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MEMORANDUM

November 20, 1998

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RECORDS AND  
REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CROSBY) *MS*

RE: DOCKET NO. 971192-WS - APPLICATION FOR GRANDFATHER  
CERTIFICATES TO OPERATE A WATER AND WASTEWATER UTILITY IN  
POLK COUNTY BY BIEBER ENTERPRISES, INC. D/B/A BREEZE HILL  
UTILITIES.

98-1550-FOF-WS

Attached is an ORDER DECLINING TO INITIATE SHOW CAUSE  
PROCEEDINGS, ACCEPTING AGREEMENT FOR DEED, AND SETTING RATES AND  
CHARGES AND NOTICE OF PROPOSED AGENCY ACTION, ORDER GRANTING  
GRANDFATHER CERTIFICATES, to be issued in the above-referenced  
docket.

(Number of pages in order - 13)

ALC/dr

Attachment

cc: Division of Water and Wastewater (Johnson, Redemann)

I:\971192A.ALC

*Clerk -*

*1-waited-RAR -  
11/24/98*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for grandfather certificates to operate a water and wastewater utility in Polk County by Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities.

DOCKET NO. 971192-WS  
ORDER NO. PSC-98-1550-FOF-WC  
ISSUED: November 23, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

ORDER DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS,  
ACCEPTING AGREEMENT FOR DEED, AND SETTING RATES AND CHARGES

AND

NOTICE OF PROPOSED AGENCY ACTION  
ORDER GRANTING GRANDFATHER CERTIFICATES

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action granting grandfather certificates as discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Background

On September 11, 1997, Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities (Breeze Hill or utility) filed an application with the Commission for certificates to provide water and wastewater service under grandfather rights in Polk County, pursuant to Section 367.171, Florida Statutes. The application was filed after the Board of County Commissioners of Polk County adopted a

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resolution on May 14, 1996, which made the utilities in the County subject to the provisions of Chapter 367, Florida Statutes.

At the time the Commission received jurisdiction, the utility was owned by Lake Walk In The Water Village Associates, Ltd. (Lake Walk). The utility is a Class C utility, which provides water and wastewater service to 110 residential customers in a mobile home community in Polk County.

Breeze Hill entered into an agreement with Lake Walk on June 13, 1997, to purchase the system, and has been operating it since that time. The agreement provided for the purchase of the entire mobile home park community and the water and wastewater facilities. The transfer occurred prior to Commission approval which is an apparent violation of Section 367.071, Florida Statutes.

#### Show Cause

Section 367.071, Florida Statutes, states, in part, "No utility shall sell assign or transfer its certificate of authorization, facilities or any portion thereof . . . without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest. Lake Walk and Breeze Hill entered into the agreement for the sale of the system on June 13, 1997, prior to Commission approval. Breeze Hill began operating the system providing water and wastewater service to customers of the utility upon entering into the agreement. Such action is "willful" in the sense intended by Section 367.161, Florida Statutes.

Section 367.161, 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. 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 "[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." Id. at 6.

Failure of Lake Walk to obtain the Commission's approval prior to the transfer appears to be due to lack of knowledge of the statutes and Commission rules. Lake Walk and Breeze Hill indicated that they were not aware of the Commission's regulation or the requirement to file the application with the Commission for approval of the transfer because they assumed that the system was still under the jurisdiction of Polk County. Lake Walk and Breeze Hill became aware of the Commission's regulation when they were contacted by the Commission staff. Upon becoming aware of the Commission's jurisdiction, Breeze Hill immediately filed an application for grandfather certificates.

Although regulated utilities are charged with knowledge of Chapter 367, Florida Statutes, we do not find that the apparent violation of Section 367.071, Florida Statutes, rises in these circumstances to the level of warranting the initiation of a show cause proceeding. Therefore, a show cause proceeding will not be initiated against Lake Walk for failure to obtain Commission approval prior to entering into the sales contract and turning the utility over to Breeze Hill.

#### Agreement for Deed

Rule 25-30.035(6), Florida Administrative Code, requires a utility to provide proof that it owns or has continued use of the land upon which its facilities are located. Breeze Hill provided an agreement for deed executed on June 13, 1997, by Dr. Ricardo Pine and Mr. Paul Bieber. An Agreement for Deed (also called installment land or sales contract, contract for deed, retained title or conditional sale contract) is a security device for the sale of land that is intended to take the place of a purchase money mortgage. Cain & Bultman, Inc. v. Miss Sam., Inc., 409 So.2d 114, 118 (Fla. 5th DCA 1982). Under the usual purchase and sale agreement, the seller gives the buyer a deed to the property under closing.

