its current charges and the charges approved in Order No. PSC-93-0816-FOF-WS subject to refund in order to protect all parties. That order also stated that the utility (Turkey Creek) would be responsible for the refund of any monthly service rates and charges ultimately determined to be in excess of those legally in effect on the date the Commission received jurisdiction. The Commission also ordered the utility to provide by August 27, 1993, a bond, letter of credit or escrow agreement to guarantee the funds collected subject to refund.

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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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.

Because of the utility's October 20, 1993, filing of a 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 revived Orders Nos. PSC-93-0229-FOF-WS, issued February 10, 1993, and PSC-93-0816-FOF-WS, issued May 27, 1993, and made them final and effective.

Order No. 93-1769-FOF-WS 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 6, 1994, Turkey Creek appealed Order No. PSC-93-1769-FOF-WS to the First District Court of Appeal. The appeal was assigned Case No. 94-64. 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.

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On March 27, 1995, the First District Court of Appeal affirmed the Commission's orders. 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 on the Commission. The Commission responded by filing its Motion to Dismiss and Request for Attorney's Fees.

ARGUMENT

I. THE COURT IS WITHOUT JURISDICTION TO REVIEW THE COMMISSION'S ORDERS REQUIRING A REFUND AND SHOULD DISMISS THE ACTION FOR LACK OF SUBJECT MATTER JURISDICTION

The Commission is a governmental agency created by the Florida Legislature as set forth in Chapter 350, Florida Statutes. The Commission is an arm of the legislative branch of government. Pursuant to Section 367.011(2), Florida Statutes, the legislature has invested the Commission with "exclusive jurisdiction over each utility with respect to its authority, service, and rates." Section 367.011(4), Florida Statutes, states, "This chapter shall supersede all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference. This chapter shall not impair or take away vested rights other than procedural rights or benefits." Pursuant to Article I, Section 3(b)(2), of the State Constitution and Section 350.128(1), Florida Statutes, the First

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Fla. Const., those actions are reviewed by the Florida Supreme Court).

The Commission is authorized to regulate the rates, terms and conditions of water and wastewater service as well as the operations inherent in the provision of such service. See, e.g., Sections 367.081, 367.111 and 367.121, Florida Statutes. The authority for establishing rates and charges for a water and wastewater utility by this Commission is specifically set forth in Section 367.081(1), Florida Statutes. The actions of the Commission set forth in Order No. PSC-93-1769-FOF-WS, requiring an adjustment of the rates and a refund, were and are within the Commission's jurisdiction.

In the case of Hill Top Developers v. Holiday Pines Services, 478 So. 2d 368, 371 (Fla. 2d DCA 1985), the Second District discussed the "preemption doctrine" and concluded as follows:

[T]he power and authority of the PSC [Commission] are preemptive. It is plain beyond any doubt that in formulating Chapter 367, the Legislature desired exclusive jurisdiction to rest with the PSC to regulate utilities . . . and to fix charges for service availability. . . . (Emphasis added)

In Hill Top, at 371, the Second District referred to the case of Richter v. Florida Power Corporation, 366 So. 2d 798 (Fla. 2d DCA 1979). The Second District, in Richter, at 799, stated:

The decisional law of Florida attests to the comprehensive character of the PSC's authority in the field of utility regulation.³ See, e.g., Storey v. Mayo, 217 So. 2d 304 (Fla. 1968). (Footnote omitted)

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The decisional law of Florida attests to the comprehensive character of the PSC's authority in the field of utility regulation.³ See, e.g., Storey v. Mayo, 217 So. 2d 304 (Fla. 1968). (Footnote omitted)

In view of the Commission's exclusive jurisdiction in the regulation of water and wastewater utilities, the Commission respectfully states that this Court is without jurisdiction to consider the Commission's decision in Order No. PSC-93-1769-FOF-WS. Where the Commission has jurisdiction to issue an order, the Circuit Court has no jurisdiction to conduct further proceedings. Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989). Moreover, neither general law nor the Constitution provide a Circuit Court with concurrent or cumulative power of direct review of Commission actions. Fuller, at 1213.

