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: OCTOBER 25, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF REGULATORY OVERSIGHT (CLAPP, WALDEN)
DIVISION OF ECONOMIC REGULATION (TAINA-COQS
DIVISION OF LEGAL SERVICES (CROSBY, BRUBAKER)

RE: DOCKET NO. 001381-WU - APPLICATION FOR CERTIFICATE TO OPERATE WATER UTILITY IN POLK COUNTY BY TEVALO, INC. COUNTY: POLK

AGENDA: 11/06/01 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUE 4 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 11/06/01 - 90-DAY STATUTORY DEADLINE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\RGO\WP\001381WU.RCM

CASE BACKGROUND

Tevalo, Inc. d/b/a McLeod Gardens Water Company (MGWC or utility) is a Class C water utility providing service to 37 residential customers in Polk County (County). Wastewater service is provided through septic tanks. At build-out, the McLeod Gardens subdivision, developed by Tevalo, Inc. (Tevalo or developer), will serve a maximum of 176 lots. The utility's 2000 annual report shows total operating revenue of $12,614 and a net operating loss of $5,533. The utility filed an application for certification as a utility in existence on September 12, 2000. The application had deficiencies which were corrected on August 8, 2001.

On May 14, 1996, the Board of County Commissioners of Polk County adopted a resolution, pursuant to Section 367.171, Florida Statutes, declaring the water and wastewater utilities in that County subject to the provisions of Chapter 367, Florida Statutes.

The resolution was acknowledged by this Commission by Order No. PSC-96-0896-FOF-WS, issued July 11, 1996, in Docket No. 960674-WS. Pursuant to Section 367.171, Florida Statutes, a utility subject to the jurisdiction of this Commission must obtain a certificate of authorization.

According to information provided by Tevalo, it received authorization to build the McLeod Gardens development and to establish a utility for the development prior to the Commission receiving jurisdiction in Polk County. MGWC's service area is not located in a critical use area or a water use caution area. The actual water system was established October 15, 1996. None of the documentation received from Polk County at the time the County transferred jurisdiction, included a reference to either Tevalo or MGWC. According to the utility, it billed its first customer for regular service on March 31, 1997.

MGWC has the same ownership as does Pinecrest Ranches, Inc. (Pinecrest Ranches), another utility located in Polk County. Pinecrest Ranches received a grandfather water certificate in March 1997. On March 9, 1999, a representative of MGWC contacted Commission staff for an application package.

This recommendation addresses whether the utility should be show caused for operating without a certificate and for failure to file certain annual reports and whether Water Certificate No. 619-W should be granted to the utility. The Commission has jurisdiction pursuant to Sections 367.061 and 367.071, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission order the utility to show cause, in writing within 21 days, why it should not be fined for operating a water utility without a certificate of authorization in apparent violation of Chapter 367.031, Florida Statutes?

RECOMMENDATION: No. Show cause proceedings should not be initiated. (BRUBAKER)

STAFF ANALYSIS: As stated in the case background, MGWC is in apparent violation of Section 367.031, Florida Statutes, which states 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. The utility has been providing water service to the public for compensation since March 1997 without a certificate of authorization from the Commission.

In failing to timely obtain a certificate, MGWC is in apparent violation of the above-referenced statutory provision. Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t 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). Thus, any intentional act, such as the utility's failure to obtain a certificate, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled 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." Id. at 6. Section 367.161, 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 Commission rule, order or provision of Chapter 367, Florida Statutes.

Staff believes however that there are mitigating circumstances in this case which lead staff to recommend that show cause proceedings are not warranted at this time. MGWC is owned by the same entity which owns Pinecrest Ranches, also located in Polk County. Pinecrest Ranches received a grandfather water certificate in March 1997. According to the utility, the bookkeeper was doing research on also securing a water certificate for MGWC and gathering engineering, accounting, and survey information, when she suffered a stroke. MGWC's officials were unsure of exactly what the bookkeeper had completed toward securing the certificate.

