



Public Service Commission

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RECORDS AND REPORTING

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DATE: JUNE 24, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAY)

FROM: DIVISION OF WATER AND WASTEWATER (CHASE)
DIVISION OF LEGAL SERVICES (JAEGER)
DIVISION OF ADMINISTRATION (SEWELL)

RE: DOCKET NO. 990558-WU - PETITION BY LEVY COUNTY AS RECEIVER FOR UNIVERSITY OAKS WATER SYSTEM FOR WAIVER OF RULE 25-30.110, F.A.C., AND TO WRITE OFF PAST DUE REGULATORY ASSESSMENT FEES.
COUNTY: LEVY

AGENDA: 07/06/99 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUES 1 AND 3 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: August 4, 1999

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\990558RW.RCM

CASE BACKGROUND

University Oaks Water System (University Oaks or utility) is a Class C utility located in Levy County. The system was initially granted Water Certificate No. 438-W in Docket No. 840008-WU, by Order No. 13712, issued September 15, 1984. According to the most recent Annual Report filed by the utility, it served 98 water customers in 1993. Wastewater service is provided by septic tanks. The 1993 annual report indicated that the system received gross revenues of \$12,024 and a net operating loss of \$5,761.

The Circuit Court in Levy County appointed Mr. Frank Woodward receiver of University Oaks on December 17, 1992. By Order No. PSC-93-0369-FOF-WU, issued March 9, 1993, the Commission acknowledged the abandonment of University Oaks and the appointment of Mr. Woodward as receiver.

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Mr. Woodward filed an application for a Transfer of Majority Organizational Control of University Oaks Utilities, Inc., from Lake Crescent Development Corporation to Mr. Frank Woodward on July 7, 1994. However, the application was never completed.

On August 15, 1997, the Commission received a letter from an attorney representing Mr. Frank Woodward, as President of University Oaks Utilities, Inc., which stated that Mr. Woodward was being forced to abandon the utility due to financial problems with the mortgage holder and also with Central Florida Electric Cooperative, and that the Levy County Board of County Commissioners had been notified. The attorney subsequently sent a letter to the Commission on December 9, 1997, stating that Mr. Woodward was taking action relative to "taking back the University Oaks utilities," and rescinding the notice of abandonment.

However, in March 1998, Levy County (County) filed a Motion to Appoint New Receiver with the Circuit Court. This motion was granted on March 6, 1998, by Joseph E. Smith, Acting Circuit Court Judge in the Eight Judicial Circuit, in Case No. 92-607-CA. In his order on that date, Judge Smith removed Mr. Woodward as receiver and appointed Levy County as the new receiver of University Oaks, effective March 9, 1998. Therefore, Mr. Woodward was the appointed receiver for University Oaks from December 17, 1992 until March 9, 1998.

Pursuant to Section 367.022(2), Florida Statutes, a utility system that is operated, managed and controlled by a governmental entity is not subject to this Commission's regulation. In Docket No. 940714-WU, Levy County requested that it be exempt from regulation by the Commission.

By Order No. PSC-98-0920-FOF-WU, issued July 7, 1998, the Commission acknowledged the appointment of Levy County as receiver and its exempt status pursuant to Section 367.022(2), Florida Statutes. That Order also denied the incomplete transfer application of Mr. Woodward, canceled Certificate Number 438-W, and closed the docket.

However, the Commission, in that Order, recognized that pursuant to Rule 25-30.110, Florida Administrative Code, the utility was responsible for filing annual reports while operating under Commission regulation, and that pursuant to Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, the utility was responsible for paying regulatory assessment fees (RAFs) during that period. University Oaks failed to file annual reports for 1994 through March 8, 1998.

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Also, except for paying \$26.50 in RAFs for 1994, Mr. Woodward, as receiver for the utility, did not pay RAFs through March 8, 1998. Because no annual report was filed for 1994, staff could not determine whether the \$26.50 paid was correct.

Based upon the foregoing, the Commission found University Oaks, with Levy County as receiver, to be responsible for filing annual reports and paying RAFs, from December 17, 1992 through March 8, 1998. Based on this finding, the Commission directed staff to address the filing of these reports and collection of the fees, including appropriate penalties and interest, in a separate docket after internal collection efforts were attempted.

