

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: July 1, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Clapp, Marsh, Walden)
Office of the General Counsel (Young)

RE: Docket No. 080098-WU – Application for certificate to provide water service in Sumter County by Cedar Acres Inc.
County: Sumter

AGENDA: 07/14/09 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: 08/20/09 ~~05/10/09~~ (Statutory Deadline for original certificate pursuant to Section 367.031, Florida Statutes, waived by applicant)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\080098.RCM.DOC

Case Background

On February 13, 2008, Cedar Acres Inc (Cedar Acres, applicant, or utility) filed its application for an original water certificate in Sumter County. The area is in the Southwest Florida Water Management District (SWFWMD) where water use restrictions apply. The utility provides water service to approximately 312 residential customers. Wastewater treatment is provided by septic tanks.

The utility is part of a corporation of the same name which began developing the Oakland Hills mobile home subdivision in 1984. At that time, the property owner determined that there was no existing water utility in the area that could provide service to the development.

Most of the original people associated with establishing the development and utility are no longer associated with the corporation. This turnover in people and incomplete record keeping has resulted in the utility not having a paper trail regarding Sumter County's (County) approval of the utility territory and rates. Neither the County nor the Florida Department of Environmental Protection (DEP) were able to locate the utility's original application; however, DEP did have a record that the utility's permit was issued in 1984.

The utility was subject to Sumter County jurisdiction when the development was designed and the utility was established. The County turned over jurisdiction to the Commission in 1987.¹ The applicant states it was unaware of the change in jurisdiction. Late in 2007, the utility contacted Sumter County for authorization to change the rates. That is when Cedar Acres learned that jurisdiction had changed. Cedar Acres then contacted the Commission for authorization to change its rates. At that point, Cedar Acres learned of the application process for certification and began its application. The last application deficiency was corrected on February 9, 2009.

The utility consists of 2 6-inch wells with each having the capacity to pump 300 gallons per minute, and water distribution lines for potable water service to the Oakland Hills development. The water system serves approximately 312 mobile home connections. The remaining 12 lots have their own wells. All of the Oakland Hills lots are sold.

Pursuant to Section 367.031, Florida Statutes (F.S.), the Commission shall grant or deny an application for a certificate of authorization within 90 days after the official filing date of the completed application. Cedar Acres' application was deemed complete on February 9, 2008, which is considered the official filing date. ~~Therefore, this application must be ruled upon by May 10, 2009.~~

The docket was deferred from the May 5, 2009, Agenda Conference so staff could more thoroughly examine the issues of regulatory assessment fees and annual reports for the period of time during which Cedar Acres was subject to Commission jurisdiction, but was not activity regulated by the Commission. The applicant was contacted regarding this deferment and agreed to waive the deadline until August 20, 2009. Therefore, this application must be ruled upon by August 20, 2009.

This recommendation addresses the application for an original water certificate. The Commission has jurisdiction pursuant to Sections 367.031 and 367.045, F.S.

¹ Order No. 17207, issued February 18, 1987, in Docket No. 870060-WS, In Re: Jurisdictional resolution of the Board of Sumter County Commissioners declaring that Sumter County be subject to the provisions of the Water and Sewer System Regulatory Law, Chapter 367, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission order the utility to show cause, in writing within 21 days, why it should not be fined for operating a water utility without a certificate of authorization in apparent violation of Chapter 367.031, F.S.?

Recommendation: No, Cedar Acres, Inc. should not be ordered to show cause for operating a water utility without a certificate of authorization. ~~No. Show cause proceedings should not be initiated.~~ (Young)

Staff Analysis: As stated, Cedar Acres has been providing water service to the public for compensation since 1987, without a certificate of authorization from the Commission, in apparent violation of Section 367.031, F.S. According to the information provided in the application, Cedar Acres initially believed its systems were regulated by Sumter County. Cedar Acres was not aware that Sumter County gave the Commission jurisdiction in the County in 1987. It was not until Cedar Acres requested a change in rates in 2007 that the utility learned that jurisdiction to regulated private utility companies had been transferred to the PSC. Cedar Acres then contacted the Commission for authorization to change its rates. At that point, Cedar Acres learned of the application process for certification and began its application. The last application deficiency was corrected on February 9, 2009.