On March 9, 1999, a representative of MGWC contacted Commission staff for an application package. The package was mailed that day. Staff followed up with the utility several times to offer assistance with the application. Due to MGWC moving its offices several times and a great amount of staff turn-over, the application was not completed and submitted until September 12, 2000.

For the foregoing reasons, staff does not believe that the apparent violation of Section 367.031, Florida Statutes, rises in these circumstances to the level of warranting the initiation of show cause proceedings. The delay in the completion of the application was due to circumstances largely beyond the control of the utility. For these reasons, staff recommends that the Commission not order the utility to show cause, in writing within 21 days, why it should not be fined for failing to obtain a certificate of authorization from the Commission in apparent violation of Section 367.031, Florida Statutes.

ISSUE 2: Should MGWC be ordered to show cause, in writing within 21 days, why it should not be fined for failure to file its 1997, 1998, and 1999 annual reports in apparent violation of Rule 25-30.110, Florida Administrative Code?

RECOMMENDATION: No. Show cause proceedings should not be initiated at this time. Staff further recommends that the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should not be assessed, as the information contained in the delinquent reports is no longer needed for the ongoing regulation of the utility. MGWC should not be required to file 1997, 1998 or 1999 annual reports. (BRUBAKER, TAINA-COQS, CLAPP)

STAFF ANALYSIS: Rule 25-30.110(3), Florida Administrative Code, requires utilities subject to the Commission's jurisdiction as of December 31 of each year to file an annual report on or before March 31 of the following year. Annual reports are due from regulated utilities regardless of whether the utility has actually applied for or been issued a certificate. Requests for extension of time must be in writing and must be filed before March 31. One extension of 30 days is automatically granted. A further extension may be granted upon a showing of good cause. MGWC is in apparent violation of Rule 25-30.110(3), Florida Administrative Code, for the failure to file its 1997, 1998 and 1999 Annual Reports. Even though the company requested an extension to April 30, 2001, the annual report for 2000 was submitted on October 5, 2001, making it 158 days late. The fine of $474 has been paid.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t 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). Thus, any intentional act, such as the utility's failure to timely file its 1997, 1998 and 1999 annual reports, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled 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." Id. at 6. Section 367.161, 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 Commission rule, order or provision of Chapter 367, Florida Statutes.

Moreover, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to file a timely, complete annual report is subject to penalties, absent demonstration of good cause for noncompliance. The penalty set out in Rule 25-30.110(7), Florida Administrative Code, for Class C utilities, is $3 per day, based on the number of calendar days elapsed from March 31, or from an approved extended filing date, until the date of filing. As of the date of the November 6, 2001 Agenda Conference, for the utility's 1997, 1998 and 1999 annual reports, staff has calculated that the total penalty would be $8,556 calculated as follows:

YEAR	CALCULATION	AMOUNT
1997	1,316 Days late x $3.00	$3,948
1998	951 Days late x $3.00	$2,853
1999	585 Days late x $3.00	$1,755
	TOTAL	$8,556

The penalty, if it were assessed, would continue to accrue until such time as MGWC files its 1997, 1998 and 1999 annual reports. Staff notes that pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, the Commission may, in its discretion, impose greater or lesser penalties for such noncompliance.

Staff believes however that there are mitigating circumstances in this case which lead staff to recommend that show cause proceedings are not warranted at this time, nor should penalties be assessed. As discussed in Issue 1, MGWC has undergone considerable turn-over in its staffing and operations, which in turn generated difficulties for the utility in completing its application requirements. However, the utility has in fact paid its regulatory assessment fees from the time it became jurisdictional, which payments included a statement of the utility's annual revenues. Furthermore, the utility filed its 2000 annual report on October 5, 2001. In light of these circumstances, the information contained

in the delinquent reports is no longer needed for the ongoing regulation of the utility.

