

SUZANNE BROWNLESS, P. A.  
ATTORNEY AT LAW  
1311-B Paul Russell Road, Suite 202  
Tallahassee, Florida 32301

ORIGINAL  
FILE COPY

ADMINISTRATIVE LAW  
GOVERNMENTAL LAW  
PUBLIC UTILITY LAW

TELEPHONE (904) 877-5200  
TELECOPIER (904) 878-0090

August 15, 1996

Ms. Blanca S. Bayó, Director  
Division of Public Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399

RE: Docket No. 96000 P-WS

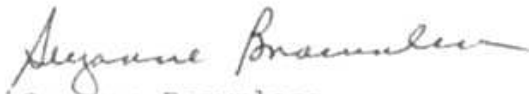
Request of Exemption from Florida Public Service  
Commission regulation for provision of water and  
wastewater service in Pinellas County by Brookgreen  
Apartments

Dear Ms: Bayó:

Enclosed please find the original and fifteen copies of  
Conservation Billing Services, Inc. (CBSI) Notice of Voluntary  
Withdrawal to be filed in the above cited docket.

Thank you for your attention in this matter.

Sincerely,



Suzanne Brownless  
Attorney for Conservation Billing  
Services, Inc.

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Request for exemption from )  
the Florida Public Service Commission )  
regulation for provision of water and )  
wastewater service in Pinellas County )  
by Brookgreen Apartments. )  
)

Docket No. 960009-WS

NOTICE OF VOLUNTARY WITHDRAWAL

Pursuant to Rule 1.420(a)(1), Florida Rules of Civil Procedure, Brookgreen Apartments and Conservation Billing Services, Inc. (CBSI) file this notice of voluntary withdrawal of the above-cited application for a reseller exemption pursuant to §367.022(8), Florida Statutes, and in support thereof state as follows:

1. On January 1, 1996, Brookgreen Apartments and CBSI filed an application for reseller exemption with the Florida Public Service Commission (FPSC). Staff requested additional information from Brookgreen on March 12, 1996 which was timely provided on April 11, 1996. No additional requests for information have been made by FPSC staff. No staff recommendation has been filed in this case nor has administrative action of any type been taken by the staff or FPSC to date.

Background

2. Rule 1.420(a)(1), Florida Rules of Civil Procedure, allows a party to file a notice of voluntary dismissal without order of the court at any time before the case has been submitted to the court or jury for decision. The Florida Supreme Court has interpreted this rule to prohibit petitioners in administrative procedures from filing voluntary dismissals after adverse factual findings have been made by a hearing officer but before the agency

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Suzanne Brownless, P. A., 1311-B Paul Russell Road, Suite 202, Tallahassee, Florida 32301

FPSC-RECORDS/REPORTING

head has acted on the hearing officer's recommendations. Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc., 645 So.2d 374 (Fla. 1994).

3. At the time this docket was filed, §367.031, Florida Statutes, required that:

Each utility subject to the jurisdiction of the commission must obtain from the commission a certificate of authorization to provide water or wastewater service or an order recognizing that the system is exempt from regulation as provided by s. 367.022. A utility must obtain a certificate of authorization or an exemption order from the commission prior to being issued a permit by the Department of Environmental Protection for the construction of a new water or wastewater facility or prior to being issued a consumptive use or drilling permit by a water management district.

[Emphasis added.]

4. Section 367.022(8), Florida Statutes, states:

The following are not subject to the regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided:

(8) Any person who resells water or wastewater service at a rate or charge which does not exceed the actual purchase price thereof, if such person files at least annually with the commission a list of charges and rates for all water service sold, the source and actual purchase price thereof, and any other information required by the commission to justify the exemption; but such person is subject to the provisions of s. 367.122 [meter testing].

5. Effective July 1, 1996, §367.031, Florida Statutes, was amended to read as follows:

Each utility subject to the jurisdiction of

the commission must obtain from the commission a certificate of authorization to provide water or wastewater service. A utility must obtain a certificate of authorization order from the commission prior to being issued a permit by the Department of Environmental Protection for the construction of a new water or wastewater facility or prior to being issued a consumptive use or drilling permit by a water management district.

Chapter 96-407, §3, Laws of Florida.<sup>1</sup>

#### Argument

6. Given the above, Brookgreen is entitled to withdraw its application on two grounds. First, as a matter of right pursuant to the provisions of Rule 1.420(a)(1), Florida Rules of Civil Procedure, adopted by the FPSC by Rule 25-22.035(3), F.A.C., since no administrative action of any type has been taken in this docket. Second, as a matter of law since the FPSC no longer has the statutory authority to issue orders granting a reseller exemption.

7. It is well established law in Florida that the FPSC has only such power as expressly or by necessary implication granted to it by legislative enactment. State Department of Transportation v. Mayo, 354 So.2d 359, 361 (Fla. 1977); Charlotte County v. General Development Utilities, Inc., 653 So.2d 1081, 1084-85 (Fla. 1 DCA

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<sup>1</sup> Chapter 96-410, §94, Laws of Florida, also amends §367.031, Florida Statutes, by adding a reference to newly created Administrative Procedures Act section 120.569 to the last sentence of the statute. The new sentence now reads: "The commission shall grant or deny an application for a certificate of authorization within 90 days after the official filing date of the completed application, unless an objection is filed pursuant to ss. 120.569 and 120.57, or the application will be deemed granted."

1995); Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1254-55 (Fla. 1990). Further, where there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the court must rule against the existence and exercise of that power. City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493, 496 (Fla. 1973); Florida Bridge Co. v. Bevis, 363 So.2d 799, 802 (Fla. 1978).

8. In the instant case there can be no doubt that the legislature intended to remove the authority of the FPSC to issue orders granting an exemption to water and wastewater resellers who meet the exemption definition of §367.022(8), Florida Statutes. Neither is there any question that the net effect of Chapter 96-407's changes is to make water and wastewater resellers self-certifying while continuing to require that they continue to sell at cost, test their meters in accord with the provisions of §367.122, Florida Statutes, and file annual reports with the FPSC.

9. Given both the status of the case and the FPSC's lack of statutory authority to issue exemption orders, the FPSC must acknowledge this voluntary dismissal and close this docket.

WHEREFORE, Brookgreen Apartments and Conservation Billing Services, Inc. request that the Florida Public Service Commission acknowledge this notice of voluntary dismissal and close the above-cited docket.

Respectfully submitted this 15th day of August, 1996 by:

  
\_\_\_\_\_  
SUZANNE BROWNLESS

Suzanne Brownless, P.A.  
1311-B Paul Russell Road  
Suite 202  
Tallahassee, Florida 32301  
(904) 877-5200

Attorney for Brookgreen Apartments  
and CBSI

c:1614

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Request for exemption from )  
the Florida Public Service Comm- )  
ission regulation for provision of )  
water and wastewater service in )  
Pinellas County by Brookgreen )  
Apartments. )  
\_\_\_\_\_ )

Docket No. 960009-WS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Brookgreen  
Apartment and CBSI's Notice of Voluntary Withdrawal has been  
furnished by Hand Delivery (\*) or United States mail this 15 day of  
August, 1996, to the following:

\*Ms. Pat Brady  
Division of Water and Wastewater  
Florida Public Service Comm.  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

\* R. Agarwal, Esquire  
Staff Attorney  
Division of Legal Services  
Florida Public Services Comm.  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

  
\_\_\_\_\_  
Suzanne Brownless

c:1615