Section 367.031, F.S., provides that “each utility subject to the jurisdiction of the commission must obtain from the commission a certificate of authorization to provide water or wastewater service.” Moreover, Section 367.161(1), F.S., 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, F.S. Utilities are charged with the knowledge of the Commission’s statutes and rules. Thus, any intentional act, such as Cedar Acres providing water service to the public for compensation since March of 1997, without first obtaining a certificate of authorization from the Commission, would meet the standard for a “willful violation” of Section 367.161(1), F.S. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, 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., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order the utility to show cause why it should not be fined, stating that “in our view, ‘willful’ implies an intent to do an act, and this is distinct from an intent to violate a statute or rule.” Additionally, “it 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).

Although Cedar Acres’ failure to obtain certificates of authorization from the Commission prior to charging the public for service is an apparent violation of the statutes, there are circumstances which appear to mitigate the apparent violation. As noted in the case background, the utility was subject to Sumter County jurisdiction when the development was designed and the utility was established. The County gave the Commission jurisdiction in the County in 1987. The applicant was unaware of the change in jurisdiction. Late in 2007, the utility contacted Sumter County for authorization to change the rates. That is when Cedar Acres learned that jurisdiction had changed. Cedar Acres then contacted the Commission for

authorization to change its rates. At that point, Cedar Acres learned of the application process for certification, and began its application. The last application deficiency was corrected on

February 9, 2009. In light of these circumstances, and the fact that Cedar Acres has been cooperative in moving forward with Commission certification, ~~Thus,~~ staff does not believe that the apparent violation of Section 367.031, F.S., rise to the level of warranting a show cause order.

~~In the review of the utility's existing rates in Issue 3, staff noted that the revenues generated from the existing water service rates appear to be less than the cost of providing those services. Therefore, staff does not believe that the customers have been harmed by the unauthorized rates and charges. As such, staff recommends that Cedar Acres not be required to refund any portion of its previously unauthorized rates.~~

Therefore, staff recommends that Cedar Acres should not be show caused for providing water service to the public for compensation without first obtaining certificates of authorization from the Commission in apparent violation of Section 367.031, F.S. ~~In addition, staff recommends that Cedar Acres should not be required to refund any portion of its previously unauthorized rates.~~

Issue 2: Should Cedar Acres, Inc. be ordered to show cause, in writing within 21 days, as to why it should not be fined for charging unauthorized rates from September 1987 to present, in apparent violation of Sections 367.081(1) and 367.091(3), Florida Statutes, and Rule 25-30.135, Florida Administrative Code (F.A.C.)?

Recommendation: No, Cedar Acres, Inc. should not be ordered to show cause for charging unauthorized rates from September 1987 to present. However, the utility should be placed on notice that it must charge its Commission-approved rates and charges until authorized to change by the Commission, and that such apparent violations will not be tolerated in the future. (Young)

Staff Analysis: As stated in the case background, Cedar Acres has been charging unauthorized rates for water service to the public from 1987 to present. According to the information provided in the application, Cedar Acres initially believed its systems were regulated by Sumter County. Cedar Acres was not aware that Sumter County gave the Commission jurisdiction in the County in 1987. It was not until Cedar Acres requested a change in rates in 2007 that the utility learned that jurisdiction to regulated investor-owned utility companies had been transferred to the Commission. Cedar Acres then contacted the Commission for authorization to change its rates. At that point, Cedar Acres learned of the application process for certification and began its application.

Section 367.081(1), F.S., provides that a utility may only charge rates and charges that have been approved by the Commission. Section 367.091(3), F.S., 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 25-30.135(1) and (2), F.A.C., 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. By charging the public for water service without Commission approval while subject to the Commission's jurisdiction, Cedar Acres is in apparent violation of the above-identified Commission statutes and rule.

Section 367.161(1), F.S., 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, F.S. By charging the public for water service since 1987 without Commission approval, the utility's act was "willful" in the sense intended by Section 367.161, F.S. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, 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., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order the utility 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."

Although Cedar Acres' failure to obtain Commission approval prior to charging its rates from 1987 to present is an apparent violation of Sections 367.081(1) and 367.091(3), F.S., and Rule 25-30.135, F.A.C., there are circumstances which appear to mitigate the utility's apparent violation. The utility mistakenly believed that it was regulated by Sumter County. When the utility became aware that it was no longer regulated by Sumter County, the utility contacted the

Commission and requested an increase in rates. Cedar Acres has taken the appropriate steps to correct its violations. Cedar Acres has filed for an original certificate and its application was deemed complete on February 8, 2008. Staff would note that the utility has not increased its monthly rates since they were first implemented by Sumter County in the 1980s. The rates include a \$9.00 base facility charge and \$0.045 per 1,000 gallons. Moreover, upon review of the utility's existing rates in Issue 5, staff notes that the revenues generated from the existing water service rates appear to be less than the cost of providing those services. Staff does not believe that the customers have been harmed by the unauthorized rates and charges. Therefore, staff does not believe that the apparent violation of Sections 367.081(1) and 367.091(3), F.S., and Rule 25-30.135, F.A.C., rises in these circumstances to the level which warrants the initiation of a show cause proceeding.

