FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

OCTOBER 31, 1996

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

FROM: DIVISION OF WATER & WASTEWATER (BRADY)
DIVISION OF LEGAL SERVICES (AGARWAL)

RE: DOCKET NO. 960009-WS - BROOKGREEN APARTMENTS - REQUEST FOR EXEMPTION FROM FLORIDA PUBLIC SERVICE COMMISSION REGULATION FOR PROVISION OF WATER AND WASTEWATER SERVICE.
COUNTY: PINELLAS

AGENDA: NOVEMBER 12, 1996 - REGULAR AGENDA - PROPOSED AGENCY ACTION (ISSUES 2 AND 3) - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\WAW\WP\960009WS.RCM

CASE BACKGROUND

On January 2, 1996, a request for exemption from Florida Public Service Commission regulation was filed on behalf of Brookgreen Apartments (Brookgreen or apartment complex) pursuant to Section 367.022(8), Florida Statutes. According to the application, the apartment complex cannot be retrofit with standard meters to read total water usage. Instead, the applicant proposes to meter the water used through each unit's hot water heater and convert hot water heater usage to total water usage by applying a conversion factor. In addition, the applicant proposes to charge customers a deposit to be collected and held by a billing company.

Section 2.08(C)(14) of the Administrative Procedures Manual grants staff the administrative authority to approve exemption applications which are clear-cut and without controversy. However, the proposed methodology for metering water usage and the holding of customer deposits by a third party is controversial. For these reasons, staff is bringing the application before the Commission for consideration. On August 15, 1996, a notice of voluntary withdrawal was filed on behalf of Brookgreen.

DISCUSSION OF ISSUES

ISSUE 1: Should Brookgreen Apartments' Notice of Voluntary Withdrawal of its application for exemption from Florida Public Service Commission regulation be granted?

RECOMMENDATION: Yes. Brookgreen Apartments' Notice of Voluntary Withdrawal of its application for exemption from Florida Public Service Commission regulation should be acknowledged. (AGARWAL)

STAFF ANALYSIS: On August 15, 1996, pursuant to Rule 1.420(a)(1), Florida Rules of Civil Procedure, a Notice of Voluntary Withdrawal of its application for a Section 367.022(8), Florida Statutes exemption, was filed by Brookgreen.

The Notice of Voluntary Withdrawal states the following:

1. Rule 1.420(a)(1), Florida Rules of Civil Procedure, adopted by the Commission by Rule 25-22.035(3), Florida Administrative Code, allows a party to file a notice of voluntary dismissal without order of court anytime before the case has been submitted for decision. The Florida Supreme Court has interpreted this rule to permit petitioners in administrative procedures to file voluntary dismissals before the agency has acted on the hearing officer's recommendations. No administrative action has been taken by the Commission; accordingly, Brookgreen asserts that it should be able to withdraw its application.

2. The Commission has only such power as expressly or by necessary implication granted it by legislative enactment. Where there is reasonable doubt as to the lawful existence of a particular power being exercised, the court must rule against the exercise of that power.

3. The change in Section 367.031, Florida Statutes, no longer requires a utility qualifying under Section 367.022 to secure an exemption order from the Commission. The legislature intended to remove the Commission's authority to issue orders granting an exemption to resellers described in Section 367.022(8), Florida Statutes. Therefore, as a matter of law, the Commission no longer has the statutory authority to issue orders granting a reseller exemption.

4. The net effect of Chapter 96-407's changes makes water and wastewater resellers self-certifying, while continuing the requirement that they continue to resell at cost, test their meters, and file annual reports.

5. Due to the status of the case and the Commission's lack of statutory authority to issue exemption orders, the Commission must acknowledge this voluntary dismissal and close this docket.

As of the date the Notice of Withdrawal was filed, the Commission has not taken any action upon the application. During the pendency of the utility's application, Section 367.031, Florida Statutes, regarding the Commission's issuance of exemption orders was revised. At the time the utility filed its application, Section 367.031, Florida Statutes, stated in part:

> Each utility subject to the jurisdiction of the commission must obtain from this commission a certificate of authorization to provide water or wastewater service or an order recognizing that the system is exempt from regulation as provided by s. 367.022. A utility must obtain a certificate of authorization or an exemption order from the commission prior to being issued a permit by the Department of Environmental Protection for the construction of a new water or wastewater facility . . . [emphasis added]

Effective July 1, 1996, the above underlined portions were deleted. This effectively abolished the exemption program and requirement of issuing exemption orders.