In addition, in Florida Public Service Commission v. Bryson, 569 So.2d 1253 (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. Bryson, at 1255. 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. Therefore, while the defense of lack of subject matter jurisdiction may be raised at any time (see, Hill Top Developers; and Department of Health and Rehabilitative Services v. Schreiber, 561 So. 2d 1236 (Fla. 4th DCA 1990)), the Florida Supreme Court, in the Bryson case, has

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determined that it is the duty of the appellate courts and not the circuit courts to correct any such error. In Case No. 94-64, the First District Court of Appeal specifically reviewed and, finding no error, affirmed Order No. PSC-93-1769-FOF-WS. It is clear that Turkey Creek is seeking a second judicial determination on the validity of Order No. PSC-93-1769-FOF-WS (see paragraph 6 of its complaint) and the First District has already issued its mandate upholding the Commission's action.

This case is procedurally similar to State of Florida, Public Service Commission v. Lindahl, 613 So.2d 63 (Fla. 2d DCA 1993). In Lindahl, the Commission entered an order approving a rate increase for water and wastewater service. Certain residents filed a class action against the utility and requested the Circuit Court enjoin the utility from collecting the new rates. The Circuit Court entered the injunction and the Commission appealed. The Second District Court of Appeal held that a circuit court did not have jurisdiction to issue an emergency temporary injunction to prevent the collection of Commission-approved rates. The Second District went on to say: "we again face judicial interference with the regulatory function, and, as we did in Hill Top Developers¹, condemn the trial court's intrusion into the PSC's statutorily delegated responsibility." Lindahl, at 64.

¹Hill Top Developers v. Holiday Pines Services, 478 So.2d 368 (Fla. 2DCA 1985).

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Likewise, this honorable Court lacks the authority to consider the plaintiffs' Complaint for Declaratory Relief as the Commission has exclusive jurisdiction over the rates and charges of a water and wastewater utility, and any appeal of such decision must go to the First District. Turkey Creek did in fact appeal and has lost on appeal. The Commission respectfully states that for the Circuit Court to proceed in this case would be the same judicial overreaching disapproved of in Bryson, Lindahl and Hill Top Developers.

Based on this Court's lack of jurisdiction to proceed in this matter, the Commission respectfully asks that this Court enter an order dismissing the Plaintiff's Complaint for Declaratory Relief.

II. THIS ACTION IS BARRED BY THE PRINCIPLES OF RES JUDICATA AND
COLLATERAL ESTOPPEL

This action is barred by the principles of res judicata and collateral estoppel in that the issues in this suit have already been decided or could have been decided in the case of Turkey Creek, Inc. and Family Diner, Inc. d/b/a Turkey Creek Utilities v. Florida Public Service Commission, 652 So. 2d 822 (Fla. 1st DCA 1995).

As stated above, the Plaintiffs appealed Order No. PSC-93-1769-FOF-WS to the First District Court of Appeal (see attached certified copy of a Notice of Administrative Appeal). This appeal was assigned Case No. 94-64. By Order dated March 27, 1995, the

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First District affirmed the Commission's order. Despite losing this appeal, the Plaintiffs have now filed this Complaint for Declaratory Relief.

In I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541 (11th Cir. 1986), the 11th Circuit both defined the doctrines of res judicata and collateral estoppel, and set out the elements necessary in order for these doctrines to apply. That court, at 1549, stated:

Res judicata or claim preclusion refers to the preclusive effect of a judgment in foreclosing relitigation of matters that were litigated or could have been litigated in an earlier suit. See, e.g., Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984); Interstate Pipe Maintenance, Inc. v. FMC Corp., 775 F.2d 1495, 1497 (11th Cir. 1985). In order for the doctrine of res judicata to bar a subsequent suit, four elements must be present: (1) there must be a final judgment on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases. See, e.g., Harte v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Ray v. Tennessee Valley Authority, 677 F.2d 813, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S. Ct. 788, 74 L.Ed.2d 994 (1983).

* * * * *

The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. See, e.g., Ray, 677 F.2d at 821; White

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v. World Finance of Meridian, Inc., 653 F.2d 147, 150 (5th Cir. Unit A 1981). In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form. See, e.g., White, 653 F.2d at 150. (e.s.) (footnote omitted)

In order for collateral estoppel (defined as issue preclusion), to be applicable, the 11th Circuit, in Greenplatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985) and I.A. Durbin, at 1549, determined that the following prerequisites must be present.

(1) The issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

There is no question that the issue in the appeal was the validity of Order No. PSC-93-1769-FOF-WS, that the appeal was taken to its final conclusion, and that the subject order was upheld. Therefore the issue has been litigated and there has been a final judgment rendered by a court of competent jurisdiction.

Therefore, the Commission would assert that all the requirements for res judicata are satisfied, and this suit should be dismissed.

