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RECORDS AND REPORTING
-M-E-M-O-R-A-N-D-U-M-

DATE: April 8, 1999

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

FROM: DIVISION OF LEGAL SERVICES (BRUBAKER) JB 18
DIVISION OF WATER AND WASTEWATER (MESSER, CHASE) JCS
DIVISION OF ADMINISTRATION (SEWELL, KNIGHT) JK BF

RE: DOCKET NO. 980586-WS - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST TROPICAL MOBILE HOME PARK IN POLK COUNTY FOR VIOLATION OF SECTION 367.171, F.S., AND RULE 25-30.035, F.A.C., APPLICATION FOR GRANDFATHER CERTIFICATE.
COUNTY: POLK

AGENDA: 04/20/99 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\980586WS.RCM

CASE BACKGROUND

On May 14, 1996, the Polk County Commission transferred jurisdiction to this Commission with respect to the regulation of investor-owned water and wastewater utilities within the county. The Public Service Commission recognized this action in Order No. PSC-96-0896-WS-FOF, issued July 11, 1996.

Tropical Mobile Home Park (Tropical or utility) is a small utility located in Polk County, which served approximately 42 mobile home park customers and 22 customers outside the park. The customers outside the park were both residential and commercial customers. The park was franchised by Polk County; however, the franchise agreement expired in 1994, and had not been renewed by May 14, 1996, which is the date the county transferred regulation

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of investor-owned utilities to this Commission. The utility was operating near capacity with respect to its water system and over capacity with respect to its wastewater system during the peak winter season. The system was not operating in compliance with the Florida Department of Environmental Protection (FDEP) rules and regulations. Consequently, FDEP did not reissue the utility's permit.

Staff initially believed that Tropical would qualify for dual exemptions pursuant to Sections 367.022(5) and (6), Florida Statutes (landlord/tenant and small system exemption). This was based on information received from the county and several conversations with the park owner, Mr. Don Gugel. However, staff received information indicating that the well capacity of the system was in excess of the level that would qualify for a small system exemption. A site visit by Commission staff in August 1997 also confirmed the need for a certificate, pursuant to Section 367.171(2)(b), Florida Statutes (grandfather certificate).

After months of trying to assist the owner in the completion of the certificate application, staff brought a recommendation to the May 12, 1998 Agenda Conference that the Commission initiate a show cause proceeding for failing to file for a certificate pursuant to Section 367.171(2)(b), Florida Statutes.

By Order No. PSC-98-0761-SC-WS, issued June 2, 1998, Tropical was ordered to show cause, in writing, within 20 days of the issuance of the Order, why it should not be fined \$5,000 for failing to file an application for a grandfather certificate in accordance with Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code. Further, the Commission ordered Tropical to file an application for a grandfather certificate in compliance with Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, by close of business on June 12, 1998.

In addition, Order No. PSC-98-0761-WS recognized that, as an entity subject to the Commission's jurisdiction, Tropical had the obligation to file annual reports and remit regulatory assessment fees (RAFs) from the jurisdictional date, May 14, 1996, in accordance with Rules 25-30.110 and 25-30.120, Florida Administrative Code. To date, the utility has not filed the 1996 or 1997 annual reports or paid RAFs for those years.

Because Tropical had only recently been given official notification of its obligation to remit RAFs and file annual reports from the jurisdictional date, no show cause proceedings

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were initiated pursuant to Order No. PSC-98-0761-SC-WS. Rather, the Commission ordered that if the utility did not file its annual report and RAFs for the period of May 14, 1996, through calendar years 1996 and 1997, by May 25, 1998, staff would present a subsequent recommendation in another docket that show cause proceedings should be initiated.

One June 15, 1998, a letter was filed with the Commission's Division of Records and Reporting from Mr. Don Gugel, the owner of the utility. In his response, Mr. Gugel stated that he was no longer able to financially run the system, and that he was returning the property to the mortgagor, L & M Mortgage Service. Shortly after the receipt of this letter, staff was no longer able to contact Mr. Gugel, who remains inaccessible and whose whereabouts are unknown.

