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State of Florida



Public Service Commission

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COMMISSION
CLERK**-M-E-M-O-R-A-N-D-U-M-**

DATE: August 03, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Johnson, Karroth, Walden) *AK*
Office of the General Counsel (Gervasi) *PS Mac*

RE: Docket No. 050595-WS – Application for certificates to provide water and wastewater service in Polk County by Four Points Utility Corporation

AGENDA: 08/15/06 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: ~~Deason~~ *Arriaga*

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\050595.RCM.DOC

Case Background

On September 8, 2005, Island Club West Development, Inc. (Island Club) filed an application for certificates of authorization for an existing utility currently charging for water and wastewater service in Polk County. In January 2006, Island Club chose to place the utility operations under a sister corporation, Four Points Utility Corporation. On June 15, 2006, the utility officially notified the Commission that the utility corporate entity would be Four Points Utility Corporation (Four Points or utility). The utility is located in a water use caution area of the Southwest Florida Water Management District. The utility has been in existence since 2001, and serves approximately 255 residential connections and two general service connections.

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Although Polk County came under Commission jurisdiction on May 14, 1996, this utility was not brought to the attention of the Commission until a customer of the utility filed a complaint. Island Club filed the application after staff had received inquiries from customers about the veracity of charges imposed by the utility. Island Club was billing customers for electric, telephone, cable, county tax, state tax, water and wastewater, and Four Points continues to bill customers for these services. Some of these services are not regulated by the Commission. The issue of electric resale is being addressed and is moving toward resolution with Progress Energy. The phone service issue is pending. While Four Points has filed its IXC registration and tariff, and STS application, the STS application requires additional information to be complete. ~~A recommendation for agenda on the STS application is anticipated to be filed by staff on August 3, 2006.~~

More recently the utility has begun imposing a set up fee of \$195 which covers all utility services (cable, electric, water and wastewater) provided to customers, regardless of whether that customer is a new or existing customer. If the customer fails to pay this fee, the utility is threatening disconnection of service. At least one customer who has contacted the Commission about this newly imposed charge bought his home last summer.

The utility's application for water and wastewater certificates was found to be deficient and a deficiency letter was sent to the utility on October 12, 2005, setting forth the items that were needed to satisfy the minimum filing requirements in this docket. The utility responded with some additional information on December 22, 2005, but deficiencies remained outstanding. A second deficiency letter was sent on March 1, 2006, with a third letter sent May 12, 2006. Additional information was filed on April 7, 18, and May 22, 2006. A fourth deficiency letter was sent on June 5, 2006 and the application remains deficient. The deficiency is that the utility has failed to provide information showing financial viability as required by Rule 25-30.034(1)(d), Florida Administrative Code. In addition, the utility has not been responsive or has been slow to respond to staff requests for additional information.

Sixteen customers took the time to write letters to the Commission complaining about utility billings, service, and objecting to the utility's application for certificate. Other customers sent e-mails concerning billing issues. Many of the customers stated they live out of state and are unable to attend a hearing, so they did not wish to pursue objections to the certificate application. The relationship between the utility owner and the customers has not been amicable due to litigation and antagonism between the homeowners association and the developer. On January 23, 2006, Jim Brett, President of the Island Club West Homeowners Association, filed a request for a hearing on the application for certificates. Therefore, this matter will be set for hearing.

This recommendation was deferred from the July 18, 2006 agenda conference at the request of counsel for the utility. By letter dated July 25, 2006, counsel for the utility advised that the utility will continue to charge its current water and wastewater rates and, pursuant to staffs request, has agreed to hold 44% of its water and wastewater revenues received as of July 18, 2006, subject to refund pending the final outcome of this proceeding. Moreover, unless otherwise authorized by the Commission, the utility has agreed not to discontinue service for

failure of a customer to pay contested bills for utility services subject to the Commission's jurisdiction while the Commission is investigating these matters.

