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RECORDS AND REPORTING



# Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

**DATE:** JUNE 29, 2000

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

**FROM:** DIVISION OF LEGAL SERVICES (CIBULA) *Inc. 90*  
DIVISION OF ECONOMIC REGULATION (DRAPER, FLETCHER, *SBS*  
MERCHANT *mom*) *198*

**RE:** DOCKET NO. 980992-WS - COMPLAINT BY D.R. HORTON CUSTOM HOMES, INC. AGAINST SOUTHLAKE UTILITIES, INC. IN LAKE COUNTY REGARDING COLLECTION OF CERTAIN AFPI CHARGES.

DOCKET NO. 981609-WS - EMERGENCY PETITION BY D.R. HORTON CUSTOM HOMES, INC. TO ELIMINATE AUTHORITY OF SOUTHLAKE UTILITIES, INC. TO COLLECT SERVICE AVAILABILITY CHARGES AND AFPI CHARGES IN LAKE COUNTY.

**AGENDA:** 07/11/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\980992.RCM

### CASE BACKGROUND

Southlake Utilities, Inc. (Southlake or utility) is a Class C utility providing service to approximately 374 water and 368 wastewater customers in Lake County. On August 4, 1998, D.R. Horton Custom Homes, Inc. (Horton), a developer in Southlake's territory, filed a Complaint against the utility, pursuant to Rules 25-22.036 and 25-30.560, Florida Administrative Code, regarding the collection of allowance for funds prudently invested (AFPI) charges under a developer's agreement entered into by both parties on September 17, 1996. On November 16, 1998, Horton filed a Petition, pursuant to Section 367.101, Florida Statutes, and Rules 25-22.036(4)(b), 25-30.580, and 28-106.301, Florida Administrative

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Code, to immediately eliminate the authority of Southlake to collect service availability and AFPI charges. By Order No. PSC-99-0027-PCO-WS, issued January 4, 1999, the Commission initiated an investigation into the utility's AFPI and service availability charges and held these charges subject to refund.

By Order No. PSC-00-0917-SC-WS, issued May 9, 2000, the Commission ordered the utility to show cause and to provide security for the service availability charges held subject to refund in the event of a protest. This Order also was a notice of proposed agency action ordering discontinuance of water plant capacity charges and AFPI charges; reducing the amount of wastewater plant capacity charges collected; and requiring refunds. On May 30, 2000, the utility timely filed a protest to the proposed agency action portions of the Order and requested a formal hearing in the matter. However, the utility did not file the security for the service availability charges being held subject to refund as required by Order No. PSC-00-0917-SC-WS. The administrative hearing in this matter is scheduled for March 15 and 16, 2001.

This recommendation addresses whether Southlake should be ordered to show cause for its apparent violation of Order No. PSC-00-0917-SC-WS, for failing to provide security for the service availability charges being held subject to refund. Further, staff is recommending that the utility's request for a corporate undertaking be denied.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should Southlake Utilities, Inc., be ordered to show cause, in writing, within 21 days, why it should not be fined for its apparent violation of Order No. PSC-00-0917-SC-WS, for failing to file the proper security for amounts being held subject to refund in the event of a protest?

**RECOMMENDATION:** Yes. The utility should be ordered to show cause, in writing, why it should not be fined \$100 per day from May 30, 2000, for its apparent violation of Order No. PSC-00-0917-SC-WS. The show cause order should incorporate the conditions stated in the staff analysis. (CIBULA, FLETCHER)

**STAFF ANALYSIS:** By Order No. PSC-00-0917-SC-WS, the Commission ordered the utility to show cause and to provide security for service availability charges held subject to refund in the event of a protest. This Order also was a notice of proposed agency action ordering the discontinuance of water plant capacity charges and AFPI charges; reducing the amount of wastewater plant capacity charges collected; and requiring refunds.

In regard to security for service availability charges being held subject to refund, Order No. PSC-00-0917-SC-WS states that:

In the event of a protest of this Order, the utility shall file either a bond or letter of credit, or if it qualifies, a corporate undertaking for the following:

1) Any service availability charges, paid or prepaid, for connections made between December 15, 1998, and April 18, 2000. For water, 100% of the plant capacity charges, paid or prepaid, shall be secured. For wastewater, the difference between the current plant capacity charge and the plant capacity charge set forth in this Order, paid or prepaid, shall be secured.

2) Any prepaid AFPI charges collected as of December 15, 1998, that have not been escrowed prior to April 18, 2000, shall be secured.

Further, the Order states that "in the event of a protest, all collections of plant capacity charges made after April 18, 2000, paid or prepaid, for water shall be escrowed" and that for wastewater, the difference between the current charge and the plant capacity charge set forth in Order No. PSC-00-0917-SC-WS collected after April 18, 2000, must be secured.

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On April 18, 2000, immediately after the agenda conference, staff discussed the security options available to the utility. At that meeting, staff informed the utility that if the utility were to request a corporate undertaking, it would have to be from someone other than the utility. Based on staff's knowledge of the utility's financial condition at that time, Southlake had negative owners' equity and as such would not qualify for a corporate undertaking.

On May 30, 2000, Southlake timely filed a protest to the proposed agency action portions of the Order and requested a formal hearing in the matter. However, the utility's protest and request for hearing did not include the security required by Order No. PSC-00-0917-SC-WS for the service availability charges being held subject to refund and for the charges collected after April 18, 2000.

