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Public Service Commission

August 10, 2009

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090000

In re: Your letter dated July 29, 2009, in response to staff's letters dated June 16, and July 17, 2009, concerning Merritt Island (E&A), LLC

Dear Ms. Rosenthal:

I have been asked to respond to your letter dated July 29, 2009, which was in response to staff's two letters dated June 16 and July 17, 2009. In your letter you discuss several court cases and what is meant by the words "service to the public" in the definition of the word "Utility" found in Section 367.021(12), Florida Statutes (F.S.). Based on those court cases, you argue that Merritt Island (E&A), LLC (the "Landlord"), does not meet the definition of a utility, and that the Commission has no authority or jurisdiction over the Landlord to require production of the materials requested in staff's two letters.

I believe your interpretation and reliance on those cases is incorrect. First of all, in the case of Florida Public Service Commission v. Bryson, 569 So. 2d 1253, 1255 (Fla. 1990), the Florida Supreme Court (Court) specifically stated:

> The PSC has the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly. *See P.W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988)* (approving the PSC's determination that the sale of electricity to a single customer makes the provider a public utility subject to PSC jurisdiction pursuant to section 366.02(1), Florida Statutes (1985)); *Fletcher Properties, Inc. v. Florida Pub. Serv. Comm'n, 356 So.2d 289, 292 (Fla. 1978)* (approving the PSC's determination that a management company is a "utility" within the PSC's regulatory jurisdiction). It follows that the PSC 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.

(Emphasis Added)

The *Fletcher Properties* case cited above is the same *Fletcher Properties* case that you cite in your letter. In the *Fletcher Properties* case, the Court interpreted the definition of a utility found in Section 367.021(3), F.S., and the exemptions found in Section 367.022, F.S. In that case, the Court agreed with the Commission that a management company was acting as a water and sewer utility, and was not exempt under any of the exemptions set out in Section 367.022, F.S.

You argue that service being provided solely to tenants should not be considered "service to the public." I believe the Legislature addressed this point when in Section 367.022(5), F.S., it exempted "[l]andlords providing service to their tenants without specific compensation for the service." (emphasis added) If you excluded all landlords from the definition of a utility, you would give no meaning to this specific exemption and make the words "without specific compensation" have no effect or purpose. This is contrary to the principles concerning statutory interpretation, and would also appear to go against the very plain meaning of the exemption.

In an administrative recommended order dated December 14, 1998, in the case of Daytona Wheels, Inc., v. State of Florida, Department of Revenue, Case No. 95-4771, 1998 Fla. Div. Adm. Hear. LEXIS 5377, the Administrative Law Judge stated as follows:

> [W]hen a law expressly describes a particular situation in which something should apply, an inference can be drawn that what is not included by specific reference was intended to be omitted or excluded. Gay v. Singletary, 700 So. 2d 1220 (Fla. 1997). Further, when general language is limited by subsequent specific language, the Legislature is presumed to have intended its specific afterthought.
> * * *
> It is essential that statutes be construed in context, and not piecemeal. Chrysler Plymouth Jeep Eagle, Inc. v. Chrysler Corp., 898 F.Supp. 858 (M.D. Fla. 1995). All parts of a statute must be read together in order to achieve a consistent whole, read to give meaning to all the statute's constituent subparts, and read harmoniously so as to give effect to each section. Tefel v. Reno, 972 F.Supp. 623 (S.D. Fla. 1997), T.R. v. State, 677 So. 2d 270 (Fla. 1996); Reyf v. Reyf, 620 So. 2d 218 (Fla. 3d DCA 1993); Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452 (Fla. 1992).

Staff believes that the reasoning set out above applies in this case. When the Legislature allowed an exemption for landlords providing service to their tenants without specific compensation, then a necessary inference is that landlords providing service for specific compensation would not be exempt.

Also, you seem to imply that there are a very limited number of people (tenants) being served, and that this therefore could not be "service to the public." Again, the Legislature addressed this argument when in Section 367.022(6), F.S., it exempted "[s]ystems with the capacity or proposed

capacity to serve 100 or fewer persons." Based on the size of the water meter serving the facilities, it appears that the system could serve over 100 persons. In order for the Landlord to claim exemption pursuant to this exemption, it must demonstrate that it only has the capacity to serve 100 or fewer persons.

In Section 367.022(8), F.S., the Legislature also provided an exemption for "[a]ny person who resells water or wastewater service at a rate or charge which does not exceed the actual purchase price of the water or wastewater." (emphasis added) Because the Landlord appears to be collecting the full amount of the water and wastewater charges, and also adding a charge of $3,600 per year, it would not appear that the Landlord would be exempt pursuant to this section.

In conclusion, the Commission is authorized to investigate and ascertain its jurisdiction in this matter. If the Landlord cannot show that it is exempt pursuant to the exemptions noted in Section 367.022, F.S., then it will have to file an application for water and wastewater certificates as set forth in Ms. Daniel's letters dated June 16 and July 17, 2009, or else take such appropriate steps as would bring it within a statutory exemption, such as changing its methods of billing. Prior to February 2009, it appears that the water and wastewater service was included in the rent without specific compensation for such service, and it appears that the Landlord would be exempt pursuant to Section 367.022(5), F.S. Also, if the Landlord can demonstrate that it is collecting no more than what it is billed by the City of Cocoa, then it may be exempt as a reseller pursuant to Section 367.022(8), F.S.

At this time, it appears to staff that the Landlord may be in violation of Section 367.031, F.S., which requires that a utility must obtain from the Commission a certificate of authorization to provide water or wastewater service. Further, Section 367.161, F.S., provides that the Commission may impose fines of up to $5,000 per day for a utility's knowingly refusing to comply with Chapter 367, F.S., or lawful rule or order of the Commission.

In your letter dated July 29, 2009, you argue that "the Landlord is contractually prohibited from disclosing its manner of billing each of its individual tenants for wastewater services pursuant to its covenants of confidentiality found in the lease agreements." Section 367.156, F.S., and Rule 25-22.006, Florida Administrative Code, set out the procedures whereby proprietary confidential business information may be kept confidential and exempt from public disclosure pursuant to Section 119.07(1), F.S. If you believe you cannot provide the information required to determine whether the Landlord is a utility without submitting what you believe is confidential information, you may request that such information be kept confidential in accordance with the above-noted statute and rule.

Based on all the above, it appears to staff that the Landlord may be operating as a utility without the required certificate of authorization. Therefore, staff does not withdraw its request for the information set out in its two letters dated June 16 and July 17, 2009. Please provide the information requested in Ms. Daniel's two letters by September 11, 2009, or demonstrate that the Landlord is now complying with one of the above-noted exemptions. The failure to timely respond to this request may result in staff opening an investigation into this matter and pursuing a show cause proceeding pursuant to Section 367.161, F.S.

The opinions expressed in this letter are my own opinions and in no way bind the Commission in any proceeding. If you have any questions, or if I can be of any further assistance, please call me at 850-413-6234, e-mail me at Rjaeger@PSC.State.FL.US, or write me at the address shown on this letter.

Sincerely,

Ralph R. Jaeger

Ralph R. Jaeger
Senior Attorney

cc: Division of Economic Regulation (Daniel, Brady)