Rule 25-22.035(3), Florida Administrative Code, states:

> Generally, the Florida Rules of Civil Procedure shall govern in proceedings before the Commission under this part, except that the provisions of these rules supersede the Florida Rules of Civil Procedure where conflict arises between the two.

Rule 1.420(a)(1), Florida Rules of Civil Procedure, states:

> ... an action may be dismissed by plaintiff without order of court (A) before trial by serving ... a notice of dismissal at any time before ... retirement of the jury in a case tried before a jury of before submission of a nonjury case to the court for decision ...

Staff's research did not reveal any conflict between Rule 1.420(a)(1), Florida Rules of Civil Procedure, Chapter 367, Florida Statutes, or the Florida Administrative Code. The Florida Supreme Court has interpreted Rule 1.420(a)(1), Florida Rules of Civil Procedure liberally in favor of the movant. Notwithstanding a trend to the contrary in other jurisdictions, the Florida Supreme

Court has reconfirmed the unqualified right to a voluntary dismissal in Florida. See Fears v. Lunsfurd, 314 So.2d 578, 579 (Fla. 1975), and Freeman v. Mintz, 523 So.2d 606, 608 (Fla. 3rd DCA 1988). Moreover, once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act and cannot revive the original action for any reason. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68, 69 (Fla. 1978).

But in a recent Florida Supreme Court case, Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc., 645 So.2d 374 (Fla. 1994), the court ruled that an affected party, an objector to an application, could not terminate an administrative agency's jurisdiction by filing a voluntary dismissal of its objection after an adverse factual finding by a hearing officer, but before the agency had acted on the hearing officer's recommendations. This case relied upon the reasoning in Middlebrooks v. St. Johns River Water Management District, 529 So.2d 1167 (Fla. 5th DCA 1988). The court in Middlebrooks held that a permit applicant was allowed to withdraw its application prior to an oral argument before the adjudicatory agency, depriving the agency of jurisdiction to enter a final order. The court stated Rule 1.420(a)(1), Florida Rules of Civil Procedure, could be used as a basis for a voluntary dismissal prior to the time the fact-finder's retires to deliberate the outcome.

In Wiregrass, the court reasoned that because of the discretionary authority granted to water management districts by the legislature, particularly section 373.413, Florida Statutes (1989), regarding permits for construction, jurisdiction of the agency to proceed with the permitting process is not lost because one or more of the parties desired to dispense with a formal proceeding or hearing. Neither is the discretion of the agency to proceed with a formal proceeding lost by the action of a party (who is not the permitting applicant) seeking to withdraw from the proceeding. The court stated that this would be true even when the nonapplicant party seeking to withdraw is the party who first sought the formal proceeding.

But the Wiregrass court emphasized that it was not the applicant that was seeking to have the proceeding terminated; but rather the objector to the issuance of the permit. Staff believes that the Wiregrass ruling should be distinguished from the instant case for two reasons. First, unlike Wiregrass, no action has been taken by the Commission. Second, Brookgreen, the applicant, not a third-party objector, has filed a notice of voluntary withdrawal.

The Commission has accepted a notice of voluntary withdrawal or a notice of dismissal in the past. For example, in Order No.

PSC-94-0310-FOF-EQ, issued in Docket No. 920977-EQ, on March 17, 1994, the Commission allowed a withdrawal of a petition for contract approval by General Peat Resources, L.P., four days prior to hearing despite the fact that a proposed agency action order had already been issued.

Therefore, in accordance with the above, staff recommends that the Commission acknowledge and accept Brookgreen's Notice of Withdrawal of its application.

ISSUE 2: If staff's recommendation in Issue No. 1 is denied by the Commission, should the reseller's proposed hot water metering methodology be approved?

