

State of Florida



Public Service Commission

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DATE: October 28, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Bennett) *JB SC JS SW PA CRB*
Division of Economic Regulation (Golden, Kaproth, Slemkewicz, Williams) *CRB*

RE: Docket No. 100065-SU – Application for certificate to provide wastewater service in Monroe County by Venture Out at Cudjoe Cay, Inc.

AGENDA: 11/09/10 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\100065.RCM.DOC

Case Background

On February 5, 2010, Venture Out at Cudjoe Cay, Inc. (Venture Out) filed an application for original wastewater certificate in Monroe County, Florida. Venture Out is a not-for-profit condominium association that provides wastewater service solely to the members who own or control the condominium. Venture Out is divided into 659 subdivided units (lots) in Monroe County. The wastewater system was established in 1975 and was recently modified to ensure compliance with current DEP standards. Venture Out is currently operating as an exempt entity pursuant to Section 367.022(7), Florida Statutes, but is requesting that it be granted a certificate to operate as a PSC-regulated utility.

On March 5, 2010, Commission staff advised Venture Out that it was staff's opinion that Venture Out was exempt from Commission jurisdiction. In a March 11, 2010 response, Venture

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Out requests the Commission issue a certificate because Venture Out believes it is in the public interest.

In addition to the jurisdictional deficiency, Venture Out was notified of the technical application deficiencies. With the exception of the jurisdictional deficiency, Venture Out has now completed all the application's deficiencies, including the noticing requirements. In response to Venture Out's notices, both Monroe County and the Florida Keys Aqueduct Authority objected to the issuance of a wastewater certificate to Venture Out.

This recommendation only addresses the Commission's jurisdiction over Venture Out. If the Commission determines that it does have jurisdiction, additional proceedings will be brought to the Commission at a later date.

Discussion of Issues

Issue 1: Does the Commission have jurisdiction to issue an original certificate to Venture Out at Cudjoe Cay, Inc.?

Recommendation: No. Venture Out at Cudjoe Cay, Inc. is exempt from Commission jurisdiction pursuant to Section 367.022(7), Florida Statutes. (Bennett)

Staff Analysis: Staff believes that, based on Venture Out's March 11, 2010, letter, Venture Out continues to be exempt from the regulation of the Public Service Commission pursuant to Section 367.022, Florida Statutes (F.S.). According to Venture Out's letters and application, Venture Out is a not-for-profit condominium association, serving only the condominium property owners. It does not provide wastewater service to any property outside of the condominium association. A review of the relevant portions of Chapter 367 follows:

367.011 Jurisdiction; legislative intent.-

(2) The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates.

367.021 Definitions.-

(12) "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, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation.

367.022 Exemptions.- The following are not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided:

(7) Nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such nonprofit corporations, associations, or cooperatives.

Staff believes that the legislature did not intend to give the Commission jurisdiction over those entities listed as exempt. The Commission was given jurisdiction to regulate utilities as that term is defined in Section 367.021(12), F.S. The definition of utilities excludes those entities listed as exempt. Venture Out does not dispute that it is exempt under 367.022 F.S., because it is a nonprofit corporation providing service solely to members who own and control the nonprofit corporation.

Venture Out believes the authority of the Commission to issue a certificate of authorization to an exempt entity rests under the authority of Section 367.045(5)(a), F.S., to grant or deny a certificate if it is in the public interest to do so. In its March 2010 letter, Venture

Out explains that the Florida Keys Aqueduct Authority is the applicable governing independent special district, created by Chapter 99-395, Laws of Florida. In the March 2010, letter Venture Out expressed concern regarding the ability of the Florida Keys Aqueduct Authority to accomplish the requirements of Chapter 99-395, Laws of Florida.

Staff does not believe Section 367.045, F.S., gives the Commission express or implied authority to take jurisdiction over an exempt entity. Section 367.045(5)(a), F.S., is the standard the Commission uses to determine whether or not to grant a certificate of authorization to a utility when that utility is under the Commission's jurisdiction.

367.045 Certificate of authorization; application and amendment procedures.-

(5)(a) The commission may grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest, but may not grant authority greater than that requested in the application or amendment thereto and noticed under this section; or it may deny a certificate of authorization or an amendment to a certificate of authorization, if in the public interest. . .

In further support of its position, staff notes that the introductory language to Section 367.022, F.S. clearly articulates that the listed exemptions are "not subject to regulation by the commission as a utility nor are they subject to the provisions of this chapter, except as expressly provided." Staff can find nothing in Section 367.045, F.S. making this section of the statutes applicable to exempt entities. The Commission has held in the past that its "powers and duties are only those conferred expressly or impliedly by statute, and any reasonable doubt as to the existence of a particular power compels [the Commission] to resolve that doubt against the exercise of such jurisdiction. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So. 2d 493 (Fla. 1973)." Order No. PSC-01-0217-FOF-EC, issued January 23, 2001, in Docket No. 981827-EC; affirmed on appeal. Lee County Electric Cooperative v. Jacobs, 820 So. 2d 297 (Fla. 2002).

Finally, Venture Out asserts that it wishes to be removed from exempt status. In its March 2010 letter, Venture Out states that it does not seek nor wish to continue to operate under the exemption of Section 367.022(7), F.S. It is staff's opinion that the Commission is without jurisdiction to regulate an exempt entity, even if that exempt entity expressly requests to be regulated by the Commission. (See, Swabilius. V. Florida Construction Industry Licensing Board, 365 So. 2d 1069 (1979 1st DCA) in which court stated that agency jurisdiction cannot be conferred by agreement or consent of the parties).

In conclusion, staff believes the Commission does not have jurisdiction to regulate Venture Out unless and until Venture Out changes its status to non-exempt. Because the Commission can only issue certificates of authorization to utilities as that term is defined by the legislature and Venture Out currently does not fit the definition of a utility, the Commission has no jurisdiction to issue an original wastewater certificate to Venture Out.

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Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission agrees with staff's recommendation in Issue 1, this docket should be closed upon expiration of the time for appeal. (Bennett)

Staff Analysis: If the Commission agrees with staff's recommendation in Issue 1, this docket should be closed upon expiration of the time for appeal. In the event the Commission determines it has jurisdiction to issue a wastewater certificate, this docket should remain open for further proceedings, consistent with Section 367.045, F.S.