State of Florida

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: SEPTEMBER 24, 1998

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

FROM: DIVISION OF WATER AND WASTEWATER (WALKER, REDEMANN)
DIVISION OF LEGAL SERVICES (REYES)

RE: DOCKET NO. 961006-WS - APPLICATION FOR CERTIFICATES UNDER GRANDFATHER RIGHTS TO PROVIDE WATER AND WASTEWATER SERVICE BY SPORTS SHINKO UTILITY, INC. D/B/A GRENELEFE UTILITIES IN POLK COUNTY.
COUNTY: POLK

AGENDA: 10/06/98 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\961006B.RCM

CASE BACKGROUND

On May 14, 1996, the Board of County Commissioners of Polk County (County Commission, Polk County or County) adopted a resolution pursuant to Section 367.171, Florida Statutes, declaring that privately-owned water and wastewater utilities in that County were subject to the provisions of Chapter 367, Florida Statutes. This Commission acknowledged the County's resolution by Order No. PSC-96-0896-FOF-WS, issued July 11, 1996, in Docket No. 960674-WS.

This utility system has provided water and wastewater service for customers in Polk County since 1977. In 1987, it was acquired by Sports Shinko Utility, Inc., d/b/a Grenelefe Utilities (Grenelefe or utility). The utility provides water service for about 646 residential customers and 102 general service customers and wastewater service for about 634 residential customers. In 1996, Grenelefe recorded operating revenues of $366,000 for water service and $210,000 for wastewater service. Operating income of

$91,000 was reported for water service, while a $42,000 operating loss was reported for wastewater service.

Grenelefe has been subject to Commission jurisdiction since May 14, 1996. By letter dated July 30, 1996, Grenelefe was advised about its obligation to obtain a certificate. On August 30, 1996, Grenelefe filed an application for grandfather certificates to provide water and wastewater service in Polk County in accordance with Section 367.171(2)(b), Florida Statutes.

On July 2, 1996, Polk County approved a plan to restructure service rates for this system, a rate issue that was pending when the Commission's jurisdiction was first invoked. Before that action, Grenelefe was collecting fixed monthly charges of $20 for water service and $15 for wastewater service as meters had not been installed. However, the Southwest Florida Water Management District (SWFWMD) ordered Grenelefe to install meters to measure water service used for domestic and irrigation purposes. Grenelefe uses both potable and non-potable water sources to provide irrigation service. The rates approved by Polk County use the base facility charge and gallonage rate features. In particular, Polk County approved an irrigation rate, which the utility has been charging for both potable and non-potable irrigation service since September 1, 1996.

On December 9, 1997, by Order No. PSC-97-1546-FOF-WS, this Commission issued Grandfather Certificates Nos. 589-W and 507-S to Grenelefe and approved rates for its potable water and wastewater systems as final agency action. In addition, as a proposed agency action, the Commission ordered Grenelefe to refund all revenues previously collected for non-potable irrigation service because, based on the information available at that time, it did not appear that Polk County had authorized their collection. The Commission also ordered Grenelefe to begin collecting Commission approved base facility and gallonage rates for non-potable irrigation service. Other measures, which are not pertinent here, were also required.

On December 30, 1997, Grenelefe timely filed a protest to the proposed agency actions contained in Order No. PSC-97-1546-FOF-WS in the form of a Petition for Formal Proceeding. Grenelefe argued that the non-potable irrigation rate was approved by Polk County, that the refund was inappropriate, and that other factors must be considered when setting non-potable irrigation rates. On January 15, 1998, Grenelefe Association of Condominium Owners No. 1, Inc. (Association), filed a Counter-Petition for a Formal Administrative Proceeding. On February 20, 1998, the Association filed an Amended Counter-Petition to further clarify that its interests would not be served by imposing a fine, which it had previously requested in its Counter-Petition, on Grenelefe for its collection of non-potable irrigation rates. However, the Association contends that Polk County did not approve non-potable irrigation service rates. An

administrative hearing on this matter was scheduled for September 17-18, 1998.

