

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by D.R. Horton
Custom Homes, Inc. against
Southlake Utilities, Inc. in
Lake County regarding collection
of certain AFPI charges.

DOCKET NO. 980992-WS

In re: Emergency petition by
D.R. Horton Custom Homes, Inc.
to eliminate authority of
Southlake Utilities, Inc. to
collect service availability
charges and AFPI charges in Lake
County.

DOCKET NO. 981609-WS
ORDER NO. PSC-00-1518-SC-WS
ISSUED: August 22, 2000

The following Commissioners participated in the disposition of
this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.

ORDER DENYING CORPORATE UNDERTAKING AND INITIATING A
SHOW CAUSE PROCEEDING

BY THE COMMISSION:

BACKGROUND

Southlake Utilities, Inc. (Southlake or utility) is a Class C utility providing service to approximately 374 water and 368 wastewater customers in Lake County. On August 4, 1998, D.R. Horton Custom Homes, Inc. (Horton), a developer in Southlake's territory, filed a Complaint against the utility, pursuant to Rules 25-22.036 and 25-30.560, Florida Administrative Code, regarding the collection of allowance for funds prudently invested (AFPI) charges under a developer's agreement entered into by both parties on September 17, 1996. On November 16, 1998, Horton filed a Petition, pursuant to Section 367.101, Florida Statutes, and Rules 25-22.036(4)(b), 25-30.580, and 28-106.301, Florida Administrative Code, to immediately eliminate the authority of Southlake to collect service availability and AFPI charges. By Order No. PSC-99-0027-PCO-WS, issued January 4, 1999, we initiated an

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investigation into the utility's AFPI and service availability charges and held these charges subject to refund.

By Order No. PSC-00-0917-SC-WS, issued May 9, 2000, we ordered the utility to show cause and to provide security for the service availability charges held subject to refund in the event of a protest. A portion of this Order was also a notice of proposed agency action discontinuing the utility's water plant capacity and AFPI charges, reducing the amount of wastewater plant capacity charges, and requiring refunds. On May 30, 2000, the utility timely filed a protest to the proposed agency action portion of the Order and requested a formal hearing in the matter. However, the utility did not file the security for the service availability charges being held subject to refund as required by Order No. PSC-00-0917-SC-WS. The administrative hearing in this matter is scheduled for March 15 and 16, 2001.

CORPORATE UNDERTAKING

On June 28, 2000, the utility filed a request for approval of a corporate undertaking based on Southlake's corporate guarantee. In its request, the utility submitted its comparative balance sheets and income statements for the years 1997, 1998 and 1999. We have reviewed these financial statements and performed an analysis of the four criteria required to approve a corporate undertaking. Based on this analysis, the utility has minimal liquidity and reflects negative equity for 1999 and 1998. In addition, the utility has minimal interest coverage and negative profitability for the same two-year period. We find that Southlake cannot support a corporate undertaking in the amount of \$735,592. Accordingly, Southlake's request for approval of a corporate undertaking as security for the service availability charges being held subject to refund is hereby denied.

SHOW CAUSE

In regard to security for service availability charges being held subject to refund, Order No. PSC-00-0917-SC-WS states that:

In the event of a protest of this Order, the utility shall file either a bond or letter of credit, or if it qualifies, a corporate undertaking for the following:

- 1) Any service availability charges, paid or prepaid, for connections made between December 15, 1998,

and April 18, 2000. For water, 100% of the plant capacity charges, paid or prepaid, shall be secured. For wastewater, the difference between the current plant capacity charge and the plant capacity charge set forth in this Order, paid or prepaid, shall be secured.

2) Any prepaid AFPI charges collected as of December 15, 1998, that have not been escrowed prior to April 18, 2000, shall be secured.

Further, the Order states that "in the event of a protest, all collections of plant capacity charges made after April 18, 2000, paid or prepaid, for water shall be escrowed" and that for wastewater, the difference between the current charge and the plant capacity charge set forth in Order No. PSC-00-0917-SC-WS collected after April 18, 2000, must be secured.

On April 18, 2000, immediately after the agenda conference, Commission staff discussed the security options available to the utility. At that meeting, our staff informed the utility that if it were to request a corporate undertaking, it would have to be from someone other than the utility. Based on our staff's knowledge of the utility's financial condition at that time, Southlake had negative owners' equity and thus would not qualify for a corporate undertaking.

As previously noted, on May 30, 2000, Southlake timely filed a protest to the proposed agency action portion of the Order and requested a formal hearing. However, the utility's protest and request for hearing did not include the security required by Order No. PSC-00-0917-SC-WS for the service availability charges being held subject to refund and for the charges collected after April 18, 2000.

On June 6, 2000, staff counsel contacted counsel for Southlake to inquire about the security required by Order No. PSC-00-0917-SC-WS. Southlake's counsel stated that the utility had hired a consultant to determine the amount of money that was required to be secured and that the utility would provide the required security as soon as possible. On June 13, 2000, the utility submitted an escrow agreement to secure the collection of plant capacity charges made after April 18, 2000. However, the security for the service availability charges, paid or prepaid, for connections made between December 15, 1998, and April 18, 2000, and any prepaid AFPI charges

collected as of December 15, 1998, that have not been escrowed prior to April 18, 2000, was not filed.