Staff contacted and arranged to meet with the mortgage holders and their attorney on September 18, 1998. Also present at the meeting was the former water plant operator and various representatives from the Polk County Health Department. The regional FDEP person was invited but was unable to attend. The meeting clarified the areas where some additional information was needed in order for staff to verify whether the plant was actually providing service outside of the mobile home park, what fees were being collected for such service, and whether the mortgage holders intended to sell their interest or move forward to foreclosure proceedings.

On January 11, 1999, staff received information the mortgage holder's attorney with respect to these questions. From this information, staff has been able to verify that the utility does not provide any customers with either water or wastewater service. The mobile home park is used by migrant laborers and no one is in the park at this time. Former water customers of the utility outside of the park are now being served by Wahneta Water System, Inc., which is a non-profit exempt utility serving the community of Wahneta in Polk County. The former wastewater customers have installed septic tanks. The mortgage holder's attorney visited the site with an engineer and confirmed that the wastewater treatment site is not in operation or functional at this time.

The purpose of this recommendation is to resolve the show cause proceedings initiated by Order No. PSC-98-0761-SC-WS, and to address the filing of annual reports and RAFs.

DISCUSSION OF ISSUES

ISSUE 1: Should Tropical Mobile Home Park be fined \$5,000 for failing to file an application for a grandfather certificate pursuant to Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code?

RECOMMENDATION: No, Tropical Mobile Home Park should not be fined \$5,000 for failing to file an application for a grandfather certificate pursuant to Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code. (BRUBAKER, MESSER)

STAFF ANALYSIS: By Order No. PSC-98-0761-SC-WS, the Commission found that the utility's apparent violation of Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code, rose to the level warranting that a show cause order be issued. The Commission ordered that Tropical Mobile Home Park show cause, in writing, within 20 days of the issuance of the Order, why it should not be fined in the amount of \$5,000 for failing to file an application for a grandfather certificate in accordance with Section 367.171, Florida Statutes and Rule 25-30.035, Florida Administrative Code.

Order No. PSC-98-0761-SC-WS also required that Tropical's response to the show cause order must contain specific allegations of fact and law, and that, if the utility failed to respond to the show cause Order within 20 days of the Order's issuance, a fine in the amount of \$5,000 would be imposed without further action of the Commission.

As discussed previously, a letter by the utility owner, Mr. Don Gugel, was timely filed with the Commission on June 15, 1998. In his response to the show cause Order, Mr. Gugel stated that he was no longer able to financially run the system, and that he was returning the property to the mortgage holder, L & M Mortgage Service. Shortly after the receipt of this letter, staff was no longer able to contact Mr. Gugel, who remains inaccessible and whose whereabouts remain unknown.

Staff has subsequently learned that the mobile home park has no tenants at the present time, and that any former customers of the utility are receiving water service from an exempt water system and wastewater service from septic tanks. The utility system itself has not been operating since August 1998, and is not now functional.

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The attorney for the mortgage holder has represented that his clients most likely intend to pursue foreclosure. Future plans for the property are uncertain; however, the mortgage holder is considering, among other options, taking the required steps to bring the mobile home park back into compliance with all state and local regulatory requirements. Staff has been informed that, should this occur, the mortgage holder would most likely seek an exemption from the regulation of the Commission.

Staff was never able to complete the certification process on this system, therefore no certificate has been issued to this utility. The whereabouts of the owner, Mr. Don Gugel, to whom the annual report and RAF letters were addressed, remain unknown. All correspondence to Mr. Gugel has been returned as undeliverable. Staff understands from conversations it has had with the mortgage holder's attorneys, the mortgage holder has likewise been unable to locate Mr. Gugel.

This utility is no longer operational. The Commission never set rates and charges for this utility, and it will not be regulated on a going-forward basis. The system is defunct, and staff has confirmed that all prior customers of the utility are receiving service from alternate sources.

