State of Florida

Public Service Commission

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

DATE: August 10, 1998

TO: Director, Division of Records and Reporting

FROM: Division of Water and Wastewater (Johnson, Redemann, Crosby)

RE: Docket No. 971192-WS, Application for a Grandfather Certificates to Operate a water and wastewater utility in Polk County by Bieber Enterprises Inc. D/B/A Breeze Hill Utilities.

The above-referenced case was filed August 6, 1998. The attached recommendation has been revised to include Attachment B on page 10, which is a suggested sample notice for the utility to use as required in Issue 3. This addition does not result in any content changes in the recommendation, however subsequent page numbers are changed with the inclusion of Attachment B. The attached revised recommendation should replace in its entirety the recommendation previously filed on August 6, 1998.

CAJ

8/10/98

Julia,
I recommend this be accepted.
Mr "T"

cc: Blanca

State of Florida

Revised 8/10/98

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: AUGUST 6, 1998

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

FROM: DIVISION OF WATER AND WASTEWATER (JOHNSON, REDEMANN)
DIVISION OF LEGAL SERVICES (CROSBY)

RE: DOCKET NO. 971192-WS - APPLICATION FOR GRANDFATHER CERTIFICATES TO OPERATE A WATER AND WASTEWATER UTILITY IN POLK COUNTY BY BIEBER ENTERPRISES INC. D/B/A BREEZE HILL UTILITIES.
COUNTY: POLK

AGENDA: 08/18/98 - REGULAR AGENDA - ISSUE 3 SHOULD BE PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\971192.RCM

CASE BACKGROUND

On September 11, 1997, Breeze Hill Utilities (Breeze Hill or utility) filed an application for a grandfather certificate to provide water and wastewater service in Polk County pursuant to Section 367.171, Florida Statutes. The application was filed after the Board of County Commissioners of Polk County adopted a resolution on May 14, 1996, which made the utilities in the County subject to the jurisdiction of the Commission pursuant to the provisions of Chapter 367, Florida Statutes. The resolution was acknowledged by this Commission on July 11, 1996, by Order No. PSC-96-0896-FOF-WS.

At the time the Commission received jurisdiction, the utility was owned by Lake Walk In The Water Village Associates, LTD, not by Breeze Hill Utilities. Breeze Hill Utilities entered into an agreement on June 13, 1997, to purchase the system from Lake Walk

In The Water Village Associates, LTD and has been operating the system since that time without prior approval of the Commission, which is an apparent violation of Section 367.071, Florida Statutes. Breeze Hill agreed to pay $200,000 for the entire mobile home park community, which includes the water and wastewater treatment facilities.

Breeze Hill is a Class C utility which provides water and wastewater service to 110 residential customers in a mobile home community in Polk county. Breeze Hill is requesting that the Commission issue grandfather certificates in its name to eliminate the duplicate filings of an application for grandfather certificates, immediately followed by a transfer proceeding. Assorted prerequisite filing matters concerning maps and territory description were recently completed.

Pursuant to Rules 25-30.110(3) and 25-30.120(2), Florida Administrative Code, annual reports and regulatory assessment fees are due from regulated utilities regardless of whether a certificate has been granted. This system has been subject to this Commission's jurisdiction since May 14, 1996.

This recommendation addresses Breeze Hill Utilities' application for grandfather certificates in Polk County; the transfer of the utility from Lake Walk In The Water Village Associates, LTD. to Breeze Hill Utilities, and the apparent violation of Section 367.071, Florida Statutes by Lake Walk In The Water Village Associates, LTD.

DISCUSSION OF ISSUES

ISSUE 1: Should Lake Walk In The Village Associates, LTD. be ordered to show cause, in writing within twenty days, why it should not be fined for violation of Section 367.071, Florida Statutes?