For the foregoing reasons, staff recommends that Cedar Acres, Inc. should not be ordered to show cause for charging unauthorized rates from 1987 to present. However, staff recommends that the Commission place the utility on notice that it must charge the Commission-approved rates and charges until authorized to change by the Commission, and that such apparent statutory and rule violations will not be tolerated in the future.

Issue 3: Should Cedar Acres Inc be ordered to show cause, in writing, within 21 days, why it should not be fined for failure to file annual reports from 1987 to present, in apparent violation of Rules 25-30-110(3), Florida Administrative Code (F.A.C.)?

Recommendation: No, Cedar Acres, Inc. should not be ordered to show cause for failing to file annual reports from 1987 to present. However, the utility should be ordered to file an annual report for 2008, the year the utility filed for an original certificate, by August 31, 2009. If Cedar Acres fails to file its 2008 annual report by August 31, 2009, staff will bring a show cause recommendation at that time. (Young)

Staff Analysis: Rule 25-30.110(3), F.A.C., provides that “each utility shall file with the Commission annual reports...The obligation to file an annual report for any year shall apply to any utility which is subject to this Commission’s jurisdiction as of December 31 of that year, whether or not the utility has actually applied for or has been issued a certificate.” During the time that Cedar Acres should have been subject to the Commission’s jurisdiction, it has failed to file its annual reports; therefore, the utility is in apparent violation of Rule 25-30.110(3), F.A.C. Rule 25-30-110(6) F.A.C., provides that “a penalty shall be assessed against any utility that fails to file annual reports...unless the utility demonstrates good cause for noncompliance.” Further, the rule states that “the Commission may, in its discretion, impose penalties for noncompliance that are greater or lesser than provided by the rule.”

In this case, there are mitigating circumstances which lead staff to recommend that show cause proceedings are not warranted at this time and the Commission should not assess penalties against the utility for failure to file annual reports from 1987 to present. As previously stated, the utility was subject to Sumter County’s jurisdiction when the development was designed and the utility was established. The County turned over jurisdiction to the Commission in 1987. Cedar Acres states it was unaware of the change in jurisdiction. This is evident because in late in 2007, the utility contacted Sumter County for authorization to change the rates. That is when Cedar Acres learned that jurisdiction had changed. Cedar Acres then contacted the Commission for authorization to change its rates. In light of these circumstances, staff believes that the apparent violation of 25-30.110(3), F.A.C, does not rise in these circumstances to the level of warranting the initiation of a show cause proceeding. Moreover, staff believes that Cedar Acres has demonstrated good cause for its apparent noncompliance, and should not be assessed a penalty. Cedar Acres has been contacted regarding filing an annual report for 2008. The utility representative indicated that the annual report for 2008 should be filed by August 31, 2009.

Therefore, staff recommends that the utility should not be ordered to show cause why it should not be fined for its failure to file its annual reports from 1987 to 2007. Moreover, staff recommends that no penalties be assessed against Cedar Acres. However, staff recommends that the Commission order Cedar Acres to file an annual report for 2008, the year the utility filed for an original certificate, by August 31, 2009. If Cedar Acres fails to file its 2008 annual report by August 31, 2009, staff will bring a show cause recommendation at that time.

Issue 4: Should Cedar Acres Inc be ordered to show cause, in writing, within 21 days, why it should not be fined for failure to remit its regulatory assessment fees (RAFs) for 1987 through 2008, in apparent violation of Section 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code (F.A.C.).

Recommendation: No, Cedar Acres, Inc. should not be ordered to show cause for failing to remit its RAFs for 1987 through 2008. (Young)

Staff Analysis: Pursuant to Sections 350.113(3)(e) and 367.145, F.S., and Rule 25-30.120(1), F.A.C., each water and wastewater utility shall remit annually RAFs in the amount of 0.045 of its gross operating revenue. Pursuant to Rule 25-30.120(2), F.A.C., “[t]he obligation to remit the [RAFs] for any year shall apply to any utility which is subject to [the] Commission’s jurisdiction on or before December 31 of that year or for any part of that year, whether or not the utility has actually applied for or has been issued a certificate.” Accordingly, Cedar Acres is responsible for RAFs for the time period of 1987 through December 31, 2008. In failing to remit the RAFs for this time period, Cedar Acres is in apparent violation of the above-referenced statutory and rule provisions.