RECOMMENDATION: Yes, if staff's recommendation in Issue No. 1 is denied by the Commission, the reseller's proposed hot water metering methodology should be approved on an experimental basis for a period of at least two full years. Data for Brookgreen Apartment's annual reseller report should be presented to staff on a monthly basis for at least two complete annual reports. (BRADY)

STAFF ANALYSIS: On January 2, 1996, a request for exemption from Florida Public Service Commission regulation was filed on behalf of Brookgreen Apartments pursuant to Section 367.022(8), Florida Statutes. Section 367.022(8), Florida Statutes, exempts from Commission regulation any person who resells water or wastewater service at a rate or charge which does not exceed the actual purchase price.

The application was filed by Mr. J. Stephen Vasen (applicant or reseller) who is the president of Pinnacle Lantana Limited Partnership, which is the general partner for Clearwater Apartments I Limited Partnership, the title owner of Brookgreen. The apartment complex is located at 501 Fairwood Avenue in the City of Clearwater, Pinellas County, Florida. The primary contact person for the application is Mr. Frank Manno of Conservation Billing Services, Inc. (CBSI) which has been contracted by the reseller to provide metering and billing services for the apartment complex. CBSI is located at 90 S. Newtown Street Road, Suite #3, Newtown Square, Pennsylvania 19073-4035.

Brookgreen is an existing 188-unit apartment complex which the applicant has determined cannot be feasibly retrofit with standard water meters. The cold water pipes, which have multiple feeds into the apartment units, are buried under the building slabs. The reseller proposes to install meters on the cold water feeds to each unit's hot water heater.

CBSI believes that total water usage is directly related to hot water usage at a relatively constant ratio of 3.5 regardless of the number of rooms, baths or occupants. This ratio was tested by a study performed by CBSI on one of the 94 communities it meters. In the study, each unit was fitted with a standard meter to measure total water usage and an additional meter on the hot water heater's cold water feed to measure hot water usage. The study was comprised of 10 apartments with differing numbers of bedrooms, baths and adult occupants. These various apartment configurations were metered for five to nine months. The resulting hot water to

total water use ratios averaged 4.1, with a low of 2.7 to a high of 6.9.

While the applicant based justification for the proposed 3.5 hot water conversion ratio on one study, staff concurs with CBSI's premise that metered water usage of any kind is more equitable than a flat rate. For this reason, the Commission has approved hot water metering in the past. In Order No. PSC-95-0953-FOF-WS, issued August 7, 1995, in Docket No. 950280-WS, the Commission approved a temporary hot water metering methodology. The percentage of each apartment unit's hot water usage to the apartment building's total hot water usage was calculated. That percentage was then applied to the apartment building's total water usage to find the total water usage per apartment.

The Commission has recently approved two other unconventional reseller methodologies by Order No. PSC-96-1060-FOF-WS, issued in Docket No. 960257-WS and Order No. PSC-96-1206-FOF-WS, issued in Docket No. 960270-WS. In these two dockets, the Commission approved allocating the total usage for an apartment complex based upon residents to bathrooms and residents to bedrooms, respectively. Staff would note that in neither these dockets nor the hot water metering docket, above, were the proposed methodologies approved on an experimental basis. First, the hot water methodology in Docket No. 950280-WS was a temporary methodology, only. When the apartment complex is completely refurbished, standard water meters will be installed. Second, in all three dockets, the total metered usage costs for the building or apartment complex was prorated in some manner so that the total revenues could not exceed costs.

In this docket, the proposed methodology is not a proration of total metered cost but a gross-up estimate of total costs. If the 3.5 billing ratio is too high, revenues could exceed costs. For this reason, staff recommends that the methodology be approved on an experimental basis. Section 367.022(8), Florida Statutes, requires resellers to submit annual reports which report total revenues against total costs to ensure that utility services are not being resold at a profit. Through Brookgreen's annual report, staff can monitor the ability of the conversion ratio to predict total water use. However, should the proposed 3.5 conversion ratio prove to be too high on a consistent basis, Brookgreen should adjust its rates before year-end to ensure that its total annual revenues do not exceed its costs. Therefore, in order for staff to monitor the performance of the proposed ratio, the data in Brookgreen's annual reports should be itemized on a monthly basis instead of presented as year-end totals.