Based upon the foregoing, staff believes that no purpose would be served in fining the utility or proceeding further with the show cause proceeding for the utility's failure to comply with Order No. PSC-98-0761-SC-WS, and file an application with the Commission pursuant to Section 367.171, Florida Statutes, and Rule 25-30.035, Florida Administrative Code. Staff therefore recommends that it is appropriate to resolve the show cause proceeding against Tropical with respect to certification by finding no fine shall be imposed.

ISSUE 2: Should Tropical Mobile Home Park be ordered to show cause within 21 days why the utility should not remit \$293.85 in regulatory assessment fees for May 14, 1996 through July 1998, as well as a statutory penalty in the amount of \$58.22 and interest in the amount of \$39.51, for violation of Sections 350.113 and 367.145, Florida Statutes and Rule 25-30.120, Florida Administrative Code, for failure to pay 1995 and 1996 regulatory assessment fees?

RECOMMENDATION: No. A show cause proceeding against Tropical Mobile Home Park should not be initiated. Staff further recommends that the Commission refer Tropical Mobile Home Park's unpaid regulatory assessment fees and associated penalties and interest to the State of Florida Comptroller's Office for permission to write off the account as uncollectible. (BRUBAKER, CHASE, SEWELL, KNIGHT)

STAFF ANALYSIS: Regulatory assessment fees (RAFs) are intended to cover the costs incurred in Public Service Commission regulation of utilities, and Section 367.145, Florida Statutes, requires water and wastewater utilities to remit RAFs to this Commission.

Pursuant to Section 350.113(4), Florida Statutes, and Rule 25-30.120(5)(a), Florida Administrative Code, a statutory penalty plus interest shall be assessed against any utility that fails to timely pay its RAFs, in the following manner:

1. 5 percent of the fee if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during the time in which failure continues, not to exceed a total penalty of 25 percent.
2. The amount of interest to be charged is 1% for each 30 days or fraction thereof, not to exceed a total of 12% annum.

In addition, pursuant to Sections 367.145(1)(b) and 367.161, Florida Statutes, and Rule 25-30.120(5)(b), Florida Administrative Code, the Commission may impose an additional penalty upon a utility for failure to pay RAFs in a timely manner.

Tropical has not paid RAFs since it became jurisdictional on May 14, 1996. As discussed in Order No. PSC-98-0761-SC-WS, staff

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advised the utility of its obligation to pay RAFs by letters dated April 10, 1998 and June 5, 1998.

Based on past correspondence and a site visit with Mr. Gugel, staff estimates an annual revenue ranging from \$2,200 to \$3,600. Staff believes it is reasonable to use the midpoint of the estimated revenue range to estimate past due RAFs. Using the midpoint, or \$2,900 in annual revenue, staff estimates the following past due RAFs and associated penalty and interest accrued up to March 31, 1999:

<u>Time period</u>	<u>Revenue</u>	<u>RAFS</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
May-Dec 1996	\$1,936	\$ 87.12	\$ 21.78	\$ 21.78	\$130.68
Jan-Dec 1997	\$2,900	\$130.50	\$ 32.63	\$ 16.97	\$180.10
Jan-July 1998	<u>\$1,694</u>	<u>\$ 76.23</u>	<u>\$ 3.81</u>	<u>\$.76</u>	<u>\$ 80.80</u>
Total	\$6,530	\$293.85	\$ 58.22	39.51	\$391.58

Staff calculated the penalty and interest based on the number of days elapsed since the respective regulatory assessments were due and the date of this agenda. The date of this agenda is included in computing the amount of time elapsed.

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). Thus, any intentional act, such as the utility's failure to pay RAFs, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., this Commission, having found that the utility 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.

As discussed previously, staff has learned that all former customers of the utility are receiving water and wastewater service from other sources. Further, the utility is no longer in operation and has not been functional since August 1998. Therefore, no additional RAFs have been incurred since that time. Also, staff

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has been unable to contact the owner of the utility, and his whereabouts remain unknown. All indications are that the utility accumulated losses during Mr. Gugel's ownership and therefore there are no funds available from which the utility may pay outstanding RAFs, penalties and interest.

