

State of Florida



Public Service Commission

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REGULATORY AND REPORTING

DATE: FEBRUARY 8, 2001

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

FROM: DIVISION OF REGULATORY OVERSIGHT (WALDEN) *Walden*
DIVISION OF LEGAL SERVICES (CHRISTENSEN) *Christensen*

RE: DOCKET NO. 991486-WU - INVESTIGATION INTO RETENTION OF
CERTIFICATED AREA OF ELLIS & COMPANY, LTD. (HOLIDAY MALL)
BY FLORALINO PROPERTIES, INC.
COUNTY: PASCO

AGENDA: FEBRUARY 20, 2001 - REGULAR AGENDA - INTERESTED PERSONS
MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\RGO\WP\991486.RCM

CASE BACKGROUND

Floralino Properties, Inc., (Floralino or utility), is a Class C utility located in southwestern Pasco County, Florida, which is in the Northern Tampa Bay Water-Use Caution Area, as designated by the Southwest Florida Water Management District. Floralino owns and operates water facilities on the east side of US Highway 19 in Pasco County. According to its 1997 annual report, Floralino serves approximately 730 water customers with 1999 annual operating revenues of \$137,017 and net income of \$4,535.

Ellis & Company, Ltd. (Holiday Mall), a Floralino customer, had completed some remodeling in 1999 to Holiday Mall. Due to the remodeling, Holiday Mall needed increased fire flow to comply with the county code. Holiday Mall retained an outside consultant to test Floralino's fire line system on June 24, 1999, and July 7, 1999, and the results showed the utility's system to be deficient. After notifying Floralino of this deficiency by letter on July 15,

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1999, Floralino responded to Holiday Mall by phone that if an emergency were to arise [a fire], Floralino would connect with Pasco County. Holiday Mall notified Floralino by letter on July 30, 1999 that this condition was not acceptable, since should a fire occur, the need would be immediate and not allow time for an interconnect to be manually activated. Floralino responded through its consultant, H2O Utility Services, Inc. (H2O), that the fire flow test conducted was not representative since neither of the two existing interconnects with Pasco County were in operation at the time of the test. A new six-inch pressure sustaining valve was to be installed, which would automatically activate when demand occurred (such as a fire), and H2O suggested that Holiday Mall re-test the system for fire flow after the valve was installed.

On October 1, 1999, Holiday Mall filed an Application for Deletion of Service Area - Emergency or Temporary Relief Requested. In its application, Holiday Mall requested to be deleted from Floralino's service area because the utility was unable to provide adequate fire flow protection for the recently upgraded mall. Holiday Mall also alleged that the utility had low pressure problems in the past and would be unable to meet its current needs. In the alternative, Holiday Mall requested that it be released from Floralino's certificated territory for fire safety service alone. Included in its application, Holiday Mall attached a letter from Pasco County which indicated that it was only willing to serve the mall if the mall was released for water and wastewater service.

On October 8, 1999, Floralino filed a letter which released Holiday Mall from Floralino's service territory for fire flow protection only. On October 25, 1999, Floralino requested that the fire flow tariff be deleted and held blank for future use. However, no revised tariff sheet was enclosed with this letter. Floralino does not provide wastewater service.

In a letter dated December 1, 1999, Holiday Mall indicated that it was requesting that the Commission not act on Floralino's request to delete its fire flow tariff because of the uncertainty as to whether Pasco County would provide fire flow service only and its expectation that it would be filing an amended deletion application. Subsequently, staff was advised by the parties that Pasco County had agreed to provide temporary fire flow service for a period of two years beginning on or about November 28, 1999, but the issue of a long-term solution had not been reached.

On April 10, 2000, Floralino filed a Motion to Strike or Dismiss Application. On April 18, 2000, Holiday Mall filed its response to Floralino's motion.

Upon review of the above Motion and Response, staff was concerned that Holiday Mall had never made a formal request for improved fire flow service or filed a complaint for low water pressure with the utility and thus, the utility had not had an opportunity to respond to the need for increased fire flow or low water pressure. In a letter dated May 9, 2000, staff expressed its belief that Holiday Mall should make a written request to the utility regarding its needs for increased fire flow service and low pressure complaint.

On May 15, 2000, Holiday Mall sent a letter to the utility requesting adequate service to the mall and restating its complaint regarding the lack of adequate fire protection service. On May 25, 2000, the utility responded to Holiday Mall's request stating that it was ready and willing to provide fire flow service. In this letter, the utility proposed that Holiday Mall provide a deposit of \$5000 dollars to cover any engineering, inspection and plan review by its engineer. On May 25, 2000, Holiday Mall sent a letter to the utility advising that a formal response to the utility's letter would be forth-coming and the silence was not to be considered acquiescence. On June 9, 2000, the utility provided a written withdrawal of its request to cancel the fire flow tariff.