This recommendation is to recommend that temporary rates be approved pending a decision on the merits of the application for certificates of authorization for an existing utility currently charging for water and wastewater service, and to recommend that the utility be required to show cause as to why it should not be fined for charging unauthorized rates. The Commission has jurisdiction pursuant to Sections 367.031, 367.045, 367.081, and 367.161, Florida Statutes.

Discussion of Issues

Issue 1: Should Four Points Utility Corporation be ordered to show cause, in writing within 21 days, as to why it should not be fined for providing water and wastewater service to the public for compensation without first obtaining certificates of authorization and without obtaining the approval of the Commission to charge rates and charges, in apparent violation of Sections 367.045, 367.081(1), and 367.091(3), Florida Statutes, and Rules 25-30.034(1)(g) and 25-30.135, Florida Administrative Code?

Recommendation: Yes. Four Points Utility Corporation should be ordered to show cause, in writing within 21 days, as to why it should not be fined in the amount of \$5,000 for providing water and wastewater service to the public for compensation without first obtaining certificates of authorization and without obtaining the approval of the Commission to charge rates and charges, in apparent violation of Sections 367.031, 367.081(1), and 367.091(3), Florida Statutes, and Rules 25-30.032(1), 25-30.034(1)(g) and 25-30.135, Florida Administrative Code. The order to show cause should incorporate the conditions as set forth in the staff analysis. (Gervasi)

Staff Analysis: Pursuant to Section 367.022(8), Florida Statutes, persons who resell water or wastewater service at a rate or charge which does not exceed the actual purchase price of the water or wastewater are exempt from Commission regulation (reseller exemption). Staff has determined that Four Points is charging above the actual purchase price for the water and wastewater service that it resells. The utility purchases bulk water and wastewater service from Polk County and resells the services at the same residential water and wastewater retail rates that Polk County charges the county's residential customers. The county's residential retail rates are higher than the county's bulk rates. Therefore, the reseller exemption does not apply to Four Points.

Section 367.031, Florida Statutes, requires utilities subject to Commission jurisdiction to obtain certificates of authorization to provide water or wastewater service. Although Four Points has applied for a certificate of authorization in this docket, it has not as yet completed the application and obtained a certificate authorizing it to provide utility service for compensation. Section 367.081(1), Florida Statutes, provides that a utility may only charge rates and charges that have been approved by the Commission. Section 367.091(3), Florida Statutes, requires that each utility's rates, charges, and customer service policies be contained in a tariff approved by and on file with the Commission. Rule 25-30.032(1), Florida Administrative Code, requires that a utility file a completed application. Rule 25-30.034(1) (g), Florida Administrative Code, requires that when an existing utility currently charging for service applies for an initial certificate of authorization, it shall provide a statement specifying on what date and under what authority the current rates and charges were established. Four Points has provided no such statement, nor does staff believe it has obtained the approval of any authority to charge rates and charges. Finally, Rule 25-30.135(1) and (2), Florida Administrative Code, requires utilities to file tariffs and prohibits utilities from modifying or revising their rules, regulations, or schedules of rates and charges until they file and receive approval from the Commission for any such modification or revision.

Four Point's application remains deficient because of its failure to provide a statement regarding the financial ability of the applicant to continue to provide service as required by Rule 25-30.034(1) (d), Florida Administrative Code. In addition, the utility has not been responsive or has been slow to respond to staff requests for additional information. Staff has written several deficiency letters and made numerous phone calls to the utility concerning the incomplete application. By providing water and wastewater service for compensation prior to obtaining a certificate of authorization and without the approval of the Commission, Four Points is in apparent violation of each of the above-identified provisions of Chapter 367, Florida Statutes, and Commission rules.

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). 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. By failing to obtain a certificate of authorization and charging rates and charges prior to Commission approval, the utility's acts were "willful" in the sense intended by Section 367.161, Florida Statutes. In Commission 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.