By letter dated April 5, 1999, staff requested that Levy County, as receiver, pay the outstanding RAFs and file the appropriate annual reports. By letter dated April 30, 1999, the County responded to that request. In that letter, the County requested a waiver of the requirements for the filing of annual reports and the payment of past due RAFs. However, the requirement for the payment of RAFs is statutory, and the County understands that the Commission cannot waive statutory requirements. Although the County understands that the Commission cannot waive a statute, it states that there are no funds to pay the RAFs, plus penalty and interest, and that it cannot be made to pay these amounts due from utility operations prior to the County being appointed receiver.

The County's letter outlining its position was filed with the Division of Records and Reporting on May 6, 1999. This docket was opened on that date, and this recommendation is filed to address the requests of the County.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the request of Levy County as receiver for University Oaks Water System for waiver of the rules requiring filing of annual reports and regulatory assessment fees?

RECOMMENDATION: Based on Section 120.542, Florida Statutes, the Commission should grant Levy County's request for waiver of that part of Rule 25-30.110, Florida Administrative Code, which provides for the filing of annual reports and delinquent penalties. However, the collection of regulatory assessment fees, plus penalty and interest, is statutory and cannot be waived. (JAEGER, CHASE)

STAFF ANALYSIS: On April 30, 1999, Levy County, as receiver for University Oaks, filed its request for waiver of the rules requiring the filing of annual reports (plus delinquent penalties) and regulatory assessment fees (RAFs), plus penalty and interest. The County seeks relief from the requirement to file annual reports arising from the failure of the previous receiver to file the utility's 1994-1998 annual reports.

In Docket No. 940714-WU, the County indicated that it planned to continue operating the system, and requested the Commission to acknowledge its exempt status. The Commission, by issuance of Order No. 98-0920-FOF-WU, recognized the exempt status of the County's operations, starting March 9, 1998, and canceled the utility's certificate.

Rule 25-30.110(3), Florida Administrative Code, requires utilities subject to the Commission's jurisdiction as of December 31 of any year to file an annual report for that year. The report is due by March 31 for the preceding year ending December 31.

Rule 25-30.110(6), Florida Administrative Code, provides, in part, that a penalty shall be assessed against any utility that fails to file an annual report or request for an extension. Rule 25-30.110(7), Florida Administrative Code, sets forth the calculation of the penalty. For Class C utilities, the rule provides that the Commission may assess a penalty of \$3 per day for each day the report is delinquent. Starting with 1994, Mr. Woodward, the prior receiver, failed to file annual reports for all subsequent years. Therefore, for each of the annual reports, from the time of their delinquency, a \$3 per day penalty would be applicable.

In its petition, the County states that, with this second abandonment, the County was unable, despite diligent effort, to obtain the records, and that, therefore, there are no records available to prepare and file the annual reports. Further, the County states that there were no funds to pay the past due RAFs, and that the County had invested substantial work and money just to make the system operable.

The County initially claimed that this situation met the conditions for a waiver under Section 120.542(2), Florida Statutes, and requested the Commission to waive both the rules requiring the filing of annual reports plus penalties, and RAFs, plus penalty and interest. However, after discussions with staff, the County realized that the requirement for the payment of RAFs was statutory, and thus not appropriate for waiver. Although not appropriate for a waiver, the County states that there are no funds to pay these past due RAFs and requests the Commission write off the RAFs.

Statutory Requirements

Pursuant to Section 120.542(6), Florida Statutes, on May 12, 1999 (an amendatory notice was also provided on May 26, 1999), the Commission provided notice to the Department of State, which published notice of the waiver request for the annual reports in the Florida Administrative Weekly. After reviewing the petition, staff found no deficiencies. The Commission received no comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, the Commission is required to issue an order in writing granting or denying the petition for waiver, stating the relevant facts and reasons supporting the Commission's decision within 90 days after receipt of the original petition. Because the letter was filed with the Division of Records and Reporting on May 6, 1999, the Commission must rule on the County's petition by August 4, 1999.

Section 120.542(2), Florida Statutes, in pertinent part, provides that "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and that application of the rule would create a substantial hardship or would violate principals of fairness. For purposes of this section, substantial hardship means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver."

The Underlying Statutes

The underlying statutes pertaining to the rules in this instance are Sections 367.121 and 367.161, Florida Statutes. Section 367.121(1)(c), Florida Statutes, grants the Commission the power "to require such regular or emergency reports from a utility, including, but not limited to, financial reports, as the commission deems necessary." The purpose, in part, for requiring annual reports is to determine whether the utility is overearning and whether the utility is paying the proper regulatory assessment fees. These reports also allow the Commission to monitor the continued operations of any utility that it regulates.