On November 29, 2000, Holiday Mall filed an Amended Application for Deletion of Service Area -- Emergency or Temporary Relief. In its prayer for relief, Holiday Mall renewed its request to be deleted from Floralino's service territory, added to Pasco County's territory, and any emergency or temporary relief necessary to maintain service during the pendency of its application.

On December 29, 2000, the staff engineer visited the utility to gather information. In a letter dated January 9, 2001, Holiday Mall requested that the Commission issue a proposed agency action to delete it from Floralino's service territory. The utility has not filed a response to Holiday Mall's amended application. Staff is not aware of any improvements that have been made to Floralino's system since the initial tests were performed in June and July, 1999.

This recommendation addresses whether the Commission should initiate an investigation into possible deletion of a portion of Floralino's certificated territory and whether Floralino's Motion to Strike and Dismiss should be granted. The Commission has jurisdiction pursuant to Sections 367.011, 367.021, 367.045, and 367.111, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission initiate proceedings to investigate whether certain territory authorized in Floralino Properties, Inc.'s Certificate No. 153-W, should be deleted?

RECOMMENDATION: Yes. Staff recommends that the Commission initiate a proceeding to investigate whether certain territory authorized in Floralino Properties, Inc.'s Certificate No. 153-W, encompassing Holiday Mall, should be deleted. Further, staff recommends that the Commission issue legal notice of the investigation to determine if certain territory should be deleted pursuant to Section 367.045(6), Florida Statutes. (CHRISTENSEN, WALDEN)

STAFF ANALYSIS: As stated in the Case Background, there appears to be sufficient information to initiate a proceeding to investigate whether certain territory authorized in Floralino's Certificate No. 153-W, encompassing Holiday Mall, should be deleted. Staff believes that Holiday Mall's complaint regarding insufficient fire flow and low pressure in conjunction with the utility's lack of responsiveness supports the initiation of an investigation. Section 367.111(1), Florida Statutes, states that

Each utility shall provide service to the area described in its certificate of authorization within a reasonable time. If the commission finds that any utility has failed to provide service to any person reasonably entitled thereto, or finds that extension of service to any such person could be accomplished only at an unreasonable cost and that addition of the deleted area to that of another utility company is economical and feasible, it may amend the certificate of authorization to delete the area not served or not properly served by the utility, or it may rescind the certificate of authorization.

In accordance with Section 367.111(1), Florida Statutes, the Commission may, upon its own motion, initiate a proceeding to investigate whether to amend the certificate of authorization to delete an area not properly served. Currently, Holiday Mall is receiving temporary fire flow service from Pasco County. Holiday Mall asserts that Floralino's facilities are unable to provide adequate service. Moreover, Holiday Mall has indicated that Pasco County is only willing to continue to provide fire flow service until November 2001, after which time the service will be terminated unless the mall is released from Floralino's territory.

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Staff is not aware of any improvements that have been made to Floralino's system since the time that the initial fire flow test were conducted in June and July 1999. Staff believes that the utility has not provided a long-term resolution to the fire flow problem. For the foregoing reasons, staff believes that there are sufficient facts to support the initiation of an investigation as to whether to delete the portion of Floralino's territory which encompasses Holiday Mall.

Pursuant to Section 367.045(6), Florida Statutes, the Commission shall give 30 days' notice before it initiates a revocation, suspension, transfer or amendment action. Therefore, staff recommends that notice be issued within seven days of the issuance date of an order approving the initiation of such investigation in accordance with Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Administrative Code. Subsections (5) and (6) of Rule 25-30.030, Florida Administrative Code, require that certain governing bodies, governmental agencies, and affected persons, including customers in the territory at issue, be noticed by regular mail or personal service. Subsection (7) of Rule 25-30.030, Florida Administrative Code, requires that notice be published once in a newspaper of general circulation in the territory proposed to be deleted. Additionally, staff recommends that notice be published in the Florida Administrative Weekly.

Based on the foregoing, staff recommends that the Commission initiate a proceeding to investigate whether certain territory authorized in Floralino Properties, Inc.'s Certificate No. 153-W, encompassing Holiday Mall, should be deleted. Further, staff recommends that the Commission issue legal notice of the investigation to determine if certain territory should be deleted pursuant to Section 367.045(6), Florida Statutes.