On June 22, 2000, staff counsel again contacted counsel for Southlake in regard to the security required for the service availability charges being held subject to refund. Staff counsel instructed the utility to file such security by June 26, 2000. On June 26, 2000, the utility contacted staff counsel and Horton and stated that it needed additional time to file the required security. Staff counsel instructed the utility to file the required security by 9:00 a.m. on June 29, 2000.

On June 28, 2000, the utility filed a request for approval of a corporate undertaking based on Southlake's corporate guarantee. As previously discussed, Southlake cannot support a corporate undertaking in the amount of \$735,592.

Order No. PSC-00-0917-SC-WS states the following:

If the utility chooses a corporate undertaking, the utility or other entity requesting the corporate undertaking shall provide the most recent three years of financial data (i.e., balance sheets and income statements). The criteria for approving a corporate undertaking includes sufficient liquidity, owners' equity, profitability and interest coverage to guarantee any potential refund.

We find that the utility's request for a corporate undertaking based on Southlake's financial condition was inappropriate. At the April 18, 2000, agenda conference, our staff stated that they did not believe that the utility would qualify for a corporate undertaking. This was discussed in more detail with the utility immediately following the agenda conference. We find that it is readily apparent that negative equity and a net loss in 1999 on Southlake's financial statements is insufficient to qualify for a corporate undertaking based on the criteria stated in Order No. PSC-00-0917-SC-WS. Southlake knew or should have known that it would not qualify for a corporate undertaking. Thus, it appears that the utility's request for a corporate undertaking is an attempt to avoid a show cause proceeding.

Section 367.161(1), Florida Statutes, authorizes us 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 Commission rule or order. In failing to file sufficient security for the service availability charges being held subject to refund upon its protest of the proposed agency action portion of Order No. PSC-00-0917-SC-WS, the utility's act was "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, Florida Administrative Code, 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."

Accordingly, Southlake shall show cause, in writing, within 21 days of the issuance date of this Order, why it should not be fined \$500 per day from May 30, 2000, the date it filed its protest to the proposed agency action order, for its apparent violation of Order No. PSC-00-0917-SC-WS. We note that pursuant to Section 367.161(1), Florida Statutes, each day the utility is in violation of Order No. PSC-00-0917-SC-WS constitutes a separate offense, which could conceivably result in a penalty of up to \$5,000 per day since the date the utility began violating Order No. PSC-00-0917-SC-WS. However, given the size of the utility, we find that \$500 per day is an appropriate amount to bring the utility into compliance with Order No. PSC-00-0917-SC-WS.

Southlake's response to the show cause order shall contain specific allegations of fact and law. Should Southlake file a timely written response that raises material questions of fact and makes a request for hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings shall be scheduled before a final determination on this matter is made. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. In the event Southlake fails to file a timely response to the show cause order, the fine shall be deemed assessed with no further action required by the Commission. If the utility timely responds but does not request a hearing, Commission staff shall prepare a recommendation for our consideration regarding the disposition of the show cause order. If the utility responds to the order to show cause by remitting the penalties, then the show cause matter shall be considered resolved.

ORDER NO. PSC-00-1518-SC-WS
DOCKETS NOS. 980992-WS, 981609-WS
PAGE 6

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Southlake Utilities, Inc.'s request for a corporate undertaking is hereby denied. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that Southlake Utilities, Inc., shall show cause, in writing, within 21 days of the issuance date of this Order, why it should not be fined \$500 per day from May 30, 2000, the date it filed its protest to the proposed agency action order, for its apparent violation of Order No. PSC-00-0917-SC-WS. It is further

ORDERED that Southlake Utilities, Inc.'s response to the show cause order shall contain specific allegations of fact and law. If the utility timely files a written response that raises material questions of fact and makes a request for hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings shall be scheduled before a final determination on this matter is made. It is further

ORDERED that failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. It is further

ORDERED that in the event Southlake Utilities, Inc., fails to file a timely response to the show cause order, the fine shall be deemed assessed with no further action required by this Commission. It is further

ORDERED that if Southlake Utilities, Inc., responds to the show cause order by remitting the penalties, then the show cause matter shall be considered resolved. It is further

ORDERED that these dockets shall remain open.

ORDER NO. PSC-00-1518-SC-WS
DOCKETS NOS. 980992-WS, 981609-WS
PAGE 7

By ORDER of the Florida Public Service Commission this 22nd
day of August, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The show cause portion of this order is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by the show cause portion of this order may file a response within 21 days of issuance of the show cause order as set forth herein. This response must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 12, 2000.

ORDER NO. PSC-00-1518-SC-WS
DOCKETS NOS. 980992-WS, 981609-WS
PAGE 8

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to the show cause portion of this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action on the request for corporate undertaking may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater 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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.