

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for exemption from)	DOCKET NO. 910655-WU
Florida Public Service Commission)	
regulation for provision of water)	ORDER NO. 25720
service in Broward County by)	
H2OULTON METERING SYSTEMS, INC.)	ISSUED: 2-13-92
)	

ORDER SETTING OUT PROCEDURE, ISSUES,
AND POSITIONS OF PARTIES

I. Case Background

On January 22, 1991, H2Oulton Metering Systems, Inc. (H2Oulton) requested a statewide exemption pursuant to Section 367.022(8), Florida Statutes. Section 367.022(8), Florida Statutes, provides that any person who resells water and wastewater service at a rate or charge which does not exceed the actual purchase price thereof and at least annually files with the Commission a list of charges and rates for all water service sold, the source and actual purchase price thereof, and any other information required by the Commission to justify the exemption, shall be exempt from Commission regulation.

In requesting an exemption H2Oulton proposed to operate a network of franchised or company owned service centers throughout the state. The proposed service centers would contract with landlords for the sub-metering program. H2Oulton would individually meter each unit and would retain ownership and the responsibility for any maintenance of the meters. H2Oulton would be responsible for reading the meters, collecting deposits, billing the tenants, receiving payment, terminating service for nonpayment, and maintaining all records. The landlord, according to H2Oulton, is solely responsible for the payment of water and wastewater bills based upon the master meter usage. Tenants would pay H2Oulton for their utility service at a rate not exceeding the purchase price of the service being resold. H2Oulton contends that it is a utility which can provide these services, and thus is entitled to a resale exemption pursuant to Section 367.022(8), Florida Statutes.

By Order No. 24936, issued August 20, 1991, as proposed agency action, this Commission denied H2Oulton's request for exemption based on the fact that H2Oulton is not a utility. In the same Order, H2Oulton was ordered to cease holding itself out as a utility and to discontinue any collection of customer deposits and disconnection of water service. H2Oulton was ordered to modify its contract and any advertising or promotional materials by removing

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any reference to the aforementioned claims. Finally, the Commission ordered H2Oulton to provide a list of all properties to which it provides its services within counties under Commission jurisdiction within thirty days.

On September 6, 1991, H2Oulton filed its Petition on Proposed Agency Action and requested a hearing pursuant to Section 120.57, Florida Statutes. Subsequently, H2Oulton agreed to waive any disputed issues of material fact. Therefore, pursuant to H2Oulton's waiver, this case has been scheduled for an administrative hearing, in accordance with Section 120.57(2), Florida Statutes, on Monday, February 17, 1992, at 3:00 p.m.

II. Purpose and Procedure

The purpose of the administrative hearing is to consider H2Oulton's application for an exemption from Commission regulation and any motions or other matters that may be pending at the time of the informal hearing. The issues and positions which follow are those that were provided by Staff and H2Oulton in the Statements of Issues and Positions filed with the Division of Records and Reporting on January 27, 1992 and January 31, 1992, respectively. At the hearing, H2Oulton will be given the opportunity to offer an oral presentation and other evidence on the issues identified below by staff and H2Oulton.

III. Prefiled Testimony and Exhibits

No testimony has been prefiled in this case. In compliance with the informal nature of this hearing, pursuant to Section 120.57(2), Florida Statutes, neither staff nor H2Oulton will conduct any cross-examination. However, the following exhibits may be identified and entered into the record at the appropriate time during the hearing:

H2Oulton

1. Letter dated May 17, 1990, from H2Oulton to Mr. Bill Lowe of the Commission.
2. Letter dated June 14, 1990, from the Commission to H2Oulton.

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3. Letter dated July 26, 1991, from Emily Moore, Chief Attorney, Florida Department of Business Regulation, to Ms. Nayola R. Frazier of the Commission.

Staff

1. The current form of Agreement to be used by H2Oulton entitled "Exempt Utility Services Agreement."

IV. Witnesses

As this is an informal hearing pursuant to Section 120.57(2), Florida Statutes, in accordance with that section, neither staff nor H2Oulton will call any witnesses.