For the foregoing reasons, staff does not believe that the apparent violation of Rule 25-30.110(3), Florida Statutes, rises in these circumstances to the level of warranting the initiation of a show cause proceeding. Moreover, staff believes that the utility has demonstrated good cause for its apparent noncompliance. Therefore, staff recommends that the Commission not order MGWC to show cause, in writing within 21 days, why it should not be fined for its failure to file its 1997, 1998 and 1999 annual reports. Staff further recommends that the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should not be assessed, as the information contained in the delinquent reports is no longer needed for the ongoing regulation of the utility. Additionally, staff recommends that MGWC should not be required to file 1997, 1998 or 1999 annual reports.

ISSUE 3: Should the application of Tevalo, Inc., d/b/a McLeod Gardens Water Company for a water certificate be granted?

RECOMMENDATION: Yes. Tevalo, Inc., d/b/a McLeod Gardens Water Company should be granted Water Certificate No. 619-W to serve the territory described in Attachment A. (CLAPP, WALDEN, BRUBAKER)

STAFF ANALYSIS: As stated in the case background, on September 12, 2000, an application was filed on behalf of MGWC for an original water certificate for a utility in existence and charging rates. As filed, the application contained numerous deficiencies. Supplemental information completing the deficiencies was filed on August 8, 2001. Pursuant to Section 367.031, Florida Statutes, 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 which, in this case, is November 6, 2001.

The application as filed and amended is in compliance with the governing statute, Section 367.045, Florida Statutes, and other pertinent statutes and administrative rules with regard to an application for a certificate of authorization for an existing utility currently charging for service. The application contained the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. Pursuant to Rules 25-30.034(1)(h), (i), and (j), Florida Administrative Code, the application also contained a description of the territory to be served, a copy of a detailed system map showing the location of the utility's lines and treatment facilities, and a copy of a tax assessment map including the plotted territory. The territory requested by the utility is described in Attachment A.

Noticing. The application contained the requisite proof of noticing pursuant to Rule 25-30.030, Florida Administrative Code. No objections to the noticing were filed.

Department of Community Affairs. Pursuant to Section 367.045(5)(b), Florida Statutes:

> When granting or amending a certificate of authorization, the commission need not consider whether the issuance or amendment of the certificate of authorization is inconsistent with the local comprehensive plan of a county or municipality unless a timely objection to the notice required by this section has been made by an

> appropriate motion or application. If such an objection has been timely made, the commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality.

While there were no objections to the utility's application, the Commission has a Memorandum of Understanding with the Department of Community Affairs (DCA) in which each application for an original certificate, or an amendment to a certificate, is provided to the DCA for its input on the need for service and comprehensive plan consistency. MGWC's application was forwarded to the DCA in October 2000. The DCA provided its comments by letter dated November 2, 2000.

In its response, the DCA indicated that the application is consistent with Polk County's comprehensive plan, which contains policies to allow developers to construct and manage utilities in areas that are not otherwise served. Therefore, the DCA staff supports the subject application for original certificate.

Utility Ownership. Pursuant to Rules 25-30.034(1)(a), (b), and (c), Florida Administrative Code, the application contained a description of the utility's ownership. McLeod Gardens Water Company is a fictitious name registered in the Division of Corporations of the Florida Department of State. Tevalo, Inc. is a Florida For-Profit Corporation established on October 29, 1970.

Financial Ability. Rule 25-30.034(1)(d), Florida Administrative Code, requires a statement of the financial ability of the utility to continue to provide service. Tevalo, Inc. provided a May 1999 financial statement which indicates that the corporation has about $775,799 in net assets available to finance this utility's expenses. Staff believes the assets represent an adequate showing of financial ability.

Technical Ability. Pursuant to Rule 25-30.034(1)(d), Florida Administrative Code, the application contained an initial statement regarding the technical ability of the utility to continue to provide service. In addition, MGWC provided information that the utility employed an operator who held Florida Department of Environmental Protection (FDEP) Class C drinking water treatment operator licenses. The owners of Tevalo, Inc. also have ownership interest in Pinecrest Ranches, also located in Polk County. Pinecrest Ranches was granted a grandfather water certificate

pursuant to Order No. PSC-97-0367-FOF-WU, issued April 2, 1997, in Docket No. 961253.

