

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: July 31, 2014

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Page) *PNP SMC*
Division of Engineering (Vickery) *PV JB*

RE: Docket No. 140115-WS – Petition for declaratory statement by Continental Utility, Inc. that in providing service only to other entities owned by Continental Country Club R.O., Inc., Continental Utility, Inc. would be exempt from Public Service Commission jurisdiction.

AGENDA: 08/12/14 – Regular Agenda – Decision on Declaratory Statement – Participation is at the Discretion of the Commission

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: Final Order must be issued by August 26, 2014, pursuant to Section 120.656(3), Florida Statutes

SPECIAL INSTRUCTIONS: None

Case Background

On May 28, 2014, pursuant to Section 120.565, Florida Statutes (F.S.), and Rule 28-105.002, Florida Administrative Code (F.A.C.), Continental Utility, Inc. (Continental) filed a Petition for Declaratory Statement (Petition) regarding the applicability of Section 367.022(7), F.S., to Continental. Continental states in its Petition that it requests the Commission issue an order declaring that “in providing service only to other entities owned by Continental Country Club R.O., Inc., it would be exempt from Public Service Commission jurisdiction” under the nonprofit exemption in Section 367.022(7), F.S.

Docket No. 140115-WS

Date: July 31, 2014

Pursuant to Rule 28-105.0024, F.A.C., a Notice of Declaratory Statement was published in the June 4, 2014, edition of the Florida Administrative Register. Pursuant to Rule 28-105.0027(1), F.A.C., and as stated in the notice, substantially affected persons were given 21 days to intervene in the proceeding. No petitions to intervene were filed.

Staff issued a data request to Continental on June 16, 2014, by which staff asked the utility for additional information to clarify the facts in the Petition. Continental responded to the data request on June 23, 2014.

This recommendation addresses Continental Utility Inc.'s Petition for Declaratory Statement. Pursuant to Section 120.565(3), F.S., and Rule 28-105.003, F.A.C., an agency must issue a declaratory statement or deny the petition within 90 days after the petition is filed. Thus, the Commission must issue an order on the Petition by August 26, 2014. The Commission has jurisdiction pursuant to Section 120.565 and Chapter 367, F.S.

Discussion of Issues

Issue 1: Should the Commission issue a declaratory statement in response to Continental Utility, Inc.'s Petition stating that in providing service only to other entities owned by Continental Country Club, R.O., Inc., Continental would be exempt from Commission jurisdiction under Section 366.022(7), F.S.?

Recommendation: No. The Commission should issue a declaratory statement that based on the facts set forth in its Petition for Declaratory Statement, Continental would not be exempt from Commission jurisdiction under Section 366.022(7), F.S., because it is a for-profit corporation. (Page, Daniel, Vickery)

Staff Analysis:

I. Governing Law

Declaratory statements are governed by Section 120.565, F.S., and by the Uniform Rules of Procedure in Chapter 28-105, F.A.C. Section 120.565, F.S., provides, in pertinent part, that:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's particular set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to a petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include a description of how the statutes, rules, or orders on which the declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. The Florida Supreme Court has noted that:

The purposes of the declaratory statement procedure are "to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their

daily affairs” and “to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts.”¹

Moreover, the Courts and the Commission have repeatedly stated that one of the benefits of a declaratory statement is to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation.²

Pursuant to Rule 28-105.003, F.A.C., an agency may rely on the statements of facts contained in a petition for declaratory statement without taking a position on the validity of the facts. Staff recommends that the Commission should rely solely on the statements of facts contained in Continental’s Petition and on the Responses to a Staff Data Request filed by Continental on June 23, 2014, in accordance with Rule 28-105.003, F.A.C.³ If the Commission issues a declaratory statement, the Order will be controlling as to those facts, and not as to other, different or additional facts.

II. Statute To Be Applied

Section 367.021(12) states that “‘Utility’ means a water or wastewater utility, and except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system . . . who is providing, or proposes to provide, water or wastewater service to the public for compensation.” Section 367.022, F.S., exempts certain entities from Commission regulation, even though they would otherwise meet the jurisdictional definition of a utility. Specifically, subsection (7) states that, “[n]onprofit corporations, associations, or cooperatives providing service solely to members who own and control such nonprofit corporations, associations, or cooperatives . . .” are not subject to regulation by the Commission as a utility.