In an Agreement for Deed, the buyer contracts to purchase the land by making payments over a designated period of time. Usually, after the Agreement is executed, the buyer takes possession of the land, along with the burdens and benefits of ownership. Cain at 118. During the contract period, which the buyer is making payments, title to the land is bifurcated. The buyer has equitable title to the land, and the seller retains bare legal title as security for the unpaid purchase price. White v. Brousseau, 566 so.2d 832, 835 (Fla. 5th DCA 1990). When the buyer pays the full purchase price, legal title is conveyed to the buyer, usually by

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warranty deed, and the buyer becomes the full legal owner of the property.

In First Federal Sav. & Loan Ass'n v. Fox, 440 So.2d 652, 653 (Fla. 2d DCA 1983), the Court held that the parties who enter into an Agreement for Deed are in essentially the same position as if the vendor had transferred the legal title and taken back a purchase money mortgage. Since Florida law deems Agreements for Deed to be mortgages, then buyers under an Agreement for Deed are deemed title holders to the property. Therefore, a buyer under an Agreement for Deed can be seen as the legal titleholder to the property, even though the seller retains possession of the actual legal title. Alternatively, an Agreement for Deed is evidence of the buyer's continued use of the land in question.

Under normal circumstances, the buyer in an Agreement for Deed does not risk losing possession or control of the land as long as he or she fulfills the terms of the Agreement. Pursuant to Florida law, if the buyer defaults in an Agreement for Deed, the seller must go through foreclosure to restore an equitable interest in (possession and control of) the property. Any attempt by the seller to repossess the land without legal process subjects the seller to liability for trespass. Mid-State Investment Corporation v. O'Steen, 133 So.2d 455, 457 (Fla. 1st DCA 1961). Thus, the buyer under an Agreement for Deed is in little danger of losing possession or control of the land, which is what the Commission wants to protect against.

Based on the foregoing, we find that the Agreement for Deed filed by Breeze Hill in this docket, is sufficient as evidence of a cost-effective alternative providing for continued use of the land, pursuant to Rule 25-30.035, Florida Administrative Code.

#### Application

Except as discussed previously, the application is in compliance with Section 367.171, Florida Statutes, and other pertinent statutes and provisions of the Florida Administrative Code. In particular, the application contains a filing fee in the amount of \$400, as required by Rule 25-30.020, Florida Administrative Code.

The rules and statutes do not require noticing for grandfather certificate applications. However, because Breeze Hill did not own the system at the time the Commission received jurisdiction in Polk County, we find it appropriate to require Breeze Hill to notice the

customers, the Office of Public Counsel, and the Polk County Commission by providing them a copy of this Order within seven days of its issuance. We further find it appropriate to require Breeze Hill to provide notice in a newspaper of general circulation in the utility's service area. The notice to be provided in the newspaper is shown on Attachment B of this Order, which by reference is incorporated herein. Within 20 days of the issuance date of this Order, Breeze Hill shall provide the Commission proof that notice has been provided as set forth herein.

Breeze Hill has provided adequate service territory and system maps and a territory description, pursuant to Rule 25-30.035(9), (10), and (11), Florida Administrative Code. A description of the territory Breeze Hill has requested to serve is shown on Attachment A of this Order, which by reference is incorporated herein.

According to the Department of Environmental Protection (DEP), there are no outstanding notices of violation against Breeze Hill. In addition, the utility is current with respect to regulatory assessment fees for 1996 and 1997 and has filed its 1997 annual report.

Based on the foregoing, we find it appropriate to grant Breeze Hill Certificates Nos. 598-W and 513-S to serve the territory described on Attachment A of this Order.

#### Rate Base

Pursuant to Section 367.171, Florida Statutes, we have the authority to establish rate base in a grandfather certificate proceeding. However, the primary goal in a grandfather certificate proceeding is to obtain enough information about a utility to enable us to regulate that utility on a going-forward basis. Although we have the discretion to establish rate base, it has been our practice not to establish rate base in grandfather certificate proceedings.

When a county turns over jurisdiction to the Commission, the only element in the utility's operation that changes is the entity which regulates it. The utility's ownership, rate base, and rates remain the same. Consequently, there is not the same necessity to review rate base in this type proceeding as there is in other types of proceedings, such as the sale of a utility or a rate case. Rate base for utilities receiving grandfather certificates is typically established in the utility's first rate proceeding filed under our jurisdiction. Therefore, we do not find it appropriate to

establish rate base or determine the appropriateness of an acquisition adjustment in this proceeding.