Utilities are charged with knowledge of the Commission's rules and statutes. As stated, “it is a common maxim, familiar to all minds that ignorance of the law will not excuse any person, either civilly or criminally.” Barlow, 32 U.S. at 411. Thus, any intentional act, such as the utility's failure to remit its RAFs, would meet the standard for a “willful violation.” Also, as stated, 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 willful implies an intent to do an act, and this is distinct from an intent to violate a statute or rule” Id. at 6. Section 367.161, F.S., 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 Commission rule, order or provision of Chapter 367, F.S.,

As discussed in Issues 1, 2, and 3, staff believes that there are mitigating circumstances in this case which lead staff to recommend that show cause proceedings are not warranted at this time. As previously discussed, the utility was subject to Sumter County’s jurisdiction when the development was designed and the utility was established. The County turned over jurisdiction to the Commission in 1987. Cedar Acres states it was unaware of the change in jurisdiction. This was demonstrated by the utility’s action in late 2007, when it contacted Sumter County requesting authorization to change the rates. At that time, Cedar Acres learned that jurisdiction had changed. Cedar Acres then contacted the Commission for authorization to change its rates. The primary purpose of paying RAFs is to defray costs incurred by the Commission in regulating jurisdictional utilities. Staff notes that the Commission has not expended any resources or dollars regulating Cedar Acres until 2008, the year the utility filed for its original certificate. Finally, Cedar Acres has been very cooperative with Commission staff in its efforts to come into compliance with the Commission’s rules and statutes.

For the foregoing reasons, staff does not believe that the apparent violation of Sections 350.113(3)(e) and 367.145, F.S., and Rule 25-30.120(1), F.A.C., rises in these circumstances to the level of warranting the initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order Cedar Acres to show cause, in writing within 21 days, why it should not be fined for its failure to remit its RAFs from 1987 through 2007.

As noted previously, the Commission has not incurred costs regulating Cedar Acres prior to this docket. Section 350.113(3), F.S., states that RAFs shall, to the extent practicable, be related to the cost of regulating such type of regulated company. Staff therefore believes it is appropriate that the Commission assess Cedar Acres RAFs for 2008. Cedar Acres has been contacted regarding its RAFs for 2008. The utility representative indicated that the RAFs for 2008 would be paid by September 30, 2009.

The utility's RAFs for 2008 is \$1,866. This amount is calculated based upon annual revenues of approximately \$41,463 for the 12 months ended June 30, 2007, as filed with the company's certificate application. Staff recommends that the Commission order Cedar Acres to pay the 2008 RAFs by September 30, 2009. If Cedar Acres fails to pay its 2008 RAFs by September 30, 2009, staff will bring a show cause recommendation at that time. In addition, the utility should be put on notice that a statutory penalty plus interest will be assessed on any unpaid 2008 RAFs in accordance with Section 350.113(4), F.S., and Rule 25-30.120(7), F.A.C., after September 30, 2009.

Issue 5 2: Should the application of Cedar Acres Inc for a water certificate be approved?

Recommendation: Cedar Acres Inc should be granted Certificate No. 643-W to serve the territory described in Attachment A, effective the date of the Commission's vote. The resultant order should serve as Cedar Acres' water certificate and it should be retained by the utility. (Clapp, Walden, Young)

Staff Analysis: As stated in the case background, Cedar Acres filed its completed application for an original water certificate to provide service in Sumter County on February 9, 2009. The application is in compliance with the governing statute, Section 367.045, F.S., and other pertinent statutes and administrative rules concerning an application for original certificate. In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code (F.A.C.). No objections to the notice of application have been received and the time for filing such has expired.

Cedar Acres submitted a recorded executed warranty deed in the name of the land development corporation which includes the water facilities. Adequate service territory and system maps and a territory description have been provided as prescribed by Rule 25-30.033(1)(l),(m) and (n), F.A.C. A description of the territory requested by the applicant is appended to this memorandum as Attachment A.

The applicant appears to have the financial and technical ability to provide water service to the proposed service area. Regarding financial ability, the application indicates that the larger corporation has and will continue to provide necessary funds sufficient to cover operation shortfalls. The utility intends to apply for a staff assisted rate case (SARC) soon after receiving a certificate.

