

FLORIDA PUBLIC SERVICE COMMISSION
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April 30, 1998

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11:35
FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (BRUBAKER) *ASB*
DIVISION OF WATER & WASTEWATER (MESSER, CHASE) *JH*

RE: DOCKET NO. 980586-WS - SHOW CAUSE PROCEEDING AGAINST
TROPICAL MOBILE HOME PARK FOR VIOLATION OF SECTION
367.171, FLORIDA STATUTES, AND RULE 25-30.035, FLORIDA
ADMINISTRATIVE CODE
COUNTY: POLK

AGENDA: MAY 12, 1998 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\980586WS.RCM

CASE BACKGROUND

On May 14, 1996, the Polk County Commission transferred jurisdiction to this Commission with respect to the regulation of investor-owned water and wastewater utilities within the county. The Public Service Commission recognized this action in Order No. PSC-96-0896-WS-FOF, issued July 11, 1996.

In order to assist in the transition of regulation, the county staff provided a list of utilities to whom it had granted franchise areas and also provided a list of entities that it believed would qualify for PSC regulation, but were not franchised by the county. Tropical Mobile Home Park (Tropical or utility) was included in the former list from the county. However, staff initially believed that the system would qualify for dual exemptions pursuant to Sections 367.022(5) and (6), Florida Statutes (landlord/tenant and small system exemption). This was based on information received from the county and several conversations with the park owner. The utility provides water and wastewater service to approximately 42 mobile home customers, which is included as a part of the lot rental fee. In addition the utility provides water service to 22 customers and wastewater service to four customers outside the park. These customers include both commercial and residential customers.

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Staff received information indicating that the well capacity of the system was in excess of the level that would qualify for a small system exemption. A site visit by Commission staff in August 1997 also confirmed the need for a certificate, pursuant to Section 367.171(2)(b), Florida Statutes (grandfather certificate).

In addition, pursuant to Rules 25-30.110 and 25-30.120, Florida Administrative Code, Tropical has the obligation to remit regulatory assessment fees (RAFs) and file annual reports from the jurisdictional date, May 14, 1996. To date, the utility has not filed the 1996 or 1997 annual reports or paid RAFs for those years. Commission staff advised the utility by letter dated April 10, 1998 of these requirements and was given 45 days in which to comply.

The purpose of this recommendation is to require Tropical to file for a grandfather certificate, direct the utility to file its annual report and remit regulatory assessment fees for the period of May 14, 1996 through calendar year 1996 and 1997, and initiate show cause proceedings.

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DISCUSSION OF ISSUES

ISSUE 1: Should Tropical Mobile Home Park show cause, in writing, within 20 days of the issuance of the order, why it should not be fined \$5,000 for failing to file an application for a grandfather certificate in accordance with Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code?

RECOMMENDATION: Yes, Tropical Mobile Home Park should show cause, in writing, within 20 days of the issuance of the order, why it should not be fined \$5,000 for failing to file an application for a grandfather certificate in accordance with Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code. Further, the Commission should order Tropical to file an application for a grandfather certificate in compliance with Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, by close of business on June 12, 1998. (BRUBAKER, MESSER)

STAFF ANALYSIS: Tropical Mobile Home Park is a small utility located in Polk County, which serves approximately 42 mobile home park customers and 22 customers outside the park. The customers outside the park are both residential and commercial customers. The park was franchised by Polk County; however, the franchise agreement expired in 1994, and had not been renewed by May 14, 1996, which is the date the county transferred regulation of investor-owned utilities to this Commission. The park is currently operating near capacity with respect to its water system and over capacity with respect to its wastewater system during the peak winter season. The system is not operating in compliance with the Florida Department of Environmental Protection (FDEP). Consequently, FDEP has not reissued the utility's permit.

Staff has been aware of this utility system since the time that the Commission received regulatory jurisdiction in May 1996. The system was contacted about the staff trip to the county to assist utilities in completing and filing applications. The utility did not send a representative to the meeting.

As stated in the case background, staff initially believed that the utility would qualify as exempt pursuant to Sections 367.022(5) and (6), Florida Statutes, (landlord/tenant and small system exemption). This was based on the preliminary information received from the county and conversations with the utility owner, Mr. Donald Gugel. Service to the park tenants was included in the lot rental fee. However, additional information concerning the well capacity and an on-site visit by staff in August 1997, confirmed that the utility would be required to file an application

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for a grandfather certificate. The utility's well capacity exceeds the parameters stated in Rule 25-30.055(1), Florida Administrative Code. In addition, the utility separately charges the customers outside of the mobile home park for utility service. Further, staff has received two complaints concerning billing and obtaining service from this utility.

Staff contacted Mr. Gugel in October 1997 to check on the status of the application, and was assured that an application would be filed by the utility. By certified letter dated December 22, 1997, staff requested that Mr. Gugel respond to the service complaint and address the necessity for filing the grandfather application. The letter stated that if the application was not received by January 1998, staff would recommend show cause proceedings.