Based on the above, staff recommends that the Commission approve the reseller's proposed hot water metering methodology on an experimental basis for a period of at least two full years. In addition, staff recommends that the Commission require Brookgreen's annual reports to be presented to staff on a monthly basis for at least two complete annual reports.

ISSUE 3: If staff's recommendation in Issue No. 1 is denied by the Commission, should the proposed $20.00 refundable customer deposit be approved?

RECOMMENDATION: Yes, if staff's recommendation in Issue No. 1 is denied by the Commission, the proposed $20.00 refundable customer deposit should be approved and placed in an escrow account with Brookgreen and CBSI as joint signatories. (BRADY, AGARWAL)

STAFF ANALYSIS: Brookgreen proposes to charge a refundable $20.00 deposit, to be collected and held by CBSI. While the Commission has allowed resellers to collect and hold customer deposits, the Commission has never approved customer deposits to be collected and held by an agent for a reseller utility, such as CBSI.

Staff became aware during the pendency of this docket that in a number of dockets in which CBSI was the agent for the reseller, CBSI was collecting and holding customer deposits for the reseller. By letter dated February 5, 1996, the legal staff informed CBSI that such practice was controversial. By letter dated April 11, 1996, the attorney for CBSI and Brookgreen Apartments informed staff that Brookgreen was not withdrawing its request for CBSI to collect customer deposits on behalf of Brookgreen preferring, instead, for the issue to be decided at agenda conference.

According to Brookgreen's application, the total master meter deposit paid by the apartment complex is $19,650. Prorating this deposit across all 188 units results in a per unit deposit of $104.52. Instead, the reseller proposes to charge a $20.00 refundable deposit, which is the standard deposit amount that CBSI recommends for all its clients. Standardizing the deposit amount helps CBSI facilitate deposit service to its extensive client base. Staff believes that a $20.00 refundable deposit is reasonable pursuant to Rule 25-30.311(7), Florida Administrative Code, which allows for deposits not exceeding an average two-months' billing. As shown on page 8, an average customer bill for water and wastewater service is estimated to be $15.00 per month. Therefore, a $20.00 deposit is less than two months' average payment and should be approved.

The Commission has rejected past reseller applications where a metering and billing agent represented that it could collect deposits and terminate service. In Docket No. 910655-WU, H2Oulton Metering Systems, Inc., (H2Oulton) originally filed a request for statewide exempt status to operate a network of service centers contracting submetering services to reseller utilities. Included in those services would be collecting deposits and terminating service for nonpayment.

Section 367.021(12), Florida Statutes, defines a utility as ". . . a water or wastewater utility and except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system . . . who is providing, or proposes to provide water or wastewater service to the public for compensation." A utility may be a reseller, exempt from Commission regulation pursuant to Section 367.022(8), Florida Statutes, if it ". . . resells water or wastewater service at a rate or charge which does not exceed the actual purchase price thereof." Section 367.011(2), Florida Statutes, provides that "The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates."

Brookgreen meets the definition of a utility. CBSI does not because it is simply a metering and billing agent. In Docket No. 910655-WU, H2Oulton Metering Systems, Inc., which operates in the same manner as CBSI, applied for exemption from Commission regulation pursuant to Section 367.022(8), Florida Statutes. In Order No. PSC-92-0410-FOF-WU, issued in that docket on May 27, 1992, the Commission found that:

> H2Oulton is not a utility . . . . H2Oulton does not have a system that it owns, operates, manages or controls . . . . H2Oulton does not own, operate, manage or control a water or wastewater facility or plant or land connected with such a facility. Accordingly, H2Oulton does not provide water or wastewater services . . . . H2Oulton is, therefore, not a utility pursuant to Chapter 367, Florida Statutes.
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> Clearly, the Commission jurisdiction is over utilities. H2Oulton is attempting to perform functions of a utility, such as collecting deposits for service and discontinuation of service. Since H2Oulton is not, by definition a utility, it cannot avail itself of the exemptions provided in Section 367.022, Florida Statutes, to utilities and cannot act in a fashion authorized for utilities by Chapter 367, be they regulated or exempt.