Staff cannot ascertain any circumstances which would appear to mitigate the utility's failure to obtain certificates of authorization and approval of rates and charges prior to providing water and wastewater service to the public for compensation, in apparent violation of Chapter 367, Florida Statutes, and Commission rules. Staff therefore recommends the Commission require Four Points to show cause, in writing within 21 days, as to why it should not be fined in the amount of \$5,000 for its apparent violation of Sections 367.031, 367.081(1), and 367.091(3), Florida Statutes, and Rules 25-30.032(1), 25-30.034(1)(d), 25-30.034(1)(g), and 25-30.135, Florida Administrative Code. Staff believes that this is a reasonable amount which should serve to capture the utility's attention and encourage the utility to comply with all Commission statutes and rules in the future.

The order to show cause should incorporate the following conditions:

1. The utility's response to the show cause order should contain specific allegations of fact and law;
2. Should Four Points file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding should be scheduled before a final determination of this matter is made;

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3. A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;
4. In the event that Four Points fails to file a timely response to the show cause order, the fine should be deemed assessed with no further action required by the Commission;
5. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order;

If the utility resolves the application deficiency and responds to the show cause order by remitting the fine, this show cause matter should be considered resolved.

Issue 2: Should the utility be authorized to continue charging its current rates on a temporary basis and subject to refund with interest?

Recommendation: Yes. The utility should be authorized on a temporary basis to continue charging its current rates and required to hold 44% of its revenues billed as of July 18, 2006, subject to refund pending the final outcome of this proceeding. If the final rates are lower than the current rates, the applicant should be required to refund the difference, with interest, pursuant to Rule 25-30.360, Florida Administrative Code. The utility should be required to provide evidence of a bond, letter of credit, or escrow account as security in the amount of \$77,050 to guarantee the refund by August 16, 2006. Pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility should file reports with the Commission's Division of Economic Regulation no later than the 20th of each month indicating the monthly and total amount of revenues billed and the amount subject to refund at the end of the preceding month until the final order is issued. The report filed should also indicate the status of the security being used to guarantee repayment of any potential refund. Further, the Commission should prohibit the utility from disconnecting service for failure to pay contested bills for any utility service subject to the Commission's jurisdiction while the Commission is investigating these matters. (Johnson)

Staff Analysis: As mentioned earlier, Four Points filed an application for certificates of authorization for an existing utility currently charging for water and wastewater service. The utility does not have Commission approved rates and has provided little cost justification for the rates that are being charged. In addition, the utility has not completed its application filing. The utility is interconnected with the county and asserts it has an investment in the lines and facilities within the development. The utility purchases bulk water and wastewater service from Polk County and resells the services at the same residential water and wastewater retail rates that Polk County charges the county's residential customers. There are two general service customers, the pool and the club house which are not billed by the utility, but the utility keeps track of the usage. Since the rates are identical to the surrounding utility area, staff recommends that the current rates of the utility should be deemed to be the temporarily approved rates of the utility for residential and general service until modified by the Commission:

<u>WATER</u>	
<u>Residential</u>	
<u>Monthly Service Rates</u>	
<u>Base Charge</u>	\$ 8.93
Charge per 1,000 gallons	
For the first 10,000 gallons	\$ 2.01
For the next 5,000 gallons	\$ 2.52
For the next 5,000 gallons	\$ 3.14
For the next 5,000 gallons	\$ 3.91

WASTEWATER
Residential
Monthly Service Rates

<u>Base Charge</u>	\$ 28.21
Charge per 1,000 gallons	\$ 2.62*
*Maximum 7,000 gallons per month for residential	

Staff recommends that a portion of the current water and wastewater rates being charged by the utility should be held subject to refund with interest until after the applicant completes its application and a hearing is held on the matter. If the final rates are lower than the current rates, the applicant should be required to refund the difference, with interest, pursuant to Rule 25-30.360, Florida Administrative Code.

