

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Staff-) DOCKET NO. 900025-WS
Assisted Rate Case in Pasco) ORDER NO. PSC-94-1015-FOF-WS
County by SHADY OAKS MOBILE-) ISSUED: August 23, 1994
MODULAR ESTATES, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
DIANE K. KIESLING

ORDER DENYING MOTION FOR STAY

BY THE COMMISSION:

BACKGROUND

Shady Oaks Mobile-Modular Estates, Inc. (Shady Oaks or utility) is a Class C water and wastewater utility located in Pasco County. On March 7, 1989, the utility signed a Consent Final Judgment with the Department of Environmental Protection (DEP). The utility agreed to construct an additional effluent disposal system, to eliminate discharge from the plant, and to establish a new percolation pond. The utility agreed to submit an application for a construction permit within 60 days of the date of the order.

On January 10, 1990, Shady Oaks applied for the instant staff-assisted rate case. On February 8, 1991, the Commission issued proposed agency action (PAA) Order No. 24084, which approved a rate increase and required the utility to do the following:

- 1) File a request for acknowledgement of a restructure and a name change;
- 2) Bring the quality of service to a satisfactory level;
- 3) Spend at least 85 percent of the allowance for preventative maintenance, or submit a written schedule showing what monthly maintenance will be implemented, along with a statement of the reasons such funds were not spent for preventative maintenance;
- 4) Install meters for all of its customers; and
- 5) Escrow a certain portion of the monthly rates.

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The utility was also authorized to charge flat rates for six months, at the end of which time the base facility charge rate structure became effective. In that case, the base facility charge rates automatically became effective on October 1, 1991.

On March 1, 1991, several utility customers timely filed a protest to Order No. 24084. In their protest, the customers objected to the location of the percolation pond proposed by the utility. Because we have no jurisdiction to dictate the location of the proposed percolation pond, by Order No. 24409, issued April 22, 1991, we dismissed the protest and revived Order No. 24084, making it final and effective.

On June 24, 1991, in response to a suit filed by the homeowners, Judge Lynn Tepper with the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, granted an emergency temporary injunction enjoining and restraining the utility from charging or attempting to collect the new utility rates.

On July 5, 1991, Judge Wayne L. Cobb with the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, issued an Order to Show Cause why Shady Oaks should not be punished for contempt of Court for willfully and deliberately violating a 1983 order of the Court that prohibited the utility from charging more than \$25 per month as a service maintenance fee (which included the provision of water and wastewater service). The July 5, 1991 order further enjoined the utility from collecting the utility rates established by this Commission and ordered that the \$25 per month service maintenance fee be tendered to the Clerk of the Circuit Court. In August 1991, both injunctions were lifted and the utility was able to begin collecting revenues.

The utility never applied for its construction permit as required by the Consent Final Judgment. Therefore, on July 8, 1991, as a result of a stipulated settlement of a motion for contempt brought against the utility by DEP, Judge Lynn Tepper ordered the utility to interconnect its wastewater system with Pasco County, rather than construct new disposal facilities. The utility was given six months from the date of the order to complete the interconnection. The utility failed to interconnect its wastewater system to Pasco County. In addition, the utility was operating without a permit from DEP.

On November 4, 1991, the Commission issued Order No. 25296, which determined the utility's noncompliance with Order No. 24084. Order No. 25296 required the utility to:

- 1) Submit all necessary information for changing its certificated name, or revert to operating under its currently certificated name;
- 2) Immediately place in the escrow account all funds necessary to bring said account to its proper balance;
- 3) Install water meters for all of its customers; and
- 4) Improve the quality of service and interconnect with the Pasco County wastewater treatment system;

Because numerous customers did not pay their utility bills as a result of a court dispute over the utility's rates, Order No. 25296 allowed the utility to charge the flat rates for an additional five months. Beginning in December 1991, the utility once again began charging flat rates.

By Order No. PSC-92-0367-FOF-WS, issued May 14, 1992, the Commission imposed a \$2,000 fine that had been previously suspended, and ordered the utility to show cause why it should not be fined for each item of noncompliance found in Orders Nos. 24084 and 25296. At the utility's request, these matters were set for hearing. By Order No. PSC-92-0356-FOF-WS, issued May 14, 1992, the Commission ordered the utility to issue credits to those customers who had paid a delinquent purchased power bill for the utility.

