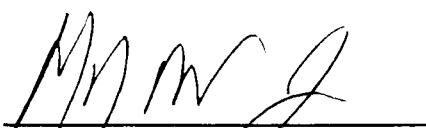


BLANCA S. BAYO, c/o Public Service Commission, Capitol Circle
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BY:



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Creek, Inc. and Family
Diner, Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for) DOCKET NO. 921098-WS
certificates to provide water) ORDER NO. PSC-96-0350-FOF-WS
and wastewater service in) ISSUED: March 11, 1996
Alachua County under grandfather)
rights by Turkey Creek, Inc. &)
Family Diner, Inc., d/b/a Turkey)
Creek Utilities.)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING REQUEST FOR FORMAL HEARING AND REQUEST FOR DEFERRAL
AND
ORDER IMPOSING FINE BUT SUSPENDING SUCH FINE
IF UTILITY CREATES AN APPROPRIATE ESCROW ACCOUNT

BY THE COMMISSION:

Background

Family Diner, Inc. and Turkey Creek, Inc. d/b/a Turkey Creek Utilities (Turkey Creek), was a Class C utility in Alachua County which provided water and wastewater service to approximately 300 customers. On October 26, 1992, Turkey Creek filed an application for certificates to provide water and wastewater service pursuant to Section 367.171, Florida Statutes.

By Proposed Agency Action Order No. PSC-93-0229-FOF-WS, issued February 10, 1993, we proposed to grant the certificates to Turkey Creek, approve its service territory and reduce its rates (and require refunds) to those which were in effect on June 30, 1992, the date we received jurisdiction of Alachua County. The utility protested this proposed agency action order and, as a result, the certificates were never issued to the utility.

A second order, Order No. PSC-93-0816-FOF-WS, issued July 27, 1993, regarding rates and charges was issued and was also protested by the utility. Refunds were required in each of these orders because the utility had illegally increased the rates and charges

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after we had assumed jurisdiction over Alachua County on June 30, 1992.

Prior to the Commission's hearing on these protests, which was scheduled for November 3, 1993, the utility withdrew the protests. By Order No. PSC-93-1769-FOF-WS, issued December 9, 1993, the two prior orders were made final and effective. Turkey Creek subsequently filed an appeal of Order No. PSC-93-1769-FOF-WS with the First District Court of Appeal on January 6, 1994. On March 27, 1995, the First District Court of Appeal affirmed the decision made by the Commission in this docket.

Subsequent to the First District Court of Appeal's affirmation of the Commission's order, our staff, by letter dated April 6, 1995, informed Turkey Creek of its obligation to complete its refund requirement in accordance with Order No. PSC-93-1769-FOF-WS, Section 367.071(2), Florida Statutes, and Rule 25-30.360, Florida Administrative Code. Section 367.071(2), Florida Statutes, states that "[t]he transferor remains liable for any outstanding regulatory assessment fees, fines, or refunds of the utility."

In a follow-up letter, dated May 26, 1995, our staff again informed Turkey Creek of its refund obligation and asked Turkey Creek to submit by June 9, 1995, a scheduled date for completing its refund requirements. Our staff also advised Turkey Creek that it would pursue show cause proceedings if Turkey Creek did not respond by June 9, 1995. By letter dated June 8, 1995, Turkey Creek stated that it was researching its obligation to make the refunds and that it estimated such research would take two weeks to complete.

However, no other response was received from Turkey Creek, and the sale to the city and the pending refunds of rates collected by Turkey Creek were considered at the August 15, 1995, Agenda Conference. Pursuant to our vote at that agenda, an Order Acknowledging Transfer And Initiating Show Cause Proceeding (Order No. PSC-95-1101-FOF-WS) was issued on September 6, 1995. That order required Turkey Creek to show cause in writing within twenty days, why it should not be fined \$5,000 for not complying with Order No. PSC-93-1769-FOF-WS (which order required refunds to be made in accordance with Orders Nos. PSC-93-0229 FOF-WS and PSC-93-0816-FOF-WS).