Health Department. Staff contacted the Polk County Health Department (PCHD) concerning the MGWC's system. According to the PCHD's records, the water system was inspected during the last year and was found to have no outstanding infractions.

FDEP Permits. Rule 25-30.034(1)(k), Florida Administrative Code, requires the utility to provide the numbers and dates of any permits issued for the systems by the FDEP. The application lists the permit number issued in October, 1996 by the Florida Department of Health for the water plant facilities. PCHD has jurisdiction over water facilities in the County, rather than the FDEP.

Customer Configuration. Pursuant to Rule 25-30.034(1)(n), Florida Administrative Code, the application contains a description of the customers currently served and proposed to be served by meter size. MGWC's current and proposed water service territory is limited to a single family development. Each housing unit has a septic tank for wastewater service. The development has 37 existing customer connections with a maximum capacity of 176 connections at build out. The customer connections currently have flat fee charges for water usage. However, water meters are being installed pursuant to a discussion with the Division of Economic Regulation concerning the establishment of metered rates.

Proof of Land Ownership. Rule 25-30.034(1)(e), Florida Administrative Code, requires proof that the utility owns or has provided for the continued use of the land upon which the utility facilities are located. The application contained a copy of a warranty deed of the transfer of the property to Tevalo, Inc. recorded on May 15, 1992.

Public Interest. Section 367.045(1)(b), Florida Statutes, requires a finding of the need for service in the area involved, and the existence or non-existence of service from other sources within geographic proximity to the area. Since the area is already being served by the utility, the need is apparent and no local government or utility objected to MGWC's application for original certificate.

Based on all of the above, staff recommends that it is in the public interest to grant Tevalo, Inc. d/b/a McLeod Gardens Water

Company, Water Certificate No. 619-W to serve the territory described in Attachment A, and that the application for original certificates should, therefore, be granted.

ATTACHMENT A

TEVALO, INC.

WATER SERVICE AREA

POLK COUNTY

McLeod Gardens:

In Section 13, Township 29 South, Range 25 East:

The South 891 feet of the NE 1/4 of the SE 1/4 of said Section 13, LESS the South 40 feet thereof for Bomber Road.

In Section 18, Township 29 South, Range 26 East:

The NW 1/4 of the SW 1/4 of said Section 18, LESS the South 40 feet thereof for Bomber Road.

ISSUE 4: What rates and charges should be approved for Tevalo, Inc. d/b/a McLeod Gardens Water Company?

RECOMMENDATION: The utility's existing flat rates and tap-in fees for water service for the housing development should be approved as submitted until the completion of the utility's first rate proceeding. The utility should be put on notice that, at the time of its next rate proceeding, all meters will be required to be installed and in compliance with Part III, Rule 25-30, Florida Administrative Code, and that appropriate base facility charges and usage rates will be established by the Commission. The utility should be allowed to continue to charge the current late payment fee. The utility should also be allowed to charge the standard miscellaneous charges specified in the Staff Analysis. Customer deposits should not be authorized at this time. The effective date of the utility's rates and charges should be the stamped approval date of the tariff sheets, pursuant to Rule 25-30.475, Florida Administrative Code. (CLAPP)

STAFF ANALYSIS: The utility currently charges its customers a monthly flat rate of $18 plus tax for water service. Pursuant to Rule 25-30.034(1)(g), Florida Administrative Code, the initial application indicated that rates and charges were established at the time the utility was established. The application also indicated that the rates had not been raised since the establishment of the utility. As such, the application indicates that the most recent authority for the current rates is based on the March 15, 2001 letter from Mr. James O. Vaughn, President of Tevalo, Inc., which states:

> When the PSC took over regulation of Polk County water utilities, Tevalo, Inc./McLeod Gardens Water Company was approved as a water utility, but had not begun providing water to any customers. We did not have a rate approved by the County, but were told to select a rate that was reasonable and fair based on our experience with our other water company, Pinecrest Ranches, Inc.
>
> Accordingly, taking into account the increased expenses and the fact that we knew we would ultimately be servicing approx. 1/3 more customers, I set the rate at $18.00 per month.