In June 1992, the utility completed the installation of all of the required water meters. By Order No. PSC-92-0723-FOF-WS, issued July 28, 1992, the Commission ordered the utility to implement the base facility and gallonage charge rates that had been approved in Order No. 24084. The utility implemented the new rates effective September 25, 1992.

In July 1992, the utility requested that the escrow requirements set forth in Orders Nos. 24084 and 25296 be suspended for a period of several months. By Order No. PSC-92-1116-FOF-WS, issued October 5, 1992, the Commission denied the utility's request to suspend the escrow account requirements. On October 26, 1992, the utility timely filed a protest to that Order.

A hearing regarding the utility's noncompliance with Orders Nos. 24084 and 25296 was held on January 7, 1993 in Zephyrhills, Florida. The utility, although it requested the hearing, did not

attend the hearing. By Order No. PSC-93-0542-FOF-WS, issued April 9, 1993, the Commission:

- 1) Fined the utility in the amount of its rate base or \$60,572;
- 2) Ordered that a proceeding be initiated to reduce the utility's rates by the amount of pro forma plant not constructed and the amount of preventative maintenance not spent; and
- 3) Ordered that revocation proceedings be initiated.

The utility filed a Motion for Reconsideration of Order No. PSC-93-0542-FOF-WS. By Order No. PSC-93-1396-FOF-WS, issued September 27, 1993, the Commission denied the Motion for Reconsideration and ordered the utility to sell or transfer the utility within 120 days of the issuance date of the order. The commission also voted to suspend the fine if a completed application for a transfer was submitted. The utility failed to transfer or interconnect the system within the 120 days. Therefore, the \$60,572 fine is due and payable. On October 19, 1993, the utility filed a Notice of Administrative Appeal of Order No. PSC-93-0542-FOF-WS.

In preparation for the prehearing relating to the escrow requirements, Commission staff met with the utility in an attempt to resolve certain concerns of the utility. Specifically, the utility contended that it was unable to meet its escrow requirements due to a shortfall in revenues collected. This Commission agreed to have staff review the utility's contended revenue shortfall within the context of the proceeding to reduce the utility's rates. Consequently, the utility withdrew its escrow-related protest. Therefore, the prehearing and hearing relating to the escrow accounts were cancelled by Order No. PSC-93-0777-PCO-WS, issued May 20, 1993. By Order No. PSC-93-1733-FOF-WS, issued December 1, 1993, the Commission reduced Shady Oaks' rates to reflect removal of proforma plant not constructed and preventative maintenance not spent and required a refund.

On September 23, 1993, the Commission, pursuant to Section 367.111(1), Florida Statutes, and in accordance with Order No. PSC-93-0542-FOF-WS, noticed its Intent to Initiate Revocation of Certificates Nos. 451-W and 382-S issued to Shady Oaks. On October 18, 1993, Shady Oaks timely filed an objection to the Notice. Accordingly, the revocation matter was scheduled for an August 4-5, 1994, administrative hearing, in Docket No. 930944-WS.

By a February 18, 1994 Agreed Order Granting DEP's Motion for Contempt, Judge Lynn Tepper ordered Shady Oaks to interconnect its wastewater treatment facility with Pasco County or sell the system within 120 days of the date of the Order, or June 18, 1994. On June 15, 1994, Judge Lynn Tepper granted in part and denied in part Shady Oaks' Extension of Time to Comply With Court Order. Judge Tepper ordered Shady Oaks to sell or convey its wastewater treatment facility free and clear of any encumbrances by July 18, 1994. The utility's request to extend the date on the option of the utility's interconnecting the system was denied. On June 14, 1994, our Staff sent the utility a collection letter requesting payment of the \$60,572 fine and the earlier \$2,000 fine imposed by Order No. PSC-92-0367-FOF-WS.

On June 29, 1994, Shady Oaks filed a Motion for Stay Pending Review pursuant to Rule 25-22.061, Florida Administrative Code. The utility requested a stay of the provision imposing the \$60,572 fine in Order No. PSC-93-0542-FOF-WS, until final disposition of Shady Oaks' appeal before the First District Court of Appeal. On July 14, 1994, the utility filed a Chapter 11 bankruptcy petition. This Order addresses the utility's Motion for Stay Pending Review.