On June 6, 2000, staff counsel contacted counsel for Southlake to inquire about the security required by Order No. PSC-00-0917-SC-WS. Southlake's counsel stated that the utility had hired a consultant to determine the amount of money that was required to be secured and that the utility would provide the required security as soon as possible. On June 13, 2000, the utility submitted an escrow agreement to secure the collection of plant capacity charges made after April 18, 2000. However, the security for the service availability charges, paid or prepaid, for connections made between December 15, 1998, and April 18, 2000, and any prepaid AFPI charges collected as of December 15, 1998, that have not been escrowed prior to April 18, 2000, was not included.

On June 22, 2000, staff counsel again contacted counsel for Southlake in regard to the security required for the service availability charges being held subject to refund. Staff counsel instructed the utility to file such security with the Commission by June 26, 2000. On June 26, 2000, the utility contacted staff counsel and Horton and stated that it needed additional time to file the required security. Staff counsel instructed the utility to file the required security by 9:00 a.m. on June 29, 2000.

On June 28, 2000, the utility filed a request for approval of a corporate undertaking based on Southlake's corporate guarantee. In this request, it submitted the comparative balance sheets and income statements for the years 1997, 1998 and 1999. Based on staff's analysis, the utility has minimal liquidity and reflects negative equity for 1999 and 1998. In addition, the utility has minimal interest coverage and negative profitability for the same

two-year period. Accordingly, staff recommends that Southlake cannot support a corporate undertaking in the amount of \$735,592.

Order No. PSC-00-0917-SC-WS states the following:

If the utility chooses a corporate undertaking, the utility or other entity requesting the corporate undertaking shall provide the most recent three years of financial data (i.e., balance sheets and income statements). The criteria for approving a corporate undertaking includes sufficient liquidity, owners' equity, profitability and interest coverage to guarantee any potential refund.

Staff believes that the utility's request for a corporate undertaking based on Southlake's financial condition was inappropriate. At the April 18, 2000 agenda conference, staff stated that we did not believe that the utility would qualify for a corporate undertaking. This was discussed in more detail with the utility immediately following the agenda. Secondly, staff believes that it is readily apparent that negative equity and a net loss in 1999 on Southlake's financial statements is insufficient to qualify for a corporate undertaking based on the criteria stated in the order. Staff believes that the utility knew or should have known that Southlake would not qualify for a corporate undertaking. Thus, staff believes that the utility's request for a corporate undertaking is an attempt to avoid a show cause recommendation with fines recommended.

Section 367.161(1), 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, or any lawful Commission rule or order. In failing to file sufficient security for the service availability charges being held subject to refund upon its protest of the proposed agency action order, staff believes the utility's act was "willful" in the sense intended by Section 367.161, 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, 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 "[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."

Staff recommends that Southlake should be ordered to show cause, in writing, within 21 days, why it should not be fined \$100 per day from May 30, 2000, the date it filed its protest to the proposed agency action order, for its apparent violation of Order No. PSC-00-0917-SC-WS. Staff realizes that pursuant to Section 367.161(1), Florida Statutes, each day the utility is in violation of Order No. PSC-00-0917-SC-WS constitutes a separate offense, which could conceivably result in a penalty of up to \$5,000 per day since the date the utility began violating Order No. PSC-00-0917-SC-WS. However, given the size of the utility, staff believes that \$100 per day is an appropriate amount to bring the utility into compliance with Order No. PSC-00-0917-SC-WS.

Staff also recommends that the show cause order incorporate the following conditions: Southlake's response to the show cause order should contain specific allegations of fact and law. Should Southlake file a timely written response that raises material questions of fact and makes a request for hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings shall be scheduled before a final determination on this matter is made. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. In the event Southlake fails to file a timely response to the show cause order, the fine shall be deemed assessed with no further action required by the Commission. If the utility timely responds but does not request a hearing, Commission staff shall prepare a recommendation for our consideration regarding the disposition of the show cause order. If the utility responds to the order to show cause by remitting the penalties, then the show cause matter shall be considered resolved.

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**ISSUE 2:** Should the utility's request for a corporate undertaking be approved?

**RECOMMENDATION:** No, Southlake cannot support a corporate undertaking in the amount of \$735,592. (D. DRAPER, FLETCHER)

**STAFF ANALYSIS:** As discussed in Issue 1, on June 28, 2000, the utility filed a request for approval of a corporate undertaking based on Southlake's corporate guarantee. In this request, it submitted the comparative balance sheets and income statements for the years 1997, 1998 and 1999. Staff has reviewed these financial statements and performed an analysis of the four criteria required to approve a corporate undertaking. Based on staff's analysis, the utility has minimal liquidity and reflects negative equity for 1999 and 1998. In addition, the utility has minimal interest coverage and negative profitability for the same two-year period. Accordingly, staff recommends that Southlake cannot support a corporate undertaking in the amount of \$735,592.

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**ISSUE 3:** Should these dockets be closed?

**RECOMMENDATION:** No. These dockets should remain open pending the outcome of the Commission's final action in these dockets. (CIBULA, FLETCHER)

**STAFF ANALYSIS:** These dockets should remain open pending the outcome of the Commission's final action in these dockets.