In response to the Show Cause Order, Turkey Creek, Inc., and Family Diner, Inc., d/b/a Turkey Creek Utilities, filed what they styled Respondents' Reply to Show Cause Order which was dated September 27, 1995. In the response, Turkey Creek requested deferral of the show cause proceeding.

After considering this reply at the November 7, 1995 Agenda Conference, the Commission issued Order No. PSC-95-1445-FOF-WS, which denied the request for deferral of show cause proceedings, clarified the initial show cause order, and reinitiated show cause proceedings against Turkey Creek. That Order was issued on November 28, 1995, and again gave Turkey Creek 20 days in which to respond.

Turkey Creek timely filed its response on December 18, 1995, and, asserting that there were material issues of fact and law in dispute, requested a formal hearing pursuant to Section 120.57(1), Florida Statutes. Turkey Creek also reiterated its assertion that the Commission did not have jurisdiction to issue the orders requiring a refund, that the question of jurisdiction was properly asserted through a Declaratory Statement Action in Circuit Court, and that the Commission should refrain from taking any action pending the outcome of its Declaratory Statement Action in Circuit Court.

In addition to its response filed on December 18, 1995, Turkey Creek, by letters dated February 8 and 19, 1996, offered to deposit funds which it thought sufficient to cover the refunds in either the registry of the court or other appropriate escrow agent in return for abatement of the penalty proceedings. This order addresses the response and offer of Turkey Creek.

Request for Formal Hearing

In its reply, Turkey Creek states that there are disputed legal and factual matters and requests a formal hearing. However, the only factual matter that Turkey Creek alleges is in dispute is the date Turkey Creek sold the utility to the City of Alachua.

However, Order No. PSC-93-1769-FOF-WS, issued on December 9, 1993, specifically states:

On September 15, 1993, the City of Alachua made a preliminary determination to purchase Turkey Creek. The utility states that the City of Alachua began operating the utility effective September 23, 1993. According to information provided by the City, the sale has been closed and the proceeds were to be held in escrow pending Department of Environmental Protection permitting. Subsequently, on October 20, 1993, the utility filed a Notice Dismissing Petitions protesting Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS.

Order No. PSC-93-1769-FOF-WS merely revived Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS, and required refunds for the monthly service rates, the miscellaneous service charges, and the late payment charges to be calculated through the date of sale to the City of Alachua.

In its response to both the first and second show cause order, Turkey Creek attached its Complaint for Declaratory Relief. In that Complaint, Turkey Creek specifically states: "Effective on or about September 23, 1993, the plaintiffs sold said utility to the City of Alachua, which thereafter owned and operated it." This is the exact date referred to in Order No. PSC-93-1769-FOF-WS, and has not been disputed by this Commission. Therefore, there appears to be no dispute of material fact.

The other issues raised by Turkey Creek are legal questions which we have already answered through issuance of our various orders (see specifically Order No. PSC-93-1769-FOF-WS). These orders have now been affirmed by the First District Court of Appeal by order issued on March 27, 1995, in Case No. 94-64.

Section 120.57, Florida Statutes, specifically states in pertinent part:

Unless waived by all parties, subsection (1) applies whenever the proceeding involves a disputed issue of material fact. (emphasis supplied)

Despite claims to the contrary, Turkey Creek has not shown that there is a dispute of material fact. Further, there has been no showing of changed circumstance which would warrant a hearing under either Section 120.57(1) or (2), Florida Statutes. Therefore, Turkey Creek's request for a formal hearing, pursuant to Section 120.57(1), Florida Statutes, is denied.

Request for Deferral

Turkey Creek has again requested that we defer taking any action in this show cause proceeding pending the outcome of its action in the Circuit Court. This exact same request was denied in Order No. PSC-95-1445-FOF-WS. Turkey Creek, except as set out below, has not provided us with any additional information to show why we should not proceed with the show cause proceeding.

Asserting that the Circuit Court does not have subject matter jurisdiction to review an order of this Commission, we have moved the Circuit Court to dismiss the complaint. However, the hearing on this motion was held on February 15, 1996, and the Circuit Court had not ruled as of the date of our vote on this order.