RECOMMENDATION: No. Show cause proceedings should not be initiated. (CROSBY)

STAFF ANALYSIS: As stated in the case background, Lake Walk In The Village Associates, LTD. (Lake Walk) is in apparent violation of Sections 367.071, Florida Statutes, which states, in part, "No utility shall sell, assign, or transfer its certificate of

authorization, facilities or any portion thereof . . . without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest. Lake Walk and Breeze Hill entered into agreement for the sale of the system June 13, 1997. The agreement does not contain any provisions making the transfer contingent upon Commission approval. Breeze Hill has been operating the system providing water and wastewater service to customers of the utility since entering into the agreement. Such action is "willful" in the sense intended by Section 367.161, Florida Statutes.

Section 367.161, 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 knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, 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 "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Failure of Lake Walk to obtain the Commission's approval prior to the transfer appears to be due to lack of knowledge of the statutes and Commission rules. Lake Walk and Breeze Hill became aware of the Commission's regulation when they were contacted by the Commission staff. Lake Walk and Breeze Hill informed staff that they were not aware of the Commission's regulation or the requirement to file the application with the Commission for approval of the transfer because they assumed that the system was still under the jurisdiction of Polk County. Upon becoming aware of the Commission's regulation, Breeze Hill immediately filed an application for grandfather certificates.

Although regulated utilities are charged with knowledge of Chapter 367, Florida Statutes, staff does not believe that the violation of Section 367.071, Florida Statutes, rises in these circumstances to the level of warranting the initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order Lake Walk to show cause for its failure to obtain Commission approval prior to the transfer of the utility to Breeze Hill. This recommendation is consistent with the Commission's decision in Order No. 19848, issued August 22, 1988, in Docket No. 880013-WS, Application of Homosassa Utilities, Inc. for water and

sewer certificates under grandfather rights, in Sumter County, Florida. This is also consistent with Order No. PSC-98-0371-FOF-WS, issued March 6, 1998, in Docket No. 961014-WS, Application for Certificates under grandfather rights to provide water and wastewater Service by Crystal River Utilities, Inc. in Polk County.

ISSUE 2: Should the Commission accept Breeze Hill Utility's Agreement for Deed as sufficient to meet the requirements of Rule 25-30.037(2)(q), Florida Administrative Code?

RECOMMENDATION: Yes. (CROSBY)

STAFF ANALYSIS: Rule 25-30.035(6), Florida Administrative Code, requires a utility to provide proof that it owns or has continued use of the land upon which its facilities are located. Breeze Hill provided an agreement for deed executed on June 13, 1997, by Dr. Ricardo Pine and Mr. Paul Bieber. An Agreement for Deed (a.k.a. installment land or sales contract, contract for deed, retained title or conditional sale contract; Cain & Bultman, Inc. v. Miss Sam., Inc., 409 So.2d 114, 118 (Fla. 5th DCA 1982)) is a security device for the sale of land that is intended to take the place of a purchase money mortgage. Under the usual purchase and sale agreement, the seller gives the buyer a deed to the property upon closing.

In an Agreement for Deed, the buyer contracts to purchase the land by making payments over a designated period of time. Usually, after the Agreement is executed, the buyer takes possession of the land, along with the burdens and benefits of ownership. Cain at 118. During the contract period, while the buyer is making payments, title to the land is bifurcated. The buyer has equitable title to the land, and the seller retains bare legal title as security for the unpaid purchase price. White v. Brousseau, 835 Fla. 5th DCA 1990). When the buyer pays the full purchase price, legal title is conveyed to the buyer, usually by warranty deed, and the buyer becomes the full legal owner of the property.

In First Federal Sav. & Loan Ass'n v. Fox, 440 So.2d 652 (Fla. 2d DCA 1983), the Court held that the parties who enter into an Agreement for Deed are in essentially the same position as if the vendor had transferred the legal title and taken back a purchase money mortgage. Id. at 653. Since Florida law deems Agreements for Deed to be mortgages, then buyers under an Agreement for Deed are deemed titleholders to the property. Therefore, a buyer under an Agreement for Deed can be seen as the legal titleholder to the property, even though the seller retains possession of the actual legal title. Alternatively, an Agreement for Deed is evidence of the buyer's continued use of the land in question.

