BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for certificates to provide water and wastewater service in Alachua County under grandfather rights by TURKEY CREEK, INC. and FAMILY DINER, INC. d/b/a TURKEY CREEK UTILITIES.	Docket No.: [redacted] Order No.: PSC-95-1445 FOF WS Issued: November 28, 1995

RESPONDENTS' REPLY TO REINSTATED SHOW CAUSE ORDER

The Respondents, **TURKEY CREEK, INC. and FAMILY DINER, INC. d/b/a TURKEY CREEK UTILITIES,** respond to the Order Reinstating Show Cause Proceedings, entered November 28, 1995, as follows:

1. There are material issues of fact and law which remain in dispute, and a hearing is hereby requested, pursuant to Section 120.57(1), Florida Statutes (1993). Among disputed legal and factual matters are the following: when did the respondents actually "sell" the utility to the City of Alachua; does the Commission retain jurisdiction over an entity after it divests itself of all utility operations; does a "transferor utility" remain liable for Commission - ordered refunds not reduced to judgment once the transferor quits utility operations; and is a Commission refund order, which became final after the subject utility is sold, binding on a company which no longer operated under the Commission's jurisdiction.

2. The Public Service Commission issued two orders in 1993, reducing the utility's rates and charges, and ordering a refund. These orders, in the form of Proposed Agency Actions, were initially challenged by the utility, which later withdrew its

request for a formal hearing. The rate reduction and the refund orders became final in December 1993, and in January 1994, the utility appealed the two orders to the First District Court of Appeal.

3. The utility's appeal centered around a challenge of the Commission's right, in a wastewater grandfather proceeding, to reduce rates and charges and to order refunds. The utility did not contest that the Commission could do so in formal rate-making proceedings, but asserted that the scope of the orders exceeded the Commission's authority in grandfather proceedings. The utility was unsuccessful and the Commission orders were affirmed. The utility's initial appellate brief in the appellate proceeding is attached hereto as Exhibit A, and incorporated herein, for the limited purpose of illustrating the issues raised in the appeal.

4. The appellate issues differ markedly from those raised in the pending circuit court litigation, as show in the complaint for declaratory relief, a copy of which is attached hereto as Exhibit B. In the appeal, the Commission's jurisdiction was not challenged, only the propriety of the exercise of its authority in the grandfather proceedings. In the pending case, the utility contests the Commission's jurisdiction to proceed against it at all. The issues are not the same, and the arcane principles of collateral estoppel, res judicata, and issue preclusion, do not apply.

5. In its reinitiated show cause order (PSC 95-1445-FOF-WS at page 4), the commission states an erroneous precept, the correction of which is vital to a proper decision: "we note that the circuit court does not have subject matter jurisdiction to review an order of this Commission . . . ." While this statement is not challenged by the utility, it is crucial to understand that the utility's lawsuit does not seek appellate review by the circuit court. Appellate review of the Commission's exercise of its discretion in the grandfather proceeding took place, unsuccessfully, in the First District. The declaratory relief proceeding now pending is not an effort to obtain circuit court review of the old PSC orders. It is a de novo challenge to the commission's jurisdiction over these respondents.

6. This misapprehension of the scope and nature of the declaratory relief sought by the plaintiff no doubt led the Commission to deny the respondents' suggestion that these proceedings be abated pending the outcome of the civil suit. (Believing that the respondents were seeking to duplicate in circuit court the review process they lost in the district court would incline the Commission to "get on with it" and deny an abatement request.) But with this explanation - that the challenge is to the fundamental jurisdiction of the Commission to proceed at all - the abatement proposition has great merit. To allow the penalty/enforcement/collection process to move forward under the

Commission's asserted authority, when that authority has not been verified, is to countenance the waste of precious resources. It is far more efficient and infinitely more fair to allow the disputants an opportunity to first resolve the threshold jurisdictional issue.

7. Circuit courts are the proper forum in which to seek declaratory relief. Disputants are afforded an opportunity to have a dispassionate jurist interpret the validity of a contract, a constitutional provision, or a statute. Chapter 86, Florida Statutes (1993). This dispute resolution mechanism is designed for problems like the instant one. The declaratory relief process affords the respondents the right to have the Commissions's jurisdiction order them either verified or renounced. If it is confirmed by the court, then the respondents can comply with the refund orders; if there is no jurisdiction, the respondents are not forced into wrongful refunds. But at any rate, the coercive, punitive powers of the Commission to order potentially fatal fines and penalties should not be a truncheon to beat the respondents away from the courthouse door, where they go in good faith seeking a resolution to the dispute.