Therefore, in consideration of the facts stated above, staff does not believe further collection efforts would be cost effective. Staff recommends that the Commission refer Tropical's unpaid RAFs for 1996 and 1997 and associated penalty and interest to the Comptroller's Office for permission to write off the account as uncollectible.

This portion of the recommendation is consistent with Order No. PSC-98-1100-FOF-WS, issued August 17, 1998, in Dockets Nos. 900025-WS and 930944-WS; Order No. PSC-98-0663-FOF-WS, issued May 14, 1998, in Docket No. 980342-WS; and Order No. PSC-98-0906-FOF-SU, issued July 7, 1998, in Docket No. 980258-SU, and Order No. PSC-98-1641-FOF-WU, issued December 7, 1998, in Docket No. 981344-WU.

ISSUE 3: Should Tropical Mobile Home Park be ordered to show cause, in writing, within 21 days, why it should not remit a penalty for failing to comply with Rule 25-30.110, Florida Administrative Code, in that it did not file its annual reports for the period of May 14, 1996 through calendar year 1997?

RECOMMENDATION: No. A show cause proceeding against Tropical Mobile Home Park should not be initiated. (BRUBAKER, CHASE)

STAFF ANALYSIS: Rule 25-30.110, Florida Administrative Code, requires utilities subject to the Commission's jurisdiction as of December 31 of each year to file an annual report on or before March 31 of the following year. Requests for extension of time must be in writing and must be filed before March 31. One extension of 30 days is automatically granted. A further extension may be granted upon showing of good cause. Incomplete or incorrect reports are considered delinquent, with a 30-day grace period in which to supply the missing information.

Pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to file a timely, complete annual report is subject to penalties, absent demonstration of good cause for noncompliance. The penalty set out in Rule 25-30.110(7), Florida Administrative Code, for Class C utilities is \$3.00 per day. The Commission may impose lesser or greater penalties, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code.

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). Thus, any intentional act, such as the utility's failure to timely file its annual report, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, 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. In this instance, Staff recommends that a show cause proceeding not be initiated. Our rationale is set forth below.

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By Order No. PSC-98-0761-SC-WS, Tropical was required to file its annual reports for the period of May 14, 1996 through calendar year 1997 by May 25, 1998. To date, no annual reports have been filed.

As discussed previously, staff has learned that all former customers of the utility are receiving water and wastewater service from other sources. Further, the utility is no longer in operation and has not been functional since August 1998. Also, staff has been unable to contact the owner of the utility, and his whereabouts remain unknown. All indications are that the utility will not resume operation, and the property is likely to be disbanded through foreclosure proceedings.

Pursuant to Rule 25-30.110(3)(a), Florida Administrative Code, the Commission requires annual reports to be filed to determine the earnings level of the utility, whether a utility is in substantial compliance with the Uniform System of Accounts as well as applicable rules and orders of the Commission, whether financial statements and related schedules fairly present the financial condition and results of operations for the period presented, and whether other information presented as to the business affairs of the utility are correct for the period they represent.

This utility is no longer operational. The Commission never set rates and charges for this utility, and it will not be regulated on a going forward basis. Because the Commission does not need the information regarding the utility's operations on a going-forward basis to meet the requirements of Rule 25-30.110(3)(a), Florida Administrative Code, staff believes there would be no purpose in requiring the 1996 through 1998 annual reports for this utility.

In consideration of the foregoing, staff recommends that Tropical not be ordered to show cause in writing, within 21 days, why it should not remit a penalty for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual reports for the period of May 14, 1996 through calendar year 1997.

This portion of the recommendation is consistent with Order No. PSC-98-0906-FOF-SU, issued July 7, 1998, in Docket No. 980258-SU.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation, upon referral of the outstanding amounts to the Comptroller's Office, no further action will be required, and this docket should be closed. (BRUBAKER, MESSER, CHASE, SEWELL, KNIGHT)

STAFF ANALYSIS: If the Commission approves Staff's recommendation, upon referral to the Comptroller's Office of Tropical's unpaid RAFs and associated penalty and interest, no further action will be required, and this docket should be closed.