MOTION FOR STAY PENDING REVIEW

As stated earlier, by Order No. PSC-93-0542-FOF-WS, the Commission imposed a fine against Shady Oaks in the amount of \$60,572 and ordered that revocation proceedings be initiated. By Order No. PSC-93-1396-FOF-WS, the Commission denied the utility's Motion for Reconsideration of Order No. PSC-93-0542-FOF-WS, but suspended the fine only if the utility submitted a completed transfer application within 120 days of issuance of Order No. PSC-93-1396-FOF-WS. The utility did not sell the utility by the given date, and the fine became due and payable.

On June 29, 1994, Shady Oaks filed a Motion for Stay Pending Judicial Review pursuant to Rule 25-22.061, Florida Administrative Code. In support of its request for a stay, the utility states that: 1) the utility is currently attempting to obtain financing to fund certain improvements to the utility that were previously ordered by the Commission; 2) if this matter is not stayed, and the Commission pursues collection efforts against the utility for the fine imposed in its final order, the utility's efforts to gain financing to fund needed improvements will be jeopardized; and 3) any additional financial burdens imposed upon the utility at this time will only serve to jeopardize the utility's ability to provide adequate utility service to its customers.

We believe that Rule 25-22.061(1)(a), Florida Administrative Code, does not apply in this instance. Rule 25-22.061(1)(a), Florida Administrative Code, states that "when the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings." Order No. PSC-93-0542-FOF-WS did not involve a refund to customers nor a decrease in rates.

Rule 25-22.061(2), Florida Administrative Code, states that:

Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:

- (a) Whether the petitioner is likely to prevail on appeal;
- (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

In accordance with Rule 25-22.061(2), Florida Administrative Code, we do not find that it is appropriate to grant the utility's request for a stay. In reaching our conclusion, we have considered the three elements of Rule 25-22.061(2), Florida Administrative Code, and a discussion of each follows.

Likelihood of Prevailing on Appeal

The crux of the utility's argument in its appellate brief is that the Commission's imposition of a penalty equal to the utility's rate base is an exercise of discretion outside the range of discretion delegated to the Commission by law, and is inconsistent with prior agency practice. We believe that the Commission did not abuse its discretion. Pursuant to Section 367.161, the Commission may impose a penalty of up to \$5,000 per day per violation for noncompliance with the Commission's rules, statutes, or orders.

The Commission's decision to impose the \$60,572 fine against Shady Oaks is consistent with the Commission's action in Order No. 20884, issued March 13, 1993, In re: Service Investigation of Lanier Utility Commission in Pasco County. In Lanier, the Commission noted that the maximum penalty of \$5,000 per day would result in a fine of \$1,045,000. However, the Commission found that a penalty equal to the utility's rate base of \$145,624 would be appropriate, along with the revocation of the utility's certificate. Based on the foregoing, we believe that it is not likely that the utility will be successful in its appeal of Order No. PSC-93-0542-FOF-WS.

Irreparable Harm

The utility asserts that if this matter is not stayed, and the Commission pursues collection efforts against the utility for the \$60,572 fine, the utility's efforts to gain financing to fund needed improvements will be jeopardized. As stated earlier, Judge Tepper has ordered Shady Oaks to sell or convey its wastewater facility by July 18, 1994. Interconnection is no longer an option for this utility. Therefore, the utility's assertions that it is attempting to obtain financing to make improvements and the Commission's collection efforts would jeopardize such efforts, have no merit. The utility owner can no longer use the necessary improvements as an excuse for failing to pay the fine since both the Commission and the Court have ordered him to sell the utility. He no longer needs funds to make improvements to the utility. Furthermore, the Commission, on numerous occasions has increased rates by a sufficient amount to cover the necessary improvements. The utility neglected to use the funds for that purpose.

Substantial Harm or Contrary to Public Interest

In its motion, the utility has failed to establish that denying the stay would result in substantial harm or be contrary to the public interest. The utility only states that its ability to obtain financing would be jeopardized. If the utility has not been able to obtain financing, a fact that we do not dispute, it is a condition which occurred prior to the Commission's decision to fine the utility \$60,572.

In consideration of the foregoing, we find that it is appropriate that Shady Oaks' Motion for Stay Pending Review be denied. However, this docket shall remain open pending the final disposition of the appeal.

ORDER NO. PSC-94-1015-FOF-WS
DOCKET NO. 900025-WS
PAGE 8

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Shady Oaks Mobile-Modular Estates, Inc.'s Motion for Stay Pending Review be denied. It is further

ORDERED that this docket shall remain open pending the final disposition of the appeal.

By ORDER of the Florida Public Service Commission, this 23rd day of August, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay J. Jagan
Chief, Bureau of Records

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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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.