Because one possible outcome of the proceeding may have been a finding that Polk County had authorized non-potable irrigation rates, the utility would have suffered an unrecoverable loss of revenues if it was not allowed to continue to collect those rates during the pendency of the proceeding. Accordingly, by Order No. PSC-98-0503-PCO-WS, issued April 13, 1998, the Commission approved the utility's collection of temporary rates subject to refund with interest during this proceeding.

During the pendency of this matter, Grenelefe and the Association have been engaged in settlement negotiations, and by Order No. PSC-98-0845-PCO-WS, issued June 25, 1998, the parties' stipulated request for a continuance of the proceedings was granted for a period of twenty days to allow the parties time to finalize their settlement agreement. On July 17, 1998, a settlement agreement was proffered by the parties for the Commission's consideration.

This recommendation addresses this settlement agreement, as well as the utility's failure to establish security for the temporary rates collected subject to refund.

DISCUSSION OF ISSUES

ISSUE 1: Should the settlement agreement between Sports Shinko Utility, Inc., d/b/a Grenelefe Utilities and Grenelefe Association of Condominium Owners No. 1, Inc. be approved?

RECOMMENDATION: Yes, the settlement agreement should be approved. A refund is scheduled per the agreement. The refund should be made with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. The utility should be required to submit the proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility should treat any unclaimed refunds as Contributions in Aid of Construction, pursuant to Rule 25-30.360(8), Florida Administrative Code. (WALKER, REYES)

STAFF ANALYSIS: On July 17, 1998, Grenelefe and the Association filed a proposed settlement agreement concerning Grenelefe's collection of non-potable irrigation rates since September of 1996. That agreement accepts the non-potable irrigation rates and charges approved by Order No. PSC-97-1546-FOF-WS, with this modification: usage above 50,000 gallons per month, per Equivalent Residential Connection (ERC) unit, will increase from $0.61 per thousand gallons to $2.16 per thousand gallons. The agreement also provides that these rates shall apply retroactive to September of 1996, with this further provision: monthly consumption charges shall not apply for usage beyond 25,000 gallons per ERC.

PAA/Temporary Rates

Since September 1, 1996, Grenelefe has been collecting the same rates for non-potable irrigation service that it collects for potable irrigation service. The rates approved by Order No. PSC-97-1546-FOF-WS for non-potable irrigation service are listed below. However, Grenelefe timely filed a protest to the proposed agency actions regarding non-potable irrigation rates.

Base Facility Charge	
5/8" x 3/4"	$ 2.83
1"	$ 7.07
1-1/2"	$ 14.15
2"	$ 22.64
Gallonage Charge	$ .61
(Per 1,000 gallons)	

By Order No. PSC-98-0503-PCO-WS, issued on April 13, 1998, the Commission observed that one possible outcome of the hearing might be a finding that Polk County intended one rate to apply for both systems. The Commission also observed that a full refund of the disputed charges might result. Accordingly, in order to protect both Grenelefe and its customers, the Commission authorized collection of the following temporary rates and charges:

Meter Size	Base Rate	Usage $/Kgals	Inverted Rate
All Meters	$5.50	$1.44 to 25K	$2.16 > 25K

According to Grenelefe, its customers were only billed $274.11 at the $2.16 inverted rate level since September of 1996. On a going-forward basis, the stipulation enlarges the usage allowance, further reducing the chance that the $2.16 rate will be incurred.

Refund Provisions

Meter Size	Base Rate	Usage $/Kgals	Inverted Rate
5/8" x 3/4"	$2.83	$0.61 to 25K	$0.00 > 25K
1"	$7.07	$0.61 to 62.5K	$0.00 > 62.5K
1 1/2"	$14.15	$0.61 to 125K	$0.00 > 125K
2"	$22.64	$0.61 to 200K	$0.00 > 200K

On July 31, 1998, Grenelefe notified staff that under the proposed settlement the overall refund for non-potable irrigation service was $144,474, which includes a $64,933 refund to the Association. The Association's portion of the refund will be offset by amounts it owes Grenelefe for irrigation service. On September 2, 1998, Grenelefe reported that revenues for non-potable irrigation service from September of 1996 through June of 1998 totaled $260,153, including $128,099 billed to the Association.