In Docket No. 920461-WS, H2Oulton Metering Systems, Inc. requested exemption from Commission regulation for provision of water and wastewater service to Hidden Harbor in Broward County. Order No. PSC-92-1181-FOF-WS, issued on October 19, 1992, in that docket, denied H2Oulton's request for exemption, citing the findings in Order No. PSC-92-0410-FOF-WS. The Commission found

that H2Oulton's method of operation had not changed, and that such operation did not meet the definition of a utility. The Commission further found that because exemptions are not assignable, there was no reason to vary from its previous decision in Order No. PSC-92-410-FOF-WS.

Because CBSI wants to collect and hold customer deposits, it will be performing functions of a utility. Clearly, CBSI is not a utility. CBSI does not own, operate, manage, or control a water or wastewater facility or plant or land connected with such a facility. CBSI does not provide water or wastewater service. To allow CBSI to collect customer deposits contradicts Section 367.021(12), Florida Statutes, and Orders Nos. PSC-92-0410-FOF-WU and PSC-92-1181-FOF-WS.

Over the years since the H2Oulton decisions, the Commission has allowed reseller utilities the authority to collect and hold deposits. Staff held a workshop with the metering companies in February 1996 to obtain more information and discuss various operational policies. One of the outcomes of the workshop was an understanding that the metering and billing companies who offer the collection of deposits, do so as a competitive service to the utility management (apartment complex). The service companies believe it gives them an "edge" over other vendors, and also provides some "safety net" in a very unstable market. Many of the metering companies expressed no interest in providing this "service" and had no intentions of pursuing this area.

When the Commission evaluates a regulated utility, it does not direct the utility on whom it may subcontract with to perform certain services. The Commission may penalize a utility for making a poor business decision if that contractor creates problems. However, there is nothing to prohibit a utility from subcontracting to a vendor the collection of its deposits, if, for example, it did not have the staff to handle that particular function. In essence, this is what Brookgreen arranged to do with CBSI.

The regulatory concern, with respect to deposits, has always been who has control of the deposits; and, therefore, concern over customer protection. Since the metering and billing industry is new and rapidly growing, it may attract somewhat unscrupulous businessmen. In fact, staff has encountered this situation in an investigation with one particular company which will be brought to the Agenda. However, staff believes that the utility is ultimately responsible for its decisions, which would require it to reimburse customers of any lost deposits. This is true, whether it is a regulated utility, or an exempt utility, like Brookgreen.

Staff believes that the control and safety issue can be easily remedied by allowing the metering/billing company to collect deposits on behalf of the utility, but requiring that these monies be deposited in an escrow account that requires the joint signatures of the billing company and the utility. That way, no money can be removed without the knowledge and approval of both parties. Staff believes this provides the reseller with the opportunity to select a company it believes will best suit its needs, allow the market to distinguish itself through competitive offerings, and protect the end-use customers of the utility.

In conclusion, staff recommends that the Commission approve the $20.00 refundable customer deposit as reasonable and placed in an escrow account with Brookgreen and CBSI as joint signatories.

ISSUE 4: Should the request for exemption from Florida Public Service Commission regulation pursuant to Section 367.022(8), Florida Statutes, for Brookgreen Apartments be granted?

RECOMMENDATION: Based on the Commission's decisions in Issues Nos. 1, 2, and 3, the staff recommends that Brookgreen Apartments application for exemption from Florida Public Service Commission regulation is in compliance with Section 367.022(8), Florida Statutes, and Rules 25-30.060(1), (2), and (3)(h), Florida Administrative Code, in effect at the time of the filing, and should be approved. (BRADY)

STAFF ANALYSIS: The application is filed in accordance with Section 367.022(8), Florida Statutes, and Rules 25-30.060(1), (2), and (3)(h), Florida Administrative Code, in effect at the time of filing. The application states that the reseller plans to resell water and wastewater services to the residents of Brookgreen at a rate or charge that does not exceed the actual purchase price.

