

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for certificates to provide water and wastewater service in Polk County by Four Points Utility Corporation. | DOCKET NO. 050595-WS
ORDER NO. PSC-06-0753-SC-WS
ISSUED: September 6, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
ISILIO ARRIAGA
MATTHEW M. CARTER II
KATRINA J. TEW

ORDER TO SHOW CAUSE AND AUTHORIZING TEMPORARY RATES
SUBJECT TO REFUND

BY THE COMMISSION:

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 placed the utility operations under a sister corporation, and on June 15, 2006, officially notified this Commission that the utility corporate entity is 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.

Although Polk County came under this Commission's jurisdiction on May 14, 1996, this utility was not brought to our attention until a utility customer filed a complaint in April, 2005. Island Club filed a certificate application after our staff 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 service, and Four Points continues to bill customers for these services. The issue of electric resale is being addressed and is moving toward resolution with Progress Energy. The telephone 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. The other services provided by Four Points are not regulated by this Commission.

More recently, the utility began imposing a "set up fee" of \$195, which covers all utility services (cable, electric, water and wastewater) provided to new and existing customers. If the customer fails to pay this fee, the utility has threatened disconnection of service.

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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 remained deficient until August 10, 2006, when the utility provided information showing financial viability as required by Rule 25-30.034(1)(d), Florida Administrative Code, under a request for confidential classification. The utility has been slow to respond to staff requests for additional information.

Sixteen customers have written letters of complaint to this Commission about utility billings, service, and have voiced their objections to the utility's certificate application. Other customers have sent e-mails concerning billing issues. Many of the customers stated that because they live out of state, they are unable to attend a hearing and therefore did not wish to pursue their objections to the certificate application. However, on January 23, 2006, Mr. Jim Brett, President of the Island Club West Homeowners Association, filed a request for a hearing on the certificate application. Therefore, this matter will be set for hearing. 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.

A recommendation on this matter 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 our staff's 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 this Commission, the utility has agreed not to discontinue service for failure of a customer to pay contested bills for utility services subject to Commission jurisdiction while we are investigating these matters.

We have jurisdiction pursuant to Sections 367.031, 367.045, 367.081, and 367.161, Florida Statutes.

Show Cause

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). We have 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 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 25-30.034(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 Points' application remained deficient until August 10, 2006, when it provided the necessary financial information as required by Rule 25-30.034(1)(d), Florida Administrative Code. The utility has been slow to respond to staff requests for additional information. Our staff issued several deficiency letters and made numerous phone calls to the utility concerning the incompleteness of the 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.

We 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. We therefore 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)(g), and 25-30.135, Florida Administrative Code. We find this to be a reasonable sum 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 following conditions shall apply to the show cause proceedings:

1. The utility's response to this show cause order shall 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 shall be scheduled before a final determination of this matter is made;
3. A failure to file a timely written response to this show cause order shall 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 this show cause order, the fine shall 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 will be presented to the Commission regarding the disposition of the show cause order; and
6. If the utility responds to the show cause order by remitting the fine, this show cause matter shall be considered resolved.

Temporary Rates

As previously noted, 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. The utility is interconnected with Polk 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. However, the utility keeps track of the usage. Because the rates are identical to the surrounding utility area, we find it appropriate to deem the current rates of the utility to be the temporarily approved rates of the utility for residential and general service until modified by this Commission:

WATER
Residential
Monthly Service Rates

| | |
|------------------------------|---------|
| <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 | |

A portion of the current water and wastewater rates received by the utility shall be held subject to refund with interest until a final decision is made on the matter. If the final rates are lower than the current rates, the applicant shall 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 an administrative services cost of \$1,250 per month, which is 8% of the revenue income. Average monthly revenue income is \$14,620. Four Points is hereby authorized to recover the monthly expenses of \$8,200, which represents 56% of revenues collected. Therefore, 44% of the revenues received as of July 18, 2006, shall be held subject to refund pending the final outcome of this proceeding.

The applicant shall provide security for the potential refund by August 28, 2006, as agreed upon at our August 15, 2006 agenda conference. Security for the refund shall be in the form of a bond or letter of credit in the amount of \$77,050. Alternatively, the utility may establish an escrow agreement with an independent financial institution. If the utility chooses a bond as security, the bond shall be renewed annually until terminated. If the utility chooses a letter of credit as security, the letter of credit shall be irrevocable for the period it is in effect. The bond or the letter of credit shall contain language that it shall 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 shall be made 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.
- 9) This account must specify by whom and on whose behalf such monies were paid.

In no instance shall the administrative costs associated with the refund be borne by the customers. These costs are the responsibility of, and shall be borne by the utility. Irrespective of the form of security chosen by the utility, an account of all monies received in rates shall be maintained by the utility. If a refund is ultimately required, it shall 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 shall 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 a final order is issued authorizing final rates. The reports shall also indicate the status of the security being used to guarantee repayment of any potential refund.

Further, unless otherwise authorized by this Commission, Four Points is hereby prohibited from disconnecting service for failure to pay contested bills for any utility service subject to this Commission's jurisdiction while we are investigating these matters.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Four Points Utility Corporation shall show cause in writing within 21 days why it should not be fined \$5,000 for its 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 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. It is further

ORDERED that the show cause proceedings shall incorporate the conditions set forth in the body of this Order. It is further

ORDERED that Four Points Utility Corporation's current water and wastewater rates as identified in the body of this Order are temporarily approved for residential and general service until modified by this Commission. If the final rates approved for Four Points Utility Corporation by subsequent Order of this Commission are lower than the current rates, the utility shall refund the difference, with interest, pursuant to Rule 25-30.360, Florida Administrative Code. It is further

ORDERED that 44% of the revenues received by Four Points Utility Corporation as of July 18, 2006, shall be held subject to refund with interest pending the final outcome of this proceeding. It is further


ORDERED that Four Points Utility Corporation shall provide security for the potential refund by August 28, 2006, as agreed upon at our August 15, 2006 agenda conference. Security for the refund shall be in the form of a bond or letter of credit in the amount of \$77,050. Alternatively, the utility may establish an escrow agreement with an independent financial institution in accordance with the terms set forth in the body of this Order. It is further

ORDERED that Four Points Utility Corporation shall 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 a final order is issued authorizing final rates. The reports shall also indicate the status of the security being used to guarantee repayment of any potential refund. It is further

ORDERED that unless otherwise authorized by this Commission, Four Points Utility Corporation shall not discontinue service for failure of a customer to pay contested bills for utility services subject to Commission jurisdiction during the pendency of this Commission's water and wastewater, electric, and telephone service investigations. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 6th day of September, 2006.


BLANCA S. BAYO, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

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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 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 the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 27, 2006.

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 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 the Commission Clerk, 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 portion of this order approving temporary rates subject to refund, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.