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State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

COMMISSION
CLERK

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

DATE: October 6, 2011

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Golden, Simpson)
Office of the General Counsel (Klancke) *ms MB P.O. CR*

RE: Docket No. 100442-SU – Application for certificate to provide wastewater service in Brevard County by TKCB.
County: Brevard

AGENDA: 10/18/11 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\100442.RCM.DOC

Case Background

On November 16, 2010, TKCB, Inc. (TKCB or Utility) filed an application for an original wastewater certificate for a utility in existence in Brevard County. TKCB is a Class C utility currently providing wastewater service to 295 mobile home lots in the Sun Lake Village Estates manufactured home community (formerly Sun Lake Estates) in Cocoa, Florida. The Utility is located in the St. Johns River Water Management District. Water service is provided by the City of Cocoa (City).

The Utility began providing wastewater service in 1984 as the Sun Lake Estates Homeowners Association (HOA) and became TKCB in November 1986. The applicant indicated that no other utilities were available to provide service to the area at that time.

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According to the application, when the wastewater plant construction was completed, the Utility entered into a billing agreement with the City of Cocoa for the City to issue the Utility's wastewater bills in conjunction with its own water bills. The Utility's current rates were established by the HOA and have been in effect since May 1, 1993. The billing agreement between the HOA and the City was last renewed on November 24, 2003.

The application indicates the Utility was never advised it was subject to Florida Public Service Commission (PSC or Commission) jurisdiction until it approached the City to inquire about increasing its wastewater rates in 2010. Upon learning that it was subject to Commission regulation, the Utility contacted the Commission and subsequently filed an application for a wastewater certificate. Although Brevard County came under Commission jurisdiction on July 2, 1970, this Utility was not brought to the Commission's attention until the Utility contacted Commission staff in 2010. It appears the Utility would have initially been eligible to be exempt from regulation as a homeowners association, pursuant to Section 367.022(7), Florida Statutes (F.S.).¹ However, ownership changed from the non-profit HOA to the for-profit corporation TKCB in November 1986. In addition, the Utility advised staff that although there were attempts to expand the HOA to include additional members, homeowner interest dwindled, and there are currently no members. Consequently, the Utility is now operated as a privately-owned utility and is subject to Commission regulation pursuant to Sections 367.011 and 367.021(12), F.S.

The Utility's wastewater facilities include a 50,000 gallon per day extended aeration wastewater treatment plant with 4 dual cell percolation ponds. In addition, the wastewater collection system includes a lift station and collection lines to serve Phases I and II of the Sun Lake Village Estates community. The HOA received a domestic wastewater permit from the Florida Department of Environmental Protection (DEP) on January 1, 1984. The permit was renewed on November 1, 2010, with an expiration date of October 27, 2015. According to DEP, the Utility does not have any notices of violation.

Pursuant to Section 367.031, F.S., the Commission shall grant or deny an application for a certificate of authorization within 90 days after the official filing date of the completed application. TKCB's application was deemed complete on September 30, 2011, which is considered the official filing date.

This recommendation addresses the Utility's application for an original certificate and initial rates and charges. The Commission has jurisdiction pursuant to Sections 367.031, 367.045, and 367.081, F.S.

¹ Pursuant to Section 367.022(7), F.S., "[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.

Discussion of Issues

Issue 1: Should the Utility's application for a wastewater certificate be approved?

Recommendation: Yes, TKCB should be granted Certificate No. 562-S to serve the territory described in Attachment A effective the date of the Commission's vote. The resultant order should serve as TKCB's wastewater certificate and should be retained by the Utility. (Golden, Simpson, Klancke)

Staff Analysis: As stated in the case background, TKCB filed its application for a wastewater certificate to provide service in Brevard County on November 16, 2010. The applicant filed its final deficiency response on September 30, 2011. The application is in compliance with the governing statute, Section 367.045, F.S., and other pertinent statutes and administrative rules concerning an application for an original certificate. Also, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code (F.A.C.). No objections were received and the time for filing such has expired.

Adequate service territory and system maps and a territory description have been provided, as prescribed by Rules 25-30.033(1)(l),(m) and (n), F.A.C. The proposed service territory has been served by the Utility since 1984 and currently includes 295 mobile home lots. A description of the territory requested by the applicant is appended as Attachment A. The applicant also submitted a copy of an executed and recorded warranty deed in the name of the Utility for the land on which the wastewater facilities are located.