However, even if this were not so, the doctrine of collateral

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estoppel would still apply. The parties are raising the exact same issue as the one involved in the prior litigation and the issue was litigated in that prior litigation. Also, the question of the validity of Order No. PSC-93-1769-FOF-WS was the purpose of the appeal, and the Plaintiffs had a full and fair opportunity to litigate the issue in the earlier proceeding.

Although distinct from res judicata, the related doctrines of the prohibition against splitting of causes of action and the requirement for an election of remedies are applicable. The court in Florida Patient's Compensation Fund v. St. Paul Fire and Marine Ins. Co., 535 So. 2d 335, 338 (Fla. 4th DCA 1988), stated:

[O]ne cannot revisit the same transaction or occurrence, already adjudicated between the same parties, by resort to a new legal theory in a separate law suit. To do so, is an impermissible splitting of causes of action.

See also, Shaver v. F.W. Woolworth Co., 840 F.2d 1361 (7th Cir. 1988); and Haphey v. Linn County, 924 F.2d 1512 (9th Cir. 1991). Therefore, the First District Court of Appeal has already considered the validity of Order No. PSC-93-1769-FOF-WS, and the Plaintiffs should not again be allowed to contest the validity of that order.

III. PURSUANT TO SECTION 57.105(1), FLORIDA STATUTES, THE COURT SHOULD AWARD ATTORNEY'S FEES AS THERE IS A COMPLETE ABSENCE OF A JUSTICIABLE ISSUE OF EITHER LAW OR FACT

Section 57.105(1), Florida Statutes, provides as follows:

(1) The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact

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raised by the complaint or defense of the losing party; provided however, that the losing party's attorney is not personally responsible if he has acted in good faith, based on the representations of his client. If the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense, the court shall also award prejudgment interest.

In the case of Castaway Lounge of Bay County, Inc. v. Reid, 411 So.2d 282, 284 (Fla. 1st DCA 1982), the First District considered the purpose of this section and stated:

We believe the statute was intended to penalize stonewallers and foot-draggers alike. . . . Potential litigants and their counsel must realize that serious thought should precede the pursuit of what later may be deemed to be an irresponsible and frivolous claim. . . . The policy is not to cast a chilling effect upon use of the court system but only to discourage unwarranted controversy.

In the case at bar, the Plaintiffs contested the orders of the Commission and knew that any appeal of a Commission decision related to water and wastewater utilities must be made to the First District Court of Appeal. Plaintiffs, in fact, took such an appeal. Having lost that appeal, they still refuse to comply with the First District Court's decision and make the refunds required by the order they appealed (see paragraphs 6 and 7 of the Complaint).

This appears to be exactly the case that the Legislature and the District Court in Castaway Lounge had in mind. The Plaintiffs have had their day in court and lost. They are now just "foot-dragging" and "stonewalling" the Commission.

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The Plaintiffs state in paragraph 5 of the complaint, that they sold the utility in September of 1993. That has never been in dispute and was known when they filed their notice of appeal of Order No. PSC-93-1769-FOF-WS on January 6, 1994, many months after the sale, and the First District still affirmed the Commission's order on March 27, 1995.

The Hill Top Developers case, the Richter case, and the Lindahl case, all cited above, are applicable, and, in Lindahl, at 64, the Second District Court reaffirmed the Hill Top Developers case, and stated:

To preserve the legislature's allocation of jurisdictional authority between the administrative agency and the general equitable power of the circuit courts, we cautioned the bench against "judicial incursion into the province of the agency." Hill Top Developers, 478 So. 2d at 371. We again face judicial interference with the regulatory function, and, as we did in Hill Top Developers, condemn the trial court's intrusion into the PSC's statutorily delegated responsibility.

The courts have repeatedly stated that it was improper for the circuit courts to interfere with the exclusive jurisdiction of the Commission, and yet, that is what the Plaintiffs seek.

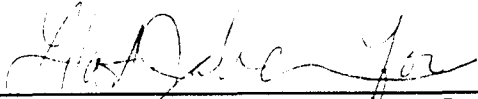
As stated in the Motion to Dismiss portion of this memorandum, neither general law nor the Constitution provide a circuit court with concurrent or cumulative power of direct review of Commission actions. Public Service Commission v. Fuller, 551 So. 2d 1210, 1213 (Fla. 1989).

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Based on all the above, there is a complete absence of a justiciable issue of either law or fact, and Section 57.105, Florida Statutes, requires the award of reasonable attorney's fees.