Under normal circumstances, the buyer in an Agreement for Deed does not risk losing possession or control of the land as long as he/she fulfills the terms of the Agreement. Pursuant to Florida

law, if the buyer defaults in an Agreement for Deed, the seller must go through foreclosure to restore an equitable interest in (possession and control of) the property. Any attempt by the seller to repossess the land without legal process subjects the seller to liability for trespass. Mid-State Investment Corporation v. O'Steen, 133 So.2d 455, 457 (Fla. 1st DCA 1961). Thus, the buyer under an Agreement for Deed is in little danger of losing possession or control of the land, which is what the Commission wants to protect against.

Therefore, for purposes of the Commission's rules, staff believes that the Agreement for Deed filed by Breeze Hill should be found to be sufficient evidence that it owns or has continued use of the land upon which the utility's facilities are located as required by Rule 25-30.035(6), Florida Administrative Code. This is consistent with the Commission's decision in Order No. PSC-94-1357-FOF-WU, issued on November 7, 1994, in Docket No. 930971-WU, Transfer of Facilities From Classic Heritage Homes, Inc. to Consolidated Water Works, Inc. and Amendment of Certificate No. 393-W.

Based on the preceding analysis, Staff believes that the Agreement for Deed, in this docket, is sufficient as evidence of a cost-effective alternative providing for continued use of the land pursuant to Rule 25-03.035, Florida Administrative Code. Therefore, Staff recommends that the Commission accept Breeze Hill's Agreement for Deed as evidence that the utility owns or has continued use of the land upon which the facilities are located as required by Rule 25-30.037(2)(q), Florida Administrative Code.

ISSUE 3: Should the application of Breeze Hill Utilities for grandfather certificates in Polk County be granted?

RECOMMENDATION: Yes, Breeze Hill should be granted Water Certificate No. 598-W and Wastewater Certificate No. 513-S. In addition, Breeze Hill should be ordered to provide notice of the action taken at this agenda conference within seven days of the issuance date of the Proposed Agency Action Order issued in this Docket to the Office of the Public Counsel, the Polk County Commission and the utility customers. Breeze Hill should also be ordered to notice once in a newspaper of general circulation in the service area. (JOHNSON, REDEMANN, CROSBY)

STAFF ANALYSIS: As discussed in the case background, the Board of County Commissioners of Polk County transferred jurisdiction of the privately owned water and wastewater utilities in Polk County to the Commission on May 14, 1996. At that time, this system was owned by Lake Walk. Thereafter, Breeze Hill and Lake Walk entered into a sales agreement without seeking Commission approval, as discussed in Issue 1. On September 11, 1997, Breeze Hill filed its application for a grandfather certificate to provide water and wastewater service in Polk County. The application is in compliance with the governing statute, Section 367.171, Florida Statutes, and other pertinent statutes for a grandfather certificate. The application contains a check in the amount of $400, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code.

The rules and statutes do not require noticing for grandfather certificate applications. However, because Breeze Hill did not own the system at the time that the Commission received jurisdiction of Polk County, we find it appropriate to require Breeze Hill to notice the customers, the Office of Public Counsel, and the Polk County Commission, by providing them a copy of this Order within seven days of its issuance. We further find it appropriate to require Breeze Hill to provide notice in a newspaper of general circulation in the utility's service area. This treatment is consistent with Order No. 19848, issued August 22, 1988, in Docket No. 880013-WS, Application of Homosassa Utilities, Inc. for water and sewer certificates under grandfather rights, Sumter County, Florida, wherein the Commission granted Homosassa Utilities, Inc. grandfather certificates and required the utility to provide a copy of the PAA order to the Office of the Public Counsel, the Sumter County Commission, the Withlacoochee Regional Planning Council and the customers of the utility. The Order also required Homosassa Utilities, Inc. to notice in a newspaper of general circulation in

the service territory. This is also consistent with Order No. PSC-98-0371-FOF-WS, issued on March 6, 1998 in Docket No. 961014-WS, Application for Certificates under Grandfather Rights to Provide Water and Wastewater Service by Crystal River Utilities Inc. in Polk County.