Rates and Charges

Breeze Hill's existing rate is a flat rate approved by the Polk County Board of County Commissioners on August 16, 1983. The current rates and charges are set forth below.

Monthly Rates  
Residential Rates

<u>Flat Rate</u>	<u>Amount</u>
Water	\$ 11.00
Wastewater	\$ 8.00

Miscellaneous Service Charges

	<u>Water</u>	<u>Wastewater</u>
Initial Connection Fee	\$ 15.00	\$ 15.00
Normal Reconnection Fee	\$ 15.00	\$ 15.00
Violation Reconnection Fee	\$ 15.00	Actual Cost
Premises Visit Fee (in lieu of disconnection)	\$ 10.00	\$ 10.00

Customer Connection (Tap-in) Charge

	<u>Water</u>	<u>Wastewater</u>
Residential (Per Unit)	\$400.00	\$600.00

In grandfather certificate cases, we usually adopt the existing rate structure of a utility. However, Rule 25-30.255, Florida Administrative Code, requires utilities to implement metered service rates, unless otherwise approved by the commission, and in certain circumstances. The purpose of this is to facilitate customers' understanding of the impact of their consumption on their bill, and to encourage water conservation. Increasingly, Water Management Districts are mandating the installation of meters on utilities for those reasons.

Although metered rates are desirable, the lack of customer usage data or other concerns such as economic feasibility to

install meters or lack of knowledge of the location of lines can be limitations in a utility's implementation of metered rates for grandfather applications, original certificates or rate cases. Because of the increasing focus on conservation, we find it appropriate to review the specifics of each case to determine whether it is appropriate to require a utility to implement metered rates or maintain the existing rate structure until otherwise ordered to change in a limited proceeding or rate case.

In this case, Breeze Hill is a small water and wastewater utility serving 110 residential customers in a mobile home community. Based on the total gallons pumped from the well, summer usage varies from 730 to 1,000 gallons per day (gpd) per lot and winter usage is about 545 gpd per lot. Wastewater flows vary, but seem to average 90 gpd per lot returning to the system. Clearly, the community served by Breeze Hill uses excess water for purposes other than household water uses. For example, the standard water usage level for rate setting purposes is considered to be 350 gpd per equivalent residential connection (ERC), which in this case equates to a per lot amount.

The Water Management District was contacted to determine whether the utility was located in any type of special district, such as a water caution use area. Breeze Hill is not located in such an area.

The owner of Breeze Hill, Mr. Paul Bieber, was contacted to determine feasibility of meter installation. A schematic of the location of lines within park was available, and the estimate to purchase the meters would be \$11,000, based on 110 customers and \$100 per meter, not including installation. Mr. Bieber indicated that he is aware of the excessive usage, and that it is his intention to file for a staff assisted rate case as soon as the grandfather certificate process is completed in order to have charges approved to recover the cost of installing meters. At this time, he cannot afford to install meters.

Although the system is not located in a sensitive water area, Mr. Bieber is hereby placed on notice that Breeze Hill will be required to install meters and implement a base facility and gallonage charge rate structure in its next filing with the Commission.

Based on the foregoing, we find it appropriate to approve Breeze Hill's existing rates and charges, as set forth above. Breeze Hill shall continue to charge these rates and charges until



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authorized to change by this Commission in a subsequent proceeding. Breeze Hill has filed a tariff which reflects the rates and charges approved herein. The tariff shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets.

Upon proof of notification and if no timely protests are filed to the proposed agency action portion of this Order, no further action shall be required and the docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities, 152 Breeze Hill, Lake Wales, Florida 33853, is hereby granted Certificates Nos. 598-W and 513-S. The territory Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities is authorized to serve is shown on Attachment A, which by reference is incorporated herein. It is further

ORDERED that the Agreement for Deed filed by Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities is accepted as sufficient, in this instance, to meet the requirements of Rule 25-30.035(6), Florida Administrative Code. It is further

ORDERED that Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities shall provide notice of the action taken herein by providing a copy of this Order within seven days of the date of its issuance to the Office of Public Counsel, the Polk County Commission, and to the utility's customers, as set forth in the body of this Order. It is further

ORDERED that Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities shall provide notice of the action taken herein once in a newspaper of general circulation in the service area approved by this Order. The notice to be published is shown on Attachment B of this Order, which by reference is incorporated herein. The notice shall be published within seven days of the issuance date of this Order. It is further

ORDERED that upon completion of the noticing, Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities shall provide the Commission with proof of notification within 20 days of the issuance date of the Order. It is further

ORDERED that Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities' current rates and charges, as set forth in the body of

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this Order, are hereby approved. Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities shall continue to charge these rates and charges until authorized to change by this Commission in a subsequent proceeding. It is further

ORDERED that the tariff filed by Bieber Enterprises, Inc. d/b/a Breeze Hill Utilities, which reflects the rates and charges approved herein, shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 23rd day of November, 1998.



