

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 990558-WU
ORDER NO. PSC-99-1452-PAA-WU
ISSUED: July 26, 1999

The following Commissioners participated in the disposition of
this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION ORDER GRANTING WAIVER OF RULE
AND
FINAL ORDER DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS AND
REFERRING UNPAID REGULATORY ASSESSMENT FEES AND ASSOCIATED PENALTY
AND INTEREST TO THE OFFICE OF THE COMPTROLLER

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission that the action concerning the waiver of Rule 25-30.110,
Florida Administrative Code, discussed herein is preliminary in
nature and will become final unless a person whose interests are
substantially affected files a petition for a formal proceeding,
pursuant to Rule 25-22.029, Florida Administrative Code.

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.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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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, we acknowledged the abandonment of University Oaks and the appointment of Mr. Woodward as receiver.

Mr. Woodward filed an application for a transfer of majority organizational control of University Oaks, from Lake Crescent Development Corporation to Mr. Frank Woodward on July 7, 1994. However, the application was never completed.

On August 15, 1997, we received a letter from an attorney representing Mr. Frank Woodward, as President of University Oaks, 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 second letter 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 the Eighth Judicial Circuit Court, in Case No. 92-607-CA. On that date, the Court 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 our regulation. In Docket No. 940714-WU, the County requested that it be exempt from our regulation.

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

However, we also recognized that, pursuant to Rule 25-30.110, Florida Administrative Code, the utility was responsible for filing

annual reports while operating under our 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 during that period. University Oaks failed to file annual reports for 1994 through March 8, 1998. Also, except for paying \$26.50 in regulatory assessment fees for 1994, Mr. Woodward, as receiver for the utility, never made another payment. Because no annual report was filed for 1994, our staff could not determine whether the \$26.50 paid was correct.

Based upon the foregoing, we found University Oaks, with Levy County as receiver, to be responsible for filing annual reports and paying regulatory assessment fees, from December 17, 1992 through March 8, 1998. Subsequently, we directed our 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 the County, as receiver, pay the outstanding regulatory assessment fees and file the appropriate annual reports. By letter dated April 30, 1999 and filed May 6, 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 regulatory assessment fees.

REQUEST FOR WAIVER OF RULE 25-30.110

On April 30, 1999, the 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, plus penalty and interest. The County sought 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.

Rule 25-30.110(3), Florida Administrative Code, requires utilities subject to our 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 we 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 regulatory assessment fees, 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 we waive both the rules requiring the filing of annual reports plus penalties, and regulatory assessment fees, plus penalty and interest. However, after discussions with staff, the County realized that the requirement for the payment of regulatory assessment fees 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 regulatory assessment fees and requests that we write off those fees as uncollectible.

Statutory Requirements For Waiver

Pursuant to Section 120.542(6), Florida Statutes, on May 12, 1999 (an amendatory notice was also provided on May 26, 1999), our staff provided notice to the Department of State, which published notice of the waiver request for Rule 25-30.110, Florida Administrative Code (filing of annual reports and penalty), in the Florida Administrative Weekly. There appear to be no deficiencies in the petition, and we received no comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, we are required to issue an order in writing granting or denying the petition for waiver, stating the relevant facts and reasons supporting our decision within 90 days after receipt of the original petition. Because the letter was filed on May 6, 1999, we must issue our Order by August 4, 1999.

Section 120.542(2), Florida Statutes, provides, in pertinent part, 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 principles 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 us the authority to require such regular or emergency reports from a utility as we deem 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 us to monitor the continued operations of any utility that we regulate.

With the County now operating the utility, the operations are exempt from our regulation, and there is no longer any need for our continued monitoring. Therefore, we find 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 us 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 of our lawful rules or orders. As noted by Proposed Agency Action Order No. PSC-98-0798-FOF-SU, issued June 8, 1998 in Docket No. 980442-SU, the purpose of penalizing utilities for violating our rules is to encourage compliance with those rules. Following the County's appointment as receiver and our recognition of its exempt status, there was no longer any need for the County to file the past due annual reports. Therefore, we find 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, the County's petition for waiver for the filing of annual reports shall 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 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.

SHOW CAUSE PROCEEDING AND WRITE OFF OF REGULATORY ASSESSMENT
FEES, PLUS PENALTY AND INTEREST

The County also requested that we write off the outstanding regulatory assessment fees plus associated penalty and interest due from University Oaks. However, payment of regulatory assessment fees, plus penalty and interest, is required by Sections 367.145(1), and 350.113(3) and (4), Florida Statutes. Therefore, we do not have the power to waive the requirement for payment of regulatory assessment fees, plus penalty and interest.

Regulatory assessment fees are intended to cover the costs incurred in our regulation of utilities, and Section 367.145, Florida Statutes, requires water and wastewater utilities to remit regulatory assessment fees 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 regulatory assessment fees, 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, we may impose an additional penalty upon a utility for failure to pay regulatory assessment fees in a timely manner.

Neither University Oaks nor Frank Woodward, as receiver, has paid regulatory assessment fees since the \$26.50 that was paid in 1994. Section 367.161(1), Florida Statutes, authorizes us 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 our 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 pay regulatory assessment fees, 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., we, 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 regulatory assessment fees is an apparent violation of Section 367.145(1)(b), Florida Statutes. As discussed above, by Order No. PSC-98-0920-FOF-WS, issued July 7, 1998, we ordered the utility, with Levy County as receiver, to pay the outstanding regulatory assessment fees due from 1994 through March 8, 1998. Our 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 regulatory assessment fees. Using the revenue reported by the utility in the 1993 annual report, our staff estimates that the

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amount of outstanding regulatory assessment fees for this period totals \$2,254.80. In addition, the utility has accumulated \$1,295.55 in penalties and interest through June 30, 1999, on this delinquent amount (\$559.16 in penalties and \$739.39 in interest). Therefore, the total amount due is \$3,550.35.