V. BASIC POSITIONS

H2OULTON: The application of H2Oulton requesting a resale exemption under Subsection 367.022(8), Florida Statutes, meets the requirements of that Subsection in that H2Oulton resells water and water services (billing and collection) purchased from a landlord to tenants at the cost which does not exceed the actual purchase price thereof. Alternatively, H2Oulton is a utility under Subsection 367.021(12) of the Florida Statutes in that it is a person managing or controlling a system providing water service to the public for compensation. If H2Oulton is neither an exempt reseller nor a utility, then the Commission has no jurisdiction over H2Oulton and cannot interfere with its contractual right to collect deposits and interrupt service for nonpayment.

STAFF: The application of H2Oulton requesting a resale exemption under Section 367.022(8), Florida Statutes, does not appear to meet the requirements of that section. Based on the information reviewed, it appears that H2Oulton does not qualify as a utility nor as a reseller. Therefore, the

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Commission should deny H2Oulton's request for an exemption.

VI. Issues and Positions

ISSUE 1: Is H2Oulton a utility?

POSITIONS

H2OULTON: Yes. The definition of a "utility" under Subsection 367.022(12) of the Florida Statutes is a person who manages or controls a system providing water service to the public for compensation. H2Oulton is now providing and proposes to continue to provide water and wastewater service to the public for compensation. H2Oulton receives compensation from the landlord. H2Oulton is in business for profit.

STAFF: No.

ISSUE 2: Can only a utility disconnect or interrupt services?

POSITIONS

H2OULTON: No, there is nothing in Chapter 367 or the Commission Rules which specifically provides or implies that the Commission has exclusive jurisdiction over interruption of services. The Commission has no jurisdiction under Chapter 83 of the Florida Statutes (Landlord/Tenant Law). The Florida Department of Business Regulation has concluded that H2Oulton has the right to interrupt service. H2Oulton has "voluntarily" agreed to conform its deposit and interruption procedure to be consistent with Rules 25-30.311 and 25-30.320 of the Florida Administrative Code. This is purely a matter of contract between the tenant and H2Oulton. Under Subsection 672.609(1) of the Florida Statutes, a seller may suspend performance when the

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buyer fails to perform. H2Oulton may suspend water supply until the tenant pays his or her bill.

There are many instances of private enterprises providing vital services, like water or garbage collection or services like cable television, having the power and right to interrupt service for those not complying. For municipalities with private firms providing garbage collection many have the interruption of service rights through specific ordinances. For those that do not have an ordinance, the right of interruption of service is contractual and, to the best of our knowledge, has never been challenged in any Florida courts. Both Pompano Beach and Fort Lauderdale have ordinances for garbage and the cable television industry providing the right of interruption.

STAFF:

Staff takes the position that Chapter 367 and the pertinent Commission Rules are specifically designed to exercise jurisdiction over water and wastewater utilities. Therefore, it follows that the rules governing interruption of services apply only to utilities.

ISSUE 3:

Does H2Oulton qualify for an exemption from Florida Public Service Commission regulation under the resale exemption of Section 367.022(8), Florida Statutes?

POSITIONS

H2OULTON:

Yes, because H2Oulton is a utility and H2Oulton resells water service at a rate which does not exceed the actual purchase price thereof. Furthermore, in reviewing the Florida Statutes, we cannot find where it states that an entity has to be a utility to be granted an exemption. As a matter of fact, the Commission granted exemptions to the Regatta Shores Apartments in Seminole County and the Heather Glen Apartments in Orange County in December. To the best of our knowledge, neither one is a utility.

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STAFF: No, because H2Oulton is not a utility.

ISSUE 4: Are the rights and duties set forth in Section 367.022(8) Florida Statutes, assignable to H2Oulton from the landlord under Section 367.022(8), Florida Statutes?

POSITIONS:

H2OULTON: There is no question of assignability. The landlord has contracted with H2Oulton to supply water service, including billing and collections, to its tenants. H2Oulton is a reseller in its own right. Its status is not created by or through the landlord. H2Oulton is applying for an original exemption.

STAFF: No.

ISSUE 5: Does a bailment relationship exist between H2Oulton and the landlord under Section 367.022(8), Florida Statutes?

POSITION:

H2OULTON: You can consider it a bailment or actual sale; it doesn't matter. Physical possession is not necessary to transfer title to property - the contract and intention of the parties govern.

STAFF: No.

ISSUE 6: If H2Oulton is not a utility, should the Commission require H2Oulton to cease "holding itself out" as a utility?