The applicant appears to have the financial and technical ability to provide wastewater service to the proposed service area. The Utility's owner stated that since the Utility began operating in 1984, its financial position has always been stable and all its bills have been paid on time. The applicant also stated that in the future the company will continue to have the necessary funds and management to keep the wastewater plant operating properly as it has in the past. Staff has reviewed the financial statements of the Utility owners, and they appear to have adequate resources to support the Utility. In addition, the Utility has on staff a bookkeeper/office assistant with 28 years of experience, and a plant operator who has held a DEP Class C wastewater license since 1988. As noted in the case background, DEP has advised staff that the Utility does not have any notices of violation.

The owner understands that the Utility's books and records must be maintained according to the National Association of Regulatory Utility Commissioners Uniform System of Accounts, and that the Utility will be required to file annual reports and pay regulatory assessment fees. In addition, the applicant is aware that it may not charge rates, serve outside its certificated territory, or sell the Utility without prior Commission approval.

Based on the above information, staff believes that it is in the public interest to grant the application for an original wastewater certificate. Accordingly, staff recommends that TKCB should be granted Certificate No. 562-S to serve the territory described in Attachment A effective the date of the Commission's vote. The resultant order should serve as TKCB's wastewater certificate and should be retained by the Utility.

Issue 2: What are the appropriate initial wastewater rates?

Recommendation: The monthly wastewater service rates proposed by TKCB and shown on Schedule No. 1 are reasonable and should be approved. TKCB should be required to charge the approved rates until authorized to change them by the Commission in a subsequent proceeding. (Golden, Simpson)

Staff Analysis: As discussed in the case background, TKCB began providing service in 1984. The Utility's current monthly residential wastewater rates include a base facility charge of \$12.50 and a gallonage charge of \$2.65 per 1,000 gallons, up to a maximum of 12,000 gallons. Under these rates, a customer's maximum wastewater bill is \$44.30 per month. These rates were established by the HOA and have been in effect since May 1, 1993.

The Utility has never charged any other wastewater charges, such as deposits, miscellaneous service charges, or service availability charges, and has not requested approval of any new charges in its application. Per the Utility's billing agreement with the City of Cocoa, the City is responsible for all functions related to customer billing, such as establishing new customer accounts, calculating amounts due, processing payments, and closing accounts. Any other charges assessed to customers, such as initial deposits, are determined by the City and solely related to the City's provision of water service. With respect to the wastewater service, the City charges customers based upon TKCB's current rates, deducts a billing fee of \$0.96 per bill, and pays the remainder of the wastewater revenues to TKCB each month.

Based on the above factors, staff recommends that the Utility's requested rates are reasonable and should be approved. The Utility's requested monthly wastewater rates, along with a comparison of typical monthly bills, are shown on Schedule No. 1. TKCB should charge these rates until authorized to change them by the Commission in a subsequent proceeding. The rates should be effective for services rendered on or after the stamped approval date on the tariff sheets, pursuant to Rule 25-30.475, F.A.C.

Issue 3: Should the Commission order TKCB to show cause, in writing within 21 days, why it should not be fined for operating a wastewater utility without a certificate of authorization in apparent violation of Section 367.031, F.S.?

Recommendation: No. TKCB should not be ordered to show cause for operating a wastewater utility without a certificate of authorization. (Klancke)

Staff Analysis: Section 367.031, F.S., provides that “each utility subject to the jurisdiction of the commission must obtain from the commission a certificate of authorization to provide water or wastewater service.” Moreover, Section 367.161(1), F.S., 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, F.S. Utilities are charged with knowledge of the Commission’s statutes and rules. Thus, any intentional act, such as TKCB providing wastewater service to the public for compensation without first obtaining a certificate of authorization from the Commission, would meet the standard for a “willful violation” of Section 367.161(1), F.S. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, In re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code (F.A.C.), Relating to Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order the utility to show cause why it should not be fined, stating that “in our view, ‘willful’ implies an intent to do an act, and this is distinct from an intent to violate a statute or rule.” Additionally, “it is a common maxim, familiar to all minds that ‘ignorance of the law’ will not excuse any person, either civilly or criminally.” Barlow v. United States, 32 U.S. 404, 411 (1833).

Section 367.031, F.S., requires each utility subject to the jurisdiction of the Commission to obtain a certificate of authorization from the Commission to provide water or wastewater service. A jurisdictional utility is defined by Section 367.021(12), F.S., as every entity providing, or proposing to provide, water or wastewater service to the public for compensation. Although TKCB’s failure to obtain a certificate of authorization prior to charging for service is an apparent violation of Section 367.031, F.S., there are circumstances which mitigate the apparent violation. As noted, TKCB began providing service in 1984 as a homeowners association and, therefore, may have initially been eligible to be exempt pursuant to Section 367.022(7), F.S. The Utility has worked cooperatively with the City of Cocoa with respect to customer billing since 1984. The application indicates that the Utility was never advised that it was subject to Commission jurisdiction until it approached the City to inquire about increasing its wastewater rates in 2010. Upon learning that it was subject to Commission regulation, the Utility contacted the Commission and subsequently filed an application for a wastewater certificate.