ISSUE 2: Should the Commission grant Floralino's Motion to Strike and Dismiss Application?

RECOMMENDATION: No. Staff recommends that Floralino's Motion to Strike and Dismiss Application should be denied. The application for deletion of territory by Holiday Mall should be treated as a Complaint. (CHRISTENSEN)

STAFF ANALYSIS: As note previously, on October 1, 1999, Ellis & Company, Ltd. (Holiday Mall), filed an Application for Deletion of Service Area - Emergency or Temporary Relief Requested. In its application, Holiday Mall requested to be deleted from Floralino's service area because the utility was unable to provide adequate fire flow protection for the recently upgraded mall. As an alternative request for relief, Holiday Mall asked that it be released from Floralino's service territory for fire safety service only.

On April 10, 2000, Floralino filed a Motion to Strike or Dismiss Application. In support of its Motion to Strike, Floralino states that the rules do not provide standing or a point of entry for Holiday Mall to apply to remove itself from a utility's territory. In its Motion to Strike, the utility asserts that a request for deletion must come from the utility, or come from the Commission if the utility refuses to serve the territory which would result from a show cause or unresolved complaint. Further, Floralino asserts that the application should be dismissed because Holiday Mall failed to state facts sufficient to support the deletion. In support of its Motion to Dismiss, the utility states that it is standard practice accepted by the Commission that when a commercial customer has special needs which require improvement in the utility's facilities, the customer bears the costs. Moreover, Floralino contends that should the application be treated as a complaint, there is no factual support for the complaint.

On April 18, 2000, Holiday Mall filed its response to Floralino's motions. Holiday Mall denies that an application for deletion by a customer is an inappropriate mechanism. Holiday Mall cites to several decisions which it believes stands for this proposition. In its Response, Holiday Mall requested an additional three months to file an amended petition for deletion with supporting factual details.

Upon review of the motions and response, staff believed that the request for deletion was premature because Holiday Mall had not made a formal request for increased fire flow service from the

utility. In addition, as requested in its application, Holiday Mall had received a release from Floralino for fire flow service. However, staff notes that because Pasco County would only provide fire flow service for 24 months, a long-term resolution was required.

On November 29, 2000, Holiday Mall filed an Amended Application for Deletion of Service Area -- Emergency or Temporary Relief. In its amended application, Holiday Mall asserts that the utility is unable to provide adequate service. Holiday Mall alleges that the utility's facilities are unable to provide the necessary fire flow and is unable to revert back to the utility for its fire flow needs. Further, Pasco County has agreed to provide only temporary fire flow protection for two years and will terminate its fire flow service unless the mall is released or deleted from Floralino's territory. Moreover, Holiday Mall asserts that the utility has low pressure problems. Holiday Mall contends that the utility has abdicated its duty to provide adequate water service. In its prayer for relief, Holiday Mall requests to be deleted from Floralino's service territory, added to Pasco County's territory, and any emergency or temporary relief necessary to maintain service during the pendency of its application.

Analysis

Pursuant to Rule 28-106.204, Florida Administrative Code, a motion to dismiss shall be filed no later than 20 days after the petition is served. Staff notes that the utility's Motion to Strike and Dismiss was not filed until approximately six months after the original application was filed. Therefore, the Motion to Dismiss should be dismissed as untimely.

In addition, the original application for deletion has been superseded by the amended application for deletion, which rendered the Motion to Strike and Dismiss moot. The utility has not responded to the amended application or renewed its Motion to Strike and Dismiss. While staff agrees with the utility's position that the statute and rules do not provide for a customer to request deletion from a territory, Section 367.111(1), Florida Statutes, provides that the Commission, upon its own motion, "may amend the certificate of authorization to delete the area not served or not properly served by the utility." In Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), the Supreme Court held, "An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-8. However, staff believes that the application as amended alleges sufficient facts to warrant an investigation as to whether

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to delete territory. Since Section 367.111(1), Florida Statutes, does not provide for a customer to request deletion from a utility's territory, staff believes that it is appropriate to treat the application as a complaint for inadequate service. Holiday Mall's complaint will be addressed in the investigation as to whether to delete territory.

Based upon the foregoing, staff recommends that Floralino's Motion to Strike and Dismiss should be denied.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. If the Commission approves Staff's recommendation in Issue 1, this docket should remain open pending the conclusion of the investigation. (CHRISTENSEN)

STAFF ANALYSIS: If the Commission approves Staff's recommendation in Issue 1, this docket should remain open pending the conclusion of the investigation.