KAY FLYNN, Chief  
Bureau of Records

( S E A L )

ALC

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.

As identified in the body of this order, our action granting grandfather certificates is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 14, 1998. If such a petition is filed, 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. In the absence of such a petition, this order shall become effective on the date subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an 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 Records and Reporting 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. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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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 Director, Division of Records and Reporting 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 or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting 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.

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**ATTACHMENT A**

BIEBER ENTERPRISES, INC. d/b/a BREEZE HILL UTILITIES  
Polk County

Water and Wastewater Service Area

Township 30 South, Range 29 East, Section 32

The North 1,620 feet, East of Lake Walk in the Water Road, and West of Lake Walk in the Water, further described as:

Commence at the Northwest corner of said Section 32, thence North  $89^{\circ}22'30.49''$  East a distance of 130 feet, more or less, to the Point of Beginning (POB), this point also the East right-of-way of Walk in the Water Road, thence continue North  $89^{\circ}22'30.49''$  East a distance of 3,709.14 feet to the waters edge of Lake Walk in the Water, (this Point also 3,839.14 feet from the Northwest Corner of said Section 32), thence meander Southerly and slightly Westerly along the waters edge a distance of approximately 1,660 feet, more or less, thence run North  $89^{\circ}58'44.5''$  West a distance of 1907.0 feet to the East right-of-way of Walk in the Water Road, Thence Northerly along the East right-of-way of Walk in the Water Road the following courses to the POB: thence North  $44^{\circ}30'$  West a distance of 1,950 feet, more or less, along the East right-of-way of Walk in the Water Road, thence North  $40^{\circ}$  West a distance of 150 feet, more or less, along the East right-of-way of Walk in the Water Road, thence North  $32^{\circ}$  West a distance of 130 feet, more or less, along the East right-of-way of Walk in the Water Road to the POB.

(Revised 10/22/98)  
**ATTACHMENT B**

**APPLICATION FOR ORIGINAL CERTIFICATE  
(FOR A UTILITY IN EXISTENCE AND CHARGING RATES)**

**(Section 367.045, Florida Statutes)**

**LEGAL NOTICE**

Notice is hereby given on     (Date)    , pursuant to Section 367.045, Florida Statutes, of the application of Bieber Enterprises, Inc. D/B/A Breeze Hill Utilities to operate a water and wastewater utility to provide service to the following described territory in Polk County, Florida as follows:

**Water and Wastewater Service Area**

Township 30 South, Range 29 East, Section 32

The North 1,620 feet, East of Lake Walk in the Water Road, and West of Lake Walk in the Water, further described as:

Commence at the Northwest corner of said Section 32, thence North  $89^{\circ}22'30.49''$  East a distance of 130 feet, more or less, to the Point of Beginning (POB), this point also the East right-of-way of Walk in the Water Road, thence continue North  $89^{\circ}22'30.49''$  East a distance of 3,709.14 feet to the waters edge of Lake Walk in the Water, (this Point also 3,839.14 feet from the Northwest Corner of said Section 32), thence meander Southerly and slightly Westerly along the waters edge a distance of approximately 1,660 feet, more or less, thence run North  $89^{\circ}58'44.5''$  West a distance of 1907.0 feet to the East right-of-way of Walk in the Water Road, Thence Northerly along the East right-of-way of Walk in the Water Road the following courses to the POB: thence North  $44^{\circ}30'$  West a distance of 1,950 feet, more or less, along the East right-of-way of Walk in the Water Road, thence North  $40^{\circ}$  West a distance of 150 feet, more or less, along the East right-of-way of Walk in the Water Road, thence North  $32^{\circ}$  West a distance of 130 feet, more or less, along the East right-of-way of Walk in the Water Road to the POB.

Any objection to the said application must be made in writing and filed with the Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within thirty (30) days from the date of this notice. At the same time, a copy of said objection should be mailed to the applicant whose address is set forth below. The objection must state the grounds for the objection with particularity.

Mr. Paul E. Bieber  
Bieber Enterprises, Inc.  
152 Breeze Hill  
Lake Wales, Florida 33853