In light of these circumstances and the fact that TKCB has been cooperative in moving forward with Commission certification, staff does not believe the apparent violation of Section 367.031, F.S., rises to the level of warranting a show cause order. Therefore, staff recommends that TKCB should not be required to show cause for providing wastewater service without first obtaining a certificate of authorization from the Commission.

Issue 4: Should TKCB be ordered to show cause, in writing within 21 days, why it should not be fined for failure to remit its regulatory assessment fees and file annual reports for 1986 through 2010, in apparent violation of Section 367.145, F.S., and Rules 25-30.120 and 25-30.110(3), F.A.C.?

Recommendation: No. TKCB should not be ordered to show cause for failing to remit regulatory assessment fees and file annual reports from 1986 to 2010. (Klancke)

Staff Analysis: Pursuant to Sections 350.113(3)(e) and 367.145, F.S., and Rule 25-30.120(1), F.A.C., each water and wastewater utility shall remit annually regulatory assessment fees (RAFs) in the amount of 0.045 of its gross operating revenue. Pursuant to Rule 25-30.120(2), F.A.C., "[t]he obligation to remit the [RAFs] for any year shall apply to any utility which is subject to [the] Commission's jurisdiction on or before December 31 of that year or for any part of that year, whether or not the utility has actually applied for or has been issued a certificate." Further, Rule 25-30.110(3), F.A.C., provides that "each utility shall file with the Commission annual reports . . . [t]he obligation to file an annual report for any year shall apply to any utility which is subject to this Commission's jurisdiction as of December 31 of that year, whether or not the utility has actually applied for or has been issued a certificate."

Utilities are charged with knowledge of the Commission's rules and statutes. As stated, "it is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow, 32 U.S. at 411. Thus, any intentional act, such as the utility's failure to remit its RAFs, would meet the standard for a "willful violation." Also, in, In re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that willful implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Section 367.161, F.S., 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 Commission rule, order or provision of Chapter 367, F.S.

As discussed in the case background, the Utility initially began providing wastewater service in 1984 as a homeowners association but then changed ownership from the non-profit HOA to the for-profit corporation TKCB in November 1986. Accordingly, TKCB is responsible for RAFs for November 1986 through December 31, 2010, and annual reports for 1986 through 2010. In failing to remit the RAFs and file annual reports for this time period, TKCB is in apparent violation of the above-referenced statutory and rule provisions.

However, as discussed in Issue 3, staff believes there are mitigating circumstances in this case which lead staff to recommend that show cause proceedings not be initiated at this time. TKCB began providing service in 1984 as a homeowners association and would have initially been eligible to be exempt from regulation pursuant to Section 367.022(7), F.S. The Utility has worked cooperatively with the City of Cocoa with respect to customer billing since 1984. The application indicates the Utility was never advised that it was subject to Commission jurisdiction until it approached the City to inquire about increasing its wastewater rates in 2010. Upon

learning that it was subject to Commission regulation, the Utility contacted the Commission and subsequently filed an application for a wastewater certificate.

Also, Section 350.113(1), F.S., notes that the Florida Public Service Regulatory Trust Fund (into which RAFs are paid) is used in the operation of the Commission in the performance of the various functions and duties required of it by law. Staff notes that the Commission has not expended any Commission resources or dollars regulating TKCB until 2010, the year the Utility filed for its certificate. Section 350.113(3), F.S., states that RAFs shall, to the extent practicable, be related to the cost of regulating such type of regulated company. The Commission has generally assessed RAFs concurrent with the time an existing utility files its application for a certificate.² However, because TKCB filed its application on November 16, 2010, staff's work related to the Utility's application during 2010 was minimal. Staff's work related to TKCB occurred predominantly during 2011. Therefore, staff believes it would be more appropriate for the Commission to assess RAFs and require annual reports from TKCB beginning in 2011. The 2011 Annual Report and RAFs for January 1, 2011 through December 31, 2011, will be due by March 31, 2012. As mentioned in Issue 2, the Utility's owner understands that the Utility will be required to file annual reports and pay RAFs.