Adequate service territory and system maps and a territory description have been provided as prescribed by Rule 25-30.035(9), (10), and (11), Florida Administrative Code. A description of the territory requested by the applicant is appended to this memorandum as Attachment A. Staff has contacted the Department of Environmental Protection (DEP) and learned that there are no outstanding notices of violation. In addition, the utility is current with respect to regulatory assessments fees for 1996 and 1997 and has filed its 1997 annual report.

Based on the above information, staff recommends that Breeze Hill be granted Water Certificate No. 598-W and Wastewater Certificate No. 513-S to serve the territory described in Attachment A. In addition, since it could be argued that the application should have been filed as an application for original certificates, staff recommends that this Issue be issued as proposed agency action and that Breeze Hill Utilities be required to send a copy of the order within seven days of the date the order is issued to the Polk County Commission, the Office of the Public Counsel and the customers of the utility. Staff further recommends that Breeze Hill be required to publish the notice, as shown on Attachment B, once in a newspaper of general circulation in the service territory. In addition, Staff recommends that Breeze Hill Utilities' be required to provide a copy of the notice to its customers within seven days of the issuance of the order.

Attachment A

Bieber Enterprises, Inc. D/B/A Breeze Hill Utilities

Polk County

Water and Wastewater Service Area

Township 30 South, Range 29 East, Section 32

The North 1,620 feet, East of Lake Walk in the Water Road, and West of Lake Walk in the Water, further described as:

Commence at the Northwest corner of said Section 32, thence North 89°22'30.49" East a distance of 130 feet, more or less, to the Point of Beginning (POB), this point also the East right-of-way of Walk in the Water Road, thence continue North 89°22'30.49" East a distance of 3,709.14 feet to the waters edge of Lake Walk in the Water, (this Point also 3,839.14 feet from the Northwest Corner of said Section 32), thence meander Southerly and slightly Westerly along the waters edge a distance of approximately 1,660 feet, more or less, thence run North 89°58'44.5" West a distance of 1907.0 feet to the East right-of-way of Walk in the Water Road, Thence Northerly along the East right-of-way of Walk in the Water Road the following courses to the POB: thence North 44°30' West a distance of 1,950 feet, more or less, along the East right-of-way of Walk in the Water Road, thence North 40° West a distance of 150 feet, more or less, along the East right-of-way of Walk in the Water Road, thence North 32° West a distance of 130 feet, more or less, along the East right-of-way of Walk in the Water Road to the POB.

(Revised 8/10/98)
Attachment B

APPLICATION FOR ORIGINAL CERTIFICATE
(FOR A UTILITY IN EXISTENCE AND CHARGING RATES)

(Section 367.045, Florida Statutes)

LEGAL NOTICE

Notice is hereby given on (Date), pursuant to Section 367.045, Florida Statutes, of the application of Bieber Enterprises, Inc. D/B/A Breeze Hill Utilities to operate a water and wastewater utility to provide service to the following described territory in Polk County, Florida as follows:

Water and Wastewater Service Area

Township 30 South, Range 29 East, Section 32

The North 1,620 feet, East of Lake Walk in the Water Road, and West of Lake Walk in the Water, further described as:

Commence at the Northwest corner of said Section 32, thence North 89°22'30.49" East a distance of 130 feet, more or less, to the Point of Beginning (POB), this point also the East right-of-way of Walk in the Water Road, thence continue North 89°22'30.49" East a distance of 3,709.14 feet to the waters edge of Lake Walk in the Water, (this Point also 3,839.14 feet from the Northwest Corner of said Section 32), thence meander Southerly and slightly Westerly along the waters edge a distance of approximately 1,660 feet, more or less, thence run North 89°58'44.5" West a distance of 1907.0 feet t the East right-of-way of Walk in the Water Road, Thence Northerly along the East right-of-way of Walk in the Water Road the following courses to the POB: thence North 44°30' West a distance of 1,950 feet, more or less, along the East right-of-way of Walk in the Water Road, thence North 40° West a distance of 150 feet, more or less, along the East right-of-way of Walk in the Water Road, thence North 32° West a distance of 130 feet, more or less, along the East right-of-way of Walk in the Water Road to the POB.