The MGWC's accountant provided a copy of the utility's 1997 general ledger as verification that the utility has not changed its rates since it started charging rates in 1997.

Rule 25-30.255(1), Florida Administrative Code, requires that each utility measure water sold on the basis of metered volume sales unless the Commission approves a flat rate service arrangement for that utility. In order to design appropriate metered volume (usage) rates, metered usage data needs to be established. Therefore, before metered usage data will be available, lot meters in the development will need to be installed. Staff recommends that the utility be put on notice that meter installation and compliance will be required at the time of its next rate proceeding. Staff would note that the utility has contacted the Division of Economic Regulation with regard to filing for a staff-assisted rate case.

For the above reasons, staff recommends that the utility continue charging its existing flat rates until all meters are installed and in compliance with Part III, Rule 25-30, Florida Administrative Code, and rate base has been established by the Commission in a subsequent proceeding.

Based on the utility application and additional information provided by the utility, staff recommends the following flat rates be approved.

RESIDENTIAL SERVICE

Monthly	**Total Flat Rate**
Water customers	$18.00

Customer Deposits: The utility does not currently require customer deposits and Commission rules do not require a deposit. Staff recommends that no customer deposits be approved at this time.

Miscellaneous Service Charges: The utility does not currently have any miscellaneous service charges, except for a late payment fee. Since it appears that the utility has charged the late payment fee since the beginning of service to the development,

staff recommends that the utility be able to continue to charge the $3.00 late fee. The purpose of the other miscellaneous service charges is to recover the cost of providing these services. For this reason, staff believes that miscellaneous service charges are prudent and reasonable. Staff therefore recommends that the Commission allow the utility to adopt the Commission's standard miscellaneous charges shown below:

Miscellaneous Service Charges

	Water
Initial Connection Fee	$15
Normal Reconnection Fee	$15
Violation Reconnection Fee	$15
Premises Visit Fee	$10
Late Fee	$ 3

Service Availability Charges. The utility has been charging a $275 water tap-in charge since it was established. The amount charged was based upon the owner's experience with its other utility. Staff believes this is a reasonable charge and the utility should be able to continue to collect this fee. However, the service availability charge should be evaluated and modified if necessary during the utility's next rate proceeding.

Customer Billing. Rule 25-30.335(1), Florida Administrative Code, requires that a utility render bills to customers at regular intervals. The utility has provided information that it renders bills to its customers on a monthly basis.

In summary, staff recommends that the Commission approve the utility's existing flat rates for water service for the housing development. The utility should be put on notice that, at the time of its next rate proceeding, all meters will be required to be installed and in compliance with Part III, Rule 25-30, Florida Administrative Code, and appropriate base facility charges and usage rates will be established by the Commission. Staff recommends the utility be allowed to continue to charge its existing late payment fee and service availability charges. Staff recommends that the utility be allowed to charge the standard miscellaneous charges specified in the Staff Analysis. However, customer deposits should not be authorized at this time. The utility has filed proposed water and wastewater tariffs. The

effective date of the utility's rates and charges should be the stamped approval date of the tariff sheets, pursuant to Rule 25-30.475, Florida Administrative Code.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No. If no timely protest is received to the proposed agency action issue, a Consummating Order should be issued upon the expiration of the protest period. Should no timely protests be received, the docket should be closed. (CROSBY, BRUBAKER)

STAFF ANALYSIS: If no timely protest is received to the proposed agency action issue, a Consummating Order should be issued upon the expiration of the protest period. Should no timely protests be received, the docket should be closed.