With the County now operating the utility, the operations are exempt from Commission regulation, and there is no longer any need for continued monitoring by this Commission. Therefore, staff believes that the purpose of Section 367.121, Florida Statutes, was negated when the County took over operation of the utility.

Section 367.161(1), 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 wilfully violated, any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission. As noted in Docket No. 980442-SU, the purpose of penalizing utilities for violating Commission rules is to encourage compliance with those rules. Staff agrees with the County that following the County's appointment as receiver and the Commission's recognition of its exempt status, there was no longer any need for the County to file the past due annual reports. Therefore, staff believes that the purpose of Section 367.161, Florida Statutes, has been achieved.

Substantial Hardship and Principles of Fairness

According to the County, it could not obtain the records that would allow it to submit appropriate annual reports for the years 1994-1998. Also, the County states that there were no funds, and that it had made a substantial investment of its own money just to make the system operable.

Based on the foregoing, staff believes that the County's petition for waiver for the filing of annual reports should be granted. The County has met the requirements of Section 120.542, Florida Statutes, by demonstrating that a waiver of Rule 25-30.110, Florida Administrative Code, would serve the purpose of Sections 367.121 and 367.161, Florida Statutes. Further, as required by

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Section 120.542, Florida Statutes, the County has demonstrated that application of the rules would create a substantial hardship in attempting to prepare any annual reports, and would violate principles of fairness for the County.

The County also requests that the Commission write off the outstanding RAFs plus associated penalty and interest due from University Oaks. However, payment of RAFs, plus penalty and interest, is required by Sections 367.145(1), and 350.113(3) and (4), Florida Statutes. Therefore, and as further discussed in Issue 2 of this recommendation, staff does not believe that the Commission has the power to waive the requirement for payment of RAFs, plus penalty and interest. The appropriate disposition of the delinquent RAFs, plus penalty and interest, is discussed in Issue 2.

ISSUE 2: Should University Oaks Water System be ordered to show cause in writing, within 21 days, why it should not remit regulatory assessment fees in the amount of \$2,254.80, as well as the statutory penalty in the amount of \$559.16, and interest in the amount of \$739.39, for violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to pay regulatory assessment fees from 1994 through March 8, 1998?

RECOMMENDATION: No. A show cause proceeding against University Oaks Water System should not be initiated. Staff further recommends that the Commission refer University Oaks Water System's unpaid regulatory assessment fees and associated penalties and interest to the State of Florida Comptroller's Office for permission to write off the account as uncollectible. (JAEGER, CHASE, SEWELL)

STAFF ANALYSIS: Regulatory assessment fees (RAFs) are intended to cover the costs incurred in Public Service Commission regulation of utilities, and Section 367.145, Florida Statutes, requires water and wastewater utilities to remit RAFs to this Commission.

Pursuant to Section 350.113(4), Florida Statutes, and Rule 25-30.120(7)(a), Florida Administrative Code, a statutory penalty plus interest shall be assessed against any utility that fails to timely pay its RAFs, in the following manner:

1. 5 percent of the fee if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during the time in which failure continues, not to exceed a total penalty of 25 percent.
2. The amount of interest to be charged is 1% for each 30 days or fraction thereof, not to exceed a total of 12% annum.

In addition, pursuant to Sections 367.145(1)(b) and 367.161, Florida Statutes, and Rule 25-30.120(7)(b), Florida Administrative Code, the Commission may impose an additional penalty upon a utility for failure to pay RAFs in a timely manner.

Neither University Oaks nor Frank Woodward, as receiver, has paid RAFs since the \$26.50 that was paid in 1994. Section 367.161(1), 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 provision of Chapter 367, Florida Statutes.

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 antecedent Commission approval to transfer the majority organizational control of its corporate grandparent, 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, F.A.C., 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.

Failure to pay RAFs is an apparent violation of Section 367.145(1)(b), Florida Statutes. As discussed above, by Order No. PSC-98-0920-FOF-WS, issued on July 7, 1998, the Commission ordered the utility, with Levy County as receiver, to pay the outstanding RAFs due from 1994 through March 8, 1998. Staff followed up on enforcement of this Order by letter dated April 5, 1999, to the County.

As stated previously, the County responded to this letter with a request for waiver of the requirement to pay outstanding RAFs. Using the revenue reported by the utility in the 1993 annual report, staff estimates that the amount of outstanding RAFs for this period totals \$2,254.80. In addition, the utility has accumulated \$1,295.55 in penalty and interest through June 30, 1999, on this delinquent amount (\$559.16 in penalty and \$739.39 in interest). Therefore, the total amount due is \$3,550.35.