POSITION:

H2OULTON: If H2Oulton is not a utility, then the Commission has no jurisdiction over H2Oulton. H2Oulton has agreed voluntarily to submit itself to the

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jurisdiction of the Commission and comply with the laws and regulations governing utilities including its procedures regarding customer deposits and interruption of service. There are many instances where vital services are provided to the general public with the power of interruption and collection of deposits. We feel that in order for us to provide these needed services to achieve true conservation, we must have a program to fairly enforce compliance, as every provider of water, sewer, garbage, cable television, telephone, electricity and gas must have, in order functionally to operate.

STAFF:

Yes. The Commission should require H2Oulton to cease holding itself out as a utility by discontinuing any collection of utility deposits and disconnection of service to tenants. H2Oulton should be required to modify its contract and any advertising or promotional materials by removing any reference to the aforementioned claims.

ISSUE 7:

Does H2Oulton's operation as set forth in its current application and contract agreement conflict with Chapter 83, Florida Statutes?

POSITION:

H2OULTON:

No. Subsection 83.51(2)(e) of the Florida Statutes permits a landlord to provide in its rental agreement that the tenant is obligated to pay costs or charges for garbage removal, water, fuel or utilities. The tenant then is free to contract with the garbage collector provider, water provider (e.g., H2Oulton), fuel provider and utility provider. These providers (some of whom are utilities, e.g., electric company and some of whom are not private utilities, e.g. garbage collector) all provide for deposits and interruption of service for nonpayment.

Subsection 83.67(1) prohibits a landlord to cause, directly or indirectly, the termination or interruption of any utility service, including

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water, whether or not the utility service is under the control of, or payment is made by, the landlord. The agreement between a landlord and H2Oulton specifically provides that H2Oulton is an independent contractor (independent of the landlord and not under the landlord's control) and that a landlord has neither the authority nor the right to request, cause or require interruption of water service to any tenant. If a tenant is current with his or her water bill but is delinquent in the rent, H2Oulton will never interrupt water service even if the landlord demands or begs H2Oulton to do so. Furthermore, if the tenant is current in the rent but delinquent in paying the water bills, H2Oulton will make its own determination as to whether to interrupt service, even if the landlord demands or begs H2Oulton not to do so. A landlord has no direct or indirect control over H2Oulton or the decision to interrupt water service.

The Department of Business Regulation is in charge of licensing apartment complexes and has the power to revoke licenses or fine landlords for violation of Chapter 83 of the Florida Statutes. It is our belief that if the state agency that is empowered with overseeing the apartment industry believes H2Oulton is not in violation of Chapter 83, Issue #7 should not be an issue.

STAFF: Yes. While the Commission does not have jurisdiction over Chapter 83, Florida Statutes, and does not enforce that particular statute, it appears that H2Oulton's practices violate Chapter 83, Florida Statutes.

ISSUE 8: If H2Oulton is granted an exemption, should it receive a statewide exemption?

POSITION:

H2OULTON: H2Oulton is no longer concerned with receiving a statewide exemption. H2Oulton wants to do whatever

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the Commission and Staff would prefer in order to make their job work most efficient.

STAFF:

No. Staff's position is that such an exemption should be handled on a case by case basis in the name of the individual landlord if the Commission finds that it has jurisdiction over H2Oulton's operation.

VII. Proposed Stipulations

There are no stipulated issues at this time.

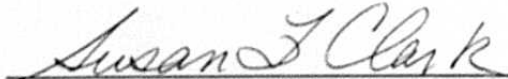
VIII. Rulings

On February 3, 1992, H2Oulton filed a Motion to File Late its Statement of Issues and Positions. The Statement was due on January 27, 1992, but was not filed until January 31, 1992. H2Oulton states, in their motion, that there was some confusion as to whether H2Oulton or its counsel would file the Statement. On February 12, 1992, the Motion to File Late was granted by the Prehearing Officer, Commissioner Susan F. Clark.

Based upon the foregoing, it is

ORDERED by Commissioner Susan F. Clark, as Prehearing Officer, that this Order Setting Out Procedure, Issues, and Positions of Parties shall govern the conduct of these proceedings unless modified by the Commission.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 13th day of FEBRUARY, 1992.



Susan F. Clark, Commissioner
and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.