WHEREFORE, the Defendant, Florida Public Service Commission, requests that this Court dismiss Plaintiffs' complaint based on the lack of subject matter jurisdiction, and award attorney's fees and costs.

Respectfully submitted, this 9th day of February, 1996.



Ralph R. Jaeger, Senior Attorney
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Robert Vandiver, General Counsel
Florida Bar No. 344052
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
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(904) 413-6234

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

CASE NO. 95-3065-CA

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

Plaintiff,

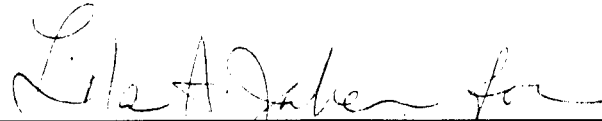
vs.

FLORIDA PUBLIC SERVICE COMMISSION

Defendant,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
has been furnished to Michael Jones, Esquire, 4046 Newberry Road,
Gainesville, Florida 32607 and Peter Enwall, Esquire, Post Office
Box 23879, Gainesville, Florida 32602 by U.S. Mail this 27th day of
February, 1996.



Ralph R. Jaeger, Senior Attorney
Florida Bar No. 326534
Robert Vandiver, General Counsel
Florida Bar No. 344052
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(904) 413-6234

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

TURKEY CREEK, INC., AND)
FAMILY DINER, INC. d/b/a :
TURKEY CREEK UTILITIES,) DOCKET NO.: 921098-WS
Appellant,) ORDER NO. : PSC-93-1769-FOF-WS
vs.) ISSUED: DECEMBER 9, 1993
FLORIDA PUBLIC SERVICE) First DCA No.:
COMMISSION,)
Appellee.)

NOTICE OF ADMINISTRATIVE APPEAL

NOTICE IS GIVEN that TURKEY CREEK, INC., and FAMILY DINER, INC., d/b/a TURKEY CREEK UTILITIES, appeals to the First District Court of Appeal the order of the Florida Public Service Commission rendered December 9, 1993. A conformed copy of this order is attached hereto. The nature of this order is an order reviving proposed agency action, making them final and effective, and requiring refunds.

I HEREBY CERTIFY that the original and one copy of the foregoing has been furnished to the State of Florida Public Service Commission, C/O Steve Tribble, Director, Division of Records and Reporting, Fletcher Building, 101 East Gaines Street, Tallahassee,

A TRUE COPY
ATTEST Kay Hagan
Chief, Bureau of Records

DOCUMENT NUMBER-DATE
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Florida 32399-0850, by Federal Express and a copy of the foregoing has been furnished to John S. Wheeler, Clerk, First District Court of Appeal, 301 Martin Luther King Boulevard, Tallahassee, Florida 32209, by Federal Express this 5th day of January 1994.

MICHAEL W. JONES, P.A.

Original Signed By
MICHAEL W. JONES

BY: _____

MICHAEL W. JONES
4046 Newberry Road
Post Office Box 90099
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Fla. Bar No.: 296198
Attorney for Turkey Creek, Inc.

A TRUE COPY

ATTEST

Kay Hyma
Chief, Bureau of Records

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for)	DOCKET NO. 921098-WS
Certificates to Provide Water)	ORDER NO. PSC-93-1769-FOF-WS
and Wastewater Service in)	ISSUED: December 9, 1993
Alachua County Under Grandfather)	
Rights by TURKEY CREEK, INC. &)	
FAMILY DINER, INC. d/b/a TURKEY)	
CREEK UTILITIES.)	

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON
LUIS J. LAUREDO

ORDER REVIVING PROPOSED AGENCY ACTION ORDERS NOS.
PSC-93-0229-FOF-WS AND PSC-93-0816-FOF-WS.
MAKING THEM FINAL AND EFFECTIVE

AND

REQUIRING REFUNDS

BY THE COMMISSION:

By proposed agency action (PAA) Order No. PSC-93-0229-FOF-WS, issued February 10, 1993, this Commission granted Turkey Creek, Inc. & Family Diner, Inc. d/b/a Turkey Creek Utilities (Turkey Creek) water certificate No. 550-W and wastewater certificate No. 480-S. We 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, we 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. This Commission, therefore, directed Turkey Creek to cease collection of the unauthorized rates and required a refund. In addition, pursuant to Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, we denied Turkey Creek's request to extend its service area beyond the territory it served on the date the Commission assumed jurisdiction over Turkey Creek. Subsequently, on March 4, 1993, Turkey Creek filed a timely petition protesting PAA Order No. PSC-93-0229-FOF-WS.