Regarding the applicant's technical ability, the applicant has been operating and maintaining the utility for over 20 years, with the help of a licensed plant operator. The utility contracts with a state certified lab for processing all testing. There are no outstanding issues with DEP or SWFWMD.

According to the application, there is currently a need for water service within the proposed service territory. The development corporation representative stated that there appeared to be no other provider of service available at the commencement of the development. Therefore, the developer worked with Sumter County and DEP to secure permits around August of 1985. It is estimated that the utility began providing water service to the requested territory sometime in 1986. The application indicates that the provision of service in the proposed service territory is consistent with the water sections of the local comprehensive plan of Sumter County, as approved by the Department of Community Affairs.

The applicant understands that it must maintain its books and records according to the National Association of Regulatory Utility Commissioners Uniform System of Accounts, as well as the requirements to file annual reports and pay regulatory assessment fees by March 31 for the previous year, beginning with 2009. In addition, the applicant is aware that it may not change rates, serve outside its certificated territory, or sell the utility without prior Commission approval.

Based on the above information, staff believes it is in the public interest to grant the application for original water certificate. Accordingly, staff recommends that Cedar Acres Inc should be granted Certificate No. 643-W to serve the territory described in Attachment A, effective the date of the Commission's vote. The resultant order should serve as the utility's water certificate and it should be retained by Cedar Acres.

Issue 6: What rates and charges should be approved for Cedar Acres Inc?

Recommendation: The water rates currently charged by the utility, including a \$9.00 base facility charge and \$0.045 per 1000 gallons, should be approved. Cedar Acres should charge the approved rates until authorized to change them by this Commission in a subsequent proceeding. The rates should be effective for services rendered or connections made on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475, F.A.C. (Clapp, Walden)

Staff Analysis: As previously discussed, the Commission became aware of the existence of the utility when it contacted staff about the procedure for securing a rate change. Staff advised the utility to apply for an original certificate and then it could apply for a SARC, for a thorough evaluation of the utility's books, records, and plant to determine compensatory rates.

As part of the application, Cedar Acres stated that the monthly rate, which includes a \$9.00 base facility charge and \$0.045 per 1,000 gallons, has not changed since implemented in the 1980s. The bill for a connection using 10,000 gallons a month is \$9.45. The utility reported 2007 revenue of \$41,462.85 and operating and maintenance expenses of \$101,223. Because the utility's financial information is comingled with the financial information of the development, staff was unable to evaluate whether the reported expenses included development expenses. Therefore, staff advised the utility how to access the SARC process pursuant to Section 367.0814, F.S. The utility anticipates submitting a SARC application within 60 days of receiving its water certificate.

Staff recommends that the water rates currently charged by the utility, including a \$9.00 base facility charge and \$0.045 per 1000 gallons, should be approved. Cedar Acres should charge the approved rates until authorized to change them by this Commission in a subsequent proceeding. The rates should be effective for services rendered or connections made on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475, F.A.C.

Issue 7 4: Should this docket be closed?

Recommendation: Yes. If the Commission approves staffs' recommendations in Issues 1-6 3, this docket should be closed because no further action is necessary. (Young)

Staff Analysis: If the Commission approves staffs' recommendations in Issues 1-6 3, this docket should be closed because no further action is necessary.

Cedar Acres Inc
Sumter County
Description of Water Territory

Sections 1 and 2, Township 18 South, Range 23 East

All of the North half of Section 1, lying SW of U. S. Highway 27-441, LESS the SW 1/4 of the NW 1/4 of the NW 1/4, LESS the SW 1/4 of the NE 1/4 lying SW of U. S. Highway 27-441, and LESS that part of the NE 1/4 of the NE 1/4 of the NW 1/4 lying SW of said U.S. Highway 27-441, in Township 18 South, Range 23 East, Sumter County.

Together with the NE 1/4 of Section 2, Township 18 South, Range 23 East, LESS the NW 1/4 of the NE 1/4, Sumter County.

**FLORIDA PUBLIC SERVICE COMMISSION
authorizes
Cedar Acres Inc.
pursuant to
Certificate Number 643-W**

to provide water service in Sumter County in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

<u>Order Number</u>	<u>Date Issued</u>	<u>Docket Number</u>	<u>Filing Type</u>
*	*	080098-WU	Original Certificate

***Order Number and date to be provided at time of issuance.**