Any objection to the said application must be made in writing and filed with the Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within thirty (30) days from the date of this notice. At the same time, a copy of said objection should be mailed to the applicant whose address is set forth below. The objection must state the grounds for the objection with particularity.

Mr. Paul E. Bieber
Bieber Enterprises, Inc.
152 Breeze Hill
Lake Wales, Florida 33853

ISSUE 4: Should rate base be established and any acquisition adjustment be determined at this time?

RECOMMENDATION: No. The rate base should not be established in this docket. Rate base and acquisition balances should be determined in the utility's next rate proceeding. (JOHNSON)

STAFF ANALYSIS: Section 367.171, Florida Statutes, gives the Commission the authority to establish rate base in a grandfather certificate proceeding. Specifically, Section 367.171(2)(c), Florida Statutes, states:

> Before the Commission issues a certificate of authorization under paragraph (b), it may establish the amount of money prudently invested in property of the utility, which property is used and useful in the public service; may establish other elements of the rate base; and may set and approve rates pursuant to s. 367.081.

The primary goal in a grandfather certificate proceeding is to obtain enough information about the utility to enable the Commission to regulate the utility on a going-forward basis. Although the Commission has the discretion to establish rate base, it has been Commission practice not to establish rate base in grandfather certificate proceedings. When a county turns over jurisdiction to the Commission, the only element in the utility's operation that changes is the entity which regulates it. The utility's ownership, rate base, and rates remain the same. Consequently, there is not the same necessity to review rate base in this type of proceeding as there is in other types of proceedings, such as the sale of a utility or a rate case. Rate base for utilities receiving grandfather certificates is typically established in the utility's first rate proceeding filed under the Commission's jurisdiction.

Staff has reviewed the utility's application for a grandfather certificate and does not believe there are any circumstances in this case which necessitate a rate base review at this time. Therefore, staff recommends that rate base be established and any acquisition adjustment be determined in the next rate proceeding.

ISSUE 5: What rates and charges should be approved for this utility?

RECOMMENDATION: The rates and charges as detailed in the staff analysis should be approved. The effective date of the rates and charges should be the stamped approval date on the tariff. (JOHNSON)

STAFF ANALYSIS: The utility's current rates and charges were approved by the Polk County Board of County Commissioners on August 16, 1983. The utility's current rates and charges are as follows:

Monthly Service Rates

Water:
Residential Service:

	Amount
Flat Rate:	$ 11.00

Wastewater:
Residential Service:

	Amount
Flat Rate:	$ 8.00

Miscellaneous Service Charges

	Water	Wastewater
Initial Connection Fee	$15.00	$15.00
Normal Reconnection Fee	$15.00	$15.00
Violation Reconnection Fee	$15.00	Actual Cost
Premises Visit Fee(in lieu of disconnection)	$10.00	$10.00

Customer Connection (Tap-in) Charge

	Water	Wastewater
Residential:		
Per Unit	$400	$600

The staff notes that although these rates are the last officially approved utility rates, they do not conform to the Commission's standard of using a base facility and gallonage charge rate structure based on metering, pursuant to Rule 25-30.255, Florida Administrative Code. A base facility and gallonage charge rate structure could not be implemented at this time without consumption data from the customers. However, the utility should be placed on notice that it may be required to meter and implement such a structure at the time of a future rate case.

The utility has filed a tariff which reflects the above rates and charges. Staff recommends that they be approved as submitted. Staff further recommends that Breeze Hill Utilities be required to continue to charge these rates and charges until authorized to change by the Commission. The tariff should be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets.

ISSUE 6: Should this docket be closed?

RECOMMENDATION: Yes, upon expiration of the protest period, if no timely protests are filed, and upon submission of the proof of notification, the docket should be closed. (CROSBY)

STAFF ANALYSIS: After submission of the proof of notification and if there are no timely protests to the proposed agency action issue (Issue No. 3), no further action will be required and the docket should be closed.