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Furthermore, by PAA Order No. PSC-93-0816-FOF-WS, issued May 27, 1993, this Commission required discontinuance of a charge for public fire protection, a reduction in certain charges, a refund of accrued interest, the installation of irrigation meters, the replacement of certain residential meters, and a revision of the service application. On June 17, 1993, Turkey Creek filed a timely protest of PAA Order No. PSC-93-0816-FOF-WS. As a result of Turkey Creek's timely filed protest to both orders, an administrative hearing was set for November 3, 1993.

On September 15, 1993, the City of Alachua made a preliminary determination to purchase Turkey Creek. The utility states that the City of Alachua began operating the utility effective September 23, 1993. According to information provided by the City, the sale has been closed and the proceeds were to be held in escrow pending Department of Environmental Protection permitting. 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.

Because of the utility's October 20, 1993, filing of a Notice Dismissing Petitions and the fact that no other protests to the orders were filed, we find it appropriate and necessary to revive Orders Nos. PSC-93-0229-FOF-WS, issued February 10, 1993, and PSC-93-0816-FOF-WS, issued May 27, 1993, and make them final and effective.

Refunds Required

As mentioned above, by Order No. PSC-93-0229-FOF-WS, we required Turkey Creek to reduce its monthly service rates to those which were in effect on June 30, 1992, the date the Commission received jurisdiction over Alachua County and to refund any monies collected pursuant to the rate increases implemented in September and November 1992, including interest. As a result of the utility's protest of that order, the order did not become final. Therefore, the utility continued to charge the higher rates and a refund was never made to the customers.

By Order No. PSC-93-1090-FOF-WS, issued July 27, 1993, we ordered the utility to hold the difference between its current charges and the charges approved in Order No. PSC-93-0816-FOF-WS subject to refund pending the final decision after the hearing. We also ordered the utility to provide by August 27, 1993, a bond, letter of credit or escrow agreement to guarantee the funds

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collected subject to refund. However, an escrow agreement was not executed prior to the sale of the utility to the City of Alachua. Therefore, no funds have been escrowed.

Upon consideration of the above, we find it appropriate to require Turkey Creek to refund all monies collected in excess of the rates and charges approved in Orders Nos. PSC-93-0229-POF-WS and PSC-93-0816-POF-WS. Since this refund is a result of excess charges, the utility shall be required to pay the interest that has 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 shall be made on a per customer basis. Also, the utility shall accomplish the refunds within ninety days from the issuance date of this order and shall file reports consistent with Rule 25-30.360, Florida Administrative Code.

Because the utility has been sold to the City of Alachua, we have determined that all unclaimed refunds shall be forwarded to the City of Alachua for further disposition. We find it appropriate to require the refunds of excess rates and charges for the following periods:

1. Monthly service rates - June 30, 1992, through the date of the sale to the City of Alachua.
2. Accrued interest on customer deposits - June 30, 1992, through the date each customer's deposit was returned.
3. Public fire protection charge to the Turkey Creek Master Owners Association (TCMOA) - all of 1992 and 1993, if any.
4. Miscellaneous service charges - July 6, 1993, through the date of the sale to the City of Alachua.
5. Late payment charges - July 6, 1993, through the date of the sale to the City of Alachua.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Turkey Creek Utilities' Notice Dismissing Petitions Protesting Orders Nos. PSC-93-0229-POF-WS and PSC-93-0816-POF-WS, is acknowledged and the

DOCKET NO. 921098-WS
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Orders are hereby revived and made final and effective. It is further

ORDERED that Turkey Creek Utilities shall refund all monies collected in excess of rates and charges as set forth in the body of this Order. It is further

ORDERED that such refunds shall include interest through the date of refund and shall be made on a per customer basis. It is further

ORDERED that Turkey Creek shall accomplish the refunds within ninety days from the issuance date of this Order. It is further

ORDERED that Turkey Creek shall be required to file reports to reflect the distribution of the required refunds as set forth herein. It is further

ORDERED that this docket remain open to monitor the refunds. It is further

ORDERED that upon completion of the refund, the docket may be closed administratively.

By ORDER of the Florida Public Service Commission, this 2th day of December, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CB/JBL

by: Kay Hymon
Chief, Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

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 25-22.080, 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 sewer 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.