The base facility charges originally approved in Order No. PSC-97-1546-FOF-WS will be used to calculate any potential refunds from September of 1996 through the date the Commission's order becomes final. These base facility charges will also apply in the future. For refund purposes, the parties agreed that the consumption charge for consumption below 25,000 gallons per month, per ERC, will be $0.61 per thousand gallons, and that this charge should apply retroactive to September of 1996. The utility will accordingly refund the difference between the $0.61 rate and the $1.44 rate to its customers pursuant to the settlement agreement. Any excess charges shall be refunded in full. However, the parties

further agreed that all charges for consumption beyond 25,000 gallons, per ERC unit, should be refunded in full. As noted, the refund balance for the Association will be offset by previously unpaid charges for non-potable irrigation service.

By stipulation, the parties agreed that all refunds should be accorded the treatment prescribed by Rule 25-30.360, Florida Administrative Code. The refunds should be made with interest as required by Section 25-30.360(4), Florida Administrative Code. The utility should be required to submit the proper refund reports pursuant to Rule 25-360(7), Florida Administrative Code. The utility should treat any unclaimed refunds as Contributions in Aid of Construction pursuant to Rule 25-30.360(8), Florida Administrative Code.

Prospective Rates

Meter Size	Base Rate	Usage $/Kgals	Inverted Rate
5/8" x 3/4"	$2.83	$0.61 to 50K	$2.16 > 50K
1"	$7.07	$0.61 to 125K	$2.16 > 125K
1 1/2"	$14.15	$0.61 to 250K	$2.16 > 250K
2"	$22.64	$0.61 to 400K	$2.16 > 400K

For prospective billings, the parties agreed that the appropriate rate should be $0.61/1000 gallons for usage below 50,000 gallons, per ERC, and $2.16 for consumption beyond that level. These rates will be implemented after an order approving the stipulated rates becomes final. For stipulation purposes, the parties have adopted an alternative rate structure whereby rates will increase as consumption rises. This rate structure uses a rate concept based on relative meter sizes, whereby the usage allowance is increased to agree with the larger meter. For example, a 5/8" x 3/4" meter is considered 1 ERC, whereas a 1" meter is 2.5 ERCs, a 1 1/2" meter is 5 ERCs, and a 2" meter is 8 ERCs. If approved, the stipulated $2.16 rate for non-potable irrigation service after 50,000 gallons, per month per ERC, will match the potable irrigation rate approved by Polk County for consumption beyond 25,000 gallons per month per ERC. These inverted rates are heavily weighed to encourage conservation.

In addition, Grenelefe agreed to purchase leak monitors for the Association's use, to retain its non-potable irrigation rates for at least one year, and to not file a rate index for one year. The parties also agreed that enforcement of the Settlement Agreement is contingent upon Commission acceptance of the terms and conditions of the agreement.

For customers other than the Association, the stipulated rates represent a substantial reduction to the rates that were previously being collected. The agreement to hold those rates constant for one year also benefits these customers. In addition, settlement of this matter will result in savings to both time and money for the utility, the Association, and other customers. Based upon the above, the staff recommends approval of the proposed Settlement Agreement.

ISSUE 2: Should Sports Shinko Utility, Inc., d/b/a Grenelefe Utilities be ordered to show cause within 21 days why it should not be fined $5,000 for its failure to comply with Order No. PSC-98-0503-FOF-WS which required the utility to provide security either in the form of a bond, letter of credit or escrow agreement as a guarantee of any potential refund of revenues collected under the temporary rates authorized in the Order?