8. The Commission should not enter any penalty against the respondents, at this time. Rather, it should leave the matter open until jurisdiction is determined. If the Commission's position is ultimately upheld and its jurisdiction over the respondents is confirmed, it retains jurisdiction to coerce compliance with the

refund order, if it is not timely and voluntarily forthcoming. By resorting to the long-revered remedy of declaratory relief, the respondents evidence their good-faith intent to resolve a bona fide dispute with the Commission, for which no penalty should inure.

Respectfully submitted,

for Michael W. Jones

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished this 15th **day of December, 1995 to BLANCA S. BAYO, c/o Public Service Commission, Capitol Circle Office Center, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 by Federal Express.**

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IN THE DISTRICT COURT OF APPEAL

STATE OF FLORIDA, FIRST DISTRICT

TURKEY CREEK, INC., and
FAMILY DINER, INC., etc.,

Appellants,

Docket No.: 94-00064
L.T. Case No.: 921098-WS

vs.

FLORIDA PUBLIC SERVICE
COMMISSION,

Appellee.
_____/

APPELLANTS' AMENDED INITIAL BRIEF

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PREFACE

In this brief, the following symbols, abbreviations, names and titles have been used:

"R" followed by a numeral indicates a citation to the record, with the page number; "utility" indicates the appellant; "the P.S.C." or "the Commission" indicates the appellee;

STATEMENT OF THE FACTS AND OF THE CASE

The appellants owned a water and wastewater utility whose function was to serve the residents of Turkey Creek, a private, lightly restricted residential and recreational community in Alachua County, Florida (R 1-97). In its early years, the utility operated in a regulatory vacuum, setting its own rates and charges.

Then, the Board of County Commissions of Alachua County passed a resolution which, effective June 30, 1992, placed the utility under the jurisdiction of the Florida Public Service Commission (R 438). The statutory authority for this procedure is set forth in Section 367.171, Florida Statutes (1991). Once this jurisdictional turnover occurs, established Commission procedure requires the utility to submit an application for a grandfather certificate, which when granted authorized the utility to continue assessing the rates and charges in effect on the turnover date (here, June 30, 1992). Turkey Creek complied with this procedure by filing its grandfather application on October 26, 1992 (R. 1-97). Thereafter, rather than follow its established policy of approving the utility's rates and charges, the Commission undertook an evaluation of the utility, as evidenced by the myriad letters and inquiries contained in the instant record.

By various orders of proposed agency action, the Commission disallowed the utility's published rates and charges, established its own version of appropriate rates and charges, and even ordered the utility to refund money to its customers. (R. 240, 335, 358). These proposed agency actions were challenged by the utility, which

filed the requisite petition on proposed agency action (R. 297, 350). These petitions were eventually dismissed (R. 426), and the Commission proceeded to enter its final order, reinstating the proposed agency actions (R. 427). From this order the utility timely appealed. (R. 436).

POINT ON APPEAL

ISSUE ONE ON APPEAL

THE ORDERS FROM WHICH THE UTILITY APPEALED ARE IMPERMISSIBLE DEVIATIONS FROM THE PUBLIC SERVICE COMMISSION'S OFFICIALLY STATED POLICY AND PRACTICE, AND THEY SHOULD BE REVERSED.

SUMMARY OF THE ARGUMENT

When counties relinquish to the Public Service Commission the jurisdiction to regulate water and wastewater utilities, the utilities must file an application for a "grandfather" certificate. This certificate permits the utility to continue operating as before, but under the oversight of the Commission. As a matter of well-stated policy, the Commission automatically approves the utility's rates and charges as of the jurisdictional turnover date, leaving any rate review to a later, more thorough proceeding, as required by statute.

In June 1992, the Alachua County Commission abdicated jurisdiction over the utilities to the Public Service Commission. Shortly thereafter, the appellant applied for a grandfather certificate, relying on the Commission's policies and procedures, and on the express oral representation of one of its supervisors. In an unprecedented series of orders, the Commission departed from its nonrule policy on grandfathering rates and charges, and conducted its own unilateral, summary rate review, contrary to the applicable statute. This arbitrary conduct resulted in the approval of rates lower than those charged by the appellant on the turnover date, the revamping and reduction of long-established charges, and the confiscatory requirement that the utility refund money to its customers.