The law, as indicated above, is clear that regulatory assessment fees, plus penalties and interest for the delinquent regulatory assessment fees, must be assessed. The law is also clear that we lack the statutory authority to grant a waiver of the requirement to pay regulatory assessment fees, plus penalties and interest. See Order No. PSC-96-0834-FOF-WS, issued July 1, 1996, in Docket No. 960540-WS; Order No. 24290, issued March 26, 1991, in Docket No. 900961-SU; and Order No. PSC-97-0767-FOF-FU, issued June 30, 1997, in Docket No. 970360-GU. In this last Order, wherein we discussed our lack of authority to waive the statutory penalty and interest assessments on late regulatory assessment fees, we specifically stated:

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, we do not have the power to grant any request of the County for waiving the requirement to pay regulatory assessment fees plus associated penalty and interest. The County understands that the requirement for regulatory assessment fees, plus penalty and interest, is by statute, and not by rule, and that a waiver is therefore not appropriate.

However, we note that it is the utility that is liable for these payments, and 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 regulatory assessment fees, 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 regulatory assessment fees or penalty and interest.

Our staff has been unable to contact the former receiver, Mr. Frank Woodward, and his whereabouts remain unknown. The utility, with Mr. Woodward as receiver, has continued to have problems with meeting its financial obligations. This led at one point to Mr. Woodward issuing a notice of abandonment. Also, the last annual report filed (in 1993) indicated 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 regulatory assessment fees, penalties and interest.

In consideration of the foregoing, we find that any attempt to collect the regulatory assessment fees, plus penalty and interest, through a show cause proceeding would almost certainly be a waste of time, money and effort. It appears that further collection efforts would not be cost effective and that collection of any fees is highly unrealistic. Therefore, we decline to initiate show cause proceedings, and direct our staff to refer University Oaks' unpaid regulatory assessment fees for 1994 through March 8, 1998, plus associated penalty and interest, to the Department of Banking and Finance's Office of the Comptroller (Comptroller's Office) for permission to write off the account as uncollectible.

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

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the request of Levy County, as receiver for University Oaks Water System, for waiver of Rule 25-30.110, Florida Administrative Code,

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is granted. The County shall neither be required to file annual reports starting with the year 1994 through March 8, 1999, nor be required to pay any delinquent penalties for failure to timely file the annual reports. It is further

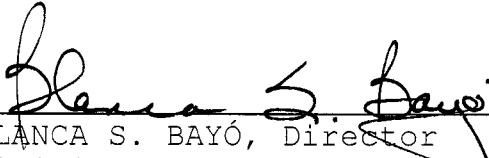
ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that no show cause proceeding shall be initiated against University Oaks Water System for its failure to remit regulatory assessment fees in the amount of \$2,254.80, plus penalties in the amount of \$559.16 and interest in the amount of \$739.39, for a total amount due of \$3,550.35. It is further

ORDERED that the unpaid regulatory assessment fees, plus penalties and interest, in the total amount of \$3,550.35 shall be referred to the Department of Banking and Finance's Office of the Comptroller for permission to write off the account as uncollectible. It is further

ORDERED that in the event this Order becomes final, this docket shall remain open pending permission of the Department of Banking and Finance's Office of the Comptroller to write off the account in the total amount of \$3,550.35 as uncollectible.

By ORDER of the Florida Public Service Commission this 26th day of July, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

As identified in the body of this order, our action concerning waiver of Rule 25-30.110, Florida Administrative Code, is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 16, 1999. If such a petition is filed, mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing. In the absence of such a petition, this order shall become effective and final upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

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 wastewater 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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

FLORIDA PUBLIC SERVICE COMMISSION - RECORDS AND REPORTING

Requisition for Photocopying and Mailing

Number of Originals 11 Date 7 27, 99 Copies Per Original 19
Requested By Kurtz

Item Presented
Agenda For (Date) _____ Order No. 99-1452 In Docket No. 990558
Notice of _____ For (Date) _____ In Docket No. _____
Other _____

Special Handling Instructions

Distribution/Mailing

Number	Distributed/Mailed To	Number	Distribution/Mailed To
<u>9</u>	<u>Commission Offices</u>		
<u>(3)</u>	<u>Docket Mailing List - Mailed</u> <u>RAR</u>		
	<u>Docket Mailing List - Faxed</u>		

Note: Items must be mailed and/or returned within one working day after issue unless specified here:

Print Shop Verification

Job Number 279 Verified By Michael
Date and Time Completed 7/28 Job Checked For Correctness and Quality (Initial) u

Mail Room Verification

Date Mailed / Verified By /

M E M O R A N D U M

RECEIVED-FPSC ✓

19 JUL 26 PM 1:59

July 26, 1999

RECORDS AND
REPORTING

TO: DIVISION OF RECORDS AND REPORTING
FROM: DIVISION OF LEGAL SERVICES (JAECER) *RRJ*
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.

1452-PAA

Attached is a NOTICE OF PROPOSED AGENCY ACTION ORDER GRANTING
WAIVER OF RULE AND FINAL ORDER DECLINING TO INITIATE SHOW CAUSE
PROCEEDINGS AND REFERRING UNPAID REGULATORY ASSESSMENT FEES AND
ASSOCIATED PENALTY AND INTEREST TO THE OFFICE OF THE COMPTROLLER,
to be issued in the above-referenced docket.

(Number of pages in order - ~~12~~) 11

RRJ/lw

Attachment

cc: Division of Water and Wastewater (Chase)

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3 mailed
RAR
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