The utility provided a schedule showing its revenue and operating and maintenance costs for January through April, 2006. For the period of January through April, the utility collected \$58,483 in revenues and incurred expenses totaling \$32,800. The utility's average monthly expenses for purchased water and wastewater services is \$6,950, which requires 48% of the revenues, and administrative services cost \$1,250 per month, which is 8% of the revenue income. Average monthly revenue income is \$14,620. The utility should be allowed to recover the monthly expenses of \$8,200 which represent 56 percent of revenues collected. Therefore 44% of the revenues billed should be held subject to refund.

The applicant should be required to provide evidence of the form of security for the refund. Security for the refund should be in the form of a bond or letter of credit in the amount of \$77,050, or the utility could establish an escrow agreement with an independent financial institution. If the utility chooses a bond as security, the bond should be renewed annually until terminated. If the utility chooses a letter of credit as security, the letter of credit should be irrevocable for the period it is in effect. The bond or the letter of credit should contain wording that it should only be terminated or revoked upon subsequent order of the Commission addressing any refund requirements.

If security is provided through an escrow agreement, the following conditions should be part of the agreement:

- 1) No funds in the escrow account may be withdrawn by the utility without the express approval of the Commission.
- 2) The escrow account shall be an interest bearing account.
- 3) If a refund to the customers is required, all interest earned by the escrow account shall be distributed to the customers.

- 4) If a refund to the customers is not required, the interest earned by the escrow account shall revert to the utility.
- 5) All information on the escrow account shall be available from the holder of the escrow account to a Commission representative at all times.
- 6) The amount of revenue subject to refund shall be deposited in the escrow account within seven days of receipt.
- 7) This escrow account is established by the direction of the Florida Public Service Commission for the purpose(s) set forth in its order requiring such account. Pursuant to Cosentino v. Elson, 263 So. 2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.
- 8) The Director of Commission Clerk and Administrative Services must be a signatory to the escrow agreement.

This account must specify by whom and on whose behalf such monies were paid.

In no instance should the administrative costs associated with the refund be borne by the customers. These costs are the responsibility of, and should be borne by the utility. Irrespective of the form of security chosen by the utility, an account of all monies received in rates should be maintained by the utility. If a refund is ultimately required, it should be paid with interest calculated pursuant to Rule 25-30.360, Florida Administrative Code. In addition, after the temporary rates are in effect, pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility should file monthly reports no later than the 20th of each month indicating the monthly and total amount of money subject to refund at the end of the preceding month until the final order is issued. The reports should also indicate the status of the security being used to guarantee repayment of any potential refund.

Staff recommends that the utility continue charging the current rates on a temporary basis, subject to refund, pending the final outcome of this proceeding. Should the final rates be lower than the current rates, the applicant should be required to refund the difference, with interest, pursuant to Rule 25-30.360, Florida Administrative Code. The utility should be required to provide evidence of a bond or letter of credit as security in the amount of \$77,050 to the guarantee the refund by August 16, 2006. As an alternative, an escrow account can be established. Pursuant to Rule 25-30.360(6), Florida Administrative Code, the utility should file monthly reports no later than the 20th of each month indicating the monthly and total amount of revenues billed and subject to refund at the end of the preceding month until the final order is issued. The reports should also indicate the status of the security being used to guarantee repayment of any potential refund. As stated in the case background, by letter dated July 25, 2006, counsel for the utility advised that the utility will continue to charge its current water and wastewater rates and, pursuant to staffs request, has agreed to hold 44% of its water and wastewater revenues received as of July 18, 2006, subject to refund pending the final outcome of this proceeding.

Further, the Commission should prohibit the utility from disconnecting service for failure to pay contested bills for any utility service subject to the Commission's jurisdiction while the Commission is investigating these matters. As stated in the case background, the utility has agreed not to discontinue service for failure of a customer to pay contested bills for utility services subject to the Commission's jurisdiction while the Commission is investigating these matters, unless otherwise authorized by the Commission.

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Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open pending a ruling on the application for certificates of authorization after a hearing is held on the matter. (Gervasi)

Staff Analysis: No. This docket should remain open pending a ruling on the application for certificates of authorization after a hearing is held on the matter.