In light of these circumstances and the fact that TKCB has been cooperative in moving forward with Commission certification, staff does not believe the apparent violation of Section 367.145, F.S., and Rules 25-30.120 and 25-30.110(3), F.A.C., rises to the level of warranting a show cause order. Therefore, staff recommends that TKCB should not be required to show cause for failing to remit regulatory assessment fees and file annual reports from 1986 to 2010.

²See e.g., Order No. PSC-09-0542-PAA-WU, issued August 4, 2009, in Docket No. 080499-WU, In re: Application for certificate to operate water utility in Lake County by TLP Water, Inc.; Order No. PSC-09-0541-FOF-WU, issued August 4, 2009, in Docket No. 080098-WU, In re: Application for certificate to provide water service in Sumter County by Cedar Acres; Order No. PSC-01-0992-PAA-WU, issued April 20, 2001, in Docket No. 001049-WU, In re: Application for original water certificate in Charlotte County by Little Gasparilla Water Utility, Inc.; Order No. PSC-01-1483-PAA-WS, issued July 16, 2001, in Docket No. 000545-WS, In re: Application for original certificates to operate a water and wastewater utility in Pasco County by Labrador Services, Inc.; Order No. PSC-99-0756-FOF-WS, issued April 19, 1999, in Docket No. 980731-WS, In re: Application for certificate to provide water and wastewater service in Charlotte County by Hunter Creek Utilities, LLC.; Order No. PSC-97-1211-FOF-WU, issued October 7, 1997, in Docket No. 970636-WU, In re: Application for certificate to provide water service in Osceola County by Morningside Utility Inc.; and Order No. PSC-97-0568-FOF-WU, issued May 20, 1997, in Docket No. 960244-WU, In re: Application for certificate to provide water service in Highlands County by Holmes Utilities, Inc.

Docket No. 100442-SU
Date: October 6, 2011

Issue 5: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issues 1 through 4, this docket should be closed because no further action is necessary. (Klancke)

Staff Analysis: Yes. If the Commission approves staff's recommendation in Issues 1 through 4, this docket should be closed because no further action is necessary.

TKCB
Brevard County
Sun Lake Village Estates Wastewater Service Area

A parcel of land lying in the East ½ of Section 1, Township 24 South, Range 35 East, being a portion of Canaveral Groves Subdivision, Phases 1 and 2, being more particularly described as follows:

Commence at the North ¼ corner of said Section 1 and run S 01° 01' 56" W along the West line of the Northeast ¼, a distance of 50 feet to a point on the north right-of-way line of Canaveral Groves Boulevard, the Point of Beginning; Thence continue South 01° 01' 56" West along said west line, a distance of 1362.29 feet; thence South 88° 45' 34" East, a distance of 320 feet more or less; thence south 1650 feet more or less to a point 150 feet south of Emerald Lakes Drive; thence east 1000 feet more or less to the west right-of-way line of Sharpes Lake Avenue; thence northwesterly along said right-of-way line, a distance of 1700 feet more or less to a point; thence north a distance of 450 feet more or less to a point on the south right-of-way line of Lake Erie Place; thence South 88° 45' 34" East a distance of 560 feet more or less to a point on the east right-of-way line of Lake Superior Drive; thence North 01° 14' 26" East a distance of 50 feet; thence South 88° 45' 34" East a distance of 70.25 feet; thence North 01° 14' 48" East a distance of 108.18 feet; thence South 88° 29' 58" East a distance of 25 feet; thence North 01° 14' 48" East a distance of 1225.69 feet to the southerly right-of-way line of Canaveral Groves Boulevard; thence North 88° 28' 48" West a distance of 1338.84 feet to the Point of Beginning.

**FLORIDA PUBLIC SERVICE COMMISSION
authorizes
TKCB, Inc.
pursuant to
Certificate Number 562-S**

to provide water service in Brevard County in accordance with the provisions of Chapter 367, Florida Statutes, and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

<u>Order Number</u>	<u>Date Issued</u>	<u>Docket Number</u>	<u>Filing Type</u>
*	*	100442-SU	Original Certificate

***Order Number and date to be provided at time of issuance.**

TKCB, Inc.
Monthly Wastewater Service Rates

Residential Service

Base Facility Charge Meter Size:	Utility Proposed and Staff Recommended
All Meter Sizes	\$12.50
Gallage Charge per 1,000 gallons (Wastewater Gallage Cap - 12,000 gallons)	\$2.65

Typical Residential Bills

5/8" x 3/4" meter	
3,000 gallons	\$20.45
5,000 gallons	\$25.75
10,000 gallons	\$39.00
12,000 gallons (Maximum Bill)	\$44.30