Mr. Gugel contacted staff and stated he did not have a copy of the application. An application was sent via certified mail on January 6, 1998. Staff contacted Mr. Gugel by phone in February 1998 to verify the status of the application. The phone call was followed by a letter dated February 12, 1998, restating the filing requirements and establishing a filing deadline of March 6, 1998. In response to this letter, Mr. Gugel contacted staff by phone and stated that the application would be filed no later than the end of March 1998. At the date of this recommendation, no application has been filed with the Commission.

Section 367.171(2)(b), Florida Statutes, provides that on the day Chapter 367, Florida Statutes, becomes applicable to any county, any utility engaged in the operation or construction of a system shall be entitled to receive a certificate for the area served by such utility. Furthermore, within 90 days after the utility becomes subject to regulation by the Commission, the utility shall make application for a certificate of authorization. Rule 25-30.035, Florida Administrative Code, sets forth the requirements for an application for a grandfather certificate.

The utility has been provided with multiple opportunities to comply with the requests of staff and the requirements set forth in Commission statutes and rules. Staff has tried to assist the utility by answering any questions, but no such requests have been made. Staff believes that the utility has not provided sufficient justification for the delay in filing its grandfather application.

Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have willfully violated any provision of Chapter 367, Florida Statutes, or lawful rule of the

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Commission. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's conduct in issue here, would meet the standard for a "willful violation."

As discussed previously, Tropical has been contacted on repeated occasions regarding the need to apply for a grandfather certificate. To staff's knowledge, no good-faith effort to file an application has been made by the utility, despite staff's calling the utility's attention directly to the provisions of Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code. Staff believes that this conduct has been "willful" in the sense intended by Section 367.161, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "willful" implies intent to do an act, and this is distinct from intent to violate a rule.

Staff believes that the utility's apparent violation of Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, rises to the level warranting that a show cause order be issued. Staff accordingly recommends that the Commission order Tropical Mobile Home Park to show cause, in writing, within 20 days of the issuance of the Order why it should not be fined in the amount of \$5,000 for failing to file an application for a grandfather certificate in accordance with Section 367.171, Florida Statutes and Rule 25-30.035, Florida Administrative Code.

The show cause order should incorporate the following conditions: Tropical's response to the show cause order must contain specific allegations of fact and law. This opportunity to file a written response shall constitute Tropical's opportunity to be heard prior to a final determination of noncompliance or assessment of penalty. A failure to file a timely written response to a show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. Should Tropical file a timely written response that raises material questions of fact and request a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings may be scheduled before a final determination on this matter is made. If the

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utility fails to respond to the show cause order within 20 days of the issuance of the order, a fine in the amount of \$5,000 should be imposed without further action of the Commission.

Further, staff recommends that the utility be ordered to file an application for a grandfather certificate in compliance with Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, by close of business on June 12, 1998.

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ISSUE 2: Should Tropical Mobile Home Park be directed to file its annual report and regulatory assessment fees for the period of May 14, 1996, through calendar years 1996 and 1997, by May 25, 1998?

RECOMMENDATION: Yes, Tropical Mobile Home Park should be directed to file its annual report and regulatory assessment fees for the period of May 14, 1996, through calendar years 1996 and 1997, by May 25, 1998. (BRUBAKER, CHASE)

STAFF ANALYSIS: As an entity subject to the PSC's jurisdiction, Tropical has the obligation to remit regulatory assessment fees (RAFs) and file annual reports from the jurisdictional date, May 14, 1996, in accordance with Rules 25-30.110 and 25-30.120, Florida Administrative Code. To date, the utility has not filed the 1996 or 1997 annual reports or paid RAFs for those years.

By letter dated April 10, 1998, Commission staff advised the utility of these requirements and was given 45 days in which to comply. Therefore, staff also recommends that the utility be directed herein to file its annual report and regulatory assessment fees for the period of May 14, 1996, through calendar year 1996 and 1997, by May 25, 1998.

Because Tropical was only recently given official notification of its obligation to remit RAFs and file annual reports from the jurisdictional date, staff recommends that no show cause proceedings should be initiated at this time for Tropical's failure to remit its RAFs and annual reports. Rather, if the utility does not respond, staff will present a subsequent recommendation in another docket that show cause proceedings should be initiated.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: If the utility timely responds to the show cause order, staff believes that this docket should remain open pending disposition of the response. If the utility fails to timely respond to the show cause order, the penalty should be deemed assessed with no further action required by the Commission, and this docket should remain open pending remittance of the penalty. If the utility timely responds in writing to the show cause order and requests a hearing, this docket should remain open for final disposition. Further, staff recommends that this docket should remain open pending receipt of the utility's application for a grandfather certificate and final disposition of the application.
(BRUBAKER, MESSER)

STAFF ANALYSIS: If the utility timely responds to the show cause order, staff believes that this docket should remain open pending disposition of the response. If the utility fails to timely respond to the show cause order, the penalty should be deemed assessed with no further action required by the Commission, and this docket should remain open pending remittance of the penalty. If the utility timely responds in writing to the show cause order and requests a hearing, this docket should remain open for final disposition. Further, staff recommends that this docket should remain open pending receipt of the utility's application for a grandfather certificate and final disposition of the application.