

FLORIDA PUBLIC SERVICE COMMISSION

Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

WT *[Signature]*
RV *[Signature]*

M E M O R A N D U M

October 26, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (JAEGER) *[Signature]*
DIVISION OF WATER AND WASTEWATER (XANDERS) *[Signature]*

RE: UTILITY: TURKEY CREEK UTILITIES, INC. & FAMILY DINER, INC. D/B/A TURKEY CREEK UTILITIES
DOCKET NO. 921098-WS
COUNTY: ALACHUA

CASE: APPLICATION FOR CERTIFICATES TO PROVIDE WATER AND WASTEWATER SERVICE UNDER GRANDFATHER RIGHTS

AGENDA: NOVEMBER 7, 1995 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\921098-WS.RCM

CASE 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 a certificate to provide water and wastewater service pursuant to Section 367.171, Florida Statutes. Order No. PSC-93-0229-FOF-WS, issued February 10, 1993, granted the certificates to Turkey Creek, approved its service territory and reduced its rates to those which were in effect the date the Public Service Commission received jurisdiction of Alachua County, June 30, 1992. 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-93-0819-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

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had illegally increased the rates and charges after the Commission assumed jurisdiction over Alachua County on June 30, 1992.

Prior to the Commission's hearing, which was scheduled for November 3, 1993, the utility withdrew the protests. By Order No. PSC-93-1769-FOF-WS, issued December 3, 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. Accordingly, the correct territory was granted to the utility which would allow for the certificates to be issued. However, since the utility had been sold to the City of Alachua on September 23, 1993, no certificates were ever issued to Turkey Creek. 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 the vote of the Commission, 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 Order Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS). However, Order No. PSC-95-1101-FOF-WS did not contain the boilerplate language that fully informs the utility of its procedural rights.

In response to the Show Cause Proceeding, 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 (although the reply was dated September 27th, it was not stamped in until September 28, 1995, and was therefore not timely filed). This recommendation addresses that response and whether fines should be imposed or an additional show cause order issued.

DISCUSSION OF ISSUES

ISSUE 1: Pursuant to Order No. PSC-95-1101-FOF-WS, should the Commission immediately fine Turkey Creek, Inc. and Family Diner, Inc., d/b/a Turkey Creek Utilities (Respondents), for failure to make refunds as required by Order No. PSC-93-1769-FOF-WS?

RECOMMENDATION: No.

STAFF ANALYSIS: A review of Order No. PSC-95-1101-FOF-WS, which initiated show cause proceedings pursuant to Section 367.161, Florida Statutes, shows that that order did not make it clear that the threatened fine of \$5,000 could be for each day the offense continued. Further, that order did not state: with particularity what should be contained in any response; that failure to file a timely response to the show cause order shall constitute an admission of the facts alleged in the body of the order and a waiver of any right to a hearing; and that the opportunity to file a written response would constitute the Respondents' opportunity to be heard prior to a final determination of noncompliance or assessment of penalty.

In responding to that order, the Respondents state that there is a genuine issue as to the Commission's jurisdiction and that they have filed suit in circuit court for declaratory relief (suit was served on the Commission on September 19, 1995). Also, in their response, the Respondents request that no penalty or fine be imposed at this time pending the final determination of jurisdiction and the outcome of their suit in circuit court.

In effect, the Respondents have requested that the Commission defer any action on the show cause proceeding. The Commission should deny this request and reissue a show cause order which adequately sets forth the requirements for responding to such an order (see issues 2 and 3 below). Accordingly, staff recommends that no fine be imposed at this time.

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ISSUE 2: Pursuant to the Respondents' request, should the Commission defer any show cause proceeding pending the outcome of the Respondents' suit in circuit court?

RECOMMENDATION: No, the request for deferral should be denied.

STAFF ANALYSIS: As stated earlier, by Order No. PSC-93-1769-FOF-WS, issued on December 9, 1993, this Commission made Orders Nos. PSC-93-0229-FOF-WS and PSC-93-0816-FOF-WS final and effective. These orders required Turkey Creek to refund any excess amount, including interest, that it had received that was related to the two unapproved increases in its rates and service availability charges. On January 6, 1994, Turkey Creek appealed Order No. PSC-93-1769-FOF-WS to the First District Court of Appeal. On March 27, 1995, the First District Court of Appeal affirmed the Commission's orders (mandate was issued on April 12, 1995).

Pursuant to the First District Court of Appeal's affirmation of the Commission's order, by letter dated April 6, 1995, staff 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."

As noted earlier, the City of Alachua purchased the utility on September 23, 1993, but the transfer was not acknowledged until Turkey Creek's appeal had been completed. In a follow-up letter, dated May 26, 1995, 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. Staff also told 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 since it was a "non-utility owner-operator," which it estimated would take two weeks to complete.

However, as of August 3, 1995, no other response was received from Turkey Creek, and staff filed its recommendation that the transfer to the City of Alachua be acknowledged and that show cause proceedings be initiated. Order No. PSC-95-1101-FOF-WS (initiating show cause proceedings) was issued on September 6, 1995, and Turkey Creek, Inc. and Family Diner, Inc. (Respondents), filed their response on September 28, 1995.