By signing the application Mr. Vasen acknowledged the requirements of Rule 25-30.111, Florida Administrative Code, regarding annual reporting requirements. He also acknowledged the requirements of Section 367.122, Florida Statutes, and Rules 25-30.262 through 25-30.267, Florida Administrative Code, regarding the examination and testing of meters. Furthermore, Mr. Vasen acknowledged that he is aware of the penalty pursuant to Section 837.06, Florida Statutes, for knowingly making false statements in writing with the intent to mislead.

Brookgreen receives water and wastewater service from the City of Clearwater Utility (Clearwater). The application included a schedule of Clearwater's current rates and charges; a schedule of the applicant's proposed method of billing residents separately for water and wastewater; and an explanation reflecting that the amount billed would not exceed the amount paid for water and wastewater services.

Brookgreen has five 1-1/2" and five 1" master meters for which Clearwater charges the following three-tiered water conservation rates per hundred cubic feet (ccf):

CITY OF CLEARWATER UTILITY'S RATES

Water usage rates for the five 1-1/2" meters:

0 - 134 ccf	x 5 meters =	0 - 670 ccf	$1.529	per ccf
134 - 187 ccf	x 5 meters =	670 - 935 ccf	$1.860	per ccf
over 187 ccf	x 5 meters =	over 935 ccf	$2.200	per ccf

CITY OF CLEARWATER UTILITY'S RATES, continued:

Water usage rates for the five 1" meters

0 - 9 ccf	x 5 meters =	0 - 45 ccf	$1.529 per ccf
9 - 54 ccf	x 5 meters =	45 - 270 ccf	$1.860 per ccf
over 54 ccf	x 5 meters =	over 270 ccf	$2.200 per ccf

Combined water usage rates for the 10 meters

0 - 715 ccf (670 + 45)	$1.529 per ccf
715 - 1,205 ccf (935 + 270)	$1.860 per ccf
over 1,205 ccf	$2.200 per ccf

Wastewater usage all meters: $2.360 per ccf

By taking the combined water usage rates, above, and dividing them by 188 units results in the following three-tiered, per-unit usage rates:

BROOKGREEN APARTMENTS' RATES

Water usage

0 - 715 ccf / 188 units =	0 - 3.80 ccf	$1.529 per ccf
3.80 - 1,205 ccf / 188 units =	3.80 - 6.40 ccf	$1.860 per ccf
over 1,205 ccf / 188 units =	over 6.40 ccf	$2.200 per ccf

Wastewater usage: $2.360 per ccf

As discussed in Issue 2, each unit's water usage will be determined by multiplying 3.5 times its metered hot water usage. Once a unit's total water usage is calculated, the above rate schedule would apply. An example of an average customer bill is as follows:

AVERAGE APARTMENT BILL
(Assuming usage of 6 ccf feet or 4.488 thousand gallons)

Water usage				
3.80 ccf	x	$1.529 per ccf	=	$ 5.81
2.20 ccf (6.0-3.8)	x	$1.860 per ccf	=	4.09
Subtotal			=	9.90
Tax of 10% on water			=	.99
Water total			=	$10.89
Wastewater usage				
6.0 ccf	x	$2.360 per ccf	=	$14.16

The reseller has contracted with CBSI for hot water meter reading and conversion billing. CBSI will bill residents within eight (8) business days after reading the meters. The reseller proposes to use CBSI's methodology for allocating common area water. The methodology takes three (3) month property average for water and wastewater and multiplies it by twelve percent (12%). The twelve percent (12%) would then be evenly divided by the total number of units in the property. Once the property is fully hot water metered, CBSI will adjust the common area fee for Brookgreen. As discussed in Issue 3, the reseller proposes to collect a $20.00 refundable deposit to be held by CBSI. The reseller does not propose to charge any administrative charges or miscellaneous fees.

Based on the above, staff recommends that the Commission find Brookgreen exempt from Commission regulation pursuant to Section 367.022(8), Florida Statutes.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes, if no timely protest is received from a substantially affected person to the proposed agency action Issues Nos. 2 and 3, within 21 days from the issuance date of the order, this docket should be closed. (AGARWAL)

STAFF ANALYSIS: If no timely protest is received from a substantially affected person to the proposed agency action Issues Nos. 2 and 3, within 21 days from the issuance date of the order, then no further action is required and this docket should be closed.