The Commission's orders are contrary to law and should be reversed.

ISSUE ON APPEAL

THE ORDERS FROM WHICH THE UTILITY APPEALED ARE IMPERMISSIBLE DEVIATIONS FROM THE PUBLIC SERVICE COMMISSION'S OFFICIALLY STATED POLICY AND PRACTICE, AND THEY SHOULD BE REVERSED.

Without question, the legislature has granted the Public Service Commission the authority to review rates when granting a grandfather certificate to a water and wastewater utility. §367.171(2)(c), *Florida Statutes (1993)*. By its own practice and stated policy, however, the Public Service Commission has promulgated a nonrule policy of avoiding rate review at the initial stage of its jurisdiction, preferring instead to uniformly approve the rates in effect when the commission assumes jurisdiction.

In Re: Eastdestin Wastewater Service, Order No. 94-0260-FOF-SU (94 FPSC 3:235 at 237), specifically states, "It is the practice of the Commission to approve the existing rates and charges that the utility is charging at the time of jurisdiction." The commission therefore denied the utility's request that a higher rate be grandfathered into its certificate. An identical statement of this policy was set out by the Commission in In Re: Destin Utility Company, Inc., Order No. 94-0259-FOF-WU (94 FPSC 3:229 at 230). The policy statement was phrased slightly differently in In Re: Kincaid Hills Water Company, Order No. 93-1027-FOF-WU (93-FPSC 7:353 at 354): "In applications for original certificates pursuant to grandfather rights, it is our policy to approve the rates and charges in effect at the time we gain jurisdiction over the county."

This practice is not novel. It has been effective since at least 1986. The following orders all approve, in the context of a grandfather application, the rates in effect on the jurisdictional turnover date:

PSC 92-0866-FOF-WU
PSC 92-0543-FOF-SU
PSC 92-1454-FOF-WS
PSC 22565
PSC 19848
PSC 18707
PSC 18379
PSC 18042
PSC 17914
PSC 17300
PSC 16935
PSC 16557
PSC 16455
PSC 16270
PSC 16156
PSC 16155
PSC 16029
PSC 16027
PSC 15911
PSC 15647
PSC 15608
PSC 93-1380-FOF-WU
PSC 93-0713-FOF-WU
PSC 93-0739-FOF-WS
PSC 93-1027-FOF-WU
PSC 93-0621-FOF-SU
PSC 93-0620-FOF-SU
PSC 94-0260-FOF-SU
PSC 94-0259-FOF-WU

In the instant case, the Commission refused to approve the rates and charges in effect in Turkey Creek as of June 30, 1992, clearly departing from its stated policy and practice. This court must remand this case to the Commission, as its actions regarding the rates requested in the Appellant's grandfather application were a departure from officially stated agency policy or practice, without sufficient explanation. §120.68(12)(c), *Florida Statutes*

(1993). The same result was reached by this court in an AFDC-denial case, Amos v. Department of Health and Rehabilitative Services, 444 So.2d 43 (Fla. 1st DCA 1983), in which the court ruled:

> Central to the fairness of administrative proceedings is the right of affected persons to be given the opportunity for adequate and full notice of agency activities. These persons have the right to locate precedent and have it apply, and the reasons for agency action. *State ex rel. Department of General Services v. Willis,* 344 So.2d 580 (Fla. 1st DCA 1977). Inconsistent results based upon similar facts, without a reasonable explanation, violate Section 120.68(12)(b), Florida Statutes, as well as the equal protection guarantees of both the Florida and United States Constitutions. *North Miami General Hospital, Inc. v. Department of Health and Rehabilitative Services,* 355 So.2d 1272, 1278 (Fla. 1st DCA 1978).

The significance of agency deviation from its stated policies and procedures is shown in B.B. v. Department of Health and Rehabilitative Services, 542 So2d 1362 (Fla. 1st DCA 1989), footnote three:

> The agency also erred by departing without explanation from its previous policy that "accidental happenings" are not child abuse. In *H.H. v. DHRS*, DOAH No. 86-454 OC (DHRS, June 15, 1987), the agency stated that "{t}he definition of child abuse requires an 'act'. This requirement for a volitional act must be distinguished from an accidental happening. . . . An accidental happening is not abuse." *H.H.* at 3.
>
> If HRS chose to depart from the policy, it was required to explain its departure. §120.68(12)(c), Fla. Stat. (1987). Because it failed to do so, remand would be proper on this ground alone. Id. at 1365.