In their response, the Respondents refer to their action in circuit court contesting Commission jurisdiction (filed in mid-September) and request this Commission to defer any action pending

the outcome of that action. Saying that the circuit court does not have subject matter jurisdiction to review an order of this Commission, the Commission has moved the circuit court to dismiss the complaint. However, the earliest hearing date to consider this motion to dismiss is sometime in January 1996. Also, the Respondents have already appealed the order requiring the refunds to the First District Court of Appeal and lost, and it appears that the defenses of collateral estoppel and res judicata would prevent the Respondents from relitigating the validity of Order No. PSC-93-1769-FOF-WS.

In I.A. Durbin, Inc. v. Jefferson National Bank, 793 F. 2d 1541 (11th Cir. 1986), the 11th Circuit both defined the doctrines of res judicata and collateral estoppel, and set out the elements necessary in order for these doctrines to apply. That court, at 1549 stated:

Res judicata or claim preclusion refers to the preclusive effect of a judgment in foreclosing relitigation of matters that were litigated or could have been litigated in an earlier suit. See, e.g., Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984); Interstate Pipe Maintenance, Inc. v. FMC Corp., 775 F.2d 1495, 1497 (11th Cir. 1985). In order for the doctrine of res judicata to bar a subsequent suit, four elements must be present: (1) there must be a final judgement on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases. See, e.g., Harte v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Ray v. Tennessee Valley Authority, 677 F.2d 813, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (193).

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The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. See, e.g., Ray, 677 F.2d at 821; White v. World Finance of Meridian, Inc., 653 F.2d 147, 150 (5th Cir. Unit A 1981). In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form. See, e.g., White, 653 F.2d at 150. (e.s.) (footnote omitted)

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In order for collateral estoppel (defined as issue preclusion), to be applicable, the 11th Circuit, in Greenplatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (1985) and I.A. Durbin, at 1549, determined that the following prerequisites must be present.

(1) The issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgement in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

In this case, all of the elements of both are satisfied. Therefore, staff does not believe that the Commission should defer any action.

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 rule or order by the Commission. Utilities are charged with the knowledge of the Commission's rules and statutes. Also, as stated by the Commission in Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, "Willful implies an intent to do an act, and this is distinct from an intent to violate a statute or rule."

Order No. PSC-93-1769-FOF-WS required the Respondents to accomplish the refunds within ninety days of the issuance date of that order. That order was "Per Curiam. Affirmed." on March 27, 1995, and mandate was issued on April 12, 1995. Therefore, it is clear that the Respondents have willfully violated an order of this Commission.

Further, staff has, on numerous occasions, informed Turkey Creek of its obligation to comply with Order No. PSC-93-1769-FOF-WS. Staff believes that Turkey Creek has been given ample time and sufficient information to comply with the Commission's order. Accordingly, based on the foregoing, staff recommends that the Commission, refuse the Respondents request to defer any show cause proceeding pending the outcome of the circuit court declaratory action.

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ISSUE 3: Should the Commission reiterate its order to Turkey Creek, Inc., and Family Diner, Inc., formerly d/b/a Turkey Creek Utilities (Turkey Creek), to show cause, in writing within twenty days, why they should not be fined \$5,000 per day, and clarify the rights, duties, and obligations of those entities for not complying with Order No. PSC-93-1769-FOF-WS, for refusing to make the required refunds?

RECOMMENDATION: Yes. (JAEGER)

STAFF ANALYSIS: As stated in Issue 1 above, Order No. PSC-95-1101-FOF-WS did not adequately set forth the requirements for responding to such order and did not adequately apprise the Respondents of their duties and rights under such order. Accordingly, the Commission should reiterate its order to the Respondents to show cause, in writing within twenty days, why they should not be fined \$5,000 per day for not complying with Order No. PSC-93-1769-FOF-WS.

This order should make it clear: that each day of the refusal to make the required refunds constitutes a separate offense; that the response must contain specific allegations of fact and law; that the opportunity to file a written response shall constitute the opportunity of the respondents to be heard prior to a final determination of noncompliance or assessment of penalty; that failure to file a timely response to this show cause order shall constitute an admission of the facts alleged in the body of the order and a waiver of any right to a hearing; that if the response raises material questions of fact and requests a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings may be scheduled before a final determination is made; that if a fine is assessable and payment is not remitted after reasonable collection efforts, the Commission may deem the fine to be uncollectible and refer the matter to the Comptroller's Office for further disposition; that the Respondents are required to make refunds in accordance with Order Nos. PSC-93-0229-FOF-WS, PSC-93-0816-FOF-WS; and PSC-93-1769-FOF-WS.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. (JAEGER)

STAFF ANALYSIS: If the Commission agrees with the staff recommendation in Issue No. 3, then Docket No. 921098-WS should remain open so staff can process the show cause proceeding initiated against Turkey Creek, Inc., and Family Diner, Inc.