III. Continental Utility Inc.’s Statements of Facts

Continental states that it is a for-profit corporation owned by Continental Country Club R.O., Inc., a nonprofit corporation. Petition, p. 2. The officers and directors of both corporations are identical. Id.

Continental states that it currently provides water and wastewater service to the residents of Continental Country Club (Country Club), all of whom are members of Continental Country Club, R.O., Inc., and to the golf club and restaurant which are owned by Continental Country Club, R.O., Inc. Id. Continental further states that it provides water and wastewater service to an

¹ DBPR, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374, 382 (Fla. 1999) (quoting Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U. L. Rev. 965, 1052 (1986)).

² See, e.g., Adventist Health Sys./Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007); Order No. PSC-02-1459-DS-EC, issued October 23, in Docket No. 020829-EC, In re: Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc., pursuant to Section 366.04, Florida Statutes.

³ To the extent the agency does not have enough facts to make a decision on a petition for declaratory statement, it may request additional information from the petitioner. See Adventist Health Sys./Sunbelt, Inc., 955 So. 2d at 1176-77.

unrelated party, Sandalwood Condominium (Sandalwood). Id. With the exception of Sandalwood, all of the customers of Continental own and control Continental as a subsidiary of the Continental Country Club R.O., Inc. Id.

According to Continental, the agreement by which Sandalwood receives water and wastewater service from Continental terminates on December 16, 2015. Id. Continental states that it is in need of a declaratory statement to determine whether to enter into negotiations to renew its agreement with Sandalwood. Id.

IV. Discussion and Analysis

In order to qualify for the exemption under Section 367.022(7), F.S., a nonprofit corporation must provide service solely to its members who own and control it. According to the Petition, the customers of Continental include the Country Club, all of whom are members of Continental Country Club, R.O., Inc., and a golf club and restaurant which are owned by Country Club, R.O., Inc. Id. Although Continental provides service to Sandalwood, an unrelated party, Continental states that this agreement to provide service terminates on December 16, 2015. Id. Thus, the issue is whether Continental would be subject to the Commission's jurisdiction if it were to provide service to the residents of the Country Club, all of whom are members of Continental Country Club, R.O., Inc., and to the golf club and restaurant which are owned by Continental Country Club, R.O., Inc. Id.

Section 367.022(7), F.S., expressly states that a corporation must be a nonprofit corporation in order to qualify for the exemption to the Commission's jurisdiction as provided in Section 367.011, F.S. In Order No. 24125, issued February 18, 1991, Docket No. 900860-WU, In re: Request for exemption from Florida Public Service Commission regulation for a water system in Lake County by Bella Vista Community Association, Inc., the Commission stated that "for an entity to qualify under Section 367.022(7), Florida Statutes, it must first be a nonprofit corporation, association, or cooperative." Although Continental states that it is owned by Continental Country Club, R.O., Inc., there is no language in the statutory exemption stating that a for-profit corporation which is a subsidiary of a nonprofit corporation is a nonprofit corporation under Section 367.022(7), F.S. Continental states in its Petition that it "is a for-profit corporation."

Exemptions are to be strictly construed against the one claiming the exemption. See Coe v. Broward County, 327 So. 2d 69 (Fla. 4th DCA 1976), and State v. Nourse, 340 So. 2d 966 (Fla. 3d DCA 1976), (statutory exceptions to general laws should usually be strictly construed against the one claiming the exemption). Even if Continental did provide service solely to its members who own and control it, Continental is a for-profit corporation, and thus does not satisfy the criteria for an exemption pursuant to Section 367.022(7), F.S.

V. Conclusion

Staff recommends that the Commission should deny the request for declaratory statement as set forth by Continental, and should issue a declaratory statement that based on the facts set forth in its Petition for Declaratory Statement, Continental would not be exempt from Commission jurisdiction under Section 366.022(7), F.S., because it is a for-profit corporation.

Issue 2: Should this docket be closed?

Recommendation: Yes, the docket should be closed. (Page)

Staff Analysis: Whether the Commission grants or denies the Petition, a final order must be issued by August 26, 2014, no further action will be necessary, and the docket should be closed.