The law, as indicated above, is clear that RAFs, plus penalties and interest for delinquent RAFs, must be assessed. The law is also clear that the Commission lacks the statutory authority to grant a waiver of the requirement to pay RAFs, plus penalties and interest. See, Order No. PSC-96-0834-FOF-WS, issued July 1, 1996, in Docket No. 960540-WS, wherein the above provisions were construed to bar waiver of RAFs, penalties, and interest, but not to preclude a reasonable payment schedule to redress a utility's delinquency. See also, Order No. 24290, issued March 26, 1991, in

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Docket No. 900961-SU, wherein the Commission stated that it had no statutory authority to grant a waiver, and that Section 350.113(5), Florida Statutes, permitted a fee deadline to be extended 30 days for good cause shown. Also see, Order No. PSC-97-0767-FOF-FU, issued June 30, 1997 in Docket No. 970360-GU, wherein the lack of authority to waive the statutory penalty and interest assessments on late RAF payments was discussed:

It is the function of the legislature and not the courts or administrative agencies to change the law. 1 Fla. Jur. 2d, Administrative Law, Section 32. The grant of a waiver of the regulatory assessment fee penalty statute, in the absence of any waiver provisions, express or implied, contained in the statute, would be a modification of the statute. This is a function reserved solely for the legislature. In addition, there is no basis for interpretation of Section 350.113(4), F.S. The statute is clear and unambiguous on its face. If the terms and provisions of a statute are plain, there is no room for administrative interpretation. Southeastern Utilities Service Co. v. Redding, 131 So. 2d 1 (Fla. 1950).

Therefore, staff does not believe that the Commission has the power to grant any request of the County for waiving the requirement to pay RAFs plus associated penalty and interest. The County understands that the requirement for RAFs, plus penalty and interest, is by statute, and not by rule, and so a waiver is not appropriate

However, it is the utility that is liable for these payments, and staff notes that the utility accumulated losses during the prior receiver's tenure. The County also states that there were no utility funds to pay either the RAFs, or the associated penalties and interest, and that the County did not want to nor was required to use its own funds to pay the outstanding penalties and interest. Further, it appears that the County has invested substantial work and money just to make the system operable. There appear to be no funds whatsoever within the utility to pay any past due RAFs or penalty and interest.

Staff has been unable to contact the former receiver, Mr. Frank Woodward, and his whereabouts remain unknown. Staff further notes that the utility, with Mr. Woodward as receiver, had continued to have problems with meeting its financial obligations. This led at one point to Mr. Woodward doing a notice of abandonment. Also, the last annual report filed (1993), indicated

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that the system received gross revenues of \$12,024 and a net operating loss of \$5,761. Thus, the utility has had a history of financial problems. All indications are that the utility accumulated losses during Mr. Woodward's receivership, and that, therefore, there are no funds available from which the utility may pay outstanding RAFs, penalties and interest.

Any attempt to collect the RAFs, plus penalty and interest, through a show cause proceeding would almost certainly be a waste of time, money and effort. Staff believes that further collection efforts would not be cost effective and that collection of any fees is highly unrealistic. Therefore, in consideration of the facts stated above, staff recommends that: 1) the Commission decline to initiate show cause proceedings; and 2) refer University Oaks' unpaid RAFs for 1994 through March 8, 1998, plus associated penalty and interest, to the Comptroller's Office for permission to write off the account as uncollectible.

This recommendation is consistent with Order No. PSC-98-1100-FOF-WS, issued August 17, 1998, in Dockets Nos. 900025-WS and 930944-WS; Order No. PSC-98-0663-FOF-WS, issued May 14, 1998, in Docket No. 980342-WS; and Order No. PSC-98-0906-FOF-SU, issued July 7, 1998, in Docket No. 980258-SU, and Order No. PSC-98-1641-FOF-WU, issued December 7, 1998, in Docket No. 981344-WU.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. If no person whose interests are substantially affected by the proposed action files a protest within the 21-day protest period, the proposed action becomes final and effective upon the issuance of a Consummating Order, but this docket should remain open until the Office of the Comptroller gives permission to write off the account as uncollectible. (JAEGER)

STAFF ANALYSIS: If no person whose interests are substantially affected by the proposed action files a protest within the 21-day protest period, the proposed action becomes final and effective upon the issuance of a Consummating Order, but this docket should remain open until the Office of the Comptroller gives permission to write off the account as uncollectible.