There is little dispute that the utility was operating in a

regulatory vacuum prior to June 30, 1992, when the Commission assumed jurisdiction. The Alachua County Commission, which had the authority to regulate the utility but never did, had no rate making or rate approval mechanism in place. The City of Alachua, within whose boundaries lay Turkey Creek, had no authority to regulate the utility. Thus, the utility set its own rates and operated without regulatory oversight until June 30, 1992.

In August 1991, before the jurisdictional turnover date, the utility increased its rates, to the level for which approval was sought in the grandfather application. Emphatically, the utility has never increased that rate. These rates were published by the utility and distributed to its customers and to the City of Alachua, for informational purposes. The most logical place for the Commission to look for the prevailing rates, when considering the utility's grandfather application, is to the utility's published and disseminated rate sheets. Such a review would plainly show the rates and charges sought by the utility, not those imposed by the Commission.

The Commission erred in its finding[1] that the utility raised its rates on two occasions since June 30, 1992. The explanation is quite simple: while the utility formally set its rates at its August 1991 meeting, from time to time thereafter it elected to discount those rates, to benefit its customers and to encourage continued growth. The two events the Commission labeled as rate hikes were no such thing. All that happened was the utility

[1] PSC-93-0229-FOF-WS, page 3

modified the amount of the discount given off of the rates which had existed since August 1991. The Commission was also wrong in its description[2] of the utility's relationship with the City of Alachua. Despite its finding that the city regulated the utility prior to 1991 "by agreement", no such agreement existed; where is the evidence of this unusual regulatory contract? No such regulatory relationship did - or could ever - exist with the City of Alachua. These two critical factual errors in the Commission's order eviscerate the grounds for its decision to approve rates lower than those sought to be grandfathered.

The Commission's position on this matter is illogical, having the unintended and ironic effect of being anti-consumer. It actually rewards maximum charges and punishes discounts. Clearly, had the utility known the Commission's position, it would not have given any customer any discount, but simply charged 100 percent of the rates it established and published in 1991. This would guarantee the grandfathering of its maximum rate at the expense of the consumers, who under the utility's plan enjoyed many months of rate relief. What possible consumer benefit is garnered by such a short-sighted policy?

This court must realize the scope of the Commission's wrongdoing in this case. It did not act according to its policy and simply grandfather in the existing rates. Rather, it engaged in a summary rate-setting proceeding without complying with the

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[2] Id.

statutory requirements of §367.081, *Florida Statutes (1993)*. Pursuant to §120.68 (12)(c), *Florida Statutes (1993)*, the Commission's order must be reversed and the matter remanded.

The matter of the rates having been argued, review of the Public Service Commission's treatment of the charges by the utility is necessary. Remember the words of the Commission: "It is the practice of the Commission to approve the existing rates and charges that the utility is charging at the time of jurisdiction. In Re: Eastdestin Wastewater Service, supra. (emphasis added).

In its May 27, 1993 order (PSC 93-0816-FOF-WS), the Commission acknowledged that, on the jurisdictional turnover date, the utility had in effect various charges for fire protection; connection and reconnection of service; late payment of bills; service availability; meter installation and replacement; etc. Had the Commission acted consistently and fairly toward the utility, it would have grandfathered in these charges, as well as the rates, pending a full and complete review as required by statute.

However, rather than approve the charges in the grandfather application, the Public Service Commission arbitrarily departed from its nonrule policies and practices by summarily altering each and every such charge, and in many cases, unilaterally and capriciously establishing its version of an "appropriate" charge. Nowhere in the multitude of orders recited above, in which other utilities' rates and charges were approved in a grandfather proceeding, was the Commission so heavy-handed. Most alarming was the Commission's failure to alter these charges in the statutorily

mandated context of a full scale review proceeding, which would have afforded the utility a measure of protection for its constitutionally protected rights.

Also unprecedented in this context is the agency's February 1993 order requiring the utility to provide a refund to its customers. Again, in an original grandfather proceeding, the Commission's policy and practice is to simply approve the existing rates and charges, nothing more. Of course, further proceedings could be initiated by the utility, or by the Commission, to review the rates and charges. §367.081 (2)(a) *Florida Statutes (1993)*. This full-scale review proceeding may result in rate adjustment, but it would only occur after consideration of the myriad of factors set out in the statute, and it would be prospective in effect. A summary grandfather proceeding has never before, or since, been the forum for rate and charges revision, let alone the issuance of a refund order.

By what authority can the Commission, in a summary grandfather certificate proceeding, review the rates and charges, arbitrarily declare them excessive, and then make this declaration retroactive and order a refund? Even in In Re: Lake Suzy Utilities, Inc., P.S.C. Order 16935, 86 FPSC 12-89, where a slight reduction in the cost of second and third block gallonage rates was necessary, the reduction was applied prospectively, and no refund was required.

Nothing occurred which justified the Public Service Commission's departure from its policy or which can sustain its unilateral summary retroactive rate-making behavior in the instant

case. The Commission orders complained of in this case were arbitrarily entered, deprived the utility of its statutory and constitutional rights, and are therefore fatally deficient. They should be reversed.

CONCLUSION

Because the Commission violated the applicable statutes governing its authority for, and the process for, reviewing and setting rates and charges, and because it improperly departed from its stated policies and practices in refusing to grandfather the Appellant's existing rates and charges, the orders complained of should be reversed, and the matter remanded to the Commission with directions to grant the utility's application for a grandfather certificate as submitted.

Respectfully submitted,

Michael W. Jones

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Amended Brief has been furnished this 10th day of September, 1994 to MARY ANN HELTON, ESQUIRE, Florida Public Service Commission, Fletcher Building, Room 226, 101 E. Gaines Street, Tallahassee, Florida 32209 by U.S. Mail.

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IN THE CIRCUIT COURT OF FLORIDA, EIGHTH JUDICIAL CIRCUIT

IN AND FOR ALACHUA COUNTY, FLORIDA

CIVIL ACTION

TURKEY CREEK, INC., and FAMILY DINER, INC.,	)	
Plaintiffs,	)	**CASE NO.:**
vs.	)	**DIVISION:**
FLORIDA PUBLIC SERVICE COMMISSION,	)	
Defendant.	)	

COMPLAINT FOR DECLARATORY RELIEF

The plaintiffs, **TURKEY CREEK, INC., and FAMILY DINER, INC.,** sue the defendant, **FLORIDA PUBLIC SERVICE COMMISSION,** and say:

1. This is an action for declaratory relief, pursuant to Chapter 86, Florida Statutes (1993).

2. The plaintiffs were the former owners and operators of a water and wastewater utility facility, located in Alachua County, Florida. At all material times, the plaintiffs were active Florida corporations headquartered in Alachua County, Florida.

3. The defendant is an agency of the State of Florida which, among other things, regulates certain water and wastewater utilities.

4. On or about June 30, 1992, the defendant assumed jurisdiction over the plaintiffs' utilities operation, and thereafter, issued several orders affecting the plaintiffs' utility.

5. Effective on or about September 23, 1993, the plaintiffs sold said utility to the City of Alachua, which thereafter owned

and operated it. Since said date, the plaintiffs have neither owned nor operated any utility under the defendant's jurisdiction.

6. On or about December 3, 1993, the defendant issued its Order No.: PSC-93-1769-FOF-WS, which finalized two underlying orders of the Commission. The effect of these orders from the Commission was to direct the plaintiffs to make certain refunds to its former customers, failing which the utility may be subject to various fines and penalties.

7. The plaintiffs have not made the refunds ordered by the Commission, challenging the Commission's jurisdiction and authority over companies which no longer own or operate utilities systems. The plaintiffs believe that, by virtue of their prior sale of the utilities to the City of Alachua, and by virtue of their cessation of utilities operations, they are no longer subject to the defendant's jurisdiction, and therefore, that the order requiring refunds is a nullity and is unenforceable. Also, Family Diner, Inc. did not own or operate the utilities when the order was entered.

8. The defendant disputes the plaintiffs' jurisdictional contentions and asserts its continuing authority over the plaintiffs. In fact, as recently as August 1995, the defendant's staff recommended to the defendant that the plaintiffs be sanctioned and that the highest monetary fine be imposed on the plaintiffs.

9. There is a genuine dispute between the parties about their respective rights and obligations under the statutes and orders which govern these matters, and about the plaintiffs' obligation to comply with Commission orders. The dispute is real, current, and genuine.

WHEREFORE, the plaintiffs, **TURKEY CREEK, INC., and FAMILY DINER, INC.**, request a judgment of this court declaring the rights and obligations of the parties in this dispute, and taxing costs against the non-prevailing party.

DATED this _____ day of September, 1995.

Respectfully submitted,

ORIGINAL SIGNED BY
Michael W. Jones
Michael W. Jones