RECOMMENDATION: No. The utility should not be ordered to show cause why it should not be fined $5,000 for its failure to comply with Order No. PSC-98-0503-FOF-WS by not providing security as a guarantee of any potential refund of revenues collected under the temporary rates. (REYES)

STAFF ANALYSIS: As stated previously, by Order No. PSC-97-1546-FOF-WS, based on the information available at that time, the Commission found that Polk County did not approve a non-potable irrigation rate. Accordingly, the Commission directed Grenelefe to commence collection of the Commission approved base facility charges and reduced gallonage charges for non-potable irrigation service and directed the utility to refund the non-potable irrigation revenues it had collected from the date it became jurisdictional. Grenelefe timely protested these proposed agency actions arguing that the non-potable irrigation rate had been approved by Polk County, and, therefore, the refund was inappropriate. Accordingly, an administrative hearing on the matter was scheduled.

Given that one possible outcome of the proceeding may have been a finding that Polk County had authorized non-potable irrigation rates, the utility would have suffered an unrecoverable loss of revenues if it was not allowed to continue to collect those rates during the pendency of the proceeding. Accordingly, by Order No. PSC-98-0503-PCO-WS, the Commission approved the utility's collection of temporary rates during the pendency of the proceeding. However, in order to protect the customers, the Commission further required the utility to hold all revenues collected pursuant to these rates subject to refund with interest. In order to guarantee the revenues collected subject to refund, Grenelefe was ordered to provide security in the form of a letter of credit, bond, or escrow agreement. It recently has come to staff's attention that the security for the potential refund has not been established.

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 knowingly refused to comply

with, or to have willfully violated, any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission. Each day that such refusal or violation continues constitutes a separate offense.

Utilities are charged with the 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 failure to comply with a Commission order, would meet the standard for a "willful violation." 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 an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

By letter dated July 31, 1998, Grenelefe addressed its apparent violation of the Order by stating that the security unfortunately was never obtained because the utility was involved in intensive and time-consuming settlement negotiations. The utility also states that this issue is compounded by the fact that the Order does not specify a date by which the security must be posted. Due to the utility's decision to dedicate its time, efforts, and money toward resolution of this matter short of a full-blown hearing and avoidance of the attendant litigation expenses that would have been incurred as a result, the utility never obtained the security.

Grenelefe requests that no show cause proceeding be initiated, especially in light of the fact that a settlement agreement has been reached. Grenelefe points out that the settlement terms are in an amount far less than the amount of the security required, and that settlement involves a refund in the nature of a credit for the majority of customers and should not involve the actual payment of monies. Grenelefe further states that his is not to say that the need for security was obviated by the settlement process, but that the facts are clear that the peculiar circumstances of this case provide justification for the Commission to decline to initiate show cause proceedings.

Finally, Grenelefe points out that it immediately offered to obtain the security in question once this essentially overlooked issue was brought to the utility's attention by staff. Should it

be determined that the security is in fact required, Grenelefe states that it will expend every effort to obtain same as rapidly as is practicable.

Although the utility appears to have violated the security requirement of Order No. PSC-98-0503-PCO-WS, staff does not believe the violation warrants the initiation of show cause proceedings. Given the expansive nature of the proceeding and the attendant time and cost that would be involved in litigating this matter, the parties in good faith have been engaged in extensive, time-consuming negotiations in an effort to settle this matter. While these negotiations did not obviate the need for the security, staff is cognizant that the utility's time, efforts, and attention have been dedicated to amicably resolving this matter, and the utility's involvement in the settlement process may have resulted in an oversight with regards to the required security provisions. In addition, staff notes that the settlement proposal involves a refund in the form of a credit for the majority of customers and should not involve the actual payment of monies, thereby alleviating the need or concern for security provisions. Finally, staff notes that the utility has been very cooperative with staff and has offered to immediately resolve the matter if security provisions are still deemed appropriate.

In light of the foregoing, staff does not believe the utility's apparent violation of Order No. PSC-98-0503-PCO-WS by failing to provide security in the form of a letter of credit, bond, or escrow agreement rises to the level of warranting the issuance of a show cause order. Accordingly, staff recommends that a show cause proceeding should not be initiated against Grenelefe.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, upon expiration of the protest period, if no timely protest is filed, and upon completion and verification of the required refund, this docket should be closed administratively. (REYES)

STAFF ANALYSIS: Upon expiration of the protest period, if no timely protest is filed, and upon completion and verification of the required refund, this docket should be closed administratively.