

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide  
wastewater service in Monroe County by  
Venture Out at Cudjoe Cay, Inc.

DOCKET NO. 100065-SU  
ORDER NO. PSC-10-0706-FOF-SU  
ISSUED: November 29, 2010

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman  
LISA POLAK EDGAR  
NATHAN A. SKOP  
RONALD A. BRISÉ

ORDER DENYING ORIGINAL WASTEWATER CERTIFICATE

BY THE COMMISSION:

On February 5, 2010, Venture Out at Cudjoe Cay, Inc. (Venture Out) filed an application for original wastewater certificate in Monroe County, Florida. Venture Out is a not-for-profit condominium association that provides wastewater service solely to the members who own or control the condominium. Venture Out is divided into 659 subdivided units (lots) in Monroe County. The wastewater system was established in 1975 and was recently modified to ensure compliance with current Department of Environmental Protection (DEP) standards. Venture Out is currently operating as an exempt entity pursuant to Section 367.022(7), Florida Statutes (F.S.), but is requesting that it be granted a certificate to operate as a PSC-regulated utility.

On March 5, 2010, our staff advised Venture Out that it was staff's opinion that Venture Out was exempt from Commission regulation. In a March 11, 2010 response, Venture Out requests we issue a certificate because it believes it is in the public interest.

Based on Venture Out's March 11, 2010, letter, Venture Out continues to be exempt from our regulation pursuant to Section 367.022, F.S. According to Venture Out's letters and application, Venture Out is a not-for-profit condominium association, serving only the condominium property owners. It does not provide wastewater service to any property outside of the condominium association. A review of the relevant portions of Chapter 367 follows:

**367.011 Jurisdiction; legislative intent.-**

(2) The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates.

**367.021 Definitions.-**

(12) "Utility" means a water or wastewater utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver

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managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation.

**367.022 Exemptions.** - The following are not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided:

(7) Nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such nonprofit corporations, associations, or cooperatives.

The legislature did not intend that we regulate those entities listed as exempt. We are given jurisdiction to regulate utilities as that term is defined in Section 367.021(12), F.S. The definition of utilities excludes those entities listed as exempt. Venture Out does not dispute that it is exempt under 367.022 F.S., because it is a nonprofit corporation providing service solely to members who own and control the nonprofit corporation.

Venture Out believes our authority to issue a certificate of authorization to an exempt entity rests under the authority of Section 367.045(5)(a), F.S., to grant or deny a certificate if it is in the public interest to do so. In its March 2010 letter, Venture Out explains that the Florida Keys Aqueduct Authority is the applicable governing independent special district, created by Chapter 99-395, Laws of Florida. In the March 2010 letter, Venture Out expressed concern regarding the ability of the Florida Keys Aqueduct Authority to accomplish the requirements of Chapter 99-395, Laws of Florida.

Section 367.045, F.S., does not give us express or implied authority to take jurisdiction over an exempt entity. Section 367.045(5)(a), F.S., is the standard we use to determine whether or not to grant a certificate of authorization to a utility when that utility is under our jurisdiction.

**367.045 Certificate of authorization; application and amendment procedures.-**

(5)(a) The commission may grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest, but may not grant authority greater than that requested in the application or amendment thereto and noticed under this section; or it may deny a certificate of authorization or an amendment to a certificate of authorization, if in the public interest. . .

In further support of our analysis, we note that the introductory language to Section 367.022, F.S., clearly articulates that the listed exemptions are “not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided.” We find nothing in Section 367.045, F.S., making this section of the statutes applicable to exempt entities. We have previously held that our “powers and duties are only those conferred expressly or impliedly by statute, and any reasonable doubt as to the existence of

a particular power compels [us] to resolve that doubt against the exercise of such jurisdiction. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So. 2d 493 (Fla. 1973).” Order No. PSC-01-0217-FOF-EC, issued January 23, 2001, in Docket No. 981827-EC; affirmed on appeal. Lee County Electric Cooperative v. Jacobs, 820 So. 2d 297 (Fla. 2002).

Finally, Venture Out asserts that it wishes to be removed from exempt status. In its March 2010 letter, Venture Out states that it does not seek nor wish to continue to operate under the exemption of Section 367.022(7), F.S. We find that we are without jurisdiction to regulate an exempt entity, even if that exempt entity expressly requests us to regulate it. (See, Swebilius V. Florida Construction Industry Licensing Board, 365 So. 2d 1069 (1979 1st DCA) in which court stated that agency jurisdiction cannot be conferred by agreement or consent of the parties).

In conclusion, we do not have jurisdiction to regulate Venture Out unless and until Venture Out changes its status to non-exempt. Because we can only issue certificates of authorization to utilities as that term is defined by the legislature and Venture Out currently does not fit the definition of a utility, we have no jurisdiction to issue an original wastewater certificate to Venture Out.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Venture Out at Cudjoe Cay’s request for original wastewater certificate is denied for lack of jurisdiction. It is further

ORDERED that this docket shall be closed upon expiration of the time for appeal.

By ORDER of the Florida Public Service Commission this 29th day of November, 2010.



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ANN COLE  
Commission Clerk

( S E A L )

LCB

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Office of 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 after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.