In Turkey Creek's Complaint for Declaratory Relief, they claim that, at the time Order No. PSC-93-1769-FOF-WS was issued, the Commission did not have jurisdiction. Although many appeals courts have held that the defense of lack of subject matter jurisdiction may be raised at any time (see, Hill Top Developers v. Holiday Pines Service Corporation, 478 So. 2d 368 (Fla. 2d DCA 1985); and Department of Health and Rehabilitative Services v. Schreiber, 561 So. 2d 1236 (Fla. 4th DCA 1990), this does not mean that the circuit court is the proper place to raise such a question.

Pursuant to Section 367.011(2), Florida Statutes, the legislature has invested the Commission with "exclusive jurisdiction over each utility with respect to its authority, service, and rates." Section 367.011(4), Florida Statutes, states, "This chapter shall supersede all other laws on the same subject, and subsequent inconsistent laws shall supersede this chapter only to the extent that they do so by express reference." Pursuant to Article I, Section 3(b)(2), of the State Constitution, and Section 350.128(1), Florida Statutes, the First District Court of Appeal shall review any action of the Commission which relates to service provided by water and wastewater utilities.

This Commission is authorized to regulate the rates, terms and conditions of water and wastewater service as well as the operations inherent in the provision of such service. The fixing of rates and charges for a water and wastewater utility by this Commission is specifically set out in Section 367.081(1), Florida Statutes, and clearly within the Commission's jurisdiction to regulate. The actions of the Commission set forth in Order No. PSC-93-1769-FOF-WS, requiring a reduction of the rates and a refund were and are clearly within the Commission's jurisdiction.

In view of the Commission's exclusive jurisdiction in the regulation of water and wastewater utilities, the Circuit Court is without jurisdiction to consider the Commission's decision in Order No. PSC-93-1769-FOF-WS. Where the Commission has jurisdiction to issue an order, the Circuit Court has no jurisdiction to conduct further proceedings. Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989). Moreover, neither general law nor the constitution provide a circuit court with concurrent or cumulative power of direct review of Commission actions. Fuller at 1213. In addition, in Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990), the Florida Supreme Court held that the Commission must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute. Bryson, at 1255. If the Commission is alleged to act without jurisdiction, it is the duty of the appellate court to review the allegation and correct the Commission's error, if any. Id., at 1255.

The First District Court of Appeal, in Case No. 94-64, specifically reviewed and upheld Order No. PSC-93-1769-FOF-WS. See, Turkey Creek, Inc. and Family Diner, Inc. d/b/a Turkey Creek Utilities v. Florida Public Service Commission, 652 So.2d 822 (Fla. 1st DCA 1995). It is clear that Turkey Creek is seeking a second judicial determination on the validity of Order No. PSC-93-1769-FOF-WS. Therefore, the defenses of collateral estoppel and res judicata would also appear to be applicable.

Further, our staff has, on numerous occasions, informed Turkey Creek of its obligation to comply with Order No. PSC-93-1769-FOF-WS. Therefore, Turkey Creek has been given ample time and sufficient information to comply with the Commission's order. Accordingly, we again deny Turkey Creek's request to defer any show cause or penalty proceeding pending the outcome of the Circuit Court declaratory statement action.

Imposition and Suspension of Fine

We have issued two orders, Orders Nos. PSC-95-1101-FOF-WS and PSC-95-1445-FOF-WS, ordering Turkey Creek to show cause why it should not be fined for its failure to comply with Order No. PSC-93-1769-FOF-WS. In its two responses, Turkey Creek has failed to demonstrate why a fine should not be imposed.

Pursuant to Section 367.161(1), Florida Statutes, the Commission is authorized to assess a penalty of up to \$5,000 per day for each offense, if a utility is found to have willfully violated any provision of Chapter 367, Florida Statutes, or any

lawful rule or order of the Commission. Further, utilities are charged with the knowledge of the Commission's rules and orders.

In Order No. PSC-93-1769-FOF-WS, we determined that Turkey Creek should make the refunds required by Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS, and that such refunds should be accomplished within 90 days. Even allowing for the time of the appeal, the 90 days have long since expired (order was affirmed on March 27, 1995, and mandate was issued on April 12, 1995). The refusal to make the refunds would appear to be a willful violation of a Commission order (see Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, whereby the Commission, finding no intent to violate the rule, still initiated show cause proceedings, 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.").

Therefore, it is clear that Turkey Creek has willfully violated Orders Nos. PSC-93-1769-FOF-WS, PSC-93-0229-FOF-WS, and PSC-93-0816-FOF-WS. Those orders found that Turkey Creek had violated Sections 367.081 and 367.171, Florida Statutes, by raising its rates in September and November of 1992, and required refunds to be made within 90 days of the issuance date of Order No. PSC-93-1769-FOF-WS. This, Turkey Creek has not done.

Based on this continuing willful violation, a fine of \$5,000 shall be imposed for the failure of Turkey Creek to make the required refunds. However, in its letter dated February 19, 1996, Turkey Creek offered to deposit with an appropriate escrow agent an amount of money which they considered sufficient to cover the refunds in return for this Commission abating the penalty proceedings. Considering this offer, we note that we do not know what Turkey Creek considers a sufficient amount, and our staff has calculated that a deposit of \$42,000 would fully protect the customers. Therefore, although we find it appropriate to impose this fine, we also find it appropriate to suspend the fine, provided that Turkey Creek deposits \$42,000 in an appropriate escrow account within three weeks of the date of this order. By allowing Turkey Creek to escrow these funds pending the outcome of the Circuit Court action in Case No. 95-3065-CA, this Commission in no way concedes that the Circuit Court has jurisdiction to hear such action.

The following conditions shall be part of any escrow agreement:

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- 1) No funds in the escrow account may be withdrawn by the utility without the approval (through the Director of Records and Reporting) of the Commission.
- 2) The escrow account shall be an interest bearing account.
- 3) If a refund to the customers is required, the interest from this escrow account attributable to the ultimate amount refunded shall be distributed to the customers.
- 4) If a refund to the customers is not required, all interest earned by the escrow account shall revert to the utility.
- 5) All information on the escrow account shall be available from the holder of the escrow account to a Commission representative at all times.
- ✓ 6) The \$42,000 shall be deposited in the escrow account within three weeks of the date of this order.
- 7) The funds shall be used to make the refunds required by Order No. PSC-93-1769-FOF-WS, provided that the Florida Public Service Commission is the prevailing party in Case No. 95-3065-CA filed in the Eighth Judicial Circuit. If Turkey Creek, Inc., and Family Diner, Inc., are the prevailing parties, then all funds, plus interest, shall be returned to them.
- 8) This escrow account is established by the direction of the Florida Public Service Commission (FPSC) for the purposes set forth in its order requiring such account. Pursuant to Cosentino v. Elson, 263 So. 2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.
- 9) The director of Records and Reporting of the FPSC must be signatory to the escrow agreement.

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Our staff will verify any refunds with interest, and in no instance should the maintenance and administrative costs associated with the refund be borne by the customers. These costs are the responsibility of, and shall be borne by, the utility.

In the event Turkey Creek fails to deposit \$42,000 in an appropriate escrow account within three weeks of the date of this order, the fine of \$5,000 shall not be suspended, and reasonable efforts shall be made to collect the fine. Reasonable efforts shall be defined as two certified letters demanding payment. If

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reasonable collection efforts fail, the fine shall be deemed uncollectible and the matter shall be referred to the Office of the Comptroller for further action, with any collection to be deposited in the State General Revenue Fund pursuant to Section 367.161, Florida Statutes.

This docket shall remain open for the continued processing of this case.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that there is no dispute of material fact and the request of Turkey Creek, Inc., and Family Diner, Inc., for a formal hearing pursuant to Section 120.57(1), is hereby denied. It is further

ORDERED that the request for the deferral of any action on the penalty proceeding is denied. It is further

ORDERED that a fine in the amount of \$5,000 shall be imposed. It is further

ORDERED that this fine shall be suspended, provided that Turkey Creek, Inc., and Family Diner, Inc., deposit \$42,000 in an appropriate escrow account within three weeks of the date of this order. It is further

ORDERED that this docket shall remain open for the continued processing of this case.

By ORDER of the Florida